RAPPORT GÉNÉRAL

GENERAL REPORT

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Formes et limites de la déférence judiciaire : le cas des cours constitutionnelles

Les cultures constitutionnelles varient et la perception qu'ont les cours de leur rôle dans une démocratie constitutionnelle influe sur l'intensité de leur analyse dans les affaires impliquant des droits fondamentaux. De nombreuses cours font preuve de déférence judiciaire.

La déférence judiciaire est un outil inventé par les juges pour maintenir la séparation des pouvoirs et limiter leurs interventions dans des questions considérées comme dépassant leur expertise ou leur légitimité à décider. Cet outil a été utilisé, en particulier, dans des affaires concernant les droits de l'homme. Ce fait est dû à leur qualité transcendante, capable de traverser tous les domaines substantiels du processus public de la prise de décision.

L'excès de déférence est considéré comme une atteinte à la prééminence du droit et à la séparation des pouvoirs, tout comme l'excès d'activisme judiciaire. La manière dans laquelle les juges exercent la déférence judiciaire est donc une question fondamentale de principe constitutionnel concernant le rôle approprié de chaque branche du gouvernement par rapport à des questions significatives de politique publique.

Les questions du questionnaire visent à découvrir les différences qui existent dans la manifestation de la déférence judiciaire par les cours constitutionnelles européennes.

Le questionnaire a été structuré en quatre chapitres: Questions non justiciables et intensités de la déférence; Décideur; champ d'application des droits, légalité et proportionnalité ; et Autres particularités.

En bref, ce rapport n'examinera que les trois premiers chapitres, qui reflètent la substance du sujet et les questions auxquelles la plupart des cours constitutionnelles ont répondu.

I. Questions non justiciables et intensités de la déférence

1. Pour définir le concept de déférence judiciaire, la Cour constitutionnelle d'Espagne nous invite à partir méthodiquement de la définition du mot « déférence » dans le dictionnaire Merriam Webster. Selon ce dernier, la déférence est un « respect affecté ou flatteur pour les souhaits d'autrui » ou « le respect et l'estime dus à un supérieur ou à un aîné ». Ces deux significations soulignent l'existence d'une relation d'altérité influencée par le respect de la position ou du mode d'action de l'autre.

Le droit espagnol, par exemple, partage la notion générale de *déférence judiciaire*. Ainsi, le juge qui fait preuve de déférence sera celui qui propose des solutions compte tenu de la pluralité du système juridique. Le juge qui manifeste de la déférence sera très intéressé à établir et à contrebalancer les éventuelles revendications concurrentes de légitimité dans un cas donné. Il traitera les raisons avancées par le législateur, en tant que pouvoir public directement chargé par la Constitution d'émettre des jugements fondamentaux, soit en leur donnant du poids (ce que nous appelons la déférence légère), soit en reconnaissant leur prééminence inconditionnelle (ce que nous appelons la déférence forte).

Mais le cas espagnol ne se reflète pas dans les réalités françaises. La notion de déférence ne se retrouve pas dans la pratique et dans la jurisprudence du Conseil constitutionnel français. Le Conseil constitutionnel français a requalifié la terminologie de ce questionnaire. Le Conseil ne fait pas preuve de déférence, mais respecte la liberté d'action du législateur, refusant de se prononcer sur des options qui relèvent naturellement de la marge d'appréciation du législateur, notant que la Constitution « ne lui confère pas un pouvoir général d'appréciation et de décision identique à celui du Parlement ».

Dans ses réponses au questionnaire, la Cour constitutionnelle fédérale allemande remplace la notion de déférence judiciaire par celle d'autolimitation judiciaire. Néanmoins, l'autolimitation judiciaire n'est pas reconnue en Allemagne. La Cour constitutionnelle fédérale n'a mentionné le terme que très rarement. Le fait que le principe n'ait été mentionné que quelques fois montre que le principe lui-même - contrairement à l'idée qui se trouve à sa base - n'a généralement pas d'importance.

La notion de déférence judiciaire n'est pas non plus présente dans la jurisprudence de la Cour constitutionnelle autrichienne. Le concept généralement rencontré dans les arrêts de la Cour qui correspond (aujourd'hui) plus étroitement au sens de la déférence judiciaire envers le législateur ou de l'autolimitation judiciaire est le concept de « marge d'appréciation », bien que l'émergence progressive de cette théorie depuis la fin des années 1970 ait eu pour conséquence que la Cour s'est écartée de la déférence antérieure plus prononcée envers le législateur dans la jurisprudence relative aux droits fondamentaux.

La Cour constitutionnelle de la République tchèque utilise le plus souvent des termes tels que le principe d'autolimitation et le principe d'ingérence minimale dans les pouvoirs d'autres autorités publiques. Dans sa jurisprudence, la Cour constitutionnelle souligne que « son activité est régie par le principe d'autolimitation et non par l'activisme judiciaire ».

Le Tribunal fédéral suisse note que le principe de déférence ou le principe d'autolimitation est important pour ce tribunal et influence son mode de fonctionnement. Il s'applique, d'une part, à la limitation du pouvoir d'examen prévu par la loi et, d'autre part, à la limitation du pouvoir d'examen fondé sur la loi substantielle en présence de particularités locales ou d'autre type.

La Cour constitutionnelle du Portugal fait une observation importante : les discussions sur la déférence n'ont de sens que lorsqu'un tribunal n'a pas de raison juridique concluante de s'abstenir de rendre un jugement dans une affaire donnée. Dire qu'une question n'est pas justiciable ne signifie pas qu'un tribunal doit faire preuve de déférence. Dans ce sens relevant, la déférence n'intervient que lorsqu'une question est justiciable. Lorsqu'un tribunal déclare qu'une question n'est pas justiciable (qu'elle ne doit pas être solutionnée par un tribunal), il ne manifeste pas de déférence. Il affirme plutôt les limites constitutionnelles de son rôle, qui consiste à la fois en des pouvoirs et des obligations.

Dans le système irlandais, la déférence décrit une situation dans laquelle le décideur laisse de côté la possibilité de prendre une décision indépendante sur une question et fait preuve de déférence à l'égard de la décision d'une institution ou d'un organisme sur la question litigieuse en discussion. Ce type de déférence est une déférence totale. Toutefois, il n'est pas nécessaire de faire preuve de déférence de cette manière; Les juges peuvent faire preuve de déférence en accordant des pondérations différentes aux opinions du décideur principal. Plus la pondération est élevée, plus l'approche est déférente et vice versa.

Pour la Cour suprême de Norvège, la déférence judiciaire représente une notion couramment utilisée. Lorsque cette cour a répondu au questionnaire, elle est partie de son sens d'autolimitation d'un tribunal malgré son pouvoir d'intervention.

2. En ce qui concerne les spectres de la déférence et les éventuelles zones inaccessibles ou les zones établies de manque de responsabilité judiciaire, la Cour constitutionnelle italienne répond que si elle est correctement saisie d'une question, elle exerce pleinement ses fonctions de garante de l'ordre constitutionnel, en respectant les options discrétionnaires effectuées par le décideur politique, mais en vérifiant toujours que ce pouvoir discrétionnaire est exercé dans le respect des principes et des règles constitutionnels. Si la Cour constate une violation de la Constitution en général, et si les conditions sont réunies, elle intervient, que les questions en jeu soient moralement ou socialement controversées ou politiquement sensibles, qu'elles concernent l'allocation de ressources limitées ou qu'elles aient des implications financières substantielles pour le gouvernement. Dans cette dernière perspective, il est vrai que les choix budgétaires « impliquent des décisions de nature politico-économique qui, en raison de leur nature, sont réservées, selon la Constitution, à l'exécutif ou au parlement, dans la mesure où il s'agit des options qui, représentant l'effet d'une marge d'appréciation politique incontestable, exigent un respect particulier et substantiel, y compris de la part de la Cour constitutionnelle, bien qu'ils ne puissent pas, bien entendu, représenter un domaine inaccessible exempt de tout contrôle ».

Pour la Cour constitutionnelle autrichienne, la règle est que toutes les parties de la Constitution sont justiciables. Ainsi, la « fonction démocratique suprême » de la Cour constitutionnelle vise à imposer au législateur un « acte de légitimité démocratique renforcée», à savoir la Constitution, et à en vé-

rifier le respect. Dans la jurisprudence de la Cour, aucune limitation à l'exercice de ses fonctions en raison de la « dimension politique d'un litige de droit constitutionnel » ne peut être identifiée. Ces dernières années, la jurisprudence de la Cour autrichienne a inclus des affaires traitant de questions moralement controversées telles que la médecine reproductive, le suicide assisté, les technologies numériques (vote électronique, stockage de données, surveillance par l'État en utilisant des programmes informatiques de type cheval de Troie), des questions de droit de la famille telles que les mariages entre personnes de même sexe, l'introduction d'un troisième sexe dans les registres d'état civil et la garde parentale, ou des questions ayant des conséquences budgétaires significatives, telles que celles liées à l'aide financière pendant la pandémie de COVID-19.

La Cour constitutionnelle fédérale allemande n'applique pas de normes morales de contrôle lorsqu'elle résout des questions moralement controversées. Si la norme constitutionnelle de contrôle est sans ambiguïté et l'application de la norme de contrôle dans un cas concret est suffisamment claire, il importe peu que le résultat soit moralement controversé ou non. La Cour constitutionnelle fédérale n'adapte pas ses décisions en fonction de normes éthiques, car la définition de ces normes n'est pas claire. Cependant, on peut supposer que la majorité de la population ne développera pas de normes morales contraires aux exigences constitutionnelles dans un ordre fondamental libre et démocratique tel que l'ordre imposé par la Loi fondamentale. Le fait qu'une question particulière soit politiquement sensible ou non n'a pas d'importance pour la Cour constitutionnelle fédérale. Les décisions ne sont problématiques que lorsque la norme constitutionnelle de contrôle n'est pas claire. Toutefois, la Constitution donne généralement au législateur une grande marge pour concevoir des questions fortement contestées sur le plan politique et qui pourraient être décrites comme politiquement sensibles. La Cour constitutionnelle fédérale tiendra dûment compte de cette marge lorsqu'elle rendra ses décisions. Toutefois, ce respect ne dépend pas de la nature controversée de la décision parlementaire dans une question politiquement sensible. En ce qui concerne l'allocation de ressources limitées, le caractère limité ne crée pas en soi une norme qui influencerait la norme de contrôle de la Cour constitutionnelle fédérale. La Cour constitutionnelle allemande considère que la Constitution ne définit les revendications financières que dans une mesure telle que le législateur dispose d'une marge de manœuvre suffisante pour décider des questions budgétaires essentielles. La Cour constitutionnelle n'est donc pas tenue d'examiner les implications financières d'une décision prise d'office.

Selon la Cour Suprême d'Irlande, la déférence n'est pas un concept statique. Il existe des degrés de manifestation de la déférence. La déférence est plus prononcée dans les domaines que la Constitution irlandaise attribue à la branche élue et législative du gouvernement, tels que, par exemple, la conduite des affaires étrangères, l'équité des mesures fiscales ou l'allocation de ressources limitées.

Pour la Cour constitutionnelle de Bosnie-Herzégovine, il n'existe pas de domaines inaccessibles ou prédéterminés sans responsabilité juridique, ni de questions que la Cour constitutionnelle ne peut pas trancher. Dans son processus décisionnel, la Cour constitutionnelle n'est soumise qu'aux limites fixées par la Constitution de Bosnie-Herzégovine et le Règlement de la Cour constitutionnelle.

La Cour constitutionnelle tchèque ne dispose pas d'un spectre clairement défini de la déférence. Cependant, elle exerce un contrôle dans lequel elle fait preuve de la déférence dans plusieurs domaines, et ce contrôle plus limité se reflète par le niveau plus réduit d'intensité du contrôle des actes du législateur, en particulier dans le cas des réglementations de politiques publiques, où le législateur dispose d'une marge discrétionnaire large et où il porte la responsabilité politique pour les décisions prises. Par conséquent, la Cour a toujours fait preuve de retenue lors de l'examen de la législation fiscale, ainsi que, de manière générale, dans les questions de politique économique. La Cour constitutionnelle de la République tchèque fait preuve de la plus grande retenue dans les questions susceptibles de susciter la controverse dans la société, telles que la vaccination obligatoire, l'adoption d'enfants par des couples de même sexe ou la réglementation juridique de l'établissement du sexe ou du changement de sexe.

Dans l'exercice de ses fonctions, la Cour constitutionnelle de Slovénie se trouve souvent à l'intersection du droit et de la politique. Elle ne refuse pas *a priori* de se prononcer sur des questions politiques

si elles ont une certaine dimension juridique Dans une de ses décisions concernant le budget de l'Etat, la Cour a expliqué que le budget est un acte juridique abstrait et général d'un type précis, qui manifeste des effets externes et qui a la force de la loi, et doit donc être doté du caractère juridique d'un règlement avec le statut hiérarchique d'une loi, la Cour étant compétente pour vérifier sa conformité avec la Constitution.

En ce qui concerne les zones inaccessibles, la Cour constitutionnelle du Liechtenstein exclut du contrôle de constitutionnalité, sur la base de l'article 29, paragraphe 2, de la Constitution, le domaine de la politique étrangère. Ce n'est que dans ce cadre étroit qu'elle se réfère à l'autolimitation judiciaire ou à la théorie de la question politique.

La Cour constitutionnelle de Géorgie, par exemple, a défini les circonstances dans lesquelles elle accorde généralement une large marge d'appréciation à une autre branche de l'État pour réglementer une question, ce qui conduit à un contrôle étroit par la Cour. Ces circonstances comprennent : la politique sociale, économique et fiscale de l'État ; la constitutionnalité des sanctions ; la défense et l'administration des forces militaires par l'État ; les ressources limitées de l'État ; le choix du système électoral et son administration ; les restrictions neutres de la perspective du contenu imposées à l'exercice de la liberté d'expression ; les attentes légitimes en matière du droit de propriété et le traitement inégal fondé sur des critères non énumérés ou des cas de traitement inégal d'une intensité réduite.

3. En ce qui concerne les facteurs qui déterminent quand et comment les tribunaux doivent faire preuve de déférence, la Cour constitutionnelle d'Albanie répond que les expériences historiques dictées par les développements politiques, juridiques, économiques et sociaux dans le pays (tels que la transition d'un régime moniste à un régime démocratique) ont influencé l'élaboration de la déférence judiciaire. En particulier, la Cour d'Albanie a souvent été appelée à examiner des décisions de l'exécutif ou du législatif qui affectaient le droit constitutionnel de propriété privée, un droit qui était totalement dénié pendant le régime communiste.

En Espagne, la culture et les conditions du pays, ainsi que les expériences historiques, peuvent être considérées comme des raisons expliquant la règle contestée ou même la décision finalement prise sur la validité de la règle, ainsi que des éléments métajuridiques qui aident à comprendre l'évolution de certaines institutions juridiques. Mais elles ne peuvent pas être utilisées comme des raisons pour ne pas décider ou ne pas exercer le pouvoir juridictionnel accordé à la Cour constitutionnelle espagnole par le pouvoir constituant, afin d'imposer la prise de décision, une valeur qui régit les systèmes juridiques contemporains.

Selon la Cour constitutionnelle belge, il est notamment essentiel que la composition de la Cour soit directement ou indirectement issue du monde politique. La moitié des juges doivent être d'anciens parlementaires et tous sont nommés par arrêté royal, sur proposition de la Chambre des représentants ou du Sénat, de manière à garantir la représentativité politique résultant des élections basées sur le suffrage proportionnel. Si l'on ajoute à cela le fait que la Belgique est divisée en huit entités différentes, avec (presque) toutes les coalitions politiques imaginables, il s'ensuit qu'aucun juge ne se trouve dans une position où son idéologie politique est toujours désavantagée par la loi. En outre, c'est un fait historique que les réformes de caste, en particulier les réformes de l'État en Belgique, prennent du temps et sont le résultat d'un consensus politique global. Un pays politiquement et électoralement pluraliste serait plus enclin à la déférence. En outre, la compétence de la Cour est précisément limitée dans certains domaines qui seraient normalement susceptibles d'une plus grande déférence.

Selon la Cour constitutionnelle italienne, le caractère spécial de certaines questions peut affecter l'issue de la procédure et même empêcher des décisions immédiates sur le fond lorsque des principes profondément enracinés dans la culture et l'expérience historique du pays sont en jeu ou lorsqu'il s'agit d'un exercice d'équilibre délicat qui relève avant tout une question relative à la marge discrétionnaire du législatif. Par exemple, le droit italien de la famille a été hérité de la tradition du droit romain, selon laquelle la connotation hétérosexuelle du mariage et la règle automatique de l'attribu-

tion du nom de famille du père lors de la transmission du nom de famille aux enfants. Sur la première question, dans un arrêt de 2010, notant que l'article 29 de la Constitution se réfère au mariage dans son sens traditionnel d'union entre un homme et une femme, la Cour constitutionnelle a précisé que le droit des personnes de même sexe de vivre librement ensemble en tant que couple légalement reconnu est garanti par l'article 2 de la Constitution, qui protège les droits inviolables d'une personne et qui exige que la question soit réglementée par une loi positive adoptée par le Parlement, sous réserve de la marge d'appréciation dont jouit le Parlement, compte tenu des nombreux modèles qui peuvent être adoptés et qui ont été adoptés dans d'autres États et qui n'envisagent pas le paradigme du mariage. À la suite de l'arrêt de la Cour constitutionnelle selon lequel les questions soulevées dans cette affaire étaient soit infondées, soit irrecevables, le législatif a réglementé les unions civiles, y compris les unions entre personnes de même sexe. En ce qui concerne la deuxième question, la règle du nom de famille du père - qui affecte clairement le principe constitutionnel d'égalité entre les époux, ainsi que le droit de l'enfant à l'identité personnelle, et qui pourrait être un héritage de la conception patriarcale de la famille qui a disparu - a conduit la Cour à imposer une révision complète des règles à plusieurs reprises. L'inertie législative ayant persisté, un arrêt rendu en 2022 a finalement invalidé l'attribution automatique du nom de famille du père à l'enfant, introduisant la règle du double nom dans l'ordre établi tant que les parents n'en décident pas autrement.

4. A la question de savoir s'il lui est déjà arrivé de faire preuve de déférence pour manque d'expertise, la Cour constitutionnelle fédérale allemande répond que de tels cas sont impensables. Dans la mesure où la Cour constitutionnelle peut décider, elle le fait sur la base des normes constitutionnelles d'interprétation, pour lesquelles elle dispose d'une expertise suffisante. Il peut y avoir des questions préliminaires, telles que l'existence de règles générales de droit international, des questions concernant l'interprétation du droit commun ou des questions de validité dans le contexte du droit international, pour lesquelles la Cour constitutionnelle fédérale demandera une expertise externe.

Dans plusieurs cas, la Cour constitutionnelle tchèque s'est montrée réticente, estimant que la question devait être tranchée en premier lieu par le législateur et non par les tribunaux. Un exemple de cette approche est la décision sur la vaccination obligatoire. La Cour constitutionnelle a effectué un contrôle réduit de la législation dans le contexte du droit à l'inviolabilité de la personne, soulignant qu'il s'agissait d'une question technique plutôt que juridique. Dans un autre arrêt rendu en 2018, la Cour constitutionnelle a vérifie la constitutionnalité d'une réglementation gouvernementale fixant des limites au bruit de la circulation. Le gouvernement a fait valoir que l'affaire ne relevait pas de la compétence des tribunaux en général, car elle dépendait de la détermination de questions techniques et scientifiques. Cependant, la Cour constitutionnelle n'était pas d'accord et a déclaré que « les tribunaux ne devraient pas et ne peuvent pas s'abstenir de vérifier les affaires dans lesquelles la décision dépend de la détermination de questions techniques ou scientifiques ». La Cour a toutefois fait preuve de déférence dans le contrôle qu'elle a effectuée, car « elle ne peut avoir l'ambition de se lancer dans un contrôle des questions purement techniques [...] Le contexte administratif et d'expertise nécessaire et les ressources pour prendre de telles décisions sont à la disposition du gouvernement et c'est avant tout à ce dernier qu'il incombe d'analyser tous les facteurs nécessaires dans leur globalité et à la lumière des connaissances actuelles ». Dans ces cas, la Cour constitutionnelle a maintenu une position modérée, principalement en raison de l'expertise supérieure du décideur.

Dans l'une des affaires jugées, la Cour constitutionnelle du Portugal s'est abstenue de déclarer inconstitutionnelles les dispositions normatives contestées, en partie à cause du « contexte épistémique limité » dans lequel elle a dû délibérer. Mais il ne s'agit pas d'un exemple de déférence au sens relevant du terme : la Cour n'a pas et ne pouvait pas imposer sa solution sur la question de fond au détriment de la solution du législateur, c'est-à-dire que la Cour n'a ni adopté ni approuvé la décision du décideur en se référant à l'aspect substantiel de la mesure. La Cour a simplement déclaré qu'elle n'était pas suffisamment informée du point de vue épistémique pour être convaincue de l'inconstitutionnalité de cette disposition. Une telle raison de ne pas déclarer une disposition législative inconstitutionnelle est une raison prudentielle pour s'abstenir d'agir de manière à violer le principe de la séparation des pouvoirs.

Selon la Cour constitutionnelle de Croatie, en général, il ne devrait pas y avoir de cas de déférence en raison d'un manque d'expertise, car la Cour peut demander et s'appuyer sur les conclusions d'experts spécialisés dans les domaines en question. Cependant, dans les cas urgents, lorsqu'il y a une pénurie générale d'experts et qu'une solution doit être prise rapidement, le décideur peut se voir accorder une marge d'appréciation plus large associée à un degré de déférence plus élevé.

La Cour constitutionnelle slovène accorde au législatif et à l'exécutif une plus grande marge de manœuvre lorsqu'il s'agit de réglementer des questions techniques ou scientifiques ne relevant pas du domaine juridique. Dans une affaire concernant l'abattage rituel des animaux, la Cour a clairement indiqué qu'elle ne pouvait pas jouer le rôle d'arbitre dans des questions scientifiques complexes. À cet égard, les considérations de la Cour constitutionnelle sur la conformité avec la Constitution des mesures de lutte contre la propagation de la pandémie de Covid-19 sont également pertinentes. Pour déterminer le caractère justifié de la mesure contestée, la Cour a expliqué que lorsque la justification de la mesure est directement liée aux raisonnements des experts, l'évaluation doit être effectuée « à la lumière des informations provenant des disciplines pertinentes disponibles au moment de la décision imposant les mesures ». Si les informations scientifiques sont encore en évolution à la date de la première apparition d'une maladie inconnue auparavant, en raison de laquelle un état d'épidémie ou de pandémie doit être déclaré, et l'avis de la communauté scientifique peut ne pas être unanime, le décideur compétent doit disposer d'une plus grande marge discrétionnaire pour déterminer l'avis des experts à suivre et la mesure dans laquelle il convient de suivre cet avis.

5. Aucune des cours interrogées n'a fait preuve de déférence à l'égard du risque d'erreur judiciaire. Comme l'a noté la Cour constitutionnelle d'Espagne, on ne peut jamais s'appuyer sur l'obscurité de la règle servant de paramètre de contrôle pour éviter la responsabilité de juger la question soumise au tribunal. Ce fait équivaudrait à un déni de justice pour les parties à la procédure et à une méconnaissance du rôle de la Cour en tant qu'« interprète suprême de la Constitution ».

La Cour constitutionnelle lettone n'a jamais fait explicitement référence à la possibilité d'une erreur judiciaire. Cependant, il semblerait que son refus de réexaminer l'opportunité politique des décisions du législateur réside dans l'absence de « normes et catégories juridiques suffisamment strictes » à l'aune desquelles mesurer cette opportunité. En d'autres termes, il est impossible pour la Cour lettone d'avoir la certitude que ses considérations d'opportunité politique sont plus correctes que celles du législateur. Les jugements rendus sans base juridique claire sont condamnés à être arbitraires dans une certaine mesure et donc susceptibles d'entraîner des erreurs judiciaires.

6. Dans la jurisprudence de la Cour constitutionnelle fédérale allemande, il n'y a pas eu de cas où la Cour a refusé de statuer, compte tenu de la légitimité du décideur. Cependant, lors de l'interprétation des dispositions constitutionnelles précises en cause et lors de l'application de la norme constitutionnelle pertinente à un cas concret, la Cour a, à plusieurs reprises, pris en compte le fait que la Constitution accorde ou non une large marge discrétionnaire au décideur.

La Cour constitutionnelle de Bosnie-Herzégovine s'est penchée sur la question du pouvoir du Haut Représentant d'adopter des lois et sur le caractère juridique et le statut de ces lois. Dans une décision de 2000, la Cour a examiné la constitutionnalité de la loi sur la police des frontières. Le Haut Représentant de Bosnie-Herzégovine a imposé cette loi suite à l'échec du Parlement à adopter un projet de loi proposé par la Présidence de Bosnie-Herzégovine. Compte tenu de la situation en Bosnie-Herzégovine et du rôle juridique du Haut Représentant en tant qu'agent de la communauté internationale, ce fait n'a pas été sans précédent, des fonctions similaires ayant été exercées dans d'autres pays dans des circonstances politiques particulières. La Cour a également noté que le Haut Représentant était investi de pouvoirs spéciaux par la communauté internationale et que son mandat était de nature internationale. Comme l'a noté la Cour, indépendamment de la nature des pouvoirs conférés au Haut Représentant par l'Accord-cadre général pour la paix en Bosnie-Herzégovine, le fait que la loi sur la police des frontières ait été adoptée par le Haut Représentant et non par le Parlement n'a pas modifié son statut de loi, ni dans la forme ni dans le fond, puisque, indépendamment de sa conformité à la Constitution, elle réglemente un domaine relevant de la compétence du Parlement.

La Cour constitutionnelle de la République tchèque a également toujours considéré que la résolution des questions fondamentales concernant les êtres humains en tant qu'espèce biologique, leur vie et leurs relations, c'est-à-dire les questions relatives à la famille, à la parentalité et au mariage, relève de la seule compétence du législateur national. La transformation de ces questions en questions judiciaires conduirait à la politisation de la Cour constitutionnelle et donc à l'affaiblissement de sa position en tant qu'organe judiciaire impartial et indépendant protégeant l'ordre constitutionnel.

7. « Plus la législation concerne une vaste question de politique sociale, moins une cour sera disposée à intervenir ». En répondant à la question de savoir s'il s'agit d'une norme valable dans son activité, la Cour suprême d'Irlande a noté que les tribunaux irlandais ne seront pas dissuadés de statuer sur des questions de droit constitutionnel, même lorsque la question concerne une politique sociale vaste. Toutefois, les tribunaux ont parfois fait preuve de déférence sur des questions de politique sociale vaste : par exemple, ils ont hésité à invalider, pour des raisons d'égalité, le traitement différent entre les filles et les garçons en ce qui concerne l'activité sexuelle des mineurs.

Le Tribunal fédéral suisse adopte une approche différente. Il fait souvent preuve d'autolimitation lorsqu'il est confronté à des questions politiquement sensibles. L'arrêt du Tribunal fédéral dans l'affaire «Aînées pour la protection du climat » mérite d'être mentionné dans ce contexte. Dans leur recours, les requérants demandaient que le gouvernement suisse prenne plusieurs mesures pour lutter contre le réchauffement climatique et qu'il réglemente le cadre juridique relatif à ses effets. En réponse à cette demande, le Tribunal a fait preuve de retenue et a souligné qu'en vertu du droit constitutionnel suisse, les propositions de mise en œuvre d'une politique publique spécifique dans un domaine faisant l'objet d'un débat peuvent en principe être introduites par le biais d'une participation démocratique. Le Tribunal a noté que « des objectifs de ce type ne peuvent pas être atteints par des moyens juridiques, mais par les moyens politiques que le système suisse offre suffisamment par le biais des instruments démocratiques ». Le Tribunal fédéral fait également souvent preuve de retenue dans sa jurisprudence sur des questions sensibles de politiques sociales. A cet égard, on peut citer les décisions relatives à l'indemnisation de l'assurance accident des étudiants salariés, à l'examen des conditions d'octroi d'une rente de veuve ou de veuf, ou encore au regroupement familial dans le cas d'une personne ayant acquis la nationalité suisse.

8. Sur l'existence d'un principe général de déférence dans l'appréciation de la philosophie et de la politique pénale, la Cour suprême estonienne a répondu que le législatif possède le pouvoir exclusif d'imposer des sanctions pénales et possède une marge discrétionnaire large dans la définition de la peine appropriée pour une infraction (y compris les limites de la peine). L'échelle des peines dépend des valeurs partagées par la société et le pouvoir législatif est compétent pour les exprimer. Cette marge permet au Parlement de modeler la politique pénale nationale et d'influencer les comportements criminels. Il découle du principe de la séparation des pouvoirs que les tribunaux ne peuvent pas commencer à modeler le système de sanctions à la place du pouvoir législatif, sur la base d'objectifs abstraits de politique pénale. Cependant, la marge discrétionnaire large du législatif n'exclut pas le pouvoir des tribunaux d'évaluer la conformité d'une règle de droit pénal, y compris d'une sanction, avec la Constitution.

La Cour constitutionnelle allemande ne se prononce pas sur des questions liées à la philosophie du droit pénal ou à la politique en matière pénale. La politique pénale doit s'inscrire dans le cadre constitutionnel et la philosophie du droit pénal ne précise aucune norme juridique directe et n'est donc pas soumise au contrôle de constitutionnalité. La Constitution allemande prévoit des conditions précises en matière de droit pénal. De l'article 101 à l'article 104, la Loi fondamentale énonce des droits procéduraux relatifs à la procédure pénale et équivalents aux droits fondamentaux.

La Cour constitutionnelle d'Espagne vérifie uniquement si la règle pénale ne conduit pas à un gaspillage inutile de la contrainte, ce qui rend la règle arbitraire et porte atteinte aux principes élémentaires de justice inhérents à la dignité de la personne et à la prééminence de la loi. La proportionnalité d'une réponse pénale peut être confirmée lorsque la règle vise à « préserver des droits ou des intérêts qui ne sont pas interdits du point de vue constitutionnel et qui ne sont pas socialement non pertinents » et lorsque la sanction est « instrumentalement appropriée à cet objectif » et qu'elle

est nécessaire et proportionnée à cette fin. « De la perspective constitutionnelle, il sera possible de qualifier la règle ou la sanction pénale de non nécessaire lorsque, à la lumière du raisonnement logique, des informations empiriques non controversées et du nombre de sanctions que le législatif lui-même a jugées nécessaires pour atteindre des objectifs de protection similaires, le caractère suffisant de certains moyens alternatifs moins restrictifs des droits et permettant d'atteindre tout aussi bien les objectifs poursuivis par le législateur [...] est suffisant et la règle ou la sanction pénale peut être considérée comme disproportionnée lorsqu'il existe un déséquilibre évident et excessif ou déraisonnable entre la sanction et l'objet de la règle, sur la base d'indices axiologiques constitutionnellement incontestés et de leur mise en œuvre dans la législation ».

Du point de vue de la Cour constitutionnelle belge, il n'existe pas de principe général de déférence dans l'appréciation de la philosophie et des politiques en matière pénale. Au contraire, la règle est le contrôle au cas par cas. En général, les lois pénales sont vérifiées avec plus d'indulgence, par exemple lorsque le législateur décide d'incriminer une nouvelle infraction ou lorsqu'il choisit d'augmenter la sévérité des peines, ou plus strictement lorsqu'il évalue la conformité des lois pénales avec les articles 6 et 7 de la Convention européenne des droits de l'homme.

La Cour constitutionnelle tchèque a toujours considéré que la politique pénale, y compris la politique d'incrimination, impliquait un processus décisionnel complexe fondé sur des considérations criminologiques, sociales ou politiques. En conséquence, elle a exprimé sa réticence à l'égard des suggestions selon lesquelles certaines actes ne devraient pas être incriminés ou que la punition pour des actes illégaux était disproportionnée. La décision du législateur de qualifier un type particulier de comportement d'infraction pénale en termes de définition formelle et de fixer l'étendue des limites de l'incrimination de certains types de comportement est avant tout une manifestation de la politique pénale de l'État, qui relève de la compétence d'autres autorités de l'État, et non de la Cour constitutionnelle.

Dans sa jurisprudence, la Cour constitutionnelle de Roumanie a estimé que le Parlement est libre de décider de la politique pénale de l'État, étant la seule autorité législative de l'État. La Cour roumaine a également estimé qu'elle n'avait pas le pouvoir d'interférer dans la sphère de la politique pénale de l'État, toute attitude contraire constituant une ingérence dans la compétence constitutionnelle du pouvoir législatif.

Selon la Cour constitutionnelle portugaise, la question dominante est de savoir si la décision du législateur d'incriminer un certain type de comportement est compatible avec les exigences du principe de l'*ultima ratio* et avec la condition d'une définition claire des infractions imposée par le principe de la prééminence de la loi. La Cour vérifie cette question au cas par cas, mais a tendance à accorder un poids considérable à sa propre jurisprudence dans des affaires similaires. Par exemple, dans une affaire concernant la constitutionnalité de l'infraction de proxénétisme, la Cour a conclu que la disposition légale incriminant le proxénétisme était inconstitutionnelle. Dans une autre affaire concernant la constitutionnalité de l'infraction de maltraitance des animaux, la Cour a conclu que la disposition définissant la maltraitance des animaux était inconstitutionnelle. Plus récemment, la Cour est revenue sur sa décision et s'est abstenue de la déclarer inconstitutionnelle.

9. En ce qui concerne la déférence pour des raisons de sécurité nationale, l'approche générale est que cette question ne devrait pas constituer un obstacle pour les tribunaux qui demandent des documents ou des informations nécessaires à la résolution d'une affaire.

L'une des décisions les plus récentes rendue par la Cour constitutionnelle slovaque dans ce domaine ne montre aucun signe de déférence. La Cour slovaque a invalidé trois dispositions de la loi sur l'asile. Selon les dispositions légales contestées, les demandes d'octroi ou d'extension d'une protection supplémentaire devaient être rejetées si les services secrets informaient le ministère de l'intérieur, qui était compétent pour les solutionner, que le demandeur représentait un danger pour la sécurité nationale. Les raisons sur lesquelles se fondait cette conclusion étaient tenues secrètes pour le demandeur et l'employé responsable du ministère.

Dans la même clé, la Cour constitutionnelle de la République de Moldavie a noté dans une affaire

que les intérêts fondés sur la sécurité nationale n'ont pas un poids absolu. Elle a déclaré inconstitutionnelles les dispositions de la loi sur le régime des étrangers, qui interdisaient la notification aux étrangers des motifs de leur déclaration en tant que personnes indésirables.

Selon la Cour constitutionnelle de Turquie, un large pouvoir discrétionnaire est accordé aux limitations visant à protéger la sécurité nationale et à assurer l'ordre public. Toutefois, la Cour a estimé que ce pouvoir discrétionnaire n'était pas illimité et a examiné attentivement si les garanties constitutionnelles étaient respectées.

10. La question suivante concerne la passivité du gouvernement dans l'introduction de réformes visant à assurer le respect des droits fondamentaux. Par exemple, la Cour constitutionnelle tchèque est intervenue dans une affaire où le législateur avait fait preuve d'une inactivité prolongée. L'affaire concernait une restriction des droits fondamentaux des propriétaires, les politiciens tchèques n'ayant pas réussi à résoudre définitivement la question des loyers réglementés, réminiscence du communisme, pendant plusieurs décennies. Bien que la Cour constitutionnelle ait longtemps fait preuve d'une approche retenue, elle a jugé inconstitutionnelle l'inaction prolongée du Parlement tchèque qui n'a pas adopté de réglementation légale spéciale établissant quand le locataire est autorisé à augmenter unilatéralement le prix du loyer et les charges pour les services fournis dans le cadre de l'utilisation de l'appartement et à modifier d'autres conditions du contrat de location.

La Cour constitutionnelle slovène est considérée comme extrêmement activiste, car elle détermine fréquemment la manière dont ses décisions doivent être mises en œuvre. Ainsi, la Cour résout souvent provisoirement une question qui resterait autrement non résolue après qu'une décision ait été rendue, afin de protéger des valeurs constitutionnelles importantes, en particulier lorsque les droits de l'homme et les libertés fondamentales risquent d'être affectés. Par exemple, lorsqu'elle a jugé inconstitutionnelle la règle juridique autorisant uniquement le mariage de personnes de sexe différent, la Cour a immédiatement autorisé, en déterminant les modalités d'application de sa décision, le mariage de personnes sans distinction de sexe, en notant que « jusqu'à ce qu'il soit remédié à la situation d'inconstitutionnalité, le mariage doit être considéré comme l'union de deux personnes ».

Pour la Cour lettone, ces cas sont exceptionnels. Un exemple est une affaire concernant les droits de succession à payer sur l'héritage reçu d'un partenaire de même sexe. La Cour lettone a noté que le Parlement n'a pas encore développé un système de reconnaissance légale et de protection des familles composées de partenaires de même sexe. Pour cette raison, la Cour lettone a souligné qu'à l'époque, l'État était « juridiquement aveugle » aux familles de même sexe et a jugé que la disposition contestée était donc inconstitutionnelle.

II. Décideur

11. En ce qui concerne la plus grande déférence à l'égard d'un acte du Parlement qu'à l'égard d'une décision de l'exécutif, l'approche de la plupart des cours qui ont répondu peut être résumée dans la formulation de la Cour constitutionnelle espagnole : il n'est pas correct d'établir une échelle de déférence en fonction des autorités publiques. Selon la Cour constitutionnelle de Roumanie, lorsqu'elle effectue le contrôle de constitutionnalité, elle ne fait aucune distinction fondée sur l'éventuel niveau différent de responsabilité démocratique du Parlement ou du Gouvernement. La Cour examine l'acte soumis au contrôle en tenant compte de sa nature législative, sans que le niveau de contrôle varie en fonction de l'émetteur de l'acte ou d'un aspect extérieur à son contenu normatif.

12. En ce qui concerne le poids que les tribunaux attachent au processus législatif, la Cour constitutionnelle fédérale allemande examine les faits sur lesquels le législateur a fondé sa décision à la lumière de leur fondement méthodologique et de leur plausibilité. La Cour accepte les faits dont dispose le législateur et l'expérience passée comme base de contrôle des lois.

La Cour constitutionnelle espagnole s'est montrée prudente dans l'utilisation du contexte parlementaire de l'adoption des normes, en particulier de la Constitution.

La Cour suprême d'Irlande peut étudier le processus législatif pour décider de la résolution d'une affaire. En particulier, lorsqu'il lui est demandé d'examiner une disposition législative, elle étudie le

contexte de l'adoption pour comprendre l'intention du législatif.

En Belgique, les documents préparatoires du Parlement figurent dans les décisions de la Cour comme point de départ pour apprécier l'existence d'un but légitime et la justification de certaines dispositions. L'avis de la section législative du Conseil d'État sur les projets de loi est également souvent sollicité et la Cour accorde une attention particulière à cet avis et à la réaction ou à l'absence de réaction du législateur à cet avis. Il existe un précédent bien connu dans la jurisprudence de la Cour en Belgique où l'argument du processus législatif a été pris en compte. C'est le cas de l'ancienne distinction, dans le droit du travail belge, entre « travailleurs » et « employés ». Interrogée sur cette inégalité assez claire, la Cour a accepté le poids du processus législatif pour valider la législation. Cependant, dix ans après cet arrêt, lorsqu'on lui a posé la même question, la Cour a revu sa solution et a donné du poids à l'égalité, déclarant la loi inconstitutionnelle.

En Italie, les débats parlementaires n'ont pas de pertinence précise pour examiner la compatibilité de la législation avec les droits de l'homme et parce que, dans le système juridique italien, l'approbation d'une loi n'est pas accompagnée d'une motivation expresse. Cependant, le travail préparatoire est d'une valeur incontestable pour l'interprétation du cadre juridique. En effet, il est également possible de déduire la raison d'être et le but de la loi du débat qui a précédé son adoption. Cette conclusion s'applique aux lois traitant de cas spécifiques et aux lois interprétatives.

La Cour constitutionnelle bulgare examine comme preuve, dans nombre de ses décisions, les sténogrammes des débats parlementaires en séance plénière ou en commission, les rapports des commissions parlementaires ou les mémoires explicatifs et analyse la genèse de la législation.

Selon la Cour constitutionnelle de Lituanie, l'analyse du processus législatif peut faire et fait partie de l'examen en vue de constater la constitutionnalité de l'acte législatif contesté. La recherche des intentions du législatif peut également contribuer à l'identification d'une solution, notamment dans le cas du test du but légitime, applicable dans le cadre du test « classique » de la proportionnalité dans les situations de limitation de l'exercice des droits fondamentaux. Par exemple, dans un arrêt sur la constitutionnalité des dispositions de la loi sur la chasse, la Cour constitutionnelle a commencé son analyse par la réglementation légale, en rappelant les origines de la réglementation des relations de chasse et en explorant son histoire, en soulignant son importance.

13. En ce qui concerne la vérification de la justification par le décideur ou sa comparaison éventuelle avec la solution que les cours adopteraient si elles étaient décideurs, la Cour constitutionnelle fédérale allemande a noté que le législateur n'a pas l'obligation de justifier les lois qu'il adopte. Par principe, la Constitution allemande oblige le législateur à adopter des lois efficaces. Dans ce contexte, la Cour allemande a notamment déclaré dans un arrêt que « l'affirmation selon laquelle la loi contestée n'est pas suffisamment motivée n'est pas fondé. Les exigences constitutionnelles ne portent pas sur la motivation d'une loi, mais sur les résultats des procédures législatives. […] La Loi fondamentale ne précise pas quelles parties de la procédure législative doivent être justifiées, quand et comment. La Loi fondamentale laisse place à la négociation et au compromis politique. Ce qui est décisif, c'est que le législateur ne manque pas aux exigences constitutionnelles ».

Le Conseil constitutionnel français ne substitue pas son appréciation à celle du législateur. Il constate habituellement qu'il ne dispose pas d'un pouvoir général d'appréciation et de prise de décision identique à celui du Parlement et qu'il ne peut investiguer si les objectifs fixés par le législateur auraient pu être atteints par d'autres voies, dès lors que les modalités retenues par la loi ne sont pas manifestement inappropriées au regard de l'objectif poursuivi.

La Cour constitutionnelle belge apprécie si un choix particulier du législateur est raisonnablement justifié. Elle conclut à la violation lorsqu'il n'y a pas de rapport raisonnable de proportionnalité entre les objectifs du législateur, les mesures choisies et leurs conséquences. La Cour a également mentionné explicitement dans plusieurs affaires que, bien que plusieurs options constitutionnelles soient disponibles, elle n'a pas le pouvoir de choisir entre elles.

En Slovénie, seuls les cas d'application rétroactive de dispositions légales exigent du législateur qu'il

justifie son choix d'une réglementation particulière, même au cours de la procédure législative. Selon la jurisprudence constitutionnelle, l'effet rétroactif ne peut être justifié que par un intérêt public particulier qui justifie l'effet rétroactif de la réglementation, sans lequel l'objectif visé par la réglementation ne pourrait être atteint. Cependant, étant donné qu'un tel intérêt public justifie l'exception à l'interdiction constitutionnelle de l'effet rétroactif d'une réglementation - et que les exceptions doivent être interprétées de manière restrictive - il doit être identifié avec précision dans la procédure législative et expliqué dans les actes législatifs.

14. La question suivante concernait la mesure dans laquelle la décision avait été précédée d'une analyse complète de la compatibilité avec les droits fondamentaux. La Cour constitutionnelle de la République tchèque a estimé, lors de l'examen de la « loi anti-tabac », qui a introduit une interdiction totale de fumer dans les restaurants, que le législateur était en mesure de défendre, dans ce cas, l'objectif visé de protéger la vie et la santé « contre les intérêts commerciaux et autres de l'industrie du tabac ». La référence à l'intention du législateur de protéger la vie et la santé devrait conduire la Cour constitutionnelle à faire preuve de retenue. Elle a souligné que le rapport explicatif démontrait que le législateur avait soigneusement examiné les interventions dans les industries du tabac et HoReCa. Pour ces raisons, la Cour constitutionnelle a conclu que l'interdiction de fumer visait à atteindre des objectifs légitimes et ne constituait pas une ingérence arbitraire dans l'exercice des droits fondamentaux. Selon la Cour tchèque, plus le législateur accorde d'attention à une éventuelle ingérence dans les droits fondamentaux, plus la législation a de chances de survivre au contrôle de la Cour constitutionnelle.

Pour la Cour constitutionnelle de Macédoine du Nord, les débats qui ont lieu au Parlement de la République dans le cadre de l'adoption d'une loi n'ont généralement pas d'impact sur la procédure et le processus décisionnel de la Cour constitutionnelle.

15. En ce qui concerne la représentation complète des opinions opposées dans les débats parlementaires lors de l'adoption d'une mesure, la Cour constitutionnelle autrichienne a répondu qu'elle ne vérifie pas seulement une éventuelle inconstitutionnalité matérielle, mais qu'elle examine également le respect des règles procédurales relatives à l'adoption des règles juridiques. Ce faisant, elle doit contrôler chaque étape du processus législatif. Même les violations des règles de procédure du corps législatif qui peuvent affecter le processus d'élaboration des politiques par le Parlement peuvent conduire à la déclaration d'inconstitutionnalité de la loi. Toute mesure prise par les organes impliqués dans le processus législatif de leur propre volonté dans le but de prendre des décisions n'est pas soumise au pouvoir de contrôle de la Cour constitutionnelle. Par conséquent, les discussions parlementaires sur le sens de la législation proposée n'ont aucune pertinence juridique pour le contrôle des normes juridiques. La « qualité » de la procédure parlementaire n'est pas un critère indépendant pour évaluer la constitutionnalité d'une loi. Les procédures « coopératives », y compris les procédures considérées comme nécessaires pour l'adoption de la loi sur l'équilibre fiscal, constituent une exception spécifique.

La Cour constitutionnelle de Croatie note qu'il n'est pas de sa compétence d'analyser le contenu d'un débat parlementaire du point de vue de la représentation complète des positions opposées ou du point de vue de l'attention portée aux raisons générales ou aux implications pour les droits. Plus récemment, dans le cadre du contrôle de constitutionnalité, elle examine si l'objectif poursuivi par le législateur est justifié et prend donc note des éléments de la procédure législative conduisant à l'adoption d'une loi. Toutefois, la Cour a constaté une tendance alarmante à l'augmentation du nombre de lois à adopter selon la procédure d'urgence. En effet, la Cour a constaté que cela pouvait porter atteinte à l'essence même du parlementarisme, à savoir les normes inhérentes à la procédure démocratique, en particulier l'exigence d'un large débat public. L'adoption de lois selon la procédure d'urgence devrait donc être une exception et doit être justifiée par des raisons précises et concluantes. Il ne semble pas que, ce faisant, la Cour ait fait une distinction entre les raisons générales et l'implication pour les droits.

Selon la Cour constitutionnelle de la République tchèque, le fait qu'elle évalue si les droits de la minorité parlementaire ont été correctement pris en compte fait partie intégrante du contrôle de la

Cour sur la constitutionnalité de la procédure d'adoption de la réglementation juridique contestée. Les droits fondamentaux de la minorité parlementaire ou de ses membres peuvent être considérés, avant tout, comme des droits garantissant la participation aux travaux parlementaires et permettant à l'opposition parlementaire d'exercer une surveillance et un contrôle sur la majorité au pouvoir, ce qui peut être compris comme une caractéristique fondamentale de l'État de droit. La Cour tchèque considère le droit de bloquer ou de reporter les décisions prises par la majorité comme un droit de la minorité parlementaire. Chaque député ou sénateur doit avoir la possibilité réelle de prendre connaissance du contenu du projet d'acte soumis, de l'évaluer et de prendre position à son sujet dans le cadre de son examen par la chambre compétente du Parlement ou ses organes, ce pour quoi il doit disposer d'un temps suffisant.

16. La question suivante portait sur la nature des preuves concluantes de la légitimité démocratique d'une décision lorsque celle-ci est prise par le pouvoir législatif ou après consultation ou débat public. La Cour constitutionnelle de Lituanie a statué dans une affaire que la législation adoptée dans le régime d'urgence et les procédures spéciales d'urgence n'est autorisée que dans des cas exceptionnels raisonnables, étant donné que la phase des consultations publiques est omise lorsqu'une loi est adoptée dans le régime d'urgence ou d'urgence spéciale. Les consultations publiques sont également l'un des moyens de mettre en œuvre le droit des citoyens à participer à la gouvernance de l'État. C'est pourquoi la Cour constitutionnelle a déclaré que « pour assurer la publicité et la transparence du processus législatif, ainsi que les droits des citoyens de participer à la gouvernance de leur État et de critiquer le travail des institutions de l'État ou de leurs fonctionnaires... la législation doit être réglementée de manière à créer la possibilité pour la société de participer à la délibération sur les projets de loi. Pour atteindre cet objectif, il faut établir une réglementation juridique du processus législatif sur la base de laquelle les projets de loi soumis au *Seimas* sont rendus publics afin que les groupes de la société et les parties impliquées aient suffisamment de temps pour y accéder et exprimer leur opinion, leurs commentaires et leurs propositions sur ces projets de loi, qui sont évalués de manière responsable et raisonnée ». En outre, il existe une obligation d'analyser et de prendre en compte les opinions publiques. La Cour constitutionnelle a estimé qu'en ce qui concerne les exigences de publicité et de transparence du processus législatif et les exigences de qualité des lois adoptées, des unités structurelles du *Seimas* doivent être mises en place pour analyser et évaluer les commentaires et les propositions reçus sur les projets de loi en cours de débat. Des instruments juridiques préventifs internes du *Seimas* doivent être mis en place afin que les lois et autres actes juridiques adoptés par le *Seimas* ne soient pas contraires à la Constitution et répondent aux exigences de qualité découlant de la Constitution pour des lois et autres actes du *Seimas*.

III. L'étendue des droits, la légalité et la proportionnalité

17. En ce qui concerne la déférence des tribunaux au stade de la définition des droits, en donnant du poids à la définition du droit fondamental fournie par le gouvernement ou en l'appliquant à la situation de fait, la Cour constitutionnelle allemande a souligné qu'elle interprète les droits fondamentaux de manière autonome et en tant qu'autorité de dernier ressort.

La Cour constitutionnelle belge évite naturellement de jouer sur les mots et s'appuie principalement sur la définition de bon sens ou sur les définitions officielles des concepts juridiques (qu'elles soient prévues par la loi ou déduites des débats parlementaires). Cependant, les définitions ne sont pas toujours en faveur des autorités publiques et la Cour veille à ne pas utiliser une définition de manière à priver les requérants potentiels de l'accès à la justice constitutionnelle. Par exemple, la Cour a donné raison à un requérant qui utilisait la définition de « propriétaire riverain » au sens commun, contre la prétendue définition du Gouvernement.

La Cour constitutionnelle n'a jamais fait preuve de déférence au stade de la définition des droits pour donner du poids à la définition du droit proposée par le gouvernement ou à l'application de cette définition à la situation factuelle.

18. À la question de savoir si la nature des droits fondamentaux applicables influe sur le degré de déférence, la Cour constitutionnelle italienne s'est référée à un arrêt dans lequel elle a déclaré que

tous les droits fondamentaux protégés par la Constitution « sont interdépendants et qu'il n'est donc pas possible d'identifier l'un d'entre eux comme absolument prédominant par rapport aux autres. La protection doit toujours être « systématique et non fragmentée en une série de règles non coordonnées et susceptibles d'entrer en conflit les unes avec les autres » [...]. S'il n'en était pas ainsi, il en résulterait une extension illimitée de l'un des droits, qui « tyranniserait » d'autres intérêts juridiques reconnus et protégés par le droit constitutionnel en tant qu'expression de la dignité humaine. »

La Cour constitutionnelle de Hongrie note que dans le cas des droits fondamentaux de deuxième génération, leur applicabilité peut être justifiée sur la base de la capacité économique du pays, ce qui relève en premier lieu de la compétence du Gouvernement et en second lieu de celle de l'Assemblée nationale. Par conséquent, ce n'est que dans des cas exceptionnels qu'une violation d'un tel droit fondamental peut être établie. L'un de ces cas est la garantie par l'État du minimum d'existence, qui a été extraite de la Constitution en combinant le droit à la sécurité sociale et le droit à la dignité humaine. La Cour constitutionnelle protège le droit à la dignité humaine de manière plus large et plus importante, en tant que droit général de la personnalité, en tant que droit fondamental subsidiaire. La liberté d'expression bénéficie également d'un traitement spécial en tant que « droit mère » des droits fondamentaux de communication. Dans ce dernier cas, le critère décisif est qu'elle est à la base de la participation démocratique aux affaires publiques et qu'elle vise à définir les valeurs d'une société pluraliste et qu'elle « doit donc céder le pas à très peu de droits ».

Pour le Tribunal fédéral suisse, la garantie de la dignité humaine joue également un rôle important. Le noyau intangible n'est généralement pas identique à la question du champ d'application de la loi ou de la protection des droits fondamentaux. Il en va différemment pour les droits fondamentaux dont le champ d'application et le noyau intangible sont combinés. C'est le cas de l'interdiction de la peine de mort et de la torture, ainsi que du droit à la vie, du droit d'obtenir réparation en cas de souffrance et de l'interdiction de la censure.

La Cour constitutionnelle belge opère une sorte de classification des droits en fonction de leur importance dans la jurisprudence concernant la condition d'un intérêt existant dans le procès ou la qualité processuelle. Une personne doit prouver un « intérêt à invalider la loi » et la Cour considère que certains droits sont si importants que toute personne a qualité processuelle. *L'habeas corpus* en fait partie. Toutefois, l'impact de ce raisonnement est quelque peu limité, car la Cour est généralement assez indulgente lorsqu'il s'agit de la qualité processuelle.

Pour la Cour constitutionnelle autrichienne, le niveau de déférence peut varier en fonction de la nature structurelle du droit fondamental concerné et de la nature et de la substance de l'ingérence dans ce droit. Un bon exemple, en ce qui concerne les procédures de contrôle de la constitutionnalité des lois, est le droit fondamental de participer à des activités lucratives. Dans ce cas, la Cour constitutionnelle accorde au législateur une plus grande marge de manœuvre lorsqu'il adopte des dispositions régissant l'exercice d'une profession ou d'une occupation en général que celles qui régissent l'accès à une profession.

Pour la Cour constitutionnelle espagnole, il suffit de souligner que les différences entre les droits fondamentaux n'ont rien à voir avec leur importance et qu'il n'existe pas non plus de hiérarchie distincte des droits fondamentaux. La Constitution doit être interprétée dans son ensemble et de manière systématique afin de résoudre les antinomies apparentes. Étant donné qu'il n'existe pas de noyau incontestable du pouvoir d'amendement, il n'est pas nécessaire d'examiner, également sous cet angle, la hiérarchie des droits fondamentaux déjà rejetée.

19. En ce qui concerne une éventuelle échelle de clarté lors de l'examen de la constitutionnalité d'une loi, la Cour constitutionnelle autrichienne détermine si une disposition peut être interprétée de manière différente d'un cas à l'autre. Pour déterminer le sens de la loi, toutes les méthodes d'interprétation disponibles doivent être épuisées. Ce n'est que si, après l'application de toutes les méthodes d'interprétation, le sens d'une disposition reste flou, que les exigences de l'État de droit sont violées. Dans un cas, la Cour constitutionnelle a justifié l'abrogation d'une disposition d'un règlement sur les allocations de chômage comme étant inconstitutionnelle : « Ce n'est qu'avec une expertise

subtile, des compétences méthodologiques extraordinaires et une certaine volonté de résoudre des exercices mentaux que l'on peut généralement comprendre quels ordres doivent être donnés ici. »

La Cour constitutionnelle d'Albanie dispose d'une échelle de clarté qu'elle applique lorsqu'elle examine la constitutionnalité d'une loi. Le degré de clarté est plus rigoureux lorsqu'il s'agit d'examiner des lois ou des actes normatifs en matière pénale.

Pour la Cour constitutionnelle d'Espagne, étant donné que les dispositions constitutionnelles se caractérisent par une formulation particulièrement ouverte, l'aphorisme *in claris non fit interpretatio* ne peut être utilisé. Il n'est pas surprenant que lorsque la Cour constitutionnelle a invoqué cette règle, elle l'a fait dans le cadre de l'interprétation de règles juridiques. Ce fut le cas lors de la comparaison entre les règles de l'État et les règles régionales, où il y avait une contradiction évidente, ou lors de la détermination du lieu et du délai de présentation des candidats dans les processus électoraux.

En ce qui concerne le principe *in claris non fit interpretatio*, le Tribunal constitutionnel d'Andorre ne renonce pas à sa fonction d'interprète constitutionnel de la loi, qu'il considère comme essentielle : « Aujourd'hui, toute la communauté juridique s'accorde à dire que l'adage *in claris non fit interpretatio* ne peut être compris dans un sens purement littéral ou grammatical, puisqu'il faut toujours interpréter, même pour déterminer si un texte est clair. L'interprète est, comme on dit, un « médiateur » qui transfère une réalité, matérielle ou idéale, d'un texte juridique, philosophique ou littéraire ou d'une partition musicale, de l'intuition d'un artiste à l'œuvre d'un artisan, à son incarnation pratique. L'interprétation est une activité essentielle dans tout processus herméneutique et implique de la subtilité dans sa compréhension, son explication et son application ».

20. En ce qui concerne l'intensité du contrôle dans le cas du test du but légitime, la Cour constitutionnelle espagnole n'a pas eu besoin de développer l'exigence que les mesures restrictives d'une loi poursuivent un but constitutionnellement légitime. La Cour belge n'a jamais conclu qu'une disposition particulière n'avait pas satisfait au test du but légitime.

La Cour constitutionnelle slovène établit l'objectif du législateur à partir du texte de la loi, des documents législatifs, de la réponse soumise par le législateur dans la procédure de contrôle de constitutionnalité et de l'avis du Gouvernement ou d'une autre autorité compétente. Si le but ne peut être déterminé de cette manière, la Cour constitutionnelle peut également le déduire de l'expérience générale de la vie, à condition qu'il soit suffisamment identifiable. Toutefois, si l'existence d'un but constitutionnellement admissible pour l'ingérence en question n'est pas claire et identifiable sans équivoque, il n'incombe pas à la Cour constitutionnelle de vérifier la cohérence de la réglementation avec la Constitution à la lumière d'éventuels buts purement hypothétiques.

21. La question suivante visait à établir quel test de proportionnalité les tribunaux utilisent et s'ils appliquent toutes les étapes de ce test.

La théorie ou la jurisprudence de la Cour constitutionnelle de la République tchèque n'a pas encore clairement établi si le test du but légitime est une étape distincte du contrôle de constitutionnalité ou s'il fait partie du test de proportionnalité. En principe, la Cour applique le test du but légitime de trois manières. Le test du but légitime peut être une étape distincte dans l'évaluation de la restriction du droit avant le test de proportionnalité ; il peut être inclus dans l'exigence d'adéquation du test de proportionnalité en trois étapes ; ou il peut constituer l'étape initiale (spéciale) du test de proportionnalité, auquel cas nous parlons du test de proportionnalité en quatre étapes.

Deux tendances existent parmi les tribunaux qui ont apporté des réponses. La première catégorie de tribunaux applique un test en quatre étapes. C'est le cas de la Cour allemande. Selon elle, l'ingérence dans les droits fondamentaux doit poursuivre un but légitime, être appropriée et nécessaire pour atteindre le but légitime et être proportionnée au sens strict. Lorsqu'elle examine si une ingérence est proportionnée au sens strict, la Cour allemande met en balance l'intensité de l'ingérence, l'importance du bien commun ou des intérêts constitutionnels concurrents et la mesure dans laquelle le bien commun bénéficierait de l'ingérence dans l'exercice du droit fondamental en question.

La Cour suprême irlandaise utilise un test de proportionnalité adopté par la jurisprudence cana-

dienne. Selon ce test, « l'objectif de la disposition contestée doit être d'une importance suffisante pour justifier la suppression d'un droit protégé par la Constitution. Il doit être lié à des préoccupations urgentes et substantielles dans une société libre et démocratique. Les moyens choisis doivent être soumis à un test de proportionnalité. Ils doivent : être rationnellement liés à l'objectif et ne pas être arbitraires, inéquitables ou fondés sur des considérations irrationnelles ; porter le moins possible atteinte au droit ; et leurs effets sur les droits doivent être proportionnés à l'objectif ». Le test de proportionnalité irlandais comporte quatre éléments : i) objectif légitime ; ii) lien rationnel ; iii) ingérence minimale dans le droit ; et iv) équilibre général.

Au contraire, la Cour constitutionnelle belge applique les trois étapes du test de proportionnalité, mais elles sont parfois indiscernables ou agrégées. Il n'y a pas de règle fixe, la Cour opère au cas par cas. La plupart du temps, la Cour va jusqu'à l'étape de la proportionnalité au sens strict et n'aborde pas les étapes précédentes ou procède à un contrôle léger. Toutefois, il y a eu de rares cas où la Cour belge a mis en évidence une question d'adéquation ou de nécessité.

22. A la question de savoir si elle passe en revue chaque étape applicable du test de proportionnalité, la même Cour a répondu qu'elle rappelle habituellement au public lecteur l'existence des critères et leurs implications théoriques, mais que parfois des préoccupations de clarté exigent une approche moins rigide de la manière dont l'application réelle du test est présentée (par exemple, lorsque le test est appliqué plusieurs fois dans la même décision à l'égard de dispositions différentes).

La Cour portugaise, par exemple, s'est montrée de plus en plus prudente dans son utilisation de la troisième étape du test de proportionnalité, soulignant le respect dû pour l'exercice par le législateur démocratiquement élu des pouvoirs qui lui sont conférés par la Constitution (en particulier dans les procédures de contrôle abstrait). Toutefois, les raisons de cette prudence n'ont pas encore été clairement et systématiquement exposées dans sa jurisprudence.

La Cour autrichienne n'harmonise pas toujours son raisonnement avec le schéma classique et saute parfois certaines étapes du test. Elle affirme parfois qu'une disposition est proportionnée.

La Cour constitutionnelle luxembourgeoise ne suit pas systématiquement chaque étape du test de proportionnalité. Dans sa pratique, deux approches se distinguent. La première consiste à appliquer le principe de constitutionnalité en tant que principe constitutionnel. Dans ce contexte, le test effectué par la Cour consiste en une « mise en balance » des droits et des objectifs de la loi ou, plus récemment, en une vérification du « juste équilibre » entre les droits protégés et les droits affectés par la loi. La seconde approche est appliquée dans le cadre des affaires concernant le principe d'égalité devant la loi. Dans ces cas, les juges constitutionnels s'assurent que la différence de traitement est fondée sur des disparités objectives et qu'elle est rationnellement justifiée, adaptée et proportionnée à son objet. Toutefois, dans ce second contexte, la Cour constitutionnelle de Luxembourg n'analyse pas toujours de manière exhaustive chaque étape du test de proportionnalité. Elle peut se concentrer sur certains aspects, selon les cas, sans nécessairement distinguer les trois étapes de manière explicite.

23. La question suivante visait à savoir si les tribunaux acceptent que la mesure contestée satisfasse à une ou plusieurs étapes du test de proportionnalité même si, à leur avis, il n'y a pas de preuves suffisantes pour le démontrer.

Pour la Cour constitutionnelle fédérale allemande, lorsqu'un pronostic est nécessaire ou lorsque la certitude scientifique quant aux effets causaux pertinents est insuffisante, elle examine uniquement si les mesures méthodologiques prises par le législateur et les faits sur lesquels elles se fondent sont plausibles. Si tel est le cas, l'ingérence dans les droits fondamentaux reste constitutionnelle, même s'il s'avère par la suite que l'appréciation du législateur était incorrecte. Un exemple pertinent dans ce contexte est celui des fermetures d'écoles pendant la pandémie de COVID-19. S'il s'avère que l'appréciation du législateur était incorrecte à l'époque, celui-ci est tenu d'adapter les dispositions légales pour l'avenir. Le fait que le Parlement, en tant que pouvoir législatif, ait pour tâche de prendre des décisions dans des circonstances factuelles incertaines et sur la base de prévisions implique nécessairement que le législateur est autorisé à agir même s'il n'est pas certain que les développements ultérieurs confirmeront qu'il a agi correctement.

De même, dans les cas où la Cour constitutionnelle de Slovénie passe directement à l'une des étapes suivantes du test de proportionnalité, la question de savoir si la mesure a franchi les étapes susmentionnées reste ouverte, mais il serait exagéré de prétendre que la Cour constitutionnelle a tacitement confirmé que la mesure a franchi ces étapes.

24. L'une des questions portait sur l'évolution de la théorie de la déférence judiciaire. Il s'agissait de savoir si cette théorie était apparue en même temps que le test de proportionnalité. En Italie, les deux aspects ont évolué de manière significative au cours des plus de soixante années d'existence de la Cour. Dans les premières années, la Cour a fait preuve d'une attitude particulièrement déférente à l'égard de la marge discrétionnaire du Parlement, fondée sur la nécessité implicite d'entrer avec prudence et ordre dans la dynamique institutionnelle, et aussi en raison de l'adoption de décisions d'irrecevabilité selon lesquelles les questions impliquaient des exercices d'équilibrage complexes et de multiples options à la disposition du législateur, au mieux accompagnées de demandes ou d'avertissements au législateur d'intervenir pour remédier à des situations de constitutionnalité douteuse. La tendance à l'inertie du Parlement a certainement encouragé le développement progressif de certains types de décisions de plus en plus sophistiqués, capables de maximiser l'étendue du contrôle constitutionnel au détriment de zones insoutenables d'inaccessibilité à l'abri de tout contrôle. Ainsi, depuis les années 1970, des décisions innovantes intégrant des déclarations de constitutionnalité « manipulatrices » ont été rendues. Fondées sur une distinction entre disposition et règle, ces décisions ont remédié à des omissions législatives, en s'appuyant sur des décisions « additives », y compris celles qui ont ajouté des principes directeurs plutôt que des règles, ou ont remplacé des règles jugées inconstitutionnelles par d'autres qui pouvaient être dérivées de la Constitution ou comme l'exigeait la Constitution et qui ont ensuite été énoncées dans le dispositif de la décision, en s'appuyant sur des décisions « substitutives ».

En Irlande, l'émergence du test de proportionnalité a coïncidé avec l'émergence de la théorie de la déférence judiciaire. Il en va de même au Tribunal fédéral suisse, où le test de proportionnalité a effectivement coïncidé avec des exercices d'autolimitation.

25. Pour la plupart des tribunaux, la jurisprudence de la CEDH a modelé leur approche concernant la déférence. En Allemagne, si la Cour européenne des droits de l'homme devait appliquer à l'ingérence de l'État un critère de contrôle plus strict que celui que la Cour constitutionnelle fédérale applique au législateur, cela amènerait probablement la Cour constitutionnelle fédérale à examiner sa propre jurisprudence en vue de l'adapter. Pour la Cour constitutionnelle fédérale, la théorie de la CEDH sur la marge d'appréciation n'est pas entièrement équivalente sur le plan juridique à la marge discrétionnaire que la Cour constitutionnelle fédérale accorde aux autorités nationales. Elle repose sur des points de vue différents. Pour déterminer la marge d'appréciation, la CEDH fait différence en fonction de la pratique des États membres du Conseil de l'Europe. Alors que les États sont le point de référence pour la CEDH dans ce contexte, la Cour constitutionnelle fédérale se réfère aux autorités de l'État. Cependant, les critères de fond que la CEDH reconnaît lorsqu'elle offre une large marge d'appréciation peuvent, dans certains cas, être transférés à l'octroi d'une marge discrétionnaire aux autorités de l'État par la Cour constitutionnelle fédérale.

Selon le Conseil constitutionnel français, les considérations relatives à la marge d'appréciation que la CEDH reconnaît aux autorités étatiques lorsqu'elle constate qu'elles remplissent leurs obligations au titre de la Convention, même si certaines similitudes conceptuelles abstraites peuvent être conçues, *mutatis mutandis*, avec le pouvoir d'appréciation et de décision que la Constitution et le Conseil constitutionnel ont reconnu au législateur national, il convient de souligner qu'il s'agit de considérations de nature différente, certaines relevant du droit international et d'autres du droit constitutionnel, de la séparation des pouvoirs et de l'exercice de la souveraineté nationale.

La marge d'appréciation reconnue par la CEDH est égale à la marge discrétionnaire reconnue par la Cour constitutionnelle de Macédoine du Nord lors de l'examen de la constitutionnalité et de la légalité des actes du législatif et de l'exécutif restreignant les libertés et les droits du citoyen, en particulier lors de l'application du test de proportionnalité, qui résulte directement de la jurisprudence de la CEDH.

Pour la Cour constitutionnelle de Serbie, la jurisprudence de la CEDH sur la marge d'appréciation dont disposent les États dans des matières précises est essentiellement similaire, voire équivalente, à son approche du pouvoir discrétionnaire.

Mais pour la Cour suprême irlandaise ou la Cour constitutionnelle tchèque, la jurisprudence de la CEDH n'a pas modelé leur approche de la déférence ou n'a pas eu d'impact significatif sur leur position en matière d'autolimitation ou de déférence.

Nous sommes convaincus que les réponses données aux questions du questionnaire présentent des informations intéressantes pour les chercheurs qui se consacrent au thème de la déférence judiciaire. Pour de plus amples informations sur ce sujet, nous invitons le lecteur à consulter les ouvrages suivants.

GENERAL REPORT

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Constitutional cultures vary and the courts' perceptions of their own role in a constitutional democracy affect the intensity of their scrutiny in fundamental rights cases. Many courts profess judicial deference.

Judicial deference is a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters which are perceived to be beyond their expertise or legitimacy to decide. The tool has been employed, most prominently, in human rights cases. This is due to their transcendent quality, capable of cutting across all substantive areas of public decision-making.

It is said that over-deferential attitude threatens the rule of law and separation of powers as much as excessive judicial activism does. The way judges exercise judicial deference is, therefore, a fundamental matter of constitutional principle that concerns the proper role of each branch of government in relation to significant questions of public policy.

The Questionnaire's questions aim to discover the differences in exercising judicial deference by European constitutional courts.

The Questionnaire was structured in four chapters: Non-justiciable questions and deference intensities; The decision-maker; Rights' scope, legality and proportionality; and other peculiarities.

> *Brevitatis causa*, this report will review only the first three chapters, which reflect the essence of the theme and the questions answered by most constitutional courts.

I. Non-justiciable questions and deference intensities

1. In defining the concept of judicial deference, the Constitutional Court of Spain invites us to proceed methodically with the definition of "deference" by the Merriam Webster dictionary. According to it, deference is "affected or ingratiating regard for another's wishes" or the "respect and esteem due a superior or an elder". Both meanings emphasise the existence of a relationship of otherness informed by respect for the position or way of acting of another.

Spanish law, for example, participates in the general notion of *judicial deference*. So the deferential judge will be the one who resolves bearing in mind the plurality of the legal system. The deferential judge will be very interested in ascertaining and counterbalancing the possible claims of legitimacy concurrent in the case. It will attend to the reasons put forward by the lawmakers, as public power directly placed by the Constitution for the realization of the fundamental determinations, either to give them a weighting sense (and we call this weak deference), or to recognize them an unconditioned authoritative preeminence (strong deference).

But the Spanish case is not the French case. The notion of deference finds no place either in the practice or in the jurisprudence of the French Constitutional Council. The French Constitutional Council requalified the terminology of this questionnaire. Thus, it shows itself not deferential, but respectful of the freedom of action of the legislator by refusing to decide on choices which fall by nature within the margin of appreciation of the latter, judging that the Constitution "does not confer to it a general power of appreciation and decision identical to that of the Parliament."

The German Federal Constitutional Court replaces in its answers to the questionnaire the notion of judicial deference with the notion of judicial self-restraint. Even so, the judicial self-restraint is not recognized in Germany. It is only very rarely that the Federal Constitutional Court has mentioned the term. The fact that the principle has only been mentioned on these very few occasions proves that the principle itself – unlike its underlying idea – generally has no importance in Germany.

Likewise, the term "judicial deference" is not found in the case law of the Austrian Constitutional Court. A concept commonly found in the Constitutional Court's rulings which (today) most closely corresponds to the meaning of judicial deference to the legislator, or judicial self-restraint, is that of "margin of appreciation," although the gradual emergence of this doctrine from the end of the 1970s

saw the Court turn away from the previously stronger deferential nature of its fundamental rights case law towards the legislator.

The Czech Constitutional Court most often uses terms such as the principle of self-limitation and the principle of minimal interference with the powers of other public authorities. In its case law, the Constitutional Court underlines that "*its activity is governed by the principle of self-limitation and not by judicial activism*."

The Swiss Federal Tribunal notes that the principle of deference or the principle of self-restraint is important for this court and influences its mode of operation. It applies, on the one hand, to the limitation of power examination provided for by law and, on the other hand, to the limitation of the power of examination based on substantive law in the presence of local or other particularities.

The Portuguese Constitutional Court makes an important observation: talk of deference makes sense only when a court has no conclusive legal reason to refrain from rendering its own judgment on an issue. To say that an issue is not justiciable is not to say that a court ought to defer. Deference, in the relevant sense, comes into play only when an issue is justiciable. When a court declares a matter non-justiciable (i.e. not suitable for the court to decide) it is not deferring. Rather, it is affirming the constitutional limits of its role, a role which is constituted both by powers and duties.

In the Irish jurisdiction, deference describes the situation where the decision-maker puts aside the possibility of reaching an authoritative independent decision on the matter and defers it to the decision of some institution or body in respect of the contentious matter at hand. This sort of deference is total deference. Deference does not have to be practiced in this way; a judge may defer by attaching different degrees of weight to the views of the primary decision-maker. The greater the weight attached, the more deferential the approach and vice versa.

For the Supreme Court of Norway, "judicial deference" is commonly used term. When answering this questionnaire, it took judicial deference to mean that the court refrains from intervening despite having the power to do so.

2. Regarding the spectrums of deference and the possible "no-go" areas or established zones of legal unaccountability, the Italian Constitutional Court replies that, when it is duly seised of a question, fully exercises its functions as guarantor of the constitutional order respecting the discretionary choices made by the political decision-maker but always verifying that the discretion has been exercised in compliance with constitutional principles and rules. If it finds an infringement of the Constitution, in general and if the conditions therefore are met, the Court intervenes to rectify it without regard to the fact that the issues in question are morally or socially controversial or politically sensitive, involve the allocation of scarce resources or entail substantial financial implications for the government. In the latter regard, it is true that budgetary choices "involve decisions of a political-economic nature which, by reason of that nature, are constitutionally reserved to the determination of governments and parliamentary assemblies, inasmuch as they are choices which, being the fruit of an unquestionable political discretion, call for particular and substantial respect including on the part of the Constitutional Court, although they cannot, of course, constitute a 'no-go' area escaping any review".

For the Austrian Constitutional Court, the rule is that all parts of the Constitution are justiciable. Correspondingly, the "supreme democratic function" of the Constitutional Court is to impose an "act of increased democratic legitimacy", i.e. the Constitution, on the legislator and review compliance therewith. No limitation on the performance of the functions of the Constitutional Court by reason of the "political dimension of a constitutional dispute" can be inferred from the case law. The Austrian Court's case law over recent years has included cases concerning matters of moral controversy such as reproductive medicine, assisted suicide, digital technologies (electronic voting, data retention, surveillance by the state using trojans), questions relating to family law such as same-sex marriage, the entry of a "third gender" in the civil register and parental custody, or questions with significant budgetary consequences, such as those arising in connection with the financial assistance provided during the COVID-19 pandemic.

The German Federal Constitutional Court does not apply a moral standard of review when deciding on questions of moral controversy. If the constitutional standard of review is unambiguous and the application of the standard of review to the case at hand is sufficiently clear, it is irrelevant whether the result is morally controversial or not. The Federal Constitutional Court does not measure its decision against ethical standards because it is unclear how such ethical standards should be defined. It can, however, be assumed that most of the population will not develop any moral standards that are contrary to constitutional requirements within a free and democratic basic order like the order under the Basic Law. Whether a question is politically sensitive or not is also irrelevant for the Federal Constitutional Court. Decisions are only problematic when the constitutional standard of review is unclear. However, the Constitution generally grants the parliamentary legislator broad leeway to design about highly contested political matters that can be described as politically sensitive. The Federal Constitutional Court will have due regard to this leeway in its decisions. However, this respect does not depend on the question of whether the parliamentary decision in a politically sensitive matter was controversial or not. About the allocation of scarce resources, scarcity does not, by itself, create a standard that would influence the Federal Constitutional Court's standard of review either. The German Constitutional Court assumes that the Constitution only predefines financial claims to such a small extent that the legislator still has enough leeway to decide on essential budgetary matters. Thus, the Constitutional Court is not obliged to examine the financial implications of a decision of its own accord.

For the Supreme Court of Ireland, deference is not a static concept. There are degrees to which one can defer. The deference is particularly marked in areas which the Irish Constitution commits to the elected and legislative branches of government, such as, for example, the conduct of foreign affairs, the fairness of taxation measures or the allocation of scarce resources.

For the Bosnia and Herzegovina's Constitutional Court, there are no "prohibited" areas or pre-established zones without legal accountability or issues that the Constitutional Court cannot adjudicate. In decision-making, the Constitutional Court is only subject to the limitations set forth in the Constitution of Bosnia and Herzegovina and the Rules of the Constitutional Court.

The Czech Constitutional Court does not have a clearly defined spectrum of deference. However, it applies deferential review in several areas, and this more restrained review is reflected in a lower level of intensity of review of acts of the legislator, especially in the case of statutory regulation of policies where the legislator is allowed a wide margin of discretion and bears political responsibility for these decisions. It has consistently exercised restraint in its review of tax legislation, but also more generally in matters of economic policy. The Czech Constitutional Court is also as restrained as possible on issues that may cause controversy in society, such as issues of compulsory vaccination, adoption of children by same-sex couples, or the legal regulation of sex determination or reassignment.

In the performance of its tasks, the Slovenian Constitutional Court regularly dwells at the intersection of law and politics, and the Court does not *a priori* refuse to rule on political issues if they have a certain legal dimension. In one of its decisions which concerned the State budget, the Court explained that the budget is an abstract and general legal act of a specific type, which has external effects and the force of law, and must therefore be accorded the legal character of a regulation with the hierarchical status of a law, and the Constitutional Court is competent to review its consistency with the Constitution.

Referring to the "no-go" areas, the Constitutional Court of Lichtenstein, based on Art. 29 (2) of the Lichtenstein's Constitution, generally excludes the field of foreign policy from constitutional judicial review. Only within this narrow framework, it normally refers to judicial self-restraint/political question.

The Constitutional Court of Georgia, for example, has defined circumstances where it generally acknowledges a wide margin of appreciation for another branch of the state to regulate the matter, resulting in reduced scrutiny by the Court. These circumstances include: the social, economic, and fiscal policy of the state; the constitutionality of the sanctions; the defense and administration of

military forces by the state; exhaustible state resources; the choice of the election system and its administration; content-neutral restrictions on freedom of expression; legitimate expectations about the right to property; and unequal treatment based on unenumerated criteria or cases of non-intense unequal treatment.

3. Regarding the factors that determine when and how a court should defer, the Constitutional Court of Albania replies that historical experiences dictated by political, legal, economic, and social developments in the country (such as the transition from the monist regime to the democratic one) has influenced the elaboration of judicial deference. More specifically, quite often the Albanian Court has been set into motion to review several decisions taken by Government or Assembly that affected the constitutional right to private property, a right which was completely denied in the previous communist regime.

In Spain, the culture, and conditions of the country, as well as historical experiences, can be considered both explanatory reasons for the disputed norm, and even for the decision finally taken on its validity, as well as meta-legal elements that help to understand the evolution of certain legal institutions. But they cannot be used as reasons for not deciding or not exercising the jurisdictional power entrusted to the Spanish Constitutional Court by the constituent power itself, in view of the prohibition of not deciding *that* governs contemporary legal systems.

According to the Constitutional Court of Belgium, first and foremost is the fact that the composition of the Court is drawn from the political world, directly or indirectly. Half the judges must be former members of Parliament, and all of them are appointed by Royal Decree on proposal of the House of Representatives or the Senate in a way that guarantees the political representativeness resulting from the elections by proportional suffrage. If we add to this the fact that Belgium is divided between eight different entities, with (almost) every conceivable political coalition, it means that no judge is in a position where her or his political ideology is forever unfavored by the law. Furthermore, there is the historical fact that large reforms (especially State reforms) in Belgium take time and are the result of a wide-ranging political consensus. A politically and electorally pluralistic country might be more prone to deference. Additionally, the jurisdiction of the Court is specifically limited about certain areas that might typically be susceptible to greater deference.

In the opinion of the Italian Constitutional Court, the special nature of certain questions may affect the outcome of the proceedings and even preclude an immediate ruling on the merits where what is at stake are principles strongly rooted in the culture and historical experience of the country or involving delicate balancing choices that are primarily a matter for the legislature's discretion. For example, Italian family law has inherited from the Roman law tradition the heterosexual connotation of marriage and the automatic rule of patronymic in the transmission of surnames to children. Regarding the first issue, in a judgment of 2010, noting that Article 29 of the Constitution intended to refer to marriage in its traditional meaning of the union of a man and a woman, the Constitutional Court clarified that the right of persons of the same sex to freely live together as a legally recognized couple is constitutionally safeguarded in Article 2, which protects the inviolable rights of the individual and requires that the matter be regulated by positive laws enacted by Parliament subject to the margin of appreciation that the latter enjoys in view of the multiple models that can be adopted and have been adopted in other States and that do not contemplate the paradigm of matrimony. Following the Constitutional Court's ruling that the questions raised in the case were either unfounded or inadmissible, the legislature followed up by fully regulating civil unions, including between persons of the same sex. Regarding the second issue, the patronymic rule – which clearly infringes the constitutional principle of equality between spouses as well as the child's right to personal identity and which can be a legacy of a patriarchal conception of the family that has gone by the wayside – led the Court to call for a thorough review of the rules on several occasions. As the legislature's inertia persisted, a judgment delivered in 2022 finally overturned the automatic granting of only the father's or husband's surname to the child, introducing – pending more complete legislative action – the rule of a double surname in the agreed order unless the parents decide otherwise.

4. Asked if it deferred because of lack of expertise, the Federal Constitutional Court of Germany re-

plies that such cases are inconceivable. Insofar as the Constitutional Court decides, it does so based on constitutional standards for the interpretation of which it possesses sufficient expertise. There may be preliminary questions, such as the existence of general rules of international law, questions concerning the interpretation of ordinary law, or questions of validity in the context of international law, for which the Federal Constitutional Court will seek external expertise.

In several cases, the Czech Constitutional Court has exercised restraint, stating that the matter should be decided primarily by the legislator and not by the courts. An example of this approach is the decision on compulsory vaccination. The Constitutional Court conducted a restrained review of the legislation in the context of the right to inviolability of the person, emphasizing that this is a technical rather than a legal question. In another judgment delivered in 2018, the Constitutional Court reviewed the constitutionality of a government regulation setting limits on traffic noise. The Government argued that the case did not fall within the jurisdiction of the courts at all as it depended on the assessment of technical and scientific questions. However, the Constitutional Court disagreed with this claim and ruled that: *"the courts should not and cannot refrain from reviewing cases in which the decision depends on an assessment of technical or scientific issues."* However, it proceeded to exercise deference in its review because it *"cannot have the ambition to embark on a review of purely technical matters* [...] *The necessary administrative and expert background and resources to make such decisions are available to the Government and it is therefore primarily the Government's task to consider all the necessary factors in their totality and in the light of the current knowledge."* In these cases, the Constitutional Court has maintained a restrained stance primarily because of the superior expertise of the previous decision-maker.

In one case, the Constitutional Court of Portugal refrained from declaring the challenged normative provisions unconstitutional in part due to the 'epistemically limited context' in which it was required to deliberate. This is not an instance of deference, in the relevant sense: the Court did not (could not) substitute its own judgment on the substantive question at hand for the judgment of the legislator, i.e. the Court is neither adopting nor endorsing the judgment of the decision-maker on the substance of the measure. It is simply saying that it is not in a sufficiently epistemically informed position to conclude for itself that the relevant provision is unconstitutional. Such a reason for not declaring a normative provision unconstitutional is a prudential reason to refrain from acting in such a way as to infringe the principle of separation of powers.

According to the Constitutional Court of Croatia, there should generally be no cases of deference due to the lack of expertise, because the Court can request and rely on expertise of experts specialized in the respective fields. However, in cases of emergency in where there is a general lack or scarcity of expert knowledge combined with time pressure, the decision-maker may be afforded a larger margin of appreciation correlating to a higher level of deference.

The Constitutional Court of Slovenia grants the legislature (and the Government) more room for maneuver when regulating technical or scientific issues that are not from the field of law. In a case concerning the ritual slaughter of animals, it thus clarified that it cannot be an arbiter in matters of complex scientific issues. In this regard, the reasoning of the Constitutional Court in its decision on the constitutional consistency of measures for containing the spread of the Covid-19 pandemic is also relevant. When assessing the appropriateness of the challenged measure, the Constitutional Court explained that, where the appropriateness of the measure is directly connected to expert reasons, this assessment must be conducted "in the light of the knowledge of the relevant disciplines available at the time of the decision to impose the measures. If scientific knowledge is still evolving at the time of the first occurrence of a previously unknown communicable disease for which an epidemic or pandemic must be declared, and the opinion of the scientific community may not be entirely unanimous, a wider margin of discretion must be allowed to the competent decision-maker in assessing which expert opinion to follow and to what extent.

5. No court of those questioned had deferred because there was a risk of judicial error. In the words of the Spanish Constitutional Court, it can never rely on the obscurity of the rule which serves as a parameter of control to avoid the responsibility of prosecuting the subject matter of the proceed-

ings. This would amount *to a* denial of justice to the parties and a disregard for the role attributed to the Court as "supreme interpreter of the Constitution."

The Latvian Court has never explicitly referred to a judicial error; however, it would appear that its refusal to re-examine the political expediency of the decisions of the legislator is the absence of "sufficiently strict legal categories and standards" against which to measure this expediency. In other words, it is impossible for the Court to have certainty that its considerations of political expediency are more correct than the ones of the legislator. Judicial decisions that are taken without a clear legal basis are bound to be to some extent arbitrary and hence prone to judicial error.

6. In the case law of the Federal Constitutional Court of Germany there has never been a case in which the Court refused to decide due to the democratic legitimation of the decision maker. However, when interpreting the specific constitutional provisions at issue and applying the relevant constitutional standard to the specific case, the Federal Constitutional Court has on several occasions taken account of whether the Constitution affords broad discretion to the decision maker or not.

The Constitutional Court of Bosnia and Herzegovina dealt with the issue of the authority of the High Representative to enact laws, as well as with the legal character and status of such laws. In a decision of 2000, the Constitutional Court examined the constitutionality of the Law on the State Border Service. The High Representative in Bosnia and Herzegovina imposed the Law following the failure of the Parliamentary Assembly to adopt a draft law proposed by the Presidency of Bosnia and Herzegovina. Considering the prevailing situation in Bosnia and Herzegovina, the legal role of the High Representative, as agent of the international community, it is not unprecedented, but similar functions are known from other countries in special political circumstances. Further, the Constitutional Court noted that the High Representative has been vested with special powers by the international community and his mandate is of an international character. As noted by the Constitutional Court, irrespective of the nature of the powers vested in the High Representative by the General Framework Agreement for Peace in Bosnia and Herzegovina, the fact that the Law on State Border Service was enacted by the High Representative and not by the Parliamentary Assembly does not change its legal status, either in form or in substance, since, whether or not it is in conformity with the Constitution of Bosnia and Herzegovina, it relates to the field falling within the legislative competence of the Parliamentary Assembly.

The Czech Constitutional Court has also consistently ruled that the resolution of fundamental issues concerning human beings as a biological species, their life, and their relationships, i.e. issues of family, parenthood, and marriage, belongs exclusively to the national legislator. If these issues were to be turned into judicial issues, it could lead to the politicization of the Constitutional Court and thus to the weakening of its position as an impartial and independent judicial body protecting the constitutional order.

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Replying if this is a valid standard for it, the Supreme Court of Ireland mentioned that the Irish courts will not be deterred from pronouncing constitutional questions even where the matter concerns one of broad social policy. Even still, the courts have occasionally shown deference because there is a matter of broad social policy: examples include a reluctance to invalidate on equality grounds the differing treatment of girls from boys in matters of underage sexual activity.

The Swiss Federal Tribunal has a different approach. It often shows judicial restraint when facing politically sensitive issues. The judgment of the Federal Court in the case "Seniors for climate protection" deserves to be mentioned in this context. By their appeal, the appellants requested that the Swiss government take more of measures concerning the problem of global warming and regulates the legal framework of the effects of the latter. In response to this request, the Tribunal showed restraint and stressed that, according to Swiss constitutional law, proposals for the implementation of a specific public policy in an area currently subject to debate can in principle be introduced by pathways to democratic participation. It noted that "[t]he objectives of this kind do not are accomplished not by legal means but by political means that the Swiss system offers enough with its democratic in-

struments". Likewise, the Federal Tribunal often shows restraint in its jurisprudence on delicate questions of social policy. In this regard, there are decisions regarding accident insurance benefits for students employees, examination of the conditions for granting a widow's or widower's pension, as well as that in matters of family reunification with a person who has acquired Swiss nationality.

8. Regarding a general principle of deference in judging penal philosophy and policies, the Supreme Court of Estonia replied that the legislature has exclusive competence to impose penal sanctions and has a wide margin of discretion in defining the punishment corresponding to an offence (sentence limits). The scale of penalties depends on the values held by society, and it is the legislative power that is competent to express them. It also allows the Parliament to shape the national penal policy and influence criminal behavior. It follows from the principle of the separation of powers that the courts cannot start to shape the system of sanctions instead of the legislature, taking abstract penal policy objectives as the basis. However, the legislature's wide discretion does not exclude the competence of the courts to assess the compliance of a rule of penal law, including a sanction, with the Constitution.

The Federal Constitutional Court of Germany does not decide on questions pertaining to the philosophy of criminal law or criminal law policy. Criminal law policy is bound to the constitutional framework and the philosophy of criminal law does not specify any direct legal standards and is thus not subject to constitutional review. The German Constitution includes certain specific requirements relating to criminal law. Articles 101 to 104 of the Basic Law set out procedural rights that concern criminal proceedings and are equivalent to fundamental rights.

The Constitutional Court of Spain merely verifies that the criminal rule does not produce a manifestly useless waste of coercion that renders the rule arbitrary and undermines the elementary principles of justice inherent in the dignity of the person and the rule of law. The proportionality of a penal reaction can be affirmed when the rule pursues 'the preservation of rights or interests that are neither constitutionally proscribed nor socially irrelevant,' and when the penalty is 'instrumentally suitable for this pursuit,' and necessary and proportionate in this sense. 'From a constitutional perspective, it will only be possible to classify the criminal rule or penalty as unnecessary when, in the light of logical reasoning, of uncontroversial empirical data and of the set of penalties that the lawmakers themselves have deemed necessary to achieve similar aims of protection, the manifest sufficiency of an alternative means which is less restrictive of rights for the equally effective achievement of the aims desired by the lawmakers is evident ...and the criminal rule or punishment can only be considered disproportionate when there is a patent and excessive or unreasonable imbalance between the punishment and the purpose of the rule, based on the constitutionally indisputable axiological guidelines and their implementation in the legislation'.

For the Constitutional Court of Belgium, there is no general principle of deference in judging penal philosophy and policies. On the contrary, case-by-case review is the rule. In general, criminal laws are reviewed in a more lenient way, for instance when the legislator decides to create a new offense or chooses to aggravate the severity of punishments, or in a stricter way when assessing the conformity of criminal laws with articles 6 and 7 ECHR.

The Constitutional Court of the Czech Republic has consistently held that penal policy, including infraction policy, involves complex decision-making with criminological, social, or political considerations. As a result, it declared its reticence towards suggestions that certain offences should not be criminalized or that the punishment for illegal acts was disproportionate. The legislator's decision to qualify a certain type of conduct as a criminal act in terms of its formal definition and to set the breadth of the limits of criminalization of certain types of conduct is primarily a manifestation of the State's penal policy, which falls within the competence of State bodies other than the Constitutional Court.

In its case-law, the Constitutional Court of Romania held that Parliament is free to decide on the criminal policy of the state, being the sole legislative authority of the country. Also, the Romanian Court held that it does not have the competence to get involved in the field of legislation and crim-

inal policy of the state, any contrary attitude constituting an interference in the competence of this constitutional authority.

According to the Constitutional Court of Portugal, a dominant concern is whether the legislator's decision to criminalize a particular type of conduct is compatible with the requirements of the *ultima ratio* principle and of the rule-of-law requirement of clear definition of criminal offences. The Court makes case-by-case judgments on this matter, but tends to give considerable weight to its own jurisprudence in relevantly similar cases. For example, in a case on the constitutional admissibility of pimping as a criminal offence, the Court concluded that the statutory provision which criminalizes pimping is unconstitutional. In another case on the constitutional admissibility of pet abuse as a criminal offence, the Court concluded that the provision which defines pet abuse as a criminal offence is unconstitutional. More recently, the Court has reversed its judgment and refrained from judging the provision unconstitutional.

9. Regarding the deference on national security grounds, the general approach is that they should not be an obstacle for the courts to ask whatever document or information required by the case.

One of the Slovakian Constitutional Court's most recent judgment in this area shows no signs of deference. The Slovakian Court invalidated three provisions of the Asylum Act. Under the challenged provisions, applications for (the award or prolongation of) supplementary protection had to be rejected if the secret services informed the Interior Ministry (competent to decide on the application) that the applicant posed threat to national security. The reasons for conclusion were kept secret from the applicant and from the competent employee of the Ministry handling the application.

In the same vein, the Constitutional Court of Moldova mentioned, in one case, that the interests based on national security are not absolute. It declared unconstitutional the provisions of Law on the regime of foreigners, which forbade the notification to the foreigners of the reasons underlying the decision to declare them as undesirable persons.

According to the Constitutional Court of Türkiye, a wide discretionary power has been granted in terms of limitations for the purpose of ensuring national security and public order. However, the Court has considered that this discretionary power is not unlimited and it carefully examines whether the constitutional guarantees are fulfilled.

10. The next question concerned the passivity of the government in introducing rights-compliant reforms. For example, the Constitutional Court of the Czech Republic intervened in a case of the legislator's prolonged inactivity. This case concerned a restriction of the basic human rights of property owners, when Czech politicians were unable to definitively resolve the issue of regulated rents, a remnant of communism, for several decades. Although the Constitutional Court maintained a restrained approach for quite a long time, it stated in its judgment that the prolonged inaction of the Parliament of the Czech Republic consisting in the failure to adopt a special legal regulation defining the cases in which the lessor is entitled to unilaterally increase the rent, the fees for services provided with the use of the apartment, and to change other terms of the lease contract is unconstitutional.

The Constitutional Court of Slovenia is considered extremely activist because it determines frequently the way its decision is to be implemented. In this manner, the Constitutional Court most often provisionally settles an issue that would otherwise remain unresolved after its decision, to protect important constitutional values, especially where human rights or fundamental freedoms may be affected. For example, having established that the statutory regulation allowing marriage only to persons of different sexes was inconsistent with the Constitution, the Court, by determining the way its decision was to be implemented, immediately enabled marriage irrespective of the sex of the spouses, holding that "Until the unconstitutionality is remedied, marriage shall be deemed to be a union of two persons."

For the Latvian Court, such cases are exceptional. An example is a case concerning inheritance duty payable with respect to inheritance received from a same-sex partner. The Latvian Court noted that the Parliament had not yet developed a system of legal recognition and protection of families formed

by same-sex partners. Due to that, the Latvian Court simply pointed out that at the relevant time the state was "legally blind" with respect to same-sex families and found the contested provision to be unconstitutional for exactly that reason.

II. The decision-maker

11. Regarding the paying of a greater deference to an act of Parliament than to a decision of the executive, the approach of most of the responders may be summarized in the words of the Constitutional Court of Spain: it is inappropriate to establish a kind of scale of deference between public authorities. According to the Romanian Constitutional Court, in carrying out the constitutionality review, the Court does not make any distinction based on a possibly different level of democratic responsibility of the Parliament or the Government. The Court examines the act subject to control in consideration of its legislative nature, without the level of its control alternating depending on the issuer of the act or on an aspect external to its normative content.

12. On the weight that the courts give to legislative history, the German Federal Constitutional Court examines the facts on which the legislator based its decision as to their methodological foundations and their plausibility. The Court accepts 'the facts available to the legislator' and 'prior experience' as a basis for reviewing laws.

The Spanish Constitutional Court has been cautious in using the parliamentary background of the rules, in particular the Constitution itself.

The Irish Supreme Court can review legislative history in deciding the outcome of a case. Particularly in cases where the Court is asked to consider a piece of legislation, it will often look at what went before to understand the intention of the Oireachtas.

In Belgium, the parliamentary preparatory documents feature prominently in the decisions of the Court, as a starting point to evaluate the presence of a legitimate aim, and to evaluate the justification of a certain provision. The opinion of the Legislative Section of the Council of State on draft legislation is also required in many instances, and the Court pays particular attention to this opinion as well as the reaction (or lack thereof) of the legislator to this opinion. There is a very famous precedent in the case-law of the Belgian Court when historical weight was considered against questioning an existing legislation, although probably unconstitutional. This is the case in Belgian labor law of the (former) distinction between 'workers' and 'employees.' Asked about this quite clear inequality, the Court accepted the weight of legislative history to validate the legislation. However, ten years or so after this judgement, when asked the same question, the Court reassessed the balance between history and equality and finally favored the latter, by declaring the law unconstitutional.

In Italy, parliamentary debates do not have a specific relevance for the purpose of examining the compatibility of legislation with human rights also because in the Italian legal system the approval of a law is not accompanied by express reasoning. However, the *travaux préparatoires* are of undoubted value in aiding the reconstruction and interpretation of the legal framework. In fact, it is also possible to deduce the rationale and purpose of legislation from the debate that preceded its enactment. This applies to tailor-made laws and authentic interpretation laws.

The Constitutional Court of Bulgaria considers as evidence in many of its decisions the verbatim reports of MPs' deliberations (sessions in plenum or in committees), reports of parliamentary standing committees, or reasons to draft laws, and makes an analysis of the genesis of legislation.

According to the Constitutional Court of Lithuania, an analysis of legislative history can be and is part of examination carried out to find the solution whether the disputed legal act (or its part) in certain constitutional justice cases follows the Constitution. Revealing intentions of the legislature can also help to find this solution, especially in the case of the legitimate aim test while applying the "classic" proportionality test in situations concerning human rights limitations. For example, in a ruling regarding the constitutionality of the provisions of the Law on Hunting, the Constitutional Court began its analysis of the legal regulation by recalling the origins of the regulation governing hunting

relationships and looked through the history of the legal regulation of hunting by emphasizing its importance.

13. On the question regarding the check of the courts whether the decision maker has justified the decision or whether the decision is one that the courts would have reached, had it itself been the decision maker, the German Federal Constitutional Court noted that the legislator generally is under no obligation to justify laws. In principle, the German Constitution only obliges the legislator to adopt effective laws. In this context, the Federal Constitutional Court, among other things, held in a judgment that: '*The claim that insufficient reasons have been stated for the challenged law is unfounded. The constitutional requirements generally do not pertain to the stating of reasons for a law, but to the results of legislative proceedings [...] The Basic Law, however, generally, does not prescribe which parts of legislative proceedings require justification, when and how. The Basic Law leaves room for negotiations and political compromise. What is decisive is that the legislator ultimately does not fail to satisfy constitutional requirements.*'

The French Constitutional Council does not substitute its assessment for that of the legislator. It asserts regularly that does not have a general power of appreciation and decision identical to that of Parliament and that it could not investigate whether the objectives set assigned by the legislator could have been achieved by other means, since the modalities retained by the law are not manifestly inappropriate for the objective pursued.

The Constitutional Court of Belgium evaluates whether a certain choice by the legislator is reasonably justified. It concludes to a violation when there is no reasonable proportionality between the goals of the legislator, the chosen measures, and their consequences. Also, in several cases, the Court explicitly mentions that, although several constitutional options are available, it does not have the authority to make that choice.

In Slovenia, only instances of retroactive application of statutory provisions require that the legislature justify its choice of a particular regulation already in the legislative procedure itself. In accordance with the established constitutional case law, retroactive effect may be justified only by a special public interest justifying precisely the retroactive effect of the regulation, without which the pursued objective of the regulation could not be achieved. However, since such public interest justifies an exception to the constitutional prohibition on the retroactive effect of a regulation – and exceptions must be interpreted restrictively – it must be specifically identified in the legislative procedure and explained in the legislative material.

14. The next question envisaged the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights. The Constitutional Court of the Czech Republic found, when reviewing the "anti-smoking law," which introduced a complete ban on smoking in restaurants, that the legislator in this case was able to shield the pursued objective of protecting life and health "from the commercial and other interests of the tobacco industry" when adopting the law. This reference to the intent of the legislator to protect life and health should lead to the restrained approach of the Constitutional Court. It pointed out that the explanatory report showed that the legislator had carefully considered interventions in the tobacco and hospitality industries. For all these reasons, the Constitutional Court concluded that the contested smoking ban pursues legitimate aims and is not an arbitrary interference with fundamental rights. According to the Czech Court, the more attention the legislator pays to potential infringements on fundamental rights, the more likely it is that the legislation will pass the Constitutional Court's review.

For the Constitutional Court of North Macedonia, the debates that take place in the Assembly of the Republic of North Macedonia throughout the process of passing a law typically have no impact on the procedure and decision-making of the Constitutional Court.

15. Regarding the check on whether the opposing views were fully represented in the parliamentary debate when adopting a measure, the Constitutional Court of Austria replied that it does not merely check for possible substantive unconstitutionality, but also examines compliance with the procedural rules for enacting legal norms. In doing so it must review every step in the legislative

process. Even violations of rules of procedure of a legislative body which can affect parliamentary policymaking result in the law being unconstitutional. Any measures undertaken by bodies involved in the legislative process of their own volition for the purpose of decision-making are not subject to the Constitutional Court's powers of review. Likewise, parliamentary discussion of the meaning of proposed legislation is of no legal relevance for the purposes of review of legal norms. The "quality" of the parliamentary procedure is not an independent criterion for assessing the constitutionality of a law. One specific exception to this are "cooperative" procedures, including procedures regarded as necessary for adopting the Fiscal Equalization Act.

The Constitutional Court of Croatia notes that it is generally beyond its purview to analyze the content of a parliamentary debate from the point of view whether the opposing positions were fully represented or whether the focus was on the general merits or implications for rights. Rather, in constitutional review proceedings it examines if the aim pursued by the legislator is justified and, to this end, takes note of the elements of the legislative procedure (legislative history) that lead up to the adoption of a particular law. Nevertheless, the Court did observe an alarming tendency of an increasing number of laws to be adopted in emergency procedure. Indeed, the Court found that this could undermine the very essence of parliamentarianism, i.e. standards inherent to democratic procedure, particularly the requirement of a broad public debate. Therefore, the adoption of laws by emergency procedure should be an exception and must be justified by specific and conclusive reasons. It does not appear that in doing so the Court has made a distinction between the general merits and the implication for rights.

According to the Constitutional Court of the Czech Republic, the assessment of whether the rights of the parliamentary minority were duly considered is an integral part of the Court's review of the constitutionality of the procedure for adopting the contested legal regulation. The fundamental rights of the parliamentary minority or its members can be primarily considered to be rights guaranteeing participation in parliamentary procedures and enabling the parliamentary opposition to exercise supervision and control over the ruling majority, which can be understood as a basic feature of the rule of law. The Constitutional Court considers the right to block or delay decisions taken by the majority to be a right of the parliamentary minority. Individual deputies or senators must be given a real opportunity to become familiar with the content of the submitted draft act, to assess it and to take a position on it in the context of its consideration in the relevant chamber of the Parliament or its bodies, for which they must be given sufficient time.

16. The next question focused on the character of conclusive evidence of a decision's democratic legitimacy when the decision is one of the legislature's or has come about after public consultation or public deliberation. The Constitutional Court of Lithuania ruled in one case that lawmaking under urgency and special urgency procedures is permissible only in exceptional reasonable cases, because the stage of public consultations is skipped when a law is adopted under urgency or special urgency procedure. Public consultations also constitute one of the ways to implement the citizen's right to participate in the governance of their state. Therefore, the Constitutional Court held that, "to ensure the publicity and transparency of the legislative process, as well as the rights of citizens to participate in the governance of their state and to criticize the work of state institutions or their officials … this [legislation] process … must be regulated so that a possibility would be created for society to participate in the deliberation of draft laws. To reach this objective, such a legal regulation of the legislative process must be established under which draft laws submitted to the Seimas would be made public so that the groups of society and the parties concerned would have enough time to access them and to express their opinion, comments and proposals concerning these draft laws, which would be assessed in a responsible and reasoned manner." Moreover, there is the obligation to analyze and take into consideration public opinions. The Constitutional Court held that, with regard to the requirements of publicity and transparency of the legislative process and the quality requirements for adopted laws, structural units of the Seimas must be set up to consider and assess the received comments and proposals concerning draft laws under deliberation, as well as internal preventive legal instruments of the Seimas must be established in order that laws and other legal acts adopted by the Seimas would not be in conflict with the Constitution and would meet the quality

requirements, stemming from the Constitution, for laws and other acts of the Seimas.

III. Rights' scope, legality and proportionality

17. Regarding the deferral of the courts at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts, the German Constitutional Court emphasized that it interprets fundamental rights autonomously and as the final authority.

The Belgian Constitutional Court naturally avoids playing with words and relies first and foremost on either the common-sense definition or the official definitions of the legal concepts (whether enshrined in the law or deduced from the parliamentary debates). However, definitions do not always benefit the public authorities and the Court is careful not to use a definition in such a way as to deny potential applicants access to constitutional justice. For instance, the Court granted standing to an applicant using the definition of "riverside owner" in the common sense, against the alleged definition of the Government.

The Constitutional Court of Ukraine has never deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts.

18. On the question on how influence of nature of applicable fundamental rights affects the degree of deference, the Italian Constitutional Court mentioned a judgment where stated that all fundamental rights protected by the Constitution "are mutually related to one another and it is thus not possible to identify any one of them in isolation as prevailing absolutely over the others. Protection must always be 'systematic and not fragmented into a series of rules that are uncoordinated and potentially conflict with one another' [...]. If this were not the case, the result would be an unlimited expansion of one of the rights, which would 'tyrannize' other legal interests recognized and protected under constitutional law, which constitute an expression of human dignity."

The Constitutional Court of Hungary mentions that in the case of second-generation fundamental rights, the enforceability of these rights may be justified based on the country's economic capacity, which is primarily a matter for the Government and secondarily for the National Assembly. Consequently, only in exceptional cases can a fundamental right violation based purely on these basic rights be established. Such an enforceable case is the state guarantee of the subsistence minimum, which was extracted from the Constitution by combining the right to social security and the right to human dignity. The Constitutional Court protects the right to human dignity in a broader and more prominent way, as a general right of personality, as a subsidiary fundamental right. Freedom of expression also receives similar special treatment as a "mother right" of the fundamental rights of communication. In the latter case, the decisive criterion is that it is the basis for democratic participation in public affairs and is intended to define the values of a pluralist society, and therefore "must yield to very few rights."

For the Swiss Federal Tribunal, the guarantee of human dignity also plays an important role. The intangible core is generally not identical to the field application or protection of fundamental rights. It is different for rights fundamentals whose protective field and intangible core merge. Such is the case of the prohibition of the death penalty and torture, as well as the right to life, the right to obtain help in situations of distress and the prohibition of censorship.

The Constitutional Court of Belgium operates a kind of classification of rights based on their importance, as part of the case-law concerning the condition of interest to the action or standing. A person must prove an 'interest to annulment' and the Court considers that certain rights are so important that everyone has standing. *Habeas corpus* is one of them. However, the impact of this reasoning is somewhat limited, as the Court is generally quite lenient when it comes to standing-requirements anyway.

For the Constitutional Court of Austria, the degree of deference may vary depending on the structural nature of the fundamental right concerned and the nature and substance of interference with the right. A good example of this, as regards proceedings for review of the constitutionality of laws, is the

fundamental right to engage in gainful activity, where the Constitutional Court accords the legislator a wider margin about provisions governing exercise of a profession or occupation in general than those relating to entry into a profession or occupation.

For the Constitutional Court of Spain, it was enough to point out that the differences between constitutional rights have nothing to do with their importance, nor does there exist a distinct hierarchy of fundamental rights. The Constitution must be interpreted jointly and systematically to resolve apparent antinomies. Since there is no unavailable core for the power of amendment, it is idle to consider, also from this perspective, the already rejected hierarchy of constitutional rights.

19. As for an eventual scale of clarity when reviewing the constitutionality of a law, the Constitutional Court of Austria determines whether a provision can be interpreted in various ways on a case-by-case basis. When determining the meaning of the law, all available methods of interpretation must be exhausted. Only if, after all methods of interpretation have been applied in a specific case, the meaning of a provision remains unclear, are the rule-of-law requirements violated. In one case, the Constitutional Court justified the repeal of a provision of a regulation granting unemployment assistance as unlawful as follows: "Only with subtle expertise, extraordinary methodological skills and a certain desire to solve mental exercises can it be understood at all what orders are to be made here."

The Constitutional Court of Albania has and applies the scale of clarity when reviewing the constitutionality of a law. The degree of clarity is more rigorous during the examination of laws or normative acts related to the criminal field.

For the Constitutional Court of Spain, given that the constitutional provisions are characterized by a particularly open texture, it is not possible to resort to aphorism *in claris non-fit interpretatio*. It will not be surprising that when the Constitutional Court has invoked this rule it has done so in the interpretation of legal norms. This has been the case of the contrast of state and regional rules where there is a manifest contradiction or the determination of the place and deadline for submitting candidates in electoral processes.

Relating to the principle *in claris non fit interpretatio*, the Constitutional Tribunal of Andorra does not renounce its function of constitutional interpreter of the Law, which it considers essential: "Today, the entire legal community agrees that the adage "in claris no fit interpretatio" cannot be understood in a purely literal or grammatical sense, because an interpretation must always be made even to determine whether a text is "clarus". As it is said, the interpreter is a "mediator" who transfers a reality, material or ideal, from a legal, philosophical, or literary text or a musical score, from the intuition of an artist to the work of a craftsman, to his practical incarnation. It supposes an essential activity in any hermeneutic process and therefore implies a subtlety (subtilitas) in its understanding (intelligendi) in its explanation (explicandi) and in its application (applicandi)".

20. With respect to the intensity review in case of the legitimate aim test, the Spanish Constitutional Court has hardly needed to deepen the requirement that restrictive measures of law pursue a constitutionally legitimate aim. The Belgian Court has never concluded that a certain provision failed the legitimate aim test.

The Constitutional Court of Slovenia ascertains the legislature's aim from the text of the law, the legislative materials, the reply submitted by the legislature in constitutional review proceedings, the opinion of the Government or other relevant authority. If the aim cannot be ascertained in this manner, the Constitutional Court may also derive it from general life experience, provided it is sufficiently clearly identifiable. However, if the existence of a constitutionally admissible aim for the interference in question is not clearly and unequivocally identifiable in this manner, it is not the task of the Constitutional Court to review the consistency of the regulation with the Constitution in the light of possible purely hypothetical aims.

21. The next question aimed to establish what proportionality test employ the courts and if they apply all the stages of this test.

Whether to include the legitimacy test as a separate step of the constitutionality review or as part

of the proportionality test has not yet been clearly resolved by the doctrine or case law of the Constitutional Court of the Czech Republic. In principle, this Court views the legitimate aim test in three variations. The legitimate aim test may be a separate step of the assessment of the restriction of the right preceding the proportionality test; or implicitly included in the appropriateness criterion of the three-step proportionality test; or the initial (special) step of the proportionality test, in which case we will talk about the four-step proportionality test.

Among the courts that replied, there are two tendencies. The first category of courts applies a test that consists of four prongs. It is the case of the German Court. According to it, interferences with fundamental rights must pursue a legitimate aim, be suitable and necessary to achieve the legitimate aim and be proportionate in the strict sense. When examining the if an interference is proportionate in the strict sense, the German Court engages in a balancing of the intensity of the interference, the importance of the common good or of conflicting constitutional goods and the extent to which the common good would benefit from the interference with the fundamental right at hand.

The Supreme Court of Ireland employs a proportionality test that is adopted from Canadian jurisprudence. According to this test, "The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionality protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test They must: be rationally connected to the objective and not be arbitrary, unfair, or based on irrational considerations; impair the right as little as possible; and be such that their effects on rights are proportional to the objective." The Irish proportionality test can be regarded as having four elements: i) Legitimate aim; ii) Rational connection; iii) Minimum impairment of the right; and iv) Overall balance.

By contrast, the Constitutional Court of Belgium, for example, applies the three stages of the proportionality test, but these are sometimes indistinguishable or aggregated. There is no fixed rule; the Court operates on a case-by-case basis. Most of the times, the Court goes all the way to the proportionality in the narrower sense and either does not address the previous stages, or performs a light check. However, there has been some rare cases in which the Court points an issue with the suitability or the necessity.

22. Asked if it goes through every applicable limb of the proportionality test, the same court replied that it usually reminds the reader of the existence of the criteria and their theoretical implications, but sometimes concerns regarding readability or clarity require a less rigid approach in how the actual application of the test is presented (for instance when the test is applied several times within the same decision, regarding different provisions).

The Portuguese Court, for example, has been increasingly cautious in its use of the third limb of the proportionality test, stressing due respect for the democratically elected legislator's exercise of its constitutionally attributed powers (particularly in abstract review proceedings). Grounds for such caution, however, have not yet been clearly and systematically articulated in its case-law.

The Austrian Court does not always align its reasoning with the "classic" scheme and sometimes "skips" individual stages of the test. Occasionally, it makes a general assessment that a provision is proportional.

The Constitutional Court of Luxembourg does not systematically follow each step of the proportionality test. Two main approaches stand out in its practice. The first concerns the application of the principle of proportionality as a constitutional principle. In this context, the test carried out by the Court consists of a "balancing" of the rights and the objectives of the law or, more recently, the verification of the "fair balance" between the rights protected and the rights called into question by the law. The second approach is applied in the context of cases which concern the principle equality before the law. In these cases, the constitutional judges ensure that the difference in treatment is based on objective disparities and is rationally justified, adequate, and proportionate to its purpose. However, in this second context, the Luxembourg Court does not always analyze exhaustively each step of the proportionality test. It may concentrate on certain aspects depending on the case, without necessarily distinguishing the three stages in an explicit manner.

23. The next question asked if the courts accept that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this.

For the Federal Constitutional Court of Germany, when there is need for a prognosis or when there is insufficient scientific certainty on relevant causal effects, it only examines whether the methodological steps taken by the legislator and the factual basis on which it relies are plausible. When this is the case, the interference with fundamental rights remains constitutional, even if it later becomes clear that the legislator's assessment was incorrect. A relevant example in this context are the school closures during the COVID-19 pandemic. Should it become clear that the legislator's assessment at the time was incorrect, the legislator is then obliged to adjust the statutory provisions for the future. The fact that Parliament as the legislative branch is tasked with making decisions under uncertain factual circumstances and based on prognoses necessarily entails that the legislator is also authorized to act when it is uncertain whether later developments will confirm that it acted correctly.

Likewise, in instances where the Constitutional Court of Slovenia proceeds directly to one of the later stages of the proportionality test, the question of whether the measure passed the preceding remains open, but it would be an exaggeration to claim that the Constitutional Court tacitly confirmed that the measure passed these stages.

24. One of the questions concerned the rise of the judicial deference doctrine. It sought to find out if it was concomitant with the inception of proportionality review. In Italy, both aspects have evolved significantly over the more than sixty years of the Court's existence. In its early years, the Court exhibited an attitude of marked deference towards Parliament's discretion, based on an implicit need to make a prudent and orderly entrance into institutional dynamics and also apparent from the adoption of decisions holding that questions entailing complex balancing exercises and multiple options available to the legislature were inadmissible, at most accompanied by solicitations or warnings to the legislature to intervene to remedy situations of dubious constitutionality. The tendency for inertia on the part of Parliament has certainly encouraged the gradual development of increasingly sophisticated types of decision-making apt to expand the review of constitutionality to the maximum at the expense of unsustainable 'no-go' areas free from review. Thus, as early as the 1970s, innovative decisions embodying 'manipulative' declarations of constitutionality came to be adopted. Premised on a distinction between provision and rule, those decisions remedied legislative omissions, relying on 'additive' judgments, including ones that added guiding principles rather than rules, or replaced rules found to be unconstitutional with others that could be derived from or were mandated by the Constitution and then set out in the operative part of the decision, relying on 'substitutive' judgments.

In Ireland, the inception of the proportionality review test has been concomitant with the rise of the judicial deference doctrine. The same at the Swiss Federal Tribunal, where the control of proportionality effectively coincided with self-restraint exercises.

25. For most of the courts, the jurisprudence of the ECtHR shaped their approaches to deference. In Germany, should the ECtHR apply a stricter standard of review to state interferences than the Federal Constitutional Court does vis-à-vis the legislator, this would likely induce the Federal Constitutional Court to examine its own case-law with a view to making adaptions. For the Federal Constitutional Court, the ECtHR's doctrine on the margin of appreciation is not entirely equivalent, in legal terms, to the discretion that the Federal Constitutional Court affords to national organs. This rests on different points of view. When deciding on the margin of appreciation, the ECtHR differentiates according to state practice in the respective member states of the Council of Europe. While states are the point of reference for the ECtHR in this context, in the case of the Federal Constitutional Court it is state organs. However, the substantive criteria that the ECtHR recognizes when affording a broad margin of appreciation may in specific cases also be transferrable to the granting of discretion to state organs by the Federal Constitutional Court.

In the opinion of the French Constitutional Council, the considerations relating to the margin of appreciation that the ECtHR recognizes State authorities when concluding that they fulfill obliga-

tions arising from the European Convention on Human Rights, even if some abstract conceptual similarities can be conceived *mutatis mutandis* with the power of appreciation and decision that the Constitution and the Constitutional Council recognized by the national legislator, it is only necessary to emphasize that these are considerations of different nature, some relating to international law and others to constitutional law, the separation of powers and the exercise of national sovereignty.

The margin of appreciation used by the ECtHR is equal to the margin of discretion recognized by the Constitutional Court of North Macedonia when reviewing the constitutionality and legality of acts by legislative and executive authority that restrict the freedoms and rights of the citizen, notably when it comes to the application of the proportionality test, which is a direct result of the case law of the European Court of Human Rights.

For the Constitutional Court of Serbia, the case-law of the ECtHR regarding the margin of appreciation that is available to the states on specific issues is essentially similar, if not even equivalent, to its approach when it comes to discretionary powers.

But for the Supreme Court of Ireland or for the Constitutional Court of the Czech Republic, The ECtHR's jurisprudence has not shaped the court's approach to deference or it did not have a significant impact on the Constitutional Court's position on restraint or deference.

We believe that the replies to the questions in the questionnaire present significant information for researchers interested by the topic of judicial deference. To deepen this subject, we urge the reading public to consult them also.

Communiqué final du XIXème Congrès de la Conférence des Cours Constitutionnelles Européennes

Final Declaration of the XIXth Congress of the Conference of European Constitutional Courts

Schlusserklärung des XIX. Kongresses der Konferenz Europäischer Verfassungsgerichte

Declarația finală a Congresului XIX al Conferinței Curților Constituționale Europene

Communiqué final

du XIXème Congrès de la Conférence des Cours Constitutionnelles Européennes

Chaque cour constitutionnelle européenne traite de questions à l'intersection du droit et de la politique. Il ne devrait y avoir aucune limitation à l'exercice de leurs fonctions en raison de la dimension politique d'un différend constitutionnel.

La fonction démocratique suprême des cours constitutionnelles est d'imposer aux législateurs et autres autorités les obligations découlant de la Constitution et de vérifier leur respect.

Le rôle des cours constitutionnelles pendant les états d'urgence est de garantir que les autorités agissent dans les limites de la Constitution et pondèrent soigneusement les préoccupations en matière de droits de l'homme. Malgré les défis, nos tribunaux doivent rester fidèles à cette tâche cruciale.

Dans un système intégré de protection des droits fondamentaux, nos tribunaux doivent également rester fidèles aux normes européennes et éviter les conflits avec les tribunaux supranationaux. Le dialogue entre eux est nécessaire pour la création d'un espace juridique commun de protection des droits fondamentaux.

Déclaration adoptée au Cercle des Présidents par 31 membres présents.

Final Declaration

of the XIXth Congress of the Conference of European

Constitutional Courts

Every European constitutional court deals with issues at the intersection of law and politics. There should be no limitation on the performance of their functions by reason of the political dimension of a constitutional dispute.

The supreme democratic function of the constitutional courts is to impose the obligations under the Constitution on the legislators and other authorities and to review compliance therewith.

The role of the constitutional courts during states of emergency is to ensure that authorities act within constitutional boundaries and carefully weigh human rights concerns. Despite the challenges, our courts must remain committed to this crucial task.

In an integrated system of fundamental rights protection, our courts must also remain committed to European standards and avoid conflicts with supranational courts. The dialogue between them is necessary for the creation of a common legal space of fundamental rights protection.

Adopted at the Circle of Presidents by 31 present Members.

Schlusserklärung

des XIX. Kongresses der Konferenz Europäischer Verfassungsgerichte

Jedes europäische Verfassungsgericht befasst sich mit Angelegenheiten an der Schnittstelle von Recht und Politik. Aufgrund der politischen Dimension eines verfassungsrechtlichen Streits sollte es zu keiner Einschränkung der Wahrnehmung ihrer Aufgaben kommen.

Die oberste demokratische Aufgabe der Verfassungsgerichte besteht darin, Gesetzgebern und anderen Behörden die sich aus der Verfassung ergebenden Verpflichtungen aufzuerlegen und deren Einhaltung zu überprüfen.

Die Rolle der Verfassungsgerichte im Ausnahmezustand besteht darin, sicherzustellen, dass die Behörden innerhalb der verfassungsmäßigen Grenzen handeln und Menschenrechtsbedenken sorgfältig abwägen. Trotz der Herausforderungen müssen unsere Gerichte dieser entscheidenden Aufgabe treu bleiben.

In einem integrierten System des Grundrechtsschutzes müssen unsere Gerichte zudem europäischen Standards treu bleiben und Konflikte mit supranationalen Gerichten vermeiden. Der Dialog zwischen ihnen ist notwendig für die Schaffung eines gemeinsamen Rechtsraums zum Schutz der Grundrechte.

Verabschiedet im Präsidentenkreis von 31 anwesenden Mitgliedern.

Declarația finală

a Congresului XIX al Conferinței Curților Constituționale Europene

Fiecare curte constituțională europeană se ocupă de chestiuni aflate la intersecția dreptului și a politicii. Nu ar trebui să existe nicio limitare a îndeplinirii funcţiilor lor din cauza dimensiunii politice a unui litigiu de drept constituțional.

Funcţia democratică supremă a curților constituționale este de a le impune legislatorilor și altor autorități obligațiile care decurg din Constituție și de a verifica respectarea lor.

Rolul curților constituționale în timpul stărilor de urgență este să se asigure că autoritățile acționează în limitele constituționale și ponderează cu atenție preocupările legate de drepturile omului. În ciuda provocărilor, curțile noastre trebuie să rămână fidele acestei sarcini cruciale.

Într-un sistem integrat de protecție a drepturilor fundamentale, curţile noastre trebuie, de asemenea, să rămână fidele față de standardele europene și să evite conflictele cu tribunalele supranaționale. Dialogul dintre ele este necesar pentru crearea unui spațiu juridic comun de protecție a drepturilor fundamentale.

Adoptată la Cercul Președinților de către 31 de membri prezenți.

CONTRIBUTIONS DES PARTICIPANTS

CONTRIBUTIONS OF PARTICIPANTS

BEITRÄGE DER MITWIRKENDEN

Allocutions d'ouverture

Opening speeches

Begrüßungswort:

Message of the President of the Constitutional Court of the Republic of Moldova, Domnica Manole, at the Solemn Opening of the XIXth Congress of the Conference of European Constitutional Courts

Your Excellencies, Ms Maia Sandu, President of the Republic of Moldova, Mr Igor Grosu, President of the Parliament of the Republic of Moldova,

Dear Presidents of the European Constitutional Courts,

Dear Ms Síofra O'Leary, President of the European Court of Human Rights,

Dear Ms Claire Bazy Malaurie, President of the Venice Commission,

Distinguished guests and participants at the XIXth Congress of the Conference of European Constitutional Courts,

Welcome to Chisinau, the capital of the Republic of Moldova. It's our first convention since 2017 that we are attending in person, not virtually. As you know, the Constitutional Court of the Republic of Moldova took over the presidency of the Conference from the Constitutional Court of the Czech Republic on 25 February 2021, in the midst of the pandemic. The pandemic ended, but participation in the circle of presidents was only possible only online, because the Republic of Moldova faced other challenges. In its immediate vicinity, the Russian Federation launched a war against Ukraine, in violation of all the fundamental principles of international law and human rights law, implicitly destabilizing the natural course of things in neighboring countries. The war was not only blessed by the Patriarch of the Russian Orthodox Church, but also by the Constitutional Court of the Russian Federation, which recognized the annexation of parts of the Ukrainian territory to the Russian Federation. After we proposed to vote on the termination or suspension of the Russian Court's membership of the Conference, it filed a request to withdraw from our organization.

In one of the most beloved passages in the history of justice, Lord Atkin said that when arms clash, the laws are not silent; they speak the same language both in time of war and in time of peace; and judges must stand between the people and any attempted usurpation of their liberty by the executive, to see whether coercive action is legally justified. It seems that not everyone shares this civilizing view.

Here we are, therefore, face to face, in a period strewn with unfortunate events, with the hope alive for a speedy peace.

The assumed role of the Conference of European Constitutional Courts is that of a forum for participants to present their views on institutional, structural and practical issues in the field of public law and constitutional justice. The Conference aims to strengthen the independence of the constitutional courts, to guarantee and implement democracy, the rule of law and human rights. What other authorities, if not the constitutional courts, are the most suitable to achieve these desired goals and to impose respect for the principle of separation and balance of powers in the state, for the benefit of the citizens? But because in the exercise of their powers the authorities sometimes have to limit themselves, we have proposed a questionnaire that addresses this issue. The theme of the questionnaire and therefore of this year's Congress is that of the forms and limits of judicial deference in the case of constitutional courts. In this context, we have organized three special discussion sections to reflect the proposed theme. The first concerns the interaction between constitutional courts and supranational courts. The European Court of Human Rights, for example, often sanctions member states because their courts, including constitutional courts, show too much deference to the decisions of other powers. The second section attacks the question of the political and the legal in the activity of the constitutional courts, and the third section aims at the safeguarding of constitutional principles during the state of emergency.

Let me highlight the professionalism of the survey respondents. Judges often criticize the writing of some legal academics, urging them to write in a manner useful to judges and practitioners. Many of

the responses we received to the questionnaire are examples of legal writing for some academics and would deserve to be published in separate monographs.

I also want to thank the representatives of the Venice Commission for preparing a special Bulletin on judicial deference.

It is a great honor for the Constitutional Court of the Republic of Moldova to hold the presidency of the largest organization of European constitutional courts and to organize this event. We are a small state, still consolidating its institutions, but with big aspirations. Our aspirations are directed towards the European Union. Recently, the Constitutional Court of the Republic of Moldova positively approved a project to amend the Constitution by referendum, which refers to the introduction of an article dedicated to the accession to the European Union. Moreover, we can affirm that the Constitutional Court of the Republic of Moldova paved the way for this state to the European Union. In several of its judgments and decisions, the Court referred to the case law of the Court of Justice of the European Union as a source of authority for the legal issues it adjudicated. It invoked the Association Agreement with the European Union many times, stating the need to respect it and harmonize the national regulatory framework with European Union law, and also referred to the European Union Directives, basing its legal analyzes on their considerations. We hope that the population of the country will also approve in the September referendum the introduction into the Constitution of the provisions related to the accession to the European Union, the space of freedom, security and justice and the only viable option for the Republic of Moldova, at present.

The practice of the Constitutional Court of the Republic of Moldova may easily be framed in the pattern of legal acculturation, which reflects the transplantation of ideas from one legal order to another. And this is the purpose of the Conference of European Constitutional Courts: to facilitate the exchange of ideas between us, to lead, if necessary, to changing of mentalities. Perhaps our ideas will also inspire political decision-makers at a time when we see how autocratic regimes want to expand their influence by militarily attacking neighboring states, where populist leaders continue to rise in public preference, or where crises of democracy are a serious cause for concern. We are the bridge between reason and everyday life, and we must be aware of this special role that we perform before the public.

Distinguished guests,

Having said that, I wish you a pleasant stay in Chisinau and urge you to come back to the Republic of Moldova, because you have a lot to see here.

Thank you for your attention!

Message of the President of the Republic of Moldova, Maia Sandu, at the Solemn Opening of the XIXth Congress of the Conference of European Constitutional Courts

Ladies and gentlemen,

Distinguished guests,

Dear friends of Moldova,

It is my pleasure to welcome you to Chisinau and to be part of the XIX Congress of the Conference of European Constitutional Courts.

We live in troubled times. Democracy is under threat in many places, experiencing erosion through disinformation, fake news, and societal polarization. There are more and more attempts to create fault lines and turn groups against each other.

Democracy is being challenged from within democratic countries by political forces and sometimes corrupt groups, as in the case of Moldova, with agendas that have nothing to do with democracy.

It is also being challenged by foreign actors seeking to exploit every vulnerability in our systems to advance authoritarian, imperialistic, and belligerent agendas.

Unfortunately, Moldova knows all too well about these attempts of destabilization, with domestic and foreign actors working in tandem to suppress the democratic voice of the people and hinder our European integration agenda.

Most importantly, here in Moldova, you are as close to the Ukrainian war as possible. This illegal war challenges our fundamental values and forces us to think more carefully about peace, prosperity, and democracy in Europe.

The situation looks bleak now, but this does not have to be the full story. We, as people who believe in democracy, should show the same determination in defending our values as the authoritarian forces show in undermining them.

We should not get bogged down by the systematic attempts to poison societies and cause the death of democracy by a thousand authoritarian cuts.

We must invest in democratic resilience and build the tools to allow our democracies to survive and thrive. We should work together to fight foreign malign influence and interference.

We should become more efficient in fighting corruption in all sectors, including in the justice system, which is often used by authoritarian regimes to undermine our states and democracies. We should become more efficient and quick in our responses to the actions meant to destroy our democratic processes and institutions.

This is what we are doing in Moldova, with our quest to join not only the single European market but also the common space of values that has democracy at its core – the European Union.

We aim to do this in the most democratic way, by giving people a voice in the referendum for European integration that we are organizing in October.

We must tell the people the bigger story—to bring together the discourse (and actions) about peace, prosperity, and democracy. There is not enough space in this room to store all the books that highlight how crucial democracy and the rule of law are for peace and prosperity.

Democratic countries do not fight with each other. Inclusive political institutions are essential for economic prosperity. Institutions free of corruption are strong institutions. In a world where facts are often caricatured or ignored, we should stick to the facts and build coalitions in support of our liberal democratic goals and commitments.

This is why I welcome such a robust and distinguished presence in Moldova. Constitutional judges know firsthand how important it is to preserve and defend democracy.

During these times, we need vocal advocates for democracy, and you play at least two important roles. First, you are a key component of any liberal democracy.

Our democratic systems are based not only on free and fair elections but also on the protection of people's rights and liberties. Your role to always uphold what is right is a barrier against the surge of populism.

Second, you are a source of inspiration and strength for all committed to democracy in Europe.

Democracy needs not only committed people but also strong alliances among these positive forces across the European space. It is an honor to also see here the President of the Venice Commission and the President of the European Court of Human Rights.

Your contribution to the diffusion of democratic norms in Europe is essential, and your work in consolidating the rule of law cannot be understated.

I wish you fruitful debates in Chisinau, in line with the responsibilities you have in ensuring that democratic principles continue to guide political action in Europe and beyond. We thank you for your work and, here in Moldova, we are happy to be part of the same community of democratic believers and democratic builders. Thank you.

Message of the President of the European Court of Human Rights, Síofra O'Leary, at the Solemn Opening of the XIXth Congress of the Conference of European Constitutional Courts

President Sandu,

President Manole,

Presidents of European Constitutional and Supreme Courts,

Judges,

Ladies and Gentlemen,

I'm honoured to represent the European Court of Human Rights at this the 19th Congress of European Constitutional Courts.

I'm also particularly pleased, Presidents Manole and Sandu, that the Congress is taking place in Moldova and that the Strasbourg Court is today represented not only by myself, but also by one of your compatriots, Judge Diana Sârcu, as well as Deputy Registrar Abel de Campos.

Many of us have had the pleasure of exchanging at judicial meetings of various types over the course of my Presidency – in Strasbourg, Luxembourg, The Hague and Vienna - to name but a few.

During those meetings, I have emphasised the key characteristics of the Convention system which dictate the nature and quality of the interaction between national constitutional and supreme courts and the Court in Strasbourg.

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Allow me today to reiterate those characteristics once more, this time via concrete illustrations provided by the three recent Grand Chamber rulings on climate change.[1]

Knowing that in some quarters those rulings may have created a little stir, my words seek to reiterate, clarify and, to the extent necessary, reassure.

Firstly, although the Convention system and the Strasbourg Court have undergone some major changes since the 1950s, the principle of subsidiarity is and always has been a *fil conducteur* or guiding principle.[2]

In *Duarte Agostinho and others v Portugal and 32 Others*, the subsidiary character of the Convention was central to the Court's rejection of the applicants' highly mediatised climate change case.[3] The non-exhaustion of available and effective domestic remedies was the key reason for the Court's decision to declare the applicants' complaints against Portugal inadmissible. As the Court explained:

> "[I]t [is] difficult to accept the applicants' vision of subsidiarity according to which the Court should rule on the issue of climate change *before* the opportunity has been given to the respondent States' courts to do so. This stands in sharp contrast to the principle of subsidiarity underpinning the Convention system as a whole, and, most specifically, the rule of

1 *Duarte Agostinho and others v Portugal and 32 Others* [GC], no 3937/1/20, 9 April 2024; *Carême v France* [GC] (dec.), no. 7189/21, 9 April 2024 and *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* [GC], no. 53600/20, 9 April 2024.

2 See *the Belgian Linguistics Case* (1968), *Handyside v UK* (1975) and Protocol No. 15.

3 *Duarte Agostinho and others v Portugal and 32 Others*, cited above, § 215. See also, in the climate change context, *Carême v France* [GC] (dec.), no. 7189/21, 9 April 2024, § 86. In the same vein, in relation to measures taken during the first phase of the Covid pandemic, see *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* [GC], no. 21881/20, §§ 138-146, 27 November 2023.

exhaustion of domestic remedies [...]."[4]

Furthermore, the failure to exhaust available domestic remedies rendered it impossible for the Court to assess whether the individual applicants had attained the high threshold which the Court established in the leading case – *Klima* – in relation to victim status in the climate change context.[5]

In a system based on shared responsibilities in which our international court plays an external and subsidiary role,[6] it is only logical that national courts should *always* be the courts of first instance when effective national remedies exist.[7]

Secondly, the Convention, like many if not most of your constitutions, is a living instrument.[8] It is an instrument which is interpreted and applied by Judges who must remain within the constraints of their judicial function, which seeks practical and effective protection of human rights and which proceeds incrementally and much more prudently than some of its critics would concede.

These three characteristics were also on display in the three climate change cases in which the Court carefully delineated the limits of the Convention's relevance, which is to apply only where the rights and freedoms guaranteed therein are seriously affected by the adverse effects of climate change.

Thirdly, the key takeaway from the three rulings is the centrality of access to independent and impartial courts; in other words, we pointed to the centrality of your judicial work.

In the leading case, *Klima*, the Court found a violation of Article 6 § 1 due to the fact that there had been no avenue under Swiss law via which the association's climate change complaints could have been brought before a court.

In contrast, in the *Carême* decision, where the applicant mayor's victim status was denied, leading to the inadmissibility of his case, the Court emphasised that protection of the interests of individuals in his French municipality in relation to climate change had been ensured through successful domestic litigation by the municipality itself in accordance with national law. In other words, all roads do not and should not lead to Strasbourg.

Our meeting in Moldova provides us with an additional opportunity to reflect on the importance of our respective work at a time of conflict and change.

As regards the former, the Republic of Moldova is, sadly, no stranger to conflict. Many cases relating to events in Transnistria, including Russian control over the region, have been brought before the Strasbourg Court and have marked the Court's jurisprudence, most notably in relation to issues of jurisdiction under Article 1.[9] Sadly, the ongoing Russian military presence in Transnistria continues to generate applications before the Court as well as many findings of violations.[10]

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4 *Duart*e, cited above, § 228.

5 Ibid., §§ 229-230.

6 See the Reykjavik Declaration adopted at the 4th Summit of Council of Europe Heads of State and Government, May 2023.

7 *Duarte Agostinho,* ibid, § 215. See also President S. O'Leary, Speech at the Opening of the Judicial Seminar 2024, "Revisiting subsidiarity in the age of shared responsibility", 26th January 2024, p. 3. See also, one of my predecessors, President J.-P. Costa, *Dialogue between Judges 2010*: ""The more [national judges] do, the less the [Strasbourg] Court will have to intervene, other than to act as a final rampart, as [the Convention's] founding fathers intended."

8 See further Bjorge, The Convention as a Living Instrument: Rooted in the Past, Looking to the Future, 36 *Human Rights Law Journal* (2017), 243-255.

9 See, for example, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII.

10 See, most recently, *Lypovchenko and Halabudenco v. the Republic of Moldova and Russia*, nos. 40926/16 and 73942/17, 20 February 2024.

The Court's case-law in relation to Moldova also highlights one of the major challenges of our times, widely discussed in this electoral year and in the run up to the European Parliament elections. I'm referring to electoral and democratic interference from States, parties or persons for whom the values underpinning the Convention constitute threats rather than ideals.[11]

In 2022, in a case called *NIT v. Moldova*, the Grand Chamber, for the first time, dealt with restrictions imposed on a broadcaster with the aim of enabling diversity in the expression of political opinion and enhancing the protection of the free-speech interests of others in the audio-visual media.[12] Those restrictions ultimately led to the broadcaster's licence being withdrawn.

When considering the obligation on broadcasters to observe the principle of political balance and pluralism, as enshrined in domestic law, the Court examined several factors with reference to Article 10 of the Convention, amongst which the domestic media context and the existence of safeguards to secure the independence of the national media regulatory authority.

As regards the former, it pointed out that, following the post-2001 election of the PCRM as the only governing party and the ensuing media situation - which had been criticised by the Court in 2009 in *Manole and Others v. Moldova*[13] - the national authorities had been under a strong positive obligation to put in place legislation ensuring the transmission of accurate and balanced news and information reflecting the full range of political opinions. The Court found no violation of Article 10 in the particular circumstances of that case.

It is a sign of the times in which we are living that this Grand Chamber judgment was quickly relied on by the General Court of the EU in a case called *RT France v. Council*, regarding the restrictive measures adopted by the EU Council in relation to audio-visual media following the invasion of Ukraine.[14] This is a further example, if one is needed, of both the Convention's reach and impact and of European judicial complementarity.

Conscious of my limited time, of the context (just touched upon) in which we are meeting and of the need to preserve the precious time allocated for your exchanges, allow me to conclude with some observations on the work of the Strasbourg court, published by two commentators immediately after the climate change rulings just referred to.

They wrote:

> "Rule of law backsliding puts at risk some of the basic rights enshrined in the Convention, from freedom of information and expression to judicial independence. The existential crises that now affect humanity (climate change and the rise of artificial intelligence) demand a response from a fundamental rights perspective. The challenges that the new digital economy brings about come hand in hand with the emergence of new tensions in which societal values demand complex compromises, mostly through the balancing of competing fundamental rights. In sum, the signs of the times are inevitably calling the European Court of Human Rights to play a key role in solving some of the complex challenges now faced by Europeans and the world more generally."[15]

I cite these words, I should stress, not to vaunt the work of the Strasbourg court but as a springboard to emphasise something omitted by the authors; namely your central role in the Convention system,

11 See, for example, https://www.consilium.europa.eu/en/press/press-releases/2024/04/24/foreign-interference-presidency-reinforces-exchange-of-information-ahead-of-the-june-2024-european-elections/ and https://www.europarl.europa.eu/RegData/etudes/ATAG/2024/759612/EPRS_ATA(2024)759612_EN.pdf.

12 *NIT S.R.L. v. the Republic of Moldova* [GC], no. 28470/12, 5 April 2022.

13 No. 13936/02, 17 September 2009.

14 Case T-125/22 *RT France v. Council*, 27 July 2022, EU:T:2022:483.

15 See Sarmiento, D. and Iglesias, S. "The Strasbourg Effect", EU Law Live, 14 May 2024, https://eulawlive.com/insight-the-strasbourt-effect-by-daniel-sarmiento-and-sara-iglesias-sanchez/.

as the primary interlocutors of the European Court of Human Rights, as the drivers of jurisprudential developments under the living instrument doctrine and as the interface between national and European law. This crucial point will be explored in the first panel which I will chair, with interventions from Presidents Grabenwarter, Harbarth and Nihoul and Vice-President Amoroso.

In addition, given the distinguished speaker from the Venice Commission who follows me on this panel, those words allow me to emphasise the importance we attribute in our judicial work to the work of the Venice Commission and other Council of Europe bodies.

We work in tandem with your national authorities and courts, but our judicial work also interacts with and is supported by the indefatigable work of the Council's various statutory and monitoring bodies, which work to tackle some of the most pressing issues of our time from gender-based violence (GREVIO), to corruption (GRECO), ill-treatment in places of detention (CPT), human trafficking (GRETA), racism (ECRI) and the protection of rule of law standards (the Venice Commission).[16]

In the *NIT* judgment just cited, for example, the work of the Venice Commission was front and centre, at a prior stage given the interaction with Moldovan authorities regarding the preparation of the national law which lay behind the contested sanctions, but it also featured in our ex-post proportionality assessment.

The location of this constitutional court exchange in Moldova also highlights another point of relevance.

Just a few weeks ago the EU celebrated the 20th anniversary of the accession of 10 Member States from Central and Eastern Europe. That anniversary event should remind us, in a candidate accession State like Moldova, of the necessary work which must be done on the road to accession and of the major bumps which may emerge post-accession in some new Member States if that work is not done well.

After 1992, the Council of Europe doubled its membership and between 1992 and 1997 the ECHR entered into force in all the Central and Eastern European States which later acceded to the EU.

This was no mere coincidence. With the prospect of the EU more than doubling its own membership, the "Copenhagen criteria", named after the European Council at which they were agreed, had set out the rules of future accession and subsequent membership of the EU. The criteria firmly anchored conditionality into the accession process.

New EU Member States, and indeed older ones, are required to ensure the stability of institutions guaranteeing democracy, the rule of law and human rights.[17] Membership of the Council of Europe and ratification of the ECHR are key in this regard. Why? Because in the words of one EU legal commentator:

> "it is the key task of the EC[t]HR, among other international institutions, to keep European legal orders in check".[18]

16 See the ECtHR's statement on the occasion of the 75th anniversary of the Council of Europe - https://www.echr.coe.int/w/75th-anniversary-of-the-council-of-europe.

17 See further C. Hillion, "The Copenhagen Criteria and their Progeny" in C. Hillion (ed.), *EU Enlargement: A Legal Approach*, Oxford, Hart Publishing, 2004 and D. Kochenov, "The ENP Conditionality: Pre-Accession Mistakes Repeated" in L. Delcour and E. Tulmets (eds.), *Pioneer Europe. Testing EU Foreign Policy in the Neighbourhood*, Baden Baden, Nomos, 2008. The economic Copenhagen criteria called for the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.

18 See D. Kochenov, "EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?" (2015) 21 *Yearbook of European Law* 1-23, 10. See also C. Closa, D. Kochenov and J.H.H. Weiler, "Reinforcing Rule of Law Oversight in the EU" RSCAS Working

If we have learned one thing since the 2004 accession, it is that the Copenhagen criteria are not of mere historical or pre-accession importance and interest. Mechanisms to protect democracy, fundamental rights and the rule of law remain and will remain as relevant as they are pre-EU accession. So too will the work of the specialised human rights court, and bodies such as the Venice Commission, designed to protect them.

In conclusion, the ECHR remains central to the stability of institutions guaranteeing the three pillars - democracy, the rule of law and respect for human rights – on which the Council of Europe and the European Union are based. The work of your courts within the Convention system remains key to the Strasbourg Court's ability to achieve the Convention's aims in this regard.

I thank our hosts and the organisers most warmly for this opportunity to participate in the Congress.

Message of the President of the Venice Commission, Claire Bazy Malaurie, at the Solemn Opening of the XIXth Congress of the Conference of European Constitutional Courts

Ladies and gentlemen, esteemed colleagues, and distinguished guests,

It is both an honour and a privilege to stand before you today as President of the Venice Commission. VC have long championed the pivotal role of constitutional courts everywhere. not only across Europe but globally.

As far as Europe is concerned, constitutional courts and some supreme courts created the European conference in the seventies. Things have changed a lot since that time in Europe, but the council of Europe is still our common home and the European Convention is still our common reference, with their three intertwining pillars, rule of law, human rights and democracy.

In defending Rule of law, VC stands up for the defence of the competences of CC. We champion the institution, sometimes even their members personally. In our opinions, we remind and explain on a case-to-case basis the principles and standards that govern the European world. We can even assist Courts through amicus curiae.

Our interest in constitutional justice has been reinforced in the previous years, when it appeared clearly that the role of the courts as guardians of the constitutional order was growing but has also become more at risk than ever. This parallelism is probably not fortuitous!

Your 19th congress will provide perfect examples of the challenges they have to take up.

They relate directly to the day-to-day professional exercise of the courts, their capacity of respecting constitutional principles and standards when deciding on the constitutionality of the law.

As regards the **Interplay of Constitutional and Supranational Courts**, courts are not mere interpreters of static texts but active guarantors of constitutional supremacy. This requires not only adherence to national legal frameworks but also a profound engagement with international jurisprudence. The synergy between national constitutional courts themselves and supranational bodies first and foremost the European Court of Human Rights and the Court of Justice of the European Union is vital. The Venice Commission has consistently emphasized the importance of this dialogue, fostering what we refer to as "cross-fertilization" of judicial practices and principles. Because this dialogue is not only about resolving occasional conflicts but also about sharing insights that enrich our collective legal wisdom. The Venice commission is itself built on that model.

Political and legal aspects within the Jurisdiction of Constitutional Courts are probably the most popular source of dispute about constitutional justice. Yes, constitutional justice requires a delicate balance between respect for the constitution and respect for political processes. Rule of law demands that Parliaments in making the laws respect the supremacy of the constitution, and Courts

Paper 2014/25 on the question whether mechanisms to deal with individual human rights violations are the best way to address rule of law deficiencies.

ensure that state actions, including legislation, are consistent with constitutional order. I am speaking of constitutional order, including principles that are not necessarily included in the written constitutional text, here not to refer to the current American quarrel over originalism, but to preserve the function of CC to interpret texts in accordance with all the legal commitments of the State.

Politicians, as well as all those who detain some power, could be tempted to abuse it. Rule of law includes this risk of abuse of powers in the protection of the separation of powers. In the political sphere this refers among other things, to the possible infringement of the basic democratic principles of inclusive deliberation and respect for diversity of opinions.

The risk of overreach is heightened during the **states of emergency**. The Commission has stressed this on many occasions. I'll insist on electoral matters, which have too often been the ground for urgency measures, with or without a declared state of emergency, thus too often preventing from a sincere and robust participation in public life.

Of course, this risk is further enhanced when the ruling coalition can rely on a large majority and is able to appoint in practically all state institutions officials favourably disposed towards its political views, even in the judiciary and … in the constitutional courts.

I will not recall VC's mantra about the independence of the judiciary, the independence of judges, of the members of the CC. As you know, many of our opinions and the current debate all around Europe, are devoted to this subject.

You have chosen as a talking point for your congress "**Judicial deference".** I must note, that he word "deference", in French at least, could have a negative connotation.

This is not a very familiar concept in many of our European states. It appears in the context of discussions between judicial and other governmental bodies. It refers to the respect that a court affords to decisions or interpretations made by other branches of government or administrative authorities, mostly in the field of administrative law.

Crisis measures, technical and complex public policy measures are areas where deference is not only useful but necessary. Anyhow, such deference should never undermine constitutional guarantees or open avenues for potential abuses of power.

What is interesting is that Canadians (who usually refer to this concept), have developed standards of review based on this principle, and they notably preserve constitutional questions. Standards of review, qualified as reasonable or correct, apply to a variety of questions. But constitutional and fundamental law, determination of competence requires a standard "correct", that means that degree of deference is low.

In any event, we must emphasize that "judicial deference" should never lead to a diminution of constitutional guarantees or open the door to possible abuses of power. On the one hand, opportunity of a measure, assessment of a situation (ref for instance to the margin of appreciation familiar to the ECHR), are within the field of responsibility of the executive and of the legislator. On the other hand, constitutional courts must have full capacity of review, generally formalized in standards of review. We are all familiar here with the triple test: necessity, adequacy, proportionality. Academic literature is abundant, yet practice is not always easy.

Everyone has its own role. That is why, for example, the Venice Commission often requires that laws be precise in order to define the rights and obligations of the state and of each individual, but also, as we have done recently on a particularly sensible case in Spain, that the law must leave it to the judiciary to classify individual situations.

What is at stake in this complex balance of power is not only respect for the rule of law, especially for the separation of powers, but also citizens' trust in constitutional justice.

In such circumstances, today's meeting appears as a crucial forum for enhancing collective efforts to maintain the integrity of our democratic institutions and legal systems.

Séance plénière I.

«Interaction entre les cours constitutionnelles et les cours supranationales»

Plenary Session I.

“Interaction between constitutional courts and supranational courts”

Plenarsitzung I.

„Interaktion zwischen Verfassungsgerichten und supranationalen Gerichten“

Christoph GRABENWARTER

President of the Constitutional Court of the Republic of Austria

1. Der Verfassungsgerichtsverbund im europäischen Rechtsraum

Der Europäische Rechtsraum umfasst alle Staaten, die den rechtsstaatlichen Zielen des Statuts des Europarates, der EMRK und der Konferenz der Europäischen Verfassungsgerichte verpflichtet sind. Einen wesentlichen Beitrag zur Rechtsstaatlichkeit in diesem Rechtsraum leisten die Verfassungsgerichte, die in einem Verfassungsgerichtsverbund zusammenwirken. Der Kongress der Konferenz der Verfassungsgerichte in Chișinău bildet eine wesentliche Aktivität in diesem Rechtsraum.

Mit dem vom ehemaligen Präsidenten des deutschen Bundesverfassungsgerichts, Andreas Voßkuhle, geprägten Begriff des "Europäischen Verfassungsgerichtsverbunds" sollten die vielen verschiedenen Arten der nicht hierarchischen Interaktion zwischen den Verfassungsgerichten und dem EuGH und dem EGMR terminologisch erfasst werden. Der Begriff des Verbundes legt nahe, dass es um ein Kooperationsverhältnis geht, ein verstärktes Zusammenwirken in Europa.

Die (nationalen) Verfassungsgerichte stehen an der Schnittstelle zwischen europäischem und nationalem Recht und ihnen kommen – wie bereits im Generalbericht der Wiener Konferenz der Verfassungsgerichte im Jahr 2014 erwähnt wurde – vor allem fünf Funktionen zu:

a) Sie sind zum ersten das Bindeglied zwischen nationalem und europäischem Recht, somit kommt ihnen eine **Verbindungsfunktion** zu, indem sie auf die Berücksichtigung der europäischen und internationalen Vorgaben achten.

b) Die Übersetzungsfunktion der Verfassungsgerichte besteht darin, zur Verbreitung der europäischen Rechtskultur in staatlichen Rechtsordnungen beizutragen. Europäische Entscheidungen sind zu rezipieren und in den innerstaatlichen Kontext zu übertragen (vgl. die Integrationsartikel in den einzelnen Verfassungen, etwa Art 23 GG).

c) Nicht nur die Verbreitung, sondern auch die steigende Bedeutung europäischer Entscheidungen im innerstaatlichen Bereich ist wesentlich. Diese **Legitimationsfunktion** von Verfassungsgerichten kommt darin zum Ausdruck, dass durch die zustimmende Zitierung europäische Entscheidungen oft erst bekannt werden.

d) Auch hatten Verfassungsgerichte schon in der Vergangenheit eine **Ergänzungsfunktion** im Bereich des Grund- und Menschenrechtsschutzes aus europäischer Sicht. Der Grundrechtsschutz rein auf europäischer Ebene wäre lückenhaft ohne die Rechtsprechung der nationalen Höchstgerichte.

e) Als fünfte Funktion ist letztlich die **Kontrollfunktion** der Verfassungsgerichte zu erwähnen, mit der sie genuin verfassungsrechtliche Standards, etwa die Einhaltung der Zuständigkeiten staatlicher Organe aller Ebenen und Gewalten und ihrer Grenzen überwachen; auch die Prüfung der Vereinbarkeit des Rechts der Union mit bestimmten Verfassungsprinzipien kann in diese Kontrollkompetenz fallen.

2. Die Verfassungsgerichte und der EGMR

Um das Verhältnis zwischen den Verfassungsgerichten und dem EGMR näher zu beschreiben, verweise ich auf einen wichtigen Vortrag der Präsidentin des EGMR zum Verfassungstag in Wien 2023. Siofra O' Leary betont, dass eine grundlegende Voraussetzung für ein funktionierendes Konventionssystem basierend auf einem "Verfassungspluralismus" ist, dass die Verfassungsgerichte als zuverlässige Hüter der dem System zugrunde liegenden Werte agieren. Sie beschreibt die Verfassungsaufgabe des EGMR dahingehend, dass dieser die relevanten Menschenrechtsstandards in Verbindung mit den nationalen Verfassungsgerichten und auch mit den EU-Gerichten erläutert, absichert und

weiterentwickelt.

Die Rolle des EGMR ist ihr zufolge eine die nationalen Gerichte ergänzende und seine Rechtsprechung soll auf die Feststellung beschränkt bleiben, ob die Verpflichtungen der Konvention verletzt wurden: Er kann nationale Gesetze nicht aufheben und soll eine solche Befugnis auch nicht erhalten.

Der Umstand, dass in Österreich die EMRK im Verfassungsrang steht und damit für den Verfassungsgerichtshof gleichermaßen wie nationales Verfassungsrecht als Prüfungsmaßstab anzuwenden ist, erklärt, weshalb die Verfassungsgerichte sehr genau die Rechtsprechung des EGMR und seine Auslegung der MRK verfolgen.

3. Die Verfassungsgerichte und der EuGH

Die Bestimmung des Art. 19 EUV legt fest, dass der EuGH die Wahrung des Rechts bei der Auslegung und Anwendung der Verträge sichert. Diese Verantwortung trägt der EuGH jedoch nicht allein, die Gewährung von Rechtsschutz in den vom Unionsrecht erfassten Bereichen müssen die Gerichte, und zwar auch die Verfassungsgerichte, der Mitgliedstaaten gemeinsam sicherstellen.

Der österreichische Verfassungsgerichtshof hat eine besonders deutliche Form der Verstärkung des Grundrechtsschutzes vorgenommen, in dem er im Jahr 2012 die Rechte der Charta den verfassungsgesetzlichen Grundrechten gleichsetzte und in seinen Prüfungsmaßstab integrierte. Andere Verfassungsgerichte sind einen ähnlichen Weg gegangen.

Ein ganz besonders wesentliches Element der Interaktion, des Verhältnisses der nationalen Gerichte mit dem EuGH ist das Vorabentscheidungsverfahren nach Art. 267 AEUV. Auch Verfassungsgerichte leisten hier einen wertvollen Beitrag, sei es, dass sie selbst Fragen direkt dem EuGH vorlegen, oder dass sie vorlageverpflichtete letztinstanzliche Gerichte zur Vorlage anhalten, und damit den EuGH in seiner Stellung als Gericht stärken, das zur letztverbindlichen Auslegung des Unionsrechts verpflichtet ist.

In dem Zusammenhang ist daran zu erinnern, dass die Kooperation der Verfassungsgerichte mit dem EuGH auch erfordert, dass der EuGH die Verfassungsgerichte stärker als Kooperationspartner ansehen sollte, als er dies in die Vergangenheit getan hat.

So erfordert die Frage der Ermittlung des Inhalts von Verfassungsidentität (Art 2 EUV), dass der EuGH eine Interpretation vornimmt, die er nur mithilfe eines Dialoges erreichen kann. Die nationale Identität ist eine Frage nationalen Rechts, also ist es nicht nur denkbar, sondern auch angemessen, dass der EuGH den Dialog auch in die "andere Richtung" führt und etwa mit der Beantwortung von Fragen durch ein Verfassungsgericht eine Auslegung der nationalen Verfassung vornimmt. Ein solches umgekehrtes Verfahren würde auch die spezifische Struktur der EU als Verbund souveräner Staaten betonen und eine höhere Akzeptanz und Vertrauen in europäische Strukturen und Institutionen bewirken.

4. Das Verhältnis zwischen dem EGMR und dem EuGH

Im Verhältnis der beiden europäischen Gerichtshöfe zueinander gab es in den letzten Jahren bemerkenswerte Entwicklungen. EuGH und EGMR haben im Ergebnis nun einen höheren Grundrechtsschutz bewirkt, wenn man etwa das Beispiel des Asylwesens im Dublin-System betrachtet.

Nicht unerwähnt darf aber werden, dass fünfzehn Jahre nach Inkrafttreten des Vertrags von Lissabon ein wesentliches Versprechen der Europäischen Union offen ist. Art 6 EUV verpflichtet die Union zum Beitritt zur EMRK. Der EuGH hat den Beitrittsprozess mit dem Gutachten 2/13 mit einer von der positiven Stellungnahme von Generalanwältin Kokott abweichenden Begründung für Jahre zum Erliegen gebracht. Die im Vorjahr erzielte Einigung über einen neuen Abkommensentwurf muss bekanntlich nur noch um eine Einigung in der Frage der Zuständigkeit der Unionsgerichte im Bereich der GASP ergänzt werden. Nachdem es hier offenbar noch keine Kommunikation über eine unionsinterne Lösung des Problems gegeben hat, hat Generalanwältin Ćapeta in ihren Schlussanträgen vom 23. November 2023 im Verfahren C-29/22 ua. einen Weg aufgezeigt, wie der EuGH die Art. 24 EUV und 275 AEUV auslegen könnte, dass sie Schadenersatzklagen wegen Grundrechtsverletzungen

durch GASP-Maßnahmen nicht ausschließen, und dadurch den Beitritt befördern könnte. Es bleibt abzuwarten, ob der EuGH diesen Weg geht und bereit ist, damit der Verpflichtung des Art 6 EUV im Rahmen seiner Zuständigkeit Rechnung zu tragen.

5. Schluss

Der europäische Rechtsstaat und die ihn tragende Zusammenarbeit der Verfassungsgerichte stehen vor großen inneren und äußeren Herausforderungen. Die Europäische Konferenz der Verfassungsgerichte hat in der Vergangenheit gezeigt, dass sie bereit ist, sich den Herausforderungen für den Rechtsstaat zu stellen. Die europäischen Verfassungsgerichte werden in den nächsten Jahren die Gelegenheit und die Notwendigkeit haben – gestärkt durch die Zusammenarbeit untereinander aber auch mit den Europäischen Gerichtshöfen – diesen Herausforderungen durch eine unabhängige Rechtssprechungspraxis zu begegnen, im Dienste von Demokratie, Freiheit und Frieden in Europa.

Stephan HARBARTH

President of the Federal Constitutional Court of Germany

President O'Leary,

dear colleagues,

ladies and gentlemen!

Tomorrow, the German Basic Law will celebrate its 75th birthday. For Germans, the 75th anniversary of the Basic Law's promulgation on 23 May 1949 is an occasion for joy and gratitude.

The Federal Republic of Germany under the Basic Law does not shut itself away in self-sufficient isolation, but instead positions itself as an active member of the international community; in particular, it is permitted to transfer sovereign powers to supranational organisations. The Federal Constitutional Court has been involved in Germany's integration into the European Union from the very beginning, addressing the relevant issues of constitutional law and ensuring that the integration rested on secure constitutional foundations. It has been particularly focused on ensuring that the protection of fundamental rights – a central aspect of our Constitution from 1949 – is guaranteed even after the transfer of sovereign powers to the complex European multi-level system. I would like to briefly outline the case-law of the Federal Constitutional Court in this regard, but given our time limitations, I will keep it to the basic guidelines and leave the rest to our subsequent discussion.

As we know, fundamental rights in Europe are protected on various levels: even since the earliest stages of European integration, the national fundamental rights set down in the constitutions of the Member States have been supplemented by the human rights and fundamental freedoms enshrined in the European Convention on Human Rights at the level of the Council of Europe. While in other contracting states, the Convention has the same status as constitutional law, in Germany it 'merely' has the status of ordinary law. However: According to the Basic Law's principle of openness to international law, the European Convention on Human Rights serves as a guideline when determining the contents and scope of the national fundamental rights. Additional fundamental rights have been gradually added at the supranational level of today's European Union, initially as general principles of law developed by the Court of Justice of the European Union and, since 2009, in the form of the written catalogue that is the Charter of Fundamental Rights of the European Union. Unlike the European Convention on Human Rights, EU law generally takes precedence of application over national law.

The Federal Constitutional Court was the first constitutional court to recognise the precedence of application of EU law over domestic constitutional law.[19] However, this precedence of application is not unconditional. The Federal Republic of Germany may only participate in the European Union and give effect to acts of EU law in Germany within the constitutional limits set by the Basic Law. This is set out in Article 23 paragraph (1) of the Basic Law, which provides: 'With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79'. It is the responsibility of the Federal Constitutional Court to determine whether there has been compliance with these limits set by the Basic Law.

19 BVerfG, Order of the Second Senate of 9 June 1971 - 2 BvR 225/69 -, BVerfGE 31, 145 <174>.

One instrument on which the Federal Constitutional Court relies in this context is the so-called identity review. The Basic Law enshrines core guarantees of the constitutional order that are even beyond the reach of the Constitution-amending legislator. These principles forming the identity of the German Constitution include the guarantee of human dignity, Germany's federal structure and the principles of the rule of law, democracy and the principle of the social state. Since the Basic Law bars the legislator from making amendments to the Constitution that would affect Germany's constitutional identity, it likewise bars the legislator from conferring upon the EU powers that would impair these core principles.[20]

The second instrument used by the Federal Constitutional Court in exercising its jurisdiction in the context of European integration is the *ultra vires* review. EU law only takes precedence over national law within the scope of the Treaties, that is, the scope agreed to by the democratically elected domestic Parliament. In consequence, a legal act of the EU that falls outside this scope – in other words an '*ultra vires* act' – is not valid law in Germany. The *ultra vires* review conducted by the Federal Constitutional Court constitutes a special type of identity review relating to the principle of democracy.[21]

Lastly, the Federal Constitutional Court recognises the so-called *Solange*, or 'as long as', reservation when exercising its jurisdiction in relation to actions of the EU. As early as 1986, the Federal Constitutional Court held that it would not exercise legal review on acts of the European Communities – or today, of the European Union – as long as the European Union and in particular the Court of Justice of the European Union guarantee effective fundamental rights protection – meaning a level of protection that is essentially comparable to the protection which the Basic Law regards as inalienable.[22] The Federal Constitutional Court's determination of whether the level of protection is equivalent depends on the specific fundamental right in question and is based on a general assessment of the level of protection in place at the EU level.[23]

With two decisions rendered in 2019 – *Right to be forgotten I*[24] and *Right to be forgotten II*[25] – and the subsequent *European Arrest Warrant III*[26] and *Ecotoxicity*[27] decisions, the Federal Constitutional Court further developed and clarified its judicial review in cases concerning EU law. The two *Right to be*

20 BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 i.a. -, BVerfGE 123, 267 <354>; Order of the Second Senate of 15 December 2015 - 2 BvR 2735/14 -, BVerfGE 140, 317 <336 et seq. paras. 40 - 50>; Order of the First Senate of 6 November 2019 - 1 BvR 276/17 -, BVerfGE 152, 216 <236 para. 49>.

21 BVerfG, Judgment of the Second Senate of 12 October 1993 - 2 BvR 2134, 2 BvR 2159/92 -, BVerfGE 89, 155 <188>; Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 i.a. -, BVerfGE 123, 267 <353>; Order of the Second Senate of 6 July 2010 - 2 BvR 2661/06 -, BVerfGE 126, 286 <302 et seq.>; Order of the First Senate of 6 November 2019 - 1 BvR 276/17 -, BVerfGE 152, 216 <236 para. 49>; Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 -, BVerfGE 154, 17 <90 et seq. paras. 110-115>.

22 BVerfG, Order of the Second Senate of 22 October 1986 - 2 BvR 197/83 -, BVerfGE 73, 339 <387>; Order of the First Senate of 6 November 2019 - 1 BvR 276/17 -, BVerfGE 152, 216 <235 and 236 para. 47>.

23 BVerfG, Order of the First Senate of 6 November 2019 - 1 BvR 276/17 -, BVerfGE 152, 216 <235 and 236 para. 47>.

24 BVerfG, Order of the First Senate of 6 November 2019 - 1 BvR 16/13 -, BVerfGE 152, 152.

25 BVerfG, Order of the First Senate of 6 November 2019 - 1 BvR 276/17 -, BVerfGE 152, 216.

26 BVerfG, Order of the Second Senate of 1 December 2020 - 2 BvR 1845/18 -, BVerfGE 156, 182.

27 BVerfG, Order of the Second Senate of 27 April 2021 - 2 BvR 206/14 -, BVerfGE 158, 1.

forgotten decisions do not involve the validity of EU law, but rather, its applicability. The standard of review depends upon the degree of harmonisation provided for in the relevant area of law. There are constellations in which EU law requires complete harmonisation of domestic law and constellations in which this is not the case. In the latter, Member States are granted a certain amount of discretion in shaping domestic legislation that is otherwise determined by EU law.

The first decision, *Right to be forgotten I*, the Federal Constitutional Court held that when EU law grants Member States discretion in shaping legislation, then the standard of review regarding acts of domestic authorities applying that legislation is to be derived from national fundamental rights. In areas where EU law itself seeks to accommodate diversity among the Member States, it must be assumed that this also extends to the diversity of fundamental rights standards in different member state jurisdictions. It is further presumed – a presumption that can be rebutted – that applying the fundamental rights of the Basic Law as the standard of review will simultaneously ensure the level of protection required by EU fundamental rights. This presumption arises from overarching links between the Basic Law and the Charter shaped by a common European tradition of fundamental rights. Like the general principles of law, which are equivalent to fundamental rights and were initially developed through the case-law of the Court of Justice of the European Union, the Charter, too, relies on the different constitutional traditions of the Member States. It combines these, expands on them and channels them into an EU law standard. The different fundamental rights regimes of the Member States have a common foundation in the European Convention on Human Rights, which the EU Treaties as well as the Charter of Fundamental Rights also draw upon, even though the European Union has not yet acceded to the Convention.[28]

On the other hand, the *Right to be forgotten II* decision concerned an area of domestic legislation that is fully harmonised under EU law. The Federal Constitutional Court held that, in these cases, the actions of domestic authorities in the context of a constitutional complaint are to be reviewed by the Federal Constitutional Court directly based on the standard of EU fundamental rights. This serves to close a gap in legal protection that would otherwise exist under EU law: In areas where domestic law is fully determined and harmonised by EU law, the fundamental rights of the Basic Law are generally not applicable. However, individuals cannot normally bring a challenge concerning a violation of their *EU* fundamental rights by *domestic* authorities before the Court of Justice of EU. By exercising its jurisdiction to review the conduct of domestic authorities on the basis of EU fundamental rights, the Federal Constitutional Court strengthens European fundamental rights standards and gives practical effect to EU fundamental rights.[29]

In closing, I would like to add the following remark: Despite all the challenges we currently face, I am confident that the Basic Law's commitment to Germany's integration within the international legal order is an important precondition for a successful future of our country and our constitutional order. Furthermore, the case-law of the Federal Constitutional Court demonstrates that this integration need not be detrimental either to the identity of the national Constitution or to the protection of the fundamental rights of the individual.

28 BVerfG, Order of the First Senate of 6 November 2019 - 1 BvR 16/13 -, BVerfGE 152, 152 <170 et seq. paras. 45 - 62>.

29 BVerfG, Order of the First Senate of 6 November 2019 - 1 BvR 276/17 -, BVerfGE 152, 216 <236 et seq. paras. 50 - 76>.

Pierre NIHOUL

Président de la Cour constitutionnelle de Belgique

LA RELATION ENTRE LA CONSTITUTION BELGE ET LE DROIT INTERNATIONAL ET EUROPEEN

I) La Constitution belge ne contient pas une disposition générale et expresse relative à la relation entre la Constitution et le droit international ou le droit européen.

Il y a une exception à cette règle, à savoir l'article 34 de la Constitution, qui dispose :

"L'exercice de pouvoirs déterminés peut être attribué par un traité ou par une loi à des institutions de droit international public".

Cette disposition a été insérée dans la Constitution en 1970 afin de justifier la participation de la Belgique et le transfert de compétences aux Communautés européennes et à la Convention européenne des droits de l'homme.

La relation entre l'ordre juridique belge et l'ordre juridique international s'est donc construite essentiellement de manière prétorienne.

II) En ce qui concerne la relation entre le droit international et la loi, la Cour de cassation a comblé cette lacune.

Dans un arrêt du 27 mai 1971 (Franco-Suisse Le Ski), la Cour de cassation a reconnu la primauté d'une norme de droit international qui a des effets directs dans l'ordre juridique interne sur la loi. D'après la Cour de cassation, "la prééminence de la norme de droit international résulte de la nature même du droit international conventionnel". Il s'agissait d'un point de vue moniste dans le prolongement de la jurisprudence de la Cour de justice.

La conséquence de cette jurisprudence est un contrôle diffus du contrôle de conventionnalité : chaque juge ordinaire ou administratif a le devoir d'écarter l'application des dispositions législatives contraires à une norme de droit international qui a des effets directs dans l'ordre juridique interne.

III) Par contre, pour le contrôle de constitutionnalité des normes législatives, le Constituant a choisi en 1980 en faveur d'un contrôle centralisé par la Cour constitutionnelle .

Cette Cour, instituée en dehors du pouvoir judiciaire, est exclusivement compétente pour juger la constitutionnalité des normes législatives, statuant soit sur un recours en annulation introduit par les parties institutionnelles (Parlement ou gouvernement) ou par toute personne justifiant d'un intérêt, soit sur une question préjudicielle à poser obligatoirement par chaque juge ordinaire ou administratif.

IV) La Cour constitutionnelle est donc investie du pouvoir exclusif du contrôle de constitutionnalité des lois. Par contre, elle n'est pas habilitée à exercer un contrôle direct de la législation au regard du droit international et européen. Le contrôle de conventionnalité des lois lui échappe donc en principe au profit du juge ordinaire et administratif.

Comment coordonner ces deux contrôles ?

La Cour constitutionnelle a développé deux techniques afin de contrôler la législation au regard des normes internationales et européennes. Ce contrôle est qualifié d'« inclusif ».

A) La première technique repose sur les articles 10 et 11 de la Constitution qui interdisent toute discrimination, quelle qu'en soit l'origine.

A partir de 1989/1990, la Cour a jugé que le principe constitutionnel d'égalité et de non-discrimination est applicable à l'égard de tous les droits et de toutes les libertés, c'est-à-dire non seulement ceux inscrits dans la Constitution, mais aussi ceux resultant des conventions internationales liant la Belgique et des principes généraux du droit.

Le raisonnement à l'origine de cette doctrine est qu'il y a violation des articles 10 et 11 de la Constitution, et donc discrimination, lorsqu'un droit ou une liberté est retirée à une catégorie de personnes, alors que ce droit ou cette liberté reste valable pour toutes les autres personnes.

B) La seconde technique est développée par la Cour après l'extension de ses compétences en 2003, à savoir un contrôle des normes législatives au regard du Titre II de la Constitution relatif à (presque) tous les droits et libertés fondamentaux.

Dans un arrêt de principe (n°136/2004, du 22 juillet 2004), la Cour a constaté que de nombreux droits fondamentaux garantis par le Titre II de la Constitution ont un équivalent dans un traité international liant la Belgique. Dans ce cas, les garanties constitutionnelles et les garanties conventionnelles constituent un ensemble indissociable. Il s'ensuit que, lorsqu'est alleguée la violation d'une disposition du Titre II de la Constitution, la Cour tient compte, dans son examen, des dispositions de droit international ou européen qui garantissent des droits ou libertés analogues.

V) Ces deux techniques « inclusives » présentent plusieurs avantages :

1. Elles ont permis à la Cour constitutionnelle de tenir compte de la jurisprudence de la Cour européenne des droits de l'homme et de la Cour de justice dont les arrêts sont abondamment mentionnés et /ou cités.

Les chiffres de la jurisprudence des cinq dernières années l'illustrent. Entre 2018 et 2022, la Cour a rendu 922 arrêts. Dans 318 arrêts, la Cour a inclus des dispositions de la CEDH et de ses protocoles dans son examen, soit près de 35 % des cas. La Charte de l'Union européenne a été mentionnée dans 98 arrêts, soit dans près de 11 % des cas. La jurisprudence de la Cour européenne des droits de l'homme a été évoquée dans 248 arrêts (27 % des affaires), tandis que la jurisprudence de la CJUE était présente dans 123 arrêts (plus de 13 %).

2. De cette manière, la Cour constitutionnelle a pu donner aux garanties constitutionnelles dont la plupart ne sont pas modifiées depuis 1831, une interpretation évolutive et contemporaine.

3. La certitude que le principe de la primauté de la protection la plus étendue soit respecté, que cette protection figure dans la Constitution ou dans les normes de droit international ou européen.

4. La prévention de conflits entre la jurisprudence constitutionnelle et la jurisprudence supranationale.

VI) Le contentieux de la protection des droits fondamentaux représente plus de 90% des dossiers pendants devant la Cour.

VII) Les deux contrôles mentionnés, à savoir, d'une part, le contrôle centralisé de constitutionnalité des normes législatives par la Cour constitutionnelle et, d'autre part, le contrôle diffus de conventionnalité des normes législatives par chaque juge ordinaire et administratif, a donné lieu à la problématique du " concours des droits fondamentaux" : que doit faire un juge, devant lequel une partie soulève qu'une disposition législative viole un droit fondamental garanti tant par la Constitution que par une disposition conventionnelle analogue ? Doit-il poser une question préjudicielle à la Cour constitutionnelle, en application de la jurisprudence de celle-ci, ou peut-il lui-même contrôler la compatibilité de la norme législative avec la disposition conventionnelle, en application de la jurisprudence de la Cour de cassation?

Le législateur spécial a résolu la question en 2009 en accordant une priorité de contrôle à la Cour constitutionnelle : hormis quelques exceptions (de l'acte clair ou de l'acte éclairé), le juge ordinaire ou administratif est tenu de poser une question préjudicielle à la Cour constitutionnelle sur la constitutionnalité de la norme législative, et après une réponse négative à cette question, le juge est compétent pour contrôler la compatibilité de la norme législative avec la disposition conventionnelle.

VIII) Qu'en est-il de ce qu'il est convenu d'appeler « l'exception de l'identité nationale » ?

La Cour constitutionnelle belge a fait référence à la notion d'identité dans les arrêts n°62/2016 et

n° 127/2021, en considérant que la disposition constitutionnelle qui autorise le transfert de pouvoirs déterminés à des institutions de droit international public et, notamment, aux institutions de l'Union européenne, « n'autorise en aucun cas qu'il soit porté une atteinte discriminatoire à l'identité nationale inhérente aux structures fondamentales, politiques et constitutionnelles ou aux valeurs fondamentales de la protection que la Constitution confère aux sujets de droit ». Cette incise n'a cependant pas été suivie d'effet concret. Et rien ne permet d'affirmer à l'heure actuelle que la Cour s'engagera dans cette voie.

Par ailleurs, en reprenant mot pour mot la formule prévue par l'article 4 du TFUE, la Cour constitutionnelle belge inscrit cette exception dans le cadre du droit de l'Union européenne. Elle permet également à la Cour de poser dans ce cadre une question préjudicielle à la Cour de justice, ce qui ouvre un dialogue entre juges. Il s'agirait dans ce cas de poser une question préjudicielle en validité de la norme de droit européen au regard de l'article concerné du TFUE.

IX) Cette dernière attitude suivrait la tendance de la Cour constitutionnelle belge à poser régulièrement des questions préjudicielles à la Cour de justice.

Au 20 juin 2024, la Cour constitutionnelle a posé 162 questions préjudicielles dans 42 arrêts de renvoi rendus pour la plupart les quinze dernières années.

Les questions de validité sont principalement soumises à la CJUE lorsque la législation de transposition est contestée devant la Cour constitutionnelle et qu'il est soutenu que la législation secondaire de l'UE qui est transposée viole de la même manière que la législation de transposition certains droits fondamentaux. Jusqu'à présent, la Cour a soumis 25 questions de validité du droit dérivé de l'UE pour conformité avec certaines dispositions de la Charte de l'UE, 10 questions de validité à la lumière du TFUE et 2 à la lumière du TUE.

De cette façon, la Cour prévient des violations du droit européen dans l'ordre juridique interne et des condamnations par la Cour de justice. Une interprétation rendue par la Cour de justice est d'ailleurs contraignante pour tous les Etats membres.

Enfin, depuis le 1er mars 2023, le protocole n° 16 de la CEDH est en vigueur en ce qui concerne la Belgique. Il reste à voir si la Cour prouvera la nécessité de soumettre des demandes d'avis consultatifs à la Cour européenne des droits de l'homme.

X. Il est temps de conclure.

Les deux techniques inclusives développées par la Cour constitutionnelle permettent que les droits constitutionnels inscrits dans la Constitution belge soient interprétés de manière dynamique à la lumière des besoins réels de la société et, dans la mesure du possible, en conformité avec les normes internationales et européennes.

La jurisprudence de la Cour constitutionnelle s'inscrit de même dans le dialogue des juges. La lecture des droits fondamentaux garantis par la Constitution en combinaison avec des normes internationales et européennes analogues et le dialogue préjudiciel avec la Cour de justice en témoignent. En conciliant ainsi le droit constitutionnel et le droit européen, la Cour constitutionnelle évite des conflits entre les hautes juridictions et favorise la sécurité juridique, ce qui est un fondement de l'Etat de droit.

Giovanni AMOROSO

Vice-President of the Constitutional Court of Italy

THE MULTILEVEL SYSTEM OF FUNDAMENTAL RIGHTS PROTECTION

The protection of fundamental rights involves the justice systems of three courts: the Constitutional Court at the national level, the Court of Justice (*i.e.* the Luxembourg Court) at the level of the European Union and the European Court of Human Rights (*i.e.* the EDU Court, or Strasbourg Court) at the level of the Council of Europe.

The subject is broad and complex and much has already been dealt with in the preceding reports. The necessary conciseness of my speech allows me now to make only a few short remarks.

Briefly, these are the three areas of jurisdiction from the point of view of the Italian legal system.

The Constitutional Court examines whether there's a discrepancy between primary national legislation and the Constitution. If such a contrast is identified, it declares the censured provision unconstitutional. Moreover, the Court also treats violations of European Union law and the European Convention on Human Rights (along with its Protocols) as violations of the Constitution, which it has the authority to confirm.

The Court of Justice establishes the interpretation of Union law and assesses the conformity of national laws with it. National judges must not apply domestic law that is not in conformity with EU law and, in case of conflict, they have **to** apply the latter if self-executing. Otherwise, they can raise an incidental question of constitutionality (preliminary ruling).

The European Court of Human Rights (ECHR), in case of a direct appeal by the person who claims the violation of his fundamental rights, ascertains the violation of the European Convention on Human Rights in the individual case. Consequently, in a similar dispute, the national judges may consider the possible unconstitutionality of the domestic legislation in conflict with the ECHR.

However, the Strasbourg Court may now also find that there is a "structural or systemic problem", which implies, beyond the case before the Court, a more general problem of conformity of the domestic legislation with the ECHR. In such a case, the Court issues a 'leading judgment' outlining corrective measures that the Member State must undertake at the national level to align with the Court's judgment".

This 'leading judgment' can identify corrective measures to be taken at the national level by the Member State in order to comply with the Court's judgment. With this type of decision, the Strasbourg Court highlights its role as a supranational Court specialized in the protection of fundamental rights and places itself in a position to review the conformity with the Convention of the domestic legislation. Anyway the Corte has made limited use of this instrument, essentially to settle serial litigation.

The Italian Constitutional Court has often referred to this sort of judgment, extended from the specific case to the general normative case, while emphasising that it is up to the European Court to decide on individual cases and individual fundamental rights.

For example, the Italian Constitutional Court has referred to the rulings of the Strasbourg Court, which has censured the Italian legislation with reference to the national discipline of the criminal trial in absentia. It has pointed out the excessive difficulty of proving the lack of knowledge of the proceeding and the short timeframe for challenging the judgment in absentia. Therefore, it has ascertained the existence of a "structural problem connected with a dysfunction of the Italian legislation".

The decisions of the Constitutional Court, issued in the wake of the judgments of the European Court of Human Rights, led the Italian legislator to introduce new rules for criminal proceedings in

the absence of the defendant.

Thus, fundamental rights may have different sources (the Constitution, the Charter of Fundamental Rights of the European Union, and the European Convention on Human Rights) and, in parallel, they have different 'reference' Courts, each empowered to adopt decisions characterised by different effects, which require mutual coordination.

In particular, the Charter of Fundamental Rights of the European Union (CFREU) - relevant to the scope of Union law - is broad and detailed and in many provisions it overlaps with the European Convention on Human Rights. According to the Charter's equivalence clause, the meaning and scope of those rights are the same as those conferred by the Convention as far as the Charter contains rights corresponding to those guaranteed by the ECHR.

A textual link that connects Charter and Convention can be found in Article 6 of the Treaty on European Union, which set**s** a possible overlap in the recognition of fundamental rights. After providing that the Union shall accede to the European Convention - according to an ongoing procedure nearing completion - Article 6 reaffirms that the fundamental rights guaranteed by the Convention (in addition to those resulting from the constitutional traditions common to the Member States) are part of Union law as 'general principles'.

Moreover, Article 52(3) of the Charter lays down the equivalence clause**,** whereby, in the event of overlapping, the Charter may not have a lower content of protection than the ECHR, but Union law may, if anything, grant protection that is more extensive.

The Court of Justice, on the other hand, has at times ascertained the infringement of rights in EU matters with reference to the higher level of guarantee recognised by the Convention.

However, the Court of Justice itself has reaffirmed that fundamental rights are an integral part of the general principles of Union law. The Court has reiterated that the reference made by Article 6(3) TEU to the ECHR does not allow national judges, in the event of a conflict between a rule of domestic law and the convention, to **directly apply** the provisions of the latter and not the rules of a national law in conflict with it.

Similarly, the Italian Constitutional Court has ruled out that the enforcement of the Lisbon Treaty (on 1st December 2009) has changed the position of the ECHR provisions in the source system. The applicability of the ECHR, as such, to European Union law and domestic legislation can be inferred and, therefore, national judges have to take in account if domestic rules are in conflict with the Convention.

In practice, it is possible to face situations where the level of protection for fundamental rights varies, being higher in one context and lower in another.

The correlation of the three levels of protection in the national Constitution, in the European Treaties and in the European Convention leads to an alignment towards a higher standard of guarantee.

For example, at a European level it is applicable the principle of "*ne bis in idem*", which is not literally provided in the Italian Constitution. Nevertheless, this principle integrates a parameter of constitutionality that ordinary laws must respect.

Another example: at a European level there is the presumption of innocence of the defendant in a criminal trial; in the Italian Constitution there is the presumption of 'not guilty', which now is interpreted as equivalent to the presumption of innocence in order to align it with European protection.

In conclusion, there is an overall integrated system of fundamental rights protection articulated on three levels: national, European Union and Council of Europe. The dialogue between the Courts is necessary for the integration of these protections and their alignment to the highest level, which creates a common legal space of fundamental rights protection.

A common space governed by the rule of law and inspired by ideals of peace, unity and goodwill.

Séance plénière II.

«Le politique et le juridique relèvent dans la compétence des cours constitutionnelles»

Plenary session II.

“Political and legal within the jurisdiction of the constitutional courts”

Plenarsitzung II.

„Politische und rechtliche Zuständigkeit der Verfassungsgerichte“

Aldis LAVIŅŠ

President of the Constitutional Court of the Republic of Latvia[30]

Distinguished colleagues,

There is no doubt that we, the judges of constitutional courts, have extensive knowledge of how political considerations play a role in constitutional adjudication, especially in the so-called "sensitive" cases. We are aware of various studies about Judicialization of Politics or Politicization of the Courts, which deal with this important question.

> Until February 2022, we were discussing issues related to distinguishing between politics and law in the context of normality, I mean, in peaceful times. However, the harsh reality is that, unfortunately, this is the 818th day of the war in Europe. Therefore, in the time allocated to me, I will highlight some of the judicial aspects of how judges can take into account the geopolitical context, which is especially important in the Baltic States as the neighbours of the aggressive autocratic regime. It is equally important here – in Moldova. In my opinion, these aspects are currently more relevant for the European constitutional courts than a scientific discussion about, for example, the methodology we are using to distinguish between the political and the legal.

First, I would like to mention the case regarding the prohibition for a soldier in professional military service to be a member of a political party. The Court underscored that, in the current geopolitical context, the need for politically neutral National Armed Forces was particularly pronounced. Political neutrality of the National Armed Forces facilitates effective performance of the national defence functions and, thus, protection of the democratic state order and public security is ensured. So, the restriction was declared as being constitutional. This example shows us in how, applying the test of proportionality, geopolitical context could be used to strike the proper balance between the right to freely choose employment, on the one hand, and protection of the democratic state order, on the other hand. I do believe that in other circumstances, in other political cultures and in other societies the proper balance could shift in favour of the right to employment.

Another example is related to the aspect of how the geopolitical context plays a certain role in defining whether two groups are comparable when applying the principle of equality. The provisions that were contested in the case envisaged expiration of the term of permanent residence permits, issued to citizens of the Russian Federation, and pre-conditions for obtaining a repeated permit. The contested provision applies only to the citizens of the Russian Federation who are former citizens and aliens of Latvia and who have permanently resided in Latvia. This requirement was not applied to other foreigners

The Court noted that the State had discretion in assessing various risks to national security and, accordingly, to change its immigration policy in order to react to them. The Court emphasised that the Russian Federation was recognised as a state sponsor of terrorism and the contested provision ensured that its citizens could stay in Latvia only if they did not endanger the security of the State.

Taking into account that the adoption of the contested provision was related to the war initiated by the Russian Federation in Ukraine and, accordingly, to the possible security risks for the State of Latvia, the Court recognised that the citizens of the Russian Federation were not in equal and, in terms

30 With the contribution of Andrejs Stupins-Jēgers, Adviser to the President of the Constitutional Court.

of certain criteria, comparable to all other foreign nationals who had a permanent residence permit. In particular, the nationals of those countries that are not Latvia's neighbours and that did not start military action against their own neighbouring countries, or historically threatened Latvia's national security. Therefore, the Court found that the groups were not comparable and the contested provision complied with the principle of equality.

In another case regarding provisions that imposed the obligation on municipalities to dismantle objects that glorified the Soviet regime, the Constitutional Court specified the principle of the continuity of the Latvian State and its importance in restoring historical justice and the statehood of the Republic of Latvia, established in 1918. In this case, the Constitutional Court recognised that the reason for adopting the contested provisions had been increasingly more active use of the objects that glorified the Soviet regime for propaganda purposes and increasingly more serious threat to Latvia's statehood that had to be eliminated. The Constitutional Court underscored that elimination of the consequences of occupation and fostering of societal cohesion required cooperation between all levels of the State power, aimed at reaching a common aim and solidarity, which would comprise both the central power and local governments.

I would also like to draw attention to the fact that several years ago the Constitutional Court of Latvia reviewed the constitutionality of the prohibition to stand for the parliament elections to persons who, after the year 1991, had been members of organisations, the activities of which were aimed against the independence of the State and the principles of a democratic state, governed by the rule of law. The Constitutional Court had reviewed before, twice, the proportionality of such a restriction, concluding that it could exist for a certain period of time, therefore the legislator, by regularly assessing the political situation in the country, should decide on the necessity and validity of this restriction. Namely, any restriction on electoral rights must be assessed in the context of the State's democratic development. Therefore, the legislator must consider regularly the need for such restrictions, aligning these with the level of democratic development in the State at the particular moment in time.

The next example concerns restrictions on the freedom of speech. We can observe that the geopolitical context is increasingly entering the judicial process through another aspect. Even five years ago, we could not have imagined a situation involving massive-scale decision-making to block media, such as TV channels and websites.

Soon after the fullscale invasion of Ukraine started, the National Electronic Media Council of Latvia adopted numerous decisions, blocking Russian media. The Media Council argued that these media outlets were spreading messages threatening the national security, e.g., claiming that the Baltic states were Russian territory or that Ukraine was initiating a war against Russia. Therefore, the Media Council deemed it necessary to adopt measures to safeguard territorial integrity and national and public security, particularly in the context of the prevailing geopolitical circumstances.

One of the most extensively discussed cases is the Media Council's decision to revoke the broadcast permission of the TV channel *Dozhd* (TV Rain). The Council found that TV Rain disseminated inaccurate and misleading information concerning the territorial integrity of Ukraine, made statements suggesting that Russia's army was integrated with Latvia's army and vice versa, issued calls for assistance to the Russian army, and depicted Crimea on the map as part of the Russian territory, etc. It was concluded that TV Rain posed threats to the national security by supporting a state sponsor of terrorism, which was contrary to the interests of the Latvian State and public security. TV Rain challenged the Media Council's decision in court. The court emphasized that in times of war it was crucial to provide accurate information and that systematic distribution of inaccurate statements and calls for help to the Russian army endangered security of Latvia and other European countries.

In conclusion – protection of the democratic state order is our shared priority. Self-defensive democracy is not a static situation but rather a continuous process, which must be constantly monitored

and improved. In times of war in Europe, when our societies are becoming more and more polarized, the role of the courts is changing. The courts not just implement fundamental rights. Nowadays, the courts have a certain role in stabilising the democratic system and political order in the long term and maintain its functioning. The role of the courts is to bring stability in our societies.

Furthermore, our generation lives in turbulent times when our values and the democratic state order are under serious threat. This is our greatest challenge – as lawyers, as judges, we must defend our values with the power of law. And considering geopolitical context is the right way for reaching a fair and sustainable ruling, capable of defending our democracy and values.

Josef BAXA

President of the Constitutional Court of the Czech Republic

Honourable Representatives of European Constitutional Judiciary,

Distinguished Colleagues,

Dear Guests,

Ladies and Gentlemen,

It has not yet been a year since I became President of the Constitutional Court of the Czech Republic. This is, therefore, my first time at the Congress of European Constitutional Courts, and I truly appreciate the warm welcome I have received. I would like to thank my esteemed colleagues for the opportunity to meet them and - at the same time – to confirm my intention to support further cooperation between the constitutional courts of Europe. This is one of the most valuable and important traditions we share.

I should speak on "Legal and Political Questions," particularly in relation to sensitive issues that require the attention of constitutional courts. Believe me, this is a topic so varied that it cannot be fully addressed in the few minutes allotted to my contribution. It is a topic that poses more questions than I can provide answers for. Therefore, I will offer a brief reflection on two decisions of our Constitutional Court, although dozens more could be mentioned. Every European constitutional court has, at some point, dealt with issues at the intersection of law, politics, ethics, and human dignity, and the Czech Constitutional Court is no exception.

The doctrine of "Political Questions" is often discussed. However, the range of questions that should be entrusted to politicians rather than courts has no clear boundaries. Does it include the electoral system, foreign policy, taxes, or perhaps the choice of one's gender? Yet, we know very well that it is precisely these questions that constitutional courts are asked to answer more often than they would like. Legislators can be blamed for not adopting a particular legal regulation or for setting it incorrectly, but we cannot abandon our duties just because another branch of power has failed in fulfilling its responsibilities. Quite the opposite. If the Parliament, the general judiciary, or the government make a mistake, the Constitutional Court must be there to remedy the error.

Modern society and modern technologies confront us with challenges that just a few legal scholars merely whispered about fifty years ago. However, this does not absolve us of the responsibility to face these new challenges head-on. It is easy to remain in the safe embrace of past decisions, but constitutional courts are not here to recall the glory of good old days but to protect the world of tomorrow through today's decisions. Therefore, I will briefly present two decisions of the Constitutional Court of the Czech Republic that will supplement my introduction with practical experience and a reflection on the case law of the European Court of Human Rights.

Decision One – Surrogacy

We can hold different opinions on who exactly should form a family and what relationships within this family should be like, but it cannot be denied that modern society is moving towards a plurality of relationship platforms. Different countries have different traditions of family life, but what we have in common is an emphasis on the best interests of the child.

In 2015, the Czech Supreme Court partially granted a petition to recognise a California court ruling that established the parenthood of two men for a child via surrogacy. However, the Supreme Court recognised parenthood, specifically fatherhood, only concerning the first applicant (a Czech citizen). Based on this judgment, the registry office issued a certificate of citizenship for the child and sub-

sequently issued a Czech birth certificate, in which the first man was listed as the father, while the column for the mother's name was left blank.

The two men then submitted a petition for recognition of the relevant California judgment regarding the second man. However, the Supreme Court rejected their petition as it was apparently contrary to public policy. According to the Constitutional Court, the Supreme Court erred in refusing to recognise the existing parental relationship between the second man and the child, which was contrary to the child's best interests. It found that the interference with family life (even if justified by the legitimate interest in protecting the traditional family) was disproportionate in this case.

The Constitutional Court emphasised the following ideas:

1) In judicial decisions concerning children, abstract principles must not take precedence over the specific interests of the child.

2) The non-recognition a foreign decision establishing parenthood of a child by two same-sex individuals, in a situation where family life between them was factually and legally established through surrogacy, due to the fact that Czech law does not permit parenthood by two individuals of the same sex, is contrary to the child's best interests protected by Article 3 section 1 of the Convention on the Rights of the Child.

3) Where a legally established family life already exists between individuals, public authorities must act to allow this relationship to flourish.

This aligned with the European Court of Human Rights judgment in Mennesson v. France, which also concerned surrogacy that materially occurred in California and was legally recognised there. However, French authorities refused to recognise such a family relationship. The Strasbourg court had no doubts about the existence of family life between the *de facto* parents and the children acquired through surrogacy, even though the given state did not legally recognise this relationship. According to the ECtHR, it was clear that in this case, the commissioning couple had acted as parents of two children acquired through surrogacy from birth, and they had all lived in a manner indistinguishable from family life in the usual sense. Therefore, it established a violation of Article 8 of the Convention. Following this judgment, Dominique Mennesson was listed in the register as the father of the children, but his wife Sylvie Mennesson was not.

The Mennesson case was finally resolved in 2019, when the Grand Chamber of the ECtHR issued an opinion answering questions posed by the French Court of Cassation. It unanimously found that for a child born abroad through surrogacy using the gametes of the intended father and an unknown female donor, where the parental relationship between the child and the intended father had already been legally recognised, the child's right to respect for private life requires that national law also allows for the legal recognition of the parental relationship between the child and the intended mother. However, this recognition does not necessarily have to take the form of entering data from the foreign-issued birth certificate into the register, but can be done through other means, such as adoption.

Decision Two – Issuing a Do-Not-Resuscitate Order

The Do-Not-Resuscitate (DNR) order is part of the medico-legal and ethical concept of the "Living Will," which allows individuals to express their will in advance should they become unable to provide consent or refusal for medical services due to their future health condition. In the Czech Republic, it is a standardly used concept, supported by the Convention on Human Rights and Biomedicine and it is regulated by law.

The Czech Constitutional Court examined whether a hospital was liable for the death of a long-term ill patient at the end of her life, for whom doctors had unilaterally issued a Do-Not-Resuscitate (DNR) order. The doctors' order was issued without informing the patient or her relatives. The main reason of the general courts for dismissing the lawsuit was that the claimants (survivors) were seeking com-

pensation from the hospital for other than proprietary harm caused by the death of a loved one, not for the harm caused by violating the participation rights of the patient or its relatives. Although the Constitutional Court rejected the petition, it summarised the broader context of this issue in its judgment.

If the patient is unable to express informed consent or refusal when resuscitation is needed, the patient's previously expressed DNR order must be taken into account. In making decisions about resuscitation at the end of life, it is generally necessary to balance the right to life and health protection on one side and the right of individuals to a dignified natural death on the other.

According to the Constitutional Court, the right to life and health protection does not imply an unconditional obligation for doctors to perform resuscitation regardless of the specific patient's condition, even if it could delay the moment of physical death for a certain period. However, the unilateral issuance of a DNR order by doctors without informing or involving the patient may violate the patient's participation rights and, therefore, the right to personal integrity and respect for family and private life.

Although the evidence showed that doctors did not involve the patient or her family in assessing the potential future resuscitation, this did not mean that they had violated her right to life. The Constitutional Court concluded that not prolonging the dying process at the end of life for a long-term ill patient could not be equated with direct killing.

The European Court of Human Rights also extensively dealt with the issue of withholding life-sustaining treatment and previously expressed patient wishes not to resuscitate in cases such as Glass v. the United Kingdom, Lambert and Others v. France, and Gard and Others v. the United Kingdom. In light of this case law, the following requirements must be put in place for a conscious absence of treatment at the end of life:

1) There must be predictable rules governing this procedure (i.e., the existence of a solid regulatory framework under Article 2 of the Convention);
2) Arbitrary and unpredictable decision-making is prohibited;
3) The patient's wishes and values must be taken into account;
4) There must be the possibility of reviewing decisions by an independent body, meaning that affected persons can appeal to a national court if they have doubts about the patient's best interests.

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Allow me to offer a brief summary in conclusion. The development of social rights, the strengthening of the rule of law, and the dramatic emancipation of the individual over the past 70 years have all placed modern European states before a difficult task. To regulate legal relations so that fundamental human rights are not only guaranteed but also protected, and that protecting these rights does not threaten other constitutionally protected values and interests. Not an easy task, is it?

And untangling these complicated relationships – societal, ethical, and competence – it is precisely the role of interpreter and arbiter, which is irreplaceable. That is the role that constitutional judiciary plays in most countries.

Although we are asked challenging questions, we usually do not have the opportunity to withhold a decision on a matter simply because that question should primarily be resolved by bodies with political legitimacy. If we are the last in line who can decide on the constitutionality of a legal regulation or on the protection of fundamental rights of an individual, then we have to decide. Regardless of whether our decision elicits criticism or praise.

That is the fate and mission of constitutional courts. Although our position is unique at the national level, platforms like CECC are a valuable source of support and exchange of experiences among institutions dealing with similar issues and sharing similar values.

I therefore look forward to further contributions and thank you for your attention.

Laura-Iuliana SCÂNTEI

Judge, Constitutional Court of Romania

(Introductory Address to the Audience)

Ladies and Gentlemen Presidents and Judges of Constitutional Courts,

I am honoured to attend the XIXth Congress of the Conference of Constitutional Courts held in Chisinau by the Constitutional Court of the Republic of Moldova, in a geo-political, historical context, both important and complicated for the Republic of Moldova. But the more complicated the context, the bigger the challenges at the borders, the more important is our presence here in Chisinau, in a congress of European constitutional courts, to talk about constitutional justice and its role in strengthening democracy and peace here, in the Republic of Moldova, but also in the rest of Europe.

I thank Mrs. President, Domnica Manole, and all the colleagues of Moldovan Court for their honourable invitation and I also convey the thanks and appreciation of the President of the Constitutional Court of Romania, Mr. Marian Enache, for the special relationship, partnership and brotherly friendship of the two Courts of Bucharest and Chisinau.

Ladies and Gentlemen,

The theme of this plenary session ***"Politics and law within the jurisdiction of constitutional courts***" is not, at first glance, a comfortable theme to be addressed in a speech by a constitutional judge.

However, this is a subject that is constantly rewritten and that never seems to have a definitive/ permanent solution because it reflects **both the relationship and the distinction between law and politics.**

In order to analyse them, together with you at this Congress, I have assumed that there are multiple perspectives on this topic and all of them are based on the premise used in the systems theory, which talks about the existence of two systems: **a legal system (system of normative order)** and **a political system (system of political decision based on the exercise of political power).**

The two systems are autonomous, but in permanent relationship. One determines the other. The two systems are like billiard balls that collide with each other and change their course. They will inevitably meet in the social system and will create conflicts/disputes.

The legal system operates on the basis of the distinction between legal/illegal (that is also constitutional/unconstitutional). In order to effectively make this distinction, **a method (an own code) is needed.** This method is based **on the act of legal interpretation, that is, on legal arguments.**

The political system operates based on the distinction between power/lack of power. In order to effectively make this distinction, a *method* is needed, as in the case with the legal system. To that end, the distinction between governance/opposition is used. Governance holds the power. The opposition counterbalances the power and seeks to obtain it in turn.

As in any analysis, questions are the foundation, so my brief -/speech is to challenge you to find the best answers together.

1. **What is the role of the Constitution with regard to the relationship between the two legal and political systems, both autonomous but interdependent?**

The Constitution is the political-legal act that ensures the structural coupling of the two systems. The Constitution allows the political system to manage the legal system from a political perspective and the legal system to manage the political system from a legal/judicial perspective.

2. **Is there a second basic question? Who is entitled in a democratic society to resolve conflicts/disputes between the two systems?**

A possible answer, not only in countries with a totalitarian past, is **the Constitutional Court or a Supreme Court**, which has been recognised by what is named in the literature as a competence to carry out '**constitutional review' or constitutionality review.**

In the last instance, the constitutionality review of a constitutional court is aimed at ensuring the supremacy of the Constitution. At the same time, however, it is important to ask ourselves, which are the consequences of ensuring the supremacy of the Constitution from the perspective of the relationship between law and politics?

If constitutionalism essentially means the subjection of politics to law, so the subjection of the power to legal norms that the sovereign himself/herself determines, then constitutionality review essentially means the mechanism by which the law imposes in front of the power exercised by a governance.

3. **How is the political system limited by the legal system?**

Politics is limited by the Constitution in two ways:

- **on the one hand PROCEDURALLY** – through the procedures by which governance based on the political majority adopts regulatory acts (we refer, on the one hand, to the organisation of the system of power in the State and, on the other hand, to decision-making procedures of the executive and legislative powers);

- **on the other hand SUBSTANTIALLY** - by setting out the fundamental principles, rights and freedoms that must be respected when a regulatory/command decision is taken using constitutional procedures.

Constitutionality review carried out by the constitutional courts **checks and guarantees precisely these procedural and substantial aspects.** It therefore provides the effective mechanism for subjecting the politics to law, for ensuring the rule of law within a constitutional democracy.

It is worth making a distinction here that is relevant to societies that have moved from a totalitarian non-democratic regime to a democratic political regime based on the principles of the rule of law. In essence, these societies are more susceptible to conflicts between the two systems (the political system based on power and the legal system based on legality), especially during the first period of transition, which is also the period of the *democratisation process*.

The transition to the next stage of democratisation, which is *the stage of democratic consolidation*, depends also on the way in which these conflicts are solved.

Societies in transition need strong constitutional courts in the democratisation process, precisely to provide rational solutions to the inherent conflicts between political and legal order, and thus to ensure that the democratisation stage stabilises the principles of organisation of a democracy that will enter the consolidation process.

Particularly in these countries that have made the transition from a non-democratic regime to a democratic regime, the constitutional order is better protected by means of institutional guarantees that impose the procedural and substantial constraints established by the normative order.

Constitutional courts and constitutionality review are such institutional guarantees without which we cannot speak of constitutional democracy.

4. **Independence of constitutional justice – a fundamental prerequisite for the rule of law**

An important guarantee to ensure the functional relationship between the political system and the legal system is the independence of justice (**involving also the independence of judges of the constitutional courts**).

The best protection for the independence of constitutional justice is the widely shared belief in

society that any interference of politics with the decision-making process of the contentious constitutional court is unacceptable. Such a belief must be supported by a high degree of trust in society in constitutional values and the principles of constitutional democracy.

The society's trust in the act of constitutional justice is the most important guarantee for a democratic society based on the rule of law.

Meanwhile, the independence of constitutional justice has a dual dimension: an external one and an internal one.

The external one means that the independence of constitutional justice must be protected from political interference in the exercise of judges' competencies. We acknowledge the external interference of politics by putting pressure directly or indirectly on judges not to apply the Constitution in a specific situation, in a particular context, but to interpret the basic law in such a way as to reflect the contextual political expectations of those politicians. In order to ensure the independence of constitutional justice in its external dimension, the Constitution has established a number of **guarantees** *regarding the appointment of judges, the procedure for making such appointments, the expertise of appointed persons, a set of incompatibilities and conflicts of interest and other such measures.*

But in fact, all these institutional guarantees that protect the independence of justice in its external size are ineffective if it is not ensured the independence of constitutional justice in its internal dimension.

This internal dimension is the most important and is of a personal nature, belonging to each individual judge. If the independence of the justice in the external dimension can be ensured through procedural and institutional guarantees, the independence of justice in the internal dimension depends exclusively on the judge's own code of professional ethics.

Although at first sight it seems difficult to understand and accept, constitutional justice is inevitably a political issue, in the sense that the subject of constitutionality review and the consequences of constitutional court's decision are political. This issue derives from the fact that the function of the constitutional law itself is to regulate the formation and exercise of political power. For this reason, the referral to the court and the court's decision have a determination, respectively a political consequence.

What really matters is what happens between the moment the Court is seized and the moment the court decides.

What matters is that the operations that judges carry out to identify the applicable rule and to interpret it are legal. Everything here depends on the judge, the way he tempers, even neutralises his own political convictions to build rational arguments based on the logic of legal reasoning.

The constitutional judge, regardless of whether the constitutional norm is clear enough or not (*usually it is not, by its nature*), is bound **by the legal logic of the interpretation process, which is based exclusively on the text of the legal norm.**

Constitutional norms regulate the most important values of a society and set the limits of political power. The constitutional judge's mission is to interpret the constitutional text by legal means and to distinguish between the legal argument and the political argument. **The legal argument results from the methodology of interpretation.**

The key elements of this methodology of interpretation are as follows:

1. Any biased/subjective influence based on personal beliefs (political, economic, religious, etc.) is eliminated from the process of interpretation of the norm.
2. Legal arguments will never be determined by a predetermined result, but actually result from the chosen method of interpretation.
3. The purpose of legal interpretation is to give value/support to the constitutional values that are included in the constitutional norm. Whatever the effect of the court's final decision, for

the constitutional judge, what matters must be solely the protection of the object of the constitutional norm and the purpose for which that norm was inserted in the constitutional text.

Ladies and Gentlemen,

The distinction between politics and law in the work of constitutional courts will remain one of the fundamental themes of any theory of law.

In order to promote constitutional democracy, we, the judges of the constitutional courts, can only ensure this separation between law and politics through a methodology that is specific to our competence.

This methodology of interpretation requires the waiving of subjective arguments based on your own beliefs and the use of objective legal arguments based on constitutional value protected by the constitutional norm.

Anything else left out of this method of interpretation that gives meaning to the supremacy of the Constitution, is just politics.

Thank you for your time and attention.

Corinne LUQUIENS

Member, Constitutional Council of France

Droit et politique dans le cadre des compétences des cours constitutionnelles

Je ne serais pas légitime pour traiter de la question qui fait l'objet de notre débat pour l'ensemble des cours constitutionnelles. Je m'en tiendrais donc évidemment au cas du Conseil constitutionnel qui a d'ailleurs des compétences particulières qui, soit n'ont pas d'équivalent, soit sont exercées par d'autres institutions, dans nombre de pays européens.

Je voudrais commencer par souligner que cette question est, au moins pour la France, au cœur de l'actualité. A la suite de plusieurs décisions importantes – je pense en particulier à celle rendue sur la réforme des retraites, qui avait suscité des débats très agités au Parlement ainsi qu'à l'examen de la non moins contestée loi sur l'immigration – des polémiques ont surgi qui se sont traduites par d'assez vives critiques. Leurs auteurs arguaient que lesdites décisions n'auraient pas été prises sur un fondement juridique mais auraient constitué des décisions inspirées par des considérations politiques. De ce fait, ils ont dénoncé un gouvernement des juges et appelé à une réforme constitutionnelle pour limiter les pouvoirs du Conseil constitutionnel !

Il me semble impossible de ne pas constater que les critiques portées sur les cours constitutionnelles tiennent souvent, au moins en partie, aux modalités de désignation de leurs membres. En France, les neuf membres du Conseil, renouvelables par tiers tous les trois ans, sont nommés pour un unique mandat de neuf ans, par le Président de la République, le Président du Sénat et le Président de l'Assemblée nationale. Aucune condition ne s'impose au choix des autorités de nomination. D'abord, il n'y a pas d'exigence tenant à la compétence juridique des membres nommés. En outre, si le mandat n'est cumulable avec aucun mandat électoral ou fonction publique ou privée, à la seule exception d'activités d'enseignement, les membres peuvent être nommés quelles qu'aient pu être leurs fonctions antérieures.

De fait, il y a actuellement au Conseil constitutionnel plusieurs membres qui ont, pour certains d'entre eux juste avant leur mandat, exercé des activités politiques : le Conseil compte ainsi deux anciens Premiers ministres, deux anciens ministres et un ancien sénateur. Evidemment, il serait fallacieux d'opposer appartenance politique et compétence juridique. S'il n'y a pas d'exigence de formation juridique pour être nommé au Conseil constitutionnel, il n'en est pas moins vrai qu'y siègent trois anciens membres de la juridiction administrative, un ancien magistrat de l'ordre judiciaire et deux anciens avocats, certains d'entre eux ayant, par ailleurs, eu une carrière politique. Quant aux autres membres s'ils n'ont été ni juges ni professeurs, ils n'en sont pas moins dépourvus de compétences juridiques, acquises au cours de leurs études mais aussi à l'occasion d'une carrière généralement bien remplie. D'ailleurs, il est désormais nécessaire de passer par le filtre d'une audition publique par une commission parlementaire.

Reste bien sûr que, au moins en termes d'apparence, l'engagement politique antérieur ne peut être ignoré s'agissant de personnalités qui ont exercé des fonctions politiques parfois éminentes. Mais, au vu de mon expérience de maintenant huit ans au Conseil, sachant que mes fonctions antérieures sont garantes de ma neutralité, je crois pouvoir dire que les membres qui ont exercé une carrière politique avant leur nomination ne se déterminent pas sur les affaires qui nous sont soumises en fonction de leur activité politique antérieure et ne m'apparaissent pas plus engagés, et même parfois moins, que d'autres membres. Après tout, il existe aussi des juges ou des professeurs, même si nous n'en comptons pas actuellement parmi les membres du Conseil, qui ont des convictions politiques ! J'ajouterai enfin que la meilleure garantie d'indépendance tient au fait que les membres, nommés en général au terme de leur carrière et à un âge déjà avancé, n'attendent rien au terme de leur mandat, ce qui est certainement une garantie d'indépendance.

Vous me pardonnerez cette introduction un peu longue qui me semblait s'imposer compte tenu du sujet que je dois traiter. Je vais maintenant tenter de distinguer dans les attributions du Conseil constitutionnel celles qui peuvent sembler plus directement relever du champ politique de celles qui apparaissent comme relevant strictement du domaine du droit. Dans l'un et l'autre cas, j'essayerai de montrer que les décisions prises sont toujours inspirées par le droit et non par la politique.

I Les attributions du Conseil relevant du champ politique : compétence consultative et attributions en matière électorale

1) *La compétence consultative du Conseil constitutionnel pour la mise en œuvre de l'article 16*

Je commencerai par dire un mot d'une compétence consultative qui ne représente qu'une activité absolument exceptionnelle pour le Conseil : il s'agit du rôle consultatif qu'il est conduit à jouer en cas de mise en œuvre de l'article 16 de la Constitution. Il ne me semble pas sans intérêt de mentionner ce champ très particulier d'intervention du Conseil parce qu'il est alors conduit à intervenir dans une situation grave et de nature éminemment politique.

Ce texte permet, en effet, au Président de la République, pour une durée limitée, lorsque des circonstances exceptionnelles sont réunies – indépendance de la Nation, intégrité du territoire ou respect de ses engagements internationaux menacés de manière grave et immédiate et interruption du fonctionnement des pouvoirs publics – de réunir entre ses mains l'ensemble des pouvoirs exécutif et législatif. Le Conseil – de même que le Premier ministre et les présidents des deux assemblées – est obligatoirement consulté pour apprécier si les conditions constitutionnelles sont réunies pour la mise en œuvre de la procédure. Il est également consulté sur les mesures prises par le Président de la République qui doivent être inspirées par la volonté d'assurer aux pouvoirs publics les moyens d'accomplir leur mission. Il peut être saisi à nouveau au bout de trente jours par les présidents des assemblées, soixante députés ou soixante sénateurs et peut se saisir lui-même au bout de soixante jours pour se prononcer sur le fait que les conditions constitutionnelles sont toujours réunies. Son avis est rendu public.

L'article 16 n'a été mis en œuvre qu'une fois, par le Général de Gaulle, à l'époque de la guerre d'Algérie, du 23 avril au 29 septembre 1961. Dans cette unique circonstance, les débats devant le Conseil constitutionnel, qui sont désormais publics, puisque le Conseil publie ses délibérés au terme d'une période de vingt-cinq ans, font ressortir qu'il y a eu une discussion approfondie au sein du collège pour déterminer si les conditions constitutionnelles pour la mise en œuvre de l'article 16 étaient effectivement réunies. Ils montrent que, dans une situation grave et éminemment politique, alors même que le Conseil était encore une institution nouvelle très critiquée pour une subordination supposée à l'exécutif, les arguments échangés portaient bien sur la conformité de la procédure, dont la mise en œuvre était envisagée, aux exigences constitutionnelles.

2) *Le contrôle par le Conseil constitutionnel de certaines élections*

A la différence de la plupart des pays européens dans lesquels il existe un organe spécialisé en la matière, le Conseil constitutionnel exerce son contrôle sur l'organisation et le déroulement de l'élection présidentielle et des référendums et est en charge du contentieux des élections législatives.

Je m'en tiendrai aux grandes lignes sur les conditions d'exercice de cette fonction qui mobilise assez fortement le Conseil au cours des années électorales, la seule question intéressante étant de savoir s'il statue sur la base de considérations purement juridiques ou s'il peut être influencé par des considérations politiques.

S'agissant de *l'élection présidentielle*, il ne fait guère de doute et il n'est pas contesté que le Conseil exerce avec une grande rigueur le contrôle des opérations préparatoires à l'élection, de même que celui des opérations électorales elles-mêmes. Il annule d'ailleurs régulièrement les résultats de certains bureaux de vote lorsque des irrégularités ont été commises et si cette vigilance est sans conséquence sur le résultat lui-même – puisque le résultat de l'élection est toujours acquis avec plusieurs

centaines de milliers de voix ou même plusieurs millions de voix d'écart entre les deux candidats du deuxième tour, alors que les décisions du Conseil n'en déplacent que quelques milliers – cela contribue certainement à inciter les pouvoirs publics, comme les candidats, à être très vigilants sur le bon déroulement du scrutin.

Néanmoins, je me dois de mentionner la décision que le Conseil a rendu, en 1995, en contrôlant *a posteriori* les comptes de campagne des candidats à l'élection présidentielle. La publication, en 2020, du délibéré de sa décision du 11 octobre, fait ressortir qu'il a reculé devant le choix de l'annulation des comptes de campagne de deux candidats, Edouard Balladur et Jacques Chirac, ce dernier ayant été élu. Je précise que cette annulation n'aurait eu aucune conséquence sur l'élection elle-même mais, au-delà de ses conséquences financières, elle aurait évidemment été embarrassante pour le Président de la République. Compte tenu du thème de notre Congrès, il me semble impossible de ne pas relever qu'il s'agit sans doute de l'unique concession que le Conseil constitutionnel a pu faire au principe de « déférence » qui n'existe pourtant pas en droit français ! Mais, je relèverai que, dans sa décision du 4 juillet 2013, il n'a, au contraire, pas hésité à annuler les comptes de campagne de M. Nicolas Sarkozy, qui n'avait certes pas été élu mais était président de la République sortant et potentiel candidat à une élection future. Au-delà de son incidence financière importante, puisque l'annulation du compte interdisait tout remboursement par l'Etat des dépenses de campagne, je crois que cette décision a eu un effet pédagogique en incitant, pour l'avenir, les candidats à être très attentif à ne pas dépasser le plafond de dépenses autorisé. Elle marque, en tout cas, que le Conseil ne se détermine plus désormais, même dans une matière aussi délicate, que sur des considérations purement juridiques.

Le Conseil constitutionnel exerce sur *les éventuelles consultations référendaires* le même contrôle que pour l'élection présidentielle. Je crois utile d'indiquer qu'il a, en la matière, élaboré une jurisprudence qui marque son indépendance à l'égard du pouvoir exécutif et qui pourrait à l'avenir avoir des conséquences importantes. Dans le cadre du contrôle qu'il exerce sur l'organisation du référendum, il s'est estimé compétent pour juger de la régularité du décret de convocation des électeurs, lequel comporte notamment la question qui doit être soumise au suffrage du peuple français. Cela pourrait donc, éventuellement, lui ouvrir la voie d'un contrôle sur la conformité de cette question au champ du référendum, tel qu'il est défini à l'article 11 de la Constitution. Je m'exprime au conditionnel car le Conseil n'a pas encore eu l'occasion d'exercer un tel pouvoir, que certains auteurs ou personnalités politiques contestent formellement, et il ne s'agit donc encore que d'une prérogative virtuelle, dont on ne peut cependant que mesurer l'importance.

Je serai très rapide sur *le contentieux des élections législatives et sénatoriales* car il n'a jamais fait l'objet de contestations sérieuses et il ne fait guère de doute qu'il est exercé sur le seul fondement du droit à l'exclusion de toute considération politique. C'était d'ailleurs le résultat attendu par le Constituant en confiant au Conseil cette compétence qui était auparavant exercée par les assemblées elles-mêmes, dans des conditions beaucoup plus discutables.

II Les attributions du Conseil relevant strictement du domaine du droit : le contrôle de constitutionnalité des lois

J'en viens à ce qui est évidemment le cœur des activités du Conseil constitutionnel, le contrôle de constitutionnalité des lois. Le Conseil a la particularité de l'exercer sous deux formes différentes, pour lesquelles la prégnance éventuelle des incidences politiques de ses décisions n'est pas la même. Pour autant, il exerce son contrôle de la même manière et sa jurisprudence se construit d'ailleurs également dans les deux sphères d'intervention.

1) *Les deux formes du contrôle de constitutionnalité des lois*

A l'origine, le contrôle de constitutionnalité des lois n'était exercé par le Conseil constitutionnel que sous la forme d'un *contrôle a priori*, à l'initiative du Président de la République, du Premier ministre, des présidents du Sénat ou de l'Assemblée nationale, immédiatement après l'adoption définitive

de la loi par le Parlement et avant sa promulgation. Depuis 1974, le droit de saisine a été étendu à soixante députés ou soixante sénateurs, ce qui signifie en pratique qu'il est ouvert à l'opposition. Le nombre de saisines a donc substantiellement augmenté puisque tous les textes fortement contestés lors de la discussion parlementaire sont désormais déférés au Conseil. Il en résulte évidemment que la pression qui s'exerce sur le Conseil constitutionnel est très forte. Il intervient, en effet, dans un délai très bref – d'un mois qui peut être réduit à huit jours en cas d'urgence – pour rendre une décision qui, aux termes de débats souvent difficiles, voire houleux, va apparaitre comme soit confortant la position de la majorité parce qu'il va valider le texte contesté, soit donnant raison à l'opposition lorsqu'il juge nécessaire d'en censurer certaines dispositions. On ne peut d'ailleurs, à cet égard, que regretter la présentation parfois faite de ses décisions qui contribue à donner le sentiment infondé qu'il s'est prononcé sur le fond.

Pourtant, comme l'a rappelé le Président du Conseil à propos de la loi sur l'immigration qui avait suscité des débats particulièrement passionnés, il n'a pas vocation à jouer le rôle d'une troisième chambre ni à arbitrer des différends de nature politique. Il ne se prononce pas sur l'opportunité de la loi qui lui est déférée. S'agissant du texte que je viens d'évoquer, il n'appartient évidemment pas au Conseil constitutionnel de déterminer la politique migratoire de la France. Sa mission est seulement de s'assurer, dans le respect de la hiérarchie des normes, que le texte voté par le Parlement ne contrevient pas aux dispositions de la Constitution.

Ce peut être au regard de son texte même, par exemple lorsque les recours qui lui sont soumis portent sur la procédure qui a été suivie devant les deux chambres. Je relèverai d'ailleurs que tel était le cas pour les deux lois que j'ai évoquées sur la réforme des retraites ou sur l'immigration. Mais ce peut être aussi au regard des droits et libertés affirmés par des Déclarations qui appartiennent à ce que l'on qualifie de « *bloc de constitutionnalité* ». La Constitution de 1958 n'affirme elle-même que peu de droits et de libertés, tout au plus mentionne-t-elle le droit de suffrage ou la garantie des libertés individuelles en faisant de l'autorité judiciaire leur garant. Les droits et libertés sont énoncés dans la Déclaration des droits de l'homme et du citoyen de 1789, s'agissant des droits politiques et individuels, le Préambule de la Constitution de 1946 pour les droits économiques et sociaux. Depuis 2005, s'y ajoute les droits proclamés par la Charte de l'environnement. Or, le Conseil constitutionnel, dans une décision fondatrice du 16 juillet 1971 a jugé que son contrôle s'exerçait aussi à l'égard de ces textes, y compris les principes fondamentaux reconnus par les lois de la République, comme, par exemple, la liberté d'association qui était en cause dans la décision de 1971.

Même si cette décision du Conseil a plus de cinquante ans, elle continue à être régulièrement contestée par ceux qui jugent qu'elle donne trop de pouvoirs au Conseil constitutionnel et dénoncent notamment le fait qu'il doit évidemment interpréter ces textes historiques pour définir leur portée contemporaine.

Le Conseil constitutionnel peut également, depuis la réforme constitutionnelle du 23 juillet 2008, *être saisi a posteriori*, c'est-à-dire après l'entrée en vigueur de la loi. Tout citoyen, ou plutôt tout justiciable, peut dans le cadre d'une instance dans laquelle il est partie, soutenir qu'une disposition législative susceptible de lui être appliquée porte atteinte aux droits et libertés que la Constitution garantit. Dans ce cas, il peut saisir le Conseil constitutionnel sous réserve que le Conseil d'Etat ou la Cour de cassation, selon la nature de l'instance, juge que la disposition contestée s'applique bien au litige, qu'elle n'a pas déjà été soumise au contrôle du Conseil constitutionnel et que la question soulevée est sérieuse. Il s'agit de la question prioritaire de constitutionnalité, plus communément dénommée QPC. Le Conseil exerce, dans cette circonstance, le même contrôle que celui qu'il pratique dans le cadre du contrôle *a priori*, à l'exception toutefois de celui portant sur la procédure d'examen de la loi contestée.

Néanmoins, en raison du fait que la loi contestée ne vient pas d'être adoptée, l'enjeu de ses décisions n'est pas comparable. La contestation peut porter sur une loi adoptée par une majorité différente de celle qui est au pouvoir au moment où le recours est formé et peut même porter sur une loi très ancienne. Par conséquent, une éventuelle décision de censure n'apparait pas nécessairement comme un désaveu pour le Gouvernement ou la majorité. De ce fait, sauf bien sûr dans certains cas

particuliers, les décisions du Conseil rendues sous cette forme suscitent nettement moins de polémiques politiques.

2) ***Le contrôle du Conseil constitutionnel s'exerce toujours au regard du droit sans prise en compte de considérations politiques***

Qu'il intervienne dans le cas du contrôle *a priori* ou du *contrôle a posteriori*, le Conseil constitutionnel juge toujours en droit, sans prendre en compte de considérations politiques.

Comme cela ressort des réponses qui ont été faites par le Conseil au questionnaire adressé aux différentes cours, la notion de « *déférence* », d'ailleurs ignorée du vocabulaire juridique français, n'a pas sa place dans la pratique ni dans la jurisprudence du Conseil constitutionnel. Pour celui-ci, la hiérarchie des normes, au sommet desquelles se trouve la Constitution, implique que les lois lui soient conformes, puisqu'il juge que « *la loi n'exprime la volonté générale que dans le respect de la Constitution* » (Décision n° 85-197 du 23 aout 1985).

Néanmoins, le questionnaire mentionnant que « *la déférence judiciaire représente un outil juridique inventé par les juges pour maintenir la séparation des pouvoirs et s'abstenir d'intervenir dans des affaires qu'ils considèrent aller au-delà de leur expertise ou de leur légitimité à trancher* », il apparait possible de relever dans la jurisprudence du Conseil des éléments qui, sans faire prévaloir en aucune manière la politique sur le droit, prennent en compte le respect de la séparation des pouvoirs.

En premier lieu, on retrouve dans beaucoup des décisions du Conseil constitutionnel une formulation qui n'est pas seulement rhétorique, selon laquelle la Constitution « *ne* [lui] *confère pas un pouvoir général et de décision identique à celui du Parlement* ». Il est frappant de constater que cette formule est apparue pour la première fois dans sa décision n° 74-54 DC du 15 janvier 1975 portant sur la loi relative à l'interruption volontaire de grossesse. C'est principalement sur ce que l'on qualifie de « *questions de société* », qui concernent notamment l'état des personnes ou la bioéthique que le Conseil « *a toujours veillé à ne pas entrer dans un débat qui est philosophique et politique* » (Commentaire de la décision n° 2010-2 du 11 juin 2010).

Je citerai à cet égard deux décisions très emblématiques rendues par le Conseil constitutionnel sur un même sujet, parce qu'elles établissent indiscutablement qu'il ne se prononce pas en opportunité sur le fond des questions qui lui sont renvoyées. S'agissant de ce qu'on appelle communément « le mariage pour tous », il a rendu deux décisions successives. D'abord, par sa *décision n° 2010-92 QPC du 28 janvier 2011*, il a écarté un recours tendant à lui faire notamment reconnaitre que l'article 75 du code civil portait atteinte au principe d'égalité parce qu'il résultait de ses dispositions que le mariage est l'union d'un homme et d'une femme. Constatant qu'il existait une différence de situation entre les couples constitués d'un homme et d'une femme et ceux constitués de deux personnes de même sexe, il a jugé qu'il n'appartenait pas au Conseil de substituer son appréciation à celle du législateur sur la prise en compte de cette différence de situation. Quelques années plus tard, par sa *décision n° 2013-669 DC du 17 mai 2013* sur la loi ouvrant le mariage aux couples de même sexe, reprenant cette même argumentation sur des dispositions opposées, il a constaté que le législateur avait estimé que la différence entre les couples formés d'un homme et d'un femme ou les couples de personnes de personnes de même sexe ne justifiait pas que ces derniers ne puissent accéder au mariage et a jugé, à nouveau, qu'il n'appartenait pas au Conseil de substituer son appréciation à celle du législateur sur la prise en compte, en matière de mariage, de cette différence de situation. Ces deux décisions présentent également l'intérêt de montrer que le Conseil applique les mêmes principes jurisprudentiels dans le cadre du contrôle *a priori* et *a posteriori*.

Sans entrer dans le détail pour ne pas être trop longue, je relèverai que le Conseil constitutionnel fait preuve de la même réserve lorsqu'il est saisi de questions d'ordre scientifique et technique, sur lesquelles il ne dispose pas nécessairement des compétences nécessaires, d'autant moins que les délais très contraints dans lesquels il doit rendre ses décisions ne lui permettent qu'exceptionnellement de recourir à des expertises extérieures. En ces matières, il fait généralement référence « *à l'état des connaissances et des techniques* » et se limite à exercer un contrôle restreint de l'erreur manifeste sur les choix opérés par le législateur.

Un autre aspect de la jurisprudence du Conseil constitutionnel marque le respect qu'il manifeste à l'égard de la compétence du législateur. Quand une disposition est contestée devant lui, que ce soit en contrôle *a priori* ou en contrôle *a posteriori*, le Conseil constitutionnel s'est reconnu la possibilité, à côté de la censure ou de la validation pure et simple, de formuler des réserves d'interprétation. Il s'agit de prévoir qu'une disposition contestée ne peut être jugée conforme à la Constitution que sous la réserve qu'elle soit interprétée d'une certaine façon. Mais, là encore, il fait preuve dans sa jurisprudence de la plus grande modération. Il s'interdit absolument les réserves qui seraient excessivement « constructives », c'est-à-dire qui inscriraient dans la loi des conditions que le législateur n'a pas jugé utile d'inscrire, voire qu'il a expressément écartées. Selon la formule d'un ancien membre du Conseil constitutionnel, le doyen Vedel, le Conseil dispose de la gomme mais il ne possède pas le crayon !

Il me semble enfin nécessaire d'évoquer un dernier aspect de la jurisprudence du Conseil constitutionnel qui marque le réalisme dont il fait preuve, non pour des raisons politiques mais pour prendre en compte les conséquences de ses décisions. Lorsqu'il est saisi dans le cadre du contrôle *a posteriori*, les dispositions qu'il juge inconstitutionnelles sont normalement abrogées à compter de la date de sa décision mais l'article 61-1 de la Constitution lui donne la possibilité de la fixer à une date ultérieure. C'est une pratique à laquelle il recourt lorsque les conséquences d'une censure immédiate seraient manifestement excessives. On peut citer, à cet égard, l'exemple emblématique de sa décision n° 2010-14/22 du 30 juillet 2010 par laquelle il a censuré le régime de la garde à vue en raison des garanties insuffisantes qu'il comportait. Sauf à priver la police de cette arme indispensable et, le cas échéant, à mettre en cause des procédures judiciaires en cours, il est apparu indispensable de reporter l'effet de cette décision. Il faut souligner que dans ce type de situation, le Conseil fixe la date d'effet de sa décision en prenant en compte le temps nécessaire pour que le Parlement puisse modifier la loi déclarée inconstitutionnelle.

Pour conclure, je voudrais souligner que j'ai essayé de traiter le sujet de mon intervention, droit et politique dans la jurisprudence des cours constitutionnelles, en prenant en compte le thème général de nos débats sur la « déférence » judiciaire.

Mais, plus généralement, il faut souligner que les décisions des cours constitutionnelles suscitent nécessairement la polémique et souvent au nom de leur prétendue politisation. Cela semble inévitable puisque leur pouvoir est considérable : elles peuvent, en effet, remettre en cause des décisions prises par le Parlement, classiquement considéré comme le représentant du peuple. C'est d'ailleurs pourquoi, il a été si difficile en France, pays de légicentrisme, inspiré par une conception rousseauiste de la loi, de mettre en place et d'élargir un contrôle de constitutionnalité des lois.

Cela doit donc inciter les cours constitutionnelles à la rigueur dans leurs décisions et les conduire à éviter tout ce qui pourrait apparaitre comme un empiètement sur les autres pouvoirs. Pour autant cela ne doit pas les conduire à l'autocensure car elles tirent la légitimité de leur intervention de la Constitution elle-même.

A cet égard, on ne peut que rappeler que les cours constitutionnelles n'ont pas vraiment le dernier mot. Il est toujours loisible au pouvoir constituant d'intervenir pour contrecarrer leur jurisprudence. Il est arrivé en France qu'il le fasse, sur les questions de politique européenne mais aussi sur le sujet de la parité. Mais il faut bien garder à l'esprit que lui seul a compétence pour le faire.

Séance plénière III.

«Garantir les principes constitutionnels pendant l'état d'urgence»

Plenary Session III.

"Safeguarding constitutional principles during the state of emergency"

Plenarsitzung III.

„Wahrung der Verfassungsgrundsätze im Ausnahmezustand"

Prof. Dr. Luc LAVRYSEN

President of the Belgian Constitutional Court

The COVID-19 Case Law of the Belgian Constitutional Court[31]

The Belgian Constitution, adopted in 1831, was not designed to deal with crisis situations. More so, the possibility of deviating from constitutional provisions, for example in a crisis situation, is explicitly prohibited by the Constitution. According to Article 187, the Constitution cannot be suspended in part nor in full. Consequently, no state of emergency can be proclaimed to permit a suspension of rights and freedoms protected by the Constitution.

Having said that, I could end my presentation. But off course, the country has witnessed some crisis situations, including the COVID 19- pandemic, and the Court has judged different cases of legislation adopted to combat the pandemic.

In its COVID-19 case law, the Constitutional Court repeatedly stated that the safeguard of Article 187 is closely linked with the fundamental rights guaranteed in Title II of the Constitution. However, it does not oppose a set of constraining measures by which the competent legislature responds in a comprehensive and far-reaching manner to an actual emergency such as the COVID-19 pandemic.[32] A mere limitation of a fundamental right does not in itself violate Article 187 of the Constitution, as long as the judicial review provided for in the Constitution remains unaffected.[33]

The urgent measures in response to the pandemic were primarily taken by ministerial decree, based on the Civil Security Act. These ministerial decrees are beyond the Court's jurisdiction which is limited to Acts of parliament (primary legislation), as opposed to administrative acts and regulations, including royal and ministerial decrees (secondary legislation).[34] The latter can be challenged before the Council of State (directly, through an action for annulment)[35] and by the ordinary courts and tribunals, including the Court of Cassation (indirectly, through a plea of illegality). However, any question on the constitutionality of the legal basis of secondary legislation that may rise before the ordinary and administrative courts should be referred to the Constitutional Court.

In judgment 109/2022 the Constitutional Court ruled that the power delegated to the Minister of the Interior does not violate the principle of legality in criminal matters. Since various risk and emergency situations are involved which cannot be described in full and in detail, the legislator was entitled to adopt broad wording so that appropriate action could be taken in respect of those risks. Moreover, the Minister does not have unfettered power, since it is sufficiently circumscribed by the Civil Security Act. More specifically, the Act clearly defines the essential elements of the offence, consisting of the refusal or failure to comply with the ministerial measures ordered under that Act.[36] By contrast, the Court considered it unjustified to prohibit the courts and tribunals from taking account of mitigating

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31 Paper based on J. THEUNIS, "The COVID-19 Case Law of the Belgian Constitutional Court. Paper presented at the 20th Meeting of the Joint Council on Constitutional Justice, held in Sofia on 24-25 April 2023", https://www.const-court.be/public/stet/f/stet-2023-001f.pdf

32 Constitutional Court (16 February 2023) ECLI:BE:GHCC:2023:ARR.026, B.31.2.

33 Constitutional Court (2 March 2023) ECLI:BE:GHCC:2023:ARR.033, B.19.1-B.20.4; Constitutional Court (27 April 2023) ECLI:BE:GHCC:2023:ARR.068, B.19.2-B.19.3; Constitutional Court (17 May 2023) ECLI:BE:GHCC:2023:ARR.076, B.20.2-B.20.3.

34 Constitutional Court (26 November 2020) ECLI:BE:GHCC:2020:ARR.161, B.2-B.3; Constitutional Court (1 July 2021) ECLI:BE:GHCC:2021:ARR.101, B.2-B.3.

35 E.g. Council of State (30 October 2020), No. 248.819 (on the curfew).

36 Constitutional Court (22 September 2022) ECLI:BE:GHCC:2022:ARR.109, B.2-B.8.4.

circumstances when assessing violations of those measures.[37]

Direct delegation of regulatory powers to the minister of the interior, rather than to the government,[38] may be justified if objective reasons exist that require urgent action by the executive branch, and only to the extent that any delay may aggravate the existing risk or emergency situation.[39]

In response to growing criticism in academic circles of governing by ministerial decrees, federal parliament finally passed the Pandemic Act of 14 August 2021, designed to effectively address epidemic emergencies. The Act allows the King – so the Federal Government - to declare the pandemic state of emergency for up to three months, renewable for up to three months at a time. Parliament must ratify each declaration and prolongation within 15 days. From now on, it is clearly stated that administrative police measures necessary to prevent or limit the consequences of the emergency for public health should be taken by royal decree and are thus a collective decision of the government. However, in case of imminent danger the Minister of the Interior can exercise these powers alone and take all necessary administrative police measures that "do not tolerate any delay". These measures must be submitted to the Council of Ministers for consultation. Moreover, in the event local circumstances require so, the governors of the provinces and mayors of municipalities can take – in accordance with possible instructions of the Minister of the Interior – measures applicable to their own territory that are stricter than the royal or ministerial decrees.

By judgment 33/2023, the Constitutional Court dismissed the ten actions for annulment of the Pandemic Act, lodged by a number of citizens, four members of parliament and some non-profit organisations. The above delegations fall within the constitutional limits outlined in judgment 109/2022. Apart from their limitation in time, the emergency measures must be necessary, appropriate and proportionate to the intended purpose. Article 5 of the Pandemic Act provides a list of possible categories of measures that can be taken (such as social distancing, restrictions for gatherings, etc.). It is clear from the general design of the Act that the legislator intended to establish a reasonable balance between, on the one hand, the protection of individual fundamental rights and freedoms and, on the other, the public interest pursued by the restrictions. However, since the Act leaves it up to the King, the Minister of the Interior and governors and mayors to concretely determine what administrative police measures should be taken, the Court does not review the authorised measures but only the delegations granted by the Act. It is up to the Council of State and the ordinary courts and tribunals to verify in concrete cases whether a specific measure taken under the Act complies with the constitutional guarantees and fundamental freedoms. These judicial bodies will decide whether the measures comply with the principles of legality, legitimacy and proportionality. That judicial review also includes verifying whether the conditions for delegation have been met.[40]

In July 2020, after a period of so-called "lockdown light", restrictions on physical contact between individuals were relaxed and travelling became possible again. In light of this new phase in the COVID-19 crisis, measures were taken to counter the associated risks of further spread of the virus, including quarantine measures and contact tracing. More specifically, these measures concern mandatory isolation and self-isolation, medical examination and medical testing, the compliance of which is monitored and non-compliance is punishable. Other measures related to data processing of certain categories of persons in the context of enforcement and contact tracing. Several actions for annulment were filed against those rules, by both individuals and a non-profit organisation aiming to promote human rights.[41] Judgment 26/2023 of the Constitutional Court rules is of particular

37 Constitutional Court (22 September 2022) ECLI:BE:GHCC:2022:ARR.109, B.20-B.26.

38 According to Article 108 of the Constitution regulatory powers should be exercised by royal decree.

39 Constitutional Court (22 September 2022) ECLI:BE:GHCC:2022:ARR.109, B.8.2.

40 Constitutional Court (2 March 2023) ECLI:BE:GHCC:2023:ARR.033, B.16, B.50.1-B.62. A suspension request by some applicants was dismissed (due to expiry of time limit), Constitutional Court (9 June 2022) ECLI:BE:GHCC:2022:ARR.080.

41 A suspension request by some applicants was dismissed (due to lack of proof

importance on three issues. Referring to the case-law of the European Court of Human Rights (ECtHR), it does not qualify this measure as a deprivation of liberty within the meaning of Article 5(1) of the European Convention on Human Rights (ECHR), but as a restriction of freedom of movement within the meaning of Article 2 of Protocol 4 to the ECHR. Such restriction is, furthermore, justified and proportionate given that, in light of the infectiousness of COVID-19, (self-)isolation is a measure necessary for the protection of public health and the health of others. The Court does note, however, that such a restriction of freedom must be subject to judicial review, which was indeed available.[42]

Thirdly, the Court finds a violation of the principle of legality in criminal matters. For a criminal law to be foreseeable and precise, the elements that determine the scope of the criminalisation must be set out in an official text, which is published in a way that allows any person to take cognisance of it at any time. In principle, such publication is done in the Belgian Official Gazette. For the interpretation of the terms "high-risk area" and "red zone", it was referred to the places designated by the Foreign Affairs Administration. However, the legislation at stake did not contain the link to the website "www.info coronavirus.be" where the lists of high-risk areas and red zones were published. In relation to those terms, therefore, the Court finds a breach of the principle of legality.[43]

By judgment 68/2023 the Constitutional Court ruled on multiple actions for annulment against the COVID Safe Ticket legislation.[44] While the contested provisions did not interfere with the freedom of movement, they did fall within the scope of the right to private life. Overall, the Constitutional Court considered the COVID Safe Ticket legislation necessary to protect the life and health of the people concerned and of other people in society, as well as to avoid the need to once again restrict activities or close certain industries. In that regard, the Court points to the positive obligation, by virtue of Articles 2 and 8 of the ECHR, to take appropriate measures to protect the life and health of those within their jurisdiction.[45] However, the Court did not accept that, as part of the COVID Safe Ticket legislation, no clear criteria for the optional use of the COVID Safe Ticket in hospitals, residential care centers, rehabilitation hospitals and facilities for persons with disabilities were established. Consequently, for visitors to those residential care facilities for vulnerable people, it was not sufficiently foreseeable whether the use of the COVID Safe Ticket was mandatory or not. On that point the legislation violated the right to private and family life.[46]

In de midst of the second COVID-19 wave, the federal parliament passed an Act to allow nursing activities to be carried out in the pandemic by persons not legally qualified for that purpose. The Act of 6 November 2020 was in force until 1 April 2021, but the King could extend its application for up to six months. By judgment 169/2020 the Constitutional Court dismissed the suspension claim.[47] In a second judgment, on the merits, the Court ruled that neither the principle of equality nor the fundamental right to health protection were violated. The Act imposed a strict set of cumulative conditions for non-nursing staff (shortage of nurses, complexity of the activities, supervision of a coordinating nurse…), so there is no equal treatment of different situations as the applicants argued. Furthermore, the contested Act aimed to relieve the overburdened healthcare staff during the

of urgency), Constitutional Court (10 June 2021) ECLI:BE:GHCC:2021:ARR.088 and ECLI:BE:GHCC:2021:ARR.089.

42 Constitutional Court (16 February 2023) ECLI:BE:GHCC:2023:ARR.026, B.32-B.48.

43 Constitutional Court (16 February 2023) ECLI:BE:GHCC:2023:ARR.026, B.49-B.55.

44 Two cases were decided by the reduced chamber (panel of three, consisting of one president and two judges), because of manifest inadmissibility (Constitutional Court, 3 February 2022, ECLI:BE:GHCC:2022:ARR.020) or lack of jurisdiction (Constitutional Court, 31 March 2022, ECLI:BE:GHCC:2022:ARR.053).

45 With reference to ECtHR (Grand Chamber, 21 April 2021) Vavřička and Others v. Czech Republic, ECLI:CE:ECHR:2021:0408JUD004762113, § 282.

46 Constitutional Court (27 April 2023), ECLI:BE:GHCC:2023:ARR.068, B.42-B.47.

47 Constitutional Court (17 December 2020) ECLI:BE:GHCC:2020:ARR.169, B.2-B.5.5.

pandemic, for a limited period of time. As to the right to health protection, the Court concluded that the Act enhances rather than diminishes that right. By judgment 56/2021 the action for annulment was rejected.[48]

At a later stage of the pandemic, by an Act of 28 February 2022, the legislator allowed the pharmacists to administer COVID-19 vaccinations, and in a second time, also vaccinations against influenza. The action for annulment of that law, brought by the Belgian association of physicians, was dismissed by the Court with a judgment of 22 February 2024. The Court held that the challenged act provides sufficient guaranties so that the vaccination meets the necessary quality standards, due to compulsory training of pharmacist that administer the vaccinations, precise protocols that must be followed and the need to dispose of a specific suitable vaccination room that guarantees also the privacy of the patients.

Coming back to the main theme of the conference it is clear that crisis legislation is not exempt from review by the Constitutional Court of Belgium. The COVID 19 pandemic, was caused by a new virus, with, certainly in the first period, not very well known ways of transmission. It is a virus that gave rise to many variants, with varying degrees of infectivity and virulence, and uncertainties about the best mitigation measures to apply. Those factors were inciting the Court to apply deference towards the legislators and policy makers that had to act in a situation of urgency, most of the time on the basis of incomplete information and confronted with scientific uncertainty as to the risks and the best way to contain the spread of the virus and to handle the shortages of medical care at some times. The Court had also to take into account that it was judging the proportionality of the legislative measures at stake, many months later – around 1 year later - *ex post*, at a moment that one had meanwhile experienced the further evolution of the pandemic, with better available knowledge and better prevention and treatment methods. So, the Court had to place itself back in the time the legislator had acted, with the information available at that time. That was another reason that incited the court to apply deference.

48 Constitutional Court (1 April 2021) ECLI:BE:GHCC:2021:ARR.056, B.4-B.16.

José JOÃO ABRANTES

President of the Constitutional Court of Portugal

Safeguarding Constitutional Principles in the state of emergency

I am going to try to give you an account of the way in which the Constitutional Court of Portugal has done its job of safeguarding constitutional principles within the state of emergency. I shall look specifically at our pandemic-related jurisprudence.

The Constitutional Court of Portugal has handed down just under 40 Covid19-related judgments. Only 3 of those judgments (nº 334/2022, nº 196/2023 and nº 326/2023) have been handed down by the Court sitting *en banc*, in abstract review proceedings. Most were produced, in incidental review proceedings, by one of the 3 chambers of the court.

The judgments can be divided into four broad categories:

a) Those which address issues concerning the allocation of powers to introduce or amend criminal offences in response to emergencies between Parliament and the Executive;
b) Those which assess the conformity with the Constitution of measures which made confinement or prophylactic isolation compulsory for passengers flying into Portugal aboard certain flights;
c) Those which control the conformity with the Constitution of measures establishing a mandatory confinement period for individuals under active surveillance by the health authorities;
d) Those which focused on the procedural effects of various Covid19 pandemic-related measures

1. Judgments which address issues concerning the allocation of powers to introduce or amend criminal offences in response to emergencies (state of emergency and state of calamity) between Parliament and the Executive.

The Court has handed down 8 judgments which fall under this heading between 2021 and 2022. The bulk of these cases deals with the offence of disobedience.

The gist of this set of judgments is that, for reasons of necessity (in situations in which a state of exception has been declared), the executive acted as an extraordinary legislator.

The exercise of emergency powers by the executive is, in such instances, both judicially reviewable (on proportionality grounds) and subject to political control by both the President and Parliament.

1.1.

In Judgments n. **352/21 and 193/2022**, the Court decided that a legal provision which increased the severity of a sanction attached to the offence of disobedience in cases of breach of an order of home confinement (which an ordinary court in Lisbon had refused to apply on unconstitutionality grounds) was **not unconstitutional**.

In another set of judgments (Judgments n. **921/2021 and 617/2022**), the Court assessed the conformity with the Constitution of a seemingly new disobedience offence introduced by the executive, in light of the rule of law requirement of the foreseeability of criminal offences (art. 29, nº 1 of the Constitution). The Court declared that the executive had not introduced a new offence when it established that breaching the duty of confinement amounted to disobedience. By implication, the Court said, the executive had not acted *ultra vires*.

In abstract review proceeding (Judgment nº **196/2023**), the Court confirmed that the norma-

tive provision at stake is **not unconstitutional**.

1.2.

In another judgment (Judgment nº **350/2022**), the Court specifically addressed the question whether the provisions (created by the executive in the context of a declared state of calamity – which is less severe than a declaration of a state of emergency) imposing on all retail and other service businesses the duty to close at 8:00 pm (the breach of which was an instance of the offence of disobedience) were partly or wholly innovative or whether they were (in the Court's own terminology) "a mere replication or non-innovative concretisation of another norm already in force in the legal system". In this case, the Court declared the **unconstitutionality** of the relevant provision stating that the executive had acted *ultra vires* when it introduced to the legal system "elements which were central to the definition of the" offence.

1.3.

The Court later revisited the question whether the executive had invaded Parliament's sphere of exclusive competence when it established a more severe sanction attached to acts of disobedience against legitimate legal directives.

In Judgment nº **477/2022**, the Court noted that "the declaration of a state of emergency cannot affect the constitutional rules of competence and functioning of constitutional bodies" (art. 19, nº 7, CRP). The Court concluded that it was faced with a case of **unconstitutionality** for breach, by the executive, of the domain of exclusive competence of Parliament. The more general conclusion was that "the separation of powers and the delimitation of competences of the constitutional bodies constitute negative limits to the constitutional exception regime. Such negative limits remain intact throughout the officially determined period of constitutional exception."

In this judgment, the first chamber ruled in a different direction to the one the Court (sitting as the third chamber) had followed in Judgment nº 352/2021.

Subsequently, in Judgment nº **619/2022**, the second chamber of the Court noted that "in situations of constitutional exception, the executive is invested in the role of a true executor of prior normative choices imposed on it by primary decision-making bodies." The Court stressed that Parliament's domain of exclusive competence remains intact within a state of constitutional exception and concluded that the executive has, in the exercise of its powers of execution of a declared state of emergency, no legislative power to introduce or expand criminal offences and attached sanctions. The provision under scrutiny was declared **unconstitutional** for breaching art.19º, nº 7, of the Constitution.

In this judgment, too, the second chamber of the Court distanced itself from the ruling of the 3rd Chamber in Judgment nº **352/2021**.

1.4.

Faced with conflicting judgments on the constitutionality of the same normative provisions, the Court has sat *en banc* to judge a request for abstract review lodged by the Public Prosecutor. The ensuing judgment **(**nº **326/2023)** was one of **unconstitutionality** for breach of article 19º, nº7 ('suspension of the exercise of rights'), and article 165º, nº1, c) (on the scope of Parliament's exclusive legislative power) of the Constitution.

2. Those which assess the conformity with the Constitution of measures which made confinement or prophylactic isolation compulsory for passengers flying into Portugal aboard certain flights.

There are 10 judgments in this category, handed down between 2020 and 2022. A significant number of the cases concerned applications for *habeas corpus*.

2.1.

The Court issued a seminal judgment under this heading (nº **424/2020**) when it declared **un-**

constitutional a number of provisions issued by the Regional Government of the Azores islands (one of the two Autonomous Regions of Portugal) in light of the right to liberty (protected by art. 27º, n. 1, of the Constitution) and in light of art. 165º, n. 1, b) of the Constitution, which identifies areas of exclusive parliamentary competence (some of which can be delegated to the executive).

The scrutinised provisions imposed a mandatory confinement period of 14 days on passengers landing in the Azores. The Court concluded that such a compulsory confinement measure amounted to a deprivation of personal freedom by authorities acting outside a declared state of emergency fell under the domain of exclusive competence of Parliament, had not been delegated and could only have been delegated to the executive (not to the regional government of the Azores).

2.2.

This reasoning formed the basis, with a few variations, for three further judgments (n. **90/2022, 352/2022 and 510/2022**), in which the Court established a clear line of reasoning that the issuing of the provision under scrutiny (which established a procedure for the judicial validation of the measures of compulsory quarantine or prophylactic isolation for passengers travelling to Azores from countries identified by the WHO as areas of active community transmission or with active transmission chains of the SARSCov-2 virus) by the Azorean regional government amounted to regulation within an area of parliamentary exclusive competence which had not been delegated and, in any case, could not be delegated to the regional government. So, once again, the Court declared that the Regional Government of the Azores had acted *ultra vires*.

2.3.

The Court issued its first **material unconstitutionality** judgments shortly after (n. **464/2022 and 465/2022**). In both cases, two provisions issued by the Council of Ministers were refused by ordinary courts within habeas corpus proceedings started by passengers on flights from Brazil who had been subjected to compulsory isolation shortly after landing in Portugal. The Court declared that such forced confinement amounted to an actual deprivation of liberty, not merely a restriction of the personal freedom of those affected by it. The constitutional provision in point was, once again, art. 27 of the CRP. The Court added that any measure entailing the deprivation of liberty of an individual must either be put forward or confirmed by a court of law. In addition to the *ultra vires* judgment it had passed in previous cases, the Court also declares the provisions invalid for directly breaching the right to liberty protected by art. 27 of the Constitution.

3. Those which control the conformity with the Constitution of measures establishing a mandatory confinement period for individuals under active surveillance by the health authorities.

A total of 10 judgments were handed down by the Court under this heading. All in 2022. One of the Court's judgments in this category was passed by the Court sitting *en banc* (nº 334/2022). It was decided that all 13 justices should sit in session due to the relevance and complexity of the issues at stake.

In one judgment (nº **87/2022**), the Court decided that a provision, adopted in the context of a declared state of emergency, which imposed mandatory confinement on individuals who were under the active surveillance of the health authorities was not unconstitutional. The provision at stake was not, the Court stated, "substantively innovative".

A subsequent string of judgments (including judgment nº **334/2022**, the one handed down by all 13 justices) confirms the line of argument followed in judgment nº **90/2022** (mentioned under the heading of category (ii)).

More substantive judgments of **unconstitutionality** followed, with the Court deeming particular provisions unconstitutional for breaching art. 27º of the Constitution. In judgments nº**489/2022 and 490/2022**, the Court established a framework for determining which funda-

mental rights are specifically affected by measures of precautionary confinement and highlighted two possible approaches:

1. The relevant constitutional criterion for assessing confinement measures is the *fundamental right to liberty* protected by art. 27 of the CRP. On this approach, the relevant distinction is the one between '*restrictions to liberty*' (allowed by para 1 of art. 27) and total (or partial) *deprivation of liberty* (exhaustively listed in paras 2 and 3).
2. An alternative approach is based on the possibility of distinguishing between different sorts of confinement measures. Those which directly affect personal freedom would fall under art. 27, whereas those specifically affecting individual freedom of movement would fall under art. 44 of the CRP.

4. Those which focused on the procedural effects of various Covid19 pandemic-related measures. These can, in turn, be divided into two categories:

- **a)** Constitutional scrutiny of provisions suspending the limitation periods of criminal and administrative offences - 3 judgments handed down in 2021.
- **b)** Constitutional control of provisions allowing the cross-examination of witnesses by videoconference in judicial proceedings - judgment n**º 738/2021**.

In **conclusion**:

Despite the occurrence of conflicting judgments in incidental review proceedings, the Court has been consistent in its approach to the various types of pandemic-related cases on which it has been asked to pass judgment.

There is a particular concern for the *ultra vires* nature of measures adopted by the executive or by regional governments (which suggests a broader concern with the separation and distribution of powers between Parliament and the executive).

Only a very few times the Court has ventured beyond considerations of competence and comity and has also advanced substantive criteria for assessing the conformity of particular measures with constitutionally protected rights.

The jurisprudential path followed by the Court in the sample of judgments is, for the most part, clear: the Court has been zealous in its shielding of the doctrines of separation of powers and comity within the Portuguese constitutional system in the face of the unprecedented challenges of the COVID pandemic.

Ivan FIAČAN

President of the Constitutional Court of the Slovak Republic

Constitutional Challenges and Pandemic Response in Slovakia

The first case of Covid-19 in Slovakia was confirmed on March 6, 2020. It involved a father whose son had recently returned from Venice. At the time, Slovakia was undergoing a government transition following general elections a week earlier. As cases surged, the outgoing government declared a state of emergency on March 16 and implemented the first preventive measures. However, the new ruling coalition immediately had to face an unprecedented crisis, unlike anything seen in the entire history of independent Slovakia.

The legal framework in Slovakia offered some tools to address the crisis, although they were not specifically tailored for pandemics. Firstly, the Constitution allowed for extraordinary constitutional regimes during exceptional times. A separate constitutional statute from 2002, known as the Crisis Constitution, authorized the cabinet of ministers to declare a state of emergency to address a pandemic and temporarily limit certain human rights — an authority normally reserved for parliamentary laws. In the times of sudden crises, such streamlined decision-making is obviously essential. However, the law originally limited the state of emergency to 90 days with no mention of any extension. This was because the original 2002 text primarily addressed local natural and industrial disasters, situations typically resolved within 90 days. The term "pandemic" was added to the list shortly after the 2005 bird flu scare, but little consideration was given to the duration of 90 days.

As the pandemic was hitting the hardest at the end of 2020, an amendment had to be passed allowing the Government to extend the state of emergency even repeatedly, subject to subsequent parliamentary approval. Additionally, the Constitutional Court was empowered to review the regularity of each declaration or extension of the state of emergency and any associated decisions. The Court upheld the state of emergency in two instances, affirming sufficient grounds for its declaration.

Secondly, the Public Health Protection Act provided measures to combat infectious diseases. Although not tailored for pandemics initially and primarily focused on local epidemics of flu and other common infections, it gave public health authorities useful powers such as closing businesses, banning public events and imposing quarantines. Since the beginning of the pandemic, the law has been amended 16 times.

In the early stages, there was a belief that tracking the movements of infected individuals could help contain the virus. While many countries focused on developing voluntary tracking apps for smartphones, Slovakia took a different approach. The legislature passed a law requiring telecom providers to retain location and identification data for all users, which would then be accessible to employees of the Public Health Authority.

This law faced opposition from a group of MPs who challenged it before the Constitutional Court, seeking its suspension. The Court did indeed suspend several provisions. Firstly, it questioned why government employees needed access to telecom data to send SMS notifications when telecom providers could perform this task themselves. Secondly, the law's vague language, particularly the reason for accessing the data stated as "the identification of users for the purposes of life and health", raised concerns. Coupled with the lack of guarantees against data misuse, the Court deemed it necessary to suspend this provision.

In response to the Court's criticism, the Parliament enacted new legislation that addressed these concerns and included the necessary legal safeguards.

Similar to other countries, Slovak authorities decided to close down most non-essential businesses early in the pandemic. These decisions were made by the Public Health Authority referred to as "measures" by the text of the law. Some service providers, especially gym owners, challenged these mea-

sures in constitutional complaints. However, in Slovakia, constitutional complaints have a subsidiary role. They can only be filed after trying all other legal options. The contested measures were seen by the Court as so-called hybrid administrative acts, thus making them ineligible for direct constitutional challenge. The complaining businesses should have first turned to administrative courts, which is why the Court had to declare the complaints inadmissible.

However, this time, the legislature's response complicated matters for affected businesses and individuals. A new law was passed shortly after these court decisions, changing the legal nature of the Public Health Authority's measures to purely normative acts. This highlighted a flaw in the Slovak constitutional complaint system: unlike many other European countries, normative acts cannot be challenged through constitutional complaints. This left individuals with no legal recourse against the closures.

During the first wave of the pandemic, public health authorities took various steps to stop the virus from spreading. This included placing people returning from abroad into quarantine in state-owned facilities. Some individuals who had to spend weeks in these facilities and were later billed for their stays complained to the Ombudsperson. She then brought a set of challenges to the Public Health Protection Act to the Constitutional Court, which became a significant Covid-related case in December 2021.

The Court ruled that the parts of the law allowing involuntary quarantines in state-owned facilities were unconstitutional. These measures were seen as amounting to deprivation of liberty because the people were isolated from their homes and closely supervised. Such a severe interference with personal liberty may only be constitutionally acceptable under strict conditions. First, authorities must carefully consider less severe options and only resort to involuntary quarantine if necessary. Second, there need to be safeguards to prevent abuse of power.

Under these safeguards, anyone deprived of liberty must be informed promptly and clearly of the reasons and of the possibility of judicial review. The person concerned must be able to initiate such judicial protection in due time and the relevant court must decide swiftly, and must be empowered, if the conditions for deprivation of liberty are not met, to order immediate release. The law must also specify the maximum period someone can be deprived of their liberty and include a reliable system to regularly check if there are still valid reasons for their detention. The Court found that the parts of the law in question did not meet these requirements.

Once a significant portion of the Slovak population had been vaccinated or had recovered from Covid-19, the virus no longer posed the serious threat it had for the past two years. This experience prompted me and my colleagues to consider the potential roles of constitutional courts in upholding the rule of law and human rights while also helping to prevent similar crises in the future. In our experience, especially within the Slovak constitutional framework, it is primarily the collaboration of political, executive, and epidemiological experts that must balance various constitutional values. Due to the rapidly changing nature of the pandemic, conducting a detailed examination of every measure's impact on human rights was impossible. Fighting a pandemic requires expertise beyond the legal realm, which constitutional judges may lack. Our role is to ensure that authorities act within constitutional boundaries and carefully weigh human rights concerns alongside the latest epidemiological knowledge. Despite the challenges, we must remain committed to this crucial task.

Viktor GORODOVENKO,

Judge of the Constitutional Court of Ukraine,

Doctor of Law, Professor,

Corresponding Member of the National Academy of Legal Sciences of Ukraine,

Representative of Ukraine to the Consultative Council of the European Judges at the Committee of Ministers of the Council of Europe

Ensuring constitutional principles under martial law: the experience of the Constitutional Court of Ukraine

The armed aggression of the Russian Federation against Ukraine, which commenced on February 20, 2014 and became full-scale on February 24, 2022, has been already going on for 11 years. All this time, the Constitutional Court of Ukraine has been a guardian of the supremacy of the Constitution of Ukraine as the Fundamental Law of the State and has been monitoring the observance of human and citizen's constitutional rights and freedoms, never ceasing to exercise its jurisdictional powers to ensure constitutional principles and guarantees.

In view of the declaration of martial law in Ukraine on February 24, 2022, in early March 2022, Ukraine informed the Secretary General of the Council of Europe and the Secretary-General of the United Nations of its derogation from a number of obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, namely Articles 3, 8.3, 9, 12, 13, 17, 19, 20, 21, 22, 24, 25, 26, 27 of the Covenant, as well as Articles 4.3, 8, 9, 10, 11, 13, 14, 16 of the Convention, Articles 1, 2, 3 of the Additional Protocol to the Convention, Article 2 of the Protocol No. 4 to the Convention, and regularly notified on such derogation in respect of the regular extension of martial law. At the same time, in April 2024, Ukraine informed about the reduction in the list of obligations from which Ukraine derogates due to martial law; the derogation from the previously defined Articles 3, 8.3, 9, 13, 20, 22, 24, 26, 27 of the Covenant and Articles 4.3, 9, 13, 14, 16 of the Convention (on the prohibition of forced or compulsory labour, the prohibition of discrimination, the restrictions on freedom of thought, conscience, and religion, political activity of aliens; the right to an effective remedy) was overturned.

The Venice Commission, in its Report dated June 19, 2020 CDL-AD(2020)014 "Respect for democracy, human rights, and the rule of law during states of emergency: reflections", in the context of measures taken by states in response to the COVID-19 pandemic, identified three main instruments that human rights law uses to accommodate exceptional situations: exceptions from human rights, restrictions of human rights and derogations from human rights. The Venice Commission also noted that the application of such instruments should respect certain general principles which aim to minimise the damage to fundamental rights, democracy, and rule of law; and assess their compliance with the principles of necessity, proportionality and temporariness, that are important internal guarantees against abuse; however, the assessment of these three conditions is not a matter that may be resolved now and forever, as the situation is constantly changing and such changes should be reflected in the measures applied (they may become stricter if the situation worsens and should become less strict if the situation improves); respect for these principles should be subject to effective, non-partisan parliamentary oversight and meaningful judicial review exercised by independent courts. It should be noted that these approaches are also applicable under martial law.

The jurisprudence of the Constitutional Court of Ukraine shows that even under martial law and Ukraine's derogation from a number of obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, it upholds the position that violations of the essence of constitutional rights and freedoms are inadmissible. Furthermore, given that the Constitution of Ukraine defines the strategic course of Ukraine

towards the acquisition of full membership in the European Union (fifth passage of the Preamble, Articles 85.1.5, 102.3, and 116.1[1]), the Court in the proceedings takes into account the acquis communautaire in general and the individual acts of the European Union relevant to the subject of constitutional review in particular (*the first passage of subparagraph 3.5 of the reasoning part of the Decision No. 9-r(II)/2023 dated November 1, 2023*).

When deliberating the cases regarding the restriction of certain human and citizen's rights and freedoms, the Constitutional Court of Ukraine assesses their compliance with the principles of necessity, proportionality and temporariness, as well as takes into account the current situation in the state (social and economic, military, political, etc.).

In its decisions, the Constitutional Court of Ukraine has set out a number of legal positions regarding the criteria for assessing the admissibility of restrictions on human and citizen's rights and freedoms. Thus, "in accordance with the principle of the rule of law, the legislator may restrict constitutional human and citizen's rights subject to the conditions set forth in the Constitution of Ukraine" (*second passage of subparagraph 2.8 of the reasoning part of the Decision of the Constitutional Court of Ukraine No. 5-r(II)/2023 dated July 5, 2023*), "state interference with constitutional right is possible under the provisions that meet the requirement of legal certainty and exclusively by means that are proportionate" (*second passage of subparagraph 4.5 of the reasoning part of the Decision of the Constitutional Court of Ukraine No. 9-r(II)/2022 dated November 16, 2022*), "restrictions on the realisation of constitutional rights and freedoms may not be arbitrary and unfair, they must be established exclusively by the Constitution and laws of Ukraine, pursue a legitimate goal, be conditioned by the social need to achieve this goal, proportionate and substantiated, in case of restriction of a constitutional right or freedom, the legislator is obliged to introduce such legal regulation which will optimally achieve a legitimate goal with minimal interference with the realisation of that right or freedom and will not violate the essential content of that right" *(third passage of subparagraph 2.1 of the reasoning part of the Decision of the Constitutional Court of Ukraine No. 2- rp/2016 dated June 1, 2016)*, "the correlation between the goal and the means of achieving it must meet the requirements of the principle of proportionality, which ensures a fair balance between the requirements of protecting the general interest and the need to ensure individual rights, according to which the goals of human rights restrictions must be substantial, and the means of achieving them must be reasonable and minimally burdensome for persons whose rights are restricted" (*second passage of subparagraph 4.2 of the reasoning part of the Decision of the Constitutional Court of Ukraine No. 1-r(II)/2022 dated April 6, 2022*).

During the period of martial law in Ukraine, the Constitutional Court of Ukraine deliberated issues related to the protection of human dignity, property right, the right to work, the right to housing, social guarantees, the right to judicial protection, individualisation of legal liability, etc. guaranteed by the Constitution of Ukraine.

In the social sphere, the Constitutional Court of Ukraine has prioritised social protection and material support of military servicemen and military servicewomen – defenders of Ukraine and members of their families, given the realities associated with the armed aggression of the Russian Federation against Ukraine, the role of the Armed Forces of Ukraine and other military formations in the defence of the Ukrainian State, its sovereignty, independence and territorial integrity, as well as the fact that the respective constitutional principles are the core of the constitutional order of Ukraine, therefore, its implementation in general, including the human and citizen's rights and freedoms guaranteed by the Constitution of Ukraine, depends on their protection (fifth *passage of the reasoning part of the Decision of the Constitutional Court of Ukraine No. 1-r(II)/2022 dated April 6, 2022*).

Despite the fact that the realities of martial law affect the assessment of the proportionality of restrictions on constitutional rights and freedoms, the Constitutional Court of Ukraine upholds the position that the essence of the latter is inviolable. Thus, when deliberating the case on the constitutionality of legislative provisions that permitted the foreclosure of a debtor's pension, which is the sole source of income (main source of subsistence) of a person and the amount of which is equal to the subsistence minimum established by law, the Constitutional Court of Ukraine declared respective provisions unconstitutional and emphasised that restrictions on the realisation of constitutional rights

and freedoms may not be arbitrary and unfair. They are established exclusively by the Constitution and laws of Ukraine, must meet a legitimate purpose, must be conditioned by the social need to achieve this goal, and be proportionate; in case of restriction of a constitutional right (freedom), the legislator is obliged to introduce such legal regulation which will optimally achieve a legitimate goal with minimal interference with the realisation of that right (freedom) and will not violate the essential content of that right. In ensuring the realisation of the constitutional right to judicial protection and public order in the field of judicial proceedings (this also applies to the execution of court decisions), the state may determine restrictions on the realisation of other human rights and freedoms, in particular, their rights in the field of social protection. However, the legislator is obliged to regulate these issues, taking appropriate measures to achieve a fair balance between the protection of public interests and the constitutional rights of a person to social protection and an adequate standard of living for himself/herself and his/her family, without violating the essence of these rights (*first and fourth passages of subparagraph 5.1 of the reasoning part of the Decision of the Constitutional Court of Ukraine No. 3-r(II)/2023 dated March 22, 2023*).

Even under martial law, the Constitutional Court of Ukraine upholds the inviolability of fundamental constitutional principles, in particular human dignity. Thus, when deliberating the case on the private and family life of a person sentenced to life imprisonment in the context of a legislative omission regarding the failure to provide such a person with the opportunity to visit his/her seriously ill close relative or to be present at his/her funeral, even given that the constitutional right to respect for private and family life (Article 32 of the Constitution of Ukraine) may be restricted under martial law, and that Ukraine has declared the possibility of derogation from Article 8 of the Convention and Article 17 of the Covenant, that guarantee this right, the Constitutional Court of Ukraine emphasised that human dignity is an absolute value inherent in every person, even if he/she is convicted of particularly serious crimes; human dignity cannot be restricted or denied by anyone under any circumstances, as well as the equality of all people in their dignity and the inseparability of their fundamental rights. Even if a person has committed particularly serious crimes and is serving a criminal sentence of life imprisonment, the regime of serving such a sentence must be consistent with human dignity as an absolute value. The Constitutional Court of Ukraine has also emphasised that the absolute value of human dignity is, first and foremost, the equally humane treatment of everyone and respect for the essence of human nature regardless of personal, social or other status. Therefore, the mechanism of execution and serving of criminal sentences for all persons sentenced to imprisonment, regardless of the gravity of their crimes, cannot lead to the destruction of a person as a personality, humiliation and devaluation of their moral, psychological, spiritual qualities and needs, the abolition of everyone's right to be treated humanely, as well as the levelling of the essential content of constitutional human rights and freedoms (*fifth passage of subparagraphs 2.2.1, 2.2.2 of the reasoning part of the Decision of the Constitutional Court of Ukraine No. 11-r(II)/2023 dated December 20, 2023*).

Thus, when deciding on the issue of ensuring constitutional principles under martial law, the Constitutional Court of Ukraine takes into account the acts of international law, the established case-law of the European Court of Human Rights, judgments of Constitutional Courts of European states, and the opinions of the Venice Commission, which, given the strategic course of Ukraine towards the acquisition of full membership in the European Union, is crucial for bringing the national legal system closer to European and international standards. When deliberating the constitutionality of restrictions on human and citizen's rights and freedoms, the Constitutional Court of Ukraine assesses in each case whether such restrictions meet the criteria of necessity, proportionality, and temporariness and takes into account the current situation in the country in order to prevent the essence of the relevant constitutional rights and freedoms from being levelled. Moreover, even under martial law, the Constitutional Court of Ukraine, in its decisions upholds the rule of law, democracy, and human rights in Ukraine as a triad of fundamental European values.

Вик.: М.Невідомський (тел.: 1478)

RAPPORTS NATIONAUX

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Questionnaire

Questionnaire

Fragebogen

Formes et limites de la déférence judiciaire: le cas des cours constitutionnelles

Les cultures constitutionnelles varient et la perception qu'ont les cours constitutionnelles quant à leur rôle dans une démocratie constitutionnelle affecte l'intensité de leur analyse dans les affaires qui impliquent des droits fondamentaux. De nombreux tribunaux font preuve de déférence judiciaire.

La déférence judiciaire représente un outil juridique inventé par les juges pour maintenir la séparation des pouvoirs et s'abstenir d'intervenir dans des affaires qu'ils considèrent aller au-delà de leur expertise ou de leur légitimité à trancher. L'instrument a surtout été utilisé dans des affaires qui impliquent des droits fondamentaux. Et ce en raison de leur qualité transcendante, de leur capacité à traverser tous les domaines substantiels du processus décisionnel public.

On dit qu'une attitude trop déférente met en danger la prééminence du droit et la séparation des pouvoirs autant qu'un activisme judiciaire excessif. La manière dont les juges exercent leur déférence est donc une question fondamentale de principe constitutionnel, qui concerne le rôle approprié de chaque branche du gouvernement par rapport à des questions importantes de politique publique.

Les questions suivantes cherchent à découvrir les différences entre les manières dont les cours constitutionnelles européennes exercent la déférence judiciaire.

Questionnaire

Pour les rapports nationaux

III. **Matières non justiciables et intensités de déférence**

1. Qu'entend-on par « déférence judiciaire » dans vos juridictions?
2. Votre Cour envisage-t-elle un éventail de déférence ? Existe-t-il des zones „interdites", ou des zones prédéterminées de non-responsabilité, ou des questions non justiciables pour votre Cour (par exemple, des questions morales controversées, des sensibilités politiques, des controverses sociétales, l'allocation de ressources limitées, des implications financières importantes pour le gouvernement, etc. .)?
3. Existe-t-il des facteurs qui déterminent comment et quand votre Cour doit faire preuve de déférence (par exemple, la culture et les conditions de votre pays; les expériences historiques de votre pays; le caractère absolu ou restreint des droits fondamentaux en question; la question débattue devant la Cour; si les circonstances de l'affaire impliquent un changement des conditions sociales et des attitudes)?
4. Existe-t-il des situations dans lesquelles votre Cour a fait preuve de déférence parce qu'elle ne disposait pas de la compétence ou de l'expertise institutionnelle nécessaire?
5. Avez-vous des cas où votre Cour a fait preuve de déférence parce qu'il y avait un risque d'erreur judiciaire?
6. Y a-t-il des cas où votre Cour a fait preuve de déférence en invoquant la légitimité institutionnelle ou démocratique du décideur?
7. „Plus la législation concerne une question de politique sociale publique au sens large, moins le tribunal sera disposé à intervenir." Est-ce une norme valide pour votre Cour? Votre Cour partage-t-elle le point de vue selon lequel les questions d'ordre public devraient être tranchées par des processus démocratiques parce que les tribunaux ne sont pas élus et n'ont pas le mandat démocratique de trancher les questions d'ordre public?
8. Votre Cour accepte-t-elle un principe général de déférence dans le jugement des politiques et de la philosophie criminelles?
9. Il peut y avoir des circonstances plus strictes dans lesquelles le gouvernement ne peut pas divulguer des informations à la Cour, en particulier dans le contexte d'affaires de sécurité nationale impliquant des informations classifiées. Votre Cour a-t-elle déjà fait preuve de déférence pour des raisons de sécurité nationale?
10. Compte tenu du rôle des cours constitutionnelles en tant que gardiennes de la Consti-

tution, devraient-elles interférer avec des politiques publiques prétendument inconstitutionnelles lorsque les gouvernements sont passifs dans la mise en œuvre des réformes des droits fondamentaux?

IV. Décideur

11. Votre Cour témoigne-t-elle plus de déférence à une loi du Parlement qu'à une décision de l'exécutif? Votre Cour fait-elle preuve de déférence en fonction du niveau de responsabilité démocratique du décideur initial?
12. Quel poids votre Cour accorde-t-elle au processus législatif? Quelle pertinence juridique, le cas échéant, l'analyse parlementaire devrait-elle avoir pour l'analyse par les juges de la compatibilité avec les droits fondamentaux?
13. Votre Cour vérifie-t-elle si le décideur a justifié sa décision ou s'il s'agit d'une décision que la Cour elle-même aurait rendue si elle avait été le décideur?
14. Votre Cour fait-elle preuve de déférence quant à la mesure dans laquelle la décision ou la mesure a été précédée d'une analyse approfondie de la compatibilité avec les droits fondamentaux? Quelle doit être, par exemple, la profondeur de l'analyse du législateur pour que votre Cour lui donne du poids?
15. Votre Cour examine-t-elle si les points de vue opposés ont été pleinement représentés dans le débat parlementaire lors de l'adoption d'une mesure? Suffit-il qu'il y ait eu un débat approfondi sur le contenu général de la législation, ou faut-il qu'il y ait eu une considération spéciale des implications sur les droits?
16. Le fait que la décision appartienne au pouvoir législatif ou qu'elle ait été prise après des consultations publiques ou des débats publics est-il une preuve concluante de la légitimité démocratique de la décision?

III. Le champ d'application des droits, légalité et proportionnalité

17. Votre Cour a-t-elle déjà fait preuve de déférence à l'étape de la définition des droits, en donnant du poids à la définition des droits du gouvernement ou à son application aux faits en cause?
18. Des droits applicables affectent-ils l'intensité de la déférence? Votre Cour considère-t-elle que certains droits ou aspects de droits sont plus importants et que, par conséquent, les ingérences dans leur exercice méritent un examen plus rigoureux que d'autres?
19. Disposez-vous d'une échelle de clarté lors du contrôle de constitutionnalité d'une loi? Comment décidez-vous de la clarté d'une loi? Quand appliquez-vous la règle d'interprétation *In claris non fit interpretatio*?
20. Quelle est l'intensité du contrôle de votre Cour au stade de l'établissement du but légitime?
21. Quel test de proportionnalité votre Cour applique-t-elle? Votre Cour applique-t-elle toutes les étapes du test classique de proportionnalité (c'est-à-dire satisfaire à une triple exigence d'adéquation, de nécessité et de proportionnalité au sens strict)?
22. Votre Cour passe-t-elle par chaque étape applicable du test de proportionnalité?
23. Existe-t-il des affaires dans lesquelles votre Cour admet que la mesure litigieuse satisfait à une ou plusieurs étapes du test de proportionnalité, même s'il n'y a manifestement pas suffisamment de preuves pour démontrer ce fait?
24. L'apparition du contrôle de la proportionnalité dans la jurisprudence de votre Cour a-t-elle coïncidé avec l'essor de la théorie de la déférence judiciaire?
25. La jurisprudence de la Cour européenne des droits de l'homme a-t-elle façonné l'approche de votre Cour en matière de déférence? La doctrine de la Cour européenne des droits de l'homme sur la marge d'appréciation est-elle l'équivalent national de la marge d'appréciation que votre Cour accorde? Si non, à quelle fréquence les considérations relatives à la marge d'appréciation de la Cour européenne des droits de l'homme recoupent-elles les considérations relatives à la déférence de votre Cour dans des affaires similaires?

26. La Cour européenne des droits de l'homme avait-elle condamné votre Etat en raison de la déférence dont votre Cour a fait preuve dans une affaire précise, déférence qui en a fait un recours inefficace?

IV. Autres particularités

27. À quelle fréquence la question de la déférence se pose-t-elle dans les affaires relatives aux droits de l'homme jugées par votre Cour?
28. Votre Cour est-elle devenue plus déférente avec le temps?
29. L'attitude déférente dépend-elle du nombre d'affaires inscrites au rôle de la Cour?
30. Votre Cour peut-elle fonder ses décisions sur des motifs non avancés par les parties ? Votre Cour peut-elle recadrer les motifs avancés en vertu d'une disposition constitutionnelle différente de celle invoquée par le demandeur?
31. Votre Cour peut-elle étendre son contrôle de constitutionnalité à une autre loi non contestée devant elle mais liée à la situation du requérant?

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Constitutional cultures vary and the courts' perceptions of their own role in a constitutional democracy affect the intensity of their scrutiny in fundamental rights cases. Many courts profess judicial deference.

Judicial deference is a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters which are perceived to be beyond their expertise or legitimacy to decide. The tool has been employed, most prominently, in human rights cases. This is due to their transcendent quality, capable of cutting across all substantive areas of public decision-making.

It is said that over-deferential attitude threatens the rule of law and separation of powers as much as excessive judicial activism does. The way judges exercise judicial deference is, therefore, a fundamental matter of constitutional principle that concerns the proper role of each branch of government in relation to significant questions of public policy.

The following questions aim to discover the differences in exercising judicial deference by European constitutional courts.

Questionnaire

for the national reports

I. Non-justiciable questions and deference intensities

1. In your jurisdictions, what is meant by "judicial deference"?
2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?
3. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?
4. Are there situations when your Court deferred because it had no institutional competence or expertise?
5. Are there cases where your Court deferred because there was a risk of judicial error?
6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?
7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?
8. Does your Court accept a general principle of deference in judging penal philosophy and policies?
9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?
10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

II. The decision-maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?
12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?
13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?
14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?
15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?
16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

III. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?
18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?
19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?
20. What is the intensity review of your Court in case of the legitimate aim test?
21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?
22. Does your Court go through every applicable limb of the proportionality test?
23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?
24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?
25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?
26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

IV. Other peculiarities

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?
28. Has your Court have grown more deferential over time?
29. Does the deferential attitude depend on the case load of your Court?
30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the

one invoked by the applicant?

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

Formen und Grenzen richterlicher Selbstbeschränkung in der Verfassungsgerichtsbarkeit

Es gibt unterschiedliche Verfassungskulturen, und die Wahrnehmung der Rolle der Verfassungsgerichte in einer rechtsstaatlichen Demokratie wirkt sich auf die Intensität ihrer Analyse in Fällen aus, in denen es um Grundrechte geht. Viele Gerichte üben richterliche Selbstbeschränkung.

Richterliche Selbstbeschränkung ist ein juristisches Instrument, das von den Richtern erfunden wurde, um die Gewaltenteilung zu wahren und sich nicht in Angelegenheiten einzumischen, die ihrer Meinung nach außerhalb ihres Fachwissens oder ihrer Legitimität liegen. Das Instrument wurde hauptsächlich in Fällen eingesetzt, in denen es um Grundrechte ging. Und zwar wegen ihrer transzendenten Qualität, ihrer Fähigkeit, alle materiellen Bereiche staatlichen Handelns zu durchdringen.

Es heißt, dass ein Zuviel an richterlicher Selbstbeschränkung den Vorrang des Rechts und die Gewaltenteilung ebenso gefährdet wie ein übermäßiger richterlicher Aktivismus. Die Art und Weise, in der sich Richter in Zurückhaltung üben, ist daher eine grundlegende Frage des Verfassungsprinzips, die die angemessene Rolle der einzelnen Staatsfunktionen in Bezug auf wichtige Fragen der öffentlichen Ordnung betrifft.

Die folgenden Fragen zielen darauf ab, die Unterschiede in der Art und Weise zu ermitteln, in der die europäischen Verfassungsgerichte ihre Kontrollfunktion ausüben.

Fragebogen

Für nationale Berichte

I. Nicht justiziable Angelegenheiten und Intensität richterlicher Selbstbeschränkung

1. Was versteht man in Ihrem Land unter „richterlicher Selbstbeschränkung"?
2. Kennt Ihr Gerichtshof verschiedene Stufen der Kontrolldichte? Gibt es „unantastbare" Bereiche oder Bereiche, in denen keine rechtliche Verantwortlichkeit besteht, oder Fragen, die als nicht justiziabel gelten (z.B. kontroverse moralische Fragen, politische Empfindlichkeiten, Kontroversen in der Gesellschaft, Verteilung knapper Mittel, erhebliche finanzielle Auswirkungen für den öffentlichen Haushalt usw.)?
3. Gibt es Faktoren, die ausschlaggebend dafür sind, wie und wann Ihr Gerichtshof Selbstbeschränkung übt (z. B. die Kultur und die Eigenheiten Ihres Landes; die historischen Erfahrungen Ihres Landes; der absolute oder besondere Charakter der fraglichen Grundrechte; der Gegenstand des Verfahrens; der Umstand, dass es um Fragen geht, die sich aus dem Wandel der Gesellschaft und der Anschauungen ergeben)?
4. Gibt es Situationen, in denen Ihr Gerichtshof aufgrund mangelnder institutioneller Zuständigkeit oder mangelnden Fachwissens Zurückhaltung geübt hat?
5. Gibt es Fälle, in denen Ihr Gerichtshof Zurückhaltung geübt hat, weil die Gefahr eines Justizirrtums bestand?
6. Gibt es Fälle, in denen Ihr Gerichtshof unter Hinweis auf die institutionelle oder demokratische Legitimation des Entscheidungsträgers Zurückhaltung geübt hat?
7. „Je mehr die Gesetzgebung die allgemeine Sozialpolitik gestaltet, desto weniger wird das Gericht bereit sein, einzugreifen". Ist dies ein gültiger Maßstab für Ihren Gerichtshof? Teilt Ihr Gerichtshof die Auffassung, dass politische Fragen durch demokratische Verfahren entschieden werden sollten, da die Gerichte nicht gewählt sind und nicht über das demokratische Mandat verfügen, über Angelegenheiten der Politik zu entscheiden?
8. Akzeptiert Ihr Gerichtshof einen allgemeinen Grundsatz der Selbstbeschränkung in Angelegenheiten der Strafrechtspolitik?
9. In engen Grenzen kann sich die Regierung veranlasst sehen, Informationen vor dem Gerichtshof geheim zu halten, insbesondere solche aus nachrichtendienstlichen Quellen. Hat

Ihr Gerichtshof jemals aus Gründen der nationalen Sicherheit Selbstbeschränkung geübt?

10. Sollten Verfassungsgerichte – als Hüter der Verfassung – einen strengeren Maßstab anlegen, wenn die Gesetzgebung bei der Umsetzung von Reformen zum Schutz der Grundrechte säumig ist?

II. Der Entscheidungsträger

11. Prüft Ihr Gerichtshof einen Akt der parlamentarischen Gesetzgebung mit größerer Zurückhaltung als einen Akt der Verwaltung? Stellt Ihr Gerichtshof bei der Prüfung von Rechtsakten darauf ab, welche demokratische Legitimation der Entscheidungsträger hat?

12. Welche Bedeutung misst Ihr Gerichtshof der Entstehung eines Rechtsaktes bei? Welche rechtliche Bedeutung kann die parlamentarische Erörterung eines Rechtsaktes für dessen Prüfung am Maßstab der Grundrechte haben?

13. Prüft Ihr Gerichtshof, ob der politische Entscheidungsträger seine Entscheidung begründet hat oder ob die Entscheidung so gefallen ist, wie sie das Gericht selbst getroffen hätte, wenn es selbst politischer Entscheidungsträger wäre?

14. Achtet Ihr Gerichtshof darauf, inwieweit der Entscheidung oder Maßnahme eine umfassende Prüfung der Kompatibilität mit den Grundrechten vorausgegangen ist? Wie gründlich muss zum Beispiel die Analyse des Gesetzgebers sein, damit Ihr Gerichtshof ihr Bedeutung beimisst?

15. Achtet Ihr Gerichtshof darauf, ob vor der Verabschiedung einer Maßnahme die gegensätzlichen Standpunkte in der parlamentarischen Debatte umfassend zum Ausdruck gekommen sind? Reicht es aus, dass eine breite Debatte über den allgemeinen Inhalt der Rechtsvorschriften stattgefunden hat, oder muss den Auswirkungen auf die Rechte besondere Aufmerksamkeit geschenkt werden?

16. Ist die Tatsache, dass die Entscheidung vom Gesetzgeber oder unter Beteiligung der Öffentlichkeit getroffen wurde, ein schlüssiger Nachweis für die demokratische Legitimität der Entscheidung?

III. Schutzbereich der Rechte, Gesetzmäßigkeit und Verhältnismäßigkeit

17. Hat Ihr Gerichtshof jemals bei der Bestimmung des Inhalts eines Rechts Zurückhaltung geübt, indem er sich die Auslegung oder Anwendung des Rechts durch die Regierung zu eigen gemacht hat?

18. Ist die Kontrolldichte von der Eigenart des Grundrechts abhängig? Ist Ihr Gerichtshof der Ansicht, dass einige Rechte oder Aspekte von Rechten wichtiger sind und dass Eingriffe in ihre Ausübung daher strenger geprüft werden müssen als andere? Nach welchen Kriterien wird diese Einteilung vorgenommen?

19. Haben Sie einen Maßstab für die Klarheit bei der Prüfung der Verfassungsmäßigkeit eines Gesetzes? Wie entscheiden Sie, wie klar ein Gesetz ist? Wann wenden Sie die Regel *In claris non fit interpretatio* an?

20. Wie intensiv prüft Ihr Gerichtshof, ob eine Maßnahme einem legitimen Ziel dient?

21. Welche Verhältnismäßigkeitsprüfung wendet Ihr Gerichtshof an? Wendet Ihr Gericht alle Schritte der klassischen Verhältnismäßigkeitsprüfung an (d. h. Angemessenheit, Erforderlichkeit und Verhältnismäßigkeit im engeren Sinne)?

22. Prüft Ihr Gerichtshof alle Elemente der Verhältnismäßigkeitsprüfung?

23. Gibt es Fälle, in denen Ihr Gerichtshof annimmt, dass die angefochtene Maßnahme einen oder mehrere Schritte der Verhältnismäßigkeitsprüfung erfüllt, auch wenn es offensichtlich keine ausreichenden Beweise gibt, um dies zu belegen?

24. Fällt die Einführung der Verhältnismäßigkeitsprüfung in der Rechtsprechung Ihres Gerichtshofs mit der Entfaltung des Grundsatzes der richterlichen Selbstbeschränkung zusammen?

25. Hat die Rechtsprechung des EGMR die Haltung Ihres Gerichtshofs in Bezug auf die Frage richterlicher Selbstbeschränkung beeinflusst? Entspricht der vom EGMR anerkannte

„margin of appreciation" der Konventionsstaaten im innerstaatlichen Bereich dem Beurteilungsspielraum, den Ihr Gerichtshof dem politischen Entscheidungsträger einräumt? Wenn nicht, wie oft überschneiden sich die Erwägungen des EGMR zum Ermessensspielraum der Konventionsstaaten mit den Erwägungen Ihres Gerichtshofs zum rechtspolitischen Gestaltungsspielraum des Gesetzgebers?

26. Ist Ihr Staat jemals vom EGMR verurteilt worden, weil Ihr Gerichtshof in einem bestimmten Fall richterliche Zurückhaltung geübt hat und das Rechtsmittel an Ihren Gerichtshof dadurch unwirksam geworden ist?

IV. **Andere Gesichtspunkte**

27. Wie oft stellt sich in Ihrem Gerichtshof die Frage richterlicher Selbstbeschränkung bei der Entscheidung über Menschenrechtsverletzungen?

28. Hat Ihr Gerichtshof seine Kontrolldichte im Lauf der Zeit zurückgenommen?

29. Hängt die gerichtliche Selbstbeschränkung von der Anzahl der beim Gerichtshof anhängigen Rechtssachen ab?

30. Kann Ihr Gerichtshof seine Entscheidungen auf Gründe stützen, die von den Parteien nicht vorgebracht wurden? Kann Ihr Gerichtshof die geltend gemachten Gründe auf eine andere als die vom Antragsteller angegebene Verfassungsbestimmung stützen?

31. Kann Ihr Gerichtshof die Prüfung der Verfassungsmäßigkeit eines Gesetzes auf ein anderes Gesetz ausdehnen, das vom Antragsteller nicht angefochten wurde, das aber für die Situation des Antragstellers relevant ist?

Membres

Members

Mitglieder

The Constitutional Court of the Republic of Albania

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Constitutional cultures vary and the courts' perceptions of their own role in a constitutional democracy affect the intensity of their scrutiny in fundamental rights cases. Many courts profess judicial deference.

Judicial deference is a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters which are perceived to be beyond their expertise or legitimacy to decide. The tool has been employed, most prominently, in human rights cases. This is due to their transcendent quality, capable of cutting across all substantive areas of public decision-making.

It is said that over-deferential attitude threatens the rule of law and separation of powers as much as excessive judicial activism does. The way judges exercise judicial deference is, therefore, a fundamental matter of constitutional principle that concerns the proper role of each branch of government in relation to significant questions of public policy.

The following questions aim to discover the differences in exercising judicial deference by European constitutional courts.

Questionnaire

for the national reports

I. Non-justiciable questions and deference intensities

1. In your jurisdictions, what is meant by "judicial deference"?

Constitutional Court of the Republic of Albania has elaborated judicial deference in two aspects, namely in terms of the judges' independence and in terms of the exercise of its activity. Its internal independence derives from article 130 of the Constitution of the Republic of Albania, which has explicitly foreseen that being a judge of this court shall not be compatible with any other political, state as well as any other compensated professional activity, except for teaching, academic, and scientific activities, in accordance with the law.

This constitutional provision has been further elaborated by the rules of organic law no. 8577, dated 10.02.2000 "On the organization and functioning of the Constitutional Court of the Republic of Albania", amended, as well as by the Rules on Judicial Procedures of the Constitutional Court[49] and the Code of Ethics for the Judges of the Constitutional Court. Both of these acts have provided that the conduct of the judge of this Court, in the course of exercising his duty and his off-duty activity and relations, should guarantee the enhancing and strengthening of public trust and confidence in the system of justice, legal profession and parties in process, and that the judge exercises his functions with impartiality, determination, deliberation, due diligence, in a reasonable time, being considerate and systematic, with objectivity, self-restraint and prudence.

Judge of the Constitutional Court has the obligation to respect the rules of solemnity and conduct in relation to the parties in process, judges and court administration, while he shall be restraint from making any public statements and in the media about the court cases, with the exception of press communication within the bounds of his duty.

On the other hand, the judicial deference of the Constitutional Court has been elaborated even in terms of the exercise of its activity in order to ensure the constitutional control of the law. The Court takes care to guarantee the institutional balance and, at the same time, to guarantee that its powers

49 *Adopted by decision no. 9, dated 22.11.2021 of the Meeting of Judges of the Constitutional Court -- https://www.gjk.gov.al/web/rregullore_per_procedurat_gjyqesore_të_Gjykates_Kushtetuese_2205.pdf*

are not transformed into arbitrary ones. The principle of the separation of powers, as an element of the rule of law, requires the Constitutional Court to deal with constitutional cases that fall under its jurisdiction, as well as to respect the jurisdiction and powers of other constitutional bodies.

Currently, with the implementation of constitutional reform in the system of justice, in 2016, Constitutional Court is operating with two chambers, one of them being the Special Appeal Chamber. The competence of Special Appeal Chamber, throughout its nine-year mandate (2017 – 2026), is the transitional re-evaluation of magistrates of all levels, as well as of other subjects provided for by the Constitution and the law (*vetting process*).

In this context, article A, point 1, of the Annex of the Constitution has defined that in order to carry out the re-evaluation process, the application of individual constitutional complaint for the subjects of re-evaluation is partly limited. Consequently, jurisdiction of the Constitutional Court concerning the transitional re-evaluation of magistrates is limited by the jurisdiction that the Constitution itself has assigned to the re-evaluation bodies. The same regime of judicial deference is applied by the Constitutional Court with regard to the examination of disciplinary violations carried out by the members of Constitutional Court, High Judicial Council, High Prosecutorial Council, General Attorney and High Inspector of Justice, as well as appeals against decisions of the High Judicial Council, High Prosecutorial Council and High Inspector of Justice imposing disciplinary measures against judges, prosecutors and other inspectors, given that these cases fall under the disciplinary jurisdiction of the Special Appeal Chamber for its nine year term (2017 – 2026). After the termination of the mandate of Special Appeal Chamber, these competencies will be exercised by the Constitutional Court itself, what means that during this period the Court should demonstrate judicial deference while exercising its activity, by respecting the Constitution, organic law, as well as other laws that regulate the organization and functioning of the governing organs of the system of justice.

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

There does exist a spectrum of deference for the Constitutional Court. This spectrum, as the case may be, is defined by the Constitution itself – as it is the case of the process of transitional re-evaluation of magistrates and/or their disciplinary proceeding, which is carried out by the Special Appeal Chamber (*for more information see the answer to question no. 1 -- above*), but also by the case law of the Constitutional Court. More specifically, when the Court was set into motion to examine the validity of local elections held on 30 June 2019, it concluded that it does not have the competence to review the constitutionality of electoral process and verification of its results. In this regard, the Court took into consideration even the briefing of the Venice Commission, sent upon the request of the Constitutional Court regarding an *amicus curiae* opinion on the competence of the Constitutional Court to examine the validity of local elections.[50]

3. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

Constitutional Court derives its jurisdiction from article 131 of the Constitution, not being influenced by external factors or undefined legal norms. However, historical experiences dictated by political, legal, economic and social developments in the country (such as the transition from the monist regime to the democratic one, period 1944 – 1991) has influenced the elaboration of the concept of Court judicial deference. More specifically, quite often the Court has been set into motion to review a number of decisions taken by Government or Assembly that affected the constitutional right to private property, a right which was completely denied in the previous communist regime. In these cases, the Court has taken into account even the decision-making of the European Court of Human

50 *See decision no. 36, dated 04.11.2021 of the Constitutional Court of Albania.*

Rights (ECtHR), when the latter has examined the applications against Albania claiming the compensation/just compensation of property to the former owners or their heirs for the nationalized properties, expropriated or confiscated by the state after 29 November 1944, or unjustly taken in any other way, requesting to the Albanian state the revision of schemes for the just compensation of property[51].

The Court, relying also on the concept elaborated by European Convention on Human Rights (ECHR) on the quiet enjoyment of property, as well as in the light of ECtHR decisions, has recognized to the lawmaker a wide margin of appreciation, underlying that the drafting and approval of legislation whose main purpose is the regulation of social and economic problems, especially those related to the restitution and compensation of property, are phenomena closely related to the drastic changes in the system of state governance, such as the transition from the totalitarian regime to the democratic one and reform in the political, legal and economic structure. In terms of the margin of appreciation of the lawmaker to regulate the issue of compensation of properties nationalized or confiscated during the communist regime, the Court has affirmed that the right to property is not the same as the right to its restitution and that the criterion for compensation and indemnification in favor of the expropriated subject cannot be complete, but just, and that the application of a minimum threshold (10% for the compensation value) might be considered as reasonable, in the context of social, economic and political factors that influence the decision-making process of the lawmaker.[52]

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

During the exercise of its activity, Constitutional Court does not take in the authorities of other institutions, both in cases when it is set into motion on the basis of individual constitutional complaints and in cases when it acts as an initial jurisdiction. More specifically, in case of examination of individual constitutional complaints, the Courts has consistently emphasized that it is the court of ordinary jurisdiction which, while exercising its constitutional role and function, makes the interpretation and application of laws, as well as the evaluation of evidence – so, it is this court that has the appropriate legal expertise to evaluate the merits of the case or of the act. From the institutional point of view, Constitutional Court has constantly shown judicial deference, putting the emphasis on the role and function of the competent institution to exercise relevant authorities – as in the case of the vetting process, when the Court underlined that this process belongs only to the authority of institutions defined by the Constitution.

5. Are there cases where your Court deferred because there was a risk of judicial error?

Constitutional Court has constantly stated that it is the duty of the courts of ordinary jurisdiction to evaluate the facts and evidence administered during the adjudication process, as well as to interpret the law for the purpose of the trial they conduct. Whereas, the duty of the Constitutional Court is to examine and evaluate whether during the court trial there has been violations of constitutional rights, and also whether the application of law has been eventually arbitrary, in the sense that it is obviously contrary to the concept of fair trial defined by article 42 of the Constitution and article 6 of the European Convention on Human Rights.[53]

This approach is also supported by the position held by the ECtHR itself, which has underlined that it does not act as a forth instance court and therefore does not put into question the decision-making of the national courts, in accordance with article 6, paragraph 1, of the ECHR, unless their findings can be regarded as arbitrary or manifestly unreasonable and that it acts if the error of law or fact by the national court is so evident as to be characterized as a "manifest error" – that is to say, is an error that no reasonable court could ever have made – it may be such as to disturb the fairness of the

51 *See decision of the ECtHR for the applications "Beshiri and others v. Albania"; "Driza v. Albania"; "Ramadhi v. Albania"; "*Manushaqe Puto and others v. Albania", *etc.*

52 *See decisions no. 4, dated 15.02.2021; no. 1, dated 16.01.2017; no. 1, dated 06.02.2013 of the Constitutional Court of Albania.*

53 *See decision no. 33, dated 14.11.2022 of the Constitutional Court of Albania.*

proceedings.[54]

In view of this approach, in a concrete case (individual complaint) the Court analyzed whether the applicant's right to substantial access was restricted and whether its restriction was reasonable and proportional due to the interpretation of law made by the courts of ordinary jurisdiction, concluding that in assessing the importance of good administration of justice, of public interest and in respect of the right to substantial access, interpretation of law by the courts was not arbitrary.[55]

6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

The Court is aware of the generally accepted rule in the constitutional doctrine and case law, that during the abstract control of constitutionality of a legal norm it is not necessary to have the consequence in order to legitimate the applicant, and that the purpose of the control of constitutionality of laws is at the same time the prevention of the negative consequences that may come from their application. In its jurisprudence, the Court has accepted that it is not its duty to play the role of positive lawmaker and define legal regulations, but to examine whether the solution provided by the lawmaker through the determination of legal criteria is in conformity with the Constitutional provisions or not.[56]

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

For the Constitutional Court it is valid the standard that social policy issues are the responsibility of the state. According to Article 59 of the Constitution, social rights of the individual constitute a positive obligation for the state, which, within its constitutional powers and the means at its disposable, aims to supplement private initiative and responsibility (point 1) Fulfillment of social objectives may not be claimed directly in court (point 2), while the law defines conditions and extent to which the realization of these objectives can be claimed (point 2).

In the context of these constitutional provisions, in its jurisprudence, the Court has emphasized that social rights differ from social objectives, since the latter are an expression of state goals and principles of state policies for the orientation of its activity in general and, social policies in particular. Social objectives are an expression of state positive actions and, therefore, their realization is closely related to the conditions, available means and the state budget.[57]

In the framework of efforts to fulfill social objectives, it is the legitimate right of the state itself to regulate the social protection system, by drafting and implementing social policies and strategies. In this sense, the lawmaker should evaluate, in line with the established priorities for economic and social development, the most suitable forms for the balance of interests, making reasonable differentiations, but without violating constitutional norms and principles.[58]

Nevertheless, the Court has emphasized that in any case, these regulations should comply with constitutional principles, values and standards, as well as with the obligations deriving from the European Social Charter, which are equality, social justice, respect for human rights and the prohibition of discrimination, principles which are also embodied in the Constitution. In this regard, the Constitutional Court has stated that: "[...] it is very important for any state of the rule of law that follows the rules of a democratic society, to enjoy a wide margin of appreciation to define fair rules and criteria within its constitutional order, in accordance with concrete conditions and various political, histori-

54 *See decision of the ECtHR Bochan v. Ukraine (n.2), no. 22251/08, dated 05.02.2015,* §§ 61 and 62

55 *See decision no. 30, dated 29.05.2023 of the Constitutional Court of Albania.*

56 *See decision no. 1, dated 07.01.2005 of the Constitutional Court of Albania.*

57 *See decision no. 34, dated 28.05.2012 of the Constitutional Court of Albania.*

58 *See decisions no. 9, dated 26.02.2007 of the Constitutional Court of Albania.*

cal, social, cultural, traditional factors, which are very decisive [...].[59]

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

Constitutional Court has accepted the general principle of deference in judging penal philosophy and policies. More specifically, keeping in mind the principle of separation of powers, it has emphasized that the definition of criminal offenses, the types and measures of punishments are at the discretion of the lawmaker, while the individualization in concrete cases is at the discretion of the court of ordinary jurisdiction, which by examining all the legal elements of criminal offense, the degree of guilt and consequences resulting from the criminal offence, determine the type and measure of punishment for the perpetrators of criminal offenses.[60]

Moreover, in conformity with article 17 of the Constitution, it has assessed that the balance between the limited right and the public interest is nothing else but striking the balance between the right of the state to ensure public and social order, on the one hand, and protection of the rights and freedoms of the individual, on the other hand.[61] Furthermore, it has emphasized that the principle of separation of powers aims to avoid the risk of concentration of power in one body or in the hands of certain persons, which practically carries with it the risk of misuse of power. Through this principle, the constitution maker has assigned to the bodies that represent these powers the authorities that correspond to its purpose. As long as these powers are determined by the constitutional norms, none of the bodies is permitted to take or avoid these competences with its own will. This principle covers the powers at horizontal level (legislative, executive and judiciary) and at vertical level (central power – local government).[62]

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

In its practice, Constitutional Court has not had cases where Government due to certain/narrow circumstances has not reveled information to the Court on national security grounds.

In regard to this issue, it could be noted that Albanian legislation has defined specific rules for the administration, revealing and access to the classified information, provided by the law no. 8457, dated 11.02.1999 "On the information classified as "state secret"", and by sub-legal acts issued in implementation thereof.[63] These acts have defined the conditions, criteria, rules and subjects that shall have access to the information classified as "state secret", including the state institution that during the exercise of their official duties, are acquainted with, produce, preserve, administer, transport and transmit the classified information.

In practical terms, it could be noted that in one case, where the Court has taken under examination the application of a group of deputies asking to resolve the dispute of competencies between no less than ¼ of the deputies and the Assembly of the Republic of Albania regarding the refusal to set up an investigative commission for controlling the lawfulness of actions and inactions of state institutions and public officials in cases that have resulted in an arbitration decision against Albania, the representative of parliamentary majority stated that all the processes where Republic of Albania is a party in international jurisdictions, having a direct or indirect relation with the object of request

59 *See decisions no. 32, dated 21.06.2010; no. 1, dated 07.01.2005 of the Constitutional Court of Albania.*

60 *See decision no. 47, dated 26.07.2012 of the Constitutional Court of Albania.*

61 *See decisions no. 73 dated 17.11.2017; no. 19, dated 01.06.2011; no. 47, dated 27.06.2012, no. 9, dated 26.02.2016 of the Constitutional Court of Albania.*

62 *See decisions no. 29, dated 02.07.2021; no. 24, dated 09.06.2011; no. 19, dated 03.05.2007 of the Constitutional Court of Albania.*

63 These rules can be found now in the new law no.10/2023, dated 02.02.2023 "On the classified information".

for investigation, are confidential, and therefore the data derived from them or produced by them could not be made public. In this case, the Court assessed that in conformity with international law, confidentiality in itself cannot constitute or serve as a constitutional argument to limit the right of parliamentary minority to request the establishment of an investigative commission and that the Assembly cannot use the application of this principle as a justification for not accepting the request to set up an investigative commission.[64]

In another case, an application concerning the repealing of a normative act issued by Albanian Government, of individual character – for the discharge from office of a mayor – the interested subject, the Government, submitted that it had information classified as state secret that indicated violation of public interest. In this case, the Court provided to that subject the necessary time to declassify the information and make it available to the Court.[65]

Likewise, in another case the Court was set into motion on the basis of an individual constitutional complaint addressed by a convicted individual, who complained *inter alia* about the violation of fair court trial due to the infringement of access to available data against him, which according to the institutions were considered as state secret. The Court held that, although the courts of ordinary jurisdiction could have access to the classified information, they did not assess whether the data against the applicant were obtained in conformity with the legal provisions in force, whether the applicant should have been acquainted with them in order to guarantee his right to fair court trial in terms of contradictority, as well as whether their issuance from the state bodies has been done in conformity with the law and not in abusive or arbitrary manner.[66]

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

Constitutional Court, based on its role as guarantor/defender of the Constitution, has maintained its judicial deference, but it has intervened in several cases when considering that institutions (Government/Assembly) had been passive in guaranteeing the individuals' fundamental and constitutional rights and freedoms.

More concretely, in one case, after having found the lack of legal provisions for the exercise of the right to vote through voting from abroad, for voters who are permanent residents outside the territory of the Republic of Albania, the Court has imposed on the Assembly the obligation to fill the legal gap within a year. This disposition was based on article 76, point 5, of the Court organic law, according to which, when during the examination of a certain case, the Court considers that there is a legal gap, as a result of which negative consequences are created for the individuals' fundamental rights and freedoms, it, *inter alia,* imposes on the lawmaker the obligation to fill the legal framework within a certain time limit.

In another case, being set into motion after a decision of the ECtHR to respect a fair threshold in compensation of the right to property, the Court ordered the Assembly to change the relevant law in order to enable the implementation of such right (*see for more the answer to the question no. 3 above*).

II. The decision-maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

Organic law of the Constitutional Court has not defined any criteria related to the body that has issued the normative act challenged on unconstitutional grounds. This means that any act that violates a fundamental and constitutional right can be reviewed by the Constitutional Court.

64 *See decision no. 42 dated 27.12.2022 of the Constitutional Court of Albania.*
65 *See decision no. 25, dated 10.05.2021 of the Constitutional Court of Albania.*
66 *See decision no. 5, dated 22.02.2022 of the Constitutional Court of Albania.*

More specifically, in its practice, the Court has been set into motion to review the constitutionality of laws[67], decisions of the Government[68], the Municipal Council[69], orders of ministers[70], etc.

It is worth mentioning that for the Constitutional Court jurisdiction it is important the content of the act and not the institution that has issued this act. In this case, based on the powers that the organic law has assigned to it, Constitutional Court assesses: a) the content of laws and normative acts; b) the form of laws and normative acts; c) the procedure for their approval, announcement and entry into force. When a certain law or normative act, or part thereof, which is subject of review before the Constitutional Court, is repealed or amended prior to the Constitutional Court decision, the adjudication is dismissed, except for the cases when it considers that proceedings should continue due to a public or state interest (*article 51 of the organic law*).

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

In its decision-making, Constitutional Court has also been referred to reports written down during the legislative process *(travaux préparatoires)*.[71] The Court, through the analysis of the history of the legislative process, aims to derive the meaning of the content of the norm under review at the time of its approval, in order to reach a fair conclusion about the intention of the legislator and the grounds of submission presented before it.

Likewise, in its jurisprudence, the Court has emphasized that despite the discretionary power of the legislator to act within its normative space, by clearly defining and on a case-by-case basis the objectives it seeks to achieve, it is unacceptable in the state of the rule of law the taking and approving of legislative initiatives without being based on preliminary studies or official statistical data.

More concretely, in a case where the Court was set into motion to review the constitutionality of normative acts with the force of law, issued by the government and approved by the Assembly, concerning the transparency and price control for some basic food products and other products related thereof, as a result of the particular situation created in the market, the Court emphasized that the reasons of emergency and necessity that led the government to this solution, must be reflected and analyzed in the reports and documents accompanying the approval of relevant acts, in order to make possible the constitutional control over their existence. Thus, the Constitutional Court concluded that the reports accompanying the contested normative acts did not contain an evaluation of the concrete impact on the national market and on the Albanian consumer coming from the situation created in the international market and the effects of Russian – Ukraine war. Therefore, they were approved in absentia of necessity and emergency.[72]

While in another case, also in terms of necessity and emergency but unlike the case cited above, Constitutional Court considered that the Government had prepared the analysis and reasons of the fuels price fluctuations, depending on their price in the stock market, as well as the policies followed until that time regarding the taxes on fuels and vehicles. This was a measurable indicator that gave to the Constitutional Court the opportunity to verify the compliance with the criteria of necessity and emergency, which were fulfilled by the contested normative acts in the case in question.[73]

In another case, Court underlined the fact that the documents drafted during *travaux préparatoires* for the adoption of the law under review were not publicly accessible, what could have made easier

67 *See decision no. 32, dated 30.05.2023 of the Constitutional Court of Albania.*

68 *See decision no. 4, dated 15.02.2021 of the Constitutional Court of Albania.*

69 *See decision no. 29, dated 02.07.2021 of the Constitutional Court of Albania.*

70 *See decision no. 11, dated 09.03.2021 of the Constitutional Court of Albania.*

71 *See decisions no. 34, dated 12.06.2023; no. 32, dated 30.05.2023; no. 37, dated 01.12.2022; no. 30, dated 02.11.2022; no. 22, dated 20.03.2017 of the Constitutional Court of Albania.*

72 *See decision no. 8 dated 22.02.2023 of the Constitutional Court of Albania.*

73 *See decision no. 21 dated 18.04.2023 of the Constitutional Court of Albania.*

to know the intention of the lawmaker and the employed legislative techniques.[74]

And in another case, the Court stated that the purpose of the law become more ambiguous after referring to the *travaux préparatoires* of its approval. The explanatory report of the draft law did not contain the grounds to justify the restriction imposed by the Government.[75]

In another case, the Court underlined that the report accompanying the law did not contain sufficient arguments on the necessity to toughen criminal sanctions for unauthorized possession of weapons, bombs, mines or explosives in public spaces or open to the public, while the Assembly, as an interested party, did not submit any constitutional arguments on the need, appropriateness and necessity of the legal tool (legal amendments), as the only way to achieve the goals of the lawmaker in the fight against organized crime and security of public and social order.

Under these circumstances, the Court identified ambiguity and spontaneity in choosing the legal tool of toughening up the criminal sentences, considering it as a ground for the violation of principle of legal certainty.[76]

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

Constitutional Court examines and analyzes whether the decision-maker has justified the act it has issued in terms of the respect for constitutional principles and standards. However, respecting the principle of judicial deference, the Court has not specified whether the decision is one that the Court would have reached, had it itself been the decision maker (*see for more the answer to question no. 12 -- above*).

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

The Constitutional Court gives weight to the analysis made by the legislator and certainly, the more thoroughgoing it is, the clearer it is for the Court itself to assess the constitutionality of the act. And that, due to the fact that the explanatory report of the contested legal/normative act is an act of probative value - evidence, particularly in the initial phase of the judgment conducted by the Court, when examining the merits of the case (*see for more the answer to question no. 12 - above*).

15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

As a general rule, Constitutional Court does not consider whether the contested act represents even the opposing views put forward during the parliamentary debate. However, in its decision-making, the Court has expressed the role of parliamentary minority in democracy, emphasizing the need to find the balance between majority and minority, what creates a form of interaction that ensures effective, democratic and legitimate governance.

More specifically, the Court has stated that existence of a parliamentary minority both inside and outside the Parliament is a crucial element of a well-functioning democracy. By monitoring and criticizing the work of majority, minority aims to ensure the transparency of public decision-making and efficiency in the management of public affairs, ensuring in this way the protection of public interest and prevention of misuse of power. Even though minority, at least as a rule, does not have the power to make decisions within the Parliament, its function is, among others, to improve the political decision-making procedure, to supervise the governance, as well as to enhance the stability,

74 *See decision no. 32, dated 30.05.2023 of the Constitutional Court of Albania.*

75 *See decision no. 37 dated 01.12.2022 of the Constitutional Court of Albania.*

76 *See decision no. 9 dated 26.02.2016 of the Constitutional Court of Albania.*

legitimacy, accountability and transparency in political processes. The existence of constitutional and legal regulations in such cases is a way to institutionalize the role of parliamentary minority. A constitutional democracy, where the exercise of powers is regulated through constitutionally protected procedures, the respect for which is not left to the discretion of majority, is the best guarantee for the existence of an effective political minority.[77]

In its jurisprudence, the Court has respected the important role of parliamentary minority even in constitutional processes. In one case, although the Court initially held that the application which set the constitutional process into motion was submitted by a group of 28 members of the Parliament, representing one of the constitutional subjects, i.e. no less than one-fifth of the members of the Parliament, it (the Court) found that two of the deputies who had signed the application resigned from their mandates as deputies and that were actually replaced by two other deputies. So, while the case was under examination, two of the signatory deputies no longer held this status. In the meantime, three other deputies had submitted their request to join as signatories the application filed with the Constitutional Court.

In this case, the Court upheld that the verification of formal criteria for the admissibility of the application, i.e. the verification of the number of deputies addressing the Court (no less than one-fifth of the deputies), is made when the constitutional review is set into motion. This criterion was met by the applicant at that stage of examination. Following the expression of the will of three other deputies, this criterion was again considered as fulfilled, as long as the applicant had the number required by the relevant constitutional provision. Consequently, the Court has legitimated the applicant and proceeded with the case examination.[78]

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

Public consultation is an essential requirement of the legislative process, regulated not only by the Constitution, but also by specific legislation for this purpose. Specifically, Article 23 of the Constitution has guaranteed the right to information for anyone who, in compliance with the law, has the right to get information about the activity of state organs, as well as of persons who exercise state functions, and to be given the opportunity to attend meetings of elected collective bodies. This constitutional right is further detailed by the law no. 146/2014 "On public notification and consultation", which regulates the process of public notification and consultation of draft laws, national and local strategic draft documents, as well as of policies of high public interest, and defines the procedural rules that must be followed in order to guarantee transparency and public participation in policy-making and decision-making processes of the public bodies. Its purpose is to enhance transparency, accountability and integrity of public authorities.

In compliance with this constitutional and legal framework, the Court has identified the level of public consultation of the draft law with groups of interest. Thus, in one case, the Court noted that the applicant did not provide convincing arguments that the failure to properly conduct the preliminary consultation process resulted in its unconstitutionality. The Court considered that, as a general rule, the consultation of a draft law with the bodies involved or affected by its scope constitute part of the legislative process; it serves to gain a deeper understanding and identification of the problems encountered by these bodies during the exercise of their competences; and that it cannot be treated as an element, the absence of which necessarily leads to the unconstitutionality of the law.[79]

While, in another case, when the Court was set into motion to review the compatibility with the Constitution of the law on the territorial-administrative division of local government units, it upheld that it is not necessary for the lawmaker to fulfill all the consultation methods such as: open meetings, public consultation sessions, public hearings, opinion polls certified by competent bodies, the position expressed through the local referendum or in any other suitable and reliable way, all at once, in

77 *See decision no. 7 dated 24.02.2016 of the Constitutional Court of Albania.*

78 *See decision no. 35, dated 15.06.2023 of the Constitutional Court of Albania.*

79 *See decision no. 64, dated 23.09.2015 of the Constitutional Court of Albania.*

order for this process to be considered as complete, but the more of them are used, the more reliable and stable the result will be. In the present case, after having stated that the process of taking the opinion of inhabitants was realized by using most of the above-mentioned methods, the Court held that the constitutional criterion of taking the opinion was met and intact, in compliance with Article 108/2 of the Constitution.[80]

III. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

Constitutional Court does not have the obligation to adhere to the definition given by the Government. On the contrary, the essence of review is related to the Constitution itself. The Court interprets the constitutional rights, and the Government is obliged to guarantee and protect them.

More specifically - in practical terms - in one case where the Court was set into motion for the review of constitutionality of the law on transitional and periodic evaluation of the employees of State Police, Guard of the Republic and Service for Internal Affairs and Complaints at the Ministry of the Interior, the Court emphasized that as far as interference in the right to private life is concerned, dealing with it does not only foresee the negative obligation of public authorities not to interfere in private and family life, but also the positive obligation of the State to protect these rights as truthfully as possible, through the bodies of the three powers (legislative, executive and judicial powers). According to the Court, the more interference there is into the sphere of intimate or sensitive life, the more increases the obligation of public power to protect private life. Furthermore, the Court stated that respecting the right to private life in a democratic society does not mean that there cannot be any interferences in the exercise of this right when this is necessary for national security, for public security, for the economic well-being of the country, for maintaining order or preventing criminal offenses, as well as for the protection of health, morals or the rights and freedoms of others, which serve as premises for taking into consideration, in accordance with constitutional principles, an interference with the right to private life.[81]

While in another case, the Court was set into motion to review the constitutionality of the law on state police, which provided for special measures for the interception of individuals. After having noted that "interception" is a legal concept, it (the Court) assessed that, from the constitutional point of view, it is not decisive whether the special measures defined in the contested law are qualified or not as "interception", in order to conclude if the right to private life is restricted by them. According to the Court, the purpose of constitutional review is to test the activity of public authorities in relation to constitutional obligations and standards, regardless of the official names given to the acts, actions or measures. From this viewpoint, the Court noted that it was of particular interest for this judgement to consider the features of these special measures related to the following facts: (a) measures are part of the state police activity; (b) this activity surveils and intercepts the individual, in the sense that it collects and processes data related to his private life; (c) surveillance and interception of the individual are done secretly, in the sense that the individual is not aware of it. There are exactly these features of the special measures foreseen by the contested law that constituted an interference of state authorities in the private life of individuals, similarly to the interference made by interception. Finally, the Court concluded that the lawmaker had not provided for the protective guarantees to the individuals' private life from the interference of the State Police's special measures, making it incompatible with the Constitution as it imposes restrictions on the constitutional right to private life.[82]

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

The nature of rights does not affect the degree of deference of the Constitutional Court, as it is de-

80 *See decision no. 19, dated 15.04.2015 of the Constitutional Court of Albania.*
81 *See decision no. 20, dated 20.04.2021 of the Constitutional Court of Albania.*
82 *See decision no. 30, dated 05.07.2021 of the Constitutional Court of Albania.*

termined by the Constitution itself. The latter has provided that the fundamental human rights and freedoms are indivisible, inalienable, and inviolable and stand at the basis of the entire juridical order (Article 15 of the Constitution). That is why it is the state's primary and constitutional obligation to respect and protect these rights through its organs. The Court is very prudent in analyzing them, considering that these rights are absolute and could not be derogated; they could be restricted only by law, for the public interest or for the protection of the rights of others. The restriction must be proportional to the situation that has dictated it. These restrictions cannot violate the essence of the rights and freedoms and in no case can they exceed the limitations provided for in the European Convention on Human Rights. The Court itself has recognized and emphasized that the individual and his right is the highest value for the state. This right stands at the foundation of all rights and its denial brings about the elimination of other human rights.[83] In cases related to the right to private property, the Court, based on Article 41 of the Constitution, which provides, among others, that the law may stipulate restrictions in the exercise of a property right only for public interest (point 3) and that restrictions are permitted only against fair compensation (item 4), has emphasized that the interference should respect the elements provided for in Article 17 of the Constitution (*see for more the answer to question no. 3 -- above*).

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

Constitutional Court has and applies the scale of clarity when reviewing the constitutionality of a law. In its jurisprudence, the Court has connected the clarity of law with the principle of legal certainty, as an element of the rule of law. The necessary requirement is that the law and part thereof should be clear, well-defined and understandable.[84] The degree of clarity is more rigorous during the examination of laws or normative acts related to the criminal field. Given the importance of the criminal legislation, particularly the effect of criminal punishments on human rights, criminal norms should be clear and predictable. In other words, the standards regarding the accuracy of the law are very important to the criminal law, as they create a direct reference with two essential principles in the criminal law, such as the principle of legality (no punishment for offenses that are not expressly provided for in the law) and prohibition of application of the criminal law by analogy.[85]

According to the Court opinion, in order to correctly understand and apply the principle of legal certainty, it is required, from the one hand, that the law in a society offer certainty, clarity and continuity, so that individuals can direct their actions correctly and in compliance with it, and, on the other hand, that the law itself does not remain static, should it give shape to a certain concept.

The existence of ambiguity, inaccuracy, logical contradiction or inapplicability of legal norms, what carries the risk of not respecting the principle of the rule of law, serves as a sufficient argument in the field of constitutional control to consider them as incompatible with the Constitution. An inaccurate regulation of the legal norm, which allows to the individuals who apply them the space to make various interpretations that lead to consequences, is not in line with the purpose, stability, reliability and effectiveness aimed by the norm itself.[86]

In one case, the Court noted that submissions presented by the Government and the Assembly, concerning the clarity in the wording of the contested legal provision, did not seem unreasonable. However, the Court, respecting the boundaries between constitutional and judicial jurisdiction, upheld that it is the constitutional duty of courts of ordinary jurisdiction to correctly interpret the law during its application in the concrete case. Furthermore, the Court considered that, in essence, the content of the contested provision didn't have any inaccuracies or legal gaps. Its referential ambiguities were such that they did not create a logical contradiction or impossibility of application, which means that linguistic ambiguities do not have such constitutional significance as to render the norm incompat-

83 *See decision no. 65, dated 10.12.1999 of the Constitutional Court of Albania.*

84 *See decision no. 9, dated 26.02.2007 of the Constitutional Court of Albania.*

85 *See decisions no. 39, dated 15.12.2022; no. 24, dated 04.05.2021 of the Constitutional Court of Albania.*

86 *See decision no. 36, dated 15.10.2007 of the Constitutional Court of Albania.*

ible with the Constitution. These ambiguities can and should be resolved through judicial interpretation by the courts of ordinary jurisdiction, in the exercise of their constitutional role and function of interpreting and applying the law. Consequently, the contested legal norm did not appear to fail to fulfil the substantial aspect of the quality of the law, therefore the applicant's claims regarding the violation of the constitutional right of no punished without law and the principles of proportionality, justice, legality, legal certainty and equality before the law, were considered as unfounded.[87]

20. What is the intensity review of your Court in case of the legitimate aim test?

The intensity review of the Constitutional Court at the moment of determining the legal purpose is related to the public interest and the protection of the rights of others.

Specifically, the Court has elaborated the approach that the constitutional concept of public interest is quite broad and should be seen in the perspective of the concrete act under review. According to the Court, it is difficult to make an exhaustive list of the issues that represent public interest or public reasonableness that may lead to the limitation of a fundamental right, since the public interest should be understood in the relative sense, depending on the different situations that may arise. They can only be ranked negatively, that is, in terms of the restrictions imposed in each specific case. Constitutional practice has already accepted that, in principle, the lawmaker is free to act within its normative space by clearly defining the goals it seeks to achieve on a case-by-case basis.[88] On the other hand, the Court has confirmed that the initiatives of the lawmaker, which serve to the market regulation or the interests of a social state, should be accepted as reasonable restrictions. The principle of social state, envisaged in the Preamble of the Constitution, justifies the direct or indirect intervention of the public authority even in the private legal relations to protect general interests, such as the public control of the cost of living, the fight against inflation, promoting and encouraging of productive activities, protecting of poor strata, promoting of social values, etc..[89]

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

In its jurisprudence, Constitutional Court has noticed that in order to review the proportionality several cumulative criteria must be taken into consideration: (i) if the goal of the lawmaker is sufficiently important to justify the limitation of the right; (ii) if the undertaken measures are reasonably related to the objective, they cannot be arbitrary, unfair or based on illogical assessments; (iii) if the means employed are not tougher than they should be in order to achieve the required goal - the greater the harmful effects of the selected measure, the more important the goal to be achieved, so that the measure is justified as necessary. The proportionality of a restriction is reviewed case by case, bearing in mind that the above-mentioned criteria are not analyzed separately, but as closely related with each other. Moreover, during the review of proportionality, a number of factors must be considered, which cannot be determined in an exhaustive manner. They vary from case to case, depending on the circumstances of the case and the nature of the interference that has limited the fundamental right.[90]

22. Does your Court go through every applicable limb of the proportionality test

The Constitutional Court deals with all the elements of the proportionality test (see *answer to question no. 21 -- above*).

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

87 *See decision no. 32, dated 30.05.2023 of the Constitutional Court of Albania.*

88 *See decision no. 20, dated 20.04.2021 of the Constitutional Court of Albania.*

89 *See decision no. 37, dated 01.12.2022 of the Constitutional Court of Albania.*

90 *See decisions no. 15, dated 22.06.2022; no. 20, dated 20.04.2021; no. 11, dated 09.03.2021; no. 33, dated 08.06.2016 of the Constitutional Court of Albania.*

There are no cases, as the Constitutional Court examines cumulatively all the criteria of proportionality test (*see answer to question no. 21 – above*).

24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

Constitutional Court in Albania is a relatively young institution, as it has been operating for 30 years now, so in its jurisprudence it has been referred to the practice of homologue courts in other countries, as well as to the practice of the ECtHR. Therefore, it cannot be said that proportionality review has been concomitant with judicial deference doctrine.

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

Constitutional Court has devotedly followed the jurisprudence of the ECtHR, especially on cases related to fundamental human freedoms and rights. In its practice, it has quoted quite often the jurisprudence of the ECHR, including cases related to the margin of appreciation and judicial deference, which have contributed to the establishment of national constitutional standards. More concretely, following the jurisprudence of the ECtHR, the Constitutional Court, regarding the respect for the right to property, upheld that the compensation for subjects expropriated during the communist regime could be incomplete, up to 10% (*see the answer to question no. 3 -- above*).

European Convention on Human Rights has been incorporated in Albanian Constitution and it has an important place among its provisions. Jurisprudence of the European Court of Human Rights, as the interpreting authority of the Convention, has served as a guide for the establishment and consolidation of our Court jurisprudence, which has borrowed the concepts elaborated in the ECtHR doctrine. Decisions of the ECtHR are mandatory to be applied by all the Albanian state institutions, in line with commitments that the Republic of Albania, as a member state of the Council of Europe, has undertaken according to Article 46, point 1, of ECHR.[91]

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

At the beginning of its jurisprudence, Constitutional Court has given deference by not considering the execution of final court decisions as part of the fair court trial. Consequently, the applications concerning the violation of fair court trial due to the non-execution of final court decisions were not accepted by the Court on the grounds that they were not part of its jurisdiction. In decision *Qufaj v. Albania* (November 18, 2004), ECtHR upheld that the right to fair court trial in Albania should have been interpreted in that way as to guarantee an effective legal remedy for the alleged violations of non-compliance with the criteria of Article 6 § 1 of the Convention. From that moment on, the Court has changed its jurisprudence, diligently following the jurisprudence of the ECtHR.

IV. Other peculiarities

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

There are not many cases where the interested subjects have raised the issue of deference. However, the cases where it has been raised are mentioned in the answers to the above questions.

28. Has your Court have grown more deferential over time?

Constitutional Court has developed its position over time, in accordance with constitutional and legal provisions, finding the border lines between constitutional and political spheres, making the

91 *See decisions no. 33, dated 14.11.2022; no. 20, dated 01.06.2011 of the Constitutional Court.*

latter believe more in jurisdictional solutions rather than in political ones. It has a clear vision about the division between ordinary jurisdiction and constitutional one, articulating its judicial deference more and more, both from the parties in process and from itself.

29. Does the deferential attitude depend on the case load of your Court?

The deferential attitude of the Constitutional Court does not depend on its case load. However, since the case load has not been very fluctuating so far, no definitive conclusion can be drawn on this question.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

Constitutional Court bases its decisions on the claims and objections presented by the parties involved in the process, as they present the case before it and, consequently, the Court has the obligation to give them the requested answers. So, the Court cannot change the legal object – the subject matter of the case – without having an explicit request from the parties. The Court, in its jurisprudence, has emphasized that the subject matter and the grounds of the application, on the basis of which the question of constitutionality is raised, constitute the essence (*thema decidendum*) of constitutional judgment.[92] Likewise, it cannot uphold its decisions on arguments other than those put forward by the applicant. However, in cases where the principle or the violated right is not properly identified by the applicant, based on the essence of arguments and *iura novit curia* principle, the Court may consider to elaborate these arguments in terms of a specific principle. Moreover, in certain cases, the Court can verify its own jurisdiction - *ex officio*.

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

Constitutional Court, on the basis of Article 48 of its organic law (no. 8577/2000[93]), extends the limits of its constitutional review within the subject matter of the application and the grounds presented therein. However, exceptionally, the Court decides on a case-by-case basis when there is a connection between the subject matter of the application and other normative acts. So, it can also be expressed about other provisions that are not included in the subject matter of the application, when it deems that they are related to the case under review. If the Court reviews the constitutionality of a certain act and concludes that it is based on an unconstitutional law or normative act, it decides to repeal the law or the normative act simultaneously.

More specifically, in a case where the Court was set into motion only for the repeal of legal provisions of the Criminal Code that provided for the death penalty, it decided to further review the subject matter of the application and the constitutionality of two provisions of the Military Criminal Code, which provided for the death penalty. The Court decided to repeal these provisions and to extend the legal effects of its decision on all the other court decisions that had decided on death penalty and had not been yet executed.[94]

92 *See decisions no. 15, dated 22.06.2022; no. 7, dated 01.03.2022; no. 22, dated 11.04.2016; no. 6, dated 17.02.2012 of the Constitutional Court of Albania.*

93 *Article 48 of the law no. 8577/2000 provides: "1.The terms of reviewing the case are within the subject of the application and the grounds provided in it. 2. Exceptionally, the Constitutional Court decides in any case when there is a link between the object of the application and the other normative acts."*

94 *See decision no. 65, dated 10.12.1999 of the Constitutional Court of Albania.*

The Federal Constitutional Court of Germany

Prof. Dr. Heinrich Amadeus Wolff, Prof. Dr. Astrid Wallrabenstein[95]

Questionnaire

For the national reports

I. Non-justiciable questions and deference intensities -

Part 1

Question 1

In your jurisdictions, what is meant by "judicial deference"?

1. The principle of judicial self-restraint

a) No technical scope of application

While an established principle in Anglo-American constitutional case-law, the principle of judicial self-restraint is not recognised in Germany. It is only very rarely that the Federal Constitutional Court has actually mentioned the term.There is one decision, rendered in 1973, where the Constitutional Court stated that this principle would also be applicable in Germany and that the Court would self-impose judicial restraint.[96] Moreover, the term is occasionally used in dissenting opinions. Dissenting Justices may use the term when voicing the opinion that the majority opinion exceeds the Constitutional Court's competences in the individual case.[97] The fact that the principle has only been mentioned on these very few occasions proves that the principle itself – unlike its underlying idea – generally has no importance in Germany.

The Constitutional Court's case-law does not specifically recognise the term 'judicial self-restraint' because it is not consistent with the structure and legal principles of the Federal Constitutional Court for several reasons. The limits of jurisdiction follow directly from the interpretation of the applicable rules governing the allocation of competences and from constitutional law, which in turn lays down and guarantees the decision-making rights and competences of other state organs. The idea that the term judicial self-restraint is meant as a prompt for the Constitutional Court to delimit its jurisdiction is objectively integrated into the system of the Basic Law (*Grundgesetz* – GG) through the provisions governing the competences of the constitutional organs.

Therefore, the German Constitutional Court is not concerned with the question of whether it should exercise self-restraint or not but with the interpretation of legal provisions. The Constitution obliges the Federal Constitutional Court to fully exercise its competences but to not exceed them. The Court is not empowered to self-impose limitations within the scope of its competences because this would amount to a partial waiver of its competences. This is prohibited by the order of competences. The principle of self-restraint is not consistent with the German understanding of the allocation of competences between constitutional organs.

b) Hermeneutical term

Even if the term cannot be found in the Constitutional Court's case-law, it is commonly used as a hermeneutical term, i.e. a collective term for a specific legal phenomenon. The exact meaning of this term can have different nuances depending on the context of the argument. When the Constitutional Court interprets the rules governing its own competences and substantive constitutional law, it is, in each instance, called upon to respect the leeway to design that the Constitution attributes to other constitutional organs. Within this meaning, the term certainly has its justification. It calls on the

95 *Prof. Dr. Heinrich Amadeus Wolff* is a Justice of the First Senate, *Prof. Dr. Astrid Wallrabenstein* is a Justice of the Second Senate of the Federal Constitutional Court.

96 Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 36, 1 <1>.

97 BVerfGE 115, 320 <371 (381)>; 93, 121 <149 (151)>; 48, 127 <158 (201)>.

Justices interpreting the individual provisions of the Constitution to have due regard to the fact that constitutional law always starts from the premise that it provides state organs with several options for solving and further developing the legal order and that not all questions derive directly from constitutional principles or are pre-determined by constitutional law.

2. The limits of the Federal Constitutional Court's jurisdiction

a) Correlation between jurisdiction and competences

From the above, it follows that in Germany it is the order of competences and its observance that assume the role that the principle of judicial self-restraint plays in other jurisdictions. The Federal Constitutional Court exercises its jurisdiction based on the competences provided for in the Constitution. Most competences are laid down in Art. 93 of the Basic Law, other important ones in Art. 100 of the Basic Law. In addition, there are individual competences set out in several other parts of the Constitution (cf. Art. 93(1) no. 5 of the Basic Law).[98] In exceptional cases, the Federal Constitutional Court's jurisdiction can arise from a federal act of Parliament (Art. 93(3) of the Basic Law). However, these competences are of no particular significance in practice.[99] The competences are procedural and laid down in the Constitution or the law. Unwritten competences of the Federal Constitutional Court are not recognised.

The so-called principle of enumeration applies,[100] according to which the Court can only decide if the specific application for legal protection can be based on a written competence.[101] The Federal Constitutional Court's jurisdiction must not be extended beyond the scope of the legal framework by way of an analogous application of the provisions on competences.[102] The competences have very different meanings and requirements. The most significant types of proceedings in practice are constitutional complaints pursuant to Art. 93(1) no. 4a of the Basic Law, specific judicial review proceedings pursuant to Art. 100(1) of the Basic Law and *Organstreit* proceedings (disputes between constitutional organs) pursuant to Art. 93(1) no. 1 of the Basic Law.

The Federal Constitutional Court's jurisdiction extends as far as the applicable scope of competences in the specific proceedings. If the Federal Constitutional Court has no jurisdiction to scrutinise a specific legal dispute, it must not conduct a judicial review. Therefore, the limit of the Federal Constitutional Court's jurisdiction results, by implication, from the scope of its competences in the respective proceedings. There are no specific areas in which the Federal Constitutional Court is not allowed to adjudicate per se. There is no prohibition of judicial review. There are only areas in which the Federal Constitutional Court lacks competence and is, thus, not allowed to act.[103]

Disputes concerning the scope of the Federal Constitutional Court's jurisdiction are, therefore, al-

98 Cf. Art. 18 second sentence of the Basic Law, Art. 21(4) of the Basic Law, Art. 41(2) of the Basic Law, Art. 61 of the Basic Law; Art. 98(2, 4) of the Basic Law; Art. 99 of the Basic Law; Art. 126 of the Basic Law.

99 See, for example, § 16(3) of the Act on the Scrutiny of Elections (*Wahlprüfungsgesetz* – WahlPrG), §§ 97a ff. of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG); § 105 of the Federal Constitutional Court Act; § 26(3) of the European Elections Act (*Europawahlgesetz* – EuWG), § 32(3, 4) of the Political Parties Act (*Parteiengesetz* – PartG), § 33(2) of the Political Parties Act, § 50(3) of the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung* - VwGO), § 39(2) of the Social Courts Act (*Sozialgerichtsgesetz* – SGG), § 18(3) of the Parliamentary Committee of Inquiry Act (*Untersuchungsausschussgesetz* – PUAG), § 36(2) of the Parliamentary Committee of Inquiry Act.

100 Cf. Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 23 July 2002 – 2 BvR 403/02 –, NVwZ 2002, 1366 f.

101 BVerfGE 2, 341 <346>; BVerfGE 21, 52 <53>.

102 Cf. BVerfGE 1, 396 <408 f.>; BVerfGE 21, 52 <53>.

103 Clearly in this sense, for example, BVerfGE 2, 341 <346>.

ways disputes on the interpretation of the respective rules of competence and standards in the specific case. The Federal Constitutional Court's jurisdiction is determined by the respective procedural and substantive requirements of the respective request.

b) Procedural Requirements

The procedural requirements include, in particular, the legal ability to file an application, the question whether the application requires a respondent and, if so, whether the right respondent has been chosen, the admissibility of the subject matter of the proceedings, the question whether a subjective legal position needs to be affected, and the question of time limits and certain forms.

The question whether the type of application is admissible by its nature in the respective proceedings is also essential.[104] For instance, the constitutional complaint as the most common type of proceedings is generally only formally admissible as an application for a declaratory judgment[105] which is supplemented by the Court's competence to reverse unconstitutional court decisions and repeal unconstitutional laws.[106] Beyond that, the Court does not make any further pronouncements on the challenged acts.

These procedural requirements ensure that the Court's actions are judicial in nature. The judicial nature of actions is primarily characterised by the following general standards:[107] (a) The Federal Constitutional Court only takes action upon application and not on its own initiative.[108][109] (b) The Court's decisions are declaratory in nature and it can reverse decisions or repeal laws. However, it does not permanently lay down how a gap in the law should be regulated;[110] (c) it applies and specifies existing law but does not create law in the way a legislative authority can;[111] (d) it reacts to cases it did not create itself; (e) its perspective on the facts of the case is generally retrospective; (f) its decisions are generally limited to the respective case. There are, however, some particularities with regard to the scope of the binding effect pursuant to § 31 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG). (g) Furthermore, the Federal Constitutional Court cannot revise its decisions on its own initiative. This is only possible in the context of a further case which concerns the same point of law.

c) Substantive requirements

Besides the procedural requirements, the competence of the Federal Constitutional Court is determined by the relief sought by the applicant which is in turn shaped by the type of proceeding.

Ordinarily, the Court examines whether the subject matter is compatible with the standard of review. This process can be subdivided into three steps: Firstly, the determination and specification of the relevant subject matter (subject matter), secondly, the abstract interpretation of the standard of review (standard of review), and thirdly, the application of that standard of review to the specific subject matter, i.e. the determination whether the state measure in question is compatible with the standard of review or not (application of the law to the specific case).

In all three steps, the Federal Constitutional Court will generally encounter decisions by other state authorities. The Constitutional Court respects the decision-making prerogative of the previously

104 Cf. § 13 of the Federal Constitutional Court Act.
105 § 95 of the Federal Constitutional Court Act.
106 § 32(1) of the Federal Constitutional Court Act.
107 See in this respect Philipp Austermann, Die rechtlichen Grenzen des Bundesverfassungsgerichts im Verhältnis zum Gesetzgeber, DÖV 2011, 267 <269>.
108 Cf. § 23 of the Federal Constitutional Court Act.
109 There is an exception for cases where the Federal Constitutional Court issues a preliminary injunction to secure the subject matter of pending proceedings - cf. § 32 of the Federal Constitutional Court Act.
110 Cf. BVerfGE 140, 211 <219>.
111 BVerfGE 3, 225 <236>.

involved authorities to varying degrees. The second step, i.e. the interpretation of the standard of review, is the one in which the Constitutional Court grants the least leeway to the other authorities. In contrast, the Constitutional Court frequently adopts the specifications of other authorities with regard to the determination of the subject matter. When it comes to applying the law to the specific case, the Court gives specific shape to the leeway to design granted to other authorities depending on the context.

aa) Standard of review

The Court will only examine the compatibility of the measure in question (subject matter) with the standard of review to the extent that the respective standard contains legal requirements.

(1) Constitutional law as the principal standard of review

For most types of proceedings the applicable standard of review will be German constitutional law. Depending on the type of proceedings, this may only mean part of the Constitution. For example, in disputes between constitutional organs (*Organstreit* proceedings) the Court will only review whether the respective rights of the organs have been violated. Given that only the law explicitly laid down in the Basic Law amounts to written constitutional law (Art. 79 of the Basic Law), the standard of review is derived from the specific provisions of the Basic Law and supplemented by unwritten provisions.

(2) Autonomous interpretation of constitutional law

The principle

If the standard of review for the subject matter of the proceedings is, as per usual, limited to provisions of the Constitution, the Federal Constitutional Court will interpret these constitutional provisions autonomously.

The exception

This principally autonomous and – within the limits of the respective methodological rules – rather independent interpretation of the standard of review by the Federal Constitutional Court is subject to context-specific modifications. In the context of provisions governing the organisation of the state, the Federal Constitutional Court will consult state practice as a first relevant additional aspect for the interpretation of the Constitution. The understanding other constitutional organs have of the respective constitutional provision provides certain indications for the Federal Constitutional Court in the context of provisions governing the organisation of the state. The previous state practice has a particularly significant weight with regard to the interpretation of legislative competences.[112] The Court will consider state practice in other respects as well. State practice may be the object rather than the standard of review when the Constitutional Court examines acts of public authority. However, tradition and practice as they have been shaped in the course of historical and political developments must be considered when interpreting rules of procedure.[113] Thus, it is necessary to take state practice into account when there are doubts about the meaning of a provision.[114] Having said that, state practice cannot replace the requirements of a constitutional provision if they are unambiguous or can be determined by the standard methods of interpretation.[115] In cases where the Constitution provides for the cooperation of multiple state organs for state measures regarding organisational matters, the Federal Constitutional Court pays increased regard to state practice. In these cases, the Federal Constitutional Court will take the understanding of the other state organs into account when interpreting the provision. As an example, the Court has reduced its standard of review in the context of the so-called constructive vote of no confidence. The Constitutional Court

112 Cf. BVerfGE 134, 33 <55 para. 55>; 109, 190 <213 f.>; BVerfGE 33, 125 <152 f.>; 61, 149 <175>; 68, 319 <328>; 106, 62 <105>; 109, 190 <213> with regard to the interpretation of provisions on legislative competences.

113 Cf. BVerfGE 1, 144 <149>.

114 BVerfGE 91, 148 <171 f.>.

115 Cf. BVerfGE 62, 1 <38 f.>.

will only examine whether there are evident errors in the other organs' assessment as to whether there is the constitutionally required instability within the parliamentary majorities. The reason for this is that the sophisticated mechanism to safeguard the separation of powers in the event of the dissolution of the Bundestag pursuant to Art. 68 of the Basic Law can only unfold its effect if the Federal Constitutional Court respects[116] the previously involved constitutional organs' political assessment of the situation and grants them the constitutionally guaranteed leeway to design and assume political responsibility.[117]

(3) Interpretation of constitutional provisions

Constitutional provisions are often phrased in a broad and general manner. It is not unusual that they only lay down principles and objectives, as for instance do the constitutional provisions relating to the principles of federalism, the rule of law, democracy or the social state.[118] The Constitution contains further specifications of some but not all aspects of these objectives and principles. Therefore, the exact legal scope of the respective constitutional provisions, in particular of the constitutional principles and objectives, may well be in dispute. The dispute on the scope of the constitutional provisions is primarily a methodological question. However, it simultaneously concerns the question of the Federal Constitutional Court's corresponding jurisdiction.

To begin with, the interpretation of constitutional provisions follows the methodological rules on the interpretation of the Constitution.[119] First of all, the methodological rules are based on four rules of interpretation (grammatical, systematic, historical and teleological). The grammatical interpretation seeks to determine the meaning of a constitutional provision based on its wording. The historical interpretation consults the debate during the respective provision's genesis, compares it to any previous provision it replaced or examines to which historical problem the provision was supposed to react. The systematic interpretation analyses the overall context into which the respective provision is embedded within the Constitution. By contrast, the teleological interpretation focuses on the spirit and purpose of the provision. There is no hierarchy between the different methods of interpretation.[120]

These main methods of interpretation are supplemented by independent sub-principles. It is uncertain in how far these can strictly be attributed to one of the respective methods of interpretation. It is common for the Federal Constitutional Court to subsequently deliberate on further consequences of the respective interpretation. It is important that the interpretation is embedded into the context of international law, EU law and comparative law. An understanding of constitutional law as a uniform order that does not recognise hierarchical relationships between the different provisions is also of relevance. In case of a conflict between different provisions, a solution must be chosen that allows all constitutional provisions to unfold to the greatest extent possible. Given the broad character of the constitutional provisions, mere interpretation oftentimes does not suffice to determine the specific constitutional requirements. The Federal Constitutional Court occasionally tries to clarify this terminologically by referring to the 'specification of the Constitution'.[121]

The Federal Constitutional Court points out that the content of constitutional provisions is substantially determined by the terms used therein. However, the literal meaning by itself is not sufficient to determine their significance and scope. Rather, it is necessary to take into account the legal and historical context in which the provisions came into being as well as their purpose and aim as they were outlined in the historical consultations and eventually expressed in the statutory context. The meaning of these constitutional provisions can only be determined by such an overall assessment.[122]

116 Cf. BVerfGE 62, 1 <51>; 114, 121 <158>.
117 Cf. BVerfGE 36, 1 <14 f.>; 114, 121 <160>.
118 See in particular Art. 20 of the Basic Law.
119 See in this respect BVerfGE 11, 126 <129 ff.>; 35, 263 <279>.
120 BVerfGE 105, 135 <157>; 133, 168 <205 para. 66>.
121 BVerfGE 55, 274 <333>; see also BVerfGE 101, 158 <219>.
122 BVerfGE 74, 102 <116>.

It is not possible to consider and interpret an individual constitutional provision in isolation. Constitutional provisions are embedded into a contextual meaning with the other provisions within the uniform order of the Constitution. Certain constitutional principles and fundamental decisions can be derived from the overall content of the Constitution. Individual constitutional provisions are subordinate to these overall principles and decisions.[123] The Constitution must be interpreted as a uniform order with the aim of avoiding contradictions between the individual provisions.[124] The Federal Constitutional Court also emphasises that the interpretation of terms in the Basic Law is open to international law and the European Convention on Human Rights (ECHR). The possibilities of interpretation in a manner open to the ECHR find their limits where such an interpretation no longer appears tenable according to the recognised methods of interpretation of the law and of the Constitution.[125] There is a constitutional duty to use the ECHR in its specific manifestation as a guideline for interpretation even when applying German fundamental rights.[126] In cases of doubt, fundamental rights provisions should in principle be interpreted in the way allowing them to take effect to the greatest extent.[127]

(4) Other provisions as a standard of review

Application scenarios

In exceptional cases, the applicable standard of review is derived from other provisions (outside of constitutional law). Three exceptions will be mentioned here. (a) Firstly, ordinary law can be the applicable standard of review. The most important example is the abstract judicial review of *Land* law. The Federal Constitutional Court will also review the compatibility of *Land* law with ordinary federal law.[128] However, these cases are of no particular significance in terms of constitutional procedure. (b) Secondly, according to the case-law of the Federal Constitutional Court, the fundamental rights enshrined in the EU Charter of Fundamental Rights can be the applicable standard of review. This is possible in the event of a constitutional complaint against a decision by a German court where secondary EU law provides an exhaustive legal framework.[129] (c) Thirdly, ordinary law may be indirectly reviewed in proceedings concerning the determination of the existence of a general rule of international law within the meaning of Art. 25 of the Basic Law. The Federal Constitutional Court does not directly decide the question whether a federal law is compatible with a general rule of international law in proceedings pursuant to Art. 100(2) of the Basic Law. Rather, it only determines whether such a general rule of international law exists. In other words, the proceedings under Art. 100(2) of the Basic Law are designed to verify whether a rule exists rather than to review provisions of German law. As the decision may, however, also concern the 'scope' of general rules of international law,[130] the Federal Constitutional Court can examine whether, depending on the scope of a particular rule of international law, such rule is capable of influencing domestic law in the individual case. As a result, the verification proceedings under Art. 100(2) of the Basic Law in effect replace the legislative process.[131] Furthermore, *Land* law must also be examined for its compatibility with rules of international law that are part of federal law (Art. 59(2), Art. 25 of the Basic Law) in abstract judicial review proceedings.[132]

123 BVerfGE 1, 14 <32>.
124 Cf. BVerfGE 33, 23 <27>.
125 Cf. BVerfGE 128, 326 <370 f.>.
126 BVerfGE 111, 307 <329>.
127 Cf. BVerfGE 6, 55 <72>; 39, 1 <37 f.>.
128 Cf., e.g., with regard to the interpretation of the Framework Act for Higher Education (*Hochschulrahmengesetz* – HRG) as a federal law BVerfGE 66, 270 <282 ff.>.
129 BVerfGE 152, 216 ff. (*Right to be forgotten II*).
130 Cf. BVerfGE 15, 25 <31 f.>; 16, 27 <32 f.>; 18, 441 <448>.
131 Cf. BVerfGE 23, 288 <318>.
132 Rozek, in: Schmidt-Bleibtreu/Klein/Bethge, Bundesverfassungsgerichtsgesetz, Loseblatt, § 76 BVerfGG (Version September 2017), para. 65.

Interpretation of ordinary law

In the rare cases where provisions that are not constitutional law constitute the applicable standard of review, the Federal Constitutional Court is more willing to base its decision on the interpretation and understanding previously applied by the ordinary courts instead of replacing the ordinary courts' interpretation of ordinary law with an interpretation of its own. It is, however, not bound by the ordinary courts' interpretation. Rather, the Federal Constitutional Court may review the meaning and effectiveness of these provisions as a preliminary question.[133]

(5) Legal standard of review

Only legal standards can be applied as the standard of review. These must, therefore, be provisions which emerged from a recognised law-making process. Other provisions than those based on official law-making procedures such as moral, ethical or religious standards cannot be the applicable standard of review in any proceedings.

bb) Subject matter of the proceedings

Specifying the subject matter of the proceedings is also a many-faceted process that depends on the context. The first relevant question is what the subject matter of the proceedings is and whether this subject matter is legally valid in itself (notwithstanding the question of whether it is compatible with the applicable standard of review).

(1) Interdependence with the application

The Federal Constitutional Court starts from the premise that the subject matter of the proceedings is for the most part determined by the specific application. The application has a binding effect, the precise extent of which depends on the specific type of proceedings. Compared to the binding effect of applications addressed to other courts, the Constitutional Court can make rather generous additions with regard to the applications addressed to it. The Federal Constitutional Court assumes that it is entitled, to a certain extent, to interpret the respective applications in a manner ensuring effective legal protection. Under special circumstances, the Federal Constitutional Court even assumes that it is competent to address questions raised in applications that have since been withdrawn. It also assumes that it is entitled to examine questions that go beyond the original application in specific cases when constitutional reasons suggest these should also be decided.

(2) Facts of the case

The Court will generally take the applicant's submissions as a basis for determining the facts of the case to which the subject matter of the proceedings relates. However, the Court feels entitled to review the facts of the case under exceptional circumstances where a specific situation potentially has an acute impact on fundamental rights. The specifics will be discussed in the answer to Question 18.

(3) Legal Acts

General information

If the proceedings concern a legal act, the Constitutional Court will usually exercise judicial restraint and typically base its decision on the interpretation of the legal act applied by the referring body. Only in obvious cases does the Constitutional Court deviate from the referring body's interpretation.

Legal questions with regard to the subject matter of the proceedings

As a general rule, the Federal Constitutional Court will not examine whether the subject matter of the proceedings is compatible with law that is not subject to the Court's review in the specific type of proceedings. Exceptions apply if the preliminary question itself is directly linked to constitutional law. For example, in abstract judicial review proceedings, the Federal Constitutional Court will generally only review an ordinance's compatibility with the Constitution. It will not examine whether the or-

133 Rozek, in: Schmidt-Bleibtreu/Klein/Bethge, Bundesverfassungsgerichtsgesetz, Loseblatt, § 76 BVerfGG (Version September 2017), para. 66.

dinance is compatible with ordinary federal law even though the latter ranks higher in the hierarchy of norms. Despite this general rule, the Federal Constitutional Court will still review the compatibility of an ordinance with its legal basis in ordinary law as a preliminary question because the German Constitution links an ordinance's effectiveness to the requirement of a legal basis in parliamentary law (Art. 80 of the Basic Law).[134]

Many types of proceedings require an answer to further legal questions that go beyond the compatibility of the subject matter of the proceedings with the applicable standard of review.

Specific judicial review proceedings pursuant to Art. 100(1) of the Basic Law serve the purpose of ensuring a constitutional decision in a specific legal dispute. Accordingly, these interim proceedings are necessary and admissible if the decision in the initial proceedings depends on the validity of the provision in question. The provision's validity must be relevant for the outcome of the initial proceedings. That is only the case if the matter would have to be decided differently if the provision were invalid.[135] When determining whether this is the case, the Federal Constitutional Court will exercise great restraint. Only if the incorrectness of the referring court's assessment is evident, will the Constitutional Court not follow the referring court.[136] If, however, constitutional questions arise in this context, the Constitutional Court assumes a similarly strict and autonomous approach as with regard to the specification of the applicable standard of review.

A court may only refer a law for review to the Federal Constitutional Court if it believes it to be unconstitutional. As a rule, this will only be the case if it is not possible to interpret the law in conformity with the Constitution.[137] If the ordinary court can resolve its constitutional concerns by interpreting the provision in conformity with the Constitution, it lacks the necessary conviction of the law's unconstitutionality, at least with regard to the specific case.[138] As a rule, the Federal Constitutional Court will review whether an interpretation in conformity with the Constitution is plausible.

Some proceedings require that the applicants or complainants have no procedural possibility to seek legal protection other than appealing to the Federal Constitutional Court. To determine whether this is the case, the Federal Constitutional Court has to interpret the existing avenues of legal redress before other courts. With regard to the most important proceedings, the Federal Constitutional will not follow the applicant's or complainant's assessment but examine the question itself. The general formula is: Whether a certain legal remedy has to be filed in order to satisfy the requirement of exhausting all available legal remedies even if its formal admissibility is in question, depends, according to the Federal Constitutional Court's case-law, on the prospects of success from the point of view of a reasonable party to the proceedings.[139] Accordingly, a particular legal remedy may still be part of the relevant avenue of recourse to the courts if its prospects of success are doubtful, e.g. because different courts or jurisprudence and legal scholarship disagree on its formal admissibility.[140] A different conclusion is merited if filing the legal remedy in question appears futile from the outset in view of opposing case-law of the ordinary courts.[141]

cc) Application of the law to the specific case

When applying the law to the specific case, the rigour of the Constitutional Court's judicial review varies in many respects. At times, the Federal Constitutional Court explicitly addresses the varying rigour of its judicial review but frequently it will simply implement it without making it an explicit

134 BVerfGE 101, 1 <30 f.
135 Cf. BVerfGE 46, 268 <283>; 58, 300 <317 f.>.
136 Cf. BVerfGE 143, 38 <50 para. 25>; established case-law.
137 Cf. BVerfGE 80, 68 <72>; 85, 329 <333 f.>; 87, 114 <133>; 124, 251 <262>.
138 Cf. BVerfGE 138, 64 <89 para. 75>.
139 Cf. Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 11, 203 <206>.
140 Cf. BVerfGE 47, 168 <175>; 128, 90 <99 f.>.
141 Cf. BVerfGE 20, 271 <275>; 49, 24 <51>; 68, 376 <380 f.>; 70, 180 <186>.

issue.

(1) Functional perspective

With regard to the application of the law to the case at hand, the Federal Constitutional Court specifies the consequences of a particular interpretation giving specific shape to a provision by interpreting it in a functional way. The Federal Constitutional Court considers its own role to be that of an actor within the constitutional order that has been assigned a particular function by the Constitution. It must exercise its function in a way that allows other constitutional organs to still exercise their own respective function in turn. This functional aspect becomes particularly clear in relation to the supreme federal courts, i.e. the Federal Court of Justice for civil and criminal matters, the Federal Labour Court, the Federal Social Court, the Federal Administrative Court, and the Federal Finance Court. In this respect, the Federal Constitutional Court has stated that it does not serve as an additional court of last instance, i.e. it is not an "ultimate court of appeal".[142]

The functional delimitation of competences is, however, also relevant in relation to other constitutional organs. The Federal Constitutional Court sees itself as the guardian of the Constitution and thereby as an essential element of the substantive rule of law as shaped by the Constitution and as juxtaposed to the principle of democracy. By contrast, Parliament is the key actor giving shape to the principle of democracy. When exercising its jurisdiction, the Constitutional Court must therefore consider whether the leeway the Constitution affords to Parliament, as the legislative branch, can be upheld.

(2) Originator of the measure

Legislator

An important factor for determining the intensity of review is who the originator of the state measure subject to the Constitutional Court's review is. When reviewing acts of Parliament or other organisational measures of Parliament, the Federal Constitutional Court will exercise a certain degree of judicial restraint. It describes this as reflecting the legislator's leeway to design and decision-making prerogative.

The Federal Constitutional Court is of the opinion that the legislator's leeway to design results directly from the Constitution. The powers the Constitution attributes to Parliament are of such nature that they allow for the exercise of political leeway and typically do not legally predetermine a single possible course of action. The Court commonly states that it is not for the Federal Constitutional Court to assess whether the legislator has chosen the most equitable, appropriate or reasonable solution.[143] Rather, a prudent judicial review of the ordinary law in question, limited to a standard of obvious unreasonableness, corresponds best to the legislator's broad leeway to design.[144]

The legislator's leeway to design may vary depending on the respective area of law. The Federal Constitutional Court assumes that the Constitution contains more rigorous requirements for some areas of law than for others. The Constitution per se grants constitutional organs a broad leeway to design

142 BVerfGE 122, 248 <303>.

143 BVerfGE 103, 310 <320>; 117, 330 <353>; 121, 241 <261>; 130, 263 <294>; 139, 64 <112 para. 95>; 140, 240 <279 para. 75>.

144 Cf. BVerfGE 65, 141 <148 f.>; 103, 310 <319 f.>; 110, 353 <364 f.>; 117, 330 <353>; 130, 263 <294 f.>; 139, 64 <113 para. 96>; 140, 240 <279 para. 75>.

in areas such as economic policy,[145] social policy[146]and foreign policy[147]. The Federal Constitutional Court takes a factual approach when determining the precise extent of the legislator's leeway to design and takes into account the respective regulatory matter. In many cases, it explicitly emphasised that the legislator's leeway to design is broad with regard to the relevant issues. When it comes to more recent decisions, the legislator's leeway to design was emphasised inter alia with regard to the fulfilment of fundamental national objectives,[148] the exercise of the *Bundestag*'s responsibility with regard to European integration (*Integrationsverantwortung*),[149] the statutory framework for ensuring an existential minimum in accordance with human dignity,[150] the principle of equivalence applicable to levies which compensate a benefit in fiscal law,[151] the determination of the public broadcasting fee,[152] the establishment and implementation of a concept to protect life and physical integrity,[153] legislation concerning civil servants,[154] the scope of fiscal and tax laws,[155] the resolution of the conflict between the *Bundestag*'s parliamentary right to ask questions and to obtain information on the one hand and the protection of the concerned companies' fundamental rights on the other hand,[156] the organisation of university admissions,[157] the design of atomic energy law,[158] the transition to a new legal regime,[159] limitations to contractual agreements on the compensation for provided services,[160] the design of a concept to protect against abuses of parental custody,[161] the design of effective legal protection,[162] the further definition and development of the constitutionally required protection of the right to know one's parentage,[163] the determination of effective sanctions for violations of rights,[164] the design of copyright-related rights.[165]

In other cases, the Federal Constitutional Court repeatedly held that it is not for the Court to assess whether the legislator has chosen the most appropriate, reasonable or equitable solution. This was

145 Cf. BVerfGE 14, 105 <117>; 37, 1 <21>; 39, 210 <225 f.>; 51, 193 <208>; 70, 191 <201 f.>; 77, 308 <332>; 109, 64 <85>; 116, 164 <182>; 118, 79 <101>; 142, 268 <286>.

146 Cf. BVerfGE 36, 102 <117>; 48, 227 <234>; 52, 264 <275>; 54, 11, <38 f.>; 59, 231 <263>; 77, 308 <332>; 97, 169 <185>; 101, 331 <350>; 102, 254 <325>; 103, 172 <185>; 103, 271 <287>; 109, 64 <85>; 111, 160 <167>, 113, 167 <220>; 114, 167, <263>; 118, 79 <101>; 132, 134 <165>; 137, 34 <73>; 142, 268 <286>; 149, 126 <143>; 152, 68 <115>; 152, 68 <116>.

147 BVerfGE 51, 1 <25>; 53, 164 <182>; 66, 39 <61>; 142, 123 <210>.

148 BVerfGE 59, 231 <263>; 82, 60 <80>; 152, 68 <116> para. 125.

149 BVerfGE 151, 202 <299 para. 149>.

150 BVerfGE 125, 175 <222, 224f.>; 132, 134 <159ff. para. 62, 67>; 137, 34 <72ff. para. 74, 76, 78>; 142, 353 <370 para. 38>.

151 BVerfGE 149, 222 <259>; 144, 369 <398>.

152 BVerfGE 149, 222 <268 para. 95>.

153 BVerfGE 96, 56 <64> ; 121, 317 <356>; 133, 59 <76 para. 45>; 142, 313 <337 para. 70>.

154 BVerfGE 148, 296 <349>; 145, 1 <12 f. para. 27>.

155 BVerfGE 149, 222 <255 para. 68>; 148, 147 <212>; 145, 171 <182>.

156 BVerfGE 147, 50 <145>.

157 BVerfGE 147, 253 <339 para. 188>.

158 BVerfGE 143, 246 <325>.

159 BVerfGE 143, 246 <384>.

160 BVerfGE 142, 268 <286>.

161 BVerfGE 142, 313 <337>.

162 BVerfGE 143, 216 <225 para. 21>.

163 BVerfGE 141, 186 <196 para. 21>.

164 BVerfGE 141, 220 <284 para. 139>.

165 BVerfGE 142, 74 <97>.

in particular set out in cases relating to the general guarantee of the right to equality,[166] laws on the organisation of higher education,[167] the laws relating to the remuneration of civil servants,[168] the assessment of the existential minimum standard of living,[169] and tax law,[170] value assessment methods for individual assets,[171] organisation of elections,[172] the decision whether a certain conduct should be punishable,[173] the protection of marriage,[174] and the imposition of fees.[175]

Executive and judiciary

The Constitutional Court rarely reviews measures taken by the executive branch directly. In most cases the executive measures will have been the subject of a review by the ordinary courts first. The approach for reviewing judicial and administrative measures is largely similar. With regard to administrative measures that have already been subject to judicial review and approved by the ordinary courts, the main issue will generally be the application of ordinary law and the determination of the facts of the case. For these cases, the Federal Constitutional Court has established a limited standard of review. The Federal Constitutional Court's approach with regard to this limited standard of review varies. It refers to court decisions because these will generally be the subject matter of the proceedings.

The most common approach is as follows: The design of the proceedings, the determination and assessment of the facts, the interpretation of ordinary law and its application to the individual case fall into the sole remit of the competent ordinary courts and are excluded from the Federal Constitutional Court's review. The Federal Constitutional Court can only intervene if a constitutional complaint regarding the violation of "specific constitutional law" by the courts has been lodged.[176] However, the fact that a decision is objectively flawed with regard to the standards of ordinary law does not necessarily amount to a violation of specific constitutional law. Rather, the courts must have failed to observe fundamental rights.[177] The Federal Constitutional Court only reviews whether a challenged decision shows any errors of interpretation that are based on a fundamentally incorrect understanding of the significance of a fundamental right, in particular its scope of protection; and whether these errors had a material impact on the case at issue.[178]

With regard to decisions of the civil courts, the Court uses the following approach: In principle, the interpretation and application of civil law falls to the ordinary courts. It is generally not for the Federal Constitutional Court to direct the civil courts as regards the outcome of their decisions.[179] The threshold of a violation of constitutional law that the Federal Constitutional Court needs to correct is not reached until the interpretation of the civil courts reveals errors that are based on a fundamentally incorrect understanding of the significance of the affected fundamental rights. These errors must also be of some weight in their substantive significance for the case at issue, in particular because the balancing of the conflicting legal positions in the private law context is adversely affected by them.[180]

166 BVerfGE 147, 252 <293 para. 64>.
167 BVerfGE 149, 1 <22 para. 46>.
168 BVerfGE 149, 382 <393 para. 18>.
169 BVerfGE 152, 68 <115 para. 122>.
170 BVerfGE 135, 126 <148 para. 68>.
171 BVerfGE 117, 1 <36>.
172 BVerfGE 89, 291 >301>.
173 BVerfGE 90, 145 <202>; 80, 182 <186>.
174 BVerfGE 108, 351 <364>.
175 BVerfGE 80, 103 <106>.
176 Cf. BVerfGE 1, 418 <420>.
177 BVerfGE 18, 85 <92 f.>.
178 BVerfGE 97, 12 <27>; BVerfGK 6, 46 <50>; 10, 13 <15>; 10, 159 <163>; established case-law.
179 Cf. BVerfGE 129, 78 <102>.
180 BVerfGE 148, 267 <281 para. 34> (*Stadium ban*) with further references; estab-

Apart from reviewing the application of ordinary law under the aforementioned circumstances, the Federal Constitutional Court also reviews whether the court decision at issue is arbitrary within the meaning of Art. 3(1) of the Basic Law. The application of the law or the procedure that is employed for such application are only arbitrary in this sense if they can under no conceivable aspect be considered legally tenable, which leads to the conclusion that the decision is based on irrelevant and therefore arbitrary considerations.[181] Furthermore, the Federal Constitutional Court will assume that decisions of ordinary courts upholding state interferences violate the Constitution if they are not comprehensible from a methodological perspective.[182]

Moreover, a somewhat broader approach is employed in particular with regard to cases where ordinary law hardly provides any legal standards at all. In these cases, the exercise of judicial power is not tenable under constitutional law if a corresponding measure by the legislator would be unconstitutional.[183] Judges may not disregard the spirit and purpose of the law as determined by the legislator. Judicial development of the law must not override the clearly recognisable intent of the legislator and replace it with judges' own regulatory concept.[184] Judges are obliged to respect fundamental legislative decisions and assert the legislative intent under changed circumstances as reliably as possible.[185] In doing so, they must apply the recognised methods of legal interpretation.[186] An interpretation of statutory law that – by way of judicial development of the law – sets aside the clear wording of the law, is not supported by or reflected in the law and is neither expressly nor – in the case of an evidently unintended gap in the law – implicitly approved by the legislator amounts to impermissible interference with the competences of the democratically elected legislator.[187]

Beyond that, there are certain areas where ordinary law justifies and limits interferences that have a particularly acute impact on fundamental rights. In these cases, the Federal Constitutional Court explicitly or implicitly deviates from the limited general standard of review. An overview of these areas will be given in the answer to Question 18.

In relation to the judiciary, the Federal Constitutional Court generally conducts a somewhat stricter review regarding adherence to the principles relating specifically to the exercise of judicial power. However, in some cases the Federal Constitutional Court still applies the general standards of the so-called 'Heck formula' (cf. in this respect answer to Question 18) in relation to procedural law.

(3) Nature of measures

(a) Measures granting benefits

Furthermore, specific standards of review have been developed for particular scenarios. The general principle is that the state has more leeway with regard to measures granting benefits than with regard to interfering ones.

(b) Planning and prognoses

In the context of prognoses and planning, the Constitutional Court assumes that the planning powers primarily rest with the executive and the legislator. The Court only reviews the methods and the facts of the case as to their plausibility. The Federal Constitutional Court examines whether the prog-

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lished case-law; see also Federal Constitutional Court, Order of the Third Chamber of the First Senate of 9 July 2020 – 1 BvR 719/19.

181 Cf. BVerfGE 108, 129 <137, 142 f.>.

182 Cf. Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 18 May 2022 - 2 BvR 1667/20 -, para. 33 ff.

183 BVerfGE 122, 248 <286>. Federal Constitutional Court, Order of the Third Chamber of the First Senate of 28 September 2010 - 1 BvR 1660/08 -, juris, para. 11.

184 BVerfGE 149, 126 <127>.

185 BVerfGE 149, 126 <156 para. 73>.

186 BVerfGE 84, 212 <226>; 96, 375 <395>.

187 BVerfGE 118, 212 <243>; 128, 193 <210>.

noses are based on sufficiently reliable foundations.[188] Insofar as the Court has to decide on value judgments and prognoses of the relevant authorities when reviewing a planning decision, it has to limit its review to the questions whether these assessments and decisions are manifestly incorrect, clearly refutable or conflict with the constitutional order.[189]

However, not even the legislator is free to make any prognosis as it sees fit. When evaluating the means chosen as well as the required assessment of the risks or dangers to the individual or to the general public, the legislator has a margin of appreciation and leeway to design, in respect of which the Federal Constitutional Court's powers of review are limited. The precise extent of this margin of appreciation and leeway to design depends on the nature of the subject matter in question, the legislator's possibilities to draw sufficiently reliable conclusions, and the affected legal interests.[190] The Constitutional Court's review can range from a mere review of evident errors to a review of reasonableness or even to a more comprehensive substantive review.[191]. The more complex the subject matter in question is, the greater is the legislator's margin of appreciation and leeway to design.[192]

On the flip side, the recognition of a margin of prognosis entails the legislator's potential obligation to remedy any shortcomings. Even after adopting a law, the legislator must monitor subsequent developments, review and, if necessary, revise the legal provisions in question if it becomes clear that the assumptions on which they were based were erroneous or no longer apply.[193]

With regard to decisions based on an uncertain factual basis, e.g. in the context of pandemics or the impact of technology, the Court likewise assumes that it does not primarily fall to the Court to address factual uncertainties in the realm of medicine or science. However, the legislator is held accountable in these cases. With regard to the genetic engineering of plants, the Federal Constitutional Court has pointed out the following: In view of a highly controversial societal debate between proponents and opponents of genetic engineering of crops and the fact that the current state of scientific knowledge does not provide any definite answers, especially with regard to the assessment of causal links and long-term consequences of genetic engineering, the legislator has a special duty of care in this area.[194] Simultaneously, this duty to implement precautionary measures against health or environmental risks grants the legislator broad leeway to design.[195]

(c) Factual uncertainties and precautionary measures

In the context of its review of measures taken to combat the COVID-19 pandemic, the Federal Constitutional Court pointed out that the Constitution gives the legislator a certain leeway, which limits judicial review. The Federal Constitutional Court has to review whether the legislator's assessment and prognosis of the impending dangers to the individual or the general public are based on sufficiently reliable foundations. Depending on the nature of the subject matter in question, the significance of the affected legal interests, and the legislator's possibilities to draw sufficiently reliable conclusions, the Court's review can range from a mere review of evident errors to a review of reasonableness or even to a more comprehensive substantive review. If serious interferences with fundamental rights are at issue, it is, in principle, not permissible for uncertainties in the assessment of the facts to simply be interpreted to the detriment of fundamental rights holders. However, the state's duty of protection can be guided by 'urgent needs for constitutional protection' – as is the case here. Where scientific knowledge is tentative and the legislator's possibilities to draw sufficiently reliable conclusions

188 BVerfGE 123, 186 <241>.
189 BVerfGE 76, 107 <107>; see also BVerfGE 95, 1 <22>-; 134, 242 <278>.
190 BVerfGE 77, 170 <215>; 88, 203 <262>; 90, 145 >173>; 150, 1 <88 para. 173>.
191 BVerfGE 50, 290 <332 f.>; see also BVerfGE 123, 186 <241>.
192 BVerfGE 122, 1 <34>.
193 BVerfGE 56, 54 <79>; 65, 1 <56>; 88, 203 <309 f.>; 95, 267 <313>; 107, 266 <296>; 111, 333 <360>; 132, 334 <358 para. 67>; 143, 216 <244 para. 71>; established case-law).
194 BVerfGE 128, 1 <36>.
195 Cf. BVerfGE 121, 317 <356 f.>.

are therefore limited, it is enough for the legislator to proceed on the basis of a context-appropriate and tenable assessment of the available information and evidence. This leeway is based on the legislator's responsibility to decide on conflicts between high-ranking and highest-ranking interests despite uncertainties – a responsibility that the legislator, with its unique form of democratic legitimation, is accorded by the Basic Law.[196]

(d) Mass phenomena and typification

Mass phenomena form another relevant group of cases. When setting out a framework dealing with mass phenomena, the legislator is authorised to generalise many individual cases into an overall framework, provided that it accurately reflects the subject matter in need of regulation based on the available information.[197] On this basis, the legislator may, in principle, adopt generalising, standardising and typifying rules, which do not as such violate the general guarantee of the right to equality merely because they give rise to inevitable hardships in individual cases.[198] The unequal impact may, however, not exceed a certain degree. Rather, the advantages of such typifications must be in adequate proportion to the inequalities they entail. Furthermore, the legislator may not choose an atypical case as its model for statutory typification; it must realistically base its determination on a typical case.[199]

(e) Transition to a new legal regime

When redesigning complex systems, the legislator has broad leeway in creating transitional rules for existing legal frameworks, entitlements, and legal relationships. Various nuances are conceivable between the immediate enactment of a new law without a transitional period and the undiminished continued existence of subjective legal interests. The Federal Constitutional Court only examines whether, in consideration of all relevant circumstances, the legislator exceeded the limits of what is reasonable in the overall balancing between the severity of the interference on the one hand, and the weight and urgency of the reasons invoked to justify the interference on the other.[200]

3. Effect of decisions

The varying reach of the Constitutional Court's decisions also manifests itself with regard to their effects. In view of individual provisions of its procedural law, the Federal Constitutional Court assumes that both the binding effect of its decisions beyond the parties to the proceedings and the subsequent ramifications of a court decision can vary from case to case.

There are areas in which the Federal Constitutional Court limits declarations of voidness for constitutional reasons. The Constitutional Court's differentiation between declaring an unconstitutional provision void, or merely declaring it incompatible with the Constitution, or compatible with the Constitution for a transitional period, is well-known and of considerable practical significance. The Constitutional Court's case-law commonly differentiates as follows: The incompatibility of a law with the Basic Law generally entails the consequence that the respective law is to be declared void.[201] However, under the Federal Constitutional Court Act the unconstitutionality of a law does not al-

196 Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 171 with further references; Federal Constitutional Court, Order of the First Senate of 27 April 2022 - 1 BvR 2649/21 -, juris, para. 152.
197 Cf. BVerfGE 11, 245 <254>; 78, 214 <227>; 84, 348 <359>; 122, 210 <232>; 126, 268 <278>; 151, 1 <21>.
198 BVerfGE 113, 167 <236>; 126, 268 <278 f.>; 151, 1 <21>.
199 BVerfGE 27, 142 <150>; 110, 274 <292>; 112, 268 <280 f.>; 117, 1 <31>; 122, 39 <569>.
200 BVerfGE 43, 242 <288 f.>; 67, 1 <15 f.>; 125, 1 <18>; Federal Constitutional Court, Order of the Second Senate of 24 November 2022 - 2 BvR 1424/15 -, para. 121.
201 Cf. BVerfGE 33, 303 <347>.

ways result in the law being declared void.[202] Rather, it also allows for a mere declaration that the law is incompatible with the Basic Law.[203] It is usually necessary to merely declare an unconstitutional provision incompatible with the Basic Law if the unconstitutional part of the law cannot be clearly separated from the rest of the legal framework or if the legislator has different options to remedy the violation of the Constitution.[204] In general, this is the case where the right to equality has been violated.[205] Not declaring a law void (§ 82(1) in conjunction with § 78 first sentence of the Federal Constitutional Court Act) is also necessary if declaring it void resulted in a situation which was even further from the constitutional order than the unconstitutional provision. This is the case if the disadvantages that result from the law immediately ceasing to have effect outweigh the disadvantages associated with its preliminary continued application.[206] A declaration of incompatibility must also be considered if the legal situation that is deemed unconstitutional arises from the combined effect of individual provisions and the constitutional shortcomings could be remedied by revising any one of those individual provisions, meaning that there is a possibility that the challenged provision may ultimately remain in force.[207] Another specific exception applicable to decisions with financial implications results from the principle of annuality governing budgetary law. If laws affecting the budget, such as, in particular, the laws relating to the remuneration of civil servants, do not comply with constitutional standards and are therefore void, the consequences of this unconstitutionality are generally limited to the respective fiscal year and are not extended to all years during which the unconstitutional provision was in force.[208] In particular with regard to provisions governing the remuneration of civil servants, it must be taken into account that, in substance, the alimentation of civil servants represents the satisfaction of a current funding requirement with funds from the current budget. Therefore, a general retroactive remedy of the constitutional violation is not necessary in view of the particularities of civil service.[209]

Question 2

Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (e.g. questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

Sub-question 1

Is there a spectrum of deference for your Court?

The Federal Constitutional Court assumes that its jurisdiction extends as far as its competences; it does not recognise a general or subject-specific duty of deference.

Sub-question 2

Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (e.g. questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

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202 § 95(3) first sentence of the Federal Constitutional Court Act.
203 § 31(2) third sentence of the Federal Constitutional Court Act.
204 Cf. BVerfGE 90, 263 <276>.
205 Cf. BVerfGE 99, 280 <298>; 105, 73 <133>; 107, 27 <57>; 117, 1 <69>; 122, 210 <245>; 126, 400 <431>; 138, 136 <249 para. 286>; established case-law.
206 Cf. BVerfGE 33, 303 <347 f.>; 61, 319 <356>; 83, 130 <154>; 85, 386 <401>; 87, 153 <177 f.>; 100, 313 <402>; 128, 282 <321 f.>; established case-law.
207 Cf. BVerfGE 82, 60 <84>.
208 Cf. BVerfGE 93, 121 <148>; 105, 73 <134>; 117, 1 <70>; 130, 263 <312 f.>; 139, 64 <148>.
209 Cf. BVerfGE 81, 363 <383 ff.>; 99, 300 <330 f.>; 130, 263 <313>; 139, 64 <148>.

The German Basic Law and the procedural law applicable to the German Constitutional Court (the Federal Constitutional Court Act) provide criteria for determining when and how the Federal Constitutional Court should decide a case. Whether the Federal Constitutional Court decides a case depends on the so-called procedural prerequisites of the respective type of proceedings. If the respective prerequisites have been met and the application is therefore admissible, the Court has to decide the case. In this regard, there are no so-called "no-go" areas for the Federal Constitutional Court. If the Constitution or ordinary law assigns the competence to review the question at issue to the Court, it will decide the question to the extent required by the competence of review.

The competence of review follows from legal provisions, which set the legal framework for the respective state actors in different ways. Therefore, the intensity of constitutional review can vary significantly with regard to different contexts and proceedings. This must not, however, be construed as meaning that the Constitution predefines areas that are exempt from review by the Federal Constitutional Court.

The standard of review and the subject matter of the proceedings determine how the Court decides. If the subject matter does not meet the requirements of the standard of review, the application is well-founded. Otherwise, the application is unfounded. The respective factors thus result from the interpretation of the respective provision.

In relation to the examples in the question, the specific answer is:

The Federal Constitutional Court does not apply a moral standard of review when deciding on questions of moral controversy. If the constitutional standard of review is unambiguous and the application of the standard of review to the case at hand is sufficiently clear, it is irrelevant whether the result is morally controversial or not. The Federal Constitutional Court does not measure its decision against ethical standards because it is unclear how such ethical standards should be defined. It can, however, be assumed that the majority of the population will not develop any moral standards that are contrary to constitutional requirements within a free and democratic basic order like the order under the Basic Law.

Whether a question is politically sensitive or not is also irrelevant for the Federal Constitutional Court. Decisions are only problematic when the constitutional standard of review is unclear. However, the Constitution generally grants the parliamentary legislator broad leeway to design with regard to highly contested political matters that can be described as politically sensitive. The Federal Constitutional Court will have due regard to this leeway in its decisions. However, this respect does not depend on the question of whether the parliamentary decision in a politically sensitive matter was controversial or not.

With regard to the allocation of scarce resources, scarcity does not, by itself, create a standard that would influence the Federal Constitutional Court's standard of review either. The decisive factor is to whom the Constitution assigns the decision on the allocation of scarce resources. With regard to budgetary resources, the Court respects the fact that the executive and Parliament decide on the budget in cooperation.

The Constitutional Court will, however, enforce financially relevant constitutional claims irrespective of how scarce the resources are in the individual case. The Constitutional Court assumes that the Constitution only predefines financial claims to such a small extent that the legislator still has enough leeway to decide on essential budgetary matters. Thus, the Constitutional Court is not obliged to examine the financial implications of a decision of its own accord.

With regard to presidential pardons based on Art. 60 of the Basic Law, the Federal Constitutional Court assumes that its review is limited as such pardons are not granted on the basis of legal standards.[210]

210 BVerfGE 25, 352 <363>; 30, 108 <111>.

Question 3

Are there factors to determine when and how your Court should defer (e.g. the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

Pursuant to the methodological rules of interpretation, certain factors that influenced the creation of a provision may also be of relevance in interpreting that provision. For example, historical experiences of a state will strongly feed into its constitutional legislation and constitutional changes.[211] As a rule, the conditions of a state's existence have to be taken into account when interpreting a provision teleologically. The culture of the respective state can influence the grammatical interpretation of certain terms. However, this is subject to significant changes which are commonly referred to as "constitutional shift" (*Verfassungswandel*).[212]

Whether a fundamental right is subject to a limitation clause or not plays a significant role with regard to the strength of that right.[213] The subject matter of the question at issue significantly limits judicial review. Changing social conditions and attitudes can also influence both the standard of the constitutional provision and the application of the law to the specific case. For example, the Federal Constitutional Court assumed that criminalising male homosexuality[214] was constitutional in 1957, which it no longer maintains today.[215]

Question 4

Are there situations when your Court deferred because it had no institutional competence or expertise?

In cases where the Constitutional Court has no institutional competence, the respective application is inadmissible. Cases in which the relief sought was not granted due to a lack of expertise on part of the Constitutional Court are inconceivable. Insofar as the Constitutional Court decides, it does so on the basis of constitutional standards for the interpretation of which it possesses sufficient expertise.

There may be preliminary questions, such as the existence of general rules of international law, questions concerning the interpretation of ordinary law, or questions of validity in the context of international law, for which the Federal Constitutional Court will seek external expertise.

As far as legal acts of other states are relevant as preliminary questions, the Federal Constitutional Court takes into account that it is not authorised to review such decisions. For example, the Federal Constitutional Court did not review the Soviet occupying power's decisions to confiscate private property after 1945.[216] If, however, these legal acts are not justifiable under any aspect, not even with due regard to a lack of responsibility on the part of the Federal Republic of Germany, they will not be recognised, as in the case of shots fired by GDR border guards at the border between the Federal Republic of Germany and the former German Democratic Republic (GDR).[217]

Question 5

Are there cases where your Court deferred because there was a risk of judicial error?

211 A clear link to previous experiences exists with regard to the guarantee of human dignity in Art. 1(1) of the Basic Law, the concept of militant democracy (Art. 9(1), Art. 18, Art. 21(1) and Art. 20(4) of the Basic Law), the eternity clause (Art. 79(3) of the Basic Law) and the constructive vote of no confidence (Art. 67 of the Basic Law).

212 BVerfGE 142, 25 <65>.

213 Cf., e.g., BVerfGE 146, 71 <118 f. para. 141>.

214 BVerfGE 6, 389 ff.

215 BVerfGE 133, 59 <79 f.>.

216 Cf. BVerfGE 84, 90 <122 f.>; 112, 1 <29>.

217 Cf. BVerfGE 84, 90 <122 f.>; 112, 1 <29>.

There is no known case in which the Constitutional Court refused to make a decision out of fear to make mistakes. The standard of review is strictly tied to the questions submitted, which substantially limits the risk of a decision triggering irreversible consequences.

Question 6

Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

There has never been a case in which the Court refused to make a decision due to the democratic legitimation of the decision maker. However, when interpreting the specific constitutional provisions at issue and applying the relevant constitutional standard to the specific case, the Federal Constitutional Court has on several occasions taken account of whether the Constitution affords broad discretion to the decision maker or not.[218] The margin of discretion afforded is heavily dependent on the scope and directness of the democratic legitimation that the decision maker enjoys in the specific case. This is not considered a limitation of judicial powers. Rather, the margin of assessment is directly determined by the way in which the Court interprets the respective standard of review.

In principle, the Federal Constitutional Court can only examine acts of German sovereign authority that is bound by the German Constitution. Consequently, the Court's competence to review acts of international organisations is limited, especially when Germany has transferred sovereign powers to these organisations. In that case, the acts of international organisations themselves are not reviewed against the standards set out in the Basic Law. Rather, judicial review only focuses on whether, in transferring sovereign powers, the German authorities stayed within the applicable constitutional limits. These limits are, in particular, set out in Art. 23 of the Basic Law with respect to the European Union and in Art. 24(1) of the Basic Law with respect to other organisations. Acts of international organisations, however, are subject to indirect review, given that they can only come into effect in Germany if there has been an effective transferral of sovereign powers. The Constitutional Court has the competence to make such finding.

The Federal Constitutional Court is also competent to examine whether sovereign acts of German – as opposed to European – authorities that are fully determined by European law are in conformity with European fundamental rights.[219]

Question 7

"The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

The Federal Constitutional Court assumes that the stringency of constitutional requirements varies across policy areas. As far as social policy is concerned, constitutional requirements are generally not particularly stringent.[220] The social state principle leaves the legislator considerable leeway to design unless questions of equality, the general right of personality or human dignity are at stake. Hence, it is correct that – compared to areas in which legislative acts come with more intense interferences, such as legislation in the areas of criminal law and the right of assembly – constitutional review of legislative decisions in the area of social policy is less strict. Ultimately, the same applies to the areas of economic policy[221] and foreign policy.[222]

218 See BVerfGE 95, 96; see also Federal Constitutional Court, Second Chamber of the Second Senate, Order of 21 July 1997 – 2 BvR 1084/97.

219 BVerfGE 152, 216 ff. (*Right to be forgotten II*).

220 See *supra* note 51.

221 Cf. BVerfGE 14, 105 <117>; 37, 1 <21>; 39, 210 <225 f.>; 51, 193 <208>; 70, 191 <201 f.> 77, 308 <332>; 109, 64 <85>; 116, 164 <182>; 118, 79 <101>; 142, 268 <286>.

222 BVerfGE 51, 1 <25>; 53, 164 <182>; 66, 39 <61>; 142, 123 <210>.

The Federal Constitutional Court does not subscribe to the view that political questions be decided through democratic processes alone. Rather, the Court is of the view that the answers to political questions must remain within the constitutional limits. If this is not the case, the Federal Constitutional Court is authorised and obliged under procedural law to make a finding to that effect and to do so regardless of whether the decision maker is more directly democratically legitimised than the Court or not.

The Court stresses that within the constitutional limits, however, decisions on political questions are not to be made by the Court but by Parliament or by the executive as authorised by Parliament. If the term 'political question' were interpreted as pertaining to questions that are not pre-determined by the Constitution, it would follow that the Constitutional Court is not authorised to make political decisions. Such a definition of 'political questions' would, however, run contrary to the way in which the term is commonly used. Generally, political questions are understood to be questions that concern and specify the common good. Requirements on how to answer questions understood in that way also arise from the Constitution.

Question 8

Does your Court accept a general principle of deference in judging penal philosophy and policies?

The Federal Constitutional Court does not decide on questions pertaining to the philosophy of criminal law or criminal law policy. Criminal law policy is bound to the constitutional framework and the philosophy of criminal law does not specify any direct legal standards and is thus not subject to constitutional review. The German Constitution includes certain specific requirements relating to criminal law. In particular Art. 101 to 104 of the Basic Law set out procedural rights that concern criminal proceedings and are equivalent to fundamental rights. However, numerous principles of criminal (procedural) law are not expressly spelled out, leaving a relatively broad constitutional margin for specification through ordinary legislation.[223]

In the area of criminal law, the Federal Constitutional Court has derived several unwritten specifications from the rule of law principle in order to slightly compensate for the fact that the German Constitution exercises more restraint in this area when compared internationally. Relevant examples for such specifications are the general principle of individual culpability[224] as well as the presumption of innocence[225] and the principle of fair trial.[226]

Question 9

There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

The Federal Constitutional Court Act only includes basic rules as far as intelligence gathering is concerned. Pursuant to § 26(1) of the Federal Constitutional Court Act, the Federal Constitutional Court takes the evidence necessary to establish the truth. This provision emphasises that the Federal Constitutional Court is not limited to reviewing questions on points of law but that the Court can also decide on *points of fact*. This is particularly important in the rare cases in which the Court decides both as a court of first and last instance (proceedings on the *forfeiture of fundamental rights* and the *prohibition of political parties,* disputes between constitutional organs, all disputes between the Federation and the *Länder*, electoral scrutiny proceedings and impeachment proceedings against the

223 See *supra* note 78.

224 BVerfGE 20, 323 <331>; 25, 269 <286>; 27, 18 <29>; 45, 187 <228>; 86, 288 <313>; 95, 96 <140>; 120, 224 <253 f.>; 130, 1 <26>; 133, 168 <197 para. 53, 54>.

225 BVerfGE 19, 342 <347>; 22, 254 <265>; 35, 311 <320>; 74, 358 <370 f.>; 82, 106 <114>; 110, 1 <23>; 133, 1 <31 para. 90>.

226 BVerfGE 26, 66 <71>; 38, 105 <111>; 46, 202 <210>; 118, 212 <2312>; 122, 248 <271>; 130, 1 <25>.

Federal President and federal and *Land* judges).

In those proceedings that are preceded by decisions of lower instance courts, the Court generally relies on the points of fact as established by the lower instance courts. Pursuant to § 33(2) of the Federal Constitutional Court Act, the Federal Constitutional Court may base its decision on the findings of facts of a final judgment rendered in a case in which the truth was to be established *ex officio*. The Federal Constitutional Court itself stresses that 'generally', 'principally' or 'primarily' it is for the ordinary courts to establish the points of fact.[227] Exceptions apply in cases which concern the compliance with fundamental rights in ordinary court proceedings, i.e. cases in which the ordinary court proceedings themselves are the main subject matter. In this respect, there necessarily is a comprehensive obligation to establish the facts.

There are two provisions in the Federal Constitutional Court Act that pertain to the question of limiting the taking of evidence for reasons of national security. The first provision concerns evidence given by witnesses and experts. Pursuant to § 28(2) of the Federal Constitutional Court Act, in those cases in which a witness or expert may only be examined with the permission of a superior authority, such permission may only be refused if the welfare of the Federation or of a *Land* so requires. Should the permission to testify be refused, the Federal Constitutional Court can, by a two-thirds majority, declare such refusal unfounded. Similar rules apply under the provision concerning documentary evidence set out in § 26(2) of the Federal Constitutional Court Act. Pursuant to that provision, the Court may, by a two-thirds majority vote, refrain from requesting or using individual documents if their use would be contrary to national security interests. There are no known published decisions in which these provisions have been formally applied. Rather, the Court takes account of the interest in maintaining secrecy by means of a 'soft' approach.

So far, the Court has not allowed for facts that were not disclosed to the parties to the proceedings to be taken into account. The Court made its only statement pertaining to this question in a decision concerning the prohibition of a political party. In the first proceedings on the prohibition of the right-extremist National Democratic Party of Germany (NPD), the Federal Constitutional Court made clear that taking evidence in camera is excluded at least when it has been established that the principle of freedom from state influence has been violated at the party leadership level and the applicant aims to fix any procedural defects by means of disclosure in camera.[228]

Question 10

Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

As a general principle, the annulment of valid legal acts by the courts is understood as being an interference that is lower in intensity compared to the obligation incumbent on state organs to adopt a certain conduct. Consequently, the Federal Constitutional Court assumes that the constitutional rights of citizens are to be understood in such a way as to only require direct acts by state organs in exceptional cases. In such exceptional cases, the rights in question can then be enforced before the Federal Constitutional Court to the extent that a formally admissible type of proceedings exists. However, cases in which the Court obliges the state to take action are rare. When the duty to protect fundamental rights is at stake, the Federal Constitutional Court refers to the prohibition of insufficient state action (*Untermaßverbot*),[229] meaning that a violation of the duty to protect, which can be challenged by way of constitutional complaint, is only to be assumed if public authority does not put in place any safeguards to protect the fundamental right at issue at all, or if the measures adopted are

227 BVerfGE 18, 85 <92>; 32, 311 <316>; see also Federal Constitutional Court, Third Chamber of the Second Senate, Order of 6 August 2003 – 2 BvR 1071/03.

228 BVerfGE 107, 339 <371>.

229 BVerfGE 88, 203 <254>.

entirely unsuitable or inadequate. [230]

II. The decision maker

Question 11

Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

In our view, there is no relevant distinction to be drawn between the two sub-questions. As outlined in our answer to Question 2 above, the Federal Constitutional Court assumes that the constitutional provisions pertaining to state organs that enjoy a high degree of democratic legitimation generally afford a broad leeway to design and that judicial review in these cases is thus less intense. As a result, the Court in principle affords Parliament a greater prerogative of assessment and broader margin of appreciation compared to the executive.

Question 12

What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

Sub-question 1

The Federal Constitutional Court holds the view that the law-making procedure is particularly suited to make decisions that fall under the scope of the legislative competence.

According to the Court, the defining characteristics of the law-making procedure are the participation of different organs, the openness of parliamentary processes to the public and the parliamentary debate including the minority rights applicable therein. The principle that parliamentary processes are open to the public is of particular importance in this respect. Decisions of considerable significance must therefore be preceded by a process that allows the public to form and express opinions and that requires Parliament to hold a public debate on the necessity and scope of the envisaged measures.[231] The law-making procedure is considered a sub-element of this larger process and is of particular importance for the democratic legitimation of decisions made by the legislator. While a sub-element, the law-making procedure is not independent from the larger parliamentary process and it is not separated from the competence of the legislator itself. Rather, the legislative procedure adds particular weight to the democratic legitimation of decisions made by the legislator.

Sub-question 2

With respect to the legal relevance of parliamentary analysis, one needs to differentiate between two questions. We will first consider the question concerning the extent to which the facts on which the legislator based its decision are subject to review. Subsequently, we will turn to the question concerning the extent to which the legislator must have examined the factual circumstances before adopting any provisions.

The Federal Constitutional Court examines the facts on which the legislator based its decision as to their methodological foundations and their plausibility.[232] The Court accepts 'the facts available to the legislator' and 'prior experience' as a basis for reviewing laws.[233]

The legislator is under a general obligation to inform itself in a correct and sufficient manner about

230 BVerfGE 77, 170 <215>.
231 BVerfGE 85, 386 <403 f.>; 95, 267 <307 f.>; 108, 282 <312>; 130, 318 <344>; 150, 204 <233 para. 82>; 150, 345 <369 para. 59>.
232 BVerfGE 125, 141 <154>.
233 BVerfGE 102, 197 <218>; 115, 276 <309>; 116, 202 <225>; 126, 112 <145>.

the factual situation at the time the law was adopted.[234] According to the Federal Constitutional Court's case-law, the legislator has a prerogative to assess facts and their further development.[235] Hence, the Federal Constitutional Court does not object to the legislator basing its decisions 'on a context-appropriate and tenable assessment of the obtainable information',[236] 'on the current state of experiences and insights',[237] 'on a sufficient factual basis'[238] and assessments that are not 'evidently deficient'.[239] By contrast, constitutional concerns arise if 'the factual circumstances relevant for legislative decisions have not been sufficiently investigated, necessarily entailing a lack of a constitutionally sound balancing of countervailing arguments'.[240] The legislator's assessments are also insufficient 'if they contradict economic laws or practical experiences to an extent that they can provide no reasonable basis for legislative measures'.[241]

To the extent that a change in factual circumstances could be relevant for the constitutionality of a law, the legislator may be under an obligation to monitor further developments.[242] In case of 'scientific uncertainties in particular with respect to the causal relationships and long-term consequences' of a measure, 'the legislator [...] is under a special duty of care'.[243] The legislator may, however, base its measures on uncertain factual circumstances and prognoses if the legislator's possibilities to draw sufficiently reliable conclusions are limited due to factual uncertainties, as in case of the COVID-19 pandemic.[244]

In terms of 'objectives, factual considerations, value judgments and prognoses', the legislator has a particular margin of appreciation and discretion, which is only exceeded if assessments and decisions are 'manifestly incorrect or can be unambiguously rebutted or contradict the constitutional system of values'.[245]

Under special circumstances, requirements may apply that are stricter compared to these general rules. In cases in which the constitutional standard is particularly dependent on legislative design and which are of immediate relevance for fundamental rights, the Constitutional Court sets out a particular requirement for legislative acts to be plausible. This is especially true when it comes to guaranteeing the minimum social subsistence level. According to the case-law by the Federal Constitutional Court, every individual has a right to an existential minimum in accordance with human dignity.[246]

Given that the Basic Law itself does not prescribe a precise amount of benefits for the right to an existential minimum in accordance with human dignity to be guaranteed, the substantive review of any amount specified by the legislator is limited to examining whether the benefits are evidently insufficient.[247] Apart from a review of evident errors, the Federal Constitutional Court also examines whether the determination of benefits by the legislator is justifiable based on current and reliable data as well as coherent calculation methods. If the benefits, including any differentiations, are based on and can be explained by comprehensible, objective and overall sound reasons, they are compat-

234 BVerfGE 39, 210 <226>.
235 Cf. BVerfGE 111, 333 <356>; 115, 276 <309>; 116, 202 <224>; 134, 242 <342>.
236 Cf. BVerfGE 57, 139 <160>.
237 Cf. BVerfGE 50, 290 <335>.
238 Cf. BVerfGE109, 96 <116>.
239 Cf. BVerfGE 126, 112 <142>.
240 Cf. BVerfGE 86, 90 <114>.
241 Cf. BVerfGE 126, 112 <141>.
242 Cf. BVerfGE 39, 169 <191 ff.>; 54, 11 <34 ff.>; 78, 249 <288 f.>; 125, 175 <225>; 159, 355 <439 para. 198>.
243 BVerfGE 128, 1 <37>.
244 Cf. BVerfGE 159, 355 <407 para. 115>, <439 para. 198>.
245 Cf. BVerfGE 50, 50 <51>.
246 Cf. BVerfGE 125, 175 <222 ff.>.
247 Cf. BVerfGE 125, 175 <225 f.>; 132, 134 <165 para. 78>; 137, 34 <75 para. 81>.

ible with Art. 1(1) in conjunction with Art. 20(1) of the Basic Law.[248]

Question 13

Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

Sub-question 1 – Obligation to state reasons

In line with the Court's case-law, the legislator generally is under no obligation to justify laws. In principle, the Constitution only obliges the legislator to adopt effective laws.[249] In this context, the Federal Constitutional Court, among other things, held:

'*The claim that insufficient reasons have been stated for the challenged law is unfounded. The constitutional requirements generally do not pertain to the stating of reasons for a law, but to the results of legislative proceedings [...] The Basic Law, however, generally, does not prescribe which parts of legislative proceedings require justification, when and how. The Basic Law leaves room for negotiations and political compromise. What is decisive is that the legislator ultimately does not fail to satisfy constitutional requirements.*'[250]

The legislator thus is, at most, under an obligation to satisfy burdens of substantiation. If the legislative materials do not include any reasons for laws that restrict fundamental rights, this can lead to a finding of unconstitutionality if no sufficient reasons are discernible otherwise.[251] This is of consequence if the legislator, as in most cases, states reasons for a law. Given that generally there is no obligation to state reasons, no disadvantages should arise for the legislator if it still chooses to state reasons. Hence, when the Constitutional Court reviews laws, it does not merely examine the reasons actually stated by the legislator in the legislative materials. The decisive point is whether it is possible to state reasons that justify the legal provision in question and not just whether the legislator actually did state reasons in the legislative materials.[252]

There are, however, exceptions to the rule that the legislator generally is not obliged to state reasons. Under specific circumstances, the Constitutional Court (in this case, mostly the Second Senate) assumes the legislator to be under an obligation to state reasons:

a) In case of legislative planning decisions, which are only permissible on exceptional grounds, the decision on how different interests should be balanced must be substantiated by the legislator.[253]

b) In case of decisions by the legislator, in which extraordinary circumstances must justify exceptions, the Federal Constitutional Court explicitly held that the legislator is under an obligation to state reasons.[254]

c) When the legislator decides on budgetary matters, the Constitutional Court at least assumes there to be a burden of substantiation for specific aspects of the legislative process.[255]

d) With respect to prognosis-based decisions by the legislator, the Constitutional Court, in line with the legislator's prerogative of assessment, demands that the grounds for such a decision be substantiated in a way that goes beyond an obligation of substantion and comes close to an obligation to

248 Cf. BVerfGE 125, 175 <225 f.>; 132, 134 <165 f. para. 79>; 137, 34 <75 para. 82>; 142, 353 <372 para. 42>.
249 Cf. BVerfGE 130, 263 <301>.
250 Cf. BVerfGE 139, 148 <179 para. 61>.
251 Cf. BVerfGE 139, 148 <179 para. 61>.
252 Cf. BVerfGE 137, 34 <74 para. 80>; Federal Constitutional Court, Order of the First Senate of 22 March 2022 - 1 BvR 2868/15 -, para. 138.
253 Cf. BVerfGE 95, 1 <22 ff.>.
254 Cf. BVerfGE 101, 158 <224 f., 235>.
255 Cf. BVerfGE 79, 311 <344 f.>.

state reasons.[256]

e) To safeguard compliance with constitutional requirements at the procedural level, the Federal Constitutional Court considers the legislator to be under an obligation to state reasons for the upper limit for state financing of political parties. In this respect, a mere possibility of justification does not suffice.[257]

f) As to the legislator's margin of appreciation in regard to statutory provisions on the remuneration of civil servants and judges, the Second Senate of the Federal Constitutional Court assumes that, procedural safeguards must apply, including an obligation to state reasons.[258] The Second Senate explicitly states that a mere justifiability of the provision should not suffice in these cases either: '*The determination and assessment of the factors that are and can be taken into account for the constitutionally required adjustment of remuneration levels must be reflected in an according substantiation and justification during the legislative process. A mere justifiability does not satisfy the procedural requirements under the Basic Law.*'[259]

g) By contrast, the First Senate of the Federal Constitutional Court currently assumes, with respect to the comparable question of the methodologically adequate way of determining the amount of social benefits guaranteed by fundamental rights, that the constitutional requirements do not refer to the legislative process but to its results.[260] The Court emphasises the legislator's leeway to design in assessing the existential minimum and the corresponding restraint on the part of the Federal Constitutional Court when exercising judicial review. What is decisive, is that overall, the amount of benefits to guarantee the existential minimum can be justified based on sound reasons.[261]

h) The First Senate, in turn, assumes fundamental rights law to impose an obligation on the legislator to state reasons for its decision on the amount of public broadcasting fees ('*an obligation to state reasons enshrined in fundamental rights law*').[262]

In summary, pursuant to the case-law of the Federal Constitutional Court it is only in specific situations that the legislator has a constitutional obligation to state reasons. Especially when the legislator has a margin of appreciation, the Federal Constitutional Court, however, assumes that the legislator is under procedural obligations, such as a burden of substantiation that, in the individual case, may amount to an obligation to state reasons.

Question 14

Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

Sub-question 1

There is no abstract standard developed by the Federal Constitutional Court according to which the intensity of review is dependent on the thoroughness of the previous analysis by the legislator. However, as a rule, the more thorough the legislator's analysis, the more thorough the reasons for its legislative proposals will be. This, in turn, increases the comprehensibility of the justification for

256 Cf. BVerfGE 111, 226 <255>.
257 Cf. Federal Constitutional Court, Judgment of the Second Senate of 24 January 2023, 2 BvF 2/18, paras. 128 ff.
258 Cf. BVerfGE 130, 263 <302>.
259 BVerfGE 149, 382 <395 para. 21>.
260 Cf. BVerfGE 132, 134 <162 para. 69 f.>; BVerfGE 137, 34 <73 f. para. 77>; still different in this respect BVerfGE 125, 175 <226>.
261 Cf. BVerfGE 137, 34 <74 para. 80>.
262 BVerfGE 119, 181 <229>; BVerfGE 158, 389 <426 para. 99> (*State Treaty on the Financing of Public Broadcasting*).

interferences with fundamental rights or the solutions proposed by the legislator. There is a tacit link between a thorough analysis by the legislator on the one hand and a lack of objections raised by the Federal Constitutional Court on the other.

Sub-question 2

There is no general doctrine requiring the legislator to meet a specific level of thoroughness in its analysis that goes beyond what has been stated in our answer to Sub-question 1 of Question 13.

Question 15

Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

Sub-question 1

The Federal Constitutional Court does not examine whether the parliamentary debate on a legislative proposal was exhaustive or whether all arguments discussed in society and scholarship were mentioned.

Sub-question 2a

The Federal Constitutional Court requires that a debate appropriate to the matters at hand is conducted in Parliament but the Court does not set general standards for reviewing whether the parliamentary debate met the minimum requirements. So far, there has been no case in which the Federal Constitutional Court found the parliamentary debate on a legislative proposal to be insufficient and therefore repealed the law in question. However, just recently the Court held that a substantive debate appropriate to the matters at hand must precede parliamentary decisions of substantial significance.[263]

Sub-question 2b

The Federal Constitutional Court does not separately examine whether the parliamentary debate paid particular regard to the effects on fundamental rights. If the parliamentary debate, however, does not consider the question of how to justify interferences with fundamental rights, this may suggest that the legislator either overlooked any interferences with fundamental rights or that the legislator itself assumes that a substantive justification cannot be given. However, this is not a necessary conclusion.

Question 16

Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

The Federal Constitutional Court assumes that weighty state measures require a sufficient level of legitimation.[264] Decisions with the highest level of democratic legitimation are those which the parliamentary legislator made through the regular parliamentary process, i.e. by upholding the public nature of parliamentary deliberations, the rules of parliamentary debate and minority rights. As a rule, the competence of the legislator and compliance with democratic procedure are considered a joint source of democratic legitimation. Tacitly, however, the competence of the legislator is considered the more weighty factor in ensuring a high degree of democratic legitimation, compared to the compliance with procedural rules.

Only the Parliament elected by the people can confer democratic legitimation upon the organs and public officials of state administration at all levels. For the exercise of state authority by officials

263 BVerfG, Judgment of 24 January 2023 – 2 BvF 2/18 –, para. 94.

264 Cf. BVerfGE 147, 50 <126 f. para. 198>.

and state organs that have not been directly elected to be democratically legitimised it is generally required that the appointment of public officials be attributable to the sovereign people and that they carry out their functions with sufficient functional-substantive legitimation. In personal terms, a sovereign decision is democratically legitimised if the appointment of the respective person can be traced back to the sovereign people in an uninterrupted chain of legitimation.[265] Factual and substantive legitimation is conveyed through the binding nature of statutes and of government mandates and instructions. The latter has a legitimising effect due to the government's responsibilities vis-à-vis Parliament.[266]

III. Rights' scope, legality and proportionality

Question 17

Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

This has already been answered under Question 1. With regard to the question whether the legislator has a margin of appreciation, it is necessary to differentiate between the interpretation of fundamental rights and the question of whether a specific measure violates fundamental rights. The Federal Constitutional Court interprets fundamental rights autonomously (and as the final authority). Other state authorities are not afforded any margin of appreciation in this respect. When it comes to assessing whether fundamental rights have been sufficiently considered in the specific case, the Federal Constitutional Court affords a margin of appreciation and assessment to the ordinary courts, as long as the courts do not fail to recognise the significance and scope of an applicable fundamental right.

Question 18

Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others? Do you have determinative factors for the nature of the fundamental right in question?

Sub-question 1

The extent of judicial review can vary depending on the subject matter and, in particular, depending on the fundamental rights affected and the intensity of the fundamental rights violation at issue.

In applying the principle of proportionality, the Federal Constitutional Court generally assumes that the legislator is also entitled to a margin of appreciation when assessing the necessity of a measure.[267] This margin of appreciation includes, among other things, the prognosis as to the effects of the chosen measures in comparison with other, less intrusive measures. The margin may be narrower depending on the fundamental right affected or the severity of interference.[268] Conversely, the margin is broader the more complex the matter addressed by the legislator is.[269]

Sub-question 2

The differences applicable depending on the fundamental rights affected have been particularly elaborated on in decisions on constitutional complaints directed against court judgments. As a starting point for determining the scope of review, the Court generally applies a formula developed by and named after former Justice Karl Heck ('Heck formula'), which was already mentioned under Question 1 (see p. 15):

'The design of the proceedings, the determination and assessment of the facts, the interpretation of ordinary law and its application to the individual case are matters that exclusively fall within the remit of the

265 BVerfGE 144, 50 <136 para. 222>.
266 Cf. BVerfGE 147, 50 <126 f. para. 198>.
267 Cf. BVerfGE 152, 68 <136 para. 179>; 155, 238 <280 para. 105>;
268 Cf. BVerfGE 152, 68 <119 para. 134>.
269 Cf. BVerfGE 122, 1 <34>; 150, 1 <89 para. 173> with further references

competent ordinary courts and are excluded from the Federal Constitutional Court's review. Only if specific constitutional law has been violated by the ordinary courts, can the Federal Constitutional Court intervene, provided that a constitutional complaint has been lodged.'[270]

This formula describes the general scope of review. Deviations remain possible in certain scenarios and largely dependent on the specific case. Deviating standards of review are known and established within the scope of application of the right to equality, the freedom of expression, the freedom of the arts, the right to family life and the freedom of assembly. There have also been occasional deviations from the Heck formula in the area of custodianship law. More specifically, the following applies:

Art. 3(1) of the Basic Law also applies with respect to constitutional complaints directly challenging a law (*Rechtssatzverfassungsbeschwerde*)

Art. 3(1) of the Basic Law requires that all people be treated equally before the law. The resulting requirement to treat equally that which is essentially alike and to treat unequally what is essentially different applies to unequal burdens and unequal privileges. At the same time, Art. 3(1) of the Basic Law does not entirely prevent the legislator from differentiating. Differentiations, however, must always be justified by objective reasons commensurate with the aim and the extent of the unequal treatment. The standard of constitutional review applicable here is a fluid one that is based on the principle of proportionality. Its limits cannot be determined in the abstract but only on the basis of the particular subject matter and regulatory areas affected. Depending on the subject matter of the legislation and the criteria for differentiation, different constitutional requirements regarding the factual reasons justifying the unequal treatment will result from the general guarantee of the right to equality; the limits imposed on the legislator in this respect may range from a mere prohibition of arbitrariness to strict proportionality requirements. Stricter constitutional requirements may apply, for instance, where unequal treatment also affects specific fundamental freedoms in the individual case. Moreover, the less the individual can influence the criteria on which the legislative differentiation is based, or the more closely such criteria resemble those listed in Art. 3(3) of the Basic Law, the stricter the constitutional requirements will be.[271]

Art. 5(1) first sentence (freedom of expression) and Art. 5(3) first sentence of the Basic Law (freedom of the arts)

The Court, however, has consistently defined the limits of its competences to intervene depending on the intensity with which the ordinary court decision affects the condemned party. In the areas of the freedom of expression and the freedom of the arts, the Federal Constitutional Court has therefore regularly conducted a strict review of criminal law sanctions for acts that the affected individual claimed fell under the freedom of expression or the freedom of the arts. The Court was not satisfied with the usual review,[272] focusing on whether the challenged decisions rested on a fundamentally incorrect interpretation of the significance and scope of the relevant fundamental right. Rather, the Court also examined the interpretation of ordinary law in its specificities as to its compatibility with fundamental rights.[273] The challenged decisions must not only be reviewed as to whether they rest on fundamentally incorrect interpretations of the significance and scope of the freedom of the arts.[274] Rather, the Court's constitutional mandate extends to reviewing the details of the way in which the authorities and ordinary courts have applied the law. In particular, the scope of review is determined by the intensity with which the challenged decisions interfere with the affected funda-

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270 Cf. BVerfGE 18*, 85* <92>.

271 Federal Constitutional Court, Order of the First Senate of 22 March 2022 - 1 BvR 2868/15 and others -, para. 122 f. with further references (*Lodging taxes*); established case-law.

272 BVerfGE 18, 85 <92 f.>.

273 BVerfGE 75, 369 <376> (*Strauß Caricature*); cf. also BVerfGE 77, 240 <250 f.> (*Herrnburg Report*).

274 Cf. BVerfGE 18, 85 <92 f.>.

mental rights.[275] Criminal prosecution of conduct protected under Art. 5(3) first sentence of the Basic Law is not the only case in which there is a lasting interference that leads to a more intense constitutional review. Rather, such a lasting interference is also to be assumed in case of other decisions by state organs that are apt to give rise to preventive effects going beyond the specific case at hand, i.e. if they may reduce the readiness to exercise the affected fundamental right in future.[276]

Art. 6 of the Basic Law

In case of court decisions that withdraw custody from the parents for the purposes of separating the child from the parents, the Federal Constitutional Court saw reason to widen the usual scope of review, given the substantive weight of the interference with the fundamental rights of both parents and children.[277] Here the Federal Constitutional Court in particular examines the reasonableness of the family court's assumption that the child's best interests were lastingly jeopardised and that such lasting threat could only be averted by separating the child from the parents. Given the considerable intensity of the interference in this context, constitutional review may, as an exception, also concern single errors of interpretation[278] as well as clear errors in the determination and assessment of the subject matter at hand.[279] Thus, the Court clarifies with respect to the protection of marriage, family and the child-parent relationship: *As a rule, the design of the proceedings, the determination and assessment of the facts, the interpretation and application of constitutionally unobjectionable provisions in the specific case are matters that fall to the competent ordinary courts and are not subject to review by the Federal Constitutional Court. The Federal Constitutional Court may only examine whether the challenged decision rests on errors of interpretation that are based on a fundamentally incorrect understanding of the significance of a fundamental right or of its scope of protection.[280] However, the limits of the Federal Constitutional Court's capacity to intervene when carrying out these tasks cannot be defined in an inflexible and rigid manner. Rather, this depends on the intensity of the interference with fundamental rights in the specific case.[281] In case of court decisions that withdraw custody from parents, the Constitutional Court sees reason to widen the usual scope of review, given the substantive weight of the interference with the parents' fundamental rights under Art. 6(2) first sentence and Art. 2(1) of the Basic Law and in particular considering that the interference with the parents' rights affects the children with the same intensity.[282] However, the same stricter scope of review must also apply in case of constitutional complaints against decisions that declared it lawful for children to remain with their parents against the children's will. Such a court decision is of equally existential significance for the children's future as is the separation from their parents.[283]*

In cases concerning the right of residence, the Federal Constitutional Court applies a comparable standard of review when parents are being separated from their children due to a measure terminating the parents' stay. Here the Federal Constitutional Court requires the public authorities and the ordinary courts to make a sound prognosis according to which the separation does not amount to a disproportionate interference with the family relationship protected under Art. 6(1) and (2) first sentence of the Basic Law. Particularly decisive factors are the children's age and thus their capacity to uphold the family relationship throughout the time of separation and physical distance.[284]

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275 Cf. BVerfGE 42, 143 <147 ff.>; 66, 116 <131>.

276 Cf. inter alia BVerfGE 43, 130 <135 f.>; 67, 213 <222 f.>; 75, 369 <376>; 77, 240 <250 f.>; BVerfGE 83, 130 <145 f.> (*Josefine Mutzenbacher*).

277 Cf. BVerfGE 72, 122 <138>; established case-law.

278 Cf. BVerfGE 60, 79 <91>.

279 BVerfGE 136, 382 <391 Rn. 28> (*On the choice of a guardian*); established case-law

280 Cf. BVerfGE 18, 85 <92>; 42, 143 <147 ff.>; 49, 304 <314>.

281 Cf. BVerfGE 42, 163 <168>; established case-law.

282 Cf. BVerfGE 60, 79 <91>.

283 Cf. BVerfGE 72, 122 <138 f.> (*Withdrawal of custody*).

284 Cf. most recently Federal Constitutional Court, Order of the Second Chamber

Protection of the general right of personality in case of custodianship

Under constitutional law, the state does not have the right to restrict the freedom of its adult citizens who are capable of freely forming their own will unless they put themselves or others at risk. Appointing a custodian against the will of a person without there being a sufficient factual basis to assume their ability to form a free will is impaired hence violates the fundamental right of the affected person under Art. 2(1) of the Basic Law.[285] Given the severity of the interference with fundamental rights when ordinary courts order the appointment of a custodian against the will of the person concerned, constitutional review, at least of such court decisions, goes beyond a mere examination of the fundamental failure to recognise the effects that the challenged measures[286] have for fundamental rights. In particular, such constitutional review also concerns the question of whether the established facts provide a sound basis for the decision and whether they have been obtained without a considerable violation of procedural law. If the affected person refused to agree with the appointment of a custodian, it is, as a rule, constitutionally imperative that the person concerned be heard in person in the custodianship law proceedings.[287]

Art. 8 of the Basic Law

Any review of the fundamental right to freedom of assembly must consider that the assembly laws of the *Länder* and the Federation (cf. Art. 125a(1) first sentence of the Basic Law) apply the express limitation clause in Art. 8(2) of the Basic Law and define the legally permissible possibilities of restricting the fundamental right of assembly. The assembly laws implement constitutional requirements in ordinary law (*konkretisiertes Verfassungsrecht*). Thus a violation of these ordinary law provisions typically also amounts to a violation of fundamental rights. This is reflected in a stricter standard of review applied by the Federal Constitutional Court. In cases of constitutional complaints challenging court decisions, constitutional review may also encompass whether the individual requirements for restrictions of the freedom of assembly under the assembly laws (by means of prohibitions or conditions) have been met. For instance, the Court held: '*The obligation to guarantee the freedom of assembly in an optimal manner and the procedural requirements this obligation entails mean that a preventive prohibition of the entire assembly due to fears of riots by a minority of participants prone to violence is only permissible under strict conditions and when § 15 of the Assembly Act (Gesetz über Versammlungen und Aufzüge – VersG) is applied in conformity with the Constitution. These conditions require a risk prognosis showing a high likelihood of an immediate danger to public security or order and the previous exhaustion of all reasonable means to give effect to the fundamental rights of peaceful protesters (e.g. by limiting a prohibition to a defined space).*'[288]

Criminal convictions, measures under the Code of Criminal Procedure, remand detention, preventive detention, psychiatric confinement and others

Similarly to the freedom of assembly under Art. 8 of the Basic Law, criminal procedural law with its particularly acute potential impact on fundamental rights, especially in regard to the execution of sentences and other measures of deprivation of liberty, also amounts to ordinary law that implements constitutional requirements, the violation of which frequently also entails a violation of fundamental rights. For instance, if provisions of criminal procedural law concerning remand detention are disregarded, this generally also amounts to a violation of the fundamental right of liberty of the person. At the same time, Art. 104 of the Basic Law includes specific constitutional requirements applicable to measures of deprivation of liberty. Thus the ordinary laws that implement these requirements are also subject to specific constitutional review.

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of 9 December 2021 - 2 BvR 1333/21 - paras. 48 ff.

285 Cf. Federal Constitutional Court, Order of the Second Chamber of the First Senate of 2 July 2010 - 1 BvR 2579/08 -, para. 43.

286 On this rule, cf. BVerfGE 18, 85 <92 f.>; established case-law.

287 Cf. Federal Constitutional Court, Order of the First Chamber of the First Senate of 20 January 2015 - 1 BvR 665/14 -, para. 26 f.

288 BVerfGE 69, 315 <362> (*Brokdorf II*).

Reaching beyond criminal law, Art. 104 of the Basic Law also mandates the same intensity of review for deprivations of liberty under police and security law. Key examples in this respect are public security measures under various *Land* laws in case of mental illness or detention pending deportation enforcing the termination of foreign nationals' stay.

General considerations

There are no general factors that determine whether the Federal Constitutional Court also reviews compliance with ordinary law. What is decisive are the specificities of the fundamental right at issue and the severity of the interference with that fundamental right. As a tentative point of reference, one can say that there is a certain assumption in favour of stricter judicial review where fundamental rights are affected which are particularly dependent on being specified in ordinary law and which are of particular relevance for the general right of personality or for the design of democracy.

Question 19

> **Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?**

The Federal Constitutional Court has developed an elaborate and detailed case-law on specificity requirements that laws must satisfy. The specific requirements depend on different factors. For instance, a law that grants security authorities the power to carry out covert surveillance measures must meet particularly strict specificity requirements, given that state actions in this context are (more) difficult to review. In recent times, there has been a clear differentiation of requirements in this regard: The principle of legal specificity is geared towards state organs whose acts are limited and governed by sufficiently specific laws. By contrast, the principle of legal clarity is to ensure that the laws are also comprehensible for citizens, who are subject to the law, so that it is clear to them whether a law even concerns a subject matter that affects them. Both requirements derived from the principle of the rule of law are to be adhered to. Usually, the following applies:

The principles of legal clarity and specificity serve to make interferences foreseeable for citizens, to effectively limit the power of public authorities and to enable effective judicial review.

aa) The requirement of specificity mainly serves to ensure that the law provides standards that limit and direct the acts of government and the administrative authorities and that enable an effective judicial review of these acts. The legislator must ensure that laws are as specific as the particular nature of the underlying subject matter allows for and as the purpose of the respective legal provisions requires.[289] It suffices if, by applying the standard rules of interpretation, it is possible to determine whether the actual requirements for the legal consequence laid down in the legal provision have been met. Any remaining uncertainties must not go so far as to put at risk the predictability and justiciability of the actions by state authorities that have been granted power to act under the respective legal provision.[290]

bb) In terms of legal clarity, the primary focus is on the substantive comprehensibility of legislation, in particular so as to allow citizens to adapt to possible onerous measures.[291] It imposes particularly strict requirements with regard to the covert collection and processing of data, as these can profoundly intrude into the private sphere. Since the persons affected are usually not aware of their data being processed and can thus not challenge these measures, their substance can only be specified to a very limited extent in the interplay of practical application and judicial review. The requirements, however, vary depending on the severity of the interference in each case and are thus closely linked to the respective substantive requirements of proportionality.[292]

289 Cf. BVerfGE 145, 20 <69 f. para. 125> with further references.

290 Cf. BVerfGE 134, 141 <184 para. 126>; 156, 11 <44 f. paras. 85 ff.> with further references.

291 Cf. BVerfGE 145, 20 <69 f. para. 125>.

292 Cf. BVerfGE 141, 220 <265 para. 94>; 155, 119 <181 para. 133> (*Subscriber*

Because the administrative authorities, police and intelligence services restrict fundamental rights here without citizens having knowledge thereof and often without having access to judicial review, it must be possible for the content of an individual provision to be determined in a comprehensible manner and without any major difficulty by way of interpretation. While it may be possible to determine a rule's substance by interpreting it, or while it may be specific in constitutional terms because it can be interpreted in conformity with the Constitution, this does not necessarily mean that it is clear to its addressees.[293]

Question 20

What is the intensity review of your Court in case of the legitimate aim tier?

The intensity of the review of the legitimate aim also depends on the requirements that the Constitution lays down for the legal provision at issue with respect to the purpose of serving the common good. With regard to fundamental rights that are not subject to an express limitation clause, i.e. do not expressly provide for the possibility of legislative intervention, interferences may only be pursued on grounds of a constitutionally recognised public interest (objectives inherent in the Constitution).[294] Interferences with fundamental rights that are subject to a limitation clause may also have to meet particular requirements relating to the common good. This is especially the case for interferences with the freedom of assembly. Here particular requirements in terms of the justification for interferences with Art. 8 of the Basic Law must be met. The same applies for the mandatory membership in associations governed under public law (relating to the general freedom of action under Art. 2(1) of the Basic Law). Other legislative initiatives can also concern the pursuit of constitutional objectives. When there is only one constitutional objective that may authorise the legislator to interfere with a fundamental right, e.g. the objective of averting acute dangers for public safety for interferences with the inviolability of the home under Art. 13(4) of the Basic Law, the Federal Constitutional Court examines whether the interference complies with this objective. The Federal Constitutional Court conducts a considerably less strict review of legislative provisions that are not subject to particular requirements in terms of compliance with a constitutional objective. The following applies here:

Given Parliament's democratic sovereignty, formal legislation may determine its own purposes as long as these purposes are not prohibited by the Basic Law or otherwise incompatible with constitutional objectives.[295] The interests of the individuals affected by the interference only serve as a legitimate purpose for state measures in exceptional cases.[296] In terms of the requirements relating to legally pursued objectives, the principles detailed above apply.

Executive measures are bound by the purpose of the respective provision.

Question 21

What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

The Federal Constitutional Court, generally, applies all four prongs of the proportionality test. Interferences with fundamental rights must pursue a legitimate aim, be suitable and necessary to achieve the legitimate aim and be proportionate in the strict sense (i.e. appropriate).[297] When examining the

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data II); Federal Constitutional Court, Judgment of the First Senate of 26 April 2022 - 1 BvR 1619/17 -, para. 273 (*Bavarian Protection of the Constitution Act*); each with further references; established case-law.

293 Cf. BVerfGE 156, 11 <46 para. 88> with further references.

294 See *supra* note 117.

295 BVerfGE 138, 136 <188 para. 138>; see also 104, 357 <364 ff. >; 138, 261 <285 f. para. 57>.

296 BVerfGE 128, 282 <304>.

297 Cf. BVerfGE 67, 157 <173>; 141, 220 <265 para. 93>.

appropriateness of an interference with fundamental rights, the Court engages in a balancing of the intensity of the interference, the importance of the common good or of conflicting constitutional goods and the extent to which the common good would benefit from the interference with the fundamental right at hand.[298]

Question 22

Does your Court go through every applicable limb of the proportionality test?

The Federal Constitutional Court generally engages in an analysis of all four prongs of the proportionality test.

Question 23

Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

When there is need for a prognosis or when there is insufficient scientific certainty on relevant causal effects, the Federal Constitutional Court only examines whether the methodological steps taken by the legislator and the factual basis on which it relies are plausible. When this is the case, the interference with fundamental rights remains constitutional, even if it later becomes clear that the legislator's assessment was incorrect. A relevant example in this context are the school closures during the COVID-19 pandemic. Should it become clear that the legislator's assessment at the time was incorrect, the legislator is then obliged to adjust the statutory provisions for the future. The fact that Parliament as the legislative branch is tasked with making decisions under uncertain factual circumstances and on the basis of prognoses necessarily entails that the legislator is also authorised to act when it is uncertain whether later developments will confirm that it acted correctly.[299]

Question 24

Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

There is no doctrine of judicial self-restraint in Germany (see answer to Question 1 above). Hence, the case-law on the proportionality principle has not been concomitant with any case-law on judicial self-restraint.

Question 25

Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

In the context of judicial deference, it is not ascertainable that the Federal Constitutional Court clearly refers to case-law by the ECtHR when choosing the standard of review for examining decisions of the legislator. However, should the ECtHR apply a stricter standard of review to state interferences than the Federal Constitutional Court does vis-à-vis the legislator, this would likely induce the Federal Constitutional Court to examine its own case-law with a view to making adaptions.

For the Federal Constitutional Court, the ECtHR's doctrine on the margin of appreciation is not entirely equivalent, in legal terms, to the discretion that the Federal Constitutional Court affords to national organs. This rests on different points of view. When deciding on the margin of appreciation, the ECtHR differentiates according to state practice in the respective member states of the Council of

298 Federal Constitutional Court, Order of the First Senate of 9 December 2022 - 1 BvR 1345/21 -, paras. 87 ff.

299 See *supra* notes 93 - 100.

Europe. While states are the point of reference for the ECtHR in this context, in the case of the Federal Constitutional Court it is state organs. However, the substantive criteria that the ECtHR recognises when affording a broad margin of appreciation may in specific cases also be transferrable to the granting of discretion to state organs by the Federal Constitutional Court.

There is no fundamental divergence concerning the standard of review applied by the ECtHR and that applied by the Federal Constitutional Court.

Question 26

Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

Given that there is no general principle of judicial self-restraint in Germany, so far there has been no case in which a measure of a German public authority has been reversed by the ECtHR due to the exercise of judicial self-restraint.

In all the cases in which the ECtHR reverses a German measure that was previously upheld as constitutional by the Federal Constitutional Court (in a decision on the merits, not just on admissibility), it must be examined whether the two Courts reached different conclusions because they apply different guarantees or because the guarantees, while comparable, are either generally interpreted in different ways or have been operationalised differently when applying the law to the specific case.

If the ECtHR reached stricter conclusions than the Federal Constitutional Court on comparable questions of law, this must not necessarily mean that the ECtHR applied a stricter standard of review. Rather, the reason could also be that the two Courts interpreted general standards in different ways. It is also conceivable that the standard of review was applied with varying degrees of strictness. In this case, the result would hence be comparable with differing degrees of judicial restraint. Methodologically, the differences between the case-law by the ECtHR and the Federal Constitutional Court, however, do not consist in a different degree of judicial restraint but in a different understanding of the scope of the respective fundamental rights guarantees.

The ECtHR, in particular, ruled against Germany, inter alia, in cases concerning:

- the excessive length of court proceedings,
- the strict duty of loyalty to the Constitution (duty of political loyalty) owed by members of the German public service,[300] taking account of the so-called requirement of militant democracy as a response to the Nazi regime of terror,
- the weak position of the biological, but not legal, father under adoption law, due to a predominantly legal understanding of the family relationship in Germany, [301]
- the protection of personality rights of celebrities,[302]
- the protection against rretrospective extension of preventive detention of offenders,[303]
- the admissible limits of the use of undercover police officers and agents provocateurs and in particular, the consequences of a violation of Art. 6(1) of the ECHR in this context,[304]

300 ECtHR, Judgment of 26 September 1995, No. 17851/91, NJW 1996, 375 ff.

301 ECtHR, Görgülü / Germany, Judgment of February 2004, No. 74969/01; BVerfGE 111, 307 <330 ff.> (*Görgülü*); see also BVerfGE 127, 132 juris para. 74.

302 ECtHR, von Hannover / Germany, Judgment of 24 June 2004, No. 59320/00, para. 64; see also ECtHR, Karhuvaara and Iltalehti / Finland, Judgment of 16 November 2004, No. 53678/00, para. 45; BVerfGE 101, 361 <390 ff.> (*Caroline II*); earlier already BVerfGE 34, 269 <283>; 120, 180 <220 f.> (*Caroline III*).

303 Foundationally, ECtHR, Mücke / Germany, Judgment of 17 December 2009, No. 19359/09; BVerfGE 109, 133 <159> (*Preventive detention I*); BVerfGE 128, 326 <370> (*Preventive detention II*).

304 ECtHR, Judgment of 23 October 2014, No. 54648/09, NJW 2015, 3631; ECtHR,

- the forced administration of emetics to make potential drug dealers regurgitate swallowed drugs[305].

The ECtHR rulings against Germany rest on the fact that it was not possible to assume congruence between the ECHR and the fundamental rights catalogue in the Basic Law, to begin with, in particular because the ECHR either includes express guarantees that are lacking in the Basic Law, such as in particular several procedural guarantees in Art. 6 ECHR or the protection of private life under Art. 8 ECHR, or that correspond to similar fundamental rights provisions in the Basic Law whose interpretation, however, is very specific in Germany due to certain historical or cultural circumstances and deviates considerably from the basic understanding of other contracting parties.

IV. **Other peculiarities**

Question 27

How often does the issue of deference arise in human rights cases adjudicated by your Court?

As outlined under Question 1 above, there is no explicit doctrine of judicial self-restraint in Germany. The question as to the applicable standard of review and the question as to which leeway to design the constitutional provisions afford to the acting state authority arise in every case the Court decides.

Question 28

Has your Court have grown more deferential over time?

Ever since the Court's existence, legal scholars in particular have critiqued individual decisions of the Court as either being too strict or not strict enough in their review of legislative, administrative or judicial acts. In the Court's case-law, there has been no development towards stricter or less strict judicial review.

Question 29

Does the deferential attitude depend on the case load of your Court?

The question as to whether constitutional law affords the acting state authority a margin of appreciation or leeway to design depends on the respective constitutional provision and not the number of cases before the Court. As such, the judicial standard applied is independent from the practical relevance of the question of constitutional law at issue. If the Court applied a stricter standard of review for scenarios that are so frequent that this would practically render the proper functioning of the Court impossible, the Court would, however, probably assume this to be an indication for its original assumption that the Constitution stipulates a stricter standard of review for such scenarios to not have been quite correct, given that the Constitution generally assumes that the Federal Constitutional Court maintains its proper functioning.

Question 30

Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

The question as to the extent to which the standard and scope of review are limited by the challenges raised, has not been uniformly answered in the Court's case-law. While the First Senate generally only analyses the challenges brought by the complainants, the Second Senate examines the challenged subject matter in admissible constitutional complaints under every conceivable vantage

Judgment of 15 October 2020, No. 40495/15, NJW 2021, 3515; still different in Federal Constitutional Court, Order of the Second Chamber of the Second Senate of 18 December 2014 - 2 BvR 209/14.

305 ECtHR, Jalloh / Germany, Judgment of 11 July 2006, No. 54810/00, NJW 2006, 3117 ff.

point to ascertain whether it is unobjectionable under constitutional law.[306]

Question 31

Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

In principle, it is to be assumed that determining the subject matter in dispute falls to the applicant or complainant.[307] Meanwhile, this does not exclude extending the constitutional review beyond the explicitly challenged matter in dispute insofar as implicit challenges are discernible in interpreting the application.[308] With respect to constitutional complaints directly challenging laws, a constitutional review is also to be conducted of provisions that themselves are not being challenged if, under the regulatory context, this is necessary for reviewing the challenged legal provisions.[309]

In specific judicial review proceedings, extending the question referred to the Court is possible if it becomes clear from the overall context of the order of referral that the referring court has also considered other questions than those mentioned and considers them to be of significance. Extending the referred question to other aspects is also required if the question would otherwise not be accessible to a plausible review or if there is a close connection between the issues relevant for decision and another question, making it necessary for this other question to also be referred for review. When conducting specific judicial review proceedings, the Court also has the possibility to consider other provisions that are not specifically relevant for the decision but that arise from the factual context.[310]

The extension of the subject matter of review beyond the challenged provision is specifically regulated in § 78 second sentence of the Federal Constitutional Court Act with respect to abstract judicial review proceedings. Pursuant to this provision, if the Federal Constitutional Court is convinced that federal law is incompatible with the Basic Law or that *Land* law is incompatible with the Basic Law or other federal law, the Court cannot only declare the challenged provision void but, stating the same reasons, it can also declare other incompatible provisions of the same law void. The Court applies § 78 second sentence of the Federal Constitutional Court Act in constitutional complaint procedures accordingly.[311]

306 Cf. with further references Hömig, in: Schmidt-Bleibtreu/Klein/Bethge, BVerfGG, § 92 para. 15; Barczak, in: Barczak, BVerfGG, § para. 94 f.

307 Cf. on the constitutional complaint, Magen, in: Burkiczak/Dollinger/Schorkopf, § 92 para. 3; Hömig, in: Schmidt-Bleibtreu/Klein/Bethge, BVerfGG, § 92 para. 15; Barczak, in: Barczak, BVerfGG, § 92 para. 96f.

308 Cf. Scheffczyk, in: BeckOK BVerfGG, Walter/Grünewald, § 92 para. 18; Magen, in: Burkiczak/Dollinger/Schorkopf, § 92 para. 6.

309 Cf. BVerfGE 109, 279 <374>.

310 Moradi Karkaj, in: Barczak, BVerfGG, § 80 para. 118.

311 Cf. BVerfGE 18, 288 <300>.

Bundesverfassungsgericht der Bundesrepublik Deutschland

Prof. Dr. Heinrich Amadeus Wolff, Prof. Dr. Astrid Wallrabenstein[312]

Fragebogen

Für nationale Berichte

I. Nicht justiziable Angelegenheiten und Intensität richterlicher Selbstbeschränkung

Teil 1

Frage 1

Was versteht man in Ihrem Land unter „richterlicher Selbstbeschränkung"?

1. Der Grundsatz des Judicial Self-Restraint

a) Kein technischer Anwendungsbereich

Der in der angloamerikanischen verfassungsgerichtlichen Rechtsprechung geläufige Grundsatz des Self-Restraint der Verfassungsgerichtsbarkeit hat in Deutschland keine Anerkennung gefunden. Es gibt in der verfassungsgerichtlichen Rechtsprechung nur sehr wenige Stellen, bei denen dieser Begriff vorkommt. Es gibt eine Entscheidung aus dem Jahr 1973, in dem das Verfassungsgericht meinte, dieser Grundsatz gelte auch für Deutschland und das Gericht lege sich selbst eine richterliche Zurückhaltung auf.[313] Darüber hinaus findet dieser Begriff in verfassungsgerichtlichen Entscheidungen vereinzelt in einem Kontext Verwendung, in dem eine Richterin bzw. ein Richter, der eine abweichende Meinung formuliert, den Begriff als Synonym dafür verwendet, dass die abweichende Stimme der Auffassung sei, dass die von ihr abgelehnte Entscheidung die kompetenziellen Grenzen der verfassungsgerichtlichen Befugnisse im konkreten Einzelfall überschritten habe.[314] Gemessen an der Bedeutung des hinter diesem Grundsatz stehenden Gedankens belegt der Umstand, dass es der Sache nach nur diese wenigen Zitate gibt, dass dieser Grundsatz in Deutschland eigentlich keine Bedeutung hat.

Der Begriff des Judicial Self-Restraint findet in der verfassungsgerichtlichen Rechtsprechung deswegen keine besondere Anerkennung, weil es der Struktur und den rechtlichen Grundsätzen des Bundesverfassungsgerichts aus mehreren Gründen nicht entspricht. Die Grenzen der Rechtsprechung ergeben sich unmittelbar aus der Auslegung der jeweiligen Kompetenznormen und dem Verfassungsrecht, das wiederum die Gestaltungsrechte anderer Staatsorgane kennt und schon selbst garantiert. Der Gedanke, der mit dem Begriff Judicial Self-Restraint als eine Aufforderung zur Selbstbeschränkung gemeint ist, ist im System des Grundgesetzes objektiv in die Kompetenzbestimmungen der Verfassungsorgane eingearbeitet.

Es geht daher bei der Verfassungsgerichtsbarkeit in Deutschland um die Auslegung von Rechtsnormen und nicht um die Frage, ob sie sich selbst zurückhält oder nicht zurückhält. Das Bundesverfassungsgericht ist vor der Verfassung verpflichtet, seine Kompetenzen vollumfänglich auszuüben, aber nicht über die Kompetenzen hinaus tätig zu werden. Es ist nicht befugt, sich Beschränkungen im Bereich seiner Kompetenzen aufzuerlegen, weil es dann seine Kompetenzen partiell aufgeben würde, was es nach der Kompetenzordnung nicht darf. Der Grundsatz, sich eine Selbstbeschränkung aufzuerlegen, entspricht nicht dem deutschen Verständnis der Kompetenzordnung von Verfassungsorganen.

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312 Prof. Dr. Heinrich Amadeus Wolff ist Richter des Ersten Senats des Bundesverfassungsgerichts, Prof. Dr. Astrid Wallrabenstein ist Richterin des Zweiten Senats des Bundesverfassungsgerichts.

313 BVerfGE 36, 1 <1>.

314 BVerfGE 115, 320 <371 (381)>; 93, 121 <149 (151)>; 48, 127 <158 (201)>.

b) Hermeneutischer Begriff

Auch wenn der Begriff in der verfassungsgerichtlichen Rechtsprechung selbst nicht vorkommt, so ist er als hermeneutischer Begriff, d.h. als Sammelbegriff für ein bestimmtes rechtliches Phänomen in Deutschland dennoch sehr gebräuchlich, wobei der genaue Inhalt dieses Begriffs je nach Argumentationszusammenhang unterschiedliche Bedeutungsnuancen besitzen kann. Jedesmal geht es darum, dass das Verfassungsgericht aufgefordert wird, bei der Auslegung seiner Kompentenznorm und bei der Auslegung des materiellen Verfassungsrechts darauf zu achten, dass den anderen Verfassungsorganen noch der Gestaltungsspielraum zukommt, den ihnen die Verfassung zuweist. In dieser Bedeutung hat der Begriff durchaus seine Rechtfertigung, weil er gewissermaßen eine Aufforderung an die jeweiligen Verfassungsrichterinnen und Verfassungsrichter bildet, bei der Auslegung der einzelnen Verfassungsnormen den Umstand im Auge zu behalten, dass das Verfassungsrecht im Ausgangspunkt immer davon ausgeht, dass es den Staatsorganen mehrere Möglichkeiten zur Lösung und Konkretisierung der Rechtsordnung lässt und nicht alle Fragen sich unmittelbar aus der Ableitung von Verfassungsprinzipien verfassungsrechtlich ergeben und vordeterminiert sind.

2. Die kompetenziellen Grenzen der Rechtsprechungsbefugnis des Bundesverfassungsgerichts

a) Kompetenzabhängigkeit

Die Funktion, die der Begriff des self-restraint für sich in Anspruch nimmt, übernimmt in Deutschland daher die Kompetenzordnung und ihre Beachtung. Das Bundesverfassungsgericht (BVerfG) übt seine Rechtsprechung anhand der in der Verfassung vorgesehenen Zuständigkeiten aus. Die meisten Zuständigkeiten sind in Art. 93 GG niedergelegt, weitere wichtige in Art. 100 GG, dazu kommen aber zusätzlich in der Verfassung verstreute Einzelzuständigkeiten (vgl. Art. 93 Abs. 1 Nr. 5 GG)[315]. Ausnahmsweise kann sich die Zuständigkeit des Bundesverfassungsgerichts aus einem Parlamentsgesetz ergeben (Art. 93 Abs. 3 GG), wobei diese Zuständigkeiten in der Praxis keine besondere Bedeutung besitzen.[316] Die Zuständigkeiten sind verfahrensbezogen und in der Verfassung oder dem Gesetz niedergeschrieben. Ungeschriebene Zuständigkeiten des Bundesverfassungsgerichts werden nicht anerkannt.

Es gilt das sog. Enumerationsprinzip,[317] nach dem das Gericht nur entscheiden kann, wenn der konkrete Rechtsschutzantrag sich auf eine geschriebene Zuständigkeit stützen kann.[318] Eine Ausdehnung der Kompetenz des Bundesverfassungsgerichts über den gesetzlich gezogenen Rahmen hinaus in analoger Anwendung der Zuständigkeitsbestimmungen ist unzulässig.[319] Die Zuständigkeiten haben sehr unterschiedliche Bedeutungen und Voraussetzungen. Die praktisch bedeutsamsten Verfahrensarten sind die Verfassungsbeschwerde gemäß Art. 93 Abs. 1 Nr. 4a GG, die konkrete Richtervorlage gemäß Art. 100 Abs. 1 GG und das Organstreitverfahren gemäß Art. 93 Abs. 1 Nr. 1 GG.

Die richterliche Gewalt des Bundesverfassungsgerichts reicht dabei soweit, wie die Kompetenzen im konkreten Verfahren gespannt sind. Hat das Bundesverfassungsgericht für eine bestimmte rechtliche Kontrolle keine Kompetenz, darf es diese gerichtliche Kontrolle nicht ausüben. Die Grenze der richterlichen Gewalt des Bundesverfassungsgerichts ergibt sich daher im Umkehrschluss aus der Reichweite der Kompetenzen im jeweiligen Verfahren. Es ist nicht so, dass es bestimmte Bereiche gibt, in denen das Bundesverfassungsgericht per se nicht judizieren darf. Es gibt keine Verbote richterlicher Kontrolle. Es gibt nur Bereiche, in denen das Bundesverfassungsgericht keine Kompetenz

315 Vgl. Art. 18 Satz 2 GG, Art. 21 Abs. 4, Art. 41 Abs. 2 GG, Art. 61 GG; Art. 98 Abs. 2, 4 GG, Art. 99 GG, Art. 126 GG.

316 S. etwa § 16 Abs. 3 WahlPrG, §§ 97a ff. BVerfGG; § 105 BVerfGG; § 26 Abs. 3 EuWG, § 32 Abs. 3, 4, PartG, 33 Abs. 2 PartG, § 50 Abs. 3 VwGO, § 39 Abs. 2 SGG, § 18 Abs. 3 PUAG, § 36 Abs. 2 PUAG.

317 Vgl. BVerfG, Beschluss der 3. Kammer des Zweiten Senats vom 23. Juli 2002 - 2 BvR 403/02 -.

318 BVerfGE 2, 341 <346>; BVerfGE 21, 52 <53>.

319 Vgl. BVerfGE 1, 396 <408 f.>; BVerfGE 21, 52 <53>.

besitzt und mangels dieser nicht tätig werden darf.[320]

Streitigkeiten über die Reichweite der Befugnisse des Bundesverfassungsgerichts sind daher immer Streitigkeiten über die Auslegung der jeweiligen Zuständigkeits- und Maßstabsnormen im konkreten Fall. Die Zuständigkeiten des Bundesverfassungsgerichts bestimmen sich dabei nach den jeweiligen prozessualen und materiellen Voraussetzungen des jeweiligen Begehrens.

b) Prozessuale Voraussetzungen

Zu den prozessualen Voraussetzungen gehören insbesondere die Antragsberechtigung, die Frage ob ein Antragsgegner erforderlich ist und falls ja, ob der richtige Antragsgegner gewählt wurde, die Zulässigkeit der Verfahrensgegenstände, die Frage des Erfordernisses einer Betroffenheit einer subjektiven Rechtsposition, die Frage der Fristen und bestimmter Formen.

Wesentlich ist auch die Frage, ob das Begehren seiner Art nach im jeweiligen Verfahren zulässig ist.[321] So ist etwa für die häufigste Verfahrensart der Verfassungsbeschwerde grundsätzlich nur ein Feststellungsantrag statthaft,[322] der bezogen auf gerichtliche Entscheidungen und Gesetze um die Befugnis des Gerichts ergänzt wird, verfassungswidrige Maßnahmen aufzuheben.[323] Weitere Aussprüche über Maßnahmen trifft das Gericht nicht .

Aus diesen prozessualen Voraussetzungen ergibt sich die Gerichtsförmigkeit des Handeln des Gerichts, die vor allem durch folgende allgemeine Maßstäbe geprägt ist:[324] (a) Das Bundesverfassungsgericht wird nur auf Antrag und nicht aus eigener Initiative tätig.[325][326] (b) Es trifft nur feststellende und kassatorische Entscheidungen, regelt eine ungeregelte Rechtslage aber nicht dauerhaft;[327] (c) es wendet Recht an und konkretisiert bestehendes Recht, schafft aber kein Recht in der Weise, wie ein Normgeber es kann;[328] (d) es reagiert auf Fallkonstellationen, die es nicht selbst geschaffen hat, (e) es betrachtet Sachverhaltskonstellationen in aller Regel retrospektiv, (f) es ist in aller Regel in seiner Entscheidung auf den jeweiligen Fall begrenzt. Dabei gibt es allerdings Besonderheiten der Rechtskrafterstreckung in § 31 BVerfGG. (g) Weiter kann das BVerfG seine Entscheidungen nicht von sich aus revidieren, sondern allenfalls im Rahmen eines weiteren Falles, der die gleiche Rechtsfrage aufwirft.

c) Materielle Voraussetzungen

Neben den prozessualen Voraussetzungen ist für die Kompetenz des Verfassungsgerichts auch das Begehren entscheidend, das wiederum auch von der Verfahrensart geformt wird.

Üblicherweise wird die Vereinbarkeit des Verfahrensgegenstandes mit einem Prüfungsmaßstab überprüft. Dieser Vorgang lässt sich der Sache nach in drei Bereiche unterteilen: Erstens die Feststellung und Konkretisierung des entscheidungserheblichen Verfahrensgegenstandes (Verfahrensgegenstand), zweitens die abstrakte Auslegung des Prüfungsmaßstabes (Prüfungsmaßstab) und drittens die Anwendung dieses Prüfungsmaßstabes auf den konkreten Verfahrensgegenstand, d.h. die Feststellung, ob die in Rede stehende staatliche Maßnahme mit dem Prüfungsmaßstab vereinbar ist oder nicht (Subsumtion).

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320 Deutlich etwa BVerfGE 2, 341 <346>.

321 Vgl. § 13 BVerfGG.

322 § 95 BVerfGG.

323 § 32 Abs. 1 BVerfGG.

324 S. dazu Philipp Austermann, Die rechtlichen Grenzen des Bundesverfassungsgerichts im Verhältnis zum Gesetzgeber, DÖV 2011, 267 <269>.

325 Vgl. § 23 BVerfGG.

326 Hier gibt es für den Fall der Möglichkeit des Erlasses einer einstweiligen Anordnung zur Sicherung eines Verfahrensgegenstands bei einem anhängigen Verfahren eine gewisse Ausnahme - vgl. § 32 BVerfGG.

327 Vgl. BVerfGE 140, 211 <219>.

328 BVerfGE 3, 225 <236>.

In allen drei Bereichen trifft das Bundesverfassungsgericht in aller Regel auf vorausgehende Entscheidungen anderer staatlicher Stellen. Das Verfassungsgericht respektiert dabei eine Entscheidungsprärogative der vorausgehenden Stellen in unterschiedlichem Maße. Im Bereich des Prüfungsmaßstabs für die verfassungsgerichtliche Entscheidung gewährt es den anderen Stellen im Ausgangspunkt die geringste Gestaltungsbefugnis, bei der Bestimmung des Verfahrensgegenstandes übernimmt das Verfassungsgericht demgegenüber oftmals Konkretisierungen anderer Stellen, während es bei der Subsumtion hinsichtlich des Gestaltungsspielraums in erheblicher Weise Konkretisierungen vornimmt, die kontextabhängig sind.

aa) Prüfungsmaßstab

Die Übereinstimmung der zur Entscheidung stehenden Maßnahme (Verfahrensgegenstand) mit dem Prüfungsmaßstab überprüft das Gericht soweit, wie der jeweilige Maßstab rechtliche Vorgaben entfaltet.

(1) Verfassungsrecht als Prüfungsmaßstab im Regelfall

Bei den meisten Verfahrensarten ist der Maßstab, an dem der Verfahrensgegenstand zu messen ist, das deutsche Verfassungsrecht. Je nach Verfahrensart kann es sich dabei um einen Ausschnitt der Verfassung handeln, insbesondere im Bereich der sog. Organstreitigkeiten, bei denen nur die jeweiligen Organrechte auf ihre Verletzung hin zu überprüfen sind. Da zumindest als geschriebenes Verfassungsrecht nur das Recht gilt, das im Grundgesetz ausdrücklich niedergelegt ist (Art. 79 GG), bilden somit in aller Regel konkrete Normen des Grundgesetzes sowie deren Ergänzungen um ungeschriebene Normen den Prüfungsmaßstab.

(2) Autonome Auslegung des Verfassungsrechts

Die Regel

Beschränkt sich der Prüfungsmaßstab, wie in aller Regel, auf Verfassungsnormen, anhand derer das Bundesverfassungsgericht den Verfahrensgegenstand überprüft, legt es die jeweiligen verfassungsrechtlichen Vorgaben autonom aus.

Die Ausnahme

Von der grundsätzlich autonomen und eher unabhängigen Auslegung des Prüfungsmaßstabes durch das Bundesverfassungsgericht im Rahmen der jeweiligen methodischen Regeln gibt es gewisse kontextbezogene Modifizierungen. Im Bereich des staatlichen Organisationsrechts zieht das Bundesverfassungsgericht als einen Gesichtspunkt der Verfassungsauslegung zunächst die Staatspraxis heran. Das Verständnis der anderen Verfassungsorgane von der jeweiligen Verfassungsnorm hat im Bereich des Staatsorganisationsrechts für das Bundesverfassungsgericht eine gewisse Indizwirkung. Insbesondere bei der Auslegung von Titeln der Gesetzgebungskompetenzen hat die bisherige Staatspraxis großes Gewicht.[329] Auch sonst nimmt das Gericht Rücksicht auf die Staatspraxis. Diese ist zwar Gegenstand und nicht Maßstab verfassungsrechtlicher Beurteilung von Akten der öffentlichen Gewalt. Dennoch sind bei der Auslegung von Geschäftsordnungen Tradition und Praxis mit heranzuziehen, wie sie sich durch die historische und politische Entwicklung geformt haben.[330] So ist es geboten, bei Zweifeln über den Sinn einer Norm der Staatspraxis Rechnung zu tragen.[331] Dagegen kann die Staatspraxis nicht die eindeutigen oder durch Auslegung ermittelten Anforderungen einer Verfassungsnorm verdrängen.[332] Gesteigert wird die Rücksicht auf die Staatspraxis in den Fällen, in denen die Verfassung für eine staatliche Maßnahme im Organisationsbereich das Zusammenwirken mehrerer Staatsorgane vorsieht. Hier berücksichtigt das Bundesverfassungsgericht das

329 Vgl. BVerfGE 134, 33 <55 Rn. 55>; 109, 190 <213 f.>; BVerfGE 33, 125 <152 f.>; 61, 149 <175>; 68, 319 <328>; 106, 62 <105>; 109, 190 <213> bezogen auf die Auslegung von Gesetzgebungskompetenztitel.

330 Vgl. BVerfGE 1, 144 <149>.

331 BVerfGE 91, 148 <171 f.>.

332 Vgl. BVerfGE 62, 1 <38f.>.

Verständnis der anderen Staatsorgane bei der Auslegung der Norm. So hat das Gericht bei der Auslegung im Zusammenhang mit dem sog. konstruktiven Misstrauensvotum den verfassungsgerichtlichen Prüfungsmaßstab funktionsbezogen dahingehend reduziert, dass das Verfassungsgericht die Einschätzung der anderen Organe, ob eine von der Verfassung geforderte Instabilität innerhalb der parlamentarischen Mehrheitsverhältnisse vorliegt, nur auf evidente Fehler hin überprüfen kann, da sich der für die Auflösung des Bundestages nach Art. 68 GG geltende anspruchsvolle Mechanismus der Gewaltenteilung sinnvoll nur zu entfalten vermag, wenn das Bundesverfassungsgericht die politische Einschätzung der Lage durch die zuvor tätigen Verfassungsorgane respektiert[333] und den anderen Verfassungsorganen den vom Grundgesetz garantierten Raum freier politischer Gestaltung und Verantwortung offenhält.[334]

(3) Auslegung von Verfassungsnormen

Die Verfassungsnormen sind oft weit und allgemein formuliert und geben nicht selten nur Prinzipien oder Ziele vor, wie etwa bezogen auf die Vorgaben des Bundesstaatsprinzips, des Rechtsstaatsprinzips, des Demokratieprinzips oder des Sozialstaatsprinzips.[335] Diese Ziele und Prinzipien werden dann in der Verfassung zwar hinsichtlich einzelner Gesichtspunkte weiter konkretisiert, nicht aber hinsichtlich aller ihrer einzelnen Verästelungen. Wie weit die rechtlichen Vorgaben der jeweiligen Verfassungsnormen, insbesondere der Verfassungsprinzipien und der Verfassungsziele reichen, kann daher durchaus streitig sein. Der Streit über die Reichweite dieser Verfassungsbestimmungen ist vordergründig eine methodische Frage, entfaltet sich dann aber in aller Regel zugleich als eine Frage der jeweiligen Kompetenz des Bundesverfassungsgerichts.

Die Auslegung der Verfassungsnormen folgt dabei zunächst den methodischen Regeln der Verfassungsauslegung.[336] Die methodischen Regeln beruhen dabei zunächst auf vier Auslegungsregeln, der grammatikalischen, der systematischen, der genetischen und der teleologischen. Bei der grammatikalischen Auslegung wird der Sinngehalt einer Verfassungsnorm am Maßstab des Verfassungswortlautes gebildet. Nach der historischen oder genetischen Auslegung wird zunächst die Debatte bei der Entstehung der jeweiligen Norm herangezogen sowie der Vergleich zu der Norm, an deren Stelle die neu geschaffene Norm trat bzw. auf welches historisches Problem sie reagieren sollte. Bei der systematischen Auslegung wird auf den Gesamtzusammenhang innerhalb der Verfassungsordnung abgestellt. Bei der teleologischen Auslegung wird demgegenüber auf den Sinn und Zweck der jeweiligen Norm abgestellt. Die Auslegungsmethoden stehen dabei nicht in einem Rangverhältnis.[337]

Diese Hauptauslegungsmethoden werden ergänzt um selbständige Unterprinzipien, bei denen fraglich ist, inwieweit sie streng einer der jeweiligen Auslegungsmethoden zuzuordnen sind. Gängig sind etwa Folgeüberlegungen, die darauf abstellen, welche weiteren Folgen ein jeweiliges Auslegungsergebnis nach sich zieht. Wichtig ist die Einbettung der Auslegung sowohl in den völkerrechtlichen, unionsrechtlichen als auch in einen international rechtsvergleichenden Kontext. Wichtig ist auch das Verständnis des Verfassungsrechts als eine einheitliche Ordnung, die kein Rangverhältnis der Normen untereinander kennt. Bei Konflikten zwischen verschiedenen Normen ist eine Lösung zu wählen, die allen Verfassungsnormen eine weitgehende Entfaltung ermöglicht. Die Ermittlung konkreter Vorgaben aus Verfassungsnormen ist aufgrund der Weite der Normen mitunter mehr als ein reiner Auslegungsvorgang, was das BVerfG vereinzelt begrifflich dadurch zu verdeutlichen sucht, dass es von Verfassungskonkretisierung spricht.[338]

Das Bundesverfassungsgericht verweist darauf, dass der Inhalt von verfassungsrechtlichen Vorschriften maßgeblich bestimmt werde von den dort verwendeten Begriffen. Deren normative Bedeutung

333 Vgl. BVerfGE 62, 1 <51>; 114, 121 <158>.
334 Vgl. BVerfGE 36, 1 <14 f.>; 114, 121 <160>.
335 S. v.a. Art. 20 GG.
336 S. dazu BVerfGE 11, 126 <129 ff.>; 35, 263 <279>.
337 BVerfGE 105, 135 <157>; 133, 168 <205 Rn. 66>.
338 BVerfGE 55, 274 <333>; s.a. BVerfGE 101, 158 <219>.

und Tragweite ließe sich indessen nicht allein vom gängigen Wortsinn her erfassen; sie zu ergründen verlange vielmehr einen Blick auf das rechtliche und historische Umfeld der Entstehung der Verfassungsnormen sowie auf ihre Zielrichtung, wie sie sich in den Beratungen darstellte und wie sie schließlich im Normzusammenhang ihren Ausdruck fand. Erst aufgrund einer solchen Gesamtbetrachtung ließe sich der Sinngehalt dieser Verfassungsbestimmungen feststellen.[339] Eine einzelne Verfassungsbestimmung könne nicht isoliert betrachtet und allein aus sich heraus ausgelegt werden. Sie stehe in einem Sinnzusammenhang mit den übrigen Vorschriften der Verfassung, die eine innere Einheit darstelle. Aus dem Gesamtinhalt der Verfassung ergäben sich gewisse verfassungsrechtliche Grundsätze und Grundentscheidungen, denen die einzelnen Verfassungsbestimmungen untergeordnet seien.[340] Die Verfassung sei als eine einheitliche Ordnung mit dem Ziel auszulegen, Widersprüche zwischen ihren einzelnen Regelungen zu vermeiden.[341] Das Bundesverfassungsgericht betont auch die völkerrechts- bzw. konventionsfreundliche Auslegung der Begriffe des Grundgesetzes. Die Möglichkeiten einer konventionsfreundlichen Auslegung endeten dort, wo diese nach den anerkannten Methoden der Gesetzesauslegung und Verfassungsinterpretation nicht mehr vertretbar erscheine.[342] Es bestehe die verfassungsrechtliche Pflicht, auch bei der Anwendung der deutschen Grundrechte die Europäische Menschenrechtskonvention in ihrer konkreten Ausgestaltung als Auslegungshilfe heranzuziehen.[343] Bei Grundrechtsnormen ist im Grundsatz in Zweifelsfällen diejenige Auslegung zu wählen, welche die juristische Wirkungskraft der Grundrechtsnorm am stärksten entfaltet.[344]

(4) Andere Normen als Prüfungsmaßstab

Anwendungsfälle

Ausnahmsweise können auch andere Normen den Prüfungsmaßstab bilden. Drei Ausnahmen sind zu nennen. (a) Es kann auch das einfache Recht Maßstab sein. Das wichtigste Beispiel, das verfassungsprozessual aber keine besondere Bedeutung spielt, ist etwa, dass im Rahmen des abstrakten Normenkontrollverfahrens die Vereinbarkeit von Landesrecht auch mit einfachem Bundesrecht zu prüfen ist.[345] (b) Weiter können nach der Rechtsprechung des Bundesverfassungsgerichts bei Verfassungsbeschwerden gegen Entscheidungen deutscher Gerichte in den Fällen, in denen das sekundäre Unionsrecht eine abschließende Regelung enthält, auch die Grundrechte der Europäischen Grundrechtecharta Prüfungsmaßstab sein.[346] (c) Im Rahmen von Verfahren zur Feststellung des Bestehens einer allgemeinen Regel des Völkerrechts im Sinne von Art. 25 GG kann es mittelbar zu einer Prüfung des einfachen Rechts kommen. Das Bundesverfassungsgericht entscheidet im Verfahren nach Art. 100 Abs. 2 GG zwar nicht unmittelbar darüber, ob ein Bundesgesetz mit einer allgemeinen Regel des Völkerrechts vereinbar ist, sondern nur darüber, ob die Regel besteht; das Verfahren nach Art. 100 Abs. 2 GG dient der Normenverifikation, nicht der Normenkontrolle. Da sich die Entscheidung aber auch auf die „Tragweite" der allgemeinen Regeln des Völkerrechts erstrecken kann,[347] kann das Bundesverfassungsgericht im Einzelfall jeweils auch prüfen, ob eine bestimmte allgemeine Regel des Völkerrechts nach ihrer Tragweite auf innerstaatliches Recht einzuwirken geeignet ist. Das Verifikationsverfahren nach Art. 100 Abs. 2 GG ersetzt im Ergebnis das Gesetzgebungsverfahren.[348] Weiter ist im Rahmen der abstrakten Normenkontrolle Landesrecht auch auf seine Vereinbarkeit mit

339 BVerfGE 74, 102 <116>.
340 BVerfGE 1, 14 <32>.
341 Vgl. BVerfGE 33, 23 <27>.
342 Vgl. BVerfGE 128, 326 <370 f.>.
343 BVerfGE 111, 307 <329>.
344 Vgl. BVerfGE 6, 55 <72>; 39, 1 <37 f.>.
345 Vgl. zur Auslegung des Hochschulrahmengesetzes als Bundesgesetz etwa BVerfGE 66, 270 <282 ff.>.
346 BVerfGE 152, 216 ff. - *Recht* auf *Vergessen* II.
347 Vgl. BVerfGE 15, 25 <31 f.>; 16, 27 <32 f.>; 18, 441 <448>.
348 Vgl. BVerfGE 23, 288 <318>.

völkerrechtliche Normen, die als Bundesrecht gelten (Art. 59 Abs. 2, Art. 25 GG) zu prüfen.[349]

Auslegung einfachen Rechts

In den seltenen Fällen, in denen Rechtsnormen, die nicht Verfassungsnormen sind, Prüfungsmaßstab sind, ist das Bundesverfassungsgericht eher gewillt, die Auslegung und das Verständnis des einfachen Rechts in der Form, wie sie durch die Fachgerichte bis dahin gefunden wurden, seinen eigenen Entscheidungen zugrunde zu legen und nicht seine eigene Auslegung des einfachen Rechts an die Stelle der Auslegung der Fachgerichte zu setzen. Es ist an diese Auslegung aber nicht gebunden, sondern kann auch die Inhalt und die Wirksamkeit dieser Normen als Vorfrage mit prüfen.[350]

(5) Rechtlicher Maßstab

Prüfungsmaßstäbe können nur rechtliche Maßstäbe sein, das heißt Normen, die einen anerkannten Rechtsentstehungsprozess vorweisen können. Andere Normen als solche, die auf hoheitlicher Rechtssetzung beruhen, wie etwa moralische, ethische oder religiöse Normen sind nicht Prüfungsmaßstab, in keinem Verfahren.

bb) Verfahrensgegenstand

Ebenfalls vielfältig und kontextabhängig ist die Konkretisierung des jeweiligen Verfahrensgegenstands. Relevant ist dabei zunächst die Frage, was der Verfahrensgegenstand ist und ob dieser Verfahrensgegenstand selbst rechtlich wirksam ist (von der Übereinstimmung mit dem Prüfungsmaßstab abgesehen).

(1) Antragsabhängigkeit

Das Bundesverfassungsgericht geht zunächst davon aus, dass der jeweilige Verfahrensgegenstand weitgehend von dem Antrag des Betroffenen bestimmt wird. Von diesem Antrag geht eine Bindungswirkung aus, die verfahrensspezifisch unterschiedlich weit ist und im Vergleich zu der Bindungswirkung anderer Gerichte an die gestellten Anträge dem Verfassungsgericht eher eine großzügigere Ergänzung erlaubt. Es hält sich für berechtigt, in gewissem Umfang die jeweiligen Anträge rechtsschutzfreundlich auszulegen. Das Verfassungsgericht geht davon aus, in besonderen Konstellationen auch bei zurückgenommenen Anträgen die aufgeworfene Frage noch beantworten zu können. Weiter geht es davon aus, dass es in bestimmten Fällen über den Antrag hinaus weitere Fragen, die aus verfassungsrechtlichen Gründen eine Mitentscheidung nahelegen, ebenfalls in die Prüfung miteinbeziehen darf.

(2) Sachverhaltskomplexe

Im Bereich des Sachverhalts, auf den sich der Verfahrensgegenstand bezieht, legt das Gericht grundsätzlich die Sachverhaltsschilderung des Antragstellers zugrunde. Das Gericht fühlt sich aber berechtigt, ausnahmsweise bei bestimmten grundrechtssensiblen Situationen auch die Sachverhaltsfeststellung mit zu überprüfen. Die Einzelheiten werden bei der Antwort von Frage 18 dargestellt.

(3) Rechtsakte

Allgemein

Ist der Verfahrensgegenstand ein Rechtsakt, übt das Verfassungsgericht bei dessen Auslegung in aller Regel eine Zurückhaltung aus und legt der Entscheidung meist die Auslegung des Rechtsakts zugrunde, die ihm die jeweilige vorlegende Stelle beimisst. Nur in offensichtlichen Fällen legt das Verfassungsgericht den Rechtsakt anders aus als die vorlegende Stelle.

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349 Rozek, in: Schmidt-Bleibtreu/Klein/Bethge, Bundesverfassungsgerichtsgesetz, Loseblatt, § 76 BVerfGG (Stand September 2017), Rn. 65.

350 *Rozek*, in: Schmidt-Bleibtreu/Klein/Bethge, Bundesverfassungsgerichtsgesetz, Loseblatt, § 76 BVerfG (Stand September 2017), Rn. 66.

Rechtliche Fragen bezogen auf den Verfahrensgegenstand

Ob der Verfahrensgegenstand mit Recht, das nicht der Überprüfung des BVerfG in der konkreten Verfahrensart unterliegt, vereinbar ist, prüft das Gericht in aller Regel nicht. Davon gibt es Ausnahmen, wenn die Vorfrage selbst einen unmittelbaren verfassungsrechtlichen Bezug hat. So überprüft das BVerfG bei der abstrakten Normenkontrolle eine Rechtsverordnung zwar grundsätzlich nur auf Ihre Vereinbarkeit mit der Verfassung, nicht aber auf ihre Vereinbarkeit mit dem einfachen Bundesrecht, obwohl dieses im Vergleich zur Rechtsverordnung höherrangig ist. Trotz dieser Regel wird die Übereinstimmung der Rechtsverordnung mit ihrer im einfachen Recht enthaltenen Ermächtigungsgrundlage als Vorfrage dann doch wieder überprüft, da die deutsche Verfassung in Art. 80 GG eine gesetzliche Grundlage einer Rechtsverordnung für deren Wirksamkeit voraussetzt.[351]

Viele Verfahrensarten sind oft mit der Beantwortung weiterer Rechtsfragen verknüpft, die sich nicht in der Vereinbarkeit des Verfahrensgegenstandes mit dem Prüfungsmaßstab erschöpfen.

Das Verfahren der Normenkontrolle nach Art. 100 Abs. 1 GG dient dem Ziel, eine verfassungsmäßige Entscheidung in einem konkreten Rechtsstreit zu gewährleisten. Demgemäß ist dieses Zwischenverfahren dann geboten und zulässig, wenn es für die im Ausgangsverfahren zu treffende Entscheidung auf die Gültigkeit der zur Prüfung gestellten Norm ankommt; sie muss für den Ausgang des Rechtsstreits entscheidungserheblich sein. Dies ist nur dann der Fall, wenn bei Ungültigkeit der Norm anders entschieden werden müsste als bei deren Gültigkeit.[352] Ob dies der Fall ist, prüft das BVerfG nur sehr zurückgenommen und folgt dem vorlegenden Gericht dann nicht, wenn die Unrichtigkeit offensichtlich ist.[353] Stellen sich in diesem Bereich allerdings verfassungsrechtliche Fragen, geht das Verfassungsgericht von einer ähnlichen Strenge und Autonomie aus wie bei der Konkretisierung des Prüfungsmaßstabes.

Auch darf ein Gericht ein Gesetz nur vorlegen, wenn es den Gegenstand selbst für verfassungswidrig hält, was in der Regel nur der Fall ist, wenn eine verfassungskonforme Auslegung nicht in Betracht kommt.[354] Kann das Fachgericht nämlich seine verfassungsrechtlichen Bedenken auf dem Wege einer zulässigen verfassungskonformen Auslegung überwinden, so fehlt es zumindest für den konkreten Fall an seiner für die Entscheidung erheblichen Überzeugung von der Verfassungswidrigkeit eines Gesetzes.[355] Die Möglichkeit einer verfassungskonformen Auslegung überprüft das BVerfG in der Regel auf ihre Plausibilität.

Einige Verfahren verlangen, dass die Antragssteller oder Beschwerdeführer keine andere prozessuale Möglichkeit haben, Rechtsschutz einzuholen als das Verfassungsgericht anzurufen. Die Beantwortung dieser Frage setzt die Auslegung der bestehenden Rechtsbehelfsmöglichkeiten zu anderen Gerichten als denen des BVerfG voraus. Für das wichtigste Verfahren folgt das BVerfG hier nicht der Einschätzung des Antragsstellers bzw. Beschwerdeführers, sondern beantwortet diese Frage selbst. Die generelle Formel lautet hier: Ob ein Rechtsbehelf zwecks Rechtswegerschöpfung eingelegt werden muss, obwohl dessen Statthaftigkeit in Zweifel steht, richtet sich in der verfassungsgerichtlichen Rechtsprechung nach dem Grad der Erfolgsaussicht aus der Sicht einer verständigen Prozesspartei.[356] Danach gehört ein Rechtsbehelf auch dann zum Rechtsweg, wenn dessen Erfolgsaussicht zweifelhaft ist, etwa weil dessen Statthaftigkeit innerhalb der Rechtsprechung oder von Rechtsprechung und Literatur unterschiedlich beurteilt wird.[357] Etwas anderes gilt, wenn der Rechtsbehelf im Hinblick auf eine entgegenstehende Rechtsprechung der Fachgerichte von vornherein als aussichtslos erscheinen muss.[358]

351 BVerfGE 101, 1 <30 f.
352 Vgl. BVerfGE 46, 268 <283>; 58, 300 <317 f.>.
353 Vgl. BVerfGE 143, 38 <50 Rn. 25>; stRspr.
354 Vgl. BVerfGE 80, 68 <72>; 85, 329 <333 f.>; 87, 114 <133>; 124, 251 <262>.
355 Vgl. BVerfGE 138, 64 <89 Rn. 75>.
356 Vgl. BVerfGK 11, 203 <206>.
357 Vgl. BVerfGE 47, 168 <175>; 128, 90 <99 f.>.
358 Vgl. BVerfGE 20, 271 <275>; 49, 24 <51>; 68, 376 <380 f.>; 70, 180 <186>.

cc) Subsumtion

Im Bereich der Subsumtion nimmt das Verfassungsgericht in vielfältiger Weise eine unterschiedliche Strenge der gerichtlichen Kontrolle vor. Die unterschiedliche Strenge wird dabei zum Teil ausdrücklich thematisiert, oftmals aber auch ohne ausdrückliche Thematisierung der Sache nach umgesetzt.

(1) Funktionsbezogene Sichtweise

Bezogen auf die Subsumtion konkretisiert das Verfassungsgericht die Folgerung aus der Normkonkretisierung im Wege der Auslegung in einer funktionsbezogenen Weise. Das BVerfG versteht sich als ein Akteur der verfassungsgerichtlichen Ordnung, dem von der Verfassung eine bestimmte Funktion zugewiesen wird. Diese Funktion muss es so ausüben, dass die anderen Verfassungsorgane deren jeweilige Funktion ebenfalls noch ausüben können. Dieser funktionsbezogene Aspekt wird besonders deutlich im Verhältnis des Bundesverfassungsgerichts zu den obersten Bundesgerichten der Fachgerichtsbarkeit, d.h. dem Bundesgerichtshof für Zivilsachen und Strafsachen, dem Bundesarbeitsgericht, dem Bundessozialgericht, dem Bundesverwaltungsgericht und dem Bundesfinanzhof. Hier spricht das Bundesverfassungsgericht davon, dass es kein Gericht sei, das die jeweilige Revisionsinstanz noch einmal verlängert; es sei keine „Superrevisionsinstanz".[359]

Die funktionsbezogene Abgrenzung spielt aber auch gegenüber den anderen Verfassungsorganen eine Rolle. Das Bundesverfassungsgericht versteht sich als Hüter der Verfassung als einem wesentlichen Element für den materiellen Rechtsstaat, den das Grundgesetz ausgestaltet hat, aber auch neben das Demokratieprinzip stellt. Der wesentliche Akteur des Demokratieprinzips ist demgegenüber das Parlament, so dass das Verfassungsgericht bei der Ausübung seiner Rechtsprechung auch im Auge behält, ob die Gestaltungsmöglichkeiten, die die Verfassung dem Parlament als erste Gewalt zuweist, noch aufrecht erhalten bleiben können.

(2) Urheber der Maßnahme

Gesetzgeber

Wichtiger Maßstab für die Frage der Prüfungsdichte ist, wer der Urheber der staatlichen Maßnahme ist, die der verfassungsgerichtlichen Prüfung unterliegt. Der Überprüfung der parlamentarischen Gesetze oder sonstigen Maßnahmen des Parlaments im organisatorischen Bereich begegnet das Bundesverfassungsgericht mit einer gewissen Zurückhaltung, die es als Gestaltungsfreiheit und Entscheidungsprärogative des Gesetzgebers bezeichnet.

Das Bundesverfassungsgericht ist dabei der Auffassung, dass diese Gestaltungsfreiheit des Gesetzgebers sich unmittelbar aus der Verfassung ergibt, weil die Befugnisse, die die Verfassung dem Parlament zuweist, ihrer Art nach so sind, dass sie politische Gestaltungsfreiheit ermöglichen und daher schon von Rechts wegen im Regelfall nicht eine einzig mögliche Entscheidung vorgeben können. Eine gängige Formulierung lautet etwa, es sei nicht Aufgabe des Bundesverfassungsgerichts zu prüfen, ob der Gesetzgeber dabei die gerechteste, zweckmäßigste und vernünftigste Lösung gewählt hat.[360] Dem weiten Entscheidungsspielraum des Gesetzgebers entspräche vielmehr eine zurückhaltende, auf den Maßstab evidenter Sachwidrigkeit beschränkte Kontrolle der einfachgesetzlichen Regelung.[361]

Der Gestaltungsspielraum des Gesetzgebers ist dabei auch von dem jeweilige Rechtsgebiet abhängig. Das Bundesverfassungsgericht geht davon aus, dass es Bereiche gibt, bei denen die Verfassung strengere Vorgaben enthält als andere. Als Bereiche, bei denen den staatlichen Organen von der Verfassung per se ein relativ großer Gestaltungsspielraum eingeräumt wird, ist etwa der Bereich der

359 BVerfGE 122, 248 <303>.

360 BVerfGE 103, 310 <320>; 117, 330 <353>; 121, 241 <261>; 130, 263 <294>; 139, 64 <112 Rn. 95>; 140, 240 <279 Rn. 75>.

361 Vgl. BVerfGE 65, 141 <148 f.>; 103, 310 <319 f.>; 110, 353 <364 f.>; 117, 330 <353>; 130, 263 <294 f.>; 139, 64 <113 Rn. 96>; 140, 240 <279 Rn. 75>.

Wirtschaftspolitik,[362] der Bereich der Sozialpolitik[363]und der Bereich der Außenpolitik[364] zu nennen. Die Bestimmung der Reichweite des Gestaltungsspielraums erfolgt dabei sachbezogen und konkretisiert auf die jeweilige Regelungsmaterie. Oft betont das BVerfG ausdrücklich einen sachbezogenen weiten Gestaltungsspielraum des Gesetzgebers. Beschränkt man sich auf jüngere Entscheidungen wird der weite Gestaltungsspielraum etwa betont bei der Erfüllung von Staatszielbestimmungen,[365] der Wahrnehmung der Integrationsverantwortung,[366] bei den Regeln zur Sicherung des menschenwürdigen Existenzminimums,[367] dem Äquivalenzprinzip der Vorzugslasten im Abgabenrecht,[368] der Festlegung des Rundfunkbeitrags,[369] bei der Aufstellung und normativen Umsetzung eines Schutzkonzepts zu Gunsten von Leben und körperliche Unversehrtheit,[370] bei der Beamtengesetzgebung,[371] bei der Reichweite von Abgaben- und Steuergesetzen,[372] bei der Lösung des Konflikts zwischen dem Frage- und Informationsrecht des Deutschen Bundestages und dem Schutz der Grundrechte der betroffenen Unternehmen andererseits[373] bei der Studienplatzverteilung,[374] der Ausgestaltung des Atomrechts,[375] bei Systemwechseln,[376] bei der Begrenzung der vertraglichen Entgeltbestimmung,[377] der Ausgestaltung des Schutzkonzepts vor Missbrauch der elterlichen Sorge,[378] bei der Ausgestaltung des effektiven Rechtsschutzes,[379] bei der Ausfüllung des verfassungsrechtlich gebotenen Schutzes des Rechts auf Kenntnis der eigenen Abstammung[380], bei der Bestimmung wirksamer Sanktionen für Rechtsverletzungen[381] und bei der Ausgestaltung von Leistungsschutzrechten.[382]

Im Zusammenhang insbesondere mit dem Gleichheitssatz,[383] dem Hochschulorganisationsrecht,[384]

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362 Vgl. BVerfGE 14, 105 <117>; 37, 1 <21>; 39, 210 <225 f.>; 51 193 <208>; 70, 191 <201 f.> 77, 308 <332>; 109, 64 <85>; 116, 164 <182>; 118, 79 <101>; 142, 268 <286>.

363 Vgl. BVerfGE 36, 102 <117>; 48, 227 <234>; 52, 264 <275>; 54, 11, <38 f.>; 59, 231 <263>; 77, 308 <332>; 97, 169 <185>; 101, 331 <350>; 102, 254 <325>; 103, 172 <185>; 103, 271 <287>; 109, 64 <85>; 111, 160 <167>, 113, 167 <220>; 114, 167, <263>; 118, 79 <101>; 132, 134 <165>; 137, 34 <73>; 142, 268 <286>; 149, 126 <143>; 152, 68 <115>; 152, 68 <116>.

364 BVerfGE 51, 1 <25>; 53, 164 <182>; 66, 39 <61>; 142, 123 <210>.

365 BVerfGE 59, 231 <263> ; 82, 60 <80>; 152, 68 <116> Rn. 125.

366 BVerfGE151, 202 <299 Rn. 149>.

367 BVerfGE 125, 175 <222, 224f.>; 132, 134 <159ff. Rn. 62, 67>; 137, 34 <72ff. Rn. 74, 76, 78>; 142, 353 <370 Rn. 38>.

368 BVerfGE 149, 222 <259>; 144, 369 <398>.

369 BVerfGE149, 222 <268 Rn. 95>.

370 BVerfGE 96, 56 <64> ; 121, 317 <356>; 133, 59 <76 Rn. 45>; 142, 313 <337 Rn. 70>.

371 BVerfGE 148, 296 <349>; 145, 1 <12 f. Rn. 27>.

372 BVerfGE149, 222 <255 Rn. 68>; 148, 147 <212>; 145, 171 <182>.

373 BVerfGE 147, 50 <145>.

374 BVerfGE 147, 253 <339 Rn. 188>.

375 BVerfGE 143, 246 <325>.

376 BVerfGE 143, 246 <384>.

377 BVerfGE 142, 268 <286>.

378 BVerfGE142, 313 <337>

379 BVerfGE 143, 216 a225 Rn. 21>.

380 BVerfGE 141, 186 <196 Rn. 21>.

381 BVerfGE141, 220 <284 Rn. 139>.

382 BVerfGE142,74 <97>.

383 BVerfGE147, 252 <293 Rn. 64>.

384 BVerfGE 149, 1 <22Rn. 46>.

dem Besoldungsrecht von Beamten,[385] der Bemessung des Existenzminimums,[386] und dem Steuerrecht[387] den Wertermittlungsmethoden für einzelne Gruppen von Vermögensgegenständen[388], der Wahlorganisation,[389] der Strafwürdigkeit von Verhalten,[390] dem Schutz der Ehe[391] und der Bestimmung der Gebührenpflichtigkeit[392] spricht das Gericht wiederholt davon, es sei nicht seine Aufgabe zu prüfen, ob der Gesetzgeber die zweckmäßigste, vernünftigste oder gerechteste gewählt habe.

Exekutive und Judikative

Maßnahmen der Exekutive werden nur selten vom Verfassungsgericht unmittelbar überprüft; vielmehr tritt in aller Regel eine gerichtliche Entscheidung dazwischen. Bei der Kontrolle von gerichtlichen Maßnahmen und Maßnahmen der Verwaltung besteht weitgehend Übereinstimmung. Sofern eine Maßnahme der Verwaltung vorliegt, die durch die Gerichte kontrolliert und bestätigt wurde, geht es in aller Regel um die Anwendung von einfachem Recht und um eine Sachverhaltsfeststellung. Für diesen Regelfall hat sich ein zurückgenommener Prüfungsmaßstab etabliert. Hierfür gibt es unterschiedliche Formeln, die dabei auf gerichtliche Entscheidungen Bezug nehmen, weil diese in der Regel der Verfahrensgegenstand sind.

Die gängigste Formel lautet: Die Gestaltung des Verfahrens, die Feststellung und Würdigung des Tatbestandes, die Auslegung des einfachen Rechts und seine Anwendung auf den einzelnen Fall sind allein Sache der dafür allgemein zuständigen Gerichte und der Nachprüfung durch das Bundesverfassungsgericht entzogen; nur bei einer Verletzung von spezifischem Verfassungsrecht durch die Gerichte kann das Bundesverfassungsgericht auf Verfassungsbeschwerde hin eingreifen.[393] Spezifisches Verfassungsrecht ist aber nicht schon dann verletzt, wenn eine Entscheidung, am einfachen Recht gemessen, objektiv fehlerhaft ist; der Fehler muss gerade in der Nichtbeachtung von Grundrechten liegen.[394] Das Bundesverfassungsgericht prüft insofern nur, ob eine angegriffene Entscheidung Auslegungsfehler erkennen lässt, die auf einer grundsätzlich unrichtigen Auffassung von der Bedeutung eines Grundrechts, insbesondere vom Umfang seines Schutzbereiches, beruhen und auch in ihrer materiellen Bedeutung für den Rechtsfall von einigem Gewicht sind.[395]

Mit Fokus auf Entscheidungen von Zivilgerichten formuliert das Gericht die Grundsätze wie folgt: Die Auslegung und Anwendung des bürgerlichen Rechts obliegt grundsätzlich den Fachgerichten. Regelmäßig ist es nicht Sache des Bundesverfassungsgerichts, den Zivilgerichten vorzugeben, wie sie im Ergebnis zu entscheiden haben.[396] Die Schwelle eines Verstoßes gegen Verfassungsrecht, den das Bundesverfassungsgericht zu korrigieren hat, ist erst erreicht, wenn die Auslegung der Zivilgerichte Fehler erkennen lässt, die auf einer grundsätzlich unrichtigen Anschauung von der Bedeutung der betroffenen Grundrechte beruhen und auch in ihrer materiellen Bedeutung für den konkreten Rechtsfall von einigem Gewicht sind, insbesondere weil darunter die Abwägung der beiderseitigen Rechtspositionen im Rahmen der privatrechtlichen Regelung leidet.[397]

Neben dieser Kontrolltätigkeit, die auf die Anwendung des einfachen Rechts abstellt, prüft das

385 BVerfGE 149, 382 <393 Rn. 18>.
386 BVerfGE 152, 68 <115 Rn. 122>.
387 BVerfGE135, 126 <148 Rn. 68>.
388 BVerfGE 117, 1 <36>.
389 BVerfGE 89, 291 >301>.
390 BVerfGE 90, 145 <202>; 80, 182 <186>.
391 BVerfGE 108, 351 <364>.
392 BVerfGE80, 103 <106>.
393 Vgl. BVerfGE 1, 418 <420>.
394 BVerfGE 18, 85 <92 f.>.
395 BVerfGE 97, 12 <27>; BVerfGK 6, 46 <50>; 10, 13 <15>; 10, 159 <163>; stRspr.
396 Vgl. BVerfGE 129, 78 <102>.
397 BVerfGE 148, 267 <281 Rn. 34> m.w.N. - Stadionverbot; stRspr.; nachfolgend auch BVerfG, 3. Kammer des Ersten Senats, Beschluss vom 9. Juli 2020 – 1 BvR 719/19.

BVerfG gerichtliche Entscheidungen noch auf einen möglichen Willkürverstoß am Maßstab von Art. 3 Abs. 1 GG. Die Rechtsanwendung oder das dazu eingeschlagene Verfahren sind danach erst dann willkürlich, wenn sie unter keinem denkbaren Gesichtspunkt rechtlich vertretbar sind und sich daher der Schluss aufdrängt, dass die Entscheidung auf sachfremden und damit willkürlichen Erwägungen beruht.[398] Zudem nimmt das Bundesverfassungsgericht bei fachgerichtlichen Entscheidungen, die staatliche Eingriffe bestätigen, einen Verfassungsverstoß an, wenn die Entscheidung methodisch nicht nachvollziehbar ist.[399]

Weiter gibt es etwas weitergehende Formulierungen, die vor allem für den Fall gelten, dass das einfache Recht in geringem Umfang rechtliche Maßstäbe vorgibt. Danach ist die richterliche Gestaltung zumindest dann verfassungsrechtlich nicht tragfähig, wenn auch eine entsprechende Maßnahme des Gesetzgebers verfassungswidrig wäre. [400] Der Richter darf sich nicht dem vom Gesetzgeber festgelegten Sinn und Zweck des Gesetzes entziehen. Richterliche Rechtsfortbildung darf den klar erkennbaren Willen des Gesetzgebers nicht übergehen und durch ein eigenes Regelungsmodell ersetzen.[401]Er muss die gesetzgeberische Grundentscheidung respektieren und den Willen des Gesetzgebers unter gewandelten Bedingungen möglichst zuverlässig zur Geltung bringen.[402] Er hat hierbei den anerkannten Methoden der Gesetzesauslegung zu folgen.[403] Eine Interpretation, die als richterliche Rechtsfortbildung den klaren Wortlaut des Gesetzes hintanstellt, keinen Widerhall im Gesetz findet und vom Gesetzgeber nicht ausdrücklich oder - bei Vorliegen einer erkennbar planwidrigen Gesetzeslücke - stillschweigend gebilligt wird, greift unzulässig in die Kompetenzen des demokratisch legitimierten Gesetzgebers ein.[404]

Darüber hinaus gibt es bestimmte Sachbereiche, bei denen das einfache Recht in besonders sensibler Weise Grundrechtseingriffe rechtfertigt und begrenzt. Hier weicht das Bundesverfassungsgericht ausdrücklich oder konkludent von dem zurückgenommenen allgemeinen Maßstab ab. Diese Bereiche werden zusammenfassend in der Antwort zu Frage 18 dargestellt.

Bezogen auf die richterliche Gewalt prüft das BVerfG die Einhaltung der Grundsätze, die sich spezifisch auf die Ausübung der richterlichen Gewalt beziehen, in der Regel etwas strenger, auch wenn es mitunter vorkommt, dass das BVerfG auf das Prozessrecht bezogen, die allgemeine Heck'sche Formel (vgl. dazu die Antwort unter Frage 18) heranzieht.

(3) Eigenarten von Maßnahme

(a) Gewährende Maßnahmen

Weiter haben sich für bestimmte Entscheidungssituationen spezifische Kontrollmaßstäbe entwickelt. Allgemein gilt der Grundsatz, dass der Staat bei leistenden Handlungen in aller Regel freier ist als bei eingreifenden.

(b) Planung und Prognosen

So geht etwa im Bereich von Prognosen und Planungen das Verfassungsgericht davon aus, dass die Planungshoheit primär bei der Exekutive und der Legislative liegt und nur die Methode und die zugrunde liegenden Tatsachen vom Gericht auf eine Plausibilität hin überprüft werden können. Das Bundesverfassungsgericht überprüft derartige Prognosen daraufhin, ob sie auf hinreichend

398 Vgl. BVerfGE 108, 129 <137, 142 f.>.
399 Vgl. BVerfG, Beschluss der 3. Kammer des Zweiten Senats vom 18. Mai 2022 - 2 BvR 1667/20 -, Rn. 33 ff.
400 BVerfGE 122, 248 <286>. BVerfG, Beschluss der 3. Kammer des Ersten Senats vom 28. September 2010 - 1 BvR 1660/08 -, juris, Rn. 11
401 BVerfGE 149, 126 <127>.
402 BVerfGE 149, 126 <156 Rn. 73>.
403 BVerfGE 84, 212 <226>; 96, 375 <395>.
404 BVerfGE 118, 212 <243>; 128, 193 <210>.

gesicherter Grundlage beruhen.[405] Soweit bei der verfassungsgerichtlichen Überprüfung einer Planungsentscheidung über Wertungen und Prognosen des Normgebers zu befinden ist, hat das Bundesverfassungsgericht seine Nachprüfung darauf zu beschränken, ob diese Einschätzungen und Entscheidungen offensichtlich fehlerhaft oder eindeutig widerlegbar sind oder der verfassungsrechtlichen Ordnung widersprechen.[406]

Ganz frei ist aber auch der Gesetzgeber bei Prognosen nicht. Bei der Beurteilung des gewählten Mittels sowie der in diesem Zusammenhang vorzunehmenden Einschätzung der dem Einzelnen oder der Allgemeinheit drohenden Risiken oder Gefahren steht dem Gesetzgeber, abhängig von der Eigenart des in Rede stehenden Sachbereichs, seinen Möglichkeiten, sich ein hinreichend sicheres Urteil zu bilden und der auf dem Spiel stehenden Rechtsgüter, ein Einschätzungs- und Gestaltungsspielraum zu, der vom Bundesverfassungsgericht nur in begrenztem Umfang überprüft werden kann.[407] Die verfassungsgerichtliche Kontrolle kann dabei von einer bloßen Evidenzkontrolle über eine Vertretbarkeitskontrolle bis hin zu einer intensivierten inhaltlichen Kontrolle reichen.[408]. Je höher sich die Komplexität einer Materie dabei ausnimmt, desto größer ist der Einschätzungs- und Gestaltungsspielraum des Gesetzgebers.[409]

Kehrseite des Prognosespielraums ist eine mögliche Nachbesserungspflicht. Auch nach dem Erlass einer Regelung muss der Gesetzgeber die weitere Entwicklung beobachten, erlassene Normen überprüfen und gegebenenfalls revidieren, falls sich herausstellt, dass die ihnen zugrunde liegenden Annahmen fehlerhaft waren oder nicht mehr zutreffen .[410]

Bei Entscheidungen auf der Basis von unsicheren Tatsachengrundlagen, wie etwa gerade bei Pandemien oder Technikfolgen, geht das Gericht ebenfalls davon aus, dass Unsicherheiten im tatsächlichen medizinischen und wissenschaftlichen Bereich primär nicht vom Verfassungsgericht zu beantworten sind. Allerdings wird hier der Gesetzgeber durchaus auch in die Pflicht genommen. Im Bereich der Gentechnik im Pflanzenbereich hat das Bundesverfassungsgericht darauf hingewiesen, dass angesichts einer hochkontroversen gesellschaftlichen Diskussion zwischen Befürwortern und Gegnern der Anwendung von Gentechnik bei Kulturpflanzen und eines noch nicht endgültig geklärten Erkenntnisstandes der Wissenschaft insbesondere bei der Beurteilung von Ursachenzusammenhängen und langfristigen Folgen eines solchen Einsatzes von Gentechnik den Gesetzgeber auf diesem Gebiet eine besondere Sorgfaltspflicht treffe.[411] Die Risikovorsorge gerade im Bereiche von Gesundheitsgefahren oder Umweltgefahren vermittelt dem Gesetzgeber gleichzeitig weite Spielräume.[412]

(c) Unsichere Tatsachengrundlage und Risikovorsorge

Im Zusammenhang mit der Überprüfung von Maßnahmen zur Bekämpfung der Corona-Pandemie weist das BVerfG darauf hin, dass die Verfassung dem Gesetzgeber einen Spielraum belässt, der vom Bundesverfassungsgericht lediglich in begrenztem Umfang überprüft werden kann. Die Einschätzung und die Prognose der dem Einzelnen oder der Allgemeinheit drohenden Gefahren sind verfassungsrechtlich darauf zu überprüfen, ob sie auf einer hinreichend gesicherten Grundlage beruhen. Je nach Eigenart des in Rede stehenden Sachbereichs, der Bedeutung der auf dem Spiel stehenden Rechtsgüter und den Möglichkeiten des Gesetzgebers, sich ein hinreichend sicheres Urteil zu bilden, kann die verfassungsgerichtliche Überprüfung dabei von einer bloßen Evidenz- über eine Vertretbarkeits- bis hin zu einer intensivierten inhaltlichen Kontrolle reichen. Geht es um schwerwiegende

405 BVerfGE 123, 186 <241>.
406 BVerfGE 76, 107 <107>; s.a. BVerfGE95, 1 <22>-; 134, 242 <278>.
407 BVerfGE 77, 170 <215>; 88, 203 <262>; 90, 145 >173>; 150, 1 <88 Rn. 173>.
408 BVerfGE 50, 290 <332f.>; s.a. BVerfGE 123, 186 <241>)
409 BVerfGE 122, 1 <34
410 BVerfGE 56, 54 <79>; 65, 1 <56>; 88, 203 <309f.>; 95, 267 <313>; 107, 266 <296>; 111, 333 <360>; 132, 334 <358 Rn. 67>; 143, 216 <244 Rn. 71>; stRspr).
411 BVerfGE 128, 1 <36>.
412 Vgl. BVerfGE 121, 317 <356 f.>.

Grundrechtseingriffe, dürfen Unklarheiten in der Bewertung von Tatsachen grundsätzlich nicht ohne Weiteres zu Lasten der Grundrechtsträger gehen. Jedoch kann sich - wie hier - auch die Schutzpflicht des Staates auf dringende verfassungsrechtliche Schutzbedarfe beziehen. Sind wegen Unwägbarkeiten der wissenschaftlichen Erkenntnislage die Möglichkeiten des Gesetzgebers begrenzt, sich ein hinreichend sicheres Bild zu machen, genügt es daher, wenn er sich an einer sachgerechten und vertretbaren Beurteilung der ihm verfügbaren Informationen und Erkenntnismöglichkeiten orientiert. Dieser Spielraum gründet auf der durch das Grundgesetz dem demokratisch in besonderer Weise legitimierten Gesetzgeber zugewiesenen Verantwortung dafür, Konflikte zwischen hoch- und höchstrangigen Interessen trotz ungewisser Lage zu entscheiden.[413]

(d) Massenerscheinungen und Typisierungen

Eine weitere Fallgruppe bildet die Regelungen von Massenerscheinungen. Bei der Ordnung von Massenerscheinungen ist der Gesetzgeber berechtigt, die Vielzahl der Einzelfälle in dem Gesamtbild zu erfassen, das nach den ihm vorliegenden Erfahrungen die regelungsbedürftigen Sachverhalte zutreffend wiedergibt.[414] Auf dieser Grundlage darf er grundsätzlich generalisierende, typisierende und pauschalierende Regelungen treffen, ohne allein schon wegen der damit unvermeidlich verbundenen Härten gegen Gleichheitsgebote zu verstoßen[415] Dabei darf die ungleiche Wirkung allerdings ein gewisses Maß nicht übersteigen. Vielmehr müssen die Vorteile der Typisierung im rechten Verhältnis zu der mit ihr notwendig verbundenen Ungleichheit stehen. Außerdem darf die gesetzliche Typisierung keinen atypischen Fall als Leitbild wählen, sondern muss sich realitätsgerecht am typischen Fall orientieren.[416]

(e) Systemumstellungen

Bei der Umgestaltung komplexer Regelsysteme steht dem Gesetzgeber für die Überleitung bestehender Rechtslagen, Berechtigungen und Rechtsverhältnisse ein weiter Gestaltungsspielraum zur Verfügung. Zwischen der sofortigen, übergangslosen Inkraftsetzung des neuen Rechts und dem ungeschmälerten Fortbestand begründeter subjektiver Rechtspositionen sind vielfache Abstufungen denkbar. Der Nachprüfung durch das Bundesverfassungsgericht unterliegt nur, ob der Gesetzgeber bei der Gesamtabwägung zwischen der Schwere des Eingriffs und dem Gewicht und der Dringlichkeit der ihn rechtfertigenden Gründe unter Berücksichtigung aller Umstände die Grenze der Zumutbarkeit überschritten hat.[417]

3. Entscheidungswirkung

Die unterschiedliche Reichweite der verfassungsgerichtlichen Entscheidungen zeigt sich auch im Bereich der Entscheidungswirkungen. Das Bundesverfassungsgericht geht, zurückgreifend auf einzelne Normen seiner Prozessordnung, davon aus, dass sich sowohl die Bindungswirkung der Entscheidung über die Verfahrensbeteiligten hinaus, als auch die Folgewirkungen einer gerichtlichen Entscheidung, fallspezifisch unterscheiden können.

Es gibt Bereiche, in denen das Bundesverfassungsgericht von Verfassungs wegen die Nichtigkeitsfolge beschränkt. Bekannt und von erheblicher praktischer Bedeutung ist die Differenzierung des Verfassungsgerichts dahingehend, ob eine verfassungswidrige Rechtsnorm für nichtig erklärt wird oder nur für mit der Verfassung unvereinbar bzw. für eine Übergangszeit für vereinbar. Das gängi-

413 BVerfG, Beschluss des Ersten Senats vom 19. November 2021 - 1 BvR 781/21 u.a. -, Rn. 171 m.w.N.; BVerfG, Beschluss des Ersten Senates vom 27. April 2022 - 1 BvR 2649/21 -, juris Rn. 152.

414 Vgl. BVerfGE 11, 245 <254> ; 78, 214 <227>; 84, 348 <359>; 122, 210 <232>; 126, 268 <278>); 151, 1 <21>.

415 BVerfGE 113, 167 <236>; 126, 268 <278f.>; 151, 1 <21>.

416 BVerfGE 27, 142 <150>; 110, 274 <292>; 112, 268 <280 f.>; 117, 1 <31>); 122, 39 <569>.

417 BVerfGE 43, 242 <288 f.>; 67, 1 <15 f.>; 125, 1 <18>); BVerfG, Beschluss des Zweiten Senats vom 24. November 2022 - 2 BvR 1424/15 -, Rn. 121.

ge Differenzierungskriterium in der verfassungsgerichtlichen Rechtsprechung lautet: Die Unvereinbarkeit einer gesetzlichen Norm mit dem Grundgesetz hat zwar regelmäßig zur Folge, dass diese Norm für nichtig zu erklären ist.[418] Das Bundesverfassungsgerichtsgesetz bestimmt als Rechtsfolge der Verfassungswidrigkeit eines Gesetzes aber nicht ausnahmslos die Nichtigkeit[419]; es lässt auch die Erklärung bloßer Unvereinbarkeit mit dem Grundgesetz zu.[420] Die bloße Unvereinbarkeitserklärung einer verfassungswidrigen Norm ist regelmäßig geboten, wenn der verfassungswidrige Teil der Norm nicht klar abgrenzbar ist oder dann, wenn der Gesetzgeber verschiedene Möglichkeiten hat, den Verfassungsverstoß zu beseitigen.[421] Dies ist grundsätzlich bei Verletzungen des Gleichheitssatzes der Fall.[422] Der Verzicht auf eine Nichtigerklärung (§ 82 Abs. 1 i.V.m. § 78 Satz 1 BVerfGG) ist zudem dann geboten, wenn durch eine solche ein Zustand geschaffen würde, der der verfassungsmäßigen Ordnung noch ferner stünde als die verfassungswidrige Regelung. Dies ist der Fall, wenn die Nachteile des sofortigen Außerkrafttretens gegenüber den Nachteilen, die mit der vorläufigen Weitergeltung verbunden wären, überwiegen.[423] Eine Unvereinbarerklärung kommt auch dann in Betracht, wenn sich die für verfassungswidrig erachtete Rechtslage aus dem Zusammenwirken mehrerer Einzelregelungen ergibt und bei der sich deshalb der etwa bestehende verfassungsrechtliche Mangel durch eine Nachbesserung bei der einen oder der anderen Einzelregelung beheben ließe, so dass die Möglichkeit besteht, dass die beanstandete Norm im Endergebnis bestehen bleiben kann.[424] Eine weitere spezielle Ausnahme folgt aus dem Jährlichkeitsprinzip des Haushaltsrechts für finanzwirksame Entscheidungen. Genügen haushaltswirksame Gesetze, wie insbesondere Besoldungsgesetze für Beamtinnen und Beamten, verfassungsrechtlichen Maßstäben nicht und sind sie daher nichtig, werden die Folgen dieser Verfassungswidrigkeit in aller Regel auf die jeweiligen Haushaltsjahre beschränkt und nicht auf all die Jahre erstreckt, in denen die verfassungswidrige Norm in Kraft war.[425] Speziell bei besoldungsrechtlichen Normen gilt es zu beachten, dass die Alimentation des Beamten der Sache nach die Befriedigung eines gegenwärtigen Bedarfs aus gegenwärtig zur Verfügung stehenden Haushaltsmitteln darstellt. Eine allgemeine rückwirkende Behebung des Verfassungsverstoßes ist daher mit Blick auf die Besonderheiten des Beamtenverhältnisses nicht geboten.[426]

Frage 2

Kennt Ihr Gerichtshof verschiedene Stufen der Kontrolldichte? Gibt es „unantastbare" Bereiche oder Bereiche, in denen keine rechtliche Verantwortlichkeit besteht, oder Fragen, die als nicht justiziabel gelten (z.B. kontroverse moralische Fragen, politische Empfindlichkeiten, Kontroversen in der Gesellschaft, Verteilung knapper Mittel, erhebliche finanzielle Auswirkungen für den öffentlichen Haushalt usw.)?

Unterfrage 1

Kennt Ihr Gerichtshof verschiedene Stufen der Kontrolldichte?

Das Bundesverfassungsgericht geht davon aus, dass seine richterliche Gewalt soweit reicht wie seine Kompetenzen. Zurückhaltung in genereller Form oder in fachspezifischer Form erkennt es nicht an.

418 Vgl. BVerfGE 33, 303 <347>.
419 § 95 Abs.3 Satz 1 BVerfGG.
420 § 31 Abs.2 Satz 3 BVerfGG.
421 Vgl. BVerfGE 90, 263 <276>.
422 Vgl. BVerfGE 99, 280 <298>; 105, 73 <133>; 107, 27 <57>; 117, 1 <69>; 122, 210 <245>; 126, 400 <431>; 138, 136 <249 Rn. 286>; stRspr.
423 Vgl. BVerfGE 33, 303 <347 f.>; 61, 319 <356>; 83, 130 <154>; 85, 386 <401>; 87, 153 <177 f.>; 100, 313 <402>; 128, 282 <321 f.>; stRspr.
424 Vgl. BVerfGE 82, 60 <84>.
425 Vgl. BVerfGE 93, 121 <148>; 105, 73 <134>; 117, 1 <70>; 130, 263 <312 f.>; 139, 64 <148>.
426 Vgl. BVerfGE 81, 363 <383 ff.>; 99, 300 <330 f.>; 130, 263 <313>; 139, 64 <148>.

Unterfrage 2

Gibt es „unantastbare" Bereiche oder Bereiche, in denen keine rechtliche Verantwortlichkeit besteht, oder Fragen, die als nicht justiziabel gelten (z.B. kontroverse moralische Fragen, politische Empfindlichkeiten, Kontroversen in der Gesellschaft, Verteilung knapper Mittel, erhebliche finanzielle Auswirkungen für den öffentlichen Haushalt usw.)?

Das deutsche Grundgesetz und die Prozessordnung des deutschen Verfassungsgerichts (Bundesverfassungsgerichtsgesetz) geben Kriterien vor, anhand derer bestimmt werden kann, wann und wie das BVerfG eine Entscheidung treffen soll. Ob eine Entscheidung getroffen wird, richtet sich nach den sog. prozessualen Voraussetzungen der jeweiligen Verfahrensart. Sind die jeweiligen Voraussetzungen für den jeweiligen Antrag gegeben, ist der Antrag also zulässig, muss das Gericht eine Entscheidung treffen. Es gibt insoweit keine sog. „No-Go-Bereiche" für das Verfassungsgericht. Sofern es um eine Frage geht, für die die Verfassung oder das einfache Recht dem Bundesverfassungsgericht eine Prüfungskompetenz zuweist, wird die Frage soweit entschieden, wie die Prüfungskompetenz es erfordert.

Da sich die Prüfungskompetenz aus rechtlichen Normen ergibt, die rechtlichen Normen aber den jeweiligen staatlichen Akteuren auf unterschiedliche Weise einen rechtlichen Rahmen vorgeben, kann die Dichte der verfassungsrechtlichen Kontrolle situationsbezogen und verfahrensbezogen deutlich unterschiedlich weit reichen, was aber nicht so verstanden werden darf, dass es von Verfassungs wegen vorgegebene Bereiche gibt, die nicht einer verfassungsgerichtlichen Kontrolle unterliegen.

Wie das Gericht eine Entscheidung trifft, hängt wiederum von dem Prüfungsmaßstab und dem Verfahrensgegenstand ab. Genügt der Verfahrensgegenstand dem Prüfungsmaßstab nicht, ist der Antrag begründet, ansonsten ist er unbegründet. Die jeweiligen Faktoren ergeben sich also aus der Auslegung der jeweiligen Norm.

Bezogen auf die Beispiele der Fragestellung lässt sich konkret antworten:

Fragen, die moralisch umstritten sind, werden vom Verfassungsgericht nicht nach moralischen Maßstäben entschieden. Ist der verfassungsrechtliche Maßstab eindeutig und die Anwendung des Maßstabs auf den Einzelfall hinreichend klar, ist es unerheblich, ob das Ergebnis moralisch umstritten ist oder nicht. Das Bundesverfassungsgericht prüft nicht die Kontrolle seiner Entscheidung anhand eines ethischen Maßstabs, weil auch unklar ist, wie der ethische Maßstab gesetzt werden soll. Es ist aber davon auszugehen, dass sich innerhalb einer freiheitlich demokratischen Grundordnung wie der des Grundgesetzes keine moralischen Maßstäbe der Mehrheit der Bevölkerung bilden, die konträr zu den verfassungsrechtlichen Vorgaben sind.

Ob eine Frage politisch heikel ist oder nicht, spielt ebenfalls für das Verfassungsgericht keine Rolle. Heikel sind nur Entscheidungen, bei denen der verfassungsrechtliche Maßstab nicht eindeutig ist. Allerdings ist es so, dass bei den Fragen, die politisch hoch umstritten sind und die politisch als heikel bezeichnet werden können, die Verfassung in der Regel dem parlamentarischen Gesetzgeber einen großen Gestaltungsspielraum zuweist, den das Verfassungsgericht dann bei der Entscheidung respektiert. Der Respekt dieser Entscheidung ist aber nicht davon abhängig, ob die parlamentarische Entscheidung bei einer politisch heiklen Frage umstritten war oder nicht umstritten war.

Geht es um die Verteilung knapper Ressourcen, ist dies ebenfalls kein Maßstab, der für sich genommen Einfluss auf den verfassungsgerichtlichen Kontrollmaßstab hat. Entscheidend ist, wem die Verfassung die Entscheidung über die Verteilung der knappen Ressourcen zuweist. Geht es um Haushaltsmittel, respektiert das Verfassungsgericht den Umstand, dass über den Haushalt die Exekutive und das Parlament im Zusammenwirken entscheiden.

Geht es allerdings um finanziell wirksame verfassungsrechtliche Ansprüche, setzt das Verfassungsgericht diese durch, unabhängig wie knapp die Ressourcen im Einzelfall sind. Das Verfassungsgericht geht davon aus, dass die Verfassung Ansprüche, die finanzieller Natur sind, nur in so engem Maße unmittelbar vorzeichnet, dass der Haushaltsgesetzgeber noch genug Gestaltungsspielraum besitzt,

um die wesentlichen finanzrechtlichen Entscheidungen zu treffen, so dass das Verfassungsgericht nicht verpflichtet ist, von sich aus die finanziellen Auswirkungen einer Entscheidung zu prüfen.

Bei den Gnadenakten des Bundespräsidenten auf der Grundlage von Art. 60 GG geht das Bundesverfassungsgericht von einer beschränkten Nachprüfbarkeit aus, da diesen kein rechtlicher Maßstab zugrunde lägen.[427]

Frage 3

Gibt es Faktoren, die ausschlaggebend dafür sind, wie und wann Ihr Gerichtshof Selbstbeschränkung übt (z. B. die Kultur und die Eigenheiten Ihres Landes; die historischen Erfahrungen Ihres Landes; der absolute oder besondere Charakter der fraglichen Grundrechte; der Gegenstand des Verfahrens; der Umstand, dass es um Fragen geht, die sich aus dem Wandel der Gesellschaft und der Anschauungen ergeben)?

Innerhalb der Auslegung einer Norm können im Rahmen der methodischen Regeln Faktoren eine Rolle spielen, die sowohl bei der Schaffung der Norm als auch bei der Auslegung der Norm eine Bedeutung haben. So fließt etwa die historische Erfahrung eines Staates ganz stark in die Verfassungsgebung und die Verfassungsänderung ein.[428] Die Existenzbedingungen eines Staates sind bei der teleologischen Auslegung einer Norm in der Regel zu berücksichtigen. Die Kultur des jeweiligen Staates kann die grammatikalische Auslegung der einzelnen Begriffe beeinflussen, wobei hier ein erheblicher Wandel möglich ist, für den der Begriff des Verfassungswandels üblich ist.[429]

Die Ausgestaltung eines Grundrechts dahingehend, ob es einer gesetzlichen Schranke unterliegt oder nicht, spielt für die Durchsetzungskraft dieses Grundrechts eine erhebliche Rolle.[430] Der Gegenstand der dem Gericht gestellten Frage begrenzt in erheblicher Weise die gerichtliche Kontrolle. Sich ändernde soziale Bedingungen und Einstellungen können ebenfalls Einfluss entweder auf den Maßstab der verfassungsrechtlichen Norm als auch auf die Subsumtion nehmen. So ging 1957 das BVerfG von der Verfassungsmäßigkeit der Strafbarkeit der männlichen Homosexualität aus,[431] was es heute nicht mehr aufrecht erhält.[432]

Frage 4

Gibt es Situationen, in denen Ihr Gerichtshof aufgrund mangelnder institutioneller Zuständigkeit oder mangelnden Fachwissens Zurückhaltung geübt hat?

In den Fällen, in denen das Verfassungsgericht keine Zuständigkeit besitzt, ist der jeweilige Antrag unzulässig. Fälle, in denen einem Antrag nicht stattgegeben wurde, weil dem Verfassungsgericht die Expertise fehlte, sind nicht denkbar. Sofern das Verfassungsgericht entscheidet, entscheidet es über Streitigkeiten anhand von verfassungsrechtlichen Maßstäben, für deren Auslegung das Verfassungsgericht eine ausreichende Expertise besitzt.

Es gibt Vorfragen, wie etwa die Existenz von allgemeinen Regeln des Völkerrechts oder einfachrechtliche Fragen für die Auslegung einfachrechtlicher Normen oder Gültigkeitsfragen im Rahmen des Völkerrechts, bei denen das Bundesverfassungsgericht für die Vorfrage Sachverständigenrat einholt.

Sofern Rechtsakte anderer Staaten als Vorfrage eine Rolle spielen, berücksichtigt das Bundesverfassungsgericht, dass es zur Kontrolle dieser Entscheidung nicht berufen ist. So wurden etwa die Konfiskationsentscheidungen der Sowjetischen Besatzungsmacht nach 1945 bezogen auf Eigen-

427 BVerfGE 25, 352 <363>; 30, 108 <111>.

428 Einen klaren Bezug zur den vorausgehenden Erfahrungen besitzen etwa die Menschenwürdegarantie in Art. 1 Abs. 1 GG, das Konzept der wehrhaften Demokratie (Art. 9 Abs. 1, Art. 18, Art .21 Abs. 1 und Art. 20 Abs. 4 GG), die Ewigkeitsgarantie (Art. 79 Abs. 3 GG) und das konstruktive Misstrauensvotum (Art. 67 GG).

429 BVerfGE 142, 25 <65>.

430 Vgl. nur BVerfGE 146, 71 >118 f. Rn. 141>.

431 BVerfGE 6, 389 ff.

432 BVerfGE 133, 59 <79 f.>.

tumsgrundstücke Privater vom Verfassungsgericht nicht einer verfassungsgerichtlichen Kontrolle unterzogen.[433] Sind diese Rechtsakte aber unter keinen Gesichtspunkten zu rechtfertigen, selbst unter Achtung der fehlenden eigenen Verantwortung Deutschlands, werden sie nicht anerkannt, wie etwa in Bezug auf die Schüsse von Grenzsoldaten der DDR an der Deutsch-Deutschen Grenze.[434]

Frage 5

Gibt es Fälle, in denen Ihr Gerichtshof Zurückhaltung geübt hat, weil die Gefahr eines Justizirrtums bestand?

Es ist keine Entscheidung bekannt, bei der das Verfassungsgericht von einer Entscheidung abgesehen hat, in der Furcht, einen Fehler zu begehen. Der Prüfungsmaßstab richtet sich jeweils eng an der vorgelegten Frage aus, wodurch das Risiko, mit der Entscheidung irreparable Folgen zu verursachen, stark eingeschränkt wird.

Frage 6

Gibt es Fälle, in denen Ihr Gerichtshof unter Hinweis auf die institutionelle oder demokratische Legitimation des Entscheidungsträgers Zurückhaltung geübt hat?

Es gibt keine Fälle, in denen das Gericht wegen der demokratischen Legitimation des Entscheidungsträgers die Entscheidung verweigert hat. Es gibt aber zahlreiche Fälle, in denen das Bundesverfassungsgericht bei der Auslegung der jeweiligen Verfassungsnorm und bei der Anwendung des jeweiligen verfassungsrechtlichen Maßstabs auf den Einzelfall berücksichtigt, ob der Entscheidungsträger von der Verfassung einen großen Gestaltungsspielraum zugewiesen bekommt oder nicht.[435] Wesentliches Element für einen Entscheidungsspielraum ist das Ausmaß und die Direktheit der jeweiligen demokratischen Legitimation. Dies wird aber nicht als eine Beschränkung der Rechtsprechung verstanden, sondern ergibt sich unmittelbar aus der Auslegung des jeweiligen Prüfungsmaßstabs.

Da das Bundesverfassungsgericht grundsätzlich nur Akte deutscher Hoheitsgewalt prüfen kann, die an die deutsche Verfassung gebunden sind, folgt daraus eine Beschränkung der Prüfungsbefugnis im Hinblick auf Akte internationaler Organisationen, insbesondere soweit diese Hoheitsbefugnisse von Deutschland übertragen bekommen haben. In diesen Fällen werden die Akte der internationalen Organisation selbst nicht am Maßstab des Grundgesetzes geprüft, vielmehr wird nur geprüft, ob die deutschen Organe bei der Übertragung der Hoheitsgewalt die Grenzen eingehalten haben, die für die Übertragung gelten. Solche sind insbesondere in Art. 23 GG bezogen auf die Europäische Union und in Art. 24 Abs. 1 GG in Bezug auf andere Organisationen niedergelegt. Eine mittelbare Kontrolle der Akte internationaler Organisationen folgt allerdings daraus, dass für den Fall, dass eine wirksame Übertragung fehlt, die entsprechenden Hoheitsakte in Deutschland keine Wirksamkeit entfalten können und dies durch das Verfassungsgericht ebenfalls festgestellt werden kann.

Geht es um Akte deutscher Hoheitsstellen (und nicht europäischer Stellen), die unionsrechtlich vollständig determiniert sind, kann deren Vereinbarkeit mit europäischen Grundrechten auch vom BVerfG geprüft werden.[436]

Frage 7

„Je mehr die Gesetzgebung die allgemeine Sozialpolitik gestaltet, desto weniger wird das Gericht bereit sein, einzugreifen". Ist dies ein gültiger Maßstab für Ihren Gerichtshof? Teilt Ihr Gerichtshof die Auffassung, dass politische Fragen durch demokratische Verfahren entschieden werden sollten, da die Gerichte nicht gewählt sind und nicht über das demokratische Mandat verfügen, über Angelegenheiten der Politik zu entscheiden?

433 Vgl. BVerfGE 84, 90 <122 f.>; 112, 1 <29>.

434 Vgl. BVerfGE 84, 90 <122 f.>; 112, 1 <29>.

435 S. BVerfGE 95, 96; nachfolgend BVerfG, 2. Kammer des Zweiten Senats, Beschluss vom 21. Juli 1997 – 2 BvR 1084/97.

436 BVerfGE 152, 216 ff. Recht auf Vergessen II.

Das Bundesverfassungsgericht geht davon aus, dass die verfassungsrechtlichen Vorgaben für die einzelnen Politikfelder für den Gesetzgeber unterschiedlich streng sind. Im Bereich der Sozialpolitik sind die verfassungsrechtlichen Vorgaben generell nicht sehr engmaschig.[437] Sofern es nicht um Gleichheitsfragen, Fragen des allgemeinen Persönlichkeitsrechts oder um Fragen der Menschenwürde geht, gibt das Sozialstaatsprinzip dem Gesetzgeber eine weitgehende Gestaltungsfreiheit. Deswegen ist es sachlich richtig, dass im Bereich von sozialpolitischen gesetzgeberischen Entscheidungen die verfassungsgerichtliche Kontrolle großzügiger ist als etwa im Bereich von eingriffsintensiven Gesetzgebungen wie etwa im Bereich der Strafgesetzgebung oder des Versammlungsrechts. Im Ergebnis gilt gleiches im Bereich der Wirtschaftspolitik[438] und Außenpolitik.[439]

Das Bundesverfassungsgericht teilt nicht die Auffassung, dass politische Fragen durch demokratische Prozesse entschieden werden sollen, sondern es teilt die Auffassung, dass die Antworten auf politische Fragen den verfassungsrechtlichen Rahmen einhalten müssen und sofern der verfassungsrechtliche Rahmen nicht eingehalten wird, das Verfassungsgericht befugt und verpflichtet ist, im Rahmen des Prozessrechts das Überschreiten des verfassungsrechtlichen Rahmens festzustellen, unabhängig davon, ob der Entscheidungsträger eine höhere unmittelbare demokratische Legitimation besitzt als das Gericht oder nicht.

Das Verfassungsgericht ist aber der Auffassung, dass Antworten auf politische Fragen innerhalb des verfassungsrechtlichen Rahmens nicht von dem Gericht zu fällen sind, sondern vom Parlament oder von der durch ihn ermächtigten Exekutive. Versteht man den Begriff der „politischen Frage" allerdings so, dass es eine Frage ist, die gerade verfassungsrechtlich nicht vordeterminiert ist, würde sich begrifflich ergeben, dass das Verfassungsgericht keine politischen Fragen entscheiden darf. Ein solches Verständnis der politischen Frage entspricht aber nicht dem üblichen Sprachgebrauch. Politische Fragen werden in der Regel verstanden als Fragen, die das Gemeinwohl betreffen und das Gemeinwohl konkretisieren. Vorgaben für einen so verstandenen politischen Bereich ergeben sich auch durch die Verfassung.

Frage 8

Akzeptiert Ihr Gerichtshof einen allgemeinen Grundsatz der Selbstbeschränkung in Angelegenheiten der Strafrechtspolitik?

Das Verfassungsgericht entscheidet keine Fragen der Strafrechtsphilosophie oder der Strafrechtspolitik. Die Strafrechtspolitik hat sich an den verfassungsrechtlichen Rahmen zu halten und die Strafrechtsphilosophie konkretisiert keine unmittelbar rechtlichen Maßstäbe und ist daher verfassungsrechtlich der Kontrolle eines Verfassungsgerichts entzogen. Im Bereich des Strafrechts enthält die deutsche Verfassung einzelne spezifische Vorgaben; die grundrechtsgleichen Prozessgrundrechte in Art. 101 bis 104 GG sind insbesondere auf den Strafprozess bezogen. Zahlreiche Strafrechts- und Strafprozessrechtsgrundsätze sind jedoch nicht ausdrücklich normiert, so dass der verfassungsrechtliche Rahmen für konkretisierende einfachgesetzliche Strafrechtsgesetzgebung relativ groß ist.[440]

Das Verfassungsgericht hat im Bereich des Strafrechts allerdings abgeleitet aus dem allgemeinen Rechtsstaatsprinzip eine Reihe von ungeschriebenen Konkretisierungen vorgenommen, um die im internationalen Vergleich verhältnismäßig große Zurückhaltung der deutschen Verfassung ein wenig zu kompensieren. Wichtige Beispiele dieser Konkretisierung ist der allgemeine Schuldgrund-

437 S.o. Fn. 51.

438 Vgl. BVerfGE 14, 105 <117>; 37, 1 <21>; 39, 210 <225 f.>; 51 193 <208>; 70, 191 <201 f.> 77, 308 <332>; 109, 64 <85>; 116, 164 <182>; 118, 79 <101>; 142, 268 <286>.

439 BVerfGE 51, 1 <25>; 53, 164 <182>; 66, 39 <61>; 142, 123 <210>.

440 S.o. Fn.78.

satz,[441] die Unschuldsvermutung[442] und der Fair-Trail-Grundsatz.[443]

Frage 9

In engen Grenzen kann sich die Regierung veranlasst sehen, Informationen vor dem Gerichtshof geheim zu halten, insbesondere solche aus nachrichtendienstlichen Quellen. Hat Ihr Gerichtshof jemals aus Gründen der nationalen Sicherheit Selbstbeschränkung geübt?

Die Regelungen zur Informationsgewinnung sind im BVerfGG nur in Ansätzen geregelt. Nach § 26 Abs. 1 BVerfGG erhebt das Bundesverfassungsgericht den zur Erforschung der Wahrheit erforderlichen Beweis. Mit dieser Norm verdeutlicht das Gesetz, dass das Bundesverfassungsgericht nicht auf die Überprüfung von Rechtsfragen beschränkt ist, sondern auch als *echte Tatsacheninstanz* entscheiden kann. Dies ist besonders wichtig in den seltenen Fällen, in denen das Gericht als erste und letzte Instanz entscheidet (Verfahrensarten der *Grundrechtsverwirkung* und des *Parteiverbots,* Organstreit, alle Bund-Länder-Streitigkeiten, das Wahlprüfungsverfahren sowie die Präsidenten- und die Richteranklage).

In den Verfahren, in denen gerichtliche Entscheidungen vorausgehen, legt das Gericht in der Regel die Tatsachenfeststellungen dieser Entscheidungen zugrunde. Nach § 33 Abs. 2 BVerfGG kann das Bundesverfassungsgericht seiner Entscheidung die tatsächlichen Feststellungen eines rechtskräftigen Urteils zugrunde legen, das in einem Verfahren ergangen ist, in dem die Wahrheit von Amts wegen zu erforschen ist. Das BVerfG spricht selbst davon, dass die Tatsachenfeststellung „grundsätzlich" oder „vornehmlich" oder „in erster Linie" Aufgabe der Fachgerichte sei.[444] Davon wird abgewichen, wenn es um die Beachtung von Grundrechten im fachgerichtlichen Verfahren geht, dieses also selbst den zentralen Gegenstand der Verfassungsbeschwerde bildet. Insoweit besteht notwendigerweise eine umfassende Verpflichtung zur Aufklärung der Tatsachen.

Zur Frage der Einschränkung der Beweiserhebung aus Gründen der Staatssicherheit nimmt das Bundesverfassungsgerichtsgesetz der Sache nach an zwei Stellen Bezug. Die erste Regelung bezieht sich auf den Zeugen- und Sachverständigenbeweis. Nach § 28 Abs. 2 BVerfGG kann in den Fällen, in denen ein Zeuge oder Sachverständiger nur mit Genehmigung einer vorgesetzten Stelle vernommen werden darf, diese Genehmigung nur verweigert werden, wenn es das Wohl des Bundes oder eines Landes erfordert. In diesen Fällen darf das Bundesverfassungsgericht aber mit einer Mehrheit von zwei Dritteln der Stimmen die Verweigerung der Aussagegenehmigung für unbegründet erklären. Ähnlich ist die Regelung bezogen auf den Urkundsbeweis in § 26 Abs. 2 BVerfGG. Danach kann auf Grund eines Beschlusses mit einer Mehrheit von zwei Dritteln der Stimmen des Gerichts die Beiziehung einzelner Urkunden unterbleiben, wenn ihre Verwendung mit der Staatssicherheit unvereinbar ist. Es sind keine veröffentlichten Entscheidungen bekannt, bei denen diese Normen formal zur Anwendung gekommen sind. Das Gericht berücksichtig die Geheimhaltungsinteressen vielmehr auf eine „weiche" Art.

Eine Berücksichtigung von Tatsachen, die den anderen Verfahrensbeteiligten nicht bekannt gegeben wurde, hat das Gericht bisher nicht zugelassen. Die einzige Äußerung, die das Gericht zu dieser Frage abgegeben hat, findet sich im Rahmen eines Parteiverbotsverfahrens. So hat das Bundesverfassungsgericht im ersten NPD-Verbotsverfahren darauf hingewiesen, ein „in camera"-Beweisverfahren sei zumindest dann ausgeschlossen, wenn die mangelnde Staatsfreiheit der Partei auf Führungsebene feststeht und der Antragsteller die darin liegenden Verfahrensmängel mittels einer

441 BVerfGE 20, 323 <331>; 25, 269 <286>; 27, 18 <29>; 45, 187 <228>; 86, 288 <313>; 95, 96 <140>; 120, 224 <253 f.>; 130, 1 <26>; 133, 168 <197 Rn. 53, 54>.

442 BVerfGE 19, 342 <347>; 22, 254 <265>; 35, 311 <320>; 74, 358 <370 f.>; 82, 106 <114>; 110, 1 <23>; 133, 1 <31 Rn. 90>.

443 BVerfGE 26, 66 <71>; 38, 105 <111>; 46, 202 <210>; 118, 212 <2312>; 122, 248 <271>; 130, 1 <25>.

444 BVerfGE 18, 85 <92>; 32, 311 <316>; s.a. BVerfG, 3. Kammer des Zweiten Senats, Beschluss vom 6. August 2003 – 2 BvR 1071/03.

Offenlegung vor Gericht in-camera reparieren will.[445]

Frage 10

Sollten Verfassungsgerichte – als Hüter der Verfassung – einen strengeren Maßstab anlegen, wenn die Gesetzgebung bei der Umsetzung von Reformen zum Schutz der Grundrechte säumig ist?

Als allgemeines Prinzip gilt, dass die Aufhebung von rechtsgültigen Rechtsakten durch die Gerichte grundsätzlich als ein geringerer Eingriff verstanden wird als die Verpflichtung der staatlichen Organe zu einem bestimmten Verhalten. Daher geht auch das Bundesverfassungsgericht davon aus, dass die verfassungsrechtlichen Rechte der Bürgerinnen und Bürger so zu verstehen sind, dass sie nur in Ausnahmefällen ein unmittelbares Handeln der Staatsorgane verlangen. Ist ein solcher Ausnahmefall gegeben, können diese Rechte dann auch vor dem Bundesverfassungsgericht durchgesetzt werden, sofern eine statthafte Verfahrensart vorhanden ist. Die Fälle, in denen das Gericht den Staat zu einem Handeln verpflichtet, sind allerdings nicht häufig. Im Zusammenhang mit den grundrechtlichen Schutzpflichten spricht das BVerfG vom sogenannten Untermaßverbot.[446] Danach ist eine mit der Verfassungsbeschwerde durch den Einzelnen rügbare Verletzung von Schutzpflichten erst dann anzunehmen, wenn die öffentliche Gewalt überhaupt keine Vorkehrungen zum Schutze des Grundrechts trifft, oder die getroffenen Maßnahmen gänzlich ungeeignet oder völlig unzulänglich sind. [447]

II. Der Entscheidungsträger

Frage 11

Prüft Ihr Gerichtshof einen Akt der parlamentarischen Gesetzgebung mit größerer Zurückhaltung als einen Akt der Verwaltung? Stellt Ihr Gerichtshof bei der Prüfung von Rechtsakten darauf ab, welche demokratische Legitimation der Entscheidungsträger hat?

Zwischen den beiden Teilfragen wird kein relevanter Unterschied gesehen. Wie bei der Beantwortung der Frage 2 schon dargestellt geht das Bundesverfassungsgericht davon aus, dass die Verfassungsnormen bei den staatlichen Organen, die eine hohe demokratische Legitimation besitzen, grundsätzlich einen weiten Rahmen für deren eigene Gestaltung vorsehen und dass dementsprechend die gerichtliche Kontrolle zurückgenommen wird. Dies führt im Ergebnis dazu, dass das Gericht bei parlamentarischen Entscheidungen grundsätzlich eine höhere Einschätzungsprärogative und einen größeren Einschätzungsfreiraum zuerkennt als bei exekutiven Entscheidungen.

Frage 12

Welche Bedeutung misst Ihr Gerichtshof der Entstehung eines Rechtsaktes bei? Welche rechtliche Bedeutung kann die parlamentarische Erörterung eines Rechtsaktes für dessen Prüfung am Maßstab der Grundrechte haben?

Teilfrage 1

Das Bundesverfassungsgericht ist der Auffassung, dass das Gesetzgebungsverfahren in besonderer Weise geeignet ist, um Entscheidungen zu treffen, die der Legislative zugewiesen sind.

Als besonderes Kennzeichen dieses Gesetzgebungsprozesses versteht es dabei die Beteiligung verschiedener Organe, die parlamentarische Öffentlichkeit und die parlamentarische Debatte mitsamt den Minderheitenrechten, insbesondere wegen des dort gelten Öffentlichkeitsprinzips. Entscheidungen von erheblicher Tragweite muss deshalb ein Verfahren vorausgehen, das der Öffentlichkeit Gelegenheit bietet, ihre Auffassungen auszubilden und zu vertreten, und das die Volksvertretung

445 BVerfGE 107, 339 <371>.
446 BVerfGE 88, 203 <254>.
447 BVerfGE 77, 170 <215>.

dazu anhält, Notwendigkeit und Umfang der zu beschließenden Maßnahmen in öffentlicher Debatte zu klären.[448] Der Gesetzgebungsprozess wird dabei als ein Teilaspekt verstanden, der für die besondere Bedeutung der demokratischen Legitimation von Entscheidungen des Gesetzgebers relevant ist. Der Gesetzgebungsprozess wird aber nicht von der Zuständigkeit des Gesetzgebers selbst getrennt und als ein eigener Gesichtspunkt verstanden. Vielmehr ist es ein unterstützender Faktor für das besondere Gewicht der demokratischen Legitimation gesetzgeberischer Entscheidungen.

Teilfrage 2

Bei der Frage der rechtlichen Relevanz der parlamentarischen Analyse sind zwei Fragen zu unterscheiden. Zunächst die Frage, inwieweit die Fakten, die der Gesetzgeber seiner Entscheidung zugrunde gelegt hat, überprüft werden, und dann die Frage, wie stark der Gesetzgeber einen Sachverhalt ausermittelt haben muss, bevor er eine Regelung ergreifen kann.

Die Tatsachengrundlage des Gesetzgebers überprüft das BVerfG auf ihre methodischen Grundlagen und ihre Schlüssigkeit hin.[449] Dabei akzeptiert das Gericht als Grundlage für die Überprüfung von Gesetzen die „dem Gesetzgeber bekannten Tatsachen" und „die bisher gemachten Erfahrungen".[450]

Grundsätzlich muss sich der Gesetzgeber „Kenntnis von der zur Zeit des Erlasses des Gesetzes bestehenden tatsächlichen Ausgangslage in korrekter und ausreichender Weise" verschaffen.[451] Nach der Rechtsprechung des BVerfG verfügt der Gesetzgeber hinsichtlich der Fakten und ihrer weiteren Entwicklung über eine Einschätzungsprärogative.[452] Daher billigt es das BVerfG, dass sich der Gesetzgeber „an einer sachgerechten und vertretbaren Beurteilung des erreichbaren Materials orientiert"[453], von „dem derzeitigen Stand der Erfahrungen und Einsichten" ausgeht,[454] dass seine Einschätzungen „auf einer ausreichenden Tatsachengrundlage" beruhen[455] und „nicht offensichtlich fehlsam" sind.[456] Dagegen ergeben sich verfassungsrechtliche Bedenken, wenn „es an einer ausreichenden Ermittlung des für die gesetzgeberischen Entscheidungen erheblichen Sachverhalts und deshalb notwendig auch an einer verfassungsrechtlich tragfähigen Abwägung der Gründe und Gegengründe" fehlt.[457] Auch genügen Einschätzungen dann nicht mehr, „wenn sie in einem Maße wirtschaftlichen Gesetzen oder praktischer Erfahrung widersprechen, dass sie vernünftigerweise keine Grundlage für gesetzgeberische Maßnahmen abgeben können".[458]

Sofern Veränderungen der realen Verhältnisse für die Verfassungsmäßigkeit des Gesetzes relevant sein können, kann den Gesetzgeber eine Beobachtungspflicht treffen.[459] Bei einem „noch nicht endgültig geklärten Erkenntnisstand der Wissenschaft insbesondere bei der Beurteilung von Ursachenzusammenhängen und langfristigen Folgen" einer Maßnahme „trifft den Gesetzgeber […] eine besondere Sorgfaltspflicht".[460] Der Gesetzgeber kann aber Maßnahmen auf unsicherer Tatsachen- und Prognosegrundlage treffen, wenn es ihm angesichts der tatsächlichen Unsicherheiten [bei der Coro-

448 BVerfGE 85, 386 <403 f.>; 95, 267 <307 f.>; 108, 282 <312>; 130, 318 <344>; 150, 204 <233 Rn. 82>; 150, 345 <369 Rn. 59>.
449 BVerfGE 125, 141 <154>.
450 BVerfGE 102, 197 <218>; 115, 276 <309>; 116, 202 <225>; 126, 112 <145>.
451 BVerfGE 39, 210 <226>.
452 Vgl. BVerfGE 111, 333, 356; 115, 276, 309;116, 202, 224; ; 134, 242, 342.
453 Vgl. BVerfGE 57, 139 <160>.
454 Vgl. BVerfGE 50, 290 <335>.
455 Vgl. BVerfGE109, 96 <116>.
456 Vgl. BVerfGE 126, 112 <142>.
457 Vgl. BVerfGE 86, 90 <114>.
458 Vgl. BVerfGE 126, 112 <141>.
459 Vgl. BVerfGE 39, 169 <191 ff>;54, 11 <34 ff>; 78, 249 <288 f.>; 125, 175 <225>; 159, 355 <439 Rn. 198>.
460 BVerfGE 128, 1 <37>.

na-Pandemie] nur begrenzt möglich ist, sich ein hinreichend sicheres Bild zu machen.[461]

Bezogen auf „Zielvorstellungen, Sachabwägungen, Wertungen und Prognosen" besitzt der Gesetzgeber in besonderem Maße einen Einschätzungs- und Entscheidungsspielraum, der nur dann überschritten ist, wenn seine Einschätzungen und Entscheidungen „offensichtlich fehlerhaft oder eindeutig widerlegbar sind oder der verfassungsrechtlichen Wertordnung widersprechen".[462]

Vor diesen allgemeinen Regeln kann es in Sondersituationen besondere verschärfte Anforderungen geben. In den Fällen, in denen der verfassungsrechtliche Maßstab in besonderer Weise auf gesetzgeberische Gestaltung angewiesen ist und zugleich eine besondere Grundrechtsrelevanz besteht, fordert das Verfassungsgericht in besonderer Weise ein nachvollziehbares Handeln des Gesetzgebers. Besonders deutlich wird dies im Bereich der Sicherung des sozialen Existenzminimums. Nach der Rechtsprechung des Bundesverfassungsgerichts hat jeder Mensch einen Anspruch auf die Gewährleistung eines menschenwürdigen Existenzminimums.[463]

Da das Grundgesetz selbst keine exakte Bezifferung des Anspruchs auf existenzsichernde Leistungen vorgibt, beschränkt sich die materielle Kontrolle der Höhe von Sozialleistungen zur Sicherung einer menschenwürdigen Existenz darauf, ob die Leistungen evident unzureichend sind.[464] Jenseits dieser Evidenzkontrolle überprüft das Bundesverfassungsgericht, ob Leistungen jeweils aktuell auf der Grundlage verlässlicher Zahlen und schlüssiger Berechnungsverfahren im Ergebnis zu rechtfertigen sind. Lassen sich die Leistungen nachvollziehbar und sachlich differenziert tragfähig begründen, stehen sie mit Art. 1 Abs. 1 in Verbindung mit Art. 20 Abs. 1 GG in Einklang.[465]

Frage 13

Prüft Ihr Gerichtshof, ob der politische Entscheidungsträger seine Entscheidung begründet hat oder ob die Entscheidung so gefallen ist, wie sie das Gericht selbst getroffen hätte, wenn es selbst politischer Entscheidungsträger wäre?

Teilfrage 1 - Begründungspflicht

Nach der Rechtsprechung des BVerfG besteht für den Gesetzgeber im Grundsatz keine Verpflichtung, Gesetze zu begründen. Der Gesetzgeber schuldet von Verfassungs wegen grundsätzlich nur ein wirksames Gesetz.[466] Das Verfassungsgericht hat insoweit u.a. ausgeführt:

„Die Rüge, das angegriffene Gesetz sei nicht ausreichend begründet worden, greift nicht durch. Die sich aus der Verfassung ergebenden Anforderungen beziehen sich grundsätzlich nicht auf die Begründung eines Gesetzes, sondern auf die Ergebnisse eines Gesetzgebungsverfahrens [...] Das Grundgesetz schreibt jedoch grundsätzlich nicht vor, was, wie und wann genau im Gesetzgebungsverfahren zu begründen und zu berechnen ist. Es lässt Raum für Verhandlungen und für den politischen Kompromiss. Entscheidend ist, dass im Ergebnis die Anforderungen des Grundgesetzes nicht verfehlt werden".[467]

Den Gesetzgeber trifft insoweit allenfalls eine Darlegungslast. Lässt sich den Gesetzgebungsmaterialien keine Begründung von grundrechtseinschränkenden Gesetzen entnehmen, kann dies daher zu deren Verfassungswidrigkeit führen, wenn auch anderweitig keine ausreichenden Gründe ersichtlich sind.[468] Dies hat Folgerungen für den Fall, dass der Gesetzgeber seine Gesetz begründet, was in so gut wie allen Fällen gegeben ist. Weil in der Regel eine Begründungspflicht nicht besteht, soll dem Gesetzgeber auch kein Nachteil entstehen, wenn er seine Gesetze begründet. Daher stellt das Ver-

461 Vgl. BVerfGE 159, 355 <407 Rn. 115, 439 Rn. 198.
462 Vgl. BVerfGE 50, 50 <51>.
463 Vgl. BVerfGE 125, 175 <222 ff.>.
464 Vgl. BVerfGE 125, 175 <225 f.>; 132, 134 <165 Rn. 78>; 137, 34 <75 Rn. 81>.
465 Vgl. BVerfGE 125, 175 <225 f.>; 132, 134 <165f. Rn. 79>; 137, 34 <75 Rn. 82>; 142, 353 <372 Rn. 42>.
466 Vgl. BVerfGE 130, 263 <301>.
467 Vgl. BVerfGE 139, 148 <179 Rn. 61>.
468 Vgl. BVerfGE 139, 148 <179 Rn. 61>.

fassungsgericht bei der verfassungsrechtlichen Prüfung von Gesetzen nicht alleine auf die aus den Gesetzgebungsmaterialien erkennbare Begründung des Gesetzgebers, sondern auf die Begründbarkeit der gesetzlichen Regelung ab.[469]

Von der Regel, nach der der Gesetzgeber Gesetze grundsätzlich nicht begründen muss, gibt es jedoch Ausnahmen. Das Verfassungsgericht (hier überwiegend der Zweite Senat) geht in speziellen Konstellationen von einer Begründungspflicht des Gesetzgebers aus:

a) So sind bei (nur ausnahmsweise möglichen) Planungsentscheidungen direkt durch den Gesetzgeber dessen Abwägungsentscheidungen darzulegen.[470]

b) Bei Entscheidungen des Gesetzgebers, in denen außergewöhnliche Gegebenheiten einen Ausnahmecharakter rechtfertigen müssen, hat das Verfassungsgericht ausdrücklich eine Begründungspflicht angenommen.[471]

c) Für den Haushaltsgesetzgeber geht das Verfassungsgericht zumindest von einer Darlegungslast zu bestimmten Aspekten im Gesetzgebungsverfahren aus.[472]

d) Im Bereich von Prognoseentscheidungen des Gesetzgebers fordert das Verfassungsgericht entsprechend der Einschätzungsprärogative des Gesetzgebers eine Darlegung der Grundlagen, die über eine Darlegungspflicht hinaus einer Begründungspflicht nahekommt.[473]

e) Das Bundesverfassungsgericht geht zur prozeduralen Sicherung der Einhaltung verfassungsrechtlicher Vorgaben von einer Begründungspflicht des Gesetzgebers für die Obergrenze der staatlichen Parteienfinanzierung aus. Eine Begründbarkeit genügt insoweit nicht.[474]

f) Im Bereich der gesetzlichen Regelungen zur Höhe der Alimentation von Beamten bzw. Richtern geht der Zweite Senat des Bundesverfassungsgerichts bei einem Einschätzungsspielraum des Gesetzgebers von einer erforderlichen prozeduralen Sicherung auch in Form einer Begründungspflicht aus.[475] Eine bloße Begründbarkeit der Regelung soll auch hier ausdrücklich nicht genügen: *„Die Ermittlung und Abwägung der berücksichtigten und berücksichtigungsfähigen Bestimmungsfaktoren für den verfassungsrechtlich gebotenen Umfang der Anpassung der Besoldung müssen sich in einer entsprechenden Darlegung und Begründung im Gesetzgebungsverfahren niederschlagen. Eine bloße Begründbarkeit genügt den verfassungsrechtlichen Anforderungen der Prozeduralisierung nicht“*.[476]

g) Der Erste Senat des Bundesverfassungsgerichts geht demgegenüber bei der vergleichbaren Frage der methodisch sachgerechten Bestimmung der Höhe grundrechtlich garantierter Sozialleistungen aktuell davon aus, dass sich die verfassungsrechtlichen Anforderungen nicht auf das Verfahren der Gesetzgebung, sondern auf dessen Ergebnisse beziehen.[477] Das Gericht betont den Gestaltungsspielraum des Gesetzgebers bei der Bemessung des Existenzminimums und die dementsprechend zurückhaltende Kontrolle durch das BVerfG. Entscheidend ist, dass die Höhe der Leistungen zu dessen Sicherung insgesamt tragfähig begründbar ist.[478]

h) Der Erste Senat nimmt seinerseits in bestimmten Fällen eine grundrechtliche Begründungspflicht

469 Vgl. BVerfGE 137, 34 <74 Rn. 80>; BVerfG, Beschluss des Ersten Senats vom 22. März 2022 - 1 BvR 2868/15 -, Rn. 138.
470 Vgl. BVerfGE 95, 1 <22 ff.>.
471 Vgl. BVerfGE 101, 158 <224 f., 235>.
472 Vgl. BVerfGE 79, 311 <344 f.>.
473 Vgl. BVerfGE 111, 226 <255>.
474 Vgl. BVerfG, Urteil des Zweiten Senats vom 24. Januar 2023, 2 BvF 2/18, Rn. 128 ff.
475 Vgl. BVerfGE 130, 263 <302>.
476 So BVerfGE 149, 382 <395 Rn. 21>.
477 Vgl. BVerfGE 132, 134 <162 Rn. 69 f.>; BVerfGE 137, 34 <73 f. Rn. 77>; insoweit anders noch BVerfGE 125, 175 <226>.
478 Vgl. BVerfGE 137, 34 <74 Rn. 80>.

des Gesetzgebers bei der Entscheidung über die Höhe von Rundfunkbeiträgen an (*„grundrechtlich verankerte[n] Begründungspflicht"*).[479]

Zusammengefasst besteht damit nach der Rechtsprechung des BVerfG eine verfassungsrechtliche Begründungspflicht des Gesetzgebers nur in speziellen Konstellationen. Insbesondere bei einem bestehenden Einschätzungsspielraum des Gesetzgebers nimmt das BVerfG unter dem Aspekt der Verfahrenskontrolle bzw. prozeduralen Sicherung jedoch eine entsprechende Darlegungslast des Gesetzgebers an, die sich im Einzelfall wie eine Begründungspflicht auswirken kann.

Frage 14

Achtet Ihr Gerichtshof darauf, inwieweit der Entscheidung oder Maßnahme eine umfassende Prüfung der Kompatibilität mit den Grundrechten vorausgegangen ist? Wie gründlich muss zum Beispiel die Analyse des Gesetzgebers sein, damit Ihr Gerichtshof ihr Bedeutung beimisst?

Teilfrage 1

Es gibt keinen abstrakten Maßstab des Bundesverfassungsgerichts, nach dem die Prüfungsdichte abhängig ist von der vorausgehenden Dichte der Analyse durch den Gesetzgeber. Es besteht aber eine Sachgesetzlichkeit dahingehend, dass, je gründlicher die Analyse des Gesetzgebers ist, umso gründlicher auch seine Begründung seines gesetzgeberischen Vorhabens sein wird. Umso nachvollziehbarer wird daher die Rechtfertigung von Grundrechtseingriffen oder der Lösungsvorschlag des Gesetzgebers sein. Ein unausgesprochener Zusammenhang zwischen sorgfältiger Analyse des Gesetzgebers einerseits und fehlender Beanstandung des Verfassungsgerichts andererseits dürfte daher unausgesprochen gelten.

Teilfrage 2

Es gibt keinen allgemeinen Lehrsatz, der eine bestimmte Tiefe der Analyse des Gesetzgebers verlangt, die über das hinausgeht, was als Antwort der Teilfrage 1 von Frage 13 dargestellt wurde.

Frage 15

Achtet Ihr Gerichtshof darauf, ob vor der Verabschiedung einer Maßnahme die gegensätzlichen Standpunkte in der parlamentarischen Debatte umfassend zum Ausdruck gekommen sind? Reicht es aus, dass eine breite Debatte über den allgemeinen Inhalt der Rechtsvorschriften stattgefunden hat, oder muss den Auswirkungen auf die Rechte besondere Aufmerksamkeit geschenkt werden?

Teilfrage 1

Das Bundesverfassungsgericht prüft nicht nach, ob die parlamentarische Diskussion zu einem Gesetzgebungsvorhaben abschließend ist oder alle in der Gesellschaft oder in der Wissenschaft vorhandenen Argumente genannt wurden.

Teilfrage 2a

Das Bundesverfassungsgericht verlangt, dass eine der Sachmaterie angemessene Diskussion innerhalb des Parlaments stattfindet, ohne allgemeine Maßstäbe aufzustellen, anhand derer die Mindestanforderungen für die parlamentarische Diskussion nachzuprüfen sind. Es ist bisher kein Gesetzgebungsvorhaben deswegen aufgehoben worden, weil die parlamentarische Diskussion vom Verfassungsgericht als unzureichend qualifiziert wurde. Allerdings wurde gerade jüngst darauf hingewiesen, dass eine der Sachmaterie angemessen Sachdiskussion möglich sein muss.[480]

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479 So BVerfGE 119, 181 <229>; ebenso BVerfGE 158, 389 <426> Rn. 99 <*Staatsvertrag Rundfunkfinanzierung*>.

480 BVerfG, Urteil vom 24. Januar 2023 – 2 BvF 2/18 –, Rn. 94.

Teilfrage 2b

Es gibt keine separate Prüfung des Bundesverfassungsgerichts bezogen auf die parlamentarische Diskussion dahingehend, ob die Auswirkungen auf die Grundrechte in besonderer Weise berücksichtigt wurden. Fehlt in der parlamentarischen Diskussion die Frage der möglichen Rechtfertigung von Grundrechtseingriffen, kann sich dies aber dahingehend auswirken, dass die Vermutung naheliegt, dass der Gesetzgeber entweder den Grundrechtseingriff übersehen hat oder selbst davon ausgeht, dass keine sachliche Rechtfertigung gegeben ist; zwingend ist dieser Schluss aber nicht.

Frage 16

Ist die Tatsache, dass die Entscheidung vom Gesetzgeber oder unter Beteiligung der Öffentlichkeit getroffen wurde, ein schlüssiger Nachweis für die demokratische Legitimität der Entscheidung?

Das Bundesverfassungsgericht geht davon aus, dass jede staatliche Maßnahme von Gewicht eines ausreichenden Legitimationsniveaus bedarf,[481] wobei Entscheidungen des parlamentarischen Gesetzgebers, die dieser in dem regulären parlamentarischen Verfahren, d.h. unter Wahrung des Öffentlichkeitsgrundsatzes, bei Einhaltung der Regeln der parlamentarischen Debatte und Wahrung der Minderheitenrechte getroffen hat, die höchste demokratische Legitimation besitzen In der Regel wird daher bei der demokratischen Legitimation sowohl die Zuständigkeit des Gesetzgebers als auch die Einhaltung des demokratischen Verfahrens als Einheit gedacht. Unausgesprochen ist aber die Zuständigkeit des Gesetzgebers der gewichtigere Faktor für die Gewährung eines hohen demokratischen Niveaus als die Einhaltung des Verfahrens.

Nur das vom Volk gewählte Parlament kann den Organ- und Funktionsträgern der Verwaltung auf allen ihren Ebenen demokratische Legitimation vermitteln. Im Fall der nicht durch unmittelbare Volkswahl legitimierten Amtswalter und Organe setzt die demokratische Legitimation der Ausübung von Staatsgewalt regelmäßig voraus, dass sich die Bestellung der Amtsträger auf das Staatsvolk zurückführen lässt und ihr Handeln eine ausreichende sachlich-inhaltliche Legitimation erfährt. In personeller Hinsicht ist eine hoheitliche Entscheidung demokratisch legitimiert, wenn sich die Bestellung desjenigen, der sie trifft, durch eine ununterbrochene Legitimationskette auf das Staatsvolk zurückführen lässt.[482] Die sachlich-inhaltliche Legitimation wird durch Gesetzesbindung und Bindung an Aufträge und Weisungen der Regierung vermittelt. Letztere entfaltet Legitimationswirkung aufgrund der Verantwortlichkeit der Regierung gegenüber der Volksvertretung.[483].

III. Schutzbereich der Rechte, Gesetzmäßigkeit und Verhältnismäßigkeit

Frage 17

Hat Ihr Gerichtshof jemals bei der Bestimmung des Inhalts eines Rechts Zurückhaltung geübt, indem er sich die Auslegung oder Anwendung des Rechts durch die Regierung zu eigen gemacht hat?

Die Frage wurde schon im Rahmen der Frage 1 beantwortet. Hinsichtlich der Frage der Einräumung eines Einschätzungsspielraums ist zwischen einerseits der Auslegung der Grundrechte und andererseits der Frage, ob eine konkrete Maßnahme die Grundrechte verletzt, zu unterscheiden. Die (letztverbindliche) Auslegung von Grundrechten nimmt das Bundesverfassungsgericht autonom vor; anderen staatlichen Instanzen kommt hierbei kein Einschätzungsspielraum zu. Bei der Frage, ob im Einzelfall die Grundrechte ausreichend beachtet wurden, räumt das Bundesverfassungsgericht den Fachgerichten je nach Rechtsmaterie in unterschiedlichem Umfang Einschätzungs- und Bewertungsspielräume ein, solange die Bedeutung und Tragweite eines anwendbaren Grundrechts nicht verkannt wird.

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481 Vgl. BVerfGE 147, 50 <126 f. Rn. 198>.

482 BVerfGE 144, 50 <136 Rn. 222>.

483 Vgl. BVerfGE 147, 50 <126 f. Rn. 198>.

Frage 18

Ist die Kontrolldichte von der Eigenart des Grundrechts abhängig? Ist Ihr Gerichtshof der Ansicht, dass einige Rechte oder Aspekte von Rechten wichtiger sind und dass Eingriffe in ihre Ausübung daher strenger geprüft werden müssen als andere? Nach welchen Kriterien wird diese Einteilung vorgenommen?

Teilfrage 1

Das Ausmaß der gerichtlichen Kontrolle kann je nach Sachverhalt und insbesondere je nach betroffenem Grundrecht und Intensität der im Raum stehenden Grundrechtsverletzung variieren.

Im Rahmen des Grundsatzes der Verhältnismäßigkeit geht das Bundesverfassungsgericht davon aus, dem Gesetzgeber stehe grundsätzlich auch für die Beurteilung der Erforderlichkeit ein Einschätzungsspielraum zu.[484] Der Spielraum beziehe sich unter anderem darauf, die Wirkung der von ihm gewählten Maßnahmen auch im Vergleich zu anderen, weniger belastenden Maßnahmen zu prognostizieren. Der Spielraum könne sich wegen des betroffenen Grundrechts und der Intensität des Eingriffs verengen.[485]Umgekehrt reicht er umso weiter, je höher die Komplexität der zu regelnden Materie ist.[486].

Teilfrage 2

Ausgearbeitet ist der Unterschied je nach betroffenem Grundrecht insbesondere im Bereich der Verfassungsbeschwerden gegen Urteile (sog. Urteilsverfassungsbeschwerden). Bei Urteilsverfassungsbeschwerden gilt im Ausgangspunkt eine Formel, die nach ihrem Erfinder, dem ehemaligen Bundesverfassungsrichter Karl Heck, als Heck'sche Formel bezeichnet wird und die oben bei Frage 1 (s. S. 15) schon erwähnt wurde:

Die Gestaltung des Verfahrens, die Feststellung und Würdigung des Tatbestandes, die Auslegung des einfachen Rechts und seine Anwendung auf den einzelnen Fall sind allein Sache der dafür allgemein zuständigen Gerichte und der Nachprüfung durch das Bundesverfassungsgericht entzogen; nur bei einer Verletzung von spezifischem Verfassungsrecht durch die Gerichte kann das Bundesverfassungsgericht auf Verfassungsbeschwerde hin eingreifen.[487]

Von dieser den Prüfungsumfang beschreibenden Formel wird in bestimmten Konstellationen abgewichen, wobei dies stark vom Einzelfall abhängig ist. Bekannt und etabliert sind indes die davon abweichenden Prüfungsmaßstäbe im Anwendungsbereich des Gleichheitssatzes, der Meinungs- und Kunstfreiheit, des Familiengrundrechts und der Versammlungsfreiheit. Aber auch etwa im Bereich der Betreuung werden bisweilen Abweichungen vorgenommen. So gilt im Einzelnen:

Art. 3 Abs. 1 GG auch bei Rechtssatzverfassungsbeschwerden

Art. 3 Abs. 1 GG gebietet, alle Menschen vor dem Gesetz gleich zu behandeln. Das hieraus folgende Gebot, wesentlich Gleiches gleich und wesentlich Ungleiches ungleich zu behandeln, gilt für ungleiche Belastungen und ungleiche Begünstigungen. Dabei verwehrt Art. 3 Abs. 1 GG dem Gesetzgeber nicht jede Differenzierung. Differenzierungen bedürfen jedoch stets der Rechtfertigung durch Sachgründe, die dem Ziel und dem Ausmaß der Ungleichbehandlung angemessen sind. Dabei gilt ein stufenloser am Grundsatz der Verhältnismäßigkeit orientierter verfassungsrechtlicher Prüfungsmaßstab, dessen Inhalt und Grenzen sich nicht abstrakt, sondern nur nach den jeweils betroffenen unterschiedlichen Sach- und Regelungsbereichen bestimmen lassen. Hinsichtlich der verfassungsrechtlichen Anforderungen an den die Ungleichbehandlung tragenden Sachgrund ergeben sich aus dem allgemeinen Gleichheitssatz je nach Regelungsgegenstand und Differenzierungsmerkmalen unterschiedliche Grenzen für den Gesetzgeber, die von gelockerten auf das Willkürverbot beschränkten Bindungen bis hin zu strengen Verhältnismäßigkeitserfordernissen reichen können. Eine strengere

484 Vgl. BVerfGE 152, 68 <136 Rn. 179>; 155, 238 <280 Rn. 105>;
485 Vgl. BVerfGE 152, 68 <119 Rn. 134>).
486 Vgl. BVerfGE 122, 1 <34>; 150, 1 <89 Rn. 173> m.w.N.)
487 Vgl. BVerfGE Band 18, 85 <92>.

Bindung des Gesetzgebers kann sich aus den jeweils betroffenen Freiheitsrechten ergeben. Zudem verschärfen sich die verfassungsrechtlichen Anforderungen, je weniger die Merkmale, an die die gesetzliche Differenzierung anknüpft, für den Einzelnen verfügbar sind oder je mehr sie sich denen des Art. 3 Abs. 3 GG annähern.[488]

Art. 5 Abs. 1 Satz 1 (Meinungsfreiheit) und Art. 5 Abs. 3 Satz 1 GG (Kunstfreiheit)

Die Grenzen seiner Eingriffsbefugnisse hat das Gericht allerdings stets daran ausgerichtet, mit welcher Intensität die fachgerichtliche Entscheidung die Sphäre des Verurteilten trifft. Deshalb hat es im Bereich der Meinungsfreiheit und Kunstfreiheit strafrechtliche Sanktionen für Handlungen, für die der Betroffene die Freiheit der Meinungsäußerung oder der Kunst beanspruchte, regelmäßig einer strengen Kontrolle unterworfen. Es hat sich nicht mit der sonst üblichen Prüfung[489] begnügt, ob die angegriffenen Entscheidungen auf einer grundsätzlich unrichtigen Auffassung von Bedeutung und Tragweite des in Anspruch genommenen Grundrechts beruhten, sondern die Auslegung des einfachen Rechts auch in ihren Einzelheiten auf ihre Vereinbarkeit mit den Grundrechten untersucht.[490] Die angegriffenen Entscheidungen sind nicht allein daraufhin zu überprüfen, ob sie auf einer grundsätzlich unrichtigen Anschauung von Bedeutung und Tragweite der Kunstfreiheit beruhen.[491] Der verfassungsrechtliche Prüfungsauftrag erstreckt sich hier vielmehr bis in die Einzelheiten der behördlichen und fachgerichtlichen Rechtsanwendung. Denn sein Umfang bestimmt sich insbesondere nach der Intensität, mit der die angegriffenen Entscheidungen das betroffene Grundrecht beeinträchtigen.[492] Ein nachhaltiger Eingriff, der zu einer intensiveren verfassungsrechtlichen Prüfung führt, liegt nicht allein bei einer strafgerichtlichen Ahndung von Verhalten vor, das unter dem Schutze des Art. 5 Abs. 3 Satz 1 GG steht. Ein solcher Eingriff ist vielmehr auch bei anderen Entscheidungen von Staatsorganen anzunehmen, wenn diese geeignet sind, über den konkreten Fall hinaus präventive Wirkungen zu entfalten, das heißt in künftigen Fällen die Bereitschaft mindern können, von dem betroffenen Grundrecht Gebrauch zu machen.[493]

Art. 6 GG

Bei gerichtlichen Entscheidungen, die Eltern zum Zweck der Trennung des Kindes von den Eltern das Sorgerecht für ihr Kind entziehen, besteht wegen des sachlichen Gewichts der Beeinträchtigung der Grundrechte von Eltern und Kindern Anlass, über den grundsätzlichen Prüfungsumfang hinauszugehen.[494] Vor allem prüft das Bundesverfassungsgericht dann, ob das Familiengericht in nachvollziehbarer Weise angenommen hat, es bestehe eine nachhaltige Gefährdung des Kindeswohls und diese sei nur durch die Trennung des Kindes von den Eltern, nicht aber durch weniger eingreifende Maßnahmen abwendbar. Dabei kann sich die verfassungsgerichtliche Kontrolle wegen des besonderen Eingriffsgewichts ausnahmsweise auch auf einzelne Auslegungsfehler[495] sowie auf deutliche Fehler bei der Feststellung und Würdigung des Sachverhalts erstrecken.[496] So weist das Gericht speziell im Bereich des Schutzes von Ehe, Familie und Kindschaftsverhältnis auf folgendes hin: *Grundsätzlich ist die Gestaltung des Verfahrens, die Feststellung und Würdigung des Tatbestandes sowie die Auslegung und Anwendung verfassungsrechtlich unbedenklicher Regelungen im einzelnen Fall Angelegenheit der zuständigen Fachgerichte und der Nachprüfung durch das Bundesverfassungsgericht entzogen. Ihm ob-*

488 BVerfG, Beschluss des Ersten Senats vom 22. März 2022 - 1 BvR 2868/15 u.a. -, Rn. 122 f. m.w.N. - Übernachtungsteuer; stRspr.

489 BVerfGE 18, 85 <92 f.>.

490 BVerfGE 75, 369 <376> – Strauß-Karikatur; vgl. auch BVerfGE 77, 240 <250 f.> – Herrnburger Bericht.

491 Vgl. BVerfGE 18, 85 < 92 f.>.

492 Vgl. BVerfGE 42, 143 <147 ff.>; 66, 116 <131>.

493 Vgl. u.a. BVerfGE 43, 130 <135 f.>; 67, 213 <222 f.>; 75, 369 <376>; 77,240 <250 f.>.;BVerfGE 83, 130 <145 f.> – Josefine Mutzenbacher.

494 Vgl. BVerfGE 72, 122 <138>; stRspr.

495 Vgl. BVerfGE 60, 79 <91>.

496 BVerfGE 136, 382 <391 Rn. 28> – Vormundauswahl; stRspr.

liegt lediglich die Kontrolle, ob die angegriffene Entscheidung Auslegungsfehler erkennen lässt, die auf einer grundsätzlich unrichtigen Auffassung von der Bedeutung eines Grundrechts oder vom Umfang seines Schutzbereichs beruhen.[497] Bei der Wahrnehmung dieser Aufgaben lassen sich die Grenzen der Eingriffsmöglichkeit des Bundesverfassungsgerichts aber nicht starr und gleichbleibend ziehen. Sie hängt namentlich von der Intensität der Grundrechtsbeeinträchtigung ab.[498] Bei gerichtlichen Entscheidungen, die Eltern das Sorgerecht für ihr Kind entziehen, besteht wegen des sachlichen Gewichts der Beeinträchtigung der Eltern in ihren Grundrechten aus Art. 6 Abs. 2 Satz 1 und Art. 2 Abs. 1 GG Anlass, über den grundsätzlichen Prüfungsumfang hinauszugehen, zumal der Eingriff in das Elternrecht das Kind in gleicher Intensität selbst trifft.[499] Dies muss aber auch dann gelten, wenn Entscheidungen mit der Verfassungsbeschwerde angegriffen werden, die gegen den Willen der Kinder ihren Verbleib im Familienverband für rechtmäßig halten. Denn ein derartiger Richterspruch ist für die Zukunft des Kindes von gleicher existentieller Bedeutung wie seine Trennung von den Eltern.[500]

Auch im Aufenthaltsrecht wendet das Bundesverfassungsgericht einen vergleichbaren Kontrollmaßstab an, wenn durch eine aufenthaltsbeendende Maßnahme Eltern von ihren Kindern getrennt werden. Es verlangt hier von den Behörden und Fachgerichten eine belastbare Prognose, dass die Trennung kein unverhältnismäßiger Eingriff in die von Art. 6 Abs. 1 und Abs. 2 Satz 1 GG geschützte Familienbeziehung darstellt. Insbesondere das Alter des Kindes und damit seine Fähigkeiten, die Familienbeziehung über die Distanz und die Trennungszeit hin aufrecht zu erhalten, sind hierfür entscheidend.[501]

Schutz des Allgemeinen Persönlichkeitsrechts bei Betreuung

Der Staat hat von Verfassung wegen nicht das Recht, seine erwachsenen und zur freien Willensbestimmung fähigen Bürger in ihrer Freiheit zu beschränken, ohne dass sie sich selbst oder andere gefährden. Die Bestellung eines Betreuers gegen den Willen des Betroffenen, ohne dass hinreichende Tatsachen für eine Beeinträchtigung des freien Willens vorliegen, verletzt deshalb das Grundrecht des Betroffenen aus Art. 2 Abs. 1 GG.[502] Jedenfalls in den Fällen, in denen eine Betreuung gegen den Willen des Betroffenen eingerichtet wird , unterliegen die dies anordnenden Gerichtsentscheidungen angesichts des Gewichts des damit verbundenen Grundrechtseingriffs einer strengen, über die bloße Prüfung der grundsätzlichen Verkennung der Grundrechtsrelevanz der angegriffenen Maßnahmen[503] hinausgehenden verfassungsgerichtlichen Kontrolle. Diese erfasst insbesondere auch die Frage, ob die festgestellten Tatsachen die Entscheidung tragen und ohne wesentlichen Verstoß gegen Verfahrensrecht gewonnen wurden. Hat der Betroffene sein Einverständnis mit der Bestellung eines Betreuers verweigert, ist eine persönliche Anhörung des Betroffenen im betreuungsrechtlichen Verfahren auch von Verfassungs wegen regelmäßig unerlässlich.[504]

Art. 8 GG

Bei Prüfung des Grundrechts der Versammlungsfreiheit gilt es zu beachten, dass das den Gesetzesvorbehalt des Art. 8 Abs. 2 GG ausfüllende Versammlungsgesetz der Länder bzw. des Bundes (vgl. Art. 125a Abs. 1 Satz 1 GG) die de jure zulässigen Einschränkungsmöglichkeiten der grundrechtlichen Versammlungsfreiheit im Einzelnen ausbuchstabiert. Bei den Versammlungsgesetzen handelt es sich mithin um konstitutionell aufgeladenes einfaches Recht (auch: konkretisiertes Verfassungs-

497 Vgl. BVerfGE 18, 85 <92>; 42, 143 <147 ff.>; 49, 304 <314>.
498 Vgl. BVerfGE 42, 163 <168>; stRspr.
499 Vgl. BVerfGE 60, 79 <91>.
500 Vgl. BVerfGE 72, 122 <138 f.> – Sorgerechtsentzug).
501 Vgl. zuletzt BVerfG, Beschluss der 2. Kammer des Zweiten Senats vom 9. Dezember 2021 - 2 BvR 1333/21 -Rn. 48 ff.
502 Vgl. BVerfG, Beschluss der 2. Kammer des Ersten Senats vom 2. Juli 2010 - 1 BvR 2579/08 -, Rn. 43.
503 Zu diesem Regelfall vgl. BVerfGE 18, 85 <92 f.>; stRspr.
504 Vgl. BVerfG, Beschluss der 1. Kammer des Ersten Senats vom 20. Januar 2015 - 1 BvR 665/14 -, Rn. 26 f.

recht), dessen Verletzung in der Regel nicht nur einen Verstoß gegen ebenjenes einfache Recht bedeutet, sondern zugleich eine Grundrechtsverletzung nach sich zieht. Das schlägt sich in einem engmaschigeren Prüfungsmaßstab des Bundesverfassungsgerichts nieder, der bei der Kontrolle von Gerichtsentscheidungen im Wege von Urteilsverfassungsbeschwerden bisweilen die einzelnen Tatbestandsvoraussetzungen der Versammlungsgesetze für Einschränkungen der Versammlungsfreiheit – Verbot, Auflagen – umfasst. Beispiel: *„Ein vorbeugendes Verbot der gesamten Veranstaltung wegen befürchteter Ausschreitungen einer gewaltorientierten Minderheit ist hingegen - das gebietet die Pflicht zur optimalen Wahrung der Versammlungsfreiheit mit den daraus folgenden verfahrensrechtlichen Anforderungen - nur unter strengen Voraussetzungen und unter verfassungskonformer Anwendung des § 15 VersG statthaft. Dazu gehört eine hohe Wahrscheinlichkeit in der Gefahrenprognose sowie die vorherige Ausschöpfung aller sinnvoll anwendbaren Mittel, die eine Grundrechtsverwirklichung der friedlichen Demonstranten (z.B. durch die räumliche Beschränkung eines Verbotes) ermöglichen"*[505].

Strafrechtliche Verurteilung, StPO-Maßnahmen, Untersuchungshaft/Sicherungsverwahrung/Maßregelvollzug etc…?

Ähnlich wie bei der Versammlungsfreiheit nach Art. 8 GG handelt es sich auch beim überaus grundrechtssensiblen Strafverfahrensrecht, zumal im Bereich der Strafvollstreckung und bei anderen freiheitsentziehenden Maßnahmen, um konstitutionell aufgeladenes einfaches Recht, dessen Verletzung häufig zugleich eine Verletzung von Grundrechten nach sich zieht. Werden beispielsweise die strafprozessualen Vorschriften über die Untersuchungshaft missachtet, liegt in aller Regel zugleich eine Verletzung des Grundrechts auf Freiheit der Person vor. Zudem enthält Art. 104 GG konkrete verfassungsrechtliche Vorgaben für freiheitsentziehende Maßnahmen. Das Fachrecht, dass diese Vorgaben umsetzt, unterliegt daher auch spezifischer verfassungsgerichtlicher Kontrolle.

Über das Strafrecht hinaus entfaltet Art. 104 GG die gleiche Kontrollintensität für Freiheitsentziehungen nach dem Polizei- und Sicherheitsrecht; insbesondere die Maßnahmen nach den verschiedenen Landesgesetzen zur Gefahrenabwehr bei psychischen Erkrankungen sowie die Abschiebehaft zur Durchsetzung der Aufenthaltsbeendigung von Ausländerinnen und Ausländern sind hier zu nennen.

Allgemein

Allgemeine Faktoren, die darüber bestimmen, ob das Bundesverfassungsgericht auch die Einhaltung des einfachen Rechts kontrolliert, gibt es nicht. Ausschlaggebend sind die Besonderheiten des jeweiligen Grundrechts sowie die Intensität des Grundrechtseingriffs. Als vorsichtiger Anhaltspunkt lässt sich sagen, dass bei Grundrechten, die in besonderer Weise von einfachrechtlicher Ausgestaltung abhängig sind, und deren Bedeutung für das allgemeine Persönlichkeitsrecht oder für die Ausgestaltung der Demokratie besonders wichtig sind, eine bestimmte Vermutung für eine verschärfte gerichtliche Kontrolle besteht.

Frage 19

Haben Sie einen Maßstab für die Klarheit bei der Prüfung der Verfassungsmäßigkeit eines Gesetzes? Wie entscheiden Sie, wie klar ein Gesetz ist? Wann wenden Sie die Regel *In claris non fit interpretatio* an?

Es gibt eine ausgearbeitete und ins Detail gehende Rechtsprechung des Bundesverfassungsgerichts zu den für Gesetze geltenden Bestimmtheitsanforderungen. Die Anforderungen hängen im Einzelnen von unterschiedlichen Elementen ab. Handelt es sich beispielsweise um ein Gesetz, das den Sicherheitsbehörden Befugnisse zur heimlichen Überwachung einräumt, sind die Bestimmtheitsanforderungen besonders hoch., weil das Staatshandeln schlecht(er) nachzuvollziehen ist. In jüngerer Zeit hat sich dabei eine deutliche Differenzierung dahingehend ergeben, dass sich der Grundsatz der Normenbestimmtheit an die staatlichen Organe adressiert, deren Handeln durch das – hinreichend bestimmte – Gesetz begrenzt und angeleitet wird. Der Grundsatz der Normenklarheit soll dagegen sicherstellen, dass Gesetze auch für die rechtsunterworfenen Bürger verständlich sind, damit sie etwa erkennen können, ob ein Gesetz auf einen sie betreffenden Sachverhalt überhaupt

505 BVerfGE 69, 315 <362> – Brokdorf II.

Anwendung findet. Beide aus dem Rechtsstaatsprinzip abgeleitete Anforderungen sind einzuhalten. Die gängigen Grundsätze lauten:

Der Grundsatz der Bestimmtheit und Normenklarheit diene der Vorhersehbarkeit von Eingriffen für die Bürgerinnen und Bürger, einer wirksamen Begrenzung der Befugnisse gegenüber der Verwaltung sowie der Ermöglichung einer effektiven Kontrolle durch die Gerichte.

aa) Bei der Bestimmtheit gehe es vornehmlich darum, dass Regierung und Verwaltung im Gesetz steuernde und begrenzende Handlungsmaßstäbe vorfinden und dass die Gerichte eine wirksame Rechtskontrolle vornehmen können. Der Gesetzgeber sei <…> gehalten, seine Regelungen so bestimmt zu fassen, wie dies nach der Eigenart des zu ordnenden Lebenssachverhalts mit Rücksicht auf den Normzweck möglich sei.[506] Dabei reiche es aus, wenn sich im Wege der Auslegung der einschlägigen Bestimmung mit Hilfe der anerkannten Auslegungsregeln feststellen lasse, ob die tatsächlichen Voraussetzungen für die in der Rechtsnorm ausgesprochene Rechtsfolge vorliegen. Verbleibende Unsicherheiten dürften nicht so weit gehen, dass die Vorhersehbarkeit und Justiziabilität des Handelns der durch die Norm ermächtigten staatlichen Stellen gefährdet seien .[507].

bb) Bei der Normenklarheit stehe die inhaltliche Verständlichkeit der Regelung im Vordergrund, insbesondere damit Bürgerinnen und Bürger sich auf mögliche belastende Maßnahmen einstellen könnten.[508] Bei der heimlichen Datenerhebung und -verarbeitung, die tief in die Privatsphäre einwirken können, stelle sie besonders strenge Anforderungen. Da deren Handhabung von den Betroffenen weitgehend nicht wahrgenommen und angegriffen werden könne, könne ihr Gehalt nur sehr eingeschränkt im Wechselspiel von Anwendungspraxis und gerichtlicher Kontrolle konkretisiert werden. Im Einzelnen unterschieden sich hierbei die Anforderungen allerdings maßgeblich nach dem Gewicht des Eingriffs und seien insoweit mit den jeweiligen materiellen Anforderungen der Verhältnismäßigkeit eng verbunden.[509].

Weil die Grundrechte hier ohne Wissen der Bürgerinnen und Bürger und oft ohne die Erreichbarkeit gerichtlicher Kontrolle durch die Verwaltung, durch Polizei und Nachrichtendienste eingeschränkt werden, müsse der Inhalt der einzelnen Norm verständlich und ohne größere Schwierigkeiten durch Auslegung zu konkretisieren seien. So mag eine Regelung durch Auslegung bestimmbar oder der verfassungskonformen Auslegung zugänglich und damit im Verfassungssinne bestimmt sein, jedoch gehe damit nicht zwingend auch ihre Normenklarheit für die Adressaten einher.[510]

Frage 20

Wie intensiv prüft Ihr Gerichtshof, ob eine Maßnahme einem legitimen Ziel dient?

Die Intensität der Kontrolle des legitimen Ziels hängt auch von den Anforderungen ab, die die Verfassung an den Gemeinwohlzweck für die jeweilige gesetzliche Regelung richtet. Grundsätzlich gilt in den Fällen, in denen es um Eingriffe in Grundrechte geht, die keinem ausdrücklichen Vorbehalt eines gesetzlichen Eingriffs oder Ausgestaltung unterliegen, dass der Gesetzgeber nur zur Verfolgung von Gemeinwohlgründen, die sich in der Verfassung finden, in die Grundrechte eingreifen darf (sog. verfassungsimmanente Ziele).[511]Darüber hinaus können sich auch bei Grundrechten, die einem Gesetzesvorbehalt unterliegen, besondere Anforderungen an das Gemeinwohl ergeben, wie insbesondere bei Eingriffen in die Versammlungsfreiheit oder auch bei der Begründung (bezogen auf Art. 8 GG) oder bei der Begründung von Zwangsmitgliedschaften in öffentlich-rechtlichen Vereinigungen (bezogen auf die allgemeine Handlungsfreiheit nach Art. 2 Abs. 1 GG). Auch bei sonstigen gesetzge-

506 Vgl. BVerfGE 145, 20 <69 f. Rn. 125> m.w.N.

507 Vgl. BVerfGE 134, 141 <184 Rn. 126>; 156, 11 <44 f. Rn. 85 ff.> m.w.N.

508 Vgl. BVerfGE 145, 20 <69 f. Rn. 125>.

509 Vgl. BVerfGE 141, 220 <265 Rn. 94>; 155, 119 <181 Rn. 133> – Bestandsdatenauskunft II; BVerfG, Urteil des Ersten Senats vom 26. April 2022 - 1 BvR 1619/17 -, Rn. 273 - Bayerisches Verfassungsschutzgesetz; jeweils m.w.N.; stRspr.

510 Vgl. BVerfGE 156, 11 <46 Rn. 88> m.w.N.

511 S.o. Fn. 117.

berischen Vorhaben kann es um die Verfolgung verfassungsrechtlicher Ziele gehen. Ist dem Gesetzgeber nur die Verfolgung eines verfassungsrechtlichen Ziels gestattet, etwa die Abwehr dringender Gefahren für die öffentliche Sicherheit bei einem Eingriff in die Unverletzlichkeit der Wohnung nach Art. 13 Abs. 4 GG, überprüft das Bundesverfassungsgericht, ob sich diese Zielvorgabe auch in dessen Rahmen hält. Bei den sonstigen gesetzgeberischen Regelungen, bei denen sich aus der Verfassung keine besonderen Anforderungen an das Ziel ergeben, ist die gerichtliche Prüfung des Bundesverfassungsgerichts für gesetzgeberische Vorhaben deutlich zurückgenommen. Dort gilt im Grundsatz:

Die förmliche Gesetzgebung dagegen darf kraft demokratischer Souveränität selbst ihre Zwecke bestimmen, solange sie nicht durch das Grundgesetz verboten, insbesondere mit seinen Zwecksetzungen unvereinbar sind.[512] Interessen des von der Einschränkung Betroffenen bilden nur ausnahmsweise einen legitimen Zweck für die staatliche Maßnahme.[513] Im Bereich der tatsächlichen Voraussetzungen eines gesetzlich verfolgten Ziels gelten die oben dargestellten Grundsätzen.

Geht es um eine Maßnahme der Exekutive, ist diese an den Zweck der jeweiligen Norm gebunden.

Frage 21

Welche Verhältnismäßigkeitsprüfung wendet Ihr Gerichtshof an? Wendet Ihr Gericht alle Schritte der klassischen Verhältnismäßigkeitsprüfung an (d. h. Angemessenheit, Erforderlichkeit und Verhältnismäßigkeit im engeren Sinne)?

Das BVerfG wendet grundsätzlich alle vier Stufen der Verhältnismäßigkeitsprüfung an. Eingriffe in Grundrechte müssen einen legitimen Zweck verfolgen, zur Erreichung des Zwecks geeignet, erforderlich und verhältnismäßig im engeren Sinne (=angemessen) sein.[514] Bei der Angemessenheit wird noch einmal abgewogen, wie schwer auf der einen Seite der Grundrechteingriff wiegt und wie bedeutsam der Gemeinwohlzweck oder entgegenstehende Verfassungsgüter und wie weitreichend seine Verbesserung durch den Grundrechtseingriff auf der anderen Seite einzuschätzen sind.[515]

Frage 22

Prüft Ihr Gerichtshof alle Elemente der Verhältnismäßigkeitsprüfung?

Das Bundesverfassungsgericht überprüft grundsätzlich jeden der vier Schritte der Verhältnismäßigkeitsprüfung.

Frage 23

Gibt es Fälle, in denen Ihr Gerichtshof annimmt, dass die angefochtene Maßnahme einen oder mehrere Schritte der Verhältnismäßigkeitsprüfung erfüllt, auch wenn es offensichtlich keine ausreichenden Beweise gibt, um dies zu belegen?

In Fällen der Notwendigkeit einer Prognose oder in Fällen, in denen die Wirkzusammenhänge aus naturwissenschaftlicher Sicht nicht hinreichend geklärt sind, überprüft das Bundesverfassungsgericht nur, ob das methodische Vorgehen und die Tatsachengrundlage des Gesetzgebers nachvollziehbar sind. Ist dies gegeben, bleibt der Grundrechtseingriff auch verfassungsgemäß, wenn sich später herausstellt, dass die Einschätzung des Gesetzgebers unrichtig ist; wie etwa beim Fall der Schulschließungen während der Coronapandemie. Er ist dann verpflichtet, ab diesem Zeitpunkt die gesetzliche Regelung für die Zukunft anzupassen. Dass zuvörderst der Gesetzgeber, die erste Gewalt, dazu aufgerufen ist, Entscheidungen auf unsicherer Tatsachengrundlage und auf der Grundlage von Prognosen zu treffen, schließt notwendig den Schluss in sich, dass der Gesetzgeber auch handeln

512 BVerfGE 138, 136 <188 Rn. 138>; siehe auch 104, 357 <364 ff. >; 138, 261 <285 f. Rn. 57>.

513 BVerfGE 128, 282 <304>.

514 Vgl. BVerfGE 67, 157 <173>; 141, 220 <265 Rn. 93>.

515 BVerfG, Beschluss des Ersten Senates vom 9. Dezember 2022 – 1 BvR 1345/21, Rn. 87 ff.

darf, wenn unsicher ist, ob sich sein Handeln im Nachhinein als richtig erweist.[516]

Frage 24

Fällt die Einführung der Verhältnismäßigkeitsprüfung in der Rechtsprechung Ihres Gerichtshofs mit der Entfaltung des Grundsatzes der richterlichen Selbstbeschränkung zusammen?

Eine Theorie der richterlichen Zurückhaltung gibt es in Deutschland nicht (siehe oben bei der Antwort auf Frage 1). Daher fällt die Rechtsprechung zur Verhältnismäßigkeit auch nicht mit der Rechtsprechung zur richterlichen Zurückhaltung zusammen.

Frage 25

Hat die Rechtsprechung des EGMR die Haltung Ihres Gerichtshofs in Bezug auf die Frage richterlicher Selbstbeschränkung beeinflusst? Entspricht der vom EGMR anerkannte „margin of appreciation" der Konventionsstaaten im innerstaatlichen Bereich dem Beurteilungsspielraum, den Ihr Gerichtshof dem politischen Entscheidungsträger einräumt? Wenn nicht, wie oft überschneiden sich die Erwägungen des EGMR zum Ermessensspielraum der Konventionsstaaten mit den Erwägungen Ihres Gerichtshofs zum rechtspolitischen Gestaltungsspielraum des Gesetzgebers?

Ein deutlicher Bezug auf die Rechtsprechung des Europäischen Gerichtshofs und der Frage des Kontrollmaßstabs der gesetzgeberischen Entscheidung durch das Bundesverfassungsgericht bei der Frage der richterlichen Zurückhaltung ist nicht erkennbar. Sollte der Europäische Gerichtshof allerdings einen stärkeren Kontrollmaßstab hinsichtlich der staatlichen Eingriffe anlegen als das Bundesverfassungsgericht dies gegenüber dem Gesetzgeber vornimmt, würde das BVerfG dies aller Wahrscheinlichkeit zum Anlass nehmen, seine Rechtsprechung auf eine Anpassung hin zu überprüfen.

Nach Einschätzung des Gerichts ist die Theorie des Ermessungsspielraums des EGMR nicht vollständig als juristisches Äquivalent des Ermessensspielraums, den das Gericht den einzelstaatlichen Organen zuleitet, zu verstehen. Dies beruht auf der unterschiedlichen Perspektive der Betrachtung. Der EGMR differenziert beim Ermessensspielraum auch nach der Praxis der jeweiligen Staaten des Europarates, er betrachtet den Ermessensspielraum daher staatsbezogen, während das Bundesverfassungsgericht den Ermessensspielraum organbezogen betrachtet. Allerdings sind die materiellen Kriterien, die der EGMR für das Einräumen eines weiten Ermessensspielraums anerkennt, mitunter fallbezogen auch auf die Einräumung eines Ermessensspielraums des Organs aus der Sicht des Bundesverfassungsgerichts übertragbar.

Von einer grundsätzlichen Divergenz hinsichtlich des Kontrollmaßstabs der EGMR einerseits und des Bundesverfassungsgerichts andererseits ist nicht auszugehen.

Frage 26

Ist Ihr Staat jemals vom EGMR verurteilt worden, weil Ihr Gerichtshof in einem bestimmten Fall richterliche Zurückhaltung geübt hat und das Rechtsmittel an Ihren Gerichtshof dadurch unwirksam geworden ist?

Da es in Deutschland keinen allgemeinen Grundsatz zur Zurückhaltung der richterlichen Kontrolle gibt, wurde eine Maßnahme deutscher Hoheitsgewalt bisher noch nie wegen der Ausübung einer solchen Zurückhaltung vom EGMR aufgehoben.

In all den Fällen, in denen der EGMR eine deutsche Maßnahme aufhebt, die vorher eine verfassungsgerichtliche Kontrolle (bei inhaltlicher Prüfung, also nicht bereits wegen Unzulässigkeit der Verfassungsbeschwerde) unbeanstandet passiert hat, ist zu prüfen, ob die unterschiedlichen gerichtlichen Folgen darauf beruhen, dass die Gewährleistung beim EGMR unterschiedlich sind oder ob sie darauf beruhen, dass die Gewährleistungen zwar vergleichbar sind, aber entweder in unterschiedlicher Weise allgemein ausgelegt wurden oder in unterschiedlicher Weise in der Subsumtion angewandt

516 S. o. Fn. 93 bis Fn. 100.

wurden.

War der EGMR in vergleichbaren Rechtsfragen strenger als das Bundesverfassungsgericht, muss dies nicht notwendig auf einem strengeren Kontrollmaßstab beruhen, sondern kann auch auf einer unterschiedlichen Auslegung der allgemeinen Maßstäbe beruhen. Denkbar ist aber auch, dass der Kontrollmaßstab unterschiedlich streng angewendet wurde, in diesem Fall wäre also das Ergebnis vergleichbar mit einer unterschiedlichen Zurückhaltung. Methodisch dürften die Unterschiede zwischen der Rechtsprechung des EGMR und des BVerfG aber nicht in einem unterschiedlichen Maß der Zurückhaltung bestehen, sondern in einem unterschiedlichen Verständnis der Reichweite der jeweiligen grundrechtlichen Garantien.

Zu Verurteilungen Deutschlands durch den EGMR kam es daher insbesondere (ohne Anspruch auf Vollständigkeit),

- zunächst in unüberschaubarem Umfang im Bereich der überlangen Verfahrensdauer von Gerichtsverfahren,
- dann bei dem strengen Verfassungstreuegebot im öffentlichen Dienst in Deutschland,[517] mit Rücksicht auf das sogenannte Gebot der wehrhaften Demokratie in Reaktion auf die nationalsozialistische Gewaltherrschaft,
- im Zusammenhang mit der schwachen Stellung des biologischen, aber nicht rechtlichen Vaters im Adoptionsrecht aufgrund des stark rechtlichen Verständnisses der Familie in Deutschland, [518]
- beim Persönlichkeitsschutz von Prominenten,[519]
- bei dem Schutz vor rückwirkender Verhängung von sichernden Maßnahmen gegen Straftäter,[520]
- bei den Grenzen und vor allen Dingen Folgen einer Verletzung im Bereich der V-Leute und dem Agent Provokateur im Strafverfahren,[521]
- bei der zwangsweisen Verabreichung von Brechmitteln, um einen potentiellen Dealer zum Erbrechen verschluckter Drogen [522] zu bringen.

Diese Verurteilungen beruhen darauf, dass zunächst nicht von einer Deckungsgleichheit zwischen der EMRK und dem Grundrechtekatalog des Grundgesetzes auszugehen war, insbesondere weil die EMRK entweder insoweit ausdrückliche Garantien enthält, die dem Grundgesetz fehlen, wie insbesondere einige der verfahrensrechtlichen Garantien des Artikel 6 EMRK oder der Schutz des Privatlebens in Artikel 8 EMRK, oder bei denen zwar die Grundrechtsbestimmungen inhaltlich ähnlich sind, die Interpretation dieser Bestimmungen aber in Deutschland aufgrund bestimmter historischer und kultureller Kontexte sehr spezifisch ausfällt und von dem Grundverständnis der anderen Vertragsstaaten erheblich abweicht.

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517 EGMR, Urteil v. 26. September 1995, Nr. 17851/91, NJW 1996, 375 ff.

518 EGMR, Görgülü / Deutschland, Urteil vom 26. Februar 2004, , Nr. 74969/01; BVerfGE 111, 307 <330 ff.> – Görgülü; S. a. BVerfGE 127, 132 juris Rn 74.

519 EGMR, von Hannover/Deutschland, Urteil vom 24. Juni 2004, Nr. 59320/00, Rn. 64; siehe ferner EGMR, Karhuvaara und Iltalehti / Finnland, Urteil vom 16. November 2004, Nr. 53678/00, Rn. 45.; BVerfGE 101, 361 <390 ff.> - Caroline II; früher schon BVerfGE 34, 269 <283>.; 120, 180 <220 f.> - Caroline III.

520 Grundlegend EGMR, Mücke / Deutschland, Urteil vom 17. Dezember 2009, Nr. 19359/09; BVerfGE 109, 133 <159> - Sicherungsverwahrung I; BVerfGE 128, 326 <370> - Sicherungsverwahrung II.

521 EGMR, Urteil vom 23.10.2014, Nr. 54648/09, NJW 2015, 3631; EGMR, Urteil vom 15. Oktober 2020, Nr. 40495/15, NJW 2021, 3515; anders noch BVerfG, Beschluss der 2. Kammer des Zweiten Senats vom 18. Dezember 2014 - 2 BvR 209/14.

522 EGMR Jalloh ./. Deutschland, Urteil vom 11. Juli 2006, Nr. 54810/00, NJW 2006, 3117 ff.

IV. Andere Gesichtspunkte

Frage 27

Wie oft stellt sich in Ihrem Gerichtshof die Frage richterlicher Selbstbeschränkung bei der Entscheidung über Menschenrechtsverletzungen?

Eine ausdrückliche richterliche Zurückhaltung gibt es wie oben bei Frage 1 dargestellt nicht. Die Frage des zutreffenden Kontrollmaßstabes und die Frage, welchen Gestaltungsspielraum die verfassungsrechtlichen Normen der handelnden staatlichen Stelle einräumen, stellt sich in jedem Fall, den das Gericht entscheidet.

Frage 28

Hat Ihr Gerichtshof seine Kontrolldichte im Lauf der Zeit zurückgenommen?

Die Einschätzung insbesondere in der Rechtswissenschaft, dass das Gericht bei seinen Entscheidungen im Einzelfall die gesetzgeberischen Entscheidungen oder die Handlungen der Verwaltung und der Gerichte entweder nicht stark genug oder zu weitgehend kontrolliert, gibt es seit der Entscheidungspraxis des Gerichts. Eine Entwicklungslinie dahingehend, dass die Entscheidungspraxis des Gerichts strenger oder großzügiger hinsichtlich der Nachprüfung geworden ist, existiert nicht.

Frage 29

Hängt die gerichtliche Selbstbeschränkung von der Anzahl der beim Gerichtshof anhängigen Rechtssachen ab?

Inwieweit das Verfassungsrecht der handelnden staatlichen Instanz einen Einschätzungsspielraum oder Gestaltungsspielraum beimisst, hängt von der jeweiligen Verfassungsnorm ab und nicht von der Anzahl der Fälle, die das Gericht erreicht. Der gerichtliche Maßstab ist im Ausgangspunkt unabhängig von der praktischen Relevanz der verfassungsrechtlichen Frage. Würde das Gericht einen strengen Prüfungsmaßstab in einer Konstellation annehmen, die so häufig ist, dass dies faktisch zum Erliegen der Funktionsfähigkeit des Gerichts führen würde, würde das Gericht dies aber vermutlich als ein Indiz dafür ansehen, dass seine ursprüngliche Annahme, die Verfassung sähe hier eine verstärkte Kontrolldichte vor, nicht ganz richtig gewesen sein kann, weil die Verfassung grundsätzlich davon ausgeht, dass das Bundesverfassungsgericht seine Funktionsfähigkeit erhält.

Frage 30

Kann Ihr Gerichtshof seine Entscheidungen auf Gründe stützen, die von den Parteien nicht vorgebracht wurden? Kann Ihr Gerichtshof die geltend gemachten Gründe auf eine andere als die vom Antragsteller angegebene Verfassungsbestimmung stützen?

Die Frage, inwieweit Prüfungsmaßstab und Prüfungsumfang durch die vorgebrachten Rügen beschränkt werden, wird in der Rechtsprechung des BVerfG nicht einheitlich beantwortet. Während der Erste Senat bei der Verfassungsbeschwerde regelmäßig nur auf die Rügen eingeht, die vom Beschwerdeführer vorgebracht wurden, überprüft der Zweite Senat den Angriffsgegenstand bei einer zulässigen Verfassungsbeschwerde unter jedem in Betracht kommenden Gesichtspunkt auf seine verfassungsrechtliche Unbedenklichkeit.[523]

Frage 31

Kann Ihr Gerichtshof die Prüfung der Verfassungsmäßigkeit eines Gesetzes auf ein anderes Gesetz ausdehnen, das vom Antragsteller nicht angefochten wurde, das aber für die Situation des Antragstellers relevant ist?

Im Grundsatz ist davon auszugehen, dass die Bestimmung des Streitgegenstandes der Dispositi-

523 Vgl. mwN Hömig, in Schmidt-Bleibtreu/Klein/Bethge, BVerfGG, § 92 Rn 15; Barczak, in: Barczak BVerfGG, § 92 Rn. 94 f.

on des Antragstellers bzw. des Beschwerdeführers unterliegt.[524] Dies schließt es indes nicht aus, im Wege der Auslegung des Antrages die verfassungsrechtliche Prüfung über den explizit gerügten Streitgegenstand hinaus zu erstrecken, soweit diese als implizit angefochten angesehen werden kann.[525] Bei Rechtssatzverfassungsbeschwerden sind in die verfassungsrechtliche Prüfung auch solche Vorschriften einzubeziehen, die selbst nicht angegriffen worden sind, wenn dies nach dem Regelungszusammenhang für die Überprüfung der in Frage gestellten Rechtsnormen notwendig ist.[526]

Bei der konkreten Normenkontrolle kommt eine Erweiterung der Vorlagefrage in Betracht, wenn der Gesamtzusammenhang des Vorlagebeschlusses ergibt, dass das vorlegende Gericht noch andere Fragen als die ausdrücklich angesprochenen erwogen hat und als erheblich ansieht. Eine Erstreckung der Vorlagefrage auf weitere Gesichtspunkte ist auch dann geboten, wenn sie anderenfalls einer sinnvollen Prüfung nicht zugänglich wäre, oder wenn sich ein enger innerer Zusammenhang zwischen der entscheidungserheblichen Problematik und einer anderen Frage ergibt, so dass auch diese als zur Prüfung vorgelegt angesehen werden muss. Es hat auch die Möglichkeit, weitere, nicht konkret entscheidungserhebliche Vorschriften kraft Sachzusammenhangs in die Normenkontrolle einzubeziehen.[527]

Ausdrücklich geregelt ist die Ausdehnung des Prüfungsgegenstandes über die angegriffene Norm hinaus in § 78 Satz 2 BVerfGG für die abstrakte Normenkontrolle. Danach kann das Bundesverfassungsgericht für den Fall der Überzeugung von der Unvereinbarkeit von Bundesrecht mit dem Grundgesetz oder von Landesrecht mit dem Grundgesetz oder sonstigem Bundesrecht nicht nur die zur Überprüfung gestellte Norm, sondern auch weitere Bestimmungen des gleichen Gesetzes aus denselben Gründen für nichtig erklären. § 78 Satz 2 BVerfGG wird im Verfassungsbeschwerdeverfahren entsprechend angewendet.[528]

524 Vgl. für die Verfassungsbeschwerde Magen in: Burkiczak/Dollinger/Schorkopf, § 92 Rn. 3; Hömig in: Schmidt-Bleibtreu/Klein/Bethge, BVerfGG, § 92 Rn. 15; Barczak in: Barczak BVerfGG, § 92 Rn. 96f.

525 Vgl. Scheffczyk in: BeckOK BVerfGG, Walter/Grünewald, § 92 Rn. 18; Magen in: Burkiczak/Dollinger/Schorkopf, § 92 Rn. 6.

526 Vgl. BVerfGE 109, 279 <374>.

527 *Moradi Karkaj* in: Barczak BVerfGG, § 80 Rn. 118.

528 Vgl. BVerfGE 18, 288 <300>.

Tribunal Constitucional del Principat d'Andorra

Questionnaire sur les formes et limites de la déférence judiciaire

Abréviations

CPA : Constitution de la Principauté d'Andorre.

LQTC : Loi Qualifiée du Tribunal Constitutionnel.

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I. Matières non justiciables et intensités de déférence

Qu'entend-on par « déférence judiciaire » dans vos juridictions ?

La notion de « déférence judiciaire » peut être perçue comme une considération particulière apportée par les magistrats constitutionnels dans l'examen des choix opérés par les organes exécutifs, législatifs ou judiciaires. Nous pouvons donc constater que cette notion n'est pas présente dans la juridiction constitutionnelle puisqu'il est inscrit dans la Constitution andorrane que l'Andorre est un Etat de droit, indépendant, démocratique et social (art. 1.1 CPA), ayant un régime parlementaire (art. 1.4 CPA) et que la justice est rendue, au nom du peuple andorran, exclusivement par des juges indépendants, inamovibles et, dans l'exercice de leurs fonctions juridictionnelles, soumis uniquement à la Constitution et à la loi (art. 85.1 CPA) et de ce fait, elle reconnaît le principe de la séparation des pouvoirs.

Votre Cour envisage-t-elle un éventail de déférence ? Existe-t-il des zones «interdites», ou des zones prédéterminées de non-responsabilité, ou des questions non justiciables pour votre Cour (par exemple, des questions morales controversées, des sensibilités politiques, des controverses sociétales, l'allocation de ressources limitées, des implications financières importantes pour le gouvernement) ?

L'activité de notre Tribunal Constitutionnel est régie par la Constitution (article 95 et suivants) et sa Loi qualifiée. Les attributions et limitations dans sa responsabilité et ses compétences, tant matérielles comme formelles, sont définies par ces textes et, de ce fait, le Tribunal agit dans le cadre de ces dispositions.

En tant qu'organe juridictionnel, le Tribunal dispose d'une marge d'appréciation, concernant la forme et le fond des affaires qu'il traite, dans laquelle on pourrait penser que la déférence judiciaire joue. Cependant, nous tenons à indiquer que l'interprétation que fait le Tribunal en vertu de cette marge se fait dans des termes strictement constitutionnels et de technique juridictionnelle, et non pas politiques.

Existe-t-il des facteurs qui déterminent comment et quand votre Cour doit faire preuve de déférence (par exemple, la culture et les conditions de votre pays ; les expériences historiques de votre pays ; le caractère absolu ou restreint des droits fondamentaux en question ; la question débattue devant la Cour ; si les circonstances de l'affaire impliquent un changement des conditions sociales et des attitudes) ?

Notre Tribunal ne fait pas preuve de déférence, en ce sens qu'il ne s'abstient jamais d'exercer ses compétences juridictionnelles, lorsqu'il est compétent.

Il est certain que, pour certaines questions, la doctrine constitutionnelle nationale et internationale permet au Tribunal d'adopter des décisions plus fermes, à l'encontre de la volonté du législateur, et ce dans le cadre de la protection des droits fondamentaux ; et, d'autre part, que pour certaines autres questions le Tribunal pourrait statuer en phase avec le législateur. Il n'en demeure que ces décisions sont toujours rendues dans le cadre de ses compétences et de son activité habituelle.

Existe-t-il des situations dans lesquelles votre Cour a fait preuve de déférence parce qu'elle ne disposait pas de la compétence ou de l'expertise institutionnelle nécessaire ?

Notre Tribunal ne fait jamais preuve de déférence, en ce sens qu'il ne s'abstient jamais d'exercer ses compétences, ni délègue sa responsabilité décisionnelle à d'autres organismes pour quelque raison que ce soit. Ceci pourrait constituer un déni de justice.

Lorsque notre Tribunal décide de ne pas se prononcer, c'est en application des compétences, formelles et matérielles, qui lui sont attribuées par la Constitution et sa Loi.

Avez-vous des cas où votre Cour a fait preuve de déférence parce qu'il y avait un risque d'erreur judiciaire ?

Notre Tribunal ne fait jamais preuve de déférence, ni refuse de statuer pour des raisons autres que celles spécifiquement prévues dans la Loi.

Y a-t-il des cas où votre Cour a fait preuve de déférence en invoquant la légitimité institutionnelle ou démocratique du décideur ?

Pour certaines questions, notre Tribunal pourrait, dans le cadre de son exercice juridictionnel, suivre l'interprétation doctrinale du législateur.

Cependant, ceci n'est pas un acte de déférence, puisque ceci est un choix interprétatif qui appartient au Tribunal, qui est rendu en vertu de son pouvoir souverain d'appréciation.

«Plus la législation concerne une question de politique sociale publique au sens large, moins le tribunal sera disposé à intervenir». Est-ce une norme valide pour votre Cour ? Votre Cour partage-t-elle le point de vue selon lequel les questions d'ordre public devraient être tranchées par des processus démocratiques parce que les tribunaux ne sont pas élus et n'ont pas le mandat démocratique de trancher les questions d'ordre public ?

Notre Tribunal est compétent pour statuer sur des affaires relatives à la protection des droits fondamentaux et aux litiges entre les institutions. Si la question qui lui est posée relève de cette compétence formelle et matérielle, et revêt d'une transcendance constitutionnelle, le Tribunal sera compétent pour se prononcer, et statuera en conséquence. Ceci est indépendant du fait que la question qui lui est soumise concerne des matières d'ordre public ou non.

Votre Cour accepte-t-elle le principe général de déférence dans le jugement des politiques et de la philosophie criminelles ?

Notre Tribunal est porté à se prononcer sur des questions politiques et de philosophie criminelle, si ses questions entrent dans la sphère de ses compétences. Il statuera selon des critères strictement constitutionnels et de technique juridictionnelle.

En ce sens, Il n'agit pas suivant un principe général de déférence.

Il peut y avoir des circonstances plus strictes dans lesquelles le gouvernement ne peut pas divulguer des informations à la Cour, en particulier dans le contexte d'affaires de sécurité nationale impliquant des informations classifiées. Votre Cour a-t-elle déjà fait preuve de déférence pour des raisons de sécurité nationale ?

Notre Tribunal ne fait pas preuve de déférence. Il choisit de statuer ou de s'abstenir de statuer en fonction des compétences qui lui sont attribuées. En ce sens, le fait qu'une affaire implique des informations sensibles ou classifiées, ne saurait être un critère susceptible d'altérer l'activité du Tribunal.

Compte tenu du rôle des cours constitutionnelles en tant que gardiennes de la Constitution, devraient-elles interférer avec des politiques publiques prétendument inconstitutionnelles lorsque les gouvernements sont passifs dans la mise en œuvre des réformes des droits fondamentaux ?

L'interprétation que fait notre Tribunal de la protection des droits fondamentaux se fait selon des critères strictement constitutionnels et de technique juridictionnelle. En ce sens, notre Tribunal est soucieux de statuer dans des termes qui soient à la hauteur des standards nationaux et européens de protection des droits fondamentaux.

Il n'appartient pas à notre Tribunal de se substituer à l'activité des autres institutions publiques de notre Principauté et, pour certaines questions et certains sujets, et dans le cadre de sa marge d'interprétation souveraine, le Tribunal pourrait choisir d'apposer une interprétation conforme à celle du législateur, par exemple, en vertu de la logique selon laquelle il appartiendrait à celui-ci d'effectuer les changements et évolutions pertinents relatifs à certains droits fondamentaux reconnus dans notre Constitution.

Ceci n'est, cependant, pas du tout un signe de déférence, puisque, pour ces questions-là, il n'appartient pas au Tribunal de mener l'initiative du revirement interprétatif, et celui-ci se prononcera toujours en vertu de ses compétences souveraines.

II. Décideur

Votre Cour témoigne-t-elle plus de déférence à une loi du Parlement qu'à une décision de l'exécutif ? Votre Cour fait-elle preuve de déférence en fonction du niveau de responsabilité démocratique du décideur initial ?

Notre Tribunal se prononce dans des termes strictement constitutionnels et de technique juridictionnelle, et ne fait pas de différence en fonction de l'origine de la décision qui lui est soumise. En ce sens, les dispositions qui sont invalidées par le Tribunal sont nulles : décisions de justice (recours d'empara), lois (recours direct ou incidentel), entre autres.

Chaque type de décision dispose de sa voie judiciaire devant le Tribunal, qui sera amené à la traiter en vertu de chacune des procédures prévues à cet effet.

Quel poids votre Cour accorde-t-elle au processus législatif ? Quelle pertinence juridique, le cas échéant, l'analyse parlementaire devrait-elle avoir pour l'analyse par les juges de la compatibilité avec les droits fondamentaux ?

Notre Tribunal ne porte aucun jugement sur l'activité de l'organe législatif ni sur le processus législatif.

Le Tribunal a la possibilité de se prononcer à propos de la constitutionnalité des lois (article 98 a) CPA), lorsqu'elles lui sont soumises par le biais des recours directs (articles 6.1 et 45 et s. LQTC) et incidentel d'inconstitutionnalité (articles 6.2 et 52 et s. LQTC). Ces recours n'ont cependant pas comme but de juger la profondeur de l'analyse parlementaire, mais exclusivement la compatibilité des dispositions légales avec des principes constitutionnels.

Votre Cour vérifie-t-elle si le décideur a justifié sa décision ou s'il s'agit d'une décision que la Cour elle-même aurait rendue si elle avait été le décideur ?

Notre Tribunal se prononce dans des termes strictement constitutionnels, de technique juridictionnelle et de protection des droits fondamentaux. En ce sens, il n'a pas vocation à se prononcer sur le travail du décideur, ni à se substituer à lui, ni à se projeter au-delà de sa propre nature et ses propres compétences.

Votre Cour fait-elle preuve de déférence quant à la mesure dans laquelle la décision ou la mesure a été précédée d'une analyse approfondie de la compatibilité avec les droits fondamentaux ? Quelle doit être, par exemple, la profondeur de l'analyse du législateur pour que votre Cour lui donne du poids ?

Il n'appartient pas à notre Tribunal de reconnaître ou nier la légitimité ou l'importance d'une décision qui lui est soumise. En ce sens, il présume que toute décision est conforme à la Constitution jusqu'à ce qu'elle en soit jugée contraire.

Le jugement du Tribunal porte exclusivement sur le respect ou non-respect des principes constitutionnels et, ainsi, n'établit pas de nuance ou hiérarchie entre les décisions, en fonction de l'analyse en droits fondamentaux qui a été faite préalablement à son édiction, ou en fonction de la quantité ou importance du respect à ces principes constitutionnels. Il s'agit, donc, de savoir si elles sont conformes ou non conformes à la Constitution.

Votre Cour examine-t-elle si les points de vue opposés ont été pleinement représen-

tés dans le débat parlementaire lors de l'adoption d'une mesure ? Suffit-il qu'il y ait eu un débat approfondi sur le contenu général de la législation, ou faut-il qu'il y ait eu une considération spéciale des implications sur les droits ?

Notre Tribunal ne porte pas de jugement sur le processus législatif.

Cependant, en vertu de la LQTC, le Tribunal peut connaître des recours adressés par les parlementaires, ayant comme objet la violation de leurs droits fondamentaux au cours du processus législatif.

Ceci n'implique en aucun cas que le Tribunal puisse juger la qualité des interventions, tant sur le fond comme sur la forme, la qualité des débats, la diversité des points de vue exprimés, ni le contenu du débat. Cela ne fait pas partie de ses compétences.

Le fait que la décision appartienne au pouvoir législatif ou qu'elle ait été prise après des consultations publiques ou des débats publics est-il une preuve concluante de la légitimité démocratique de la décision ?

Le Tribunal ne porte pas de jugement sur la légitimité démocratique des décisions qui lui sont soumises.

III. Le champ d'application des droits, légalité et proportionnalité

Votre Cour a-t-elle déjà fait preuve de déférence à l'étape de la définition des droits, en donnant du poids à la définition des droits du gouvernement ou à son application aux faits en cause ?

Notre Tribunal se prononce dans des termes strictement constitutionnels, de technique juridictionnelle et de protection des droits fondamentaux. Il définit les droits constitutionnellement garantis à la lumière des standards nationaux et internationaux de protection des droits fondamentaux, et donne droit aux moyens qui lui sont formulés indépendamment de celui qui les formule. En ce sens, il statue objectivement, et ne fait preuve d'aucune déférence.

Des droits applicables affectent-ils l'intensité de la déférence ? Votre Cour considère-t-elle que certains droits ou aspects de droits sont plus importants et que, par conséquent, les ingérences dans leur exercice méritent un examen plus rigoureux que d'autres ? Avez-vous des facteurs qui déterminent la nature du droit fondamental en question ?

Le Tribunal ne fait preuve d'aucune déférence à l'égard d'aucun droit. En ce sens, il apprécie et juge chaque droit en suivant la même rigueur.

Disposez-vous d'une échelle de clarté d'une loi ? Quand appliquez-vous la règle d'interprétation *In claris non fit interpretatio* ?

Notre Tribunal interprète les dispositions légales qui lui sont soumises à la lumière des standards constitutionnels nationaux et internationaux, et toujours dans le but d'assurer une meilleure protection des droits et libertés fondamentaux.

L'interprétation que peut faire notre Tribunal se fait dans le cadre strict de ses compétences et de la marge d'appréciation dont il dispose. Les magistrats apposent leur interprétation en vertu de cette marge et à la lumière de leur intime conviction.

Il ressort de sa doctrine, relative au principe *in claris non fit interpretatio*, que le Tribunal ne renonce pas à sa fonction d'interprète constitutionnel de la Loi, qu'il considère essentielle : «*Aujourd'hui, toute la communauté juridique convient que l'adage «in claris no fit interpretatio» ne peut être compris dans un sens purement littéral ou grammatical, car une interprétation doit toujours être faite même pour déterminer si un texte est ou non «clarus». Comme il est dit, l'interprète est un «médiateur» qui transfère une réalité, matérielle ou idéale, d'un texte juridique, philosophique ou littéraire ou d'une partition musicale, de l'intuition d'un artiste à l'œuvre d'un artisan, à son incarnation pratique. Elle suppose une activité essentielle dans tout processus herméneutique et donc implique une subtilité (subtilitas) dans sa compréhension (intelligendi) dans son explication (explicandi) et dans son application (applicandi)*» (Arrêt du Tribunal du 19 avril 2021, affaire 2021-2-L).

Le degré de clarté de la loi soumise, et donc le devoir d'interprétation du Tribunal, sont appréciés par lui en vertu du sa marge d'appréciation.

Quelle est l'intensité du contrôle de votre Cour au stade de l'établissement du but légitime ?

Le Tribunal n'a pas eu se prononcer pour l'instant sur l'intensité de son contrôle constitutionnel au stade de l'établissement du but légitime.

Quel test de proportionnalité votre Cour applique-t-elle ? Votre Cour applique-t-elle toutes les étapes du test classique de proportionnalité (c'est-à-dire l'opportunité, la nécessité et la stricte proportionnalité) ?

Le Tribunal procède à une analyse de la proportionnalité en se fondant sur les critères établis notamment par la Cour européenne des droits de l'homme.

Votre Cour passe-t-elle par chaque étape applicable du test de proportionnalité ?

Dans les recours d'empara, qui sont les plus fréquents, son contrôle est limité à évaluer le caractère logique, raisonnable, et non-arbitraire du raisonnement des juges du fond, et ce à la lumière des différents «*canons de constitutionnalité*»: «*C'est aussi un canon de constitutionnalité réitéré celui selon lequel l'application et l'interprétation de l'ordonnancement juridique [...] correspond à la juridiction ordinaire, à la seule exception des situations dans lesquelles elles puissent être considérées absurdes, invraisemblables, déraisonnables ou illogiques; des considérations qui peuvent justifier un recours d'empara et une analyse de la part du Tribunal Constitutionnel*» (Arrêt du Tribunal du 14 février 2022, affaire 2021-90-RE, *Obiols Obiols c/ Principauté d'Andorre*) ou «*Ce recours d'empara repose sur le principe de proportionnalité. Ce principe, comme le reconnaît la partie requérante elle-même, ne saurait être conçu comme un droit ou une liberté fondamentale pouvant justifier à eux seuls un recours d'empara, comme c'est le cas des principes énoncés au paragraphe 2 de l'article 3 de la Constitution. Toutefois, le principe de proportionnalité découle et est inhérent à la conception de l'État de droit, à la valeur de la dignité et au principe d'interdiction de tout arbitraire (articles 1.1, 1.2 et 3.2 de la Constitution). Et bien qu'il ne soit pas per se un canon de constitutionnalité, il peut, avec d'autres infractions, produire une violation du droit à la juridiction (article 10 de la Constitution) lorsque la motivation utilisée devient illogique, déraisonnable ou arbitraire.*» (Arrêt du Tribunal du 14 juin 2021, affaire 2021-22-RE. *TED, SL c/ Govern d'Andorra).*

Existe-t-il des affaires dans lesquelles votre Cour admet que la mesure litigieuse satisfait à une ou plusieurs étapes du test de proportionnalité, même s'il n'y a manifestement pas suffisamment de preuves pour démontrer ce fait ?

En ce sens, l'article 8.1 LQTC dispose que «*le Tribunal constitutionnel, en statuant sur la constitutionnalité de l'acte ou de la règle déférés, mettra en application la Constitution conformément aux mandats et aux valeurs qu'elle contient de façon expresse, et statue sur leur validité ou leur nullité sans émettre des jugements d'opportunité par rapport aux actes des pouvoirs publics*».

3.3. Conformément à ces prémisses, il est nécessaire d'analyser si, en l'espèce, l'interprétation et l'application des règles effectuées par la juridiction ordinaire, et notamment par la Chambre administrative, ont signifié une interprétation qui conduit à une conclusion déraisonnable ou arbitraire dans l'application de la réglementation fiscale.
En outre, il faut faire la distinction entre l'action législative, où le législateur juge l'opportunité et la politique, de sorte que le Tribunal constitutionnel doit se limiter à contrôler, d'un point de vue technique, la conformité à la Constitution en tranchant les recours et les demandes d'inconstitutionnalité, et les actions de l'administration, notamment de l'administration de justice, où le Tribunal constitutionnel peut, par le biais du recours d'empara, examiner si le canon de constitutionnalité qui interdit les décisions déraisonnables ou arbitraires a été enfreint au moyen d'une interprétation des règlements applicables qui peut être considérée comme disproportionnée.»

L'apparition du contrôle de la proportionnalité dans la jurisprudence de votre Cour a-t-elle coïncidé avec l'essor de la théorie de la déférence judiciaire ?

Notre Tribunal n'a pas l'initiative d'évaluer l'opportunité, la nécessité et la proportionnalité d'une mesure potentiellement attentatoire contre les droits et libertés fondamentaux. Il n'évalue la proportionnalité au sens général du terme, qu'en vertu de ses compétences juridictionnelles et dans le sens de la protection des droits fondamentaux.

La jurisprudence de la Cour européenne des droits de l'homme a-t-elle façonné l'approche de votre Cour en matière de déférence ? La doctrine de la Cour européenne des droits de l'homme sur la marge d'appréciation est-elle l'équivalent national de la marge d'appréciation que votre Cour accorde ? Si non, à quelle fréquence les considérations relatives à la marge d'appréciation de la Cour européenne des droits de l'homme recoupent-elles les considérations relatives à la déférence de votre Cour dans des affaires similaires ?

Il est vrai que le Tribunal constitutionnel interprète souverainement ses compétences (dans le cadre de la Constitution et de la LQTC), et reconnaît les limites de son intervention sur les décisions souveraines des autres institutions publiques et, en ce sens, considère que certaines décisions correspondent à ces autres institutions (Arrêt du Tribunal du 14 novembre 2022, affaire 2022-47-RE, Pintat Forné i d'altres c/ Sindicatura).

Ceci pourrait être assimilé au mécanisme de la *margin of appreciation* appliqué par la Cour européenne des droits de l'homme mais, comme vu précédemment, la reconnaissance de ses propres limites de la part du Tribunal n'est pas un exercice de déférence, en ce sens qu'il ne juge pas que l'opportunité d'une décision corresponde à une autre institution. Au contraire, il s'agit d'une simple mais stricte reconnaissance et application de ses propres compétences.

Le Tribunal s'abstient de statuer sur un sujet non pas parce qu'il juge plus opportun ou pertinent qu'un autre organisme le fasse, mais parce qu'il applique une interprétation claire sur la limite de ses compétences.

La Cour européenne des droits de l'homme avait-elle condamné votre Etat en raison de la déférence dont votre Cour a fait preuve dans une affaire précise, déférence qui en a fait un recours inefficace ?

La Cour européenne des droits de l'homme n'a jamais condamné notre État en raison de la déférence dont notre Tribunal aurait pu faire preuve dans quelque décision que ce soit.

IV. Autres particularités

À quelle fréquence la question de déférence se pose-t-elle dans les affaires de fond entendues par votre Cour ?

La question de la déférence ne se pose pas dans les affaires de fond entendues par notre Tribunal.

Votre Cour est-elle devenue plus déférente avec le temps ?

Notre Tribunal ne statue jamais en vertu d'une supposée déférence, mais exclusivement dans des termes strictement constitutionnels, de technique juridictionnelle et de protection des droits fondamentaux.

L'attitude déférente dépend-elle du nombre d'affaires inscrites au rôle de la Cour ?

Notre Tribunal ne statue jamais en vertu d'une supposée déférence, mais exclusivement dans des termes strictement constitutionnels, de technique juridictionnelle et de protection des droits fondamentaux.

Votre Cour peut-elle fonder ses décisions sur des motifs non avancés par les parties ? Votre Cour peut-elle recadrer les motifs avancés en vertu d'une disposition constitutionnelle différente de celle invoquée par le demander ?

L'article 7.3 LQTC dispose que «*la décision ou l'arrêt mettant fin à une affaire déclarée recevable ne peut contenir des considérations différentes de celles qui ont été présentées par les parties dans leurs prétentions respectives*».

Il ressort de cet article que le Tribunal n'a pas vocation à soulever des moyens d'office, ni corriger les parties en substituant les leurs. Ceci est soutenu par sa jurisprudence (arrêt du 6 juin 1994, affaire 94-1-L; arrêt du 16 septembre 1998, affaire 98-1-RE).

Votre Cour peut-elle étendre son contrôle de constitutionnalité à une autre loi non contestée devant elle mais liée à la situation du requérant ?

Le Tribunal n'a pas vocation à se prononcer d'office sur des dispositions ou décisions qui n'ont pas été soumises ou présentées par les parties (veuillez-vous référer à la réponse précédente).

The Constitutional Court of the Republic of Armenia

RESPONSES

TO THE QUESTIONNAIRE FOR THE XIXTH CONGRESS OF

THE CONFERENCE OF THE EUROPEAN CONSTITUTIONAL COURTS

We would like to inform you that the legal system of the Republic of Armenia does not include the concept of "judicial deference". At the same time, it is worth mentioning that in accordance with the Constitutional Law Judicial Code of the Republic of Armenia, the courts of the Republic of Armenia shall operate according to the following fundamental principles:

- A judge may not be a member or a founder of any political party, hold a position in a political party, deliver speeches on behalf of the political party or otherwise engage in political activities. In public speeches and any other circumstances, a judge must exercise political restraint and neutrality. A judge may participate in elections to the National Assembly and of local self-government bodies only as an elector. A judge may not speak publicly for or against any candidate, political party or alliance of political parties, or otherwise participate in election campaigns. Professional discussions or conclusions on draft regulatory legal acts, as well as opinions voiced and statements made during the discussions on activities of the judiciary, including public ones, shall not be considered as violating the principle of apolitical stance;

- A judge may not hold any position not stemming from his or her status in state or local self-government bodies, any position in commercial organizations, engage in entrepreneurial activities or perform other paid work, except for scientific, educational, and creative work. Regulations prescribed by law for public servants with regard to entrepreneurial activities shall apply to judges. A judge must endeavor to manage his or her input in such a way as to minimize the number of cases in which he or she has to recuse himself or herself. A judge may not act as an executor of a will or property trust manager, except when he or she acts so gratuitously in connection with a property of his or her close relative or that of a person under his or her guardianship or curatorship;

- Justice shall be administered only by courts in accordance with the Constitution and laws. While administering justice, the practice of the bodies operating based on international human rights treaties ratified by the Republic of Armenia shall be taken into account when interpreting the provisions on fundamental rights and freedoms enshrined by the Constitution;

- When administering justice and exercising other powers provided for by law when acting as a court, as well as exercising rights stemming from the status of a judge, a judge shall be independent from state and local self-government bodies, officials, natural and legal persons, and shall not be accountable to anyone and, inter alia, shall not be obliged to give any explanations. A court shall examine and decide on a case or a matter (hereinafter referred to as "case") in accordance with the Constitution and law, evaluating the circumstances of the case through his or her inner conviction. State and local self-government bodies and officials shall abstain from actions which may jeopardize or harm the independence of a court or judge;

- The activities of courts must be organized in such a way as to ensure effective judicial protection of everyone's rights and freedoms through a fair and public hearing of their case within a reasonable time limit by an independent and impartial court established by law;

- The examination and disposition of a case must be carried out within a reasonable time limit. Where a special time limit for the examination and disposition of a case is prescribed by law, it shall be examined and disposed of within that time limit. The time limit may be extended exclusively in cases and in the manner prescribed by law;

- Discrimination by a court, while administering justice or exercising other powers provided for by law when acting as a court, on the ground of sex, race, skin color, ethnic or social origin, genetic features, language, religion, world view, political or other views, belonging to an ethnic minority, property status, birth, disability, age, or other personal or social circumstances shall be prohibited;

- Court sessions shall be open to the public. The judicial proceedings or a part thereof may, in cases and in the manner prescribed by law and upon the decision of the court, be held behind closed doors, for the purpose of protecting the private life of the participants of the proceedings, the interests of minors or of justice, as well as the state security, public order or morals. Court sessions shall be recorded as prescribed by law;

- The language of procedure in the Republic of Armenia shall be Armenian. All the documents submitted to the court shall be in Armenian or properly translated into Armenian, except for cases provided for by law;

- Courts shall render conclusive judicial acts in the name of the Republic of Armenia. Judicial acts entered into force shall be binding for their addresses. The right for the judicial act of a court of first instance, not entered into force, to be reviewed under the procedure of appeal shall be ensured in cases and under the procedure provided for by law. The right to file a cassation appeal against the judicial act of a court of appeal, not entered into force, shall be ensured in cases and under the procedure provided for by law. Judicial acts entered into force shall be appealed against in cases and under the procedure provided for by law.

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The Constitutional Court of the Republic of Austria

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Michael Mayrhofer, Member of the Constitutional Court of the Republic of Austria

I. Non-justiciable questions and deference intensities

1. In your jurisdiction, what is meant by "judicial deference"?

The term "judicial deference" (*richterliche Selbstbeschränkung*) itself is not found in the case law of the Austrian Constitutional Court. A concept commonly found in the Constitutional Court's rulings which (today) most closely corresponds to the meaning of judicial deference to the legislator[529], or judicial self-restraint, is that of "margin of appreciation" (*rechtspolitischer Gestaltungsspielraum*), although the gradual emergence of this doctrine from the end of the 1970s saw the Court turn away from the previously stronger deferential nature of its fundamental rights case law towards the legislator[530].[3531]

"Margin of appreciation" here refers to the legislative powers a territorial entity has within the given constitutional limits and the related decreased intensity of judicial review.[532] Its initial outlines were drawn by the Constitutional Court in a judgment in 1978, in which it held that[533] the legislator has legislative freedom (*rechtspolitische Gestaltungsfreiheit*), though this is of course not unlimited. This legislative freedom applies both to the objectives pursued and the selection of the means to be used to achieve those objectives. In general, the legislator is free to decide which instruments it considers suitable for achieving the objectives and which means it selects from those available and subsequently applies. According to the 1978 judgment, the Constitutional Court can oppose the legislator only if, in determining the means to be used, the legislator exceeds the limits imposed by the Constitution.

Although the concept of margin of appreciation was developed in the context of the principle of equality (Article 7 paragraph 1 of the Constitution [*Bundes-Verfassungsgesetz, B-VG*]), it is crucial today for the Constitutional Court's fundamental rights case law as a whole[534] and over time has under-

529 This report primarily discusses the powers of the Constitutional Court (*Verfassungsgerichtshof, VfGH*) to review laws (Article 140 of the Constitution [*Bundes-Verfassungsgesetz, B-VG*]) and general-abstract regulations (*Verordnungen*) imposed by administrative authorities (Article 139 of the Constitution). The powers of the Constitutional Court with regard to its powers to rule on complaints against judgments and decisions of administrative courts (Article 144 of the Constitution), referred to as *Sonderverwaltungsgerichtsbarkeit*, are addressed only in exceptional cases. The other powers of the Constitutional Court shall remain out of consideration in this report.

530 Cf. Heller, Judicial self-restraint in der Rechtsprechung des Supreme Court und des Verfassungsgerichtshofes, ZÖR 1988, 89 (especially 113 ff); Eberhard, Judicial activism und judicial self restraint in der Judikatur des VfGH, in Bernat/Grabenwarter et al. (eds.), Festschrift Christian Kopetzki zum 65. Geburtstag (2019) 141 (143 ff); see also below: 23 to 25.

531 Cf. Dopplinger/Mörth, Rechtspolitischer Gestaltungsspielraum des Gesetzgebers und Margin of Appreciation:
zwei Seiten einer Medaille?, JRP 2022, 240 (242 ff).

532 Cf. *Dopplinger/Mörth*, Gestaltungsspielraum 242, 261.

533 Selected decisions of the Constitutional Court of the Republic of Austria (*VfSlg.*) *8457/1978*.

534 Cf. on the development of case law *Korinek*, Entwicklungstendenzen in den Grundrechtsjudikatur des Verfassungsgerichtshofes (1991); *Dopplinger/Mörth*, Gestaltungsspielraum 243 *ff*; examples of case law are *VfSlg. 12.103/1989, 14.301/1995* and *20.483/2021, 20.509/2021* (concerning the margin of appreciation regarding Article 8 ECHR), *14.263/1995, 20.0523/2021* and *VfGH 20.6.2022, G 279/2021* (margin of appreciation in context with Article 1 1. Additional protocol to the ECHR) as well as *14.260/1995,*

gone dynamic development,[535] resulting in a spectrum of deference (see Question 2.).

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (e.g. questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

a. In general, all parts of the Constitution are justiciable. Correspondingly, the "supreme democratic function" of the Constitutional Court is to impose an "act of increased democratic legitimacy", i.e. the Constitution, on the legislator and review compliance therewith.[536] No limitation on the performance of the functions of the Constitutional Court by reason of the "political dimension of a constitutional dispute" can be inferred from the case law.[537] In line with its role in a democratic state under the rule of law, the Constitutional Court does not limit itself in its rulings to the "supervision of apolitical positions" and accordingly does not exercise overall judicial deference regarding "politically relevant questions".[538] The Court's case law over recent years has included cases concerning matters of moral controversy such as reproductive medicine,[539] assisted suicide,[540] digital technologies (electronic voting,[541] data retention,[542] surveillance by the state using trojans[543]), questions relating to family law such as same-sex marriage,[544] the entry of a "third gender" in the civil register[545] and parental custody,[546] or questions with significant budgetary consequences, such as those arising in connection with the financial assistance provided during the COVID-19 pandemic.[547]

b. The standard of review, and hence the degree of deference, varies firstly according to the jurisdiction of the Constitutional Court (see also Question 3.) and also depends to a great extent on the area of constitutional law concerned, particularly as there are considerable differences in the case law of the Constitutional Court as regards interpretation of constitutional law.[548] Discussion in this report of the margin of appreciation (*rechtspolitischer Gestaltungsspielraum*) in particular focusses on fundamental rights jurisprudence. The Constitutional Court does not grant the legislator a comparable margin in other areas of constitutional law. For example, the constitutional principle of the rule

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16.911/2003 and *VfGH 8.3.2022, E 3120/2021* (in each case based on the margin of appreciation in conjunction with Article 10 ECHR).

535 *Dopplinger/Mörth*, Gestaltungsspielraum 245.

536 *Oberndorfer*, Demokratie und Verfassungsgerichtsbarkeit in Österreich, in: Holoubek et al. (eds.), Dimensionen des modernen Verfassungsstaates, Symposium zum 60. Geburtstag von Karl Korinek (2002) (105) 106 *f*; see also Korinek, Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen, in: Korinek, Grundrechte und Verfassungsgerichtsbarkeit (2000) 243 (274).

537 Cf. *Oberndorfer*, Demokratie 106; recently *Eberhard*, Judicial activism 150: The Constitutional Court is "– often contrary to the wording – willing […] to correct clear value judgments of the law, an unambiguous example of judicial activism"; for a similar view see *Berka*, Die Grundrechte. Grundfreiheiten und Menschenrechte in Österreich (1999), point 142.

538 Cf. *Korinek*, Verfassungsgerichtsbarkeit 274; *Oberndorfer*, Demokratie 106 f.

539 *VfSlg. 15.632/1999, 19.824/2013*, and *VfGH 30.6.2022, G 230/2021*.

540 *VfSlg. 20.433/2020*.

541 *VfSlg. 19.592/2011*.

542 *VfSlg. 19.702/2012*.

543 *VfSlg. 20.356/2019*.

544 *VfSlg. 20.225/2017*.

545 *VfSlg. 20.258/2018*.

546 *VfGH 9.3.2023, G 223/2022*.

547 As of the time of preparing this report, the proceedings relating to this matter were pending before the Constitutional Court under case number *G 265/2022*.

548 *Grabenwarter*, § 102. Der österreichische Verfassungsgerichtshof, in Bogdandy/Grabenwarter/Huber (eds.), Handbuch Ius Publicum Europaeum. Band IV, point 69 *f*.

of law is increasingly specified in more detail in areas ranging from the question of the rule-of-law conditions under which fully automated individual administrative decisions (*Bescheide*) are permitted[549] through to the legal protection required under the rule of law against administrative notices (especially in the field of financial market law)[550].[551] The case law also derives detailed constitutional requirements e.g. from the principles of suffrage,[552] without entirely depriving the legislator of the margin of appreciation.[553]

c. The scope of the margin of appreciation varies. In certain areas such as the law on employment, remuneration and pensions for public employees,[554] fiscal equalization arrangements between the territorial entities,[555] the law regarding taxation[556] and benefits[557], as well as in matters of private law (e.g. some family and succession law matters[558] and tenancy matters[559]) the Constitutional Court expressly grants the legislator not just a margin of appreciation, but a "wide margin of appreciation". The reasons for this extended margin have to do with the nature of the individual subject matters. For instance, the question of whether the state is legislating on its "own" matters, as in the case of the law relating to public employees, plays a role. As regards fiscal equalization, the necessarily "cooperative" approach when adopting the law to represent the mutual agreement of the territorial entities on the allocation of resources is decisive.[560] In matters of private law, the legislator's duty to balance

549 VfSlg. 11.590/1987 (computer-assisted administrative decisions); recently *Mayrhofer* in Mayrhofer/Parycek, Digitalisierung des Rechts – Herausforderungen und Voraussetzungen, 21. ÖJT Band IV/1, 77 *ff*.

550 *VfSlg. 20.238/2018* (duty to issue warnings of the financial market supervisory authority).

551 Cf. also e.g. *VfSlg. 12.683/1991* (premature enforceability of employee claims), *16.772/2002* (exclusion of appeal against extraditions), *17.018/2003* (power to adopt regulations for the extension of adjustment periods of landfills), *20.239/2018* (general exclusion of the suspensive effect in the case of penalties), *20.345/2019* (public broadcaster [*ORF*] broadcasting rights).

552 Cf. *VfSlg. 18.215/2007, 18.551/2008, 20.306/2019* (universal suffrage); *VfSlg. 19.982/2015, 15.616/1999* (equal suffrage); *VfSlg. 10.412/1985, 14.440/1996, 19.893/2014, 20.071/2016* (personal suffrage); *VfSlg. 13.839/1994, 18.603/2008, 20.071/2016, 20.128/2016, 20.273/2018*; *VfGH 15.6.2023, W I 4/2023* (free suffrage); *VfSlg. 8694/1979, 10.412/1985, 19.893/2014, 20.071/2016, 20.242/2018* (secret suffrage); VfSlg. 8321/1978, 8700/1979, 19.782/2013, 19.820/2013, 20.417/2020, 20.439/2021; *VfGH 1.3.2023, W I 12/2022*; *15.6.2023, W I 1/2023* (proportional representation).

553 Cf. on the legislator's margin regarding the proportional electoral system, *VfGH 1.3.2023, W I 12/2022; 15.6.2023, W I 1/2023*.

554 Cf. e.g. *VfSlg. 9607/1983*; *VfGH 17.6.2022, G 397/2021*; *1.7.2022, G 17/2022*.

555 Cf. e.g. *VfSlg. 12.505/1990, 19.032/2010, 19.562/2011, 19.984/2015*; *VfGH 26.9.2014, B 1504/2013* and others; *23.2.2015, G 220/2015*.

556 Cf. e.g. *VfSlg. 19.411/2011, 19.984/2015, 20.287/2018, 20.462/2020, 20.518/2021*.

557 Cf. e.g. *VfSlg. 5972/1969, 8605/1979, 18.638/2008, 19.999/2015, 20.199/2017*.

558 Cf. e.g. *VfSlg. 12.103/1989, 14.301/1995, 20.018/2015, 20.032/2015, 20.130/2016, 20.496/2021*. [31] Cf. e.g. *VfSlg. 20.077/2016, 20.089/2016, 20.179/2017, 20.180/2017*.

559 Cf. e.g. VfSlg. 20.077/2016, 20.089/2016, 20.179/2017, 20.180/2017

560 Cf. *VfSlg. 12.505/1990:* "An appropriate system of financial equalization complying with the requirement set out in section 4 of the Constitutional Law on Public Finance (*Finanz-Verfassungsgesetz, F-VG)* 1948 requires and presupposes cooperation between the territorial authorities characterized by political insight and mutual consideration already at the pre-legislative stage. […] Therefore, consultation between the representatives of the territorial authorities prior to adoption of the Fiscal Equalization Act *(Finanzausgleichsgesetz)* is indispensable […]. If the negotiations result in agreement, at least on the essential and fundamental aspects, it can usually be assumed that an overall arrangement compliant with Article 4 of the Fiscal Equalization Act 1948 has

different interests is relevant. When legislating on matters relating to the law of tenancy, and in particular where provisions governing rents are concerned, the legislator must "balance partly conflicting housing, social, and urban development policy interests".[561] As regards parental custody, the Constitutional Court additionally emphasizes the need for a scientific foundation of legal provisions, as this is an "area of legislation which is frequently characterized by decision-making situations in an environment of problematic relationships, of special protection to be afforded to involved minors, and of complex expert assessments in the field of (child) psychology".[562]

However, there are also some decisions in which the Constitutional Court explicitly denies a wide margin of appreciation for the legislator. For example, in *VfSlg. 20.433/2020*, the Court held that the prohibition of any form of assisted suicide (provided for in section 78 of the Criminal Code [*Strafgesetzbuch, StGB*]) is unconstitutional because it violates the individual's constitutional right to self-determination: "As the provision of section 78 (second case) StGB concerns the existential decision on how to live and die and, thus, essentially affects the individual's right to self-determination, the margin of appreciation by the legislator is not wide at all."

Finally, there are situations in which the Constitutional Court refers to a wide or less wide margin depending on the specific situation. Regarding in particular the fundamental right to engage in gainful activity (Article 6 of the Basic State Law [*Staatsgrundgesetz, StGG*]), the Court differentiates between provisions governing exercise of a profession or occupation and those relating to entry into a profession or occupation, finding that the legislator has a greater margin of appreciation in the former case than in the latter.[563]

d. In proceedings for review of the constitutionality of regulations under Article 139 of the Constitution, the Constitutional Court assumes that the administrative authorities have a broad discretionary power when enacting regulations in situations such as the following:

One reason for according a broad discretionary power is related to the legislator's regulatory approach. Based on a judgment referred to as the "*Perchtoldsdorfer Erkenntnis*",[564] the Constitutional Court has recognized the specific character of administrative planning: the principle of legal decision-making that specific circumstances always entail a specific legal consequence ("conditional programming") largely does not apply and a purely target-oriented approach prevails, i.e. decisions are made only with regard to certain planning objectives to be achieved ("final programming").[565]

This (merely) target-oriented programming of regulations governing administrative planning provides for a wider (planning) margin. This is not associated with any abandonment by the Constitutional Court of its judicial review powers, but with a shifting emphasis of the review because the Constitutional Court requires the legislator to set precise procedural rules for the enactment of regulations ("procedural legitimation") and places particular focus on this in the individual case.[566] This means that the limited review of planning within the scope of substantive law is – in a manner that is both required and sufficient under the rule of law– replaced by a review of adherence to planning procedure.[567]

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been reached." [33] *VfSlg. 20.179/2017*.

561 VfSlg. 20.179/2017

562 *VfSlg. 20.018/2015*.

563 *VfSlg. 11.558/1987, 11.625/1988, 20.090/2016, 20.248/2018* and many others.

564 *VfSlg. 8280/1978*.

565 For more detail, cf. *Leitl-Staudinger/Mayrhofer*, Innovation in der Verwaltungsrechtswissenschaft am Beispiel des Planungsrechts, in Wirth et al. (eds.), 50 Jahre Johannes Kepler Universität Linz (2017) 165 (168 *ff*).

566 Cf. e.g. *VfSlg. 12.687/1991, 14.941/1997, 17.854/2006, 19.126/2010, 19.985/2015, 20.251/2018, 20.357/2019*.

567 *Oberndorfer*, Strukturprobleme im Raumplanungsrecht, Die Verwaltung 1972, 257 (271 f.).

This case law, originally established in relation to the law governing the planning of land use,[568] has become a landmark in other areas of judicial decision-making in which, due to the nature of the subject matter concerned, the legal basis for administrative action is based on a target-oriented approach.[569] In those cases, the basis on which the administrative authority made its decisions usually needs to be established in great detail. The Constitutional Court reviews whether this was adequately done prior to enactment of the regulation;[570] nevertheless, in proceedings for review of a regulation relating to electricity system charges, the Court found that it was not its duty to obtain expert opinions or verify expert statements in detail or weigh such opinions and statements against one another.[571] The Court takes a similar approach when reviewing regulations which require the authority enacting the regulation to strike a balance in decision-making on the basis of expert knowledge, as in the case of traffic restrictions in road traffic law.[572]

Based on the foregoing, a broader discretionary power can be generally assumed in the field of administration in cases in which regulatory provisions are required to be established on the basis of scientific or expert assessment. One particular context in which the Constitutional Court allowed an essentially wide margin to the regulator, i. e. the authority enacting regulations, was in relation to measures to contain the COVID-19 pandemic, e.g. prohibitions on entering and staying in certain places, leaving (one's own) home, or on engaging in certain activities, including gainful work:

The Constitutional Court found that the legislator, in a manner which in itself was constitutionally unobjectionable, conferred on the Federal Minister for Health a "discretion to decide on estimate and forecasts" on "whether and in how far restrictions on fundamental rights, including substantial ones, are deemed necessary to prevent the spread of COVID-19", with the administrative authority enacting the regulation having to base its decision on "a weighing of the relevant interests of the people concerned which are protected by fundamental rights. The administrative authority enacting the regulation must therefore with regard to the level and spread of COVID-19 and necessarily on the basis of forecasts assess in how far the envisaged prohibitions are measures that are appropriate [...], necessary [...] and adequate [...]." Nevertheless, the Constitutional Court requires the administrative authority enacting the regulation, in view of its "far-reaching authorization", "to show how it exercised its margin of decision-making in light of the statutory objectives by recording, during the adoption procedure, the information basis concerning the relevant legal criteria which is used as the basis for its decision to adopt the regulation and the statutory weighing of interests". Therefore, the Court reviews whether the foundations on which the decision to establish a COVID-19 measure was taken were adequately documented "in the files",[573] but does not scrutinize the administrative authority enacting the regulation's "information basis" from a scientific or technical perspective.

3. Are there factors to determine when and how your Court should defer (e.g. the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

568 Cf. VfSlg. 8280/1978 as well as e.g. VfSlg. 10.711/1985, 12.926/1991, 17.057/2003, 17.224/2004, 20,081/2016.

569 See e.g. *VfSlg. 17.348/2004, 18.453/2008, 19.700/2012* (in each case regarding energy law), *VfSlg. 20.399/2020* (regarding the epidemic law), *17.101/2004* (concerning the law on the organization of higher education institutions), *17.232/2004* (regarding hospital law), *14.256/1995* (concerning media law), *19.126/2010* (regarding road law) as well as *17.854/2006, 19.305/2011* (in each case concerning environmental protection law).

570 Cf. e.g. *VfSlg. 11.972/1989, 17.161/2004, 20.095/2016, 20.398/2020*.

571 *VfSlg. 17.517/2005*.

572 Cf. e.g. *VfSlg. 13.449/1993, 17.573/2005, 18.579/2008, 18.766/2009*; *VfGH 18.9.2014, V 38/2014*; *24.11.2016, V 147/2015; 11.12.2019, V 74/2019*; *14.12.2022, V 177/2022* and others; *28.2.2023, V 102/2022* and others.

573 *VfSlg. 20.399/2020*; as well e.g. *VfSlg. 20.458/2020, 20.521/2021*; *VfGH 29.6.2023, V 143/2021*.

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

a. The Constitutional Court must limit itself to the powers exhaustively conferred on it under the Constitution (cf. in particular Articles 137 to 145 of the Constitution).[574] Specifically as regards the power to review the constitutionality of laws,[575] it should be noted that the Constitutional Court rules exclusively on the unconstitutionality of formal laws adopted at the federal or regional level (Article 140 paragraph 1 of the Constitution). Publications to correct typographical errors in the official gazette[576] or "simple" parliamentary decisions such as those to ratify international treaties[577] or hold referendums or plebiscites are not deemed laws in this regard.[578] A similar distinction is made regarding the Constitutional Court's power to review the lawfulness of regulations adopted by administrative authorities in accordance with Article

139 paragraph 1 of the Constitution. For example, merely "internal" provisions (administrative regulations [*Verwaltungsverordnungen*] or decrees [*Erlässe*]) are not subject to review by the Court[579] unless they (exceptionally) have external effect and therefore (for considerations relating to the rule of law) are regarded as legal regulations within the meaning of Article 139 paragraph 1 of the Constitution.[580]

In accordance with Article 144 paragraph 1 of the Constitution, the Constitutional Court rules on judgments (and decisions) of the administrative courts "where complainants allege an infringement by the judgment of a constitutionally guaranteed right or infringement of their rights by reason of application of an unlawful regulation, an unlawful publication regarding the republication of the consolidated text of a law (international treaty), an unconstitutional law or an unlawful international treaty." The Constitutional Court's standard of review in the former case is in principle limited to dealing with shortcomings which extend into the constitutional sphere, while the Supreme Administrative Court (*Verwaltungsgerichtshof, VwGH*) has to deal with any unlawfulness.[581] In this respect, the Constitutional Court performs (depending on the nature of the fundamental right concerned,[582] but as a general rule) only a kind of "basic review", and reviews serious rights infringements only. However, the question of whether a decision of an administrative court "complies with the law in all

574 Cf. in more detail on the above *Grabenwarter*, Verfassungsgerichtshof, point 53 *ff.*

575 Öhlinger/Eberhard, Verfassungsrecht[13] (2022), point 984.

576 *VfSlg. 16.327/2001*.

577 *VfSlg. 18.576/2008*.

578 *VfSlg. 8370/1978*.

579 Cf. e.g. *VfSlg. 12.581/1990, 13.635/1993; 13.784/1994; 17.644/2005, 18.929/2009*.

580 Cf. e.g. *VfSlg. 8647/1979, 8648/1979, 8807/1980, 9416/1982, 10.170/1984, 10.607/1985, 10.728/1985, 11.467/1987, 12.286/1990, 19.230/2010, 20.472/2021*.

581 *Kneihs/Rohregger*, Art. 144 B-VG, in Korinek/Holoubek et al. (eds.), Österreichisches Bundesverfassungsrecht, 13. Lfg. (2017), point 5.

582 In the case of fundamental rights that need to be laid down in more detail in laws (*Ausführungsvorbehalt*), such as the freedom of association and assembly, the Constitutional Court found in its rulings that any breach of ordinary implementing laws constitutes an infringement of the respective constitutionally guaranteed right pursuant to Article 144 paragraph 1 of the Constitution. Beginning with its judgment in *VfSlg 19.818/2013* (right of assembly), the Constitutional Court has departed from this "detailed review" practice in the broad sense described above. In its more recent case law, only decisions which relate to core issues of freedom of assembly (e.g. the prohibition or dispersal of an assembly) or freedom of association (e.g. *VfSlg. 19.818/2013, 19.962/2015, 20.057/2016, 20.261/2018*) fall within its exclusive jurisdiction. Additionally, the Court no longer reviews whether the impugned decision "complies with the law in every respect" (cf. most recently *VfSlg. 19.994/2015, 20.117/2016*). The Supreme Administrative Court now has jurisdiction to carry out a "detailed review" in relation to questions of this kind (*VwGH 27.2.2018, Ra 2017/01/0105*).

respects" (a "detailed review") must (as a general rule) be reviewed by the Supreme Administrative Court.[583] Accordingly, the Constitutional Court usually refuses to deal with complaints concerning judgments of administrative courts which raise only "questions of ordinary statute law", i.e. which do not extend into the constitutional law.[584]

b. General factors that have a "limiting" effect on the powers of review and decision-making of the Constitutional Court[585] are the fundamentally case-specific nature of its case law[586] and the fact that the court is strictly bound by its "own" procedural law (the Constitutional Court Act [*VfGG*][587]) and secondarily (in accordance with Article 35 of the Constitutional Court Act), the Code of Civil Procedure (*Zivilprozessordnung*, *ZPO*)[588].

Because the Court is thus bound, (even) proceedings for the review of legal norms are structured as contentious proceedings in which the Court must decide only on what was dealt with in proceedings between the parties;[589] as a result of this, the Constitutional Court regards itself as bound by the concerns (raised in an application for review of legal norms or formulated by the Constitutional Court itself in a decision initiating *ex officio* proceedings for review of legal norms).[590] This means that, when reviewing laws and regulations of administrative authorities, the Court must assess only whether the legal norm challenged is unconstitutional or unlawful for the reasons set out in the application.[591] The Constitutional Court is prohibited from addressing any other concerns relating to a law or regulation (no matter if submitted by a party or raised by the Court itself). This also applies to concerns which are raised by the applicant in a later stage of proceedings.[592] Accordingly, the scope of repeal accorded to the Court depends on the application: In accordance with the first sentence of Article 140 paragraph 3 and the first sentence of Article 139 paragraph 3 of the Constitution, the Court may repeal a provision only to the extent explicitly requested.

Contrary to this, the Constitutional Court is not similarly bound in proceedings relating to complaints against judgments and decisions of the administrative courts (Article 144 of the Constitution). In this type of proceedings, the Constitutional Court examines *ex officio*, i.e. of its own motion, whether the judgment or decision challenged infringes any constitutionally guaranteed right or whether the

583 Cf. e.g. Öhlinger/Eberhard, Verfassungsrecht[13], point 728.

584 Cf. e.g. *VfGH 23.6.2022, E 3691/2021*; *13.12.2022, E 933/2022*; *15.3.2023, E 3778/2021* and others; *12.6.2023, E 96/2023*.

585 For more detail, cf. *Korinek*, Verfassungsgerichtsbarkeit 264 *ff*

586 Cf. e.g. *VfSlg. 17.121/2004, 17.547/2005, 19.657/2012, 20.035/2015, 20.135/2017, 20.341/2019*.

587 Constitutional Court Act (*Verfassungsgerichtshofgesetz*) 1953 – VfGG, BGBl. 85/1953 idF BGBl. I 88/2023. [60] Code of Civil Procedure (*Gesetz vom 1. August 1895, über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten*) (Zivilprozessordnung – ZPO), RGBl. 113/1895 idF BGBl. I 77/2023.

588 Code of Civil Procedure (*Gesetz vom 1. August 1895, über das gerichtliche Verfahren in bürgerlichen*
Rechtsstreitigkeiten) (Zivilprozessordnung – ZPO), RGBl. 113/1895 idF BGBl. I 77/2023

589 *Korinek*, Verfassungsgerichtsbarkeit 265 f.

590 For proceedings pursuant to Article 139 of the Constitution cf. e.g. VfSlg. 11.580/1987, 14.044/1995,
16.674/2002; for proceedings pursuant to Article 140 of the Constitution cf. e.g. VfSlg 12.691/1991, 13.471/1993,
14.895/1997, 16.824/2003, 20.356/2019 as well as VfGH 15.12.2021, G 233/2021 and others

591 For proceedings pursuant to Article 139 of the Constitution cf. e.g. *VfSlg. 15.644/1999, 17.222/2004*; for proceedings pursuant to Article 140 of the Constitution cf. e.g. *VfSlg 15.193/1998, 16.374/2001, 16.538/2002, 16.929/2003*.

592 E.g. *VfSlg. 9260/1981, 14.802/1997* with further references.

rights of the complainant have been infringed by applying an unlawful law or regulation.[593] Thus, the Constitutional Court is not bound by the complainant's submissions in proceedings in accordance with Article 144 of the Constitution.

c. The Constitutional Court accepts a formal limit to its powers of review in the case of national provisions which serve to implement EU law (directives and, where applicable, also decisions). The Court does not review such provisions in light of the (Austrian) Constitution if and to the extent that their substance is determined entirely by EU law, i.e. the national legislator has no leeway of implementation:

"Due to the primacy of EU law, including over national constitutional law (cf. *VfSlg. 16.050/2000*), the repeal of provisions implementing EU law is prohibited if EU law does not grant the national legislator any margin, i.e. the legislator cannot establish a substitute provision which complies with both EU law and national constitutional law".[594]

This case law is therefore relevant if a directive (or a decision of an EU institution) requires implementation of a specific content, but that content conflicts with national constitutional law.[595] If the Constitutional Court has doubts as to the lawfulness (particularly conformity with the Charter of Fundamental Rights of the European Union [CFR]) of the Union legislative act transposed, it submits a request for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU) to the CJEU.[596] This shows the "*remarkable relationship of dialogue*"[597] that the Constitutional Court has entered into with the CJEU.[598]

5. Are there cases where your Court deferred because there was a risk of judicial error?

No.

6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

Austria is a representative parliamentary democracy. The legislative bodies are, at the federal level, the National Council (*Nationalrat*) together with the Federal Council (*Bundesrat*) (Article 24 of the Constitution) and, at the regional level, the Regional Parliaments (*Landtage*) (Article 95 paragraph 1 of the Constitution).[599] The National Council is elected directly by the Austrian people (Article 26 of the Constitution) and the Regional Parliaments by the people of the individual regions (*Länder*) (Article 95 paragraph 1 of the Constitution) on the basis of proportional representation. Whenever the case law of the Constitutional Court accords these legislative bodies a margin of appreciation,

593 VfSlg. 7370/1974.

594 *VfSlg. 20.070/2016* (arrest warrant); see also *VfSlg. 18.642/2008*; as well as *VfSlg. 20.209/2017*. In its decision *VfSlg. 19.702/2012*, the Constitutional Court used these considerations in support of admissibility of its request to the Court of Justice of the European Union (CJEU) for a preliminary ruling (dated 28 November 2012) in connection with the provisions on data retention.

595 Cf. *Holoubek*, Doppelte Bindung und Richtlinienumsetzung, ZÖR 2018, 603 (607).

596 Cf. VfSlg. 19.702/2012, and *VfSlg. 19.892/2014* (data retention).

597 *Eberhard*, Judicial activism 149.

598 See *VfSlg 15.450/1999, 16.050/2000, 16.100/2001, 19.702/2012*.

599 *Grabenwarter/Frank*, B-VG (2020) Article 1, point 5.

the Court will (also) implicitly defer, invoking their democratic legitimacy.[600]

Nevertheless, it should be noted here that constitutional laws (and constitutional provisions contained in ordinary laws) can be adopted only if a qualified majority of members are present and by qualified majority of the votes cast (Article 44 paragraph 1 of the Constitution). In light of this, the Austrian legal literature[601] has made it clear that, politically speaking, the greater preservation accorded to questions of a substantive legal nature when they attain constitutional status serves to protect the qualified minority against the simple absolute majority. Therefore, it is even more important that the Constitutional Court – in particular for democratic reasons – does not neglect its duty to monitor compliance of justiciable legal norms with the Constitution. The Court would not do justice to its role in a democratic state under the rule of law if – for reasons of misconceived judicial self-restraint – it were to limit itself to the supervision of apolitical positions.

A key consideration when demarcating the role of the Constitutional Court vis-à-vis that of the parliamentary legislator is the fact that the Court can only act as what is referred to as a "negative legislator" in literature[602]. As such, it may not issue decisions that fill in where a statutory provision is lacking or draw the scope of repeal in such a way as to give the remainder of the law a (changed) meaning that appears to be no longer in line with the intention of the legislator.[603] Accordingly, the Constitutional Court repeatedly emphasizes in its rulings that it is not a "positive legislator". This understanding has (in particular) impacts in terms of the scope of (substantive) review of a legal norm and – in the event that the norm is found to be unlawful – the scope of repeal by the Constitutional Court.[604] Correspondingly, applications for review of legal norms are inadmissible if the scope of the challenged provisions is defined in such a way (in particular if it is drawn too narrowly) that the repeal sought "would mean an impermissible act of positive legislation by the Constitutional Court because repeal of the wording challenged would change the meaning of the law in a manner the legislator did not intend."[605]

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

As regards criminal law, the Constitutional Court accords the legislator a (generally wide) margin of appreciation,[606] including intrusive provisions, which typically occur in criminal law.[607]

In *VfSlg. 20.231/2017*, the Constitutional Court – departing from its established case law – widened

600 As regards the (wide) margin of appreciation accorded in agricultural law cf. e.g. *VfSlg. 20.032/2015*, in asylum law *VfSlg. 20.286/2018*, in land use planning law *VfSlg. 14.375/1995*, as well as *VfGH 18.9.2014, B 1311/2012*, in employment law for public employees *VfSlg. 16.176/2001, 17.452/2005, 20.073/2016*, and *VfGH 1.7.2022, G 17/2022*, in health law *VfSlg. 20.397/2020*, in civil status law *VfSlg. 20.258/2018*, in social insurance law *VfSlg. 16.007/2000*, as well as *VfGH 6.3.2023, G 296/2022*, in tax law *VfSlg. 19.598/2011, 19.933/2014* and in criminal law *VfSlg. 20.057/2016*.

601 *Korinek*, Verfassungsgerichtsbarkeit 274; *Oberndorfer*, Demokratie 126, with further references in each case.

602 Cf. e.g. *Bußjäger*, Art. 140 B-VG, in: Kahl/Khakzadeh/Schmid (eds.), Bundesverfassungsrecht, 2021, point 17; Öhlinger/Eberhard, Verfassungsrecht[13], point 1002; *Rohregger*, Art. 140 B-VG, in: Korinek/Holoubek et. al., Österreichisches Bundesverfassungsrecht, 6. Lfg., 2006, point 14 mwN; *Stöger* regarding OGH 31.8.2015, 6 Ob 147/15h, NZ 2015/113, 350.

603 Cf. *Oberndorfer/Wagner*, Gesetzgeberisches Unterlassen als Problem verfassungsgerichtlicher Kontrolle, Austrian National Report for the XIVth Congress of the Conference of the European Constitutional Courts (2008) 11 *f.*

604 Cf., most recently, e.g. *VfGH 6.12.2022, G 221/2022* (repeal of a provision of regional constitutional law for breach of the Federal Constitution).

605 Cf. e.g. *VfSlg. 12.465/1990*; *VfGH 27.6.2023, G 123/2023*.

606 *VfSlg. 19.960/2015, 20.057/2016, 20.156/2017*; *VfGH 18.6.2022, G 51/2022*.

607 *VfSlg. 19.831/2013, 20.213/2017, 20.240/2018*.

the margin accorded to the legislator in connection with the distinction provided for in Austrian law between judicial criminal law enforced by criminal courts (referred to as *gerichtliches Strafrecht*, *Justizstrafrecht* or *Kriminalstrafrecht*) and administrative penal law (*Verwaltungsstrafrecht*), which is enforced at first instance by administrative authorities. In *VfSlg. 20.231/2017*, the Constitutional Court ruled that – contrary to its previous case law – the amount of the penalty for an offence is not a suitable means for distinguishing judicial criminal law from administrative penal law. This grants the legislator a (greater) margin of appreciation when conferring jurisdiction to impose penalties (either on the ordinary courts or on administrative authorities).

Nevertheless, the granting of a margin of appreciation is not associated with any "general principle of deference". Recently, the Constitutional Court has reviewed and repealed as unconstitutional several provisions of criminal (procedural) law.[608] As mentioned above, the Court recently explicitly ruled in its review of the criminal prohibition of any form of assisted suicide that in that case the "margin of appreciation by the legislator is not wide at all".[609]

> **9.** There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

The powers of the Constitutional Court are exhaustively stipulated in the Constitution (cf. in particular Articles 137 to 145 of the Constitution). There is no specific jurisdiction relating to secret intelligence matters or matters attributable to state security. Questions connected with e.g. the State Protection Act (*Polizeiliches Staatsschutzgesetz*) are generally deemed justiciable.[610] The non-public deliberations of the Constitutional Court itself are secret. In addition, section 20 of the Constitutional Court Act (*VfGG*) provides that certain court files or parts thereof may be excluded from inspection.[611] Personal data of parties to proceedings brought before the Constitutional Court are anonymized prior to publication of the decision.

> **10.** Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

Generally, the Constitutional Court does not differentiate in its rulings based on the "cause" of any non-compliance of a legal norm with fundamental rights. According to the Court's case law, inadequacies in a legal norm which arise only over time (possibly due to a failure to introduce reforms) can also result in non-compliance of a norm with fundamental rights.[612]

However, a failure to act on the part of the legislator may – in light of the Court's decisionmaking powers, which permit it (only) to repeal formal laws that have been found to be unconstitutional (Article 140 of the Constitution) – occasionally escape review by the Constitutional Court.[613] The Constitutional Court itself is not permitted to pass legislation or compel the legislator to act, even "if the

608 Cf. *VfSlg. 20.082/2016* (exemption of former spouse from testifying), *VfSlg. 20.433/2020* (killing on demand); *VfGH 1.12.2022, G 53/2022* (mandatory pre-trial detention in case of a penalty of ten years or more of imprisonment).

609 *VfSlg. 20,433/2020*.

610 *VfSlg. 20.213/2017*.

611 *VfSlg 16.424/2002* with further references.

612 E.g. *VfSlg. 12.568/1990* (different retirement ages for men and women), *13.917/1994* (compulsory attendance of a home economics school for girls only), *19.936/2014* (medical staffing), *20.340/2019* (unlawfulness of an ordinance on the posting of printed works for lack of adaptation to changed conditions); *VfGH 14.12.2022, V 177/2022* and others with further references (unlawfulness of a speed limit ordinance due to a change in local conditions).

613 Cf. *Grabenwarter*, Verfassungsgerichtshof, point 74; *Oberndorfer/Wagner*, Gesetzgeberisches Unterlassen.

adoption of certain provisions would seem necessary to ensure compliance with the Constitution".[614] (A similar problem is that of "inactivity" by the administrative authority enacting the regulation in light of the jurisdiction of the Constitutional Court to review the lawfulness of regulations in accordance with Article 139 of the Constitution[615].)

II. The decision-maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

No. Differences (and commonalities) regarding the standard of review and degree of deference are related only to (the implementation in practice of) the various powers of the Constitutional Court (see Questions 2., 3. and 4. above).

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

a. In proceedings for review of the constitutionality of laws in accordance with Article 140 of the Constitution, the Constitutional Court does not merely check for possible substantive unconstitutionality, but also examines compliance with the procedural rules for enacting legal norms.[616] In doing so it must review every step in the legislative process.[617] Even violations of rules of procedure of a legislative body which are capable of affecting parliamentary policymaking result in the law being unconstitutional.[618] Any measures undertaken by bodies involved in the legislative process of their own volition for the purpose of decision-making are not subject to the Constitutional Court's powers of review.[619] Likewise, parliamentary discussion of the meaning of proposed legislation is of no legal relevance for the purposes of review of legal norms. Generally speaking, the "quality" of the parliamentary procedure is not an independent criterion for assessing the constitutionality of a law.

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614 *Rohregger*, Article 140 B-VG, point 14.

615 Cf. recently *VfGH 5.12.2022, E 394/2021* (nitrate regulation); for a possible solution to the problem in EU law contexts see *Herbst/Mayrhofer*, Zur Untätigkeit des Verordnungsgebers bei Umsetzung unionsrechtlicher Verpflichtungen, in Wagner et al. (eds.), Liber Amicorum anlässlich des 60. Geburtstages von Wilhelm Bergthaler (forthcoming).

616 *Rohregger*, Article 140 B-VG, in Korinek/Holoubek et al., Österreichisches Bundesverfassungsrecht, 6. Lfg.
(2006), point 75.

617 Cf. e.g. *VfSlg. 4497/1963, 5996/1969, 8466/1978, 16.152/2001, 16.515/2001, 16,848/2003*.

618 *VfSlg 16.151/2001*.

619 *Rohregger*, Article 140 B-VG, point 78.

One specific exception to this are "cooperative" procedures, including in particular procedures regarded as necessary for adopting the Fiscal Equalization Act (*Finanzausgleichsgesetz*) (see 2.c. above).

Existing case law does not require the legislator to justify a measure. The considerations of the legislator included in the preparatory documents (regarding compatibility with fundamental rights, for instance) may of course be of interest to the Court,[620] but they do not prevent the Court from finding an abstract justification for a provision.

b. In proceedings for review of the lawfulness of regulations in accordance with Article 139 of the Constitution, and in particular of regulations which are target-oriented as described above, the Constitutional Court also reviews compliance with the procedure prescribed by statute for determining an adequate basis for decision-making; it must be possible for the Constitutional Court to assess whether a regulation also meets the pertinent statutory objectives (see 2.d. above).[621] In connection with regulations establishing measures to contain the COVID-19 pandemic, the Constitutional Court, as mentioned (2.d. above), requires these circumstances to be documented in the files. A breach by the authority of this documentation requirement renders the regulation unlawful without the Constitutional Court having to scrutinize its actual content.[622]

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

Democratic legitimacy must be distinguished from the legal compliance of the decisions, the existence of which, insofar as they are decisions in the form of formal federal or regional laws (Article 140 paragraph 1 of the Constitution) or in the form of regulations (Article 139 paragraph 1 of the Constitution), is subject to review by the Constitutional Court. In contrast, other democratically legitimized political decisions are not subject to constitutional court review.[623]

III. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

The Constitutional Court is prohibited by the Constitution from giving unconditional weight to the definition of a right or application of that definition to the facts given by e.g. the Federal Government. Nevertheless, the observations of the Federal Government and the statements of other parties to proceedings before the Constitutional Court may be of interest in review proceedings.[624] Furthermore, the Constitutional Court may endorse observations submitted in the proceedings.[625]

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

The degree of deference may vary depending on the structural nature of the fundamental right concerned and the nature and substance of interference with the right.[626] A good example of this, as regards proceedings for review of the constitutionality of laws, is the fundamental right to engage in

620 Cf. *VfGH 1.12.2022, G 53/2022*.

621 *VfSlg. 8280/1978*; cf. as well e.g. *VfSlg. 16.032/2000, 17.015/2003, 20.474/2021*.

622 Cf. *VfSlg. 20.399/2020, 20.521/2021*; *VfGH 14.6.2022, V 53/2022* (breach of documentation requirement) and conversely *VfSlg. 20.458/2021*; *VfGH 13.6.2023, V 161/2022; 29.6.2023, V 143/2021* (sufficient documentation).

623 *Korinek*, Verfassungsgerichtsbarkeit 257 with further references; see above 12. bis 15. a.

624 Cf. *VfGH 16.6.2023, G 85/2021, V 116/2021*; *13.6.2023, V 161/2022*; *5.10.2022, G 141/2022*; *29.9.2022, V 110/2022*; cf. also Questions 12 and 14.

625 Cf. *VfGH 28.6.2023, G 299/2022* and others, *V 20/2023* and others; *VfSlg. 20.412/2020, 17.967/2006, 14.260/1995*.

626 Cf. e.g. Öhlinger/Eberhard, Verfassungsrecht[13], point 734.

gainful activity (Article 6 of the Basic State Law [*StGG*]), where the Constitutional Court accords the legislator a wider margin with regard to provisions governing exercise of a profession or occupation in general than those relating to entry into a profession or occupation (see 2.c. above).

When examining whether a judgment (or decision) of an administrative court infringes a constitutionally guaranteed right (Article 144 of the Constitution), a general distinction can be drawn between a "basic review" as the rule, and a "detailed review" as the exception. The Constitutional Court carries out a "detailed review" in the case of fundamental rights that need to be specified in more detail by law (*Ausführungsvorbehalt*) (see point 54 above). The Court also tends to carry out a "detailed review" in cases concerning fundamental procedural rights.[627]

In the case of the fundamental right to protection of personal freedom, the Court carries out a "basic review" which, due to existing detailed constitutional provisions relating to this fundamental right (in the Federal Constitutional Law of 29. November 1988 on the Protection of Personal Freedom [*Bundesverfassungsgesetz vom 29. November 1988* über *den Schutz der persönlichen Freiheit*]) frequently amounts to a "detailed review".[628] As already mentioned (see 2.c.), the spectrum of deference may rather depend on the subject matter at hand and less on fundamental rights' peculiarities.

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

The Constitutional Court determines whether a provision can be interpreted in various ways on a case-by-case basis. When determining the meaning of the law, all available methods of interpretation must be exhausted. Only if, after all methods of interpretation have been applied in a specific case, the meaning of a provision still remains unclear, are the rule-of-law requirements violated.[629] E.g. in *VfSlg. 12.420/1990*, the Constitutional Court justified the repeal of a provision of a regulation granting unemployment assistance as unlawful as follows: "Only with subtle expertise, extraordinary methodological skills and a certain desire to solve mental exercises can it be understood at all what orders are to be made here."

The *acte clair* doctrine as such is relevant when reviewing the constitutionality of laws (only) if the conflict between an Austrian provision and a (directly applicable) provision of EU law is obvious. A possible (but not inevitable) consequence is that the national provision is not applicable (*präjudiziell*) for the purposes of Article 140 paragraph 1 of the Constitution and so cannot undergo review of constitutionality.[630]

20. What is the intensity review of your Court in case of the legitimate aim test?

When reviewing whether a provision serves the public interest, the Constitutional Court usually applies a test of reasonableness only.[631] The Court grants the legislative territorial entities a relatively wide margin of appreciation in this regard. In particular, the Constitutional Court is not required to assess whether pursuit of a particular objective is appropriate on economic or social policy grounds. It can oppose the legislator only if the legislator pursues objectives which cannot be regarded as being in the public interest under any circumstances.[632]

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627 *VfSlg. 19.960/2015, 19.970/2015, 20.183/2017, 20.271/2018, 20.314/2019, 20.454/2021*; *VfGH 24.11.2017, E 2845/2017*; *6.10.2021, E 3811/2020* and others.

628 Öhlinger/Eberhard, Verfassungsrecht[13], point 855; *VfSlg. 13.893/1994, 13.914/1994, 17.891/2006, 18.058/2007, 18.081/2007, 19.968/2015*.

629 *VfSlg. 8395/1978, 11.639/1988, 14.644/1996, 15.447/1999, 16.137/2001, 20.070/2016*.

630 Cf. *VfSlg. 15.368/1998, 16.293/2001*; *VfGH 12.12.2018, G 104/2018* and others.; on review proceedings of regulations in accordance with Article 139 paragraph 1 of the Constitution cf. *VfSlg. 17.560/2005*.

631 Öhlinger/Eberhard, Verfassungsrecht[13], point 716; cf. also the responses to Questions 4., 12. and 14.

632 *VfSlg. 9911/1983, 12.094/1989, 19.933/2014, 20.285/2018*.

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (i.e. suitability, necessity, and proportionality in the narrower sense)?

22. Does your Court go through every applicable limb of the proportionality test?

The Constitutional Court applies all elements of the "classic" proportionality test shaped by the case law of the German Federal Constitutional Court and by the ECtHR. A kind of turning point in the case law of the Austrian Constitutional Court came about with the judgment in *VfSlg. 10.179/1984* concerning the Scrap Metal Act (*Schrottlenkungsgesetz*), which marked the beginning of the application of the proportionality test by the Constitutional Court.[633] In accordance with the case law that began with this judgment, restrictions on fundamental rights are lawful only if they serve the public interest, are suitable and necessary for the achievement of an objective in the public interest, and if there is a reasonable relationship between the public interest and the curtailed fundamental right aspect.[634] The legal wording developed by the Constitutional Court in connection with the proportionality test and used in the case law reflects those stages, but is specific to the fundamental right concerned. As regards freedom of expression (Article 10 ECHR), to give an example connected with a right as defined in the European Convention of Human Rights (ECHR), the Constitutional Court uses the following wording:

"A constitutionally justified interference with freedom of expression must therefore – in line with rulings of the European Court of Human Rights (see e.g. ECtHR 26.4.1979, *Sunday Times v. United Kingdom*, EuGRZ 1979, 390; 25.3.1985, *Barthold v. Germany*, EuGRZ 1985, 173) – be prescribed by law, pursue one or more of the legitimate aims specified in Article 10 (2) ECHR and be 'necessary in a democratic society' for achieving this aim or these aims".[635]

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

No. However, the Constitutional Court does not always align its reasoning with the "classic" scheme and sometimes "skips" individual stages of the test.[636] Occasionally, it makes a general assessment that a provision is proportional.[637]

24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

28. Has your Court have grown more deferential over time?

"In comparison with other European countries, the ECHR and ECtHR case law are of utmost significance in Austria".[638] This is due firstly to the position of the ECHR in the Austrian legal system: as part

633 Cf. *Grabenwarter*, Verfassungsgerichtshof, point 118.

634 On public interest cf. e.g. *VfSlg. 12.094/1989, 20.032.2015, 20.089/2016, 20.268/2018*; on suitability cf. e.g. *VfSlg. 13.725/1994, 20.202/2017*; *VfGH 27.6.2023, E 1517/2022*; on necessity cf. e.g. *VfSlg. 17.817/2006, 19.722/2012, 20.073/2016, 20.475/2021*; on adequacy cf. e.g. *VfSlg. 11.853/1988, 18.115/2007, 20.398/2020*.

635 *VfSlg. 20.014/2015*; *VfGH 24.2.2021, E 607/2021*; *27.9.2021, E 4337/2020*; *8.3.2022, E 3120/2021*; *19.9.2022, V 183/2021*.

636 See Öhlinger/Eberhard, Verfassungsrecht[13], point 717; cf. e.g. *VfSlg. 19.624/2012, 20.181/2017, 20.261/2017*.

637 Cf. e.g. *VfSlg. 13.330/1993, 13.659/1993*.

638 *Grabenwarter*, Verfassungsgerichtshof, point 123; for more detail see *Graben-*

of constitutional law, it is applied as a direct standard of review by the Constitutional Court.[639111] The rights enshrined in the ECHR can be asserted before the Constitutional Court as constitutionally guaranteed rights under the Constitution.[640] In addition, the case law of the Court demonstrates a high degree of willingness to take account the jurisprudence of the European Court of Human Rights.[641]

In the late 1980s, the Constitutional Court began to adopt the concept of margin of appreciation developed in the case law of the bodies of the ECHR as *Gestaltungsspielraum*[642] and continues to use it today.[643] The Constitutional Court has repeatedly emphasized that the Austrian *rechtspolitischer Gestaltungsspielraum* should be understood as being synonymous with "margin of appreciation".[644] It sometimes extends the margin to national fundamental rights.[645] This may appear to be obvious given the constitutional status of the ECHR in Austria, but the different approaches of the doctrines involved mean that this is by no means self-evident, because *rechtspolitischer Gestaltungsspielraum* depends on the extent to which the legislator is bound by the Constitution, while the margin of appreciation is primarily connected to the allocation of powers between the ECtHR and the bodies of the Convention state.[646]

The judicial review carried out by the Constitutional Court has become much more intense over recent decades, particularly as regards fundamental rights jurisprudence.[647] This is also due to factors including the influence of the fundamental rights set out in the ECHR (and its protocols) and the related case law of the ECtHR.[648] In Austria, therefore, establishment of the test of proportionality in the case law of the Constitutional Court, which is closely interwoven with the jurisprudence of the European Court of Human Rights in Strasbourg, does not coincide with the development of the principle of judicial deference; rather, it is a key element of a development in jurisprudence that has been leading away from a restrictive form of judicial self-restraint since the early 1980s.[649] In only 113 cases between 1947, when the Constitutional Court resumed its activities, and the end of 1979 did the Court find in proceedings reviewing the constitutionality of laws that a fundamental right had been infringed.[650] Since then, i.e. in the last 42 years, the Constitutional Court has found fundamental rights infringements in approximately 700 cases.

It is worth mentioning in this connection that the Constitutional Court – finally – put an end to the practice of the constitutional legislator (which had continued well into the 1990s) of reenacting

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warter, Europäische Grundrechte in der Rechtsprechung des Verfassungsgerichtshofes, JRP 2012, 298 (298 *ff.*).

639 *Grabenwarter*, Verfassungsgerichtshof, point 123.

640 *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention[7] (2021) § 3 point 2.

641 Cf. recently e.g. *VfSlg. 20.394/2020, 20.509/2021*; *VfGH 7.12.2022, E 2303/2021*; *14.12.2022, E 1487/2022* and others; *29.6.2023, V 143/2023*.

642 *Dopplinger/Mörth*, Gestaltungsspielraum 241, 244.

643 Cf. *VfSlg. 12.103/1989, 19.904/2014, 20.258/2018, 20.286/2018, 20.334/2019*.

644 *VfSlg 20.179/2017, 20.180/2017*; cf. *VfSlg 16.911/2003, 20.089/2016*.

645 Cf. *VfSlg. 20.089/2016, 20.179/2017, 20,180/2017*.

646 Cf. *Dopplinger/Mörth*, Gestaltungsspielraum 261.

647 Cf. in particular the current findings by *Eberhard*, Judicial activism 150.

648 For the first few decades cf. in particular *Novak*, Verhältnismäßigkeitsgebot und Grundrechtsschutz, Festschrift für Günther Winkler (1989) 39 *ff.*

649 Cf. *Eberhard*, Judicial activism 148 *f.*; *Rohregger*, Article 140 B-VG, point 7.

650 Öhlinger, Die Grundrechte in Österreich, EuGRZ 1982, 216 (244). *Korinek* stated as late as 1980 that the Constitutional Court was regularly criticized in the literature for being too reserved, especially with regard to substantive questions of constitutional interpretation, and thus for practicing a pronounced judicial self-restraint; in its most recent case law, however, examples of a more substantive emphasis on constitutional jurisdiction were evident (Verfassungsgerichtsbarkeit 262).

as constitutional provisions enshrined in ordinary laws which had been ruled unconstitutional by the Constitutional Court.[651] In a decision on a procurement law provision which had been "immunized", and thus exempted from review of the Constitutional Court in this way,[652] the Court found this constitutional provision, specifically its adoption without a mandatory referendum in this case of a so-called "overall amendment" of the Constitution, to be in breach of the fundamental rule of law principle of the Federal Constitution.[653] Since this judgment, it has been established that the Constitutional Court may review not only ordinary laws, but also (federal) constitutional law and, if it has been adopted in violation of the constitution, may repeal it as unconstitutional.[654]

The transformation in fundamental rights jurisprudence, which had begun in 1958 with Austria's accession to the ECHR, intensified with Austria's accession to the European Union in 1995 and the "dialogue" between the Constitutional Court and the CJEU initiated at that point and was later broadened and intensified when the CFR attained the status of primary law.[655] One milestone in this development, which contributed to further focus on the proportionality test at the expense of the margin of appreciation,[656] was the recognition of CFR rights as constitutionally guaranteed rights and thus a standard of review (also) for the Constitutional Court.[657] The principle of proportionality, which is explicitly provided for in Article 52 paragraph 1 CFR, plays a key role in the interpretation of the Charter rights, and the Constitutional Court uses the case law of the ECtHR as an aid to interpretation of those rights. As clearly demonstrated in *VfSlg. 19.632/2012*, the Constitutional Court uses the principle of proportionality as kind of a gateway for the case law of the ECtHR by reference to which (in the specific case) it reviewed the proportionality of restrictions on the conduct of oral hearings.[658]

At the same time, however, the increasing recognition and differentiation of a "division of responsibilities" of the courts in the multilevel constitutionalism in Europe also represents a reverse trend, described elsewhere in this report (above 19.). In the first few years following EU accession, the Constitutional Court regarded the national legislator as being subject to a comprehensive "*twofold tie*" – to EU law on the one hand and to Austrian constitutional law on the other,[659] a situation referred to in the literature even as a "clear case of judicial activism".[660] The Court has since modified this twofold-tie principle to a significant extent and reduced the relevance of the Constitution and thus its role in cases in which a provision of EU law fully determines the meaning of the national provision implementing it.

26. Had the ECtHR condemned your State because of the deference given by your Court in a

651 Cf. *Grabenwarter*, Verfassungsgerichtshof, point 102.

652 The constitutional provision specified in section 126a of the Federal Procurement Act (*Bundesvergabegesetz*), Federal Law Gazette (*BGBl.*) I 56/1997 as amended by Federal Law Gazette I 125/2000, declared all provisions of regional law concerning legal protection bodies in procurement law in force on 1 January 2001 to be "not contrary to the Federal Constitution".

653 *VfSlg. 16.327/2001*; cf. also *VfSlg. 15.888/2000*.

654 On the federal unconstitutionality of regional constitutional law cf. *VfGH 6.12.2022, G 221/2022*.

655 *Eberhard*, Judicial activism 149; *Grabenwarter*, Verfassungsgerichtshof, point 125 *ff*.

656 *Rohregger*, Article 140 B-VG, point 7.

657 Essentially *VfSlg. 19.632/2012*; see also *VfSlg. 20.394/2020* as well as *VfGH, 28.2.2023, G 241/2022*; *15.3.2023, E 4001/2021*.

658 Cf. *Grabenwarter*, Wirkungen eines Urteils des Europäischen Gerichtshofs für Menschenrechte – am Beispiel des Falls M. gegen Deutschland, Juristen Zeitung 2010, 857 *ff*, re the similar approach taken by the German Federal Constitutional Court when interpreting the fundamental rights set out in the Basic Law.

659 VfSlg. 14.863/1997, 17.967/2006, 18.642/2008, 19.529/2011.

660 *Eberhard*, Judicial activism 149.

specific case, a deference that has made it an ineffective remedy?

No. In its judgment of 7 December 2006, application no. 37301/03, *Hauser-Sporn v. Austria*, the ECtHR found, in essence, that contrary to Article 13 ECHR, the applicant had no domestic remedy in administrative penal proceedings, including a complaint to the Constitutional Court under Article 144 of the Constitution, whereby he could effectively enforce his right to a hearing within a reasonable time. The Constitutional Court's refusal to deal with the complaint did not result from "judicial deference", however.[661]

IV. **Other peculiarities**

29. Does the deferential attitude depend on the case load of your Court?

No.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

See Question 11.

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

In proceedings for review of rulings by an administrative court (Article 144 of the Constitution), the Constitutional Court must *ex officio* respond to concerns relating to a provision which arise in the course of those proceedings, even if the provision concerned was not challenged by the complainant. In particular procedural situations, including in proceedings for review of a legal norm initiated on application, the Court may be placed in the position of having to review *ex officio* a provision which has not been challenged.[662]

661 Cf. e.g. *VfSlg. 18.642/2009, 19.702/2012, 20.070/2016, 20.209/2017, 20.522/2021* as well as *VfGH 14.12.2022, G 287/2022* and others.

662 Cf. e.g. *VfSlg. 7382/1974, 14.709/1996*.

Verfassungsgerichtshof der Republik Österreich

Formen und Grenzen richterlicher Selbstbeschränkung in der Verfassungsgerichtsbarkeit

Univ.-Prof. Dr. Michael Mayrhofer, Mitglied des Österreichischen *Verfassungsgerichtshofes*

I. Nicht justiziable Angelegenheiten und Intensität richterlicher Selbstbeschränkung

1. Was versteht man in Ihrem Land unter „richterlicher Selbstbeschränkung"?

Der Begriff „richterliche Selbstbeschränkung" selbst findet sich in der Rechtsprechung des VfGH nicht. Dem Wesensgehalt richterlicher Selbstbeschränkung (*judicial self restraint*) gegenüber dem Gesetzgeber,[663] entspricht (heute) jedoch am ehesten die in der Judikatur des VfGH geläufige Figur des „*rechtspolitischen Gestaltungsspielraumes*", wenngleich (gerade) deren schrittweise Herausbildung ab Ende der 1970er-Jahre die Abkehr von der bis dahin starken Zurückhaltung der Grundrechtsjudikatur des VfGH gegenüber dem Gesetzgeber[664] bedeutete.[665]

Als rechtspolitischer Gestaltungsspielraum wird die einer gesetzgebenden Gebietskörperschaft innerhalb der verfassungsrechtlichen Grenzen zukommende Gestaltungshoheit und eine daraus resultierende zurückgenommene gerichtliche Kontrollintensität bezeichnet.[666] Erste Konturen gab ihm der VfGH in einem Erkenntnis aus dem Jahr 1978:[667] Dem Gesetzgeber stehe – freilich nicht unbegrenzt – rechtspolitische Gestaltungsfreiheit zu. Diese Gestaltungsfreiheit bestehe sowohl in Ansehung der angestrebten Ziele als auch bezüglich der Auswahl der zur Zielerreichung einzusetzenden Mittel. Grundsätzlich stehe es dem Gesetzgeber frei, zu entscheiden, welche Instrumente er zur Zielerreichung geeignet erachtet und welches unter mehreren möglichen Mitteln er auswählt und einsetzt. Der VfGH könne dem Gesetzgeber nur dann entgegentreten, wenn er bei der Bestimmung der einzusetzenden Mittel die ihm von Verfassungs wegen gesetzten Schranken überschreitet.

Die Figur des rechtspolitischen Gestaltungsspielraums ist zwar im Kontext des Gleichheitsgrundsatzes (Art. 7 Abs. 1 B-VG) entwickelt worden; sie ist mittlerweile gleichwohl für die Grundrechtsjudikatur

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663 Dieser Bericht behandelt in erster Linie die Zuständigkeiten des Verfassungsgerichtshofes (VfGH) zur Kontrolle von Gesetzen (Art. 140 Bundes-Verfassungsgesetz – B-VG) und von generell-abstrakten Rechtsakten von Verwaltungsbehörden (Verordnungen) (Art. 139 B-VG). Lediglich ausnahmsweise wird auf die Zuständigkeit des VfGH zur „Sonderverwaltungsgerichtsbarkeit", dh. zur Entscheidung über Beschwerde gegen Erkenntnisse und Beschlüsse der Verwaltungsgerichte (Art. 144 B-VG) eingegangen. Die sonstigen Zuständigkeiten des VfGH bleiben außer Betracht.

664 Vgl. dazu *Heller*, Judical self restraint in der Rechtsprechung des Supreme Court und des Verfassungsgerichtshofes, ZÖR 1988, 89 (insb. 113 ff.); *Eberhard*, Judicial activism und judicial self restraint in der Judikatur des VfGH, in: Bernat/Grabenwarter et al. (Hrsg.), Festschrift Christian Kopetzki zum 65. Geburtstag (2019) 141 (143 ff.); siehe dazu auch unten 23 bis 25.

665 Vgl. *Dopplinger/Mörth*, Rechtspolitischer Gestaltungsspielraum des Gesetzgebers und Margin of Appreciation: zwei Seiten einer Medaille?, JRP 2022, 240 (242 ff.).

666 Vgl. *Dopplinger/Mörth*, Gestaltungsspielraum 242, 261.

667 VfSlg. 8457/1978.

des VfGH insgesamt prägend[668] und hat im Laufe der Zeit eine „*Dynamisierung*" erfahren,[669] die unterschiedliche Stufen der verfassungsgerichtlichen Kontrolldichte (mit) hervorgebracht hat (dazu 2.).

> **2.** Kennt Ihr Gerichtshof verschiedene Stufen der Kontrolldichte? Gibt es „unantastbare" Bereiche oder Bereiche, in denen keine rechtliche Verantwortlichkeit besteht, oder Fragen, die als nicht justiziabel gelten (z.B. kontroverse moralische Fragen, politische Empfindlichkeiten, Kontroversen in der Gesellschaft, Verteilung knapper Mittel, erhebliche finanzielle Auswirkungen für den öffentlichen Haushalt usw.)?

a. Grundsätzlich gelten alle Teile der Verfassung als justiziabel. Damit korrespondiert die „*eminent demokratische Funktion*" des VfGH, die Bindung des einfachen Gesetzgebers an einen „*Akt erhöhter demokratischer Legitimation*", also an die Verfassung, zu effektuieren und zu kontrollieren.[670] Eine Beschränkung der Wahrnehmung der Funktionen des VfGH unter Hinweis auf die „*politische Dimension eines Verfassungsstreits*" kann der Rechtsprechung nicht entnommen werden.[671] Der VfGH zieht sich – vor dem Hintergrund seiner demokratischen und rechtsstaatlichen Funktion – in seiner Rechtsprechung nicht auf die „Überwachung *unpolitischer Positionen*" zurück und spart demnach „*politisch relevante Fragen*" nicht aus seiner Kontrolle aus.[672] Die Judikatur des Gerichtshofes in den letzten Jahren behandelte demnach

(auch) kontroverse moralische Fragen, etwa betreffend die Reproduktionsmedizin,[673] die Hilfe Dritter bei der Mitwirkung am Selbstmord[674] oder digitale Technologien (E-Voting,[675] Vorratsdatenspeicherung,[676] staatliche Überwachung mittels Trojanern[677]), familienrechtlich relevante Fragen, etwa betreffend die gleichgeschlechtliche Ehe,[678] die Eintragung eines „dritten Geschlechts" in das Personenstandsregister[679] oder die Obsorge,[680] sowie Fragen von erheblichen finanziellen Auswirkungen auf den öffentlichen Haushalt, wie sie sich etwa im Zusammenhang mit den COVID-19-Finanzhilfen stellen.[681]

668 Vgl. zur Entwicklung der Rsp. *Korinek*, Entwicklungstendenzen in den Grundrechtsjudikatur des Verfassungsgerichtshofes (1991); *Dopplinger/Mörth*, Gestaltungsspielraum 243 ff; als Beispiele aus der Rsp. können VfSlg. 12.103/1989, 14.301/1995 und 20.483/2021, 20.509/2021 (zum rechtspolitischen Gestaltungsspielraum hinsichtlich Art. 8 EMRK), 14.263/1995, 20.0523/2021 und VfGH 20.6.2022, G 279/2021 (rechtspolitischer Gestaltungsspielraum im Kontext mit Art. 1 1. ZPEMRK) sowie 14.260/1995, 16.911/2003 und VfGH 8.3.2022, E 3120/2021 (jeweils bezogen auf den rechtspolitischen Gestaltungsspielraum iVm Art. 10 EMRK) genannt werden.

669 *Dopplinger/Mörth*, Gestaltungsspielraum 245.

670 *Oberndorfer*, Demokratie und Verfassungsgerichtsbarkeit in Österreich, in: Holoubek et al. (Hrsg.), Dimensionen des modernen Verfassungsstaates, Symposium zum 60. Geburtstag von Karl Korinek (2002), 105 (106 f.); idS bereits *Korinek*, Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen, in: Korinek, Grundrechte und Verfassungsgerichtsbarkeit (2000), 243 (274).

671 Vgl. *Oberndorfer*, Demokratie 106; jüngst *Eberhard*, Judicical activism 150: „Der VfGH sei „*– oft auch gegen den Wortlaut – gewillt* […]*, klare gesetzliche Wertungen zu korrigieren, ein wohl eindeutiges Beispiel für judicial activism*"; ähnlich bereits *Berka*, Dir Grundrechte. Grundfreiheiten und Menschenrechte in Österreich (1999) Rz.

672 Vgl. *Korinek*, Verfassungsgerichtsbarkeit 274; *Oberndorfer*, Demokratie 106 f.

673 VfSlg. 15.632/1999, 19.824/2013, und VfGH 30.6.2022, G 230/2021.

674 VfSlg. 20.433/2020.

675 VfSlg. 19.592/2011.

676 VfSlg. 19.702/2012.

677 VfSlg. 20.356/2019.

678 VfSlg. 20.225/2017.

679 VfSlg. 20.258/2018.

680 VfGH 9.3.2023, G 223/2022.

681 Das Verfahren dazu ist im Zeitpunkt der Verfassung dieses Beitrags beim VfGH zur Zahl G 265/2022 anhängig. [20] *Grabenwarter*, § 102. Der österreichische Verfassungs-

b. Der Prüfungsmaßstab und mit ihm die Kontrolldichte variiert zunächst je nach Zuständigkeit des VfGH (dazu noch 3.) und hängt wesentlich auch vom betroffenen Teil des Verfassungsrechts ab, zumal die Rechtsprechung des VfGH bei der Auslegung des Verfassungsrechts teils erhebliche Unterschiede aufweist.[682] Wenn im Folgenden insbesondere vom rechtspolitischen Gestaltungsspielraum die Rede ist, dann wird damit die Grundrechtsjudikatur in den Fokus genommen. Zu anderen Bereichen des Verfassungsrechts gesteht der VfGH dem Gesetzgeber keinen vergleichbaren Spielraum zu. So erfährt etwa das rechtsstaatliche Prinzip der Verfassung eine zunehmende Konkretisierung, die von der Frage, unter welchen rechtsstaatlichen Voraussetzungen vollständig automatisierte individuelle Verwaltungsakte (Bescheide) statthaft sind,[683] bis zum rechtsstaatlich gebotenen Rechtsschutz gegen behördliche Warnungen (namentlich im Finanzmarktrecht)[684] reichen.[685] Engmaschige verfassungsrechtliche Vorgaben leitet die Rechtsprechung auch beispielsweise aus den Wahlrechtsgrundsätzen ab,[686] nimmt dem Gesetzgeber dabei aber nicht jeden Spielraum.[687]

c. Die Weite des rechtspolitischen Gestaltungsspielraums divergiert. Der Verfassungsgerichtshof gesteht dem Gesetzgeber in bestimmten Sachmaterien (nicht bloß einen Gestaltungsspielraum, sondern) ausdrücklich einen „*weiten Gestaltungsspielraum*" zu, so beispielsweise im Dienst-, Besoldungs- und Pensionsrecht,[688] bei der Regelung des Finanzausgleiches zwischen den Gebietskörperschaften,[689] im Abgaben-[690] und im Beihilfenrecht[691] sowie auch in privatrechtlichen Materien (zB bisweilen im Familien- und Erbrecht[692] sowie im Mietrecht[693]). Die Gründe hiefür sind

gerichtshof, in Bogdandy/Grabenwarter/Huber (Hrsg.), Handbuch Ius Publicum Europaeum. Band IV, Rz. 69 f.

682 Grabenwarter, § 102. Der österreichische Verfassungsgerichtshof, in Bogdandy/Grabenwarter/Huber (Hrsg.),
Handbuch Ius Publicum Europaeum. Band IV, Rz. 69 f.

683 VfSlg. 11.590/1987 (Computerbescheid); dazu jüngst *Mayrhofer* in: Mayrhofer/Parycek, Digitalisierung des Rechts – Herausforderungen und Voraussetzungen, 21. ÖJT Band IV/1, 77 ff.

684 VfSlg. 20.238/2018 (Warnpflichten der Finanzmarktaufsichtsbehörde).

685 Vgl. ferner zB VfSlg. 12.683/1991 (vorzeitige Vollstreckbarkeit von Dienstnehmeransprüchen), 16.772/2002 (Rechtsmittelausschluss gegen Auslieferungen), 17.018/2003 (Verordnungsermächtigung zur Verlängerung von Anpassungsfristen von Deponien), 20.239/2018 (genereller Ausschluss der aufschiebenden Wirkung bei Strafen), 20.345/2019 (ORF Übertragungsrechte).

686 Vgl. VfSlg. 18.215/2007, 18.551/2008, 20.306/2019 (allgemeines Wahlrecht); VfSlg. 19.982/2015, 15.616/1999 (gleiches Wahlrecht); VfSlg. 10.412/1985, 14.440/1996, 19.893/2014, 20.071/2016 (persönliches
Wahlrecht); VfSlg. 13.839/1994, 18.603/2008, 20.071/2016, 20.128/2016, 20.273/2018; VfGH 15.6.2023,
W I 4/2023 (freies Wahlrecht); VfSlg. 8694/1979, 10.412/1985, 19.893/2014, 20.071/2016, 20.242/2018 (geheimes Wahlrecht); VfSlg. 8321/1978, 8700/1979, 19.782/2013, 19.820/2013, 20.417/2020, 20.439/2021; VfGH 1.3.2023, W I 12/2022; 15.6.2023, W I 1/2023 (Verhältniswahlrecht).

687 Vgl. zum Spielraum des Gesetzgebers bei der Ausgestaltung des Verhältniswahlrechts VfGH 1.3.2023, W I 12/2022; 15.6.2023, W I 1/2023.

688 Vgl. zB VfSlg. 9607/1983; VfGH 17.6.2022, G 397/2021; 1.7.2022, G 17/2022.

689 Vgl. zB VfSlg. 12.505/1990, 19.032/2010, 19.562/2011, 19.984/2015; VfGH 26.9.2014, B 1504/2013 ua.; 23.2.2015, G 220/2015.

690 Vgl. zB VfSlg. 19.411/2011, 19.984/2015, 20.287/2018, 20.462/2020, 20.518/2021.

691 Vgl. zB VfSlg. 5972/1969, 8605/1979, 18.638/2008, 19.999/2015, 20.199/2017.

692 Vgl. zB VfSlg. 12.103/1989, 14.301/1995, 20.018/2015, 20.032/2015, 20.130/2016, 20.496/2021.

693 Vgl. zB VfSlg. 20.077/2016, 20.089/2016, 20.179/2017, 20.180/2017.

in der Eigenart des jeweiligen Regelungsgegenstands zu finden. Eine Rolle spielt etwa, ob der Staat „seine" Angelegenheiten regelt, wie dies beim Recht des staatlichen Personals der Fall ist. Beim Finanzausgleich ist das notwendigerweise „kooperative" Zustandekommen des Gesetzes, das das Einvernehmen der Gebietskörperschaften über die Mittelverteilung repräsentieren soll, ausschlaggebend.[694] In privatrechtlichen Materien ist der dem Gesetzgeber zur Aufgabe gemachte Ausgleich unterschiedlicher Interessen von Relevanz. So muss der Gesetzgeber etwa bei der Regelung des Mietrechts, insbesondere bei der Regelung des Mietzinses, „*teils widerstreitende wohnungs-, sozial- und stadtentwicklungspolitische Interessen zum Ausgleich bringen*".[695] Zum Obsorgerecht betont der VfGH zusätzlich die notwendige wissenschaftliche Fundierung der gesetzlichen Regelungen; dieses sei ein „*Regelungsbereich, der häufig durch konfliktbeladene Entscheidungssituationen, ein besonderes Schutzbedürfnis beteiligter Minderjähriger und komplexe wissenschaftliche Einschätzungen auf dem Gebiet der (Kinder)Psychologie geprägt ist*".[696]

Umgekehrt finden sich einzelne Entscheidungen, in denen der VfGH explizit festhält, dass dem Gesetzgeber kein weiter rechtspolitischer Gestaltungsspielraum zukomme. So heißt es in VfSlg. 20.433/2020 zur Verfassungswidrigkeit des (in § 78 des Strafgesetzbuches – StGB verankerten) strafrechtlichen Verbots jeglicher Hilfe eines Dritten bei der Mitwirkung am Selbstmord auf Grund Verletzung des verfassungsgesetzlich gewährleisteten Rechts des Einzelnen auf freie Selbstbestimmung: „*Da die Regelung des § 78 (zweiter Tatbestand) StGB die existentielle Entscheidung* über *die Gestaltung des Lebens und Sterbens und damit ganz wesentlich das Selbstbestimmungsrecht des Einzelnen betrifft, besteht insoweit kein weiter rechtspolitischer Gestaltungsspielraum des Gesetzgebers.*"

Schließlich gibt es Konstellationen, in denen der VfGH je nach Konstellation einen kleineren oder größeren Gestaltungsspielraum annimmt. Insbesondere beim Grundrecht auf Erwerbsfreiheit (Art. 6 StGG) differenziert er idS zwischen der Regelung der Berufsausübung und der Regelung des Berufsantritts, wobei dem Gesetzgeber bei ersterer ein größerer rechtspolitischer Gestaltungsspielraum offen stehe als bei zweiterer.[697]

d. Im Verordnungsprüfungsverfahren gemäß Art. 139 B-VG nimmt der VfGH einen weiten Ermessensspielraum der Verwaltungsbehörden bei der Erlassung von Verordnungen beispielsweise in folgenden Konstellationen an:

Der weite Ermessensspielraum kann einmal durch die Regelungstechnik des Gesetzgebers begründet sein. Der VfGH akzeptiert seit dem sogenannten Perchtoldsdorfer Erkenntnis[698] die spezifische Eigenart der Verwaltungsplanung, die sich weitgehend einer konditionalen gesetzlichen Programmierung entzieht, sondern bloß final, also nur im Hinblick auf bestimmte zu erreichende Planungsziele determiniert werden kann.[699] Aus der (lediglich) finalen Programmierung von Planungsakten (in Gestalt von Verordnungen) der Verwaltungsbehörden resultiert ein größerer (Planungs-)Spielraum derselben. Damit ist allerdings keine Preisgabe der verfassungsgerichtlichen Normenkontrolle, son-

694 Vgl. VfSlg. 12.505/1990: „*Ein dem Gebot des § 4* [Finanz-Verfassungsgesetz - F-VG 1948] *entsprechendes, sachgerechtes System des Finanzausgleiches setzt schon im Vorfeld der Gesetzgebung eine Kooperation der Gebietskörperschaften voraus, die durch politische Einsicht und gegenseitige Rücksichtnahme bestimmt ist.* […]
Vor Erlassung des Finanzausgleichsgesetzes sind also entsprechende Beratungen zwischen den Vertretern der Gebietskörperschaften unabdingbar […]. *Führen diese Gespräche zumindest in den wesentlichen, grundsätzlichen Belangen zu einem Einvernehmen, so kann in aller Regel davon ausgegangen werden, daß eine dem Art 4 F-VG 1948 entsprechende Gesamtregelung getroffen wurde*"

695 VfSlg. 20.179/2017.

696 VfSlg. 20.018/2015.

697 VfSlg. 11.558/1987, 11.625/1988, 20.090/2016, 20.248/2018 uvam.

698 VfSlg. 8280/1978.

699 Vgl. dazu näher *Leitl-Staudinger/Mayrhofer*, Innovation in der Verwaltungsrechtswissenschaft am Beispiel des Planungsrechts, in: Wirth et al. (Hrsg.), 50 Jahre Johannes Kepler Universität Linz (2017), 165 (168 ff.).

dern eine andere Akzentuierung der Kontrolle verbunden, weil der VfGH vom Gesetzgeber eine genaue Regelung des Verfahrens der Verordnungserlassung verlangt („Legitimation durch Verfahren") und dieses im Einzelfall besonders in den Blick nimmt.[700] Die beschränkte Kontrolle des Planes am materiellen Gesetz wird damit – in rechtsstaatlich gleichermaßen gebotener wie genügender Weise – durch eine Kontrolle der Einhaltung des Planungsverfahrens substituiert.[701]

Bedeutsam ist diese zum Raumordnungsrecht entwickelte Rechtsprechung[702] auch für andere Materien geworden, in denen die gesetzliche Vorzeichnung des Verwaltungshandelns aufgrund der Eigenart des Regelungsgegenstandes bloß final möglich ist.[703] Regelmäßig bedarf es in diesen Konstellationen einer umfassenden Ermittlung der Entscheidungsgrundlagen der Verwaltungsbehörde. Der VfGH prüft, ob diese in hinreichender Weise – vor der Verordnungserlassung – erfolgt ist;[704] er hat gleichwohl in einem Verfahren zur Prüfung einer elektrizitätsrechtlichen Systemnutzungstarife-Verordnung ausgesprochen, dass es nicht seine Aufgabe sei, Sachverständigengutachten einzuholen oder fachliche Stellungnahmen im Detail nachzuprüfen oder sie gegeneinander abzuwägen.[705] In ähnlicher Weise geht der Gerichtshof bei der Prüfung von Verordnungen vor, die eine Abwägungsentscheidung des Verordnungsgebers auf einer sachverständigen Grundlage voraussetzen, wie dies etwa bei verkehrsbeschränkenden Maßnahmen im Straßenverkehrsrecht der Fall ist.[706]

Vor diesem Hintergrund kann allgemein in solchen Konstellationen von einem größeren Ermessensspielraum der Verwaltung ausgegangen werden, in denen die Normsetzung auf der Basis wissenschaftlicher bzw. sachverständiger Einschätzungen erfolgen muss. In diesem Sinn hat der VfGH dem Normsetzer im Besonderen bei der Regelung von Maßnahmen zur Eindämmung der COVID-19-Pandemie – zB Verbote zum Betreten von und zum Aufenthalt an bestimmen Orten, zum Verlassen der (eigenen) Wohnung oder zur Ausübung einer bestimmten (etwa auch Erwerbs-)Tätigkeit – einen grundsätzlich weiten Spielraum belassen:

Der Gesetzgeber habe, so der VfGH, dem Bundesminister für Gesundheit in an sich verfassungsrechtlich nicht zu beanstandender Weise einen „*Einschätzungs- und Prognosespielraum*" übertragen, „*ob und inwieweit er zur Verhinderung der Verbreitung von COVID-19 auch erhebliche Grundrechtsbeschränkungen für erforderlich hält, womit der Verordnungsgeber seine Entscheidung als Ergebnis einer Abwägung mit den einschlägigen grundrechtlich geschützten Interessen der betroffenen [Personen] zu treffen hat. Der Verordnungsgeber muss also in Ansehung des Standes und der Ausbreitung von COVID-19 notwendig prognosehaft beurteilen, inwieweit in Aussicht genommene [Verbote] zur Verhinderung der Verbreitung von COVID-19 geeignete […], erforderliche […] und insgesamt angemessene Maßnahmen darstellen.*" Der VfGH fordert gleichwohl vom Verordnungsgeber angesichts dessen „*inhaltlich weitreichender Ermächtigung*", „*die Wahrnehmung seines Entscheidungsspielraums im Lichte der gesetzlichen Zielsetzungen insoweit nachvollziehbar zu machen, als er im Verordnungserlassungsverfahren festhält, auf welcher Informationsbasis* über *die nach dem Gesetz maßgeblichen Umstände die Verordnungsentscheidung*

700 Vgl. zB VfSlg. 12.687/1991, 14.941/1997, 17.854/2006, 19.126/2010, 19.985/2015, 20.251/2018, 20.357/2019.

701 *Oberndorfer*, Strukturprobleme im Raumplanungsrecht, Die Verwaltung 1972, 257 (271 f.).

702 Vgl. VfSlg. 8280/1978 sowie ferner zB VfSlg. 10.711/1985, 12.926/1991, 17.057/2003, 17.224/2004, 20.081/2016.

703 Vgl. zB VfSlg. 17.348/2004, 18.453/2008, 19.700/2012 (jeweils zum Energierecht), VfSlg. 20.399/2020, (zum Epidemierecht), 17.101/2004 (zum Hochschulorganisationsrecht), 17.232/2004 (zum Krankenanstaltenrecht), 14.256/1995 (zum Medienrecht), VfSlg. 19.126/2010 (zum Straßenrecht) sowie 17.854/2006, 19.305/2011 (jeweils zum Umweltschutzrecht).

704 Vgl. zB VfSlg. 11.972/1989, 17.161/2004, 20.095/2016, 20.398/2020.

705 VfSlg. 17.517/2005.

706 Vgl. zB VfSlg. 13.449/1993, 17.573/2005, 18.579/2008, 18.766/2009; VfGH 18.9.2014, V 38/2014; 24.11.2016, V 147/2015; 11.12.2019, V 74/2019; 14.12.2022, V 177/2022 ua; 28.2.2023, V 102/2022 ua.

fußt und die gesetzlich vorgegebene Abwägungsentscheidung erfolgt ist". Der Gerichtshof prüft demnach, ob die Entscheidungsgrundlagen für die Regelung einer COVID-19-Maßnahme „*aktenmäßig*" hinreichend dokumentiert sind,[707] er hinterfragt aber nicht die „Informationsbasis" des Verordnungsgebers aus einer wissenschaftlich-fachlichen Perspektive.

3. Gibt es Faktoren, die ausschlaggebend dafür sind, wie und wann Ihr Gerichtshof Selbstbeschränkung übt (z. B. die Kultur und die Eigenheiten Ihres Landes; die historischen Erfahrungen Ihres Landes; der absolute oder besondere Charakter der fraglichen Grundrechte; der Gegenstand des Verfahrens; der Umstand, dass es um Fragen geht, die sich aus dem Wandel der Gesellschaft und der Anschauungen ergeben)?

4. Gibt es Situationen, in denen Ihr Gerichtshof aufgrund mangelnder institutioneller Zuständigkeit oder mangelnden Fachwissens Zurückhaltung geübt hat?

a. Der VfGH hat sich auf die ihm verfassungsrechtlich abschließend eingeräumten Zuständigkeiten (vgl. insbesondere Art. 137 bis 145 B-VG) zu beschränken.[708] Speziell für die Befugnis Gesetze auf ihre Verfassungsmäßigkeit hin zu überprüfen,[709] ist in diesem Zusammenhang zu beachten, dass der VfGH (ausschließlich) über die Verfassungswidrigkeit von formellen Bundes- und Landesgesetzen (Art. 140 Abs. 1 B-VG) erkennt. Nicht als Gesetze gelten etwa Berichtigungskundmachungen betreffend Druckfehler im Gesetzesblatt[710] oder „schlichte" Parlamentsbeschlüsse wie beispielsweise Staatsvertragsgenehmigungsbeschlüsse[711] oder Beschlüsse auf Durchführung einer Volksabstimmung oder Volksbefragung.[712] Vergleichbares gilt für die Befugnis des VfGH zur Prüfung der Gesetzmäßigkeit genereller Rechtsakte der Verwaltung (Verordnungen) gemäß Art. 139 Abs. 1 B-VG. Nicht der Normprüfung des Gerichtshofes unterliegen beispielsweise bloß „verwaltungsinterne" Rechtsvorschriften (sogenannte „Verwaltungsverordnungen" oder „Erlässe"),[713] jedenfalls soweit sie nicht (ausnahmsweise) nach außen wirken und daher (aus rechtsstaatlichen Erwägungen) als (Rechts-)Verordnungen iSd Art. 139 Abs. 1 B-VG qualifiziert werden.[714]

Gemäß Art. 144 Abs. 1 B-VG erkennt der VfGH über Beschwerden gegen Erkenntnisse (und Beschlüsse) der Verwaltungsgerichte, „*soweit der Beschwerdeführer durch das Erkenntnis in einem verfassungsgesetzlich gewährleisteten Recht oder wegen Anwendung einer gesetzwidrigen Verordnung, einer gesetzwidrigen Kundmachung* über *die Wiederverlautbarung eines Gesetzes (Staatsvertrages), eines verfassungswidrigen Gesetzes oder eines rechtswidrigen Staatsvertrages in seinen Rechten verletzt zu sein behauptet.*" Sein Prüfungsmaßstab ist im ersten Fall grundsätzlich darauf beschränkt, lediglich in die Verfassungssphäre reichende Mängel wahrzunehmen, während es dem Verwaltungsgerichtshof (VwGH) obliegt, grundsätzlich jedwede Rechtswidrigkeit wahrzunehmen.[715] Der VfGH beschränkt sich (abhängig von der Art des Grundrechts,[716] jedoch in aller Regel) auf eine Art „Grobprüfung" und

707 VfSlg. 20.399/2020; ferner zB VfSlg. 20.458/2020, 20.521/2021; VfGH 29.6.2023, V 143/2021.

708 Vgl. zu diesen im Einzelnen *Grabenwarter*, Verfassungsgerichtshof, Rz. 53 ff.

709 Öhlinger/Eberhard, Verfassungsrecht[13] (2022) Rz. 984.

710 VfSlg. 16.327/2001.

711 VfSlg. 18.576/2008.

712 VfSlg. 8370/1978.

713 Vgl. zB VfSlg. 12.581/1990, 13.635/1993; 13.784/1994; 17.644/2005, 18.929/2009.

714 Vgl. zB VfSlg. 8647/1979, 8648/1979, 8807/1980, 9416/1982, 10.170/1984, 10.607/1985, 10.728/1985, 11.467/1987, 12.286/1990, 19.230/2010, 20.472/2021.

715 *Kneihs/Rohregger*, Art. 144 B-VG, in: Korinek/Holoubek et al. (Hrsg.), Österreichisches Bundesverfassungsrecht, 13. Lfg. (2017) Rz. 5.

716 Bei sog. Grundrechten mit Ausführungsvorbehalt (Vereins- und Versammlungsfreiheit) erachtete der VfGH in seiner Rsp. jede Verletzung des einfachgesetzlichen Ausführungsgesetzes als eine Verletzung des verfassungsgesetzlich gewährleisteten Rechtes gemäß Art. 144 Abs. 1 B-VG. Beginnend mit seinem (zum Versammlungsrecht ergangenen) Erkenntnis VfSlg 19.818/2013 ist der VfGH von dieser „Feinprüfungsjudika-

greift lediglich gravierende Rechtsverletzungen auf. Ob eine Entscheidung eines Verwaltungsgerichtes „*in jeder Hinsicht dem Gesetz entspricht*" („Feinprüfung"), ist hingegen (in aller Regel) vom VwGH zu beurteilen.[717] Der VfGH lehnt demnach die Behandlung von Beschwerden gegen verwaltungsgerichtliche Erkenntnisse, die lediglich „*einfachgesetzliche Fragen*" aufwerfen, regelmäßig ab.[718]

b. Allgemeine Faktoren, die „begrenzend" für die verfassungsgerichtliche Prüfungs- und Entscheidungsbefugnis wirken,[719] sind die grundsätzliche Einzelfallbezogenheit der Judikatur des VfGH[720] sowie die strenge verfahrensrechtliche Bindung des VfGH an „sein" Verfahrensgesetz (VfGG[721]) und subsidiär (gemäß Art. 35 VfGG) an die Zivilprozessordnung (ZPO)[722].

Eine Konsequenz dieser Bindung ist, dass (selbst) Normprüfungsverfahren als kontradiktorische Verfahren konstruiert sind, in denen nur entschieden werden soll, was in einem Parteiprozess abgehandelt wurde;[723] ein Umstand, aufgrund dessen sich der VfGH an die (in einem Normprüfungsantrag geäußerten oder von ihm selbst in einem Beschluss auf amtswegige Einleitung eines Normprüfungsverfahrens formulierten) Bedenken gebunden erachtet.[724] Sohin hat der Gerichtshof bei der Prüfung von Gesetzen und von generellen Rechtsakten der Verwaltung (Verordnungen) ausschließlich zu beurteilen, ob die angefochtene Norm aus den in der Begründung des Antrages dargelegten Gründen verfassungswidrig oder gesetzwidrig ist.[725] Dem VfGH ist es verwehrt, weitere Bedenken gegen ein Gesetz oder eine Verordnung auf Anregung oder von Amts wegen aufzugreifen. Dasselbe gilt für Bedenken, die von der antragstellenden Partei in einem späteren Verfahrensabschnitt vorgebracht werden.[726] Damit korrespondiert auch der dem Gerichtshof zugestandene Aufhebungsumfang. Gemäß Art. 140 Abs. 3 erster Satz und Art. 139 Abs. 3 erster Satz B-VG darf er eine Rechtsvorschrift bloß bis zu dem Umfang aufheben, der explizit beantragt wurde.

Keine derartige Bedenkenbindung nimmt der VfGH hingegen in Verfahren über Beschwerden gegen Erkenntnisse und Beschlüsse der Verwaltungsgerichte (Art. 144 B-VG) an. In diesen prüft der VfGH von Amts wegen, ob durch das angefochtene Erkenntnis oder den angefochtenen Beschluss (irgend)ein verfassungsgesetzlich gewährleistetes Recht verletzt oder durch die Anwendung eines verfassungswidrigen Gesetzes oder einer gesetzwidrigen Verordnung der Beschwerdeführer in

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tur" im dargestellten umfassenden Sinn abgegangen. Nach seiner jüngeren Rsp. fallen ausschließlich Entscheidungen, die den Kernbereich der Versammlungsfreiheit (zB die Untersagung oder die Auflösung einer Versammlung) oder der Vereinsfreiheit (zB VfSlg. 19.818/2013, 19.962/2015, 20.057/2016, 20.261/2018) betreffen, in seine ausschließliche Zuständigkeit. Darüber hinaus prüft er nicht (mehr), ob die angefochtene Entscheidung „in jeder Hinsicht dem Gesetz entspricht" (vgl. idS zuletzt VfSlg. 19.994/2015, 20.117/2016). In derartigen Fragen besteht nunmehr eine Zuständigkeit des VwGH zur „Feinprüfung" (VwGH 27.2.2018, Ra 2017/01/0105).

717 Vgl. zB Öhlinger/Eberhard, Verfassungsrecht, Rz. 728.

718 Vgl. zB VfGH 23.6.2022, E 3691/2021; 13.12.2022, E 933/2022; 15.3.2023, E 3778/2021 ua.; 12.6.2023, E 96/2023.

719 Vgl. dazu näher *Korinek*, Verfassungsgerichtsbarkeit 264 ff.

720 Vgl. zB VfSlg. 17.121/2004, 17.547/2005, 19.657/2012, 20.035/2015, 20.135/2017, 20.341/2019.

721 Verfassungsgerichtshofgesetz 1953 – VfGG, BGBl. 85/1953 idF BGBl. I 88/2023.

722 Gesetz vom 1. August 1895, über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Zivilprozessordnung – ZPO), RGBl. 113/1895 idF BGBl. I 77/2023.

723 *Korinek*, Verfassungsgerichtsbarkeit 265 f.

724 Für Verfahren gemäß Art. 139 B-VG vgl. zB VfSlg. 11.580/1987, 14.044/1995, 16.674/2002; für Verfahren gemäß Art. 140 B-VG vgl. zB VfSlg 12.691/1991, 13.471/1993, 14.895/1997, 16.824/2003, 20.356/2019 sowie VfGH 15.12.2021, G 233/2021 ua.

725 Für Verfahren gemäß Art. 139 B-VG vgl. zB VfSlg. 15.644/1999, 17.222/2004; für Verfahren gemäß Art. 140 B-VG vgl. zB VfSlg 15.193/1998, 16.374/2001, 16.538/2002, 16.929/2003.

726 ZB VfSlg. 9260/1981, 14.802/1997 mwN.

seinen Rechten verletzt wurde.[727] Sohin ist der VfGH in Verfahren gemäß Art. 144 B-VG nicht an das Vorbringen des Beschwerdeführers gebunden.

c. Eine formelle Grenze seiner Prüfungsbefugnis nimmt der VfGH bei staatlichen Rechtsvorschriften an, die der Umsetzung von Unionsrecht (Richtlinien, ggf. auch Beschlüsse) dienen. Der Gerichtshof prüft solche Rechtsvorschriften nicht am Maßstab der (österreichischen) Verfassung, wenn und soweit sie durch Unionsrecht inhaltlich vollständig determiniert sind, der staatliche Gesetzgeber also keinen Umsetzungsspielraum besitzt:

„[A]*uf Grund des Vorrangs des Unionsrechtes auch vor nationalem Verfassungsrecht (vgl. VfSlg. 16.050/2000)* [ist] *die Aufhebung einer Bestimmung, die Unionsrecht umsetzt, unzulässig*[,] *wenn das Unionsrecht dem innerstaatlichen Gesetzgeber keinen Spielraum für die inhaltliche Gestaltung einräumt, sodass der Gesetzgeber keine Möglichkeit hat, eine Ersatzregelung zu schaffen, die sowohl dem Unionsrecht als auch dem innerstaatlichen Verfassungsrecht entspricht*".[728]

Von Bedeutung ist diese Rechtsprechung sohin dann, wenn eine Richtlinie (oder allenfalls auch ein Beschluss eines Unionsorgans) eine Umsetzung mit einem unbedingt und eindeutig bestimmten Inhalt verlangt, dieser Inhalt aber im Widerspruch zum staatlichen Verfassungsrecht steht.[729] Bezweifelt der VfGH in einer solchen Konstellation die Rechtmäßigkeit (insbesondere die Konformität mit der GRC) des umgesetzten Unionsrechtsaktes, richtet er ein Vorabentscheidungsersuchen gemäß Art. 267 AEUV an den EuGH.[730] Hierin zeigt sich u.a. das „*bemerkenswerte Dialogverhältnis*",[731] in das der VfGH mit dem EuGH getreten ist.[732]

5. Gibt es Fälle, in denen Ihr Gerichtshof Zurückhaltung geübt hat, weil die Gefahr eines Justizirrtums bestand?

Nein.

6. Gibt es Fälle, in denen Ihr Gerichtshof unter Hinweis auf die institutionelle oder demokratische Legitimation des Entscheidungsträgers Zurückhaltung geübt hat?

7. „Je mehr die Gesetzgebung die allgemeine Sozialpolitik gestaltet, desto weniger wird das Gericht bereit sein, einzugreifen". Ist dies ein gültiger Maßstab für Ihren Gerichtshof? Teilt Ihr Gerichtshof die Auffassung, dass politische Fragen durch demokratische Verfahren entschieden werden sollten, da die Gerichte nicht gewählt sind und nicht über das demokratische Mandat verfügen, über Angelegenheiten der Politik zu entscheiden?

Österreich ist eine repräsentativ-parlamentarische Demokratie. Die Gesetzgebungsorgane sind auf Bundesebene der Nationalrat gemeinsam mit dem Bundesrat (Art. 24 B-VG) und auf Landesebene die Landtage (Art. 95 Abs. 1 B-VG).[733] Der Nationalrat wird vom Bundesvolk (Art. 26 B-VG) und die Landtage werden vom jeweiligen Landesvolk (Art. 95 Abs. 1 B-VG) nach den Grundsätzen der Verhältniswahl gewählt. Der Gerichtshof übt immer dann (auch) implizit im Hinblick auf die demokratische Legitimation dieser Gesetzgebungsorgane Zurückhaltung, wenn diesen nach seiner Rechtsprechung ein rechtspolitischer Gestaltungsspielraum zukommt.[734]

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727 VfSlg. 7370/1974.

728 VfSlg. 20.070/2016 (Haftbefehl); idS bereits VfSlg. 18.642/2008; ferner VfSlg. 20.209/2017. In VfSlg. 19.702/2012 begründete der VfGH die Zulässigkeit seines Vorabentscheidungsersuchens (vom 28.11.2012) an den EuGH im Zusammenhang mit den Regelungen zur Vorratsdatenspeicherung mit diesen Erwägungen.

729 Vgl. *Holoubek*, Doppelte Bindung und Richtlinienumsetzung, ZÖR 2018, 603 (607).

730 Vgl. VfSlg. 19.702/2012, sowie VfSlg. 19.892/2014 (Vorratsdatenspeicherung).

731 *Eberhard*, Judicial activism 149.

732 Zu diesem VfSlg 15.450/1999, 16.050/2000, 16.100/2001, 19.702/2012.

733 *Grabenwarter/Frank*, B-VG (2020) Art. 1 Rz. 5.

734 Zum (weiten) rechtspolitischen Gestaltungsspielraum im Agrarrecht vgl. zB VfSlg. 20.032/2015, im Asylrecht VfSlg. 20.286/2018, im Raumordnungsrecht VfSlg.

Bedenkenswert ist gleichwohl, dass Verfassungsgesetze (und Verfassungsbestimmungen in einfachen Gesetzen) einer Beschlussfassung mit qualifizierten Präsenz- und Konsensquoren bedürfen (Art. 44 Abs. 1 B-VG). In der österreichischen Lehre[735] wurde vor diesem Hintergrund deutlich gemacht, dass die erhöhte Bestandsgarantie, die Fragen rechtsinhaltlicher Art durch ihre Aufnahme in den Verfassungsrang erfahren, politisch gesehen eine Schutzfunktion der qualifizierten Minderheit gegenüber der bloß absoluten Mehrheit bedeute. Der VfGH dürfe sich daher seiner Aufgabe, die Einhaltung der justiziablen Normen der Verfassung zu überwachen, gerade aus demokratischen Gründen nicht entschlagen. Er würde seiner demokratischen und rechtsstaatlichen Funktion nicht gerecht, würde er sich – im Sinne eines falsch verstandenen *judical self restraint* – auf die Überwachung unpolitischer Positionen zurückziehen.

Wesentlich für die Abgrenzung der Rolle des VfGH im Verhältnis zum parlamentarischen Gesetzgeber ist, dass der Gerichtshof lediglich als – in der Literatur[736] so bezeichneter – „negativer Gesetzgeber" tätig werden kann. Es ist ihm also verwehrt, fehlende gesetzliche Regelungen durch seine Entscheidungen zu ersetzen oder durch den Umfang seiner Aufhebung dem verbleibenden Gesetz einen (veränderten) Inhalt zu geben, der nicht mehr vom Willen des Gesetzgebers getragen erscheint.[737] Der VfGH betont dementsprechend in seiner Rechtsprechung immer wieder, dass er nicht „positiver Gesetzgeber" sei. Diese Einsicht hat (im Besonderen) Auswirkungen für den Umfang der (inhaltlichen) Prüfung einer Norm und – im Fall der Rechtswidrigkeit der Norm – für den Umfang der Aufhebung durch den VfGH.[738] Damit korrespondiert die Unzulässigkeit von Anträgen auf Normenkontrolle, deren Anfechtungsumfang derart gestaltet (insbesondere zu eng gezogen) ist, dass die beantragte Aufhebung *„einen unzulässigen Akt positiver Gesetzgebung durch den Verfassungsgerichtshof bedeuten* [würde], *da dem Gesetz durch die Aufhebung der angefochtenen Wortfolge ein dem Gesetzgeber nicht zusinnbarer*

Inhalt zukommen würde."[739]

8. Akzeptiert Ihr Gerichtshof einen allgemeinen Grundsatz der Selbstbeschränkung in Angelegenheiten der Strafrechtspolitik?

Der VfGH räumt dem Gesetzgeber auf dem Gebiet des Strafrechts einen (in aller Regel weiten) rechtspolitischen Gestaltungsspielraum ein,[740] und zwar auch im Fall eingriffsintensiver Regelungen, wie sie für das Strafrecht geradezu typisch sind.[741]

Der VfGH eröffnete mit VfSlg. 20.231/2017 dem Gesetzgeber – in Abweichung von seiner bis dahin ständigen Rechtsprechung – eine weitere Gestaltungsmöglichkeit im Zusammenhang mit der im österreichischen Recht vorgesehenen Differenzierung zwischen dem gerichtlichen Strafrecht (auch

14.375/1995 sowie VfGH 18.9.2014, B 1311/2012, im Dienstrecht VfSlg. 16.176/2001, 17.452/2005, 20.073/2016, sowie VfGH 1.7.2022, G 17/2022, im Gesundheitsrecht VfSlg. 20.397/2020, im Personenstandsrecht VfSlg. 20.258/2018, im Sozialversicherungsrecht VfSlg. 16.007/2000 sowie VfGH 6.3.2023, G 296/2022, im Steuerrecht VfSlg. 19.598/2011, 19.933/2014 oder im Strafrecht VfSlg. 20.057/2016.

735 *Korinek*, Verfassungsgerichtsbarkeit 274; *Oberndorfer*, Demokratie 126, jeweils mwN.

736 Vgl. zB *Bußjäger*, Art. 140 B-VG, in: Kahl/Khakzadeh/Schmid (Hrsg.), Bundesverfassungsrecht, 2021, Rz. 17; Öhlinger/Eberhard, Verfassungsrecht, Rz. 1002; *Rohregger*, Art. 140 B-VG, in: Korinek/Holoubek et. al., Österreichisches Bundesverfassungsrecht, 6. Lfg., 2006, Rz. 14 mwN; *Stöger* zu OGH 31.8.2015, 6 Ob 147/15h, NZ 2015/113, 350

737 Vgl. *Oberndorfer/Wagner*, Gesetzgeberisches Unterlassen als Problem verfassungsgerichtlicher Kontrolle, Landesbericht Österreich für den XIV. Kongress der Europäischen Verfassungsgerichte (2008) 11 f.

738 Vgl. zuletzt zB VfGH 6.12.2022, G 221/2022 (Aufhebung einer landesverfassungsgesetzlichen Bestimmung wegen Verstoßes gegen die Bundesverfassung).

739 Vgl. zB VfSlg. 12.465/1990; VfGH 27.6.2023, G 123/2023.

740 VfSlg. 19.960/2015, 20.057/2016, 20.156/2017, VfGH 18.6.2022, G 51/2022.

741 VfSlg. 19.831/2013, 20.213/2017, 20.240/2018.

„Justizstrafrecht" oder „Kriminalstrafrecht") und dem – in erster Instanz von Verwaltungsbehörden zu vollziehenden – Verwaltungsstrafrecht. In VfSlg. 20.231/2017 sprach der VfGH aus, dass – entgegen seiner bisherigen Rechtsprechung – die Höhe der angedrohten Sanktion kein taugliches Mittel für die Abgrenzung des gerichtlichen Strafrechts und des Verwaltungsstrafrechts darstelle. Der Gesetzgeber besitzt damit einen (größeren) rechtspolitischen Gestaltungsspielraum bei der Übertragung der Zuständigkeit zur Verhängung von Strafen (entweder auf ordentliche Gerichte oder auf Verwaltungsbehörden).

Ein „allgemeiner Grundsatz der Selbstbeschränkung" ist mit der Einräumung eines rechtspolitischen Gestaltungsspielraums gleichwohl nicht verbunden. Der VfGH hat speziell auch in jüngster Zeit mehrere straf(prozess)rechtliche Vorschriften in Prüfung gezogen und als verfassungswidrig aufgehoben.[742] Zuletzt hat er, wie erwähnt, bei der Prüfung des strafrechtlichen Verbotes der Hilfe Dritter an der Mitwirkung zum Selbstmord explizit ausgesprochen, dass dem Gesetzgeber in diesem Fall *„gerade kein weiter rechtspolitischer Gestaltungsspielraum*" zukomme.[743]

> **9.** In engen Grenzen kann sich die Regierung veranlasst sehen, Informationen vor dem Gerichtshof geheim zu halten, insbesondere solche aus nachrichtendienstlichen Quellen. Hat Ihr Gerichtshof jemals aus Gründen der nationalen Sicherheit Selbstbeschränkung geübt?

Die Zuständigkeiten des VfGH sind verfassungsrechtlich abschließend geregelt (vgl. insbesondere Art. 137 bis 145 B-VG). Eine besondere Zuständigkeit etwa für nachrichtendienstliche Angelegenheiten oder Angelegenheiten, die dem Staatsschutz zuzurechnen sind, besteht nicht. Fragen die zB in Zusammenhang mit dem Polizeilichen Staatsschutzgesetz stehen, gelten grundsätzlich als justiziabel.[744] Für die nicht-öffentlichen Beratungen des VfGH selbst gilt ein Beratungsgeheimnis. Dazu kommt die Möglichkeit, bestimmte Akten oder Aktenbestandteile von der Akteneinsicht gemäß § 20 VfGG auszunehmen.[745] Personenbezogene Daten der Parteien eines vor dem VfGH geführten Verfahrens werden bei der Veröffentlichung der Entscheidung anonymisiert.

> **10.** Sollten Verfassungsgerichte – als Hüter der Verfassung – einen strengeren Maßstab anlegen, wenn die Gesetzgebung bei der Umsetzung von Reformen zum Schutz der Grundrechte säumig ist?

Der VfGH differenziert in seiner Rechtsprechung grundsätzlich nicht nach der „Ursache" für die (allfällige) Grundrechtswidrigkeit einer Norm. Nach seiner Rechtsprechung können auch erst im Zeitablauf (also möglicherweise aufgrund unterbliebener Reformen) eingetretene Unzulänglichkeiten einer Norm, zu deren Grundrechtswidrigkeit führen.[746]

Ein Unterlassen des Gesetzgebers kann sich allerdings – vor dem Hintergrund der Entscheidungsbefugnis des Gerichtshofes, die es ihm (lediglich) erlaubt, als verfassungswidrig erkannte formelle Gesetze aufzuheben (Art. 140 B-VG) – mitunter der verfassungsgerichtlichen Kontrolle entziehen.[747] Der VfGH darf nicht selbst gesetzgebend tätig werden oder den Gesetzgeber zu einem Tätigwerden

742 Vgl. VfSlg. 20.082/2016 (Aussagebefreiung ehemaliger Ehepartner), VfSlg. 20.433/2020 (Tötung auf Verlangen); VfGH 1.12.2022, G 53/2022 („bedingt obligatorische" Untersuchungshaft).

743 VfSlg. 20.433/2020.

744 VfSlg. 20.213/2017.

745 VfSlg 16.424/2002 mwN.

746 ZB VfSlg. 12.568/1990 (unterschiedliches Pensionsalter von Mann und Frau), 13.917/1994 (Besuchsfplicht einer Hauswirtschaftsschule nur für Mädchen), 19.936/2014 (Besetzung von Arztstellen), 20.340/2019 (Gesetzwidrigkeit einer Verordnung betreffend das Anschlagen von Druckwerken mangels Anpassung an die geänderten Verhältnisse); VfGH 14.12.2022, V 177/2022 ua. mwN (Gesetzwidrigkeit einer Geschwindigkeitsbeschränkungsverordnung auf Grund der Änderung der örtlichen Verhältnisse).

747 Vgl. *Grabenwarter*, Verfassungsgerichtshof, Rz. 74; *Oberndorfer/Wagner*, Gesetzgeberisches Unterlassen.

verpflichten, auch „*wenn die Erlassung bestimmter Regelungen von Verfassungs wegen geboten wäre*".[748] (Ähnlich stellt sich das Problem einer „Untätigkeit" des Verordnungsgebers im Licht der Verordnungsprüfungszuständigkeit des VfGH gemäß Art. 139 B-VG dar.[749])

II. Der Entscheidungsträger

11. Prüft Ihr Gerichtshof einen Akt der parlamentarischen Gesetzgebung mit größerer Zurückhaltung als einen Akt der Verwaltung? Stellt Ihr Gerichtshof bei der Prüfung von Rechtsakten darauf ab, welche demokratische Legitimation der Entscheidungsträger hat?

Nein. Unterschiede (und Gemeinsamkeiten) hinsichtlich des Prüfungsmaßstabs und der Kontrolldichte sind ausschließlich in der (Ausgestaltung der) jeweiligen Zuständigkeit des VfGH begründet (siehe dazu oben 2., 3. und 4.).

12. Welche Bedeutung misst Ihr Gerichtshof der Entstehung eines Rechtsaktes bei? Welche rechtliche Bedeutung kann die parlamentarische Erörterung eines Rechtsaktes für dessen Prüfung am Maßstab der Grundrechte haben?

13. Prüft Ihr Gerichtshof, ob der politische Entscheidungsträger seine Entscheidung begründet hat oder ob die Entscheidung so gefallen ist, wie sie das Gericht selbst getroffen hätte, wenn es selbst politischer Entscheidungsträger wäre?

14. Achtet Ihr Gerichtshof darauf, inwieweit der Entscheidung oder Maßnahme eine umfassende Prüfung der Kompatibilität mit den Grundrechten vorausgegangen ist? Wie gründlich muss zum Beispiel die Analyse des Gesetzgebers sein, damit Ihr Gerichtshof ihr Bedeutung beimisst?

15. Achtet Ihr Gerichtshof darauf, ob vor der Verabschiedung einer Maßnahme die gegensätzlichen Standpunkte in der parlamentarischen Debatte umfassend zum Ausdruck gekommen sind? Reicht es aus, dass eine breite Debatte über den allgemeinen Inhalt der Rechtsvorschriften stattgefunden hat, oder muss den Auswirkungen auf die Rechte besondere Aufmerksamkeit geschenkt werden?

a. Der VfGH prüft in Gesetzesprüfungsverfahren gemäß Art. 140 B-VG zwar nicht bloß mögliche materielle Verfassungswidrigkeiten, sondern auch ob bei der Erzeugung einer Bestimmung die Erzeugungsregeln eingehalten wurden.[750] Dabei hat der VfGH jeden Schritt des Gesetzgebungsprozesses zu prüfen.[751] Auch Verstöße gegen die Geschäftsordnung des Gesetzgebungsorgans, die geeignet sind, die freie Willensbildung im Parlament zu beeinträchtigen, führen zur Verfassungswidrigkeit des Gesetzes.[752] Maßnahmen, die von Organen, die in den Gesetzgebungsprozess eingebunden sind, freiwillig zur Entscheidungsfindung vorgenommen werden, entziehen sich ebenso der Prüfungsbefugnis des VfGH.[753] Die inhaltliche parlamentarische Erörterung eines Gesetzesvorhabens selbst besitzt ebenso keine rechtliche Relevanz für die Normenkontrolle. Ganz allgemein ist die „Qualität"

748 *Rohregger*, Art. 140 B-VG, Rz. 14.

749 Vgl. dazu jüngst VfGH 5.12.2022, E 394/2021 (Nitrat-Verordnung); zu einer möglichen Lösung des Problems in unionsrechtlichen Kontexten vgl. *Herbst/Mayrhofer*, Zur Untätigkeit des Verordnungsgebers bei Umsetzung unionsrechtlicher Verpflichtungen, in: Wagner et al. (Hrsg.), Liber Amicorum anlässlich des 60. Geburtstages von Wilhelm Bergthaler (im Erscheinen).

750 *Rohregger*, Art. 140 B-VG, in: Korinek/Holoubek et al., Österreichisches Bundesverfassungsrecht, 6. Lfg.
(2006) Rz. 75.

751 Vgl. zB VfSlg. 4497/1963, 5996/1969, 8466/1978, 16.152/2001, 16.515/2001, 16.848/2003.

752 VfSlg 16.151/2001

753 *Rohregger*, Art.
140 B-VG Rz. 78.

des parlamentarischen Verfahrens kein selbständiges Kriterium für die Verfassungsmäßigkeit eines Gesetzes. Eine spezifische Ausnahme bilden „kooperative" Verfahren, wie sie insbesondere für das Zustandekommen des Finanzausgleichsgesetzes als notwendig erachtet werden (siehe dazu oben 2.c.).

Eine Begründungspflicht des Gesetzgebers besteht nach der Rechtsprechung nicht. Die in den Gesetzesmaterialien aufgenommenen Überlegungen des Gesetzgebers (etwa zu deren Grundrechtskompatibilität) können freilich für den Gerichtshof von Interesse sein;[754] sie hindern ihn jedoch nicht daran, (selbst) eine abstrakte Rechtfertigung für eine Regelung zu finden.

b. In Verordnungsprüfungsverfahren gemäß Art. 139 B-VG prüft der VfGH (insbesondere bei final determinierten Verordnungen) auch, ob das gesetzlich vorgesehene Verfahren zur Ermittlung hinreichender Entscheidungsgrundlagen eingehalten wurde, wobei es dem VfGH möglich sein muss, zu beurteilen, ob eine Verordnung auch den gesetzlich vorgesehenen Zielen entspricht (dazu oben 2.d.).[755] Im Zusammenhang mit Verordnungen, mit denen Maßnahmen zur Eindämmung der COVID-19-Pandemie gesetzt wurden, verlangt der VfGH, wie erwähnt (oben 2.d.), zur Gewährleistung der Kontrolle der die Behörde treffenden Ermittlungspflicht diese Umstände im Akt zu dokumentieren. Verletzt die Behörde diese Dokumentationspflicht, führt dies (allein) zur Gesetzwidrigkeit der Verordnung, ohne dass der VfGH deren Inhalte selbst in Prüfung zieht.[756]

16. Ist die Tatsache, dass die Entscheidung vom Gesetzgeber oder unter Beteiligung der Öffentlichkeit getroffen wurde, ein schlüssiger Nachweis für die demokratische Legitimität der Entscheidung?

Die demokratische Legitimität ist von der Rechtskonformität einer Entscheidung zu unterscheiden, deren Vorliegen, sofern es sich um Entscheidungen in Form formeller Bundes- oder Landesgesetze (Art. 140 Abs. 1 B VG) oder in Form von Verordnungen (Art. 139 Abs. 1 B-VG) handelt, dem VfGH zur Prüfung vorbehalten ist. Sonstige demokratisch legitimierte politische Entscheidungen sind hingegen kein Gegenstand der verfassungsgerichtlichen Kontrolle.[757]

III. Schutzbereich der Rechte, Gesetzmäßigkeit und Verhältnismäßigkeit

17. Hat Ihr Gerichtshof jemals bei der Bestimmung des Inhalts eines Rechts Zurückhaltung geübt, indem er sich die Auslegung oder Anwendung des Rechts durch die Regierung zu eigen gemacht hat?

Dem VfGH ist es schon von Verfassungs wegen verwehrt, sich die Auslegung oder Anwendung des Rechts etwa durch die Bundesregierung bedingungslos zu eigen zu machen. Gleichwohl kann deren Äußerung, ebenso wie eine Äußerung einer anderen Parteien des verfassungsgerichtlichen Verfahrens, im Normprüfungsverfahren von Interesse sein.[758] Es ist auch nicht ausgeschlossen, dass sich der VfGH einer im Verfahren erstatteten Äußerung anschließt.[759]

18. Ist die Kontrolldichte von der Eigenart des Grundrechts abhängig? Ist Ihr Gerichtshof der Ansicht, dass einige Rechte oder Aspekte von Rechten wichtiger sind und dass Eingriffe in ihre Ausübung daher strenger geprüft werden müssen als andere? Nach

754 Vgl. VfGH 1.12.2022, G 53/2022.

755 VfSlg. 8280/1978; vgl. ferner zB VfSlg. 16.032/2000, 17.015/2003, 20.474/2021.

756 Vgl. einerseits VfSlg. 20.399/2020, 20.521/2021; VfGH 14.6.2022, V 53/2022 (Verletzung der Dokumentationspflicht) und andererseits VfSlg. 20.458/2021; VfGH 13.6.2023, V 161/2022; 29.6.2023, V 143/2021 (hinreichende Dokumentation).

757 So bereits *Korinek*, Verfassungsgerichtsbarkeit 257 mwN; dazu bereits oben 12. bis 15.a.

758 Vgl. VfGH 16.6.2023, G 85/2021, V 116/2021; 13.6.2023, V 161/2022; 5.10.2022, G 141/2022; 29.9.2022, V 110/2022; vgl. auch oben 12. und 14.

759 Vgl. VfGH 28.6.2023, G 299/2022 ua., V 20/2023 ua.; VfSlg. 20.412/2020, 17.967/2006, 14.260/1995.

welchen Kriterien wird diese Einteilung vorgenommen?

Aus der strukturellen Eigenart des Grundrechts kann sich ebenso wie aus der Art und dem Inhalt des Eingriffs eine jeweils unterschiedliche Kontrolldichte ergeben.[760] Dies lässt sich für das Gesetzesprüfungsverfahren gut am Grundrecht auf Erwerbsfreiheit (Art. 6 StGG) illustrieren, bei dem der VfGH bei gesetzlichen Regelungen der Berufsausübung allgemein einen weiteren Gestaltungsspielraum des Gesetzgebers annimmt als bei Regelungen des Berufsantritts (dazu oben 2.c.).

Bei der Prüfung, ob ein Erkenntnis (oder ein Beschluss) eines Verwaltungsgerichtes ein verfassungsgesetzlich gewährleistetes Recht verletzt (Art. 144 B-VG), kann grundsätzlich zwischen einer „Grobprüfung" als Regel und einer „Feinprüfung" als Ausnahme unterschieden werden. Eine „Feinprüfung" findet speziell im Kernbereich von Grundrechten mit Ausführungsvorbehalt statt (dazu oben Fn 54). Auch bei Verfahrensgrundrechten tendiert der Gerichtshof zu einer „Feinprüfung".[761] Beim Grundrecht auf Schutz der persönlichen Freiheit nimmt der Gerichtshof zwar eine „Grobprüfung" vor, die jedoch aufgrund der detaillierten verfassungsgesetzlichen Regelung dieses Grundrechts (im Bundesverfassungsgesetz vom 29. November 1988 über den Schutz der persönlichen Freiheit) im Ergebnis häufig auf eine „Feinprüfung" hinausläuft.[762] Dass die Kontrolldichte überdies materien- und weniger grundrechtsspezifische Besonderheiten aufweisen kann, wurde schon erwähnt (dazu 2.c.).

19. Haben Sie einen Maßstab für die Klarheit bei der Prüfung der Verfassungsmäßigkeit eines Gesetzes? Wie entscheiden Sie, wie klar ein Gesetz ist? Wann wenden Sie die Regel *In claris non fit interpretatio* an?

Ob eine Bestimmung einer Auslegung zugänglich ist oder nicht, prüft der VfGH im Einzelfall. Dabei sind in Ermittlung des Inhalts des Gesetzes alle zur Verfügung stehenden Auslegungsmöglichkeiten auszuschöpfen. Nur wenn sich nach Heranziehung aller Interpretationsmethoden immer noch nicht beurteilen lässt, was im konkreten Fall rechtens ist, verletzt die Bestimmung die rechtsstaatlichen Anforderungen.[763] So hat der VfGH etwa in VfSlg. 12.420/1990 die Aufhebung einer Verordnungsbestimmung als gesetzwidrig wie folgt begründet: „*Nur mit subtiler Sachkenntnis, außerordentlichen methodischen Fähigkeiten und einer gewissen Lust zum Lösen von Denksport-Aufgaben kann* überhaupt *verstanden werden, welche Anordnungen hier getroffen werden sollen.*"

Die *acte clair*-Doktrin als solche besitzt bei der Gesetzesprüfung (nur) dann Relevanz, wenn der Widerspruch einer österreichischen Rechtsvorschrift zu einer (unmittelbar anwendbaren) unionsrechtlichen Norm im Sinne dieser offenkundig ist. Die Konsequenz kann (muss nicht) sein, dass die staatliche Rechtsvorschrift nicht präjudiziell im Sinne des Art. 140 Abs. 1 B-VG ist und demnach nicht Gegenstand des Gesetzesprüfungsverfahrens sein kann.[764]

20. Wie intensiv prüft Ihr Gerichtshof, ob eine Maßnahme einem legitimen Ziel dient?

Bei der Prüfung, ob eine Regelung im öffentlichen Interesse liegt, beschränkt sich der VfGH idR auf eine bloße Vertretbarkeitskontrolle.[765] Der Gerichtshof räumt den gesetzgebenden Gebietskörperschaften insofern einen relativ weiten rechtspolitischen Gestaltungsspielraum ein. Der VfGH hat insbesondere nicht zu beurteilen, ob die Verfolgung eines bestimmten Zieles etwa aus wirtschaftspolitischen oder sozialpolitischen Gründen zweckmäßig ist. Er kann dem Gesetzgeber nur entgegentreten, wenn

760 Vgl. zB Öhlinger/Eberhard, Verfassungsrecht, Rz. 734.

761 VfSlg. 19.960/2015, 19.970/2015, 20.183/2017, 20.271/2018, 20.314/2019, 20.454/2021; VfGH 24.11.2017, E 2845/2017; 6.10.2021, E 3811/2020 ua.

762 Öhlinger/Eberhard, Verfassungsrecht, Rz. 855; VfSlg. 13.893/1994, 13.914/1994, 17.891/2006, 18.058/2007, 18.081/2007, 19.968/2015.

763 VfSlg. 8395/1978, 11.639/1988, 14.644/1996, 15.447/1999, 16.137/2001, 20.070/2016.

764 Vgl. VfSlg. 15.368/1998, 16.293/2001; VfGH 12.12.2018, G 104/2018 ua.; zum Verordnungsprüfungsverfahren gemäß Art. 139 Abs. 1 B-VG vgl. VfSlg. 17.560/2005.

765 Öhlinger/Eberhard, Verfassungsrecht, Rz. 716; vgl. auch die Antworten zu 4., 12. und 14.

dieser Ziele verfolgt, die keinesfalls als im öffentlichen Interesse liegend anzusehen sind.[766]

21. Welche Verhältnismäßigkeitsprüfung wendet Ihr Gerichtshof an? Wendet Ihr Gericht alle Schritte der klassischen Verhältnismäßigkeitsprüfung an (d. h. Angemessenheit, Erforderlichkeit und Verhältnismäßigkeit im engeren Sinne)?

22. Prüft Ihr Gerichtshof alle Elemente der Verhältnismäßigkeitsprüfung?

Der VfGH wendet alle Schritte der „klassischen", von der Judikatur des deutschen Bundesverfassungsgerichts und vom EGMR geprägten Verhältnismäßigkeitsprüfung an. Als eine Art Wendepunkt in der Judikatur des VfGH gilt insofern das Erkenntnis VfSlg. 10.179/1984 zum Schrottlenkungsgesetz, das am Beginn der Entwicklung der Verhältnismäßigkeitsprüfung durch den VfGH steht.[767] Grundrechtsbeschränkungen sind nach der damit begonnenen Rechtsprechung nur dann zulässig sind, wenn sie im öffentlichen Interesse liegen, zur Erreichung des im öffentlichen Interesse liegenden Zieles geeignet und erforderlich sind und zwischen dem öffentlichen Interesse und der verkürzten Grundrechtsposition eine adäquate Relation besteht.[768] Die vom VfGH zur Prüfung der Verhältnismäßigkeit entwickelten, in ständiger Rechtsprechung wiedergegeben Formeln folgen diesem Schema, sie weisen gleichwohl grundrechtsspezifische Besonderheiten auf. Zur Freiheit der Meinungsäußerung (Art. 10 EMRK) verwendet der VfGH, um ein Beispiel im Zusammenhang mit einem Konventionsrecht zu nennen, beispielsweise folgende Formel:

„Ein verfassungsrechtlich zulässiger Eingriff in die Freiheit der Meinungsäußerung muss sohin, wie auch der Europäische Gerichtshof für *Menschenrechte ausgesprochen hat (s. zB EGMR 26.4.1979, Fall Sunday Times, EuGRZ 1979, 390; 25.3.1985, Fall Barthold, EuGRZ 1985, 173), gesetzlich vorgesehen sein, einen oder mehrere der in Art. 10 Abs. 2 EMRK genannten rechtfertigenden Zwecke verfolgen und zur Erreichung dieses Zweckes oder dieser*

Zwecke ‚in einer demokratischen Gesellschaft notwendig' sein".[769]

23. Gibt es Fälle, in denen Ihr Gerichtshof annimmt, dass die angefochtene Maßnahme einen oder mehrere Schritte der Verhältnismäßigkeitsprüfung erfüllt, auch wenn es offensichtlich keine ausreichenden Beweise gibt, um dies zu belegen?

Nein. Der VfGH gliedert seine Begründung jedoch nicht immer nach dem „klassischen" Schema, sondern „überspringt" mitunter einzelne Prüfungsschritte.[770] Vereinzelt stellt er pauschal fest, dass eine Regelung verhältnismäßig sei.[771]

24. Fällt die Einführung der Verhältnismäßigkeitsprüfung in der Rechtsprechung Ihres Gerichtshofs mit der Entfaltung des Grundsatzes der richterlichen Selbstbeschränkung zusammen?

25. Hat die Rechtsprechung des EGMR die Haltung Ihres Gerichtshofs in Bezug auf die Frage richterlicher Selbstbeschränkung beeinflusst? Entspricht der vom EGMR anerkannte „margin of appreciation" der Konventionsstaaten im innerstaatlichen Bereich dem Beurteilungsspielraum, den Ihr Gerichtshof dem politischen Entscheidungsträger einräumt? Wenn nicht, wie oft überschneiden sich die Erwägungen des EGMR zum Ermessensspielraum der Konventionsstaaten mit den Erwägungen Ihres Gerichtshofs zum rechtspolitischen Gestal-

766 VfSlg. 9911/1983, 12.094/1989, 19.933/2014, 20.285/2018.

767 Vgl. *Grabenwarter*, Verfassungsgerichtshof, Rz. 118.

768 Zum öffentlichen Interesse vgl. zB VfSlg. 12.094/1989, 20.032.2015, 20.089/2016, 20.268/2018; zur Eignung vgl. zB VfSlg. 13.725/1994, 20.202/2017; VfGH 27.6.2023, E 1517/2022; zur Erforderlichkeit vgl. zB VfSlg. 17.817/2006, 19.722/2012, 20.073/2016, 20.475/2021; zur Adäquanz vgl. zB VfSlg. 11.853/1988, 18.115/2007, 20.398/2020.

769 VfSlg. 20.014/2015; VfGH 24.2.2021, E 607/2021; 27.9.2021, E 4337/2020; 8.3.2022, E 3120/2021; 19.9.2022, V 183/2021.

770 Mit diesem Befund Öhlinger/Eberhard, Verfassungsrecht, Rz. 717; vgl. zB VfSlg. 19.624/2012, 20.181/2017, 20.261/2017.

771 Vgl. zB VfSlg 13.330/1993, 13.659/1993.

tungsspielraum des Gesetzgebers?

28. Hat Ihr Gerichtshof seine Kontrolldichte im Lauf der Zeit zurückgenommen?

„Die Auseinandersetzung mit der EMRK und mit der Rechtsprechung des EGMR ist im europäischen Vergleich in Österreich in einem Höchstmaß gegeben".[772] Dafür ist zunächst die Stellung der EMRK in der österreichischen Rechtsordnung ausschlaggebend, zumal diese als Teil des Verfassungsrechts unmittelbarer Prüfungsmaßstab des VfGH ist.[773] Die Konventionsrechte können als verfassungsgesetzlich gewährleistete Rechte im Sinne des B-VG vor dem VfGH geltend gemacht werden.[774] Der Gerichtshof zeigt in seiner Rechtsprechung zudem eine hohe Bereitschaft zur Berücksichtigung der Straßburger Rechtsprechung.[775]

Ende der 1980er-Jahre begann der VfGH, den in der Spruchpraxis der Organe der EMRK entwickelten *margin of appreciation* als Gestaltungsspielraum zu übernehmen[776] und setzt diese Rezeption bis heute fort.[777] Der VfGH betont immer wieder, dass der rechtspolitische Gestaltungsspielraum und der *margin of appreciation* synonym zu verstehen seien.[778] Teilweise erstreckt er den *margin* auch auf nationale Grundrechte.[779] Diese Vorgangsweise mag aufgrund des Verfassungsrangs der EMRK in Österreich nahe liegen; sie ist aber angesichts der jeweils unterschiedlichen dogmatischen Konzepte keineswegs selbstverständlich, weil der rechtspolitische Gestaltungsspielraum vom Ausmaß der verfassungsrechtlichen Bindungen des Gesetzgebers abhängt, während sich der *margin of appreciation* vor allem auch aus der Zuständigkeitsverteilung zwischen dem EGMR und den Organen des Konventionsstaates ergibt.[780]

Die Kontrolldichte des VfGH hat in den letzten Jahrzehnten speziell in der Grundrechtsjudikatur nicht ab-, sondern deutlich zugenommen.[781] Verantwortlich dafür sind gerade auch die Einflüsse der Grundrechte der EMRK (und ihrer Zusatzprotokolle) und die dazu ergangene Rechtsprechung des EGMR.[782] Die eng mit der Straßburger Judikatur verwobene Etablierung der Verhältnismäßigkeitsprüfung in der Rechtsprechung des VfGH fällt sohin in Österreich nicht mit der Entfaltung des Grundsatzes der richterlichen Selbstbeschränkung zusammen, sondern ist wesentlicher Teil einer Judikaturentwicklung, die seit Anfang der 1980er-Jahre von einem restriktiv gelebten *judicical self restraint* weggeführt hat.[783] So hat der Gerichtshof im Zeitraum zwischen der Wiederaufnahme seiner Tätigkeit 1947 bis Ende 1979 lediglich in 113 Fällen auf die Verletzung eines Grundrechtes im Rahmen des Gesetzesprüfungsverfahrens festgestellt.[784] Seither, also in den vergangenen 43 Jahren hat der VfGH

772 *Grabenwarter*, Verfassungsgerichtshof, Rz. 123; dazu näher *ders*, Europäische Grundrechte in der Rechtsprechung des Verfassungsgerichtshofes, JRP 2012, 298 (298 ff.).

773 *Grabenwarter*, Verfassungsgerichtshof, Rz. 123.

774 *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention[7] (2021) § 3 Rz. 2.

775 Vgl. aus jüngster Zeit zB VfSlg. 20.394/2020, 20.509/2021; VfGH 7.12.2022, E 2303/2021; 14.12.2022, E 1487/2022 ua.; 29.6.2023, V 143/2023.

776 *Dopplinger/Mörth*, Gestaltungsspielraum 241, 244.

777 Vgl. VfSlg. 12.103/1989, 19.904/2014, 20.258/2018, 20.286/2018, 20.334/2019.

778 VfSlg 20.179/2017, 20.180/2017; vgl. VfSlg 16.911/2003, 20.089/2016.

779 Vgl. VfSlg. 20.089/2016, 20.179/2017, 20.180/2017.

780 Vgl. *Dopplinger/Mörth*, Gestaltungsspielraum 261.

781 Vgl. nur den aktuellen Befund von *Eberhard*, Judicial activism 150.

782 Vgl. für die ersten Jahrzehnte insbesondere *Novak*, Verhältnismäßigkeitsgebot und Grundrechtsschutz, Festschrift für Günther Winkler (1989) 39 ff.

783 Vgl. *Eberhard*, Judicial activism 148 f.; *Rohregger*, Art. 140 B-VG, Rz. 7.

784 Öhlinger, Die Grundrechte in Österreich, EuGRZ 1982, 216 (244). *Korinek* hielt noch im Jahr 1980 fest, dass dem VfGH zwar in der Literatur regelmäßig vorgeworfen werde, sich insbesondere bei inhaltlichen Fragen der Verfassungsinterpretation zu stark zurückzuhalten – sohin eine ausgeprägte judicial self restraint zu praktizieren; in seiner jüngsten Judikatur würden sich jedoch Beispiele für eine stärker inhaltlich betonte Ver-

hingegen in etwa 700 Fällen eine Grundrechtsverletzung erkannt.

Erwähnenswert erscheint in diesem Zusammenhang auch, dass der VfGH – letztlich – sogar der bis in die 1990er-Jahre hinein geübten Praxis des Verfassungsgesetzgebers entgegen getregen ist, Vorschriften, die im Rang einfacher Gesetze standen und vom VfGH als verfassungswidrig erkannt wurden, als Verfassungsbestimmungen neu zu erlassen.[785] In einer Entscheidung zu einer vergaberechtlichen Bestimmung, die solcherart verfassungsrechtlich immunisiert und der verfassungsgerichtlichen Kontrolle entzogen worden war,[786] erachtete der Gerichtshof diese verfassungsgesetzliche Bestimmung, konkret deren Zustandekommen ohne eine in diesem Fall einer sogenannten „Gesamtänderung" der Verfassung obligatorische Volksabstimmung (Art. 44 Abs. 3 B-VG) als Verstoß gegen das rechtsstaatliche Grundprinzip der Bundesverfassung.[787] Geklärt ist seit dieser Entscheidung, dass der VfGH nicht bloß einfache Gesetze, sondern auch (Bundes-)Verfassungsrecht in Prüfung ziehen kann und dann, wenn es entgegen den Erzeugungsbedingungen der Verfassung zustande gekommen ist, als verfassungswidrig aufhebt.[788]

Die durch den Beitritt Österreichs zur EMRK im Jahr 1958 beginnende Transformation speziell der Grundrechtsjudikatur intensivierte sich mit dem Beitritt Österreichs zur Europäischen Union im Jahr 1995 und dem damit beginnenden, später mit dem Primärrechtsrang der GRC verbreiterten und vertieften „Dialog" zwischen dem VfGH und dem EuGH.[789] Einen Meilenstein dieser Entwicklung, die zu einer weiteren Fokussierung der Verhältnismäßigkeitsprüfung zu Lasten des rechtspolitischen Gestaltungsspielraums beiträgt,[790] ist die Anerkennung von GRC-Rechten als verfassungsgesetzlich gewährleistete Rechte und damit als Prüfungsmaßstab (auch) des VfGH.[791] Eine Schlüsselrolle für die Auslegung der Chartarechte, für die sich der VfGH als Auslegungshilfe der Rechtsprechung des EGMR bedient, spielt in diesem Zusammenhang der Verhältnismäßigkeitsgrundsatz. Dieser ist für die Charterechte bekanntermaßen in Art. 52 Abs. 1 GRC in spezifischer Weise positiviert. Der VfGH nutzt, wie VfSlg. 19.632/2012 eindrucksvoll zeigt, den Verhältnismäßigkeitsgrundsatz gleichsam als Pforte für die Rechtsprechung des EGMR, anhand der er (im konkreten Fall) im Ergebnis die Verhältnismäßigkeit von Beschränkungen der Durchführung mündlicher Verhandlungen prüft.[792]

Die zunehmende Anerkennung und Ausdifferenzierung einer „Aufgabenteilung" der Gerichte im europäischen Verfassungsverbund steht jedoch gleichzeitig auch für eine gegenläufige Entwicklung, die an anderer Stelle dieses Berichts bereits dargestellt wurde (oben 19.). Der VfGH ist in den ersten Jahren nach dem EU-Beitritt noch von einer umfassenden „*doppelten Bindung*" des nationalen Gesetzgebers – nämlich einerseits an Unionsrecht und andererseits an das österreichische Verfassungsrecht – ausgegangen,[793] was in der Lehre sogar als „*eindeutiger Hinweis auf* […] *judicial*

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fassungsgerichtsbarkeit zeigen (Verfassungsgerichtsbarkeit 262).

785 Vgl. *Grabenwarter*, Verfassungsgerichtshof, Rz. 102.

786 Die Verfassungsbestimmung des § 126a des Bundesvergabegesetzes, BGBl. I 56/1997 idF BGBl. I 125/2000, erklärte sämtliche am 1.1.2001 in Geltung stehenden landesgesetzlichen Bestimmungen über Vergaberechtsschutzorgane als „*nicht bundesverfassungswidrig*".

787 VfSlg. 16.327/2001; vgl. auch VfSlg. 15.888/2000.

788 Zur Bundesverfassungswidrigkeit von Landesverfassungsrecht vgl. VfGH 6.12.2022, G 221/2022.

789 *Eberhard*, Judicial activism 149; *Grabenwarter*, Verfassungsgerichtshof, Rz. 125 ff.

790 *Rohregger*, Art. 140 B-VG Rz. 7.

791 Grundlegend VfSlg. 19.632/2012; vgl. ferner VfSlg. 20.394/2020 sowie VfGH, 28.2.2023, G 241/2022; 15.3.2023, E 4001/2021.

792 Vgl. *Grabenwarter*, Wirkungen eines Urteils des Europäischen Gerichtshofs für Menschenrechte – am Beispiel des Falls M. gegen Deutschland, Juristen Zeitung 2010, 857 ff, zur ähnlichen Vorgangsweise des deutschen BVferG bei der Auslegung der Grundrechte des Grundgesetzes.

793 VfSlg. 14.863/1997, 17.967/2006, 18.642/2008, 19.529/2011.

activism" bezeichnet wird.[794] Diesen Grundsatz der doppelten Bindung hat der Gerichtshof mittlerweile – entscheidend – relativiert und die Relevanz der Verfassung und damit seine Rolle in den Fällen zurückgenommen, in denen eine unionsrechtliche Vorschrift die sie umsetzende staatliche Rechtsvorschrift inhaltlich vollständig determiniert.[795]

26. Ist Ihr Staat jemals vom EGMR verurteilt worden, weil Ihr Gerichtshof in einem bestimmten Fall richterliche Zurückhaltung geübt hat und das Rechtsmittel an Ihren Gerichtshof dadurch unwirksam geworden ist?

Nein. Im Urteil vom 7.12.2006, Bsw. 37.301/03, *Hauser-Sporn gg. Österreich*, sprach der EGMR auf das Wesentliche zusammengefasst zwar aus, dass dem Beschwerdeführer in einem Verwaltungsstrafverfahren entgegen Art. 13 EMRK kein innerstaatlicher Rechtsbehelf, auch nicht eine auf Art. 144 B-VG gestützte Beschwerde an den VfGH zur Verfügung gestanden sei, mit Hilfe dessen das Recht auf eine Entscheidung in angemessener Frist effektiv hätte durchgesetzt werden können. Die Ablehnung der Beschwerdebehandlung durch den VfGH erfolgte gleichwohl nicht aus „*richterlicher Zurückhaltung*".

IV. Andere Gesichtspunkte

29. Hängt die gerichtliche Selbstbeschränkung von der Anzahl der beim Gerichtshof anhängigen Rechtssachen ab?

Nein.

30. Kann Ihr Gerichtshof seine Entscheidungen auf Gründe stützen, die von den Parteien nicht vorgebracht wurden? Kann Ihr Gerichtshof die geltend gemachten Gründe auf eine andere als die vom Antragsteller angegebene Verfassungsbestimmung stützen?

Siehe oben 11.

31. Kann Ihr Gerichtshof die Prüfung der Verfassungsmäßigkeit eines Gesetzes auf ein anderes Gesetz ausdehnen, das vom Antragsteller nicht angefochten wurde, das aber für die Situation des Antragstellers relevant ist?

Im Erkenntnisprüfungsverfahren (Art. 144 B-VG) hat der VfGH Bedenken gegen eine Rechtsvorschrift auch dann von Amts wegen wahrzunehmen, wenn diese Rechtsvorschrift vom Beschwerdeführer zwar nicht angefochten wurde, die Bedenken jedoch im Rahmen des von ihm initiierten Verfahrens entstanden sind. In besonderen verfahrensrechtlichen Konstellationen kann sich der Gerichtshof auch in auf Antrag eingeleiteten Normenkontrollverfahren in die Lage versetzt sehen, eine nicht angefochtene Rechtsvorschrift von Amts wegen in Prüfung ziehen zu müssen.[796]

794 *Eberhard*, Judicial activism 149.

795 Vgl. zB VfSlg. 18.642/2009, 19.702/2012, 20.070/2016, 20.209/2017, 20.522/2021 sowie VfGH 14.12.2022, G 287/2022 ua.

796 Vgl. zB VfSlg. 7382/1974, 14.709/1996.

CONSTITUTIONAL COURT OF THE REPUBLIC OF AZERBAIJAN

Forms and Limits of Judicial Deference:

the Case of Constitutional Courts

I. Non-justiciable questions and deference intensities

Constitutional Court of the Republic of Azerbaijan is the highest constitutional review body on issues assigned to its powers by the Constitution of the Republic of Azerbaijan, and its main objectives are to ensure the supremacy of the Constitution of the Republic of Azerbaijan and protect the fundamental rights and freedoms of everyone.

Constitutional Court is actively involved in the process of democratic, legal and secular state building in the Republic of Azerbaijan and by adopting decisions in the field of ensuring the supremacy of Constitution, protection of human rights and freedoms, it tried to contribute to strengthening universal respect for the Constitution and laws of the Republic of Azerbaijan.

Direct or indirect restriction of the constitutional proceedings by any individual or for any reason, impact, threat and interference as well as contempt of the Court shall be inadmissible and entail criminal responsibility in accordance with the legislation of the Republic of Azerbaijan (Article 5 of the Law of the Republic of Azerbaijan on Constitutional Court).

The activities of the courts of the Republic of Azerbaijan are aimed only at the implementation of justice and judicial review in cases and in the manner specified by law.

The activity of Constitutional Court shall be based on the principle of supremacy of the Constitution of the Republic of Azerbaijan as well as principles of independence, collegiality and publicity (Article 4 of the Law of the Republic of Azerbaijan on Constitutional Court).

Constitutional justice shall be administered on the basis of equality of everyone before law and Constitutional Court (Article 26 of the Law of the Republic of Azerbaijan on Constitutional Court).

Constitutional proceedings are carried out on the basis of principles of legal equality of parties and adversary system. Constitutional Court is not bound with evidence and arguments of parties of constitutional proceedings and shall strive for thorough study (Article 28 of the Law of the Republic of Azerbaijan on Constitutional Court).

The main authority of Constitutional Court, undoubtedly, is to verify the compliance with the normative legal acts listed in Article 130 of the Constitution. Through this authority, the Court ensures the supremacy of the Constitution and laws.

One of important competences of Constitutional Court is the interpretation of the Constitution and laws. This competence allows the Court to clarify the content of any norm, bring its real constitutional legal essence to the attention of law enforcers and form the practice of the exact and uniform application of that norm in accordance with its meaning. With the official interpretation given by the court, the legal norm is completed from the point of view of modern values and takes on a more perfect form, and the application of that norm in any other unconstitutional form becomes impossible and thus by clarifying the procedure of application of the norm, the practice of its unconstitutional application in a restrictive or broad form changes.

One of the main competences of Constitutional Court is to examine the constitutional complaints. According to Part V of Article 130 of the Basic Law, everyone shall have the right to lodge complaints with the Constitutional Court of the Republic of Azerbaijan against normative acts of the legislator and the executive, acts of municipalities, and judicial acts infringing upon his/her rights and freedoms. According to modification introduced into legislation in July of 2023, the judicial act (implying the decison of Supreme Court) challenged by complaint can be subject to examination by Constitutional Court if it is based on the normative legal act that contradicts to Constitution or laws.

Constitutional Court sometimes examining the cases related to the interpretation of legislation or its compliance with the Constitution, taking into account that the issue exclusively belongs to the competence of one of the other branches of power, gave recommendations to those bodies as to the implementation of the relevant legislative regulations arising from the decision of the Plenum of Constitutional Court or taking additional measures.

Such recommendations, due to their legal nature and force, should be considered as part of a decision based on the legal positions formulated in the decision of the Plenum of Constitutional Court.

At the same time, it should be noted that according to Article 49 of the Law of the Republic of Azerbaijan on Constitutional Court, the Plenum of Constitutional Court shall terminate the proceedings if any grounds to reject the admission of inquiry, request or complaint for proceedings are discovered.

Article 37 of this Law states the grounds of dismissal the inquiry, request and complaint from examination. Thus, if the drawing up of inquiry, request or complaint does not meet the requirements of the present Law; if the matter does not fall within the jurisdiction of Constitutional Court; if inquiry, request or complaint was submitted by a body or an individual who does not have such a right; if the collegial body, which adopted the decision to submit an inquiry or request to Constitutional Court had no quorum and necessary majority of votes at its session; if the documents certifying the exhaustion of the right to challenge the judicial act or violation of the right to apply to court have not been submitted; if Constitutional Court had already adopted a decision on the matter concerned the inquiry, request or complaint is not admitted for examination of Constitutional Court.

In all other cases, except for the above cases, inquiry, request or complaint received by Constitutional Court shall be examined in accordance with the Law and a legal assessment shall be given.

Human and civil rights and freedoms, as well as the mechanisms of their realization, are widely defined in the Constitution of the Republic of Azerbaijan. The Third Chapter, that is the largest Chapter of the Basic Law, is entirely devoted to fundamental human and civil rights and freedoms, in that Chapter, the rights and freedoms that must be ensured in a democratic, legal state, the mechanisms of their realization, as well as the permissible limits of the legal limitation of individual rights in accordance with international standards are provided.

No provision of the Constitution may be interpreted as a provision aimed at abolishing human and civil rights and freedoms. Human and civil rights and freedoms shall have direct effect on the territory of the Republic of Azerbaijan.

II. **The decision-maker**

According to paragraph 1 of Part III of Article 130 of the Constitution of the Republic of Azerbaijan, the Constitutional Court of the Republic of Azerbaijan verifies the conformity of laws of the Republic of Azerbaijan, decrees and orders of the President, resolutions of the Milli Majlis (Parliament), resolutions and orders of the Cabinet of Ministers, and normative legal acts of central executive bodies with the Constitution of the Republic of Azerbaijan.

At the same time, according to paragraph 2 of Part III of this Article, Constitutional Court verifies the conformity of decrees of the President of the Republic of Azerbaijan, resolutions of the Cabinet of Ministers of the Republic of Azerbaijan, and normative legal acts of central executive bodies with the laws of the Republic of Azerbaijan.

When giving an official interpretation to the provision of any normative legal act or verifying its compliance with the Constitution, Court pays attention to the stage of historical development of that provision. While focusing on the "historical path" passed by the provision being interpreted, the purpose reasoning and intention of the legislator at the time of its enactment is considered. The Court conducts an analysis between the relevance and effectiveness of the law at the time of adoption of the relevant legislative act. This is very useful within interpreting or verifying the conformity of any legislative norm with the Constitution.

It should be noted that the fact that any normative act that is the subject of an inquiry, request or complaint was under broad public debate within the process of adoption by legislator does not ensure its conformity with the Constitution, and the Court conducts a full and comprehensive legal investigation due to the depth of investigation involved regarding fundamental rights.

Appropriate legal recommendations can be given to competent state authorities to ensure unambiguous enforcement of constitutional principles and values. For this purpose, while observing the principle of separation of powers, rule-making institutions are recommended to take certain actions in accordance with their legal positions specified in the decision of Constitutional Court and in some cases the outlines of future rule-making are being determined.

Moreover, when the inconsistency of any legal norm with the Basic Law is determined by Constitutional Court, as stated above, arising from the importance of eliminating the threat of gaps in legislation and regulating the relevant legal relations, the Plenum of Constitutional Court, by its decision, may establish temporary rules until the legislator adopts a new legal norm. Those rules, based on constitutional principles, are of great importance for the practical functioning of law enforcement agencies.

III. **Rights' scope, legality and proportionality**

When examining any case, the Constitutional Court of the Republic of Azerbaijan studies the written opinion of the relevant state bodies, including the bodies related to the executive power. In their opinions those institutions present their views with respect to the legislative norms related to implementation of human rights. However, those views are not binding for Constitutional Court, and Constitutional Court formulates its position taking into account the constitutional essence of the rights established in the Basic Law.

In a number of its decisions, the Constitutional Court noted the need to observe the principles of fairness, equality, rights and freedoms and the proportionality of public interests.

In its decision of 29 October 2010, the Plenum of Constitutional Court noted that for the correct interpretation of the norm, the principle of proportionality, which is a part of the rule of law reflected in the Preamble of Constitution, should be taken into account. In accordance with the principle of proportionality, measures that involve any interference with the legal status of natural or legal persons must be proportionate to the legal goal pursued by the administrative body, and must be necessary and useful in terms of their content, place, time, and the circle of people they cover to achieve that goal.

At the same time, the Plenum of Constitutional Court noted in its decision dated 24 April 2020 that since proving the infliction of moral damage is quite complicated, in these types of claims, the person is not material, but the negative situations that happened in his/her spiritual world, consciousness, shock, etc. must prove before the court.

In this regard, the Plenum of Constitutional Court considered that when examining a case related to moral damage, the court should determine in details due to the moral and physical suffering of the victim, under what conditions and as a result of what action (inaction) the damage was inflicted, the degree of guilt of the person causing the damage, and other circumstances which are important for the resolution of a dispute.

In that decision, the Plenum of Constitutional Court concluded that if one of the relatives of the person who died or whose health was harmed, including family members, received compensation for moral damage, the claim of others for compensation should be resolved by the court hearing the case in accordance with the criteria of proportionality and fairness specified in this decision. When the amount of compensation for moral damage is determined by the courts, the type, degree, duration of the illegal act, under what conditions, environment and other factors should be taken

into account.

The Plenum of Constitutional Court referred to the principle of margin of appreciation in some of its decisions and applied that principle based on the approach of the European Court of Human Rights. For instance, the Plenum of Constitutional Court noted in its decision dated 26 July 2023 that the legislator has quite wide margin of appreciation when determining the elements of taxation. In this regard, it is also possible to find legal positions formed in the judgements of the European Court of Human Rights. The European Court has repeatedly stated that domestic legislative authorities are in a better position than Convention authorities to assess and determine what can be classified as taxable income in relation to the type and amount of tax to be levied (Guiso and Consiglio v. Italy §44 and Cacciato v. Italy §25, Judgments of 8 February 2018).

In the decision of the Plenum of Constitutional Court of 23 July 2020, it was noted that the legislator enjoys a quite wide margin of appreciation when determining the main elements of taxation and the amount of taxes, the composition of taxpayers and taxation objects, the types of tax rates, the continuity of the tax period, the value and quantity indicators necessary for fixing the tax base, tax calculation procedure, etc.

It was noted in that decision that similar legal positions were reflected in the judgements of the European Court of Human Rights. The Court has repeatedly noted that States Parties have a certain margin of appreciation in formulating and implementing their tax policies in order to prepare for the payment of taxes (Gasus Dosier-und Fördertechnik GmbH v. the Netherlands, 23 February 1995, N.K.M. v. Hungary, 14 May 2013, §65 and Microintelect OOD v. Bulgaria, 4 March 2014, §42).

However, the Plenum considered that the mentioned margin of appreciation of the legislator is not excessive and is limited by the requirements established in Constitution, including the principles of equality and proportionality reflected in Part I of Article 25 and Part II of Article 71 of the Constitution.

In addition, it should be noted that the European Court had not recognized the Constitutional Court as an ineffective remedy in any of its decisions.

IV. **Other peculiarities**

The goals of the Constitutional Court of the Republic of Azerbaijan are to protect the foundations of the constitutional structure, the basic rights and freedoms and to ensure the supremacy and direct effect of the Constitution in the entire territory of the Republic of Azerbaijan.

According to the procedure established by the legislation of the Republic of Azerbaijan, the courts may apply to the Constitutional Court of the Republic of Azerbaijan for the interpretation of the Constitution and laws of the Republic of Azerbaijan regarding the implementation of human rights and freedoms.

Interpretation of the Constitution and laws is one of the important competences of Constitutional Court. This competence allows the Court to clarify the content of one or another norm, to bring its real constitutional-legal purpose to the attention of law enforcers and to form the practice as to exact and uniform application of that norm in accordance with that meaning. The important point is that as a result of official interpretation given by Constitutional Court, the legal norm gets completed in terms of modern values and takes a more advanced form, and it becomes impossible to apply that norm in any other non-constitutional form.

There are general cases in the case-law of Constitutional Court, where the Court, instead of declaring a norm unconstitutional, reveals its meaning and gives its constitutional interpretation which serves a legal basis during application of this norm. In fact, in this case, Constitutional Court proceeds from the need to ensure the stability in the legal field.

In its decisions, Constitutional Court sometimes not only applies the principles directly envisaged in Constitution, but also applies the principles that are not reflected in normative legal acts, especially referring to its own legal positions. Along with it, in a number of cases, in addition to the

constitutional norms emphasized by the applicant, other norms of Constitution are also raised by the Plenum as additional guarantee.

At the same time, it should be noted that a number of recommendations were addressed to the legislative and executive authorities in the decisions of the Plenum adopted on the basis of court requests.

While exercising competences provided by the Basic Law, the Constitutional Court interacts with other branches of power, by its decisions makes its contribution to the formation of the national legal system and the development of legislation. This is done through the legal positions formed in the decisions of the Plenum of Constitutional Court. It should be especially emphasized that Constitutional Court, without exception, operates within the framework of the competences vested to it by legislation and does not interfere in the rule-making activities of other branches of power.

Constitutional Court may analyse other constitutional norms in addition to the constitutional norms specified in the inquiry, request or complaint related to the case admitted for examination, and in order to ground its position, it applies them in the examined case by analysing other constitutional norms. In a number of its decisions, the Plenum of Constitutional Court, when investigating the raised legal issue, gives its legal assessment to other legislative norms that are not raised by inquiry, request or complaint, but are related to the issue, in order to effectively and usefully resolve this issue.

AZƏRBAYCAN RESPUBLİKASININ KONSTİTUSİYA MƏHKƏMƏSİ

Məhkəmə Güzəştinin Formaları və Məhdudiyyətləri: Konstitusiya Məhkəmələrində Baxılan İşlər

I. Məhkəmə baxışına aid olmayan məsələlər və güzəştin intensivliyi

Az–rbaycan Respublikasının Konstitusiya M–hk–m–si Az–rbaycan Respublikasının Konstitusiyası il– onun s–lahiyy–tl–rin– aid edilmiş m–s–l–l–r– dair ali konstitusiya –dal–t mühakim–si orqanıdır v– –sas m–qs–dl–ri Az–rbaycan Respublikası Konstitusiyasının aliliyini t–min etm–k, h–r k–sin –sas hüquq v– azadlıqlarını müdafi– etm–kdir.

Konstitusiya M–hk–m–si Az–rbaycan Respublikasında demokratik, hüquqi, düny–vi dövl–t quruculuğu prosesind– f–al iştirak edir, Konstitusiyanın aliliyinin t–min olunması, insan hüquqlarının v– azadlıqlarının müdafi–si sah–sind– q–bul etdiyi q–rarları il– h–r k–sin Az–rbaycan Respublikasının Konstitusiyasına, qanunlarına hörm–tinin möhk–ml–ndirilm–sin– töhf–sini verm–y– çalışmışdır.

H–r hansı bir ş–xs t–r–find–n, h–r hansı bir s–b–bd–n bilavasit–, yaxud dolayı yolla konstitusiya icraatına m–hdudiyy–t qoyulması, t–sir, h–d– v– müdaxil– edilm–si, habel– m–hk–m–y– hörm–tsizlik göst–rilm–si yolverilm–zdir v– Az–rbaycan Respublikasının qanunvericiliyin– müvafiq sur–td– m–suliyy–t– s–b–b olur ("Konstitusiya M–hk–m–si haqqında" Az–rbaycan Respublikası Qanununun 5-ci madd–si).

Az–rbaycan Respublikası m–hk–m–l–rinin f–aliyy–ti yalnız –dal–t mühakim–sinin v– qanunvericilikl– mü–yy–n edilmiş hallarda v– qaydada m–hk–m– n–zar–tinin h–yata keçirilm–sin– yön–ldilmişdir.

Konstitusiya M–hk–m–sinin f–aliyy–ti Az–rbaycan Respublikası Konstitusiyasının aliliyi, müst–qillik, kollegiallıq v– açıqlıq prinsipl–ri –sasında qurulur ("Konstitusiya M–hk–m–si haqqında" Az–rbaycan Respublikası Qanununun 4-cü madd–si).

Konstitusiya –dal–t mühakim–si h–r k–sin qanun v– Konstitusiya M–hk–m–si qarşısında b–rab–rliyi –sasında h–yata keçirilir ("Konstitusiya M–hk–m–si haqqında" Az–rbaycan Respublikası Qanununun 26-cı madd–si).

Konstitusiya m–hk–m– icraatı t–r–fl–rin hüquq b–rab–rliyi v– ç–kişm–si prinsipl–ri –sasında h–yata keçirilir. Konstitusiya M–hk–m–si konstitusiya m–hk–m– icraatında t–r–fl–rin sübutları v– d–lill–ri il– bağlı deyildir v– baxılan m–s–l–l–rin tam araşdırılmasına nail olmalıdır ("Konstitusiya M–hk–m–si haqqında" Az–rbaycan Respublikası Qanununun 28-ci madd–si).

Konstitusiya M–hk–m–sinin –sas s–lahiyy–ti şübh–siz ki, Konstitusiyanın 130-cu madd–sind– sadalanmış normativ hüquqi aktların Konstitusiyaya uyğunluğunun yoxlanılmasıdır. Bu s–lahiyy–ti vasit–sil– M–hk–m– Konstitusiyanın v– qanunların aliliyini t–min etmiş olur.

Konstitusiya M–hk–m–sinin mühüm s–lahiyy–tl–rind–n biri d– Konstitusiyanın v– qanunların ş–rhidir. Bu s–lahiyy–t M–hk–m–y– bu v– ya dig–r normanın m–zmununu aydınlaşdırmaqla onun real konstitusiya - hüquqi predmetini hüquqt–tbiqedicil–rin n–z–rin– çatdırmağa v– h–min normanın m–hz bu m–naya uyğun d–qiq v– eyni cür t–tbiqi t–crüb–sini formalaşdırmağa imkan verir. M–hk–m–nin verdiyi r–smi ş–rhl– hüquq norması müasir d–y–rl–r baxımından dolğunlaşdırılaraq daha t–kmil forma alır v– h–min normanın h–r hansı dig–r qeyri-konstitusion formada t–tbiqi mümkünsüz olur, bel–likl– d–, normanın t–tbiqi qaydası d–qiql–şdirilm–kl– onun m–hdudlaşdırıcı v– ya genişl–ndirici formada qeyri-konstitusion t–tbiqi t–crüb–si d–yişdirilmiş olur.

Konstitusiya M–hk–m–sinin –sas s–lahiyy–tl–rind–n biri konstitusiya şikay–tl–rin– baxılmasıdır. –sas Qanunun 130-cu madd–sinin V hiss–sin– –sas–n, h–r k–s onun hüquq v– azadlıqlarını pozan qanunvericilik v– icra hakimiyy–ti orqanlarının normativ aktlarından, b–l–diyy– v– m–hk–m– aktlarından Konstitusiya M–hk–m–sin– şikay–t ver– bil–r. 2023-cü ilin iyul ayında qanunvericiliy– edil–n

d–yişikliy– –sas–n, şikay–t– Konstitusiya M–hk–m–si t–r–find–n baxılmasına bar–sind– şikay–t edil–n m–hk–m– aktı (Ali M–hk–m–nin q–rarı) Konstitusiyaya v– ya qanunlarına uyğun olmayan normativ hüquqi akta –saslandığı hallarda yol verilir.

Konstitusiya M–hk–m–si b–z–n qanunvericiliyin ş–rhi v– yaxud Konstitusiyaya uyğunluğu il– bağlı baxdığı işl–rd– m–s–l–nin müst–sna olaraq hakimiyy–tin dig–r qollarından birinin s–lahiyy–tin– aid olduğunu n–z–r– alaraq, h–min orqanlara Konstitusiya M–hk–m–sinin Plenumunun q–rarından ir–li g–l–n müvafiq qanunvericilik nizamlamalarının h–yata keçirilm–sin– v– ya –lav– t–dbirl–rin görülm–sin– dair tövsiy–l–r vermişdir. Hüquqi t–bi–tin– v– qüvv–sin– gör– bel– tövsiy–l–r Konstitusiya M–hk–m–sinin Plenumunun q–rarında formalaşdırılmış hüquqi mövqel–r– –saslanan q–rarın t–rkib hiss–si kimi q–bul edilm–lidir.

Eyni zamanda, "Konstitusiya M–hk–m–si haqqında" Az–rbaycan Respublikası Qanununun 49-cu madd–sin– –sas–n M–hk–m– iclasının gedişind– sorğu, müraci–t v– ya şikay–tin icraata q–bul edilm–sind–n imtina olunması –sasları aşkar edildikd–, habel– sorğu, müraci–t v– ya şikay–t geri götürüldükd– Konstitusiya M–hk–m–sinin Plenumu iş üzr– icraata xitam verir.

Bu Qanunun 37-ci madd–sind– is– sorğu, müraci–t v– ya şikay–tin icraata q–bul edilm–sind–n imtina olunması –sasları qeyd olunmuşdur. Bel– ki, sorğu, müraci–t v– ya şikay–tin t–rtibi bu Qanunun t–l–bl–rin– uyğun olmadıqda; m–s–l– Konstitusiya M–hk–m–sinin s–lahiyy–tin– aid olmadıqda; sorğu, müraci–t v– ya şikay–t bel– hüquqa malik olmayan orqan v– ya ş–xs t–r–find–n verildikd–; sorğu v– ya müraci–t onun Konstitusiya M–hk–m–sin– verilm–si bar–d– q–rar q–bul etmiş kollegial orqanın iclasında yet–rsay v– lazımi s–s çoxluğu olmadan verildikd–; m–hk–m– aktından şikay–t verm–k hüququndan tam istifad– edilm–sini v– ya m–hk–m–y– müraci–t etm–k hüququnun pozulmasını t–sdiq ed–n s–n–dl–r t–qdim olunmadıqda; m–s–l– üzr– Konstitusiya M–hk–m–sinin q–rarı mövcud olduqda sorğu, müraci–t v– ya şikay–t Konstitusiya M–hk–m–sinin icraatına q–bul edilmir.

Qeyd olunan hallar istisna olmaqla, dig–r bütün hallarda Konstitusiya M–hk–m–sin– daxil olmuş sorğu, müraci–t v– şikay–tl–r bu Qanuna müvafiq olaraq baxılır v– hüquqi qiym–t verilir.

Az–rbaycan Respublikasının Konstitusiyasında insan v– v–t–ndaş hüquqları v– azadlıqları, habel– onların reallaşdırılması mexanizml–ri geniş t–sbit edilmişdir. –sas Qanunun –n böyük f–sli olan üçüncü f–sli bütünlükl– –sas insan v– v–t–ndaş hüquqları v– azadlıqlarına h–sr edilmiş, h–min f–sild– demokratik, hüquqi dövl–td– t–min edilm–si z–ruri olan hüquqlar v– azadlıqlar, onların reallaşdırılması mexanizml–ri, habel– ayrı-ayrı hüquqların beyn–lxalq standartlara müvafiq olaraq, qanuni m–hdudlaşdırılmasının yol veril–n h–dl–ri n–z–rd– tutulmuşdur.

Konstitusiyanın heç bir müdd–ası insan v– v–t–ndaş hüquqlarının v– azadlıqlarının l–ğvin– yön–ldilmiş müdd–a kimi t–fsir edil– bilm–z. Az–rbaycan Respublikası –razisind– insan v– v–t–ndaş hüquqları v– azadlıqları birbaşa qüvv–d–dir.

II. Qərarı qəbul edən təşkilat

Az–rbaycan Respublikası Konstitusiyasının 130-cu madd–sinin III hiss–sinin 1-ci b–ndin– –sas–n Az–rbaycan Respublikasının Konstitusiya M–hk–m–si Az–rbaycan Respublikasının Milli M– clisinin (Parlament) q–bul etdiyi qanunların, Az–rbaycan Respublikası Prezidentinin f–rman v– s–r–ncamlarının, Az–rbaycan Respublikası Milli M–clisinin q–rarlarının, Az–rbaycan Respublikası Nazirl–r Kabinetinin q–rar v– s–r–ncamlarının, m–rk–zi icra hakimiyy–ti orqanlarının normativ hüquqi aktlarının Az–rbaycan Respublikası Konstitusiyasına uyğunluğunu yoxlayır.

Eyni zamanda, bu madd–nin III hiss–sinin 2-ci b–ndin– –sas–n Konstitusiya M–hk–m–si Az–rbaycan Respublikası Prezidentinin f–rmanlarının, Az–rbaycan Respublikası Nazirl–r Kabinetinin q–rarlarının, m–rk–zi icra hakimiyy–ti orqanlarının normativ hüquqi aktlarının Az–rbaycan Respublikası qanunlarına uyğunluğunu yoxlayır.

Konstitusiya M–hk–m–si h–r hansı normativ hüquqi aktın müdd–asına r–smi ş–rh ver–rk–n v– yaxud onun Konstitusiyaya uyğunluğunu yoxlayark–n h–min müdd–anın tarixi inkişaf m–rh–l–sin– diqq–t yetirir. Ş–rh olunan müdd–anın keçdiyi "tarixi yola" diqq–t yetir–rk–n onun q–bul olunması

zamanı qanunvericinin m–qs–dini, –saslandırmasını v– niyy–tini n–z–rd–n keçirir. M–hk–m– müvafiq qanunvericilik aktının q–bul olunması zamanı hazırkı günd– qanunun aktuallığı v– effektivliyi arasında analiz keçirir. Bu h–r hansı qanunvericilik normasının Konstitusiyaya uyğunluğunun yoxlanılmasında v– yaxud ş–rh edilm–sind– çox faydalıdır.

Qeyd edilm–lidir ki, sorğu, müraci–t v– ya şikay–tin predmetini t–şkil ed–n h–r hansı normativ aktın qanunverici orqan t–r–find–n q–bul edil–rk–n böyük ictimai müzakir–l–rd–n keçm–si onun Konstitusiyaya uyğunluğunu sığortalamır v– M–hk–m– adi qaydada fundamental hüquqlara uyğunluqla bağlı araşdırmanın d–rinliyin– gör– hüquqi araşdırmanı tam v– h–rt–r–fli aparır.

Konstitusiya prinsipl–ri v– d–y–rl–rinin birm–nalı t–min edilm–si üçün s–lahiyy–tli dövl–t orqanlarına müvafiq hüquqi tövsiy–l–r veril– bil–r. Bu zaman hakimiyy–t bölgüsü prinsipin– –m–l edilm–si ş–rtil– normayaradıcı institutlara Konstitusiya M–hk–m–sinin q–rarında göst–ril–n hüquqi mövqel–rin– uyğun olaraq mü–yy–n h–r–k–tl–ri etm–k tövsiy– olunur v– bir sıra hallarda g–l–c–k normayaradıcılığının konturları mü–yy–nl–şdirilir.

Eyni zamanda, Konstitusiya M–hk–m–si t–r–find–n h–r hansı bir hüquq normasının –sas Qanuna uyğunsuzluğu mü–yy–n edildikd–, yuxarıda qeyd edildiyi kimi, qanunvericilikd– boşluqların yaranması t–hlük–sinin aradan qaldırılması v– müvafiq hüquq münasib–tl–rinin t–nziml–nm–sinin vacibliyind–n ir–li g–l–r–k, Konstitusiya M–hk–m–sinin Plenumu öz q–rarında qanunverici t–r–find–n yeni hüquq normasının q–bul edilm–sin– q–d–r müv–qq–ti qaydalar mü–yy–n ed– bil–r. Konstitusiya prinsipl–rin– –saslanan h–min qaydalar hüquqt–tbiqedici orqanların praktiki f–aliyy–tl–ri üçün böyük –h–miyy–t daşıyırlar.

III. **Hüquqların ƀhatƀdairƀsi, qanuniliyi vƀmütƀnasibliyi**

Az–rbaycan Respublikasının Konstitusiya M–hk–m–si h–r hansı iş– baxark–n müvafiq dövl–t orqanları, o cüml–d–n icra hakimiyy–tin– aid olan orqanların yazılı ş–kild– r–yini öyr–nir. Bu r–yl–rd–h–min t–sisatlar insan hüquqlarının h–yata keçirilm–si il– bağlı qanunvericilik normalarına öz mülahiz–l–rini t–qdim edirl–r. Lakin h–min mülahiz–l–r Konstitusiya M–hk–m–si üçün m–cburi deyill–r v– Konstitusiya M–hk–m–si öz mövqeyini –sas Qanunda t–sbit edilmiş hüquqların Konstitusiya mahiyy–tini n–z–r– alaraq formalaşdırır.

Bir sıra q–rarlarında Konstitusiya M–hk–m–si –dal–tlilik, b–rab–rlik, hüquq v– azadlıqların ictimai maraqlara aid müt–nasiblik prinsipl–rin– riay–t edilm–sinin z–ruriliyini qeyd edib.

29 oktyabr 2010-cu il tarixli Q–rarında, Konstitusiya M–hk–m–sinin Plenumu qeyd etmişdir ki, normanın düzgün ş–rh edilm–si üçün, Konstitusiyanın Preambulasında –ksini tapan qanunun aliliyinin t–rkib hiss–si olan müt–nasiblik prinsipi n–z–r– alınmalıdır. Müt–nasiblik prinsipin– müvafiq olaraq fiziki v– ya hüquqi ş–xsl–rin hüquqi statusuna h–r hansı müdaxil–ni n–z–rd– tutan t–dbirl–r inzibati orqanın güddüyü qanuni m–qs–d– müt–nasib olmalı, h–min m–qs–d– çatmaq üçün öz m–zmunu, yeri, vaxtı v– –hat– etdiyi ş–xsl–rin dair–si baxımından z–ruri v– yararlı olmalıdır.

Eyni zamanda, Konstitusiya M–hk–m–sinin Plenumu 2020-ci il 24 aprel tarixli Q–rarında qeyd etmişdir ki, m–n–vi z–r–rin vurulmasının sübut edilm–si kifay–t q–d–r mür–kk–b olduğundan, bu növ iddialarda ş–xs maddi deyil, m–n–vi al–mind–, şüurunda baş vermiş m–nfi halları, sarsıntını v– s. m–hk–m– qarşısında sübut etm–lidir.

Bu baxımdan Konstitusiya M–hk–m–sinin Plenumu hesab etmişdir ki, m–hk–m–d– m–n–vi z–r–rl– bağlı iş– baxılark–n z–r–rç–kmiş ş–xsin m–n–vi v– fiziki iztirablar keçirm–si il– –laq–dar z–r–rin hansı ş–raitd– v– hansı h–r–k–t (h–r–k–tsizlik) n–tic–sind– vurulması, z–r–r vuranın t–qsirinin d–r–c–si v– mübahis–nin h–lli üçün –h–miyy–t k–sb ed–n dig–r hallar –traflı araşdırılaraq mü–yy–n edilm–lidir.

H–min Q–rarda Konstitusiya M–hk–m–sinin Plenumu bel– n–tic–y– g–lib ki, ölmüş v– ya sağlamlığına z–r–r vurulmuş ş–xsin yaxınlarından, o cüml–d–n ail– üzvl–rind–n birinin m–n–vi z–r–r– gör– t–zminat almış olduğu halda, dig–rl–rinin t–zminat t–l–bi bu Q–rarda göst–ril–n müt–nasiblik v– –dal–tlilik meyarlarına uyğun olaraq iş– baxan m–hk–m– t–r–find–n h–ll edilm–lidir. M–hk–m–l–r t–r–find–n m–n–vi z–r–r– gör– t–zminatın miqdarı mü–yy–n edil–rk–n hüquqazidd –m–lin növü, d–r–c–si, davam etdiyi müdd–t, hansı ş–raitd–, mühitd– baş verm–si v– dig–r amill–r n–z–r– alınma-

lıdır.

Konstitusiya M–hk–m–sinin Plenumu bir sıra q–rarlarında mülahiz– s–rb–stliyi prinsipin– istinad ed–r–k, h–min prinsipi m–hz İnsan Hüquqları üzr– Avropa M–hk–m–sinin yanaşması –sasında t–tbiq etmişdir. Bel– ki, Konstitusiya M–hk–m–sinin Plenumu 26 iyul 2023-cü il tarixli Q–rarında qeyd etmişdir ki, vergitutma elementl–rinin mü–yy–n edilm–si zamanı qanunverici kifay–t q–d–r geniş mülahiz– s–rb–stliyin– malikdir. Bununla bağlı İnsan Hüquqları üzr– Avropa M–hk–m–sinin q–rarlarında formalaşmış hüquqi mövqel–r– d– rast g–lm–k mümkündür. Avropa M–hk–m–si d–f–l–rl– bildirmişdir ki, tutulacaq verginin növü v– m–bl–ği il– bağlı, n–yin vergi tutulan g–lir kimi t–snif edil–bil–c–yini qiym–tl–ndirm–k v– mü–yy–n etm–kd– daxili qanunverici orqanlar Konvensiya orqanlarından daha yaxşı mövqed–dirl–r (Guıso and Consıglıo İtaliyaya qarşı iş üzr– §44 v– Cacciato İtaliyaya qarşı iş üzr– §25, 2018-ci il 8 fevral tarixli Q–rarlar).

Konstitusiya M–hk–m–si Plenumunun 23 iyul 2020-ci il tarixli Q–rarında is– qeyd edilmişdir ki, qanunverici vergitutmanın –sas elementl–rini v– vergil–rin miqdarını, vergi öd–yicil–rinin v– vergitutma obyektl–rinin t–rkibini, vergi d–r–c–l–rinin növl–rini, vergi dövrünün davamlılığını, vergi bazasının mü–yy–nl–şdirilm–si üçün g–r–kli olan d–y–r v– k–miyy–t göst–ricil–rini, vergil–rin hesablanma qaydasını v– s. mü–yy–n ed–rk–n kifay–t q–d–r geniş mülahiz– s–rb–stliyin– malikdir.

Q–rarda qeyd edilmişdir ki, oxşar hüquqi mövqel–r İnsan Hüquqları üzr– Avropa M–hk–m–sinin q–rarlarında da –ks olunmuşdur. M–hk–m– d–f–l–rl– qeyd etmişdir ki, t–r–f Dövl–tl–r öz vergi siyas–tl–rini formalaşdıraraq v– h–yata keçir–r–k, vergil–rin öd–nilm–sini t–min etm–k üçün hazırlıq görm–k m–qs–di il– mü–yy–n mülahiz– s–rb–stliyin– malikdirl–r (Gasus Dosier-und Fördertechnik GmbH Niderlanda qarşı iş üzr– 1995-ci il 23 fevral tarixli, N.K.M. v. Macarıstana qarşı iş üzr– 2013-cü il 14 may tarixli, §65 v– Microintelect OOD Bolqarıstana qarşı iş üzr– 2014-cü il 4 mart tarixli, §42 Q–rarlar).

Bununla bel–, Plenum hesab etmişdir ki, qanunvericinin qeyd edil–n mülahiz– s–rb–stliyi h–dsiz deyil v– Konstitusiyada t–sbit olunmuş t–l–bl–rl–, o cüml–d–n Konstitusiyanın 25-ci madd–sinin I hiss–sind– v– 71-ci madd–sinin II hiss–sind– –ks olunmuş b–rab–rlik v– müt–nasiblik prinsipl–ri il–m–hdudlaşdırılır.

–lav– olaraq qeyd edilm–lidir ki, Avropa M–hk–m–si heç bir q–rarında Konstitusiya M–hk–m–sini s–m–r–siz vasit– kimi tanımamışdır.

IV. **Dig□r xüsusiyy□tl□r**

Az–rbaycan Respublikası Konstitusiya M–hk–m–sinin m–qs–dl–ri konstitusiya quruluşunun –saslarını, insan v– v–t–ndaşın –sas hüquq v– azadlıqlarını müdafi– etm–k, Az–rbaycan Respublikasının bütün –razisind– Konstitusiyanın aliliyini v– bilavasit– t–sirini t–min etm–kd–n ibar–tdir.

Az–rbaycan Respublikasının qanunvericiliyi il– mü–yy–n edilmiş qaydada m–hk–m–l–r insan hüquqlarının v– azadlıqlarının h–yata keçirilm–si m–s–l–l–ri il– bağlı Az–rbaycan Respublikası Konstitusiyasının v– qanunlarının ş–rh edilm–si haqqında Az–rbaycan Respublikasının Konstitusiya M–hk–m–sin– müraci–t ed– bil–rl–r.

Konstitusiyanın v– qanunların ş–rhi Konstitusiya M–hk–m–sinin mühüm s–lahiyy–tl–rind–n biridir. Bu s–lahiyy–t M–hk–m–y– bu v– ya dig–r normanın m–zmununu aydınlaşdırmaqla onun real konstitusiya - hüquqi t–yinatını hüquqt–tbiqedicil–rin n–z–rin– çatdırmağa v– h–min normanın m–hz bu m–naya uyğun d–qiq v– eyni cür t–tbiqi t–crüb–sini formalaşdırmağa imkan verir. Mühüm m–qam ondan ibar–tdir ki, Konstitusiya M–hk–m–sinin verdiyi r–smi ş–rhl– hüquq norması müasir d–y–rl–r baxımından dolğunlaşdırılaraq daha t–kmil forma alır v– h–min normanın h–r hansı dig–r qeyri-konstitusion formada t–tbiqi mümkünsüz olur.

Konstitusiya M–hk–m–sinin t–crüb–sind– ümumi hallar var ki, M–hk–m– normanı Konstitusiyaya zidd elan etm–k –v–zin–, onun m–nasını mü–yy–n ed–r–k, onun konstitusiya ş–rhini verir ki, bu normanın t–tbiqi zamanı r–smi t–fsird– qeyd olunan hüquqi mövqe r–hb–r tutulur. –slind–, bu halda Konstitusiya M–hk–m–si hüquqi sah–d– sabitliyin t–min edilm–si z–rur–tind–n çıxış edir.

Konstitusiya M–hk–m–si öz q–rarlarında b–z–n t–kc– Konstitusiyada bilavasit– t–sbit olunmuş prinsipl–rd–n istifad– etm–kl– yanaşı, normativ hüquqi aktlarda –ksini tapmayan prinsipl–ri d– t–tbiq edir, xüsus–n d– özünün hüquqi mövqel–rin– istinad edir. Bununla yanaşı, bir sıra hallarda müraci–t-ed–nin vurğuladığı konstitusiya normalarından –lav– Plenum t–r–find–n Konstitusiyanın dig–r normalarına da toxunularaq –lav– t–minat kimi qaldırılır.

Eyni zamanda, onu da qeyd etm–k lazımdır ki, m–hk–m–l–rin müraci–tl–ri –sasında q–bul edilmiş Plenum q–rarlarında qanunverici v– icra hakimiyy–ti orqanlarına bir sıra tövsiy–l–r ünvanlanmışdır.

–sas Qanunla n–z–rd– tutulmuş s–lahiyy–tl–rini h–yata keçir–rk–n Konstitusiya M–hk–m–si hakimiyy–tin dig–r qolları il– qarşılıqlı f–aliyy–t göst–rir, q–bul etdiyi q–rarları il– milli hüquq sisteminin formalaşmasına, qanunvericiliyin inkişafına öz töhf–sini verir. Bu, Konstitusiya M–hk–m–sinin Plenumunun q–rarlarında formalaşdırılan hüquqi mövqel–r vasit–sil– edilir. Xüsusil– vurğulanmalıdır ki, Konstitusiya M–hk–m–si istisnasız olaraq qanunvericiliyin ona verdiyi s–lahiyy–tl–r ç–rçiv–sind– f–aliyy–t göst–rir, hakimiyy–tin dig–r qollarının normayaratma f–aliyy–tin– müdaxil– etmir.

Konstitusiya M–hk–m–si onun icraatına daxil olan iş il– –laq–dar sorğu, müraci–t v– yaxud şikay–td– göst–ril–n konstitusiya normalarından –lav– dig–r konstitusiya normalarını t–hlil ed– bil–r v– öz mövqeyini –saslandırmaq üçün dig–r konstitusiya normalarını t–hlil etm–kl– baxılan işd– onları t–tbiq edir. Bir sıra q–rarlarda is– Konstitusiya M–hk–m–sinin Plenumu qaldırılan hüquqi m–s–l–ni araşdırark–n bu m–s–l–nin s–m–r–li v– faydalı h–ll edilm–si m–qs–di il– sorğu, müraci–t v– ya şikay–tl– qaldırılmayan, lakin m–s–l– il– –laq–li olan dig–r qanunvericilik normalarına öz hüquqi qiym–tini verir.

The Constitutional Court of Belgium

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Pierre Nihoul[797]

Luc Lavrysen[798]

Ann-Sophie Vandaele[799]

Quentin Pironnet[800]

I. Non-justiciable questions and deference intensities

1. In your jurisdictions, what is meant by "judicial deference"?

The Court has no general concept or definition of "judicial deference". Moreover, other than the purely quantitative annual reports, there is no systematic or regular self-assessment by the Court of the case-law to detect any implicit practice. Scholarship is starting to analyse in a more comprehensive way the varying intensity of review of the Court.[801]

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

Several no-go areas are pre-determined by the Constitution and the organic law on the Constitutional Court. Indeed, the Court is only entrusted with the task of assessing the conformity of legislative norms with regard to a specific list of the constitutional articles (see article 142 of the Belgian Constitution[802] and articles 1 and 26 of the Special Law on the Constitutional Court of 6 January 1989[803]). Those mostly include the Bill of Rights of the country (freedoms and liberties, etc.) and the rules that determine the respective competences of the federal State, the communities and the regions. Other institutional provisions are therefore excluded from the scope of action of the Court. As a result, the latter is protected in advance against some attempts that would be too political since the most politically and institutionally sensitive articles of the Belgian supreme text are not entrusted to the Court for safekeeping. For instance, one of the cornerstones of the Belgian executive branch is that the federal Government must comprise as much French-speaking ministers as Dutch-speaking ones (article 99 of the Constitution). This latter provision is unaccountable before

797 French speaking President of the Court

798 Dutch speaking President of the Court

799 Legal Secretary

800 Legal secretary

801 See eg B. MEEUSEN, *Variërende toetsingsintensiteit in de rechtspraak van het Grondwettelijk Hof*, doctoral thesis, Ghent University, 2023, 409 p. (not published yet).

802 An English version of the Constitution is available on the website of the House of Representatives: https://www.lachambre.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf.

803 An unofficial English version of the Special Law on the Constitutional Court is available at this url: https://hdl.handle.net/2268/305658 (pp. 48-70). The Special Law will be referred to as the SLCC in the rest of the report.

the Constitutional court. One must therefore bear in mind that the need for 'deference' in Belgium is at least in part attenuated by the fact that the Court itself is legally bound in its jurisdiction. Beyond this first aspect, there is no specific normative prohibition for the Court relating to questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, or substantial financial implications for the government.

3. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

One might claim that a lot is put in place as to encourage deference. First and foremost is the fact that the composition of the Court is drawn from the political world, directly or indirectly. Half the judges must be former members of Parliament, and all of them are appointed by Royal Decree on proposal of the House of Representatives or the Senate in a way that guarantees the political representativeness resulting from the elections by proportional suffrage. If we add to this the fact that Belgium is divided between eight different entities, with (almost) every conceivable political coalition, it means that no judge is in a position where her or his political ideology is forever unfavoured by the law. Furthermore, there is the historical fact that large reforms (especially State reforms) in Belgium take time (see the 541 days for the one in 20102011) and are the result of a wide-ranging political consensus. A politically and electorally pluralistic country might be more prone to deference. Additionally, the jurisdiction of the Court is specifically limited with regard to certain areas that might typically be susceptible to greater deference (see question 2).

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

See answer to question 2. It is clear that expertise does not play a major role in the way the Court operates or reasons. However, a formal possibility of investigating and seeking out proper experts exists in the organic law, even if those provisions are rarely if never used (articles 91 and 94 of the SLCC). In any case, the Court always takes time to clear up any factual issues, however complicated, before deciding. The Court may address questions to the parties, who then have the responsibility to provide the necessary information. See for instance a case concerning the prohibition, for men who have sexual intercourse with men, to donate blood. In this case, the Court asked the parties questions regarding the safety measures that might be necessary to guarantee safe donation[804]. In two other recent cases involving medical expertise, regarding covid safe tickets[805] and transgender law[10], the Court was more deferential for the first one and less so for the second, regardless of any issue of expertise.

5. Are there cases where your Court deferred because there was a risk of judicial error?

The concept of 'judicial error' is in itself unknown to the case-law of the Court. Two things must nevertheless be pointed out. First, the Court always takes great care to assemble all relevant facts and information (see question 4). Second, criminal matters, where we most generally speak of 'judicial error', call for specific scrutiny in the Court's case-law. In particular, the Court is more generous in granting the condition of interest in the action where the claimant or the party to the original dispute is (or could be) subject to criminal law.

6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

We found no trace of any explicit mentions of the democratic legitimacy in such a context, however, this is obviously one of the considerations underlying any reference to a large margin of appreciation of the legislator, especially in the light of the fact that the Court's competence is limited to

804 CC 26.09.2019, nr. 122/2019, ECLI:BE:GHCC:2019:ARR.122.
805 CC 17.05.2023, nr. 75/2023, ECLI:BE:GHCC:2023:ARR.075. See e.g. B.41.3.2. on the 'scientific consensus'. [10] CC 19.06.2019, nr. 99/2019, ECLI :BE:GHCC:2019:ARR.99.

legislative acts. The paradigmatic example of a domain where the Court recognises a 'large margin of appreciation' to the legislator is the socio-economic policy in general and tax law in particular, for which there is extensive case-law (see eg case nr 56/2022). But there are other instances in which the Court does make such a stance: the law of nationality (eg case nr 79/2022), road safety regulations (eg nr 134/2021), the organisation of municipal emergency services (eg case nr 5/2016), notice periods under employment law (eg case nr 98/2015), the status of military personnel (eg case nr 40/2015) or police personnel (eg case nr 79/2011), etc. In practice, the legislator's margin of appreciation determines the general framework of the Court's review, rather than the review, as such, of the proportionality of the measure. A priori, the review of proportionality remains the same as regards its nature, but the Court simply announces its restraint, since it will limit itself to censuring what is manifestly unreasonable or manifestly disproportionate.

As for the democratic aspect of an adopted law, with the obvious exception of the application of the principle of legality attached to certain provisions (for instance article 23 of the Constitution or the rule *nullum crimen sine lege*), the case-law of the Court does not show a clear-cut and systematic deference rule whether the legislation challenged has been adopted by a more or less wide majority of the relevant assembly. For example, a regulation relating to ritual slaughter of animals, unanimously voted by the Walloon Region parliament, was validated by the Court but with some caveats[806].

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

There are different layers in this question. On the one hand, the case-law of the Court often mentions the 'margin of appreciation' of the democratic assemblies of the country. For instance, the Court refuses to assess the intrinsic seriousness of a criminal offense (see eg the case on the absence of statute of limitations for sexual offences against minors[807]), or the opportunity to create a new tax (see question 6). The Court reserves pure questions of policy to the legislative branch and acts if those go beyond what is considered reasonable (vis-à-vis the principles of equality and non-discrimination, among others). On the other hand, the Court rarely (if ever) acknowledges its 'unelected' status to defer. Nor does it use a so-called 'broad social policy' distinction to do so. There are numerous examples of strict or more lenient (or marginal) review for different 'broad social' issues, so no fixed trend can be inferred.

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

There is no general principle of deference in judging penal philosophy and policies. On the contrary, case-by-case review is the rule. However, the 'margin of appreciation' in criminal cases has been largely studied by Belgian legal scholarship. In general, criminal laws are reviewed in a more lenient way, for instance when the legislator decides to create a new offense or chooses to aggravate the severity of punishments[808], or in a more strict way when assessing the conformity of criminal laws with articles 6 and 7 ECHR[809].

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

806 CC 30.09.2021, nr. 117/2021, ECLI :BE:GHCC:2021:ARR.117.

807 CC 09.06.2022, nr. 76/2022, ECLI :BE:GHCC:2022:ARR.76.

808 Eg CC 13.07.2005, nr. 125/2005, ECLI :BE:GHCC:2005:ARR.125.

809 See for instance O. Michiels, *La Jurisprudence de la Cour constitutionnelle en procédure pénale : le Code d'instruction criminelle remodelé par le procès équitable ?*, Anthemis, 2015.

The fact that the Court seldom deals with concrete matters does not offer much to answer the question. However, those circumstances, should they arise, shouldn't be an obstacle for the Court to ask whatever document or information required by the case. Article 91 of the organic law states that "The Court has the widest powers of inquiry and investigation" and can "obtain from any public authority all documents and information relating to the case". Case-law of the Belgian Council of State regarding the licensing of heavy weapons to Saudi Arabia, stating that the Government must provide all unredacted documents to the jurisdiction (even when they cannot be transmitted to the parties for security reasons), could be applied by analogy by the Constitutional court should it be necessary[810].

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

In several cases, the Court has explicitly taken into account that the legislator had framed a contested provision as a specific rights-compliant reform, to conclude that in the light of this specific aim, the reform did not go far enough. For instance, regarding the provision that allowed the use of double family-names (from both parents), this provision was explicitly framed by the legislator to ensure equality between women and men. In that context, the Court concluded that the rule that, in case of disagreement between the parents, the father's name would always come first, was unconstitutional[811]. A similar reasoning was applied when the rules regarding the gender mentioned on birth certificates were changed, without taking into account non-binary people[812]. More broadly, the Court will be more inclined to point to the passivity of the legislator where this concerns Belgium's positive obligations under European or international law. However, no clear trend can be spotted.

II. The decision-maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

Given the limits of the Court's jurisdiction (except some specific exceptions that have yet to happen in practice, only legislative acts can be contested before the Court, art. 142 of the Belgian Constitution), this question does not arise.

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

The parliamentary preparatory documents feature prominently in the decisions of the Court, as a starting point to evaluate the presence of a legitimate aim, and to evaluate the justification of a certain provision. In Belgium, the opinion of the Legislative Section of the Council of State on draft legislation is also required in many instances, and the Court pays particular attention to this opinion as well as the reaction (or lack thereof) of the legislator to this opinion. Moreover, the Court also considers the provision in its larger historical context, as many newer provisions of course build on or modify existing legislation or systems. There is a very famous precedent in the case-law of the Court when historical weight was considered against questioning an existing legislation, although probably unconstitutional. This is the case in Belgian labour law of the (former) distinction between 'workers' and 'employees'. Asked about this quite clear inequality, the Court accepted the weight of legislative history to validate the legislation. However, ten years or so after this judgement, when asked the same question, the Court reassessed the balance between history and equality and finally favoured the latter, by declaring the law unconstitutional[813].

810 Belgian Council of State, 14.06.2019, nr. 244.800.
811 CC 14.01.2016, nr. 2/2016, ECLI:BE:GHCC:2016:ARR.2
812 CC 19.06.2019, nr. 99/2019, ECLI :BE:GHCC:2019:ARR.99.
813 CC 02.02.2016, nr. 86/2016, ECLI:BE:GHCC:2016:ARR.86.

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

The former. Broadly, in most cases and when there are no more specific requirement (for instance based on ECtHR-case law but also on specific requirements mentioned in the Constitution), the Court evaluates whether a certain choice by the legislator is reasonably justified. It concludes to a violation when there is no reasonable proportionality between the goals of the legislator, the chosen measures and their consequences. Also, in several cases, the Court explicitly mentions that, although several constitutional options are available, it does not have the authority to make that choice[814].

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

We would like to answer these questions together. The Court consistently states that it has no jurisdiction with regard to the way the contested provisions were adopted (unless it concerns the rules regarding the distribution of powers amongst the different legislators within the federal system)[815]. This includes the fulfilment of certain criteria regarding special majorities, the obligation to consult the Council of State, etc. Recently, the Court has however concluded that obligations resulting from European Union law (such as mandatory participation regarding environmental law or mandatory consultation on privacy matters) do enter the scope of its competence[816].

Of course, extensively motivated parliamentary documents might make it easier for the Government to defend a certain provision, but the Court has also concluded that the fact that a certain argument is not mentioned in these documents, does not keep the Government from raising it before the Court. [817]

III. **Rights' scope, legality and proportionality**

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

The Court naturally avoids playing with words and relies first and foremost on either the common-sense definition or the official definitions of the legal concepts (whether enshrined in the law or deduced from the parliamentary debates). However, definitions do not always benefit the public authorities and the Court is careful not to use a definition in such a way as to deny potential applicants access to constitutional justice. For instance, the Court granted standing to an applicant using the definition of "riverside owner" in the common sense, against the alleged definition of the Government[818].

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your

814 CC 19.06.2019, nr. 99/2019, ECLI :BE:GHCC:2019:ARR.99.

815 For instance CC 26.09.2019, nr. 121/2019, ECLI :BE :GHCC :2019 :ARR.121.

816 For instance CC 28.02.2019, nr. 33/2019, ECLI:BE:GHCC:2019:ARR.33; CC 15.06.2023, nr. 92/2023, ECLI:BE:GHCC:2023:ARR.92.

817 For instance CC 22.12.2010, nr. 160/2010, ECLI:BE:GHCC:2010:ARR.160; CC 27.10.2022, nr. 138/2022, ECLI:BE:GHCC:2022:ARR.138.

818 CC 19.06.2019, nr. 99/2019, ECLI:BE:GHCC:2019:ARR.99.

Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

Quite a vast question, that would require something like a doctoral thesis… In fact, in June 2023, a PhD has been submitted concerning the intensity of review in the jurisprudence of the Belgian Constitutional Court, by Benjamin Meeusen a researcher at Ghent University. However, the defence as well as the publication will take place after the deadline for the submission of this report. The Court awaits his conclusions with great interest.

Less directly, we could remark that the Court operates a kind of classification of rights based on their importance, as part of the case-law concerning the condition of interest to the action or standing. A person has to prove an 'interest to annulment' and the Court considers that certain rights are so important that everyone has standing. *Habeas corpus* is one of them. However, the impact of this reasoning is somewhat limited, as the Court is generally quite lenient when it comes to standing-requirements anyway.

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

The *In claris non fit interpretatio* canon does not apply before the Court. Since the Court deals with a type of litigation that could be said objective (focused on the law) rather than subjective (focused on interests), vagueness does not prevent the Court from performing its Constitutional duty. In practice, the judges and their clerks carry out all the necessary additional research where information or arguments are lacking.

20. What is the intensity review of your Court in case of the legitimate aim test?

To our knowledge, the Court has never concluded that a certain provision failed the legitimate aim test.

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

The Court indeed applies the three stages of the classic proportionality test, but these are sometimes indistinguishable or aggregated. There is no fixed rule, the Court operates on a caseby-case basis. Most of the times, the Court goes all the way to the proportionality in the narrower sense and either does not address the previous stages, or performs a light check. However, there has been some rare cases in which the Court points an issue with the suitability or the necessity.

22. Does your Court go through every applicable limb of the proportionality test?

Not always explicitly. The Court usually reminds the reader of the existence of the criteria and their theoretical implications, but sometimes concerns regarding readability or clarity require a less rigid approach in how the actual application of the test is presented (for instance when the test is applied several times within the same decision, regarding different provisions).

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

We could not find any such cases. See also our answer to question 2.

24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

See our answer to question 26. Additionally, the Court is relatively young (1985 for its first case), and proportionality review (explicitly or implicitly) has always featured heavily in its case-law, so it might be difficult to speak of a period before the inception of proportionality review

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

The ECtHR's doctrine of the margin of appreciation focuses on allowing Member States to guarantee Convention rights in the best possible way at domestic level. This doctrine restricts the margin of appreciation as the legal culture between States is harmonised. While the Belgian Constitutional Court draws on the case law of the ECtHR to review the conformity of laws submitted to it with the standards of the Convention that are similar to those of the Constitution, its underlying philosophy for leaving a margin of appreciation to the legislature, whether federal or federated, is different. See question 6.

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

There are no such decisions.

IV. Other peculiarities

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

It is very logical that in a lot of cases, the government defending the contested provisions will at least try to argue that the legislator has a large margin of appreciation in the subject matter. However, regarding the answer of the Court, we would like to refer to our answers on the questions in title I.

28. Has your Court have grown more deferential over time?

To answer this question, it might be possible to look at the annual reports (published on the website[819]) and check the ratio of annulment/rejection and unconstitutionality/constitutionality, while placing a caveat as to the simplistic and reductive aspect of only looking at quantitative figures. However, the relatively limited number of cases before the Court make any basic statistical analysis of these results highly susceptible to outliers. As for a qualitative assessment, it is not possible to do so within the context of this report.

29. Does the deferential attitude depend on the case load of your Court?

Again, and referring to the previous question, answering this question correctly would require a level of quantitative and qualitative analysis that goes beyond the scope of this report, and does not happen systematically within the Court either. Moreover, because of the way the cases are assigned to the judges and their collaborators, the individual case load for the people writing the first drafts of the decisions, can vary a lot at any given time and is not necessarily reflective of the total caseload of the Court.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

According to article 90 of the organic law, the Court can indicate the arguments it would like to raise ex officio, in addition to the ones raised by the parties. It happens very seldom.

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

819 https://www.const-court.be/fr/court/publications/annual-reports.

The Court might, in some occasions, conclude that a provision that is not explicitly contested, is intrinsically linked with the contested provision, and therefore the former has to be included in the annulment of the latter[820]. This reasoning is however more linked to the internal logic of the contested law, and less to the applicant's situation.

820 The Court has done so very explicitly, by first confirming that certain provisions have not been contested by the parties, to then conclude that, these provisions should nevertheless be included in any potention annulment, due to their intrinsic link with the contested provisions. CC 19/11/2020, nr. 154/2020, ECLI:BE:GHCC:2020:ARR.154.

The Constitutional Court of Bosnia and Herzegovina

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Constitutional cultures vary and the courts' perceptions of their own role in a constitutional democracy affect the intensity of their scrutiny in fundamental rights cases. Many courts profess judicial deference.

Judicial deference is a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters which are perceived to be beyond their expertise or legitimacy to decide. The tool has been employed, most prominently, in human rights cases. This is due to their transcendent quality, capable of cutting across all substantive areas of public decision-making.

It is said that over-deferential attitude threatens the rule of law and separation of powers as much as excessive judicial activism does. The way judges exercise judicial deference is, therefore, a fundamental matter of constitutional principle that concerns the proper role of each branch of government in relation to significant questions of public policy.

The following questions aim to discover the differences in exercising judicial deference by European constitutional courts.

Questionnaire

for the national reports

I. Non-justiciable questions and deference intensities

1. In your jurisdictions, what is meant by "judicial deference"?

In interpreting its competences, the Constitutional Court of Bosnia and Herzegovina must always adhere to the text of the Constitution of BiH and the obligation to uphold this Constitution.[821]

One may refer to "judicial deference" only in situations of interference with the competences of lower-ranking authorities. The lower-ranking authorities are, primarily, recognized as the ones that need to deal with specific cases and in situations where the Constitutional Court is not competent to make a decision (which is prescribed by the Rules of the Constitutional Court of Bosnia and Herzegovina).

The relationship between the constitutional court and the legislator is, without a doubt, of crucial importance for this issue. In this relationship, there are always dilemmas about the extent to which the trial includes politics or discretion; to what extent judges must promote the certainty of the law or the goals of justice, and what are the permitted techniques in the interpretation of the law. Despite the possibility of mutual influence, both branches of government must take care not to enter or jeopardize the very essence related to the features of the constitutional court or the legislator. Therefore, it is a very sensitive issue of setting the limit above which the constitutional court, with its decisions, may turn into a supplementary legislator. More precisely, where the constitutional court may affect the creation or implementation of political will.

However, nowadays we often hear that the principle of effective functioning of the state must be interpreted in such a way that, among other things, constitutional courts are also required to use the judicial activism. It implies an extensive and dynamic interpretation of constitutional rights and freedoms, resolving political crises by imposing transitional legislative arrangements, etc. This is used to overcome various problems whose source lies in the deficient constitutional and legal systems of countries with complex political or national elements. Given the goal sought to be achieved through judicial activism and although it can have its positive role at a certain time and in a certain place, it objectively violates the usual division of power in the system of government and that especially concerns the relationship between constitutional courts and legislative bodies.

However, if the constitutional judiciary is currently required to uphold the principle of the rule of

821 See Constitutional Court, Decision no. U 5/04 of 27 January 2006.

law, which inevitably includes the effective protection of human rights and freedoms, then the question arises as to whether proactive interpretation of constitutional norms in specific cases and interventionist problem-solving approach are necessary prerogatives of the constitutional judiciary rather than judicial activism. The latter is often viewed negatively by the legislature. In other words, the issue is whether certain actions by constitutional courts in the modern era**,** which aim to uphold the rule of law and which in the past could be viewed as classic examples of criticized judicial activism, still fall under the exclusive jurisdiction of the legislator in light of the latter's presumed parliamentary sovereignty to resolve political issues**.**

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

Under the particular socio-economic and political circumstances in which the Constitutional Court has been functioning since its establishment, the Constitutional Court has conscientiously and courageously exercised its constitutional powers to safeguard human rights and fundamental freedoms as provided for in the Constitution of Bosnia. In the light of the case law of the Constitutional Court, it is clear that this court, through its dynamic and ever-changing interpretations of the Constitution of BiH, has consistently contributed towards guaranteeing the equality and constitutional status of peoples all over the territory of Bosnia and Herzegovina. It has contributed to ensuring the sovereignty, territorial integrity and international personality of the state, and strengthening the legal certainty and the rule of law, as well as the protection of human rights. The comprehensive body of decisions in cases of the Constitutional Court make a real contribution to the protection and affirmation of the rule of law in Bosnia and Herzegovina.

In one of its decisions, the Constitutional Court of Bosnia and Herzegovina noted that its jurisdiction is determined by the Constitution of Bosnia and Herzegovina and limitations (constraints) created by the Constitutional Court throughout its case-law. One of those limitations (constraints) is a principled position of the Constitutional Court not to examine the facts established by ordinary courts. However, that position is not absolute given that the caselaw of the Constitutional Court allows exceptions in cases where relevant facts are established "in an evidently arbitrary manner". The Constitutional Court finds justification for the mentioned exception in the fact that "arbitrariness" cannot be in accordance with the principles of the Constitution of Bosnia and Herzegovina despite the fact that the task of establishing relevant facts falls within the scope of basic responsibilities of ordinary courts. Therefore, the mentioned exception is necessary for amending a decision, which might be unconstitutional. This exception is to be applied with extreme caution and it must not become an absolute rule because it would eventually represent reduction of constitutional rights.[822]

The aforementioned is purposed to assert that there are no "prohibited" areas or pre-established zones without legal accountability or issues that the Constitutional Court cannot adjudicate. In decision-making, the Constitutional Court is only subject to the limitations set forth in the Constitution of Bosnia and Herzegovina and the Rules of the Constitutional Court.

3. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

Apart from the cases mentioned in the answers to the previous question, there are no other factors that can influence whether the Constitutional Court of Bosnia and Herzegovina will make a decision or not.

822 See Constitutional Court, Decision no. AP-754/14 of 30 March 2017, paragraph 25.

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

Articles 18.3(a) and 19(a) of the Rules of the Constitutional Court stipulate that the appeal or request for review shall be rejected in cases where the Constitutional Court is not competent to take a decision. In cases of the Constitutional Court's abstract jurisdiction, the Constitutional Court declined its jurisdiction to take a decision in, *inter alia,* the following cases:

- The Constitutional Court has no jurisdiction to take a decision on the issue whether the provisions of the Cantonal Constitution are compatible with the Constitution of the Federation of Bosnia and Herzegovina (Decision no. U-5/03). In the Decision no. U-8/18, the Constitutional Court recalled that it is competent to uphold the Constitution of BiH, but that it does not have the jurisdiction to uphold the entity's constitutions. This is so as this issue is within the exclusive competence of the entity's constitutional court.

- In the case no. U-8/05, the applicant challenged the constitutionality of certain general acts based on Article III(5)(a) of the Constitution of Bosnia and Herzegovina in connection with Articles 5, 7 and 9 of Annex 8 to the General Framework Agreement. In this case, the Constitutional Court noted that it is given the competence by the Constitution to review the constitutionality with regard to the provisions of the Constitution of Bosnia and Herzegovina and the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is not given the competence to review the constitutionality relating to the other annexes of the General Framework Agreement for Peace of Bosnia and Herzegovina.

- In the case no. U-12/08, the applicant raised the issue of the enforcement of the judgment of *Karanović vs. Bosnia and Herzegovina*. In this case, the Constitutional Court asserted that the enforcement of the judgment of the European Court of Human Rights is an international legal obligation of Bosnia and Herzegovina. System of the supervision of enforcement of judgments of the European Court for Human Rights, also including possible adoption of the measures in the event of failure to enforce those judgments, is under full discretion of the Council of Europe. For that reason, the Constitutional Court has no jurisdiction to establish whether the judgment was enforced or order certain public legal subject in Bosnia and Herzegovina to enforce obligations referred to in this judgment.

- In the case no. U-5/20, the Constitutional Court emphasized that this particular case concerns the review of the legality of an act for which there is judicial protection before an ordinary court (Court of BiH, in accordance with the jurisdiction of that court). It stressed that regardless of a possible conclusion that there was a violation of the law, the legality of the general act (as a bylaw) cannot be reviewed in the proceedings before the Constitutional Court, but the constitutionality. This is provided the conditions already stated in the case law of the Constitutional Court have been met. The Constitutional Court considered the allegations stated in the request concerning the unconstitutionality and unlawfulness of the challenged decision in respect of the extension of the term of office of elected representatives and relating to the impossibility of postponing the elections in their entirety. It also considered the reasons for postponing the elections due to inability to vote and failure to comply with the deadline by which elections can be postponed. Therefore, having considered all this, the Constitutional Court found this matter to fall within the jurisdiction of an ordinary court. Thus, there are no reasons for the Constitutional Court to depart from its case law in interpreting jurisdiction. There are no reasons to accept jurisdiction to review the constitutionality of the challenged decision as a legal act of lower legal rank than the law. This act is not explicitly stated in Article VI (3)(a) of the Constitution of Bosnia and Herzegovina

1. Are there cases where your Court deferred because there was a risk of judicial error?

There are no such cases.

2. Are there cases when your Court deferred, invoking the institutional or dem-

ocratic legitimacy of the decision-maker?

In a number of its decisions arising under abstract jurisdiction, the Constitutional Court dealt with the issue of the authority of the High Representative to enact laws, as well as with the legal character and status of such laws. In the decision no. U-9/00 of 3 November 2000, the Constitutional Court examined the constitutionality of the Law on the State Border Service. The High Representative in Bosnia and Herzegovina imposed the Law on 13 January 2000, following the failure of the Parliamentary Assembly to adopt a draft law proposed by the Presidency of Bosnia and Herzegovina in 1999. Taking into account the prevailing situation in Bosnia and Herzegovina, the legal role of the High Representative, as agent of the international community, it is not unprecedented, but similar functions are known from other countries in special political circumstances. Further, the Constitutional Court noted that the High Representative has been vested with special powers by the international community and his mandate is of an international character. In the present case, the High Representative - whose powers arise under Annex 10 to the General Framework Agreement, the relevant resolutions of the Security Council and the Bonn Declaration as well as his exercise of those powers are not subject to review by the Constitutional Court - intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina. Thus, as noted by the Constitutional Court, irrespective of the nature of the powers vested in the High Representative by Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina, the fact that the Law on State Border Service was enacted by the High Representative and not by the Parliamentary Assembly does not change its legal status, either in form - since the Law was published as such in the Official Gazette of Bosnia and Herzegovina or in substance, since, whether or not it is in conformity with the Constitution of Bosnia and Herzegovina, it relates to the field falling within the legislative competence of the Parliamentary Assembly according to Article IV.4 (a) of the Constitution of Bosnia and Herzegovina. The Parliamentary Assembly is free to modify in the future the whole text or part of the text of the Law, provided that the appropriate procedure is followed. In this decision, the Constitutional Court further noted that the competence given to the Constitutional Court to "uphold the Constitution" according to the first paragraph of Article VI.3 of the Constitution of Bosnia and Herzegovina, as further specified by subparagraphs (a), (b) and (c) and as read in conjunction with Article I.2 of the Constitution of Bosnia and Herzegovina, which provides that "Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections", confers on the Constitutional Court the control of the conformity with the Constitution of Bosnia and Herzegovina of all acts, regardless of the author, as long as this control is based on one of the competences enumerated in Article VI.3 of the Constitution of Bosnia and Herzegovina.

Conversely, in the cases arising under appellate jurisdiction, in which the decisions on removal from public office rendered by the High Representative were contested, the Constitutional Court had in mind the decision of the European Court in the case of *Dragan Kalinić and Milorad Bilbija v. Bosnia and Herzegovina*. In this case, this court recalled that the removals from office ordered by the High Representative in accordance with his "Bonn powers" can, in principle, be attributed to the United Nations and that Bosnia and Herzegovina cannot be held responsible for such removals. Thus, *inter alia*, in the case no. AP-680/07, the Constitutional Court pointed out that the contested decisions on removal from public office were made solely based on the decision of the High Representative. In respect of that, the European Court concluded that Bosnia and Herzegovina had no responsibility, and concluded that the appeal *ratione personae* is incompatible with the Constitution of Bosnia and Herzegovina.

The Constitutional Court decided similarly in the cases related to the termination of employment based on the IPTF act, adopted within the mandate of the United Nations Mission in Bosnia and Herzegovina. The Constitutional Court considered that the stance taken by the

European Court in the case of *Dragan Kalinić and Milorad Bilbija v. Bosnia and Herzegovina*, can also

apply to the specific case. It can be applied, given that the act of the IPTF, which determined that the appellant was not eligible for certification, was passed in the certification process in accordance with its powers as derived from the Agreement. The Agreement was signed on 9 December 1998 between the legal representatives of the Republika Srpska and the representatives of the United Nations Mission in Bosnia and Herzegovina. The Constitutional Court considered that Bosnia and Herzegovina was not responsible for the decision of the IPTF Commissioner, made within the mandate of the United Nations Mission in Bosnia and Herzegovina, and accordingly rejected the appeal as *ratione personae* incompatible with the Constitution of Bosnia and Herzegovina.

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

In its recent case law, the Constitutional Court of Bosnia and Herzegovina decided on a case referred to it by an ordinary court. It concerned a request for review of the constitutionality of a provision of an article of the Law on Amendments to the Law on Principles of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children, stipulating different conditions for exercising the prescribed benefits. It stipulated the conditions for exercising right to personal disability benefits (the differential treatment in pecuniary social benefits between disabled civilians and disabled war veterans). In this case, the Constitutional Court concluded that, it is a sphere of social and economic policy and the competent public authority has a wide margin of appreciation. Further, the Constitutional Court concluded that the public authority is certainly in a better position, than the judges of the Constitutional Court, to resolve issues related to who will receive social protection benefits, what will be the amounts paid, and, as in this case, to prescribe the conditions under which certain persons may exercise their social protection rights. In this case, the public authority prescribed a different degree of impairment as a condition for the use of social protection rights, specifically the right to personal disability benefits. The justification is that the difference in the degree of impairment in the percentage ranging from 60% to 80% refers to the "moral debt" or "war reparation" that the state has towards CVW, because it could not protect them during the war. In addition, it is considered that PWD with a degree of impairment in the percentage ranging from 60% to 80% can work, though with certain difficulty. This is why the Law on Professional Rehabilitation of Persons with Disabilities was passed. In addition, it was for economic reasons that it is not possible to provide all necessary funds so that everyone (PWD and CVW) would be paid the same amount of benefits. The Constitutional Court of Bosnia and Herzegovina pointed out that these reasons indeed fall within the free margin of appreciation, and there is no reason for the Constitutional Court not to accept that in the specific case, the difference in treatment had a reasonable justification, i.e. that differential treatment is based on a legitimate aim. In conclusion, the Constitutional Court considered that the contested provision meets the principle of proportionality, because it strikes a fair balance between the public interest and the protection of the rights of the individual and that it is in accordance with Article 1 of Protocol No. 12 to the European Convention.[823] Conversely, in deciding on the provision of this Law with regards to a differential treatment of persons with disabilities on the ground of the years of age, the Constitutional Court found that it is in contravention to Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1 of Protocol No. 12 to the European Convention. This is so as it indicates a differential treatment of persons with disabilities and there is no reasonable and objective justification for such treatment. The Constitutional Court emphasized that the persons with disabilities have the right to participate completely and equally in the society and to improve the quality of their life. It also emphasized that it is the obligation of the state to make it possible for them to achieve the highest quality of life potential, respect and dignity, independence, productivity and equal participation in the society in the most productive and as accessible as possible environment. The Constitutional Court pointed out that it is up to the state to aspire to such a social policy

823 See Constitutional Court, Decision no. U-11/22 of 14 July 2022.

concerning the persons with disabilities so that there are no differences regarding the exercise of their respective rights or that they are brought down to a minimum.[824] The Constitutional Court of Bosnia and Herzegovina found a violation of Article 14 of the European Convention in connection with the right to family life in a case arising under appellate jurisdiction. In this case the decisions have been challenged that rejected the appellant's request for payment of salary remuneration while absent from work due to pregnancy, childbirth and childcare. This was done solely because according to the provisions of the then applicable Law on Social Protection, persons who are not citizens of Bosnia and Herzegovina (the appellant is a citizen of France) could not exercise that right.[825] It is evident from the case law of the Constitutional Court of Bosnia and Herzegovina that this court also intervened in cases concerning social policy.

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

When it comes to penal policy or more specifically in the cases relating to the amount of penalty, the Constitutional Court of Bosnia and Herzegovina recalled that, according to the case law of the European Court and the Constitutional Court, the task of these courts is not to review the conclusions of ordinary courts regarding the factual situation and the application of substantive law and procedural law. The Constitutional Court emphasized that it is not competent to substitute for ordinary courts in the evaluation of facts and evidence. In general, it is the task of ordinary courts to evaluate the facts and evidence they have presented. The task of the Constitutional Court is to examine whether there was a possible violation or neglect of constitutional rights (right to a fair trial, right to access to court, right to an effective legal remedy, etc.), and whether the application of the law was possibly arbitrary or discriminatory. Therefore, within the framework of appellate jurisdiction, the Constitutional Court deals exclusively with the issue of possible violations of constitutional rights or rights from the European Convention in proceedings before ordinary courts.[826]

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

There have been no such situations in the case law of the Constitutional Court so far.

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

In its previous case law, the Constitutional Court has made several decisions that are worthy of note from the point of view of its role as guardian of the Constitution and in the context of the passive attitude of some other holders of public authority.

In the decision no. U-44/01 of February 2004, the Constitutional Court found that some law provisions determining the names of individual towns and municipalities in the Republika Srpska were not compatible with the Constitution of BiH and set a deadline for the legislator to harmonize these provisions with the Constitution. Since the legislator failed to remove the established inconsistences, in September 2004, the Constitutional Court adopted a decision on the termination of validity of unconstitutional provisions, and at the same time, it temporarily specified the new names of towns and municipalities until the established inconsistences are removed. In this decision, the Constitutional Court stated that it took into account the fact "of occurrence of a legal gap when the contested provisions ceased to be in force, the need for an undisturbed functioning of the town and the municipalities whose names have been determined by the provisions of the

824 See Constitutional Court, Decision no. U-9/12 of 30 January 2013.

825 See Constitutional Court, Decision no. AP-324/18 of 27 November 2019.

826 See Constitutional Court, Decision no. AP-1694/20 of 12 January 2022, paragraph 52.

laws that ceased to be in force, and the need for respect of the General Framework Agreement for Peace in Bosnia and Herzegovina and the inter-Entity municipal demarcations". However, the Constitutional Court particularly emphasized that "in the view of its overall constitutional role as a guardian of the Constitution of Bosnia and Herzegovina, it did not assume the role of a legislator in the present case".

With decision no. U-3/11 of 27 May 2011, the Constitutional Court decided that the law provision that specified the registration areas for determining the personal identification number of citizens with regard to towns and municipality names was unconstitutional. In this case, too, the legislature did not implement the decision of the Constitutional Court within the six-month period, and the Constitutional Court adopted a decision terminating the validity of the unconstitutional provisions. After that, it was no longer possible to determine the personal identification number of citizens. In real life, this meant that personal documents such as passports, ID cards, etc. could not be issued. It was obvious that the human rights of citizens were being seriously violated. In such a situation, the Constitutional Court was publicly called upon by citizens, and also by some politicians, even members of the legislative body that was supposed to pass the law in question, to take on the role of positive legislator. It was to, again temporarily, specify the names of towns and municipalities to determine registration areas in order for citizens to obtain a personal identification number. However, this did not happen. As a result, the legislature made corresponding amendments to the law, primarily in response to pressure from the public.

Additionally, the Constitutional Court adopted two decisions, in which it decided that two laws at the level of Bosnia and Herzegovina are unconstitutional because they had legal gaps. In the decision no. U-6/12 of 13 July 2012, the Constitutional Court concluded that the Law on Civil Procedure before the Court of Bosnia and Herzegovina is unconstitutional because the Law at issue lacks the provision on the "necessary" transfer of jurisdiction of the Court of BiH, which constitutes a legal gap amounting to the violation of the right to a fair trial. In the decision no. U-7/12 of 30 January 2013, the Constitutional Court concluded that the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina is not compatible with the Constitution of Bosnia and Herzegovina. It is not found compatible as it does not contain provisions on individual compensation and thus violates the principle of independence of the judiciary as the fundamental guarantee of the rule of law.

II. The decision-maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

It could not be said that the Constitutional Court generally follows a "policy" of judicial deference in decision-making and that, therefore, there is some previously taken "position" of greater judicial deference in relation to decisions made by any authority.

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

Bosnia and Herzegovina is a country of specific historical circumstances. Given this fact, the conclusion could be drawn that the legislative history also has a certain significance in the decision-making process of the Constitutional Court of Bosnia and Herzegovina, especially when it comes to cases from abstract jurisdiction.

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

Pursuant to Article 23 of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Constitutional Court shall send the request/appeal to the author of the challenged act for the purpose

of giving the latter an opportunity to reply or submit documents. Failure to submit a reply to the request/appeal shall not affect the course of the proceedings before the Constitutional Court, which will, in that case, base its decision on the submitted information which were not challenged by other parties to the proceedings. For example, in the case no. U19/22, the Constitutional Court conducted a judicial examination in order to find whether the impugned legislative provisions give rise to an arbitrary denial of citizenship. In the framework of this examination, as stated in paragraph 27 of the decision, the legislator did not submit any observation in reply to the request in the present case. The Constitutional Court noted that by doing so, the legislator has omitted to answer a very important question, i.e. what was the *ratio legis* that the legislator wanted to achieve by passing the impugned provision of the Law on Citizenship.

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

15. Does your Court analyse whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

The answer to questions no. 14 and no. 15 is "no".

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

The Constitutional Court of Bosnia and Herzegovina makes decisions based on the Constitution of Bosnia and Herzegovina, the standards of the European Court as the main interpreter of the European Convention and its own case law. The mere fact that the decision was made by the legislative body has no influence on the decision of the Constitutional Court. For example, in the case no. U-1/11, the Constitutional Court considered the constitutionality of the law passed by the National Assembly of the Republika Srpska as the legislative body of one of the entities of Bosnia and Herzegovina. In this case, the Constitutional Court concluded that the Republika Srpska enacted the challenged Law on Status of State Property located in the territory of Republika Srpska and is under the Disposal Ban contrary to the Constitution of BiH. This is so as the matter falls under the exclusive responsibility of BiH to regulate the issue of property. For these reasons, the challenged Law was declared unconstitutional. The Constitutional Court of BiH concluded that the whole law could not remain in effect.

III. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

The Constitutional Court of Bosnia and Herzegovina does not have jurisdiction to review the constitutionality preventively, which would enable the elimination of possible unconstitutionality in the process of passing regulations or defining rights. The Constitutional Court of Bosnia and Herzegovina can react only if an authorized applicant submits a request for the review of constitutionality of a law that has been adopted and entered into force. If an issue relates to the exercise of a certain, already defined right under an already passed law, that issue can be resolved through the appellate jurisdiction. In both cases, thus through the abstract and appellate jurisdiction, the Constitutional Court of Bosnia and Herzegovina, as said in the answer to the previous question, decides in accordance with the Constitution of Bosnia and Herzegovina, standards established by the European Court and its own case law.

18. Does the nature of applicable fundamental rights affect the degree of def-

erence? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

The only "division" that could be spoken of from the case law of the Constitutional Court of Bosnia and Herzegovina is a generalized "division" into absolute rights and rights that can be restricted in accordance with law only when this is necessary in a democratic society. It has already been said above that, generally, there is no "policy" of deference in the case law of the Constitutional Court of Bosnia and Herzegovina. Thus, there is neither deference when it comes to fundamental rights. Moreover, the Constitutional Court of Bosnia and Herzegovina has emphasized in its case law that the standards established by the European Court constitutes the minimum standards of protection of the rights safeguarded under the European Convention. The aforementioned in no way prevents the Constitutional Court from providing a wider scope of protection than that provided in accordance with the standards established in the case law of the European Court.[827]

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

In its decisions, the Constitutional Court of Bosnia and Herzegovina has fully accepted the "quality of law" standard developed through the case law of the European Court. In its case law, the Constitutional Court of Bosnia and Herzegovina often emphasizes that the principle of the rule of law is not limited only to the formal respect for the constitutionality and lawfulness, but requires that all legal acts (laws, regulations, etc.) have a certain content, that is, a quality suitable for a democratic system. This is required so that they serve the protection of human rights and freedoms in relations between citizens and public authorities within the democratic political system. In this regard, the Constitutional Court emphasizes that the standard of the quality of law requires that the provisions of laws be available to the persons to whom they apply (transparency) and that they be foreseeable for them. It is to be clear and precise enough so that citizens can be really and concretely aware of their rights and obligations to a degree that is reasonable under the circumstances in order adapt their behaviour accordingly. In addition, legal provisions should be in accordance with the public interest and cannot impose an excessive burden on individuals, that is, legal provisions must be proportionate for all relevant parties. In the Constitutional Court's view, every legal provision, regardless of whether it concerns the rights safeguarded under the European Convention, must to a certain extent meet the standards of the quality of law that are developed by the European Court of Human Rights. If a legal provision does not concern the rights and obligations protected under the European Convention, then, according to the Constitutional Court, the examination of those provisions does not have to consistently follow the meaning, strength and scope given to the "quality of law" standard in the judgments of the European Court.[8] In the case number U-5/16, the Constitutional Court of Bosnia and Herzegovina reviewed the constitutionality of some provisions of the Criminal Procedure Code of Bosnia and Herzegovina, which, among other things, related to the determination and extension of special investigative actions. In that case, the Constitutional Court noted, *inter alia*, that according to the standards of the European Court of Human Rights, given the fact that the case related to secret measures not subject to the scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive authority or to a judge to be expressed in terms of an unfettered power. Consequently, the law must indicate sufficiently clearly the scope of any such discretion conferred upon the competent authorities and the manner of its exercise to give the individual adequate protection against arbitrary interference. In this regard, the Constitutional Court recalled that inappropriate implementation of certain statutory solutions was not a matter of constitutionality, if such solutions were *per se* in accordance with the Constitution. In such situations, in the event of abuse in the implementation of legal provisions there were other appropriate protective mechanisms. However, the mentioned case did not relate to such a situation, but a situ-

827 See Constitutional Court of BiH, Decision no. A-3184/16 of 10 October 2016, paragraph 37. [8] See Constitutional Court of BiH, Decision no. U 4-/19, paragraphs 27, 29 and 30.

ation where the challenged provisions were *per se*, in the implementation, contrary to the Constitution of Bosnia and Herzegovina. The challenged provisions did not sufficiently clearly prescribe the scope of the discretion conferred upon the preliminary proceedings judge, since his discretion was manifested in the form of unlimited powers when interpreting those undetermined legal notions i.e. a presumption "for particularly important reasons" so that they did not guarantee to an individual an adequate protection against arbitrary interference. The Constitutional Court therefore found that the legislator, by prescribing that the special investigative measures could be extended for particularly important reasons, which was an undetermined presumption, had failed to comply with the fact that the law had to stipulate in a sufficiently clear manner the scope of discretion conferred upon the competent authorities.

20. What is the intensity review of your Court in case of the legitimate aim test?

In general, there are not that many decisions in the Constitutional Court's case law in which Constitutional Court found that there was no legitimate aim in the public interest warranting an imposed restriction. A final review is mainly carried out at the stage of the examination of proportionality.

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

The Constitutional Court of Bosnia and Herzegovina applies the "test" developed in the case law of the European Court, which is based on the following three questions:

- Was the interference in accordance with law?
- Did the interference pursued a legitimate aim?
- Was it proportionate?

22. Does your Court go through every applicable limb of the proportionality test?

Yes.

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

The hitherto case law of the Constitutional Court shows that there were no such cases.

24. Has the inception of proportionality review in your Court's case law been concomitant with the rise of the judicial deference doctrine?

Article II of the Constitution of Bosnia and Herzegovina stipulates that the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law. Thus, the provisions of the European Convention have the force of constitutional provisions in Bosnia and Herzegovina. Accordingly, the Constitutional Court of Bosnia and Herzegovina, from the first days of its existence, has applied the standards established by the European Court as the main interpreter of the European Convention. Equally, according to the case law of the Constitutional Court, the standard of proportionality has been applied since the very beginning of the operation of the Constitutional Court. This is the only moment that can be related to the beginning of the assessment of proportionality in the case law of the Constitutional Court of Bosnia and Herzegovina.

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

The case law of the European Court is of great importance for the adoption of decisions of the Constitutional Court. However, as noted above, in its case law, the Constitutional Court of Bosnia and Herzegovina emphasized that the standards established by the European Court constituted the minimum standards of protection of the right guaranteed under the European Convention. The aforementioned did not in any way prevent the Constitutional Court from providing a broader scope of protection than that provided in accordance with the standards established in the case law of the European Court. Thus, for example, according to the consistent case law of the Constitutional Court, the public authorities, as participants in court proceedings, do not enjoy the guarantees of the right to a fair trial and right to property under the European Convention. However, they do enjoy the right to a fair trial and the right to property under the Constitution of Bosnia and Herzegovina. In such cases, the Constitutional Court of Bosnia and Herzegovina noted that the Constitution of Bosnia and Herzegovina did not in any case divide the constitutional rights according to the nature of the parties to the proceedings, and if the Constitutional Court were to exclude the possibility for the public authorities to file an appeal, this would, in fact, reduce its appellate jurisdiction.[828]

When it comes to public authorities at a lower level and ordinary courts, the Constitutional

Court of Bosnia and Herzegovina also uses the doctrine of free margin of appreciation in its case law. This is evident from the example given in the answer to question number 7, in which, among other things, it is stated that the public authority is in a better position than the judges of the Constitutional Court to resolve the issues as to who will receive assistance in the field of social protection. The Constitutional Court also pointed out that the tax policy and the modalities of its implementation fell within a wide margin of appreciation of the public authorities[829] and that the legislator enjoyed a wide margin of appreciation in adoption of legal solutions on the issues related to the exclusion of certain categories of persons from affording certain rights (e.g. the purchase of a nationalized apartment).[830] Other aspects of the public interest known from the case law the Constitutional Court of Bosnia and Herzegovina are the functional legal system,[831] ensuring legal certainty by means of the statute of limitations, and others.[832] As a matter of principle, the public authorities enjoy a wide margin of appreciation in choosing the methods and measures to achieve a legitimate aim, notably when it comes to important economic and social changes. The case law of the Constitutional Court of Bosnia and Herzegovina shows that that is taken into account when it comes to the legitimate interest, but, eventually, the final decision of the Constitutional Court depends on the issue of proportionality.

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

The European Court found a violation of the Convention rights in two cases against Bosnia and Herzegovina because the Constitutional Court of Bosnia and Herzegovina dismissed the applicants' appeals, as it could not reach a majority in deciding on any of the considered proposals. The Constitutional Court dismissed the appeals by applying Article 40, paragraph 3 of the then Rules of the Constitutional Court of Bosnia and Herzegovina, reading as follows:

„Exceptionally, when less than a total number of nine judges participate in a decision-making procedure at the plenary session, for the reasons referred to in Article 93(1) or Article 99(6) of these

828 See Constitutional Court, Decision no. AP-39/03 of 27 February 2004, paragraphs 14 and 15.
829 See Constitutional Court, Decision no. AP-2620/20 of 6 April 2022.
830 See Constitutional Court, Decision no. AP-2050/19 of 22 December 2020, paragraph 48.
831 See Constitutional Court, Decision no. AP-1105/05, paragraph 28.
832 See Constitutional Court, Decision no. AP-239/03, paragraph 21. [14] Judgment of 19 January 2013.

Rules, as well as in the event that all of the judges have not been appointed or there is an incapacity of the judge/judges to exercise his/her office due to illness for a longer period, unless a minimum of five judges vote identically on a draft decision on an appeal, it shall be considered that the decision is taken to dismiss the request/appeal."

In the case of *Avdić and Others v. Bosnia and Herzegovina*[14], the European Court noted that although the Constitutional Court had taken formal decisions on the applicants' appeals, it had effectively declined to decide on their admissibility and/or merits. The impugned decisions contained reasons both for and against the finding of a violation and the only reason why the applicants' appeals had been dismissed was the court's failure to reach a majority on any of the issues, which would determine the applicants' civil rights and obligations. In other words, as alleged by the European Court, there was no majority for either accepting or dismissing their appeals. The European Court further noted that when there was no real "determination" of civil rights and obligations, the right of access to court remained illusory. The European Court therefore found a violation of Article 6(1) of the European Convention in that case. In the judgment of Čović v. Bosnia and Herzegovina,[833] the European Court found a violation of Article 5(4) of the European Convention for the same reasons.

Article 40(3) of the Rules of the Constitutional Court of Bosnai and Herzegovina has been removed from the Rules of the Constitutional Court of Bosnia and Herzegovina. Article 42(5) of the Rules adopted in 2014 reads as follows:

„Exceptionally, in the event where less than the total of nine judges take part in the decisionmaking by a plenary Court, for the reasons referred to in Article 90 paragraph 1 or Article 98 of these Rules and in the event where not all judges have been elected, or where a judge/judges have been prevented from discharging their office due to illness for a prolonged period of time, unless at least five judges vote identically on the proposal of a decision on a request/appeal, in the case referred to in Article 98, the decision-making procedure shall be postponed for one of the next sessions provided that this period is no longer than six months, and if the same situation occurs again after the expiry of that time limit, the President's vote i.e. the vote of the judge replacing the President shall carry a weight of two votes."

IV. Other peculiarities

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

28. Has your Court have grown more deferential over time?

29. Does the deferential attitude depend on the caseload of your Court?

Answers to the questions 27-29

The protection of the principle of the rule of law necessarily includes effective protection of human rights and freedoms and is an unavoidable obligation of the constitutional judiciary. The Constitutional Court fulfilled this task by proactively interpreting the constitutional norms in individual cases precisely with a view to protecting human rights and freedoms. The Constitutional Court had a special challenge to interpret its jurisdiction, among other things, in the cases of the review of constitutionality of by-laws, which is not explicitly established by the Constitution of Bosnia and Herzegovina. Starting from the fact that the Constitutional Court, through the review of constitutionality, has a role of guardian of human rights, the

Constitutional Court extensively interpreted the wording "*including, but not limited to*" of Article VI(3) (a) of the Constitution of Bosnia and Herzegovina, which stipulates the constitutional court's competence for abstract control of constitutionality. In that way, the Constitutional Court took the position that it could also review legal acts of a lower rank than that of the law, when such acts raise issues of violation of human rights and fundamental freedoms safeguarded under the Constitution of Bosnia and Herzegovina and European Convention for the Protection of Human Rights and Fun-

833 Judgment of 3 October 2017.

damental Freedoms. In line with the arguments concerning the human rights, the Constitutional Court must, whenever this is feasible, interpret its jurisdiction in such way as to allow the broadest possibility of removing the consequences of violation of human rights.[834] This interpretation of the Constitution of Bosnia and Herzegovina made it possible for the Constitutional Court to solve significant systemic issues, which were not explicitly mentioned in the text of the Constitution of BiH. However, it is still the Constitutional Court's opinion that the abstract jurisdiction of the Constitutional Court should, as a rule, be focused on the review of legislative general acts, and not the acts of the executive and administrative authorities and other individual legal acts. In other words, the interpretation of its competence for abstract control must not be too extensive. By the decision no. U-1/09 of 29 May 2009, the Constitutional Court rejected as inadmissible a request for the review of the constitutionality of a Decision granting consent to the payment schedule for debt settlement by issuing bonds for verified old foreign currency savings accounts, Decision on cash payments of verified claims arising from the old foreign currency savings accounts by issuing bonds planned for 2008 and Decree Amending the Decree on Procedure for Verification of the Claims and Cash Payables Arising from the Old Foreign Currency Savings Deposits in the Federation of Bosnia and Herzegovina. It did so as it was not competent to take a decision. The applicant contested in his request for the review of constitutionality the acts of lower legal rank than the law, namely, three by-laws of the Government of the Federation of Bosnia and Herzegovina. Also in that decision, the Constitutional Court reiterated that the Constitutional Court could review the constitutionality of legal acts with lower-ranking legal force than the laws if they gave rise to the issue of violation of human rights and freedoms under the Constitution of Bosnia and Herzegovina and European Convention. However, in that case, the Constitutional Court did not see any reason for which the challenged acts would give rise to the issue of violation of human rights and freedoms. The Constitutional Court therefore declined jurisdiction to consider the case. Therefore, it can be concluded that, in the mentioned cases, the Constitutional Court, when deciding whether to accept jurisdiction, had taken into account exclusively the issue of the protection of human rights. Thus, it can be concluded when it comes to the protection of human rights, that deference is generally not present in the case law of the Constitutional Court. There is no "trend" towards an increased deference, nor does deferential attitude depend on the caseload.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

Article 31 of the Rules of the Constitutional Court stipulates: „As a rule, during the decisionmaking procedure, the Constitutional Court shall examine the existence of only those violations that are stated in the request/appeal". As a rule, the Constitutional Court decides only on the allegations (reasons, arguments, facts, etc.) on the violations presented in the request/appeal. In a case before it, the Constitutional Court noted that, according to the aforementioned Article of the Rules of the Constitutional Court, it was "bound" by the allegations contained in the request or the appeal, regarding the contents thereof, i.e. regarding the facts alleged in the request/appeal. It also noted that it could happen that, despite the appellant's or the applicant's clear allegation of a violation of a particular right, the Constitutional Court, based on the presented facts, "includes" that right, which the appellant or applicant deemed to be violated, under some other right not referred to in the request/appeal, in accordance with the rule of *iura novit curia* (the court knows the laws). The Constitutional Court recalled that the mentioned rule applied to any other case. This means that, when the Constitutional Court received a case, it examined the facts in relation to all rights that could potentially be raised in the presented facts even where they were not explicitly stated or specifically, regardless of the classification of the rights made by the appellant or applicant. Therefore, in each individual request and appeal, the Constitutional Court considers all the possibilities arising from the facts by which it is strictly bound, and considers the request or appeal from all possible aspects that might arise from it, although it does not explicitly state so in its decisions, solely for the

834 See Constitutional Court, Decision no. U-4/05 of 22 April 2005, paragraphs 14 and 16.

purpose of expediency. The Constitutional Court also reminded in that decision that it was not entitled to initiate the proceedings *ex officio*, but it could subsume the facts of the request or appeal under any other right.[835]

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

The case no. U-16/11 related to jurisdiction of the Constitutional Court under Article VI(3)(c) of the Constitution of Bosnia and Herzegovina (a question referred by an ordinary court to the Constitutional Court). The applicant filed a request for the review of constitutionality of Article 4 of the Law on the Implementation of Annex "G" of the Agreement on Succession Issues in the Territory of the Republika Srpska. Although the applicant did explicitly raise the issue of the constitutional competence of the Republika Srpska to enact the law in question, the Constitutional Court was of the opinion that that issue had to be dealt with. The Constitutional Court pointed to the fact that, before the enactment of the contested law, the Council of Ministers as an institution of Bosnia and Herzegovina had adopted a Decision on the Implementation of Annex "G" of the Agreement on Succession Issues in the Territory of Bosnia and Herzegovina. It pointed out that, therefore, two regulations existed adopted by the legislative bodies of different level, the title and contents of which indicated that they regulated the same matter. The Constitutional Court noted that it could not exclusively restrict itself to the allegations in the request. It could restrict itself to review the constitutionally of some provisions of the Law on Implementation of Annex G of the Agreement on Succession Issues on the Territory of the Republika Srpska without previous consideration of the constitutional competence of the Entity for the adoption of that law. Furthermore, as to the provision of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, stipulating that the Constitutional Court shall have jurisdiction to examine whether „a law (...) is compatible with this Constitution", the Constitutional Court dealt with the preliminary issue whether the author of the contested law had constitutional competence to enact that law according to the Constitution of BiH. The Constitutional Court noted that in the procedure of concrete control of constitutionality the mentioned provision of the Constitution, as interpreted by the Constitutional Court, gave the Constitutional Court wide possibilities to examine the entire text of the law and the constitutional grounds for the enactment of the law. The Constitutional Court noted that the challenged provision of a law could not exist independently, out of the context of the entire text of the law and that, thus, the Constitutional Court had the competence to examine the constitutional grounds for the enactment of the law in question. In the decision in that case, the Constitutional Court also noted that in its case law it had taken a position that not only individual provisions but also the entire law could be the subject of constitutional review. It noted that in several cases it had reviewed the constitutionality of the law within a wider constitutional context, without limiting itself to the provisions of the Constitution of BiH that were referred to in the request (see, *mutatis mutandis*, Decision of the Constitutional Court, no. U-11/08 of 30 January 2009, paragraph 19, and Decision no. U-6/06 of 29 March 2008, paragraph 21). Thus, in that case, the Constitutional Court considered the request in a "wider constitutional context" and concluded eventually that the contested law, as a whole, was not compatible with the Constitution of Bosnia and Herzegovina.

835 See Constitutional Court, Decision on Admissibility and Merits, no. U-23/18 of 5 July 2019, paragraph 17.

Ustavni Sud Bosne i Hercegovine

Oblici i granice sudskog suzdržavanja od donošenja odluka/intervencije: Slučaj ustavnih sudova

Ustavne kulture variraju, a percepcije sudova o njihovoj vlastitoj ulozi u ustavnoj demokraciji utiču na intenzitet njihovog nadzora u predmetima koji se odnose na temeljna prava. Mnogi sudovi prakticiraju sudsko suzdržavanje od donošenja odluka ili intervencije.

Sudsko suzdržavanje od donošenja odluka ili intervencije je pravni alat koji su izmislili suci kako bi podržali podjelu vlasti i suzdržali se od intervencije/uplitanja u stvari za koje se smatra da su izvan njihove stručnosti ili nadležnosti za odlučivanje. Alat je korišten, najistaknutije, u predmetima koji se tiču ljudskih prava. To je slučaj zbog njihove transcendentne kvalitete, jer oni dotiču sva značajna područja javnog odlučivanja.

Rečeno je da pretjerano suzdržavanje od donošenja odluka ili intervencije ugrožava vladavinu prava i podjelu vlasti jednako kao i pretjerani pravosudni aktivizam. Način na koji se suci odnose prema sudskom suzdržavanje od donošenja odluka ili intervencija temeljno je pitanje ustavnog principa koji se tiče pravilne uloge svake grane vlasti u odnosu na značajna pitanja javne politike.

Sljedeća pitanja imaju za cilj otkriti razlike u vršenju sudskog suzdržavanje od donošenja odluka ili intervencije evropskih ustavnih sudova.

Upitnik

za nacionalne izvještaje

I. Pitanja koja se ne odnose na pitanja o kojima se presuđuje i intenzitet suzdržavanja od donošenja odluka

1. Šta vaš sud podrazumijeva pod „sudskim suzdržavanjem od donošenja odluka/intervencije"?

Ustavni sud Bosne i Hercegovine se prilikom tumačenja svojiih nadležnosti uvijek drži teksta Ustava Bosne i Hercegovine i obaveze da podržava Ustav Bosne i Hercegovine.[836]

O „sudskom suzdržavanju od donošenja odluka" bi se moglo govoriti jedino u situacijama u kojima se radi o uplitanju u nadležnosti nižerangiranih organa gdje su prije svega oni ti koji trebaju rješavati konkretne slučajeve i situacijama kada Ustavni sud nije nadležan za odlučivanje (što je propisano Pravilima Ustavnog suda Bosne i Hercegovine).

Odnos ustavnog suda i zakonodavca je, bez sumnje, od krucijalnog značaja za ovo pitanje. U ovom odnosu uvijek su prisutne dileme o tome do koje mjere suđenje obuhvaća i politiku, odnosno diskreciju; do koje mjere sudije moraju promovirati izvjesnost zakona, odnosno ciljeve pravde, i koje su to dopuštene tehnike u interpretaciji zakona. Uprkos mogućnosti međusobnog utjecaja obje vrste vlasti moraju voditi računa o tome da ne uđu ili ugroze samu suštinu koja je karakteristična za ustavni sud, tj. zakonodavca. Dakle, veoma je osjetljivo pitanje postavljanja granice iznad koje se ustavni sud pretvara u dopunskog zakonodavca ili, čak šta više, svojim odlukama utječe na stvaranje ili realizaciju političke volje.

Danas se, međutim, nerijetko može čuti da se načelo učinkovite funkcionalnosti države mora tumačiti na takav način da se, između ostalih, i od ustavnih sudova zahtijeva primjena tzv. sudskog aktivizma. On podrazumijeva ekstenzivno i dinamičko tumačenje ustavnih prava i sloboda, razrješavanje političkih kriza nametanjem prijelaznih zakonodavnih rješenja i slično. Time se žele prevladati razni problemi čiji izvor leži u deficitarnim ustavnopravnim sustavima država sa složenim političkim ili nacionalnim elementima. Iako sudski aktivizam, obzirom na cilj koji se želi time postići, može imati svoju pozitivnu ulogu u određeno vrijeme i na određenom mjestu, on objektivno narušava uobičajenu podjelu sistema vlasti, a što se posebno tiče odnosa ustavnih sudova prema zakonodavnim tijelima.

836 Vidi Ustavni sud, Odluka broj U 5/04 od 27. januara 2006. godine

Međutim, ako je u današnje doba zaštita načela vladavine prava, koja nužno uključuje učinkovitu zaštitu ljudskih prava i sloboda, nezaobilazna obaveza ustavnog sudstva, postavlja se pitanje je li proaktivno tumačenje ustavnih normi u pojedinim slučajevima i

intervencionistički pristup rješavanju problema nezaobilazni prerogativ ustavnog sudstva, a ne sudski aktivizam, obzirom da on uvijek ima negativan prizvuk sa tačke gledišta zakonodavca.

Drugim riječima, postavlja se pitanje jesu li u današnje doba određene mjere ustavnih sudova, koje imaju za cilj zaštitu pravne države, a koje su se ranije mogle tretirati kao klasične mjere kritiziranog sudskog aktivizma, još uvijek ekskluzivno pravo zakonodavca obzirom na njegov pretpostavljeni parlamentarni suverenitet rješavanja političkih pitanja.

2. Postoji li spektar suzdržavanje od donošenja odluka za vaš sud? Postoje li „zabranjena" područja ili uspostavljene zone bez pravne odgovornosti ili pitanja o kojima vaš sud ne može presuđivati (npr. pitanje moralne kontroverze, političke osjetljivosti, društvene kontroverze, raspodjele oskudnih resursa, značajnih financijskih implikacija za vladu itd.)?

U specifičnim uslovima, društvenim, privrednim i političkim u Bosni i Hercegovini, u kojima djeluje od početka svog konstituisanja do danas, Ustavni sud savjesno i hrabro se koristi svojim ustavnim ovlaštenjima zaštite ljudskih prava i osnovnih sloboda zagarantovanih Ustavom Bosne i Hercegovine. Iz prakse Ustavnog suda više je nego vidljivo da je ovaj sud dinamičnim i evolutivim tumačenjem Ustava BiH doprinio dosljednom garantiranju ravnopravnosti i konstitutivnosti naroda na cijeloj teritoriji BiH, osiguranju suvereniteta, teritorijalnog integriteta i međunarodnog subjektiviteta države i jačanju pravne sigurnosti i vladavine prava, te zaštiti ljudskih prava. Ukupnost odluka u predmetima Ustavnog suda čini stvaran doprinos zaštiti i afirmisanju vladavine prava u Bosni i Hercegovini.

U jednoj od svojih odluka Ustavni sud Bosne i Hercegovine je naglasio da je njegova nadležnost određena Ustavom Bosne i Hercegovine, kao i ograničenjima (kočnicama) koje je Ustavni sud razvio kroz svoju praksu. Jedno od takvih ograničenja (kočnica) je, između ostalih, principijelan stav Ustavnog suda da ne ispituje činjenice koje su utvrdili redovni sudovi. Međutim, taj stav, kako je Ustavni sud naglasio, nije apsolutan s obzirom na to da praksa Ustavnog suda u tom pravcu dozvoljava izuzetke u slučajevima kada su relevantne činjenice utvrđene „očigledno proizvoljno". Opravdanje za navedeni izuzetak Ustavni sud nalazi u činjenici da „proizvoljnost", odnosno „arbitrarnost ili samovolja" ne može biti u skladu sa principima iz Ustava Bosne i Hercegovine uprkos tome što utvrđivanje relevantnih činjenica spada u osnovnu nadležnost redovnih sudova. Dakle, navedeni izuzetak je potreban da bi se mogla popraviti odluka koja je potencijalno neustavna. Ovaj izuzetak se mora krajnje oprezno primjenjivati, ali ne smije postati apsolutno pravilo, jer bi to, u konačnici, predstavljalo redukciju ustavnih prava.[837]

Prethodno navedeno ima za cilj da ukaže na to da ne postoji „zabranjena" područja ili uspostavljene zone bez pravne odgovornosti ili pitanja o kojima Ustavni sud ne može presuđivati. Jedino što može limitirati Ustavni sud u donošenju odluke je sam Ustav Bosne i Hercegovine i Pravila Ustavnog suda.

3. Postoje li faktori koji određuju kada i kako vaš sud treba da se suzdrži od donošenja odluke (npr. kultura i uslovi vaše države; historijska iskustva u vašoj državi; apsolutni ili kvalificirani karakter spornih osnovnih prava; predmet spora pred Sudom; uključuje li sadržaj predmeta promjenu društvenih uslova i stavova)?

Osim slučajeva koji su navedeni u odgovorima na prethodno pitanje ne postoje drugi faktori koji mogu utjecati na to da li će Ustavni sud Bosne i Hercegovine donijeti odluku ili ne.

4. Postoje li situacije u kojima se vaš sud suzdržava od donošenja odluke ili intervencije jer nema institucionalnu stručnost ili nadležnost?

Čl. 18.3.a i 19.a Pravila Ustavnog suda propisuje odbacivanje apelacije odnosno zahtjeva u slučajevima kada Ustavni sud nije nadležan za odlučivanje. U predmetima iz apstraktne nadležnosti Ustavni sud se, između ostalih, u sljedećim slučajevima oglasio nenadležnim:

837 Vidi Ustavni sud, Odluka broj AP-754/14 od 30.3.2017. godine, tačka 25.

- Ustavni sud nije nadležan da odlučuje o saglasnosti odredbi ustava kantona s Ustavom Federacije Bosne i Hercegovine. (Odluka broj U-5/03). U odluci broj U-8/18 Ustavni sud je podsjetio da je nadležan da podržava Ustav BiH, ali da nema nadležnost da podržava i ustav entiteta jer je to pitanje u isključivoj nadležnosti entitetskog ustavnog suda.

- U predmetu broj U-8/05 u kojem je osporena ustavnost određenih općih akata na osnovu člana III/5.a) Ustava Bosne i Hercegovine u vezi sa čl. 5, 7. i 9. Aneksa 8. Općeg okvirnog sporazuma Ustavni sud je istakao da mu je Ustavom Bosne i Hercegovine data nadležnost da vrši kontrolu ustavnosti u odnosu na odredbe Ustava Bosne i Hercegovine, odnosno Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda, te da mu nije data nadležnost da vrši kontrolu ustavnosti u odnosu na odredbe ostalih aneksa Opšteg okvirnog sporazuma za mir u Bosni i Hercegovini.

- Predmet broj U-12/08 pokretao je pitanje izvršenja presude Evropskog suda u predmetu Karanović protiv BiH. U ovom predmetu Ustavni sud je naglasio da je izvršenje presude Evropskog suda međunarodnopravna obaveza Bosne i Hercegovine. Sistem kontrole izvršenja presuda Evropskog suda za ljudska prava, uključujući i, eventualno, donošenje mjera zbog neizvršenja tih presuda, u potpunosti je u diskreciji Savjeta Evrope. Iz ovog razloga Ustavni sud je zaključio da nema nadležnost da utvrđuje da li je predmetna presuda izvršena ili ne, ili nadležnost da naloži određenom javnopravnom subjektu u Bosni i Hercegovini da izvrši obaveze iz te presude.

- U predmetu broj U-5/20 Ustavni sud je naglasio da se u konkretnom slučaju radi o ocjeni zakonitosti akta za koji postoji sudska zaštita pred redovnim sudom (Sudom BiH, u skladu sa nadležnošću tog suda) i bez obzira na moguću ocjenu o kršenju zakona, u postupku pred Ustavnim sudom se ne može cijeniti zakonitost opšteg akta (kao podzakonskog akta), već ustavnost, ako su ispunjeni uslovi koji su već navedeni u praksi Ustavnog suda. Upravo imajući u vidu tvrdnje iz zahtjeva u pogledu neustavnosti i nezakonitosti osporene Odluke o odgađanju održavanja lokalnih izbora 2020. godine, koje se odnose na produženje trajanja mandata izabranih predstavnika, nemogućnost odgađanja izbora u cijelosti, razloge za odgađanje izbora zbog nemogućnosti glasanja i nepridržavanje roka do kojeg se izbori mogu odgoditi, Ustavni sud smatra da se radi o nadležnosti redovnog suda. Stoga, ne postoje razlozi da Ustavni sud odstupi od svoje prakse u tumačenju nadležnosti, odnosno da se oglasi nadležnim za ocjenu ustavnosti osporene Odluke, kao pravnog akta niže pravne snage od zakona, odnosno akta koji nije izričito naveden u odredbi člana VI/3.a) Ustava Bosne i Hercegovine.

5. Da li postoje slučajevi u kojima se vaš sud suzdržao od donošenja odluke jer je postojao rizik od sudske greške?

Ne postoje.

6. Postoje li slučajevi u kojima se vaš sud suzdržao od donošenja odluke pozivajući se na institucionalni ili demokratski legitimitet donosioca odluka?

Ustavni sud se u nizu svojih odluka iz apstraktne nadležnosti bavio razmatranjem ovlaštenja visokog predstavnika da donosi zakone, kao i pravnom prirodom i statusom takvih zakona. U Odluci broj U 9/00 od 3. novembra 2000. godine Ustavni sud je ispitivao ustavnost Zakona o državnoj graničnoj službi koji je nametnuo visoki predstavnik međunarodne zajednice u Bosni i Hercegovini 13. januara 2000. godine, nakon što Parlamentarna skupština Bosne i Hercegovine nije usvojila nacrt zakona koji je 1999. godine predložilo Predsjedništvo Bosne i Hercegovine. Uzimajući u obzir sveukupnu situaciju u Bosni i Hercegovini, Ustavni sud je istakao da pravni status visokog predstavnika kao predstavnika međunarodne zajednice nije izuzetak, već su slične funkcije poznate iz drugih zemalja u specijalnim političkim okolnostima. Ustavni sud je dalje istakao da je međunarodna zajednica visokom predstavniku povjerila posebne ovlasti i njegov mandat je međunarodnog karaktera. U konkretnom slučaju, visoki predstavnik – čije ovlasti koje proizlaze iz Aneksa 10. Općeg okvirnog sporazuma, relevantnih rezolucija Vijeća sigurnosti Ujedinjenih naroda i Bonske deklaracije, nisu podložne kontroli Ustavnog suda, kao ni vršenje tih ovlasti – intervenirao je u pravni sistem Bosne i Hercegovine, supstituirajući domaće vlasti. U tom pogledu, on je, djelovao kao vlast Bosne i Hercegovine, a zakon koji je on donio je prirode domaćeg zakona te se mora smatrati zakonom Bosne i Hercegovine. Stoga, kako

je istakao Ustavni sud, bez obzira na prirodu ovlasti dodijeljenih visokom predstavniku Aneksom 10. Općeg okvirnog sporazuma za mir u Bosni i Hercegovini, činjenica da je Zakon o državnoj graničnoj službi donio visoki predstavnik, a ne Parlamentarna skupština, ne mijenja njegov status zakona, ni u njegovoj formi, budući da je ovaj zakon objavljen kao takav u „Službenom glasniku Bosne i Hercegovine", kao ni u njegovoj suštini, koja se, bio on ili ne u saglasnosti sa Ustavom, tiče sfere koja potpada pod zakonodavnu nadležnost Parlamentarne skupštine Bosne i Hercegovine prema članu IV/4.a) Ustava Bosne i Hercegovine. Parlamentarna skupština je slobodna da mijenja čitav tekst ili dio teksta ovog zakona u budućnosti, pod pretpostavkom da se ispoštuje odgovarajuća procedura. Ustavni sud je dalje, u ovoj odluci, istakao da nadležnost zaštite Ustava Bosne i Hercegovine, dodijeljena Ustavnom sudu prema prvoj rečenici člana VI/3. Ustava Bosne i Hercegovine, precizirana stavovima (a), (b) i (c), i čitana u vezi sa članom I/2. Ustava, koji glasi da je Bosna i Hercegovina demokratska država koja funkcioniše u skladu sa zakonom i na osnovu slobodnih i demokratskih izbora, dodjeljuje Ustavnom sudu moć kontrole saglasnosti sa Ustavom svih akata, bez obzira na autora, dok god ta kontrola počiva na jednoj od nadležnosti pobrojanih u članu VI/3. Ustava Bosne i Hercegovine.

S druge strane, u predmetima iz apelacione nadležnosti, u kojima su osporavane odluke o smjenama sa određenih javnih funkcija koje je donio visoki predstavnik, Ustavni sud je imao u vidu odluku Evropskog suda u predmetu Dragan Kalinić i Milorad Bilbija protiv Bosne i Hercegovine u kojem je ovaj sud podsjetio da se smjene koje je naložio Visoki predstavnik u skladu sa njegovim «bonskim ovlastima» u principu mogu prepisati Ujedinjenim nacijama i da se Bosna i Hercegovina ne može smatrati odgovornom za takva smjenjivanja. Tako je, između ostalih, u predmetu broj AP-680/07 Ustavni sud istakao da su osporene odluke o smjeni sa javne funkcije donesene isključivo na temelju odluke visokog predstavnika, u odnosu na koje je Evropski sud zaključio da Bosna i Hercegovina nema odgovornost, te je zaključio da je apelacija ratione personae inkompatibilna sa Ustavom Bosne i Hercegovine.

Na jednak način je Ustavni sud odlučivao i u predmetima koji su se odnosili na prestanak radnog odnosa na osnovu akta IPTF-a, donesenog u okviru mandata Misije Ujedinjenih nacija u Bosni i Hercegovini. Ustavni sud je smatrao da se stav Evropskog suda zauzet u odluci Dragan Kalinić i Milorad Bilbija protiv Bosne i Hercegovine može primijeniti i u konkretnom slučaju, s obzirom da je akt IPTF-a, kojim je utvrđeno da apelant nije podoban za certifikaciju, donio u procesu certifikacije u skladu sa svojim ovlaštenjima iz Sporazuma, koji je 9. decembra 1998. godine potpisan između legalnih predstavnika Republike Srpske i predstavnika Misije Ujedinjenih nacija u Bosni i Hercegovini. U skladu sa tim, Ustavni sud je smatrao da Bosna i Hercegovina nema odgovornost za tu odluku Komesara IPTF-a, donesenu u okviru mandata Misije Ujedinjenih nacija u Bosni i Hercegovini, pa je shodno tome, apelaciju odbacio kao *ratione personae* inkompatibilnu sa Ustavom Bosne i Hercegovine.

> **7.** „Što se zakonodavstvo više tiče pitanja široke socijalne politike, sud će sve manje biti spreman da intervenira". Da li je to važeći standard za vaš sud? Da li vaš sud dijeli koncepciju da o pitanjima politike treba odlučivati demokratskim procesom, jer sudovi nisu izabrani i nedostaje im demokratski mandat da odlučuju o pitanjima politike?

Ustavni sud Bosne i Hercegovine je u svojoj recentnoj praksi odlučivao o predmetu koji mu je proslijedio redovni sud a ticao se zahtjeva za ocjenu ustavnosti odredbe člana Zakona o izmjenama i dopunama Zakona o osnovama socijalne zaštite, zaštite civilnih žrtava rata i zaštite porodice sa djecom kojom su propisani različiti uvjeti za korištenje naknada u oblasti socijalne zaštite, tj. uvjeti za ostvarivanje prava na ličnu invalidninu (razlike u nakndai između lica sa invaliditetom i civilnih žrtava rata). Ustavni sud je u ovom predmetu konstatovao da se radi o sferi socijalne i ekonomske politike te da nadležna javna vlast tu ima široko polje slobodne procjene (margin of appreciation). Ustavni sud je dalje konstatovao da je javna vlast u boljoj poziciji od sudija Ustavnog suda da riješi pitanja koja se odnose na to ko će primati pomoć u oblasti socijalne zaštite, koliki će biti iznosi koji se isplaćuju na ime socijalne zaštite, te, kao što je u konkretnom slučaju, da se propišu uvjeti pod kojim određena lica mogu ostvarivati prava iz oblasti socijalne zaštite. U ovom slučaju javna vlast je propisala različit stepen oštećenja organizma kao uvjet za korištenje prava iz socijalne zaštite, konkretno prava na ličnu invalidninu. Opravdanje za navedeno je da se razlika u stepenu oštećenja organizma odnosi na

„moralni dug" ili „ratnu reparaciju" koji država ima prema civilnim žrtvama rata zato što ih nije mogla zaštititi tokom rata. Osim toga, smatra se da lica sa invaliditetom sa stepenom oštećenja organizma u procentu od 60% do 80% mogu da rade, istina otežano, ali je u tom pravcu zato i donijet Zakon o profesionalnoj rehabilitaciji invalida, kao i da iz ekonomskih razloga nije moguće osigurati sva potrebna sredstva da bi svima bile isplaćene naknade u istom iznosu. Kako je istakao Ustavni sud Bosne i Hercegovine navedeni razlozi zaista spadaju u slobodno polje procjene nadležne vlasti, te Ustavni sud nema razloga da ne prihvati da je u konkretnom slučaju razlika u postupanju imala razumno opravdanje, tj. da je različit tretman zasnovan na legitimnom cilju. U konačnici je Ustavni sud Bosne i Hercegovine zaključio da osporena odredba zadovoljava načelo proporcionalnosti jer uspostavlja pravičnu ravnotežu između javnog interesa i zaštite prava pojedinca, te da je u skladu sa članom 1. Protokola broj 12 uz Evropsku konvenciju.[838] S druge strane, Ustavni sud Bosne i Hercegovine je odlučujući o odredbi istog ovog zakona, a koja se odnosila na razliku između lica sa invalidnošću po godinama starosti, utvrdio da je ona u suprotnosti sa članom II/2. Ustava Bosne i Hercegovine, u vezi sa članom 1. Protokola broj 12 uz Evropsku konvenciju, jer ukazuje na različit tretman lica sa invaliditetom, a ne postoji razumno i objektivno opravdanje za takvo postupanje. Ustavni sud Bosne i Hercegovine je naglasio da lica sa invaliditetom imaju pravo da u potpunosti i jednako učestvuju u društvu i da poboljšaju kvalitet svog života, te da je obaveza države da im omogući da dostignu najviši kvalitet životnog potencijala, poštovanja i digniteta, nezavisnosti, produktivnosti i jednakog učešća u društvu u najproduktivnijem i što pristupačnijem okruženju. Kako je istakao Ustavni sud na državi je da teži da socijalna politika u odnosu na lica sa invaliditetom bude takva da ne bude različitosti u pogledu ostvarivanja njihovih prava ili da se one svedu na najmanju moguću mjeru.[839] Ustavni sud Bosne i Hercegovine je utvrdio povredu člana 14. Evropske konvencije u vezi s pravom na porodični život u predmetu iz apelacione nadležnosti u kojem su osporene odluke kojima je odbijen apelanticin zahtjev za isplatu naknade plaće za vrijeme dok odsustvuje s posla zbog trudnoće, porođaja i njege djeteta, isključivo zbog toga što prema odredbi tada važećeg Zakona o socijalnoj zaštiti to pravo nisu mogla ostvariti lica koja nisu državljani BiH (apelantica je državljanka Francuske).[840] Evidentno je iz prakse Ustavnog suda Bosne i Hercegovne da je ovaj sud intervenirao i u predmetima koji se tiču socijalne politike.

8. Da li vaš sud prihvata opći princip suzdržavanja od donošenja odluka pri prosuđivanju kaznene filozofije i politika?

Kada je riječ o kaznenoj politici, u predmetima koji su se odnosili na navode o visini kazne Ustavni sud Bosne i Hercegovine je podsjećao da prema praksi Evropskog suda i Ustavnog suda, zadatak ovih sudova nije da preispituju zaključke redovnih sudova u pogledu činjeničnog stanja i primjene materijalnog i procesnog prava. Ustavni sud je isticao da nije nadležan supstituisati redovne sudove u procjeni činjenica i dokaza, već je, generalno, zadatak redovnih sudova da ocijene činjenice i dokaze koje su izveli. Zadatak Ustavnog suda je da ispita da li je eventualno došlo do povrede ili zanemarivanja ustavnih prava (pravo na pravično suđenje, pravo na pristup sudu, pravo na djelotvoran pravni lijek i dr.), te da li je primjena zakona bila eventualno proizvoljna ili diskriminaciona. Dakle, u okviru apelacione nadležnosti Ustavni sud se bavi isključivo pitanjem eventualne povrede ustavnih prava ili prava iz Evropske konvencije u postupku pred redovnim sudovima.[841]

9. Može doći do ograničenih okolnosti u kojima vlada ne može dati informacije Sudu, posebno u kontekstu nacionalne sigurnosti koji uključuje tajne obavještajne podatke. Da li se vaš sud suzdržao od donošenja odluke iz razloga nacionalne sigurnosti?

U dosadašnjoj praksi Ustavnog suda nije bilo takvih situacija.

10. S obzirom na ulogu sudova kao čuvara Ustava, da li bi se oni trebali više uplitati u politiku (primijeniti strožiji nadzor) kada su vlade pasivne u uvođenju reformi usklađenih sa pravima?

838 Vidi Ustavni sud, Odluka broj U-11/22 od 14.7.2022.
839 Vidi Ustavni sud, Odluka broj U-9/12 od 30.1.2013.
840 Vidi Ustavni sud, Odluka broj AP-324/18 od 27.11.2019.
841 Vidi Ustavni sud, Odluka broj AP-1694/20 od 12.1.2022. godine, tačka 52.

Ustavni sud je u svojoj dosadašnjoj praksi donio nekoliko odluka interesantnih sa stanovišta svoje uloge čuvara Ustava,a u kontekstu pasivnosti nekih drugih nosilaca javne vlasti. U Odluci broj U 44/01 iz februara 2004. godine Ustavni sud je utvrdio kako dio zakonske odredbe kojom su utvrđeni nazivi pojedinih gradova i općina u Republici Srpskoj nije u skladu sa Ustavom BiH i ostavio rok zakonodavcu za usaglašavanje ove neustavne odredbe. Nakon što zakonodavac nije otklonio utvrđene neustavnosti, Ustavni sud je u septembru 2004. godine donio odluku o prestanku važenja neustavnih odredbi, ali istovremeno i utvrdio privremeno, dok se ne otklone utvrđene neustavnosti, nove nazive gradova i općina. U ovoj odluci Ustavni sud je naveo kako ima u vidu činjenicu „nastanka pravne praznine prestankom važenja osporenih odredbi, kao i potrebu za nesmetanim funkcioniranjem grada i općina čiji nazivi su određeni odredbama zakona koje su prestale važiti, potrebu poštivanja Općeg okvirnog sporazuma za mir u BiH i međuentitetskog razgraničenja općina". Međutim, Ustavni sud je posebice naglasio da „s obzirom na njegovu ukupnu ustavnu ulogu objektivnog čuvara Ustava BiH, u konkretnom slučaju nije preuzeo ulogu zakonodavca".

Odlukom broj U 3/11 od 27. maja 2011. godine Ustavni sud je utvrdio neustavnost zakonske odredbe kojom su utvrđena registraciona područja za određivanje jedinstvenog matičnog broja građana u pogledu naziva gradova i općina. Ni u ovom slučaju zakonodavac, u ostavljenom roku od šest mjeseci, nije izvršio odluku Ustavnog suda, te je Ustavni sud donio odluku o prestanku važenja neustavnih odredbi. Nakon toga više nije postojala mogućnost određivanja jedinstvenog matičnog broja građana. U realnom životu to je značilo da se ne mogu izdati lična dokumenta kao što je npr. pasoš, lična karta itd. Bilo je očigledno da se ljudska prava građana značajno krše. U takvoj situaciji, Ustavni sud je javno bio pozivan od strane građana ali i pojedinih političara, čak članova zakonodavnog tijela koje je trebalo donijeti predmetni zakon, da preuzme ulogu pozitivnog zakonodavca i, opet na privremenoj osnovi, utvrdi nazive gradova i općina za određivanje registracionih područja za dobivanje jedinstvenog matičnog broja. Međutim, do toga nije došlo. Zakonodavac je naknadno, prvenstveno pod pritiskom javnosti, donio odgovarajuće izmjene zakona.

Ustavni sud je donio i dvije odluke kojima je utvrdio neustavnost dva zakona na nivou Bosne i Hercegovine jer su, ustvari, imali pravne praznine. Odlukom broj U 6/12 od 13. jula 2012. godine Ustavni sud je utvrdio neustavnost Zakona o parničnom postupku pred Sudom BiH jer nema odredaba o nužnoj delegaciji nadležnosti Suda BiH što predstavlja pravnu prazninu koja vodi ka kršenju prava na pravično suđenje. Odlukom broj U 7/12 od 30. januara 2013. godine Ustavni sud je utvrdio neustavnost Zakona o plaćama i drugim naknadama u sudskim i tužilačkim institucijama na nivou BiH jer ne sadrži odredbe o pojedinim naknadama i time krši princip nezavisnosti pravosuđa kao osnovne garancije vladavine prava.

II. Donosilac odluka

11. Da li se vaš sud više suzdržava od donošenja odluka u vezi sa aktima Parlamenta nego odlukama izvršne vlasti? Da li se vaš sud suzdržava od donošenja odluka ili od intervencije u ovisnosti od stepena demokratske odgovornosti prvobitnog donosioca odluke?

Ne bi se moglo reći da u radu Ustavnog suda generalno postoji „politika" suzdržavanja od donošenja odluka, pa samim tim i da postoji neki unaprijed zauzet „stav" većeg suzdržavanja u odnosu na odluke bilo koje vrste vlasti.

12. Kakav značaj vaš sud pridaje zakonodavnoj historiji? Koju pravnu relevantnost, ako uopće postoji, treba imati parlamentarno razmatranje za sudsku ocjenu usklađenosti ljudskih prava?

Bosna i Hercegovina je država specifičnih historijskih okolnosti. Iz te činjenice bi se mogao izvući zaključak da i zakonodavna historija ima određeni značaj u postupku donošenja odluka Ustavnog suda Bosne i Hercegovine, naročito kada je riječ o predmetima iz apstraktne nadležnosti.

13. Da li vaš sud provjerava da je donosilac odluke opravdao odluku ili da li je odluka takva da bi je vaš sud donio da je sam bio donosilac odluke?

U skladu sa članom 23. Pravila Ustavnog suda Bosne i Hercegovine, Ustavni sud dostavlja zahtjev/apelaciju donositelju osporenog akta radi davanja odgovora, odnosno dostavljanja spisa. Nedostavljanje odgovora na zahtjev/apelaciju ne utječe na tok postupka pred Ustavnim sudom, koji će u tom slučaju svoju odluku temeljiti na dostavljenim informacijama koje nisu osporili drugi učesnici u postupku. Primjera radi, Ustavni sud je u predmetu broj U-19/22 obavio sudsko ispitivanje osporene odredbe Zakona o državljanstvu BiH kako bi ustanovio da li se osporenim odredbama zakona proizvoljno uskraćuje državljanstvo. U okviru tog ispitivanja, kao što je navedeno u stavu 27. odluke u ovom predmetu, zakonodavac nije dostavio nikakav odgovor na zahtjev u ovom predmetu. Kako je istakao Ustavni sud Bosne i Hercegovine zakonodavac je na taj način propustio dati odgovor na jedno veoma važno pitanje, to jest koji je *ratio legis* zakonodavac želio postići donošenjem osporene odredbe Zakona o državljanstvu.

14. Da li se vaš sud suzdržava od donošenja odluke u ovisnosti od toga u kojoj mjeri je odluci ili mjeri prethodila detaljna istraga u vezi sa kompatibilnošću sa osnovnim pravima? Koliko temeljita mora biti zakonodavna istraga, na primjer, prije nego što će joj vaš sud, na kraju, dati važnost?

15. Analizira li vaš sud da li su suprotna mišljenja u potpunosti zastupljena u parlamentarnoj debati prilikom usvajanja određene mjere? Je li dovoljno da se opsežna debata vodi o općim vrijednostima zakona ili fokus mora biti usmjereniji ka posljedicama po prava?

Odgovor na pitanja br. 14. i 15. je „ne"

16. Je li činjenica da je odluku donijelo zakonodavno tijelo ili da je donesena nakon javnih konsultacija ili javne rasprave, uvjerljiv dokaz o demokratskom legitimitetu odluke?

Ustavni sud Bosne i Hercegovine donosi odluke na osnovu Ustava Bosne i Hercegovine, standarda Evropskog suda kao glavnog tumača Evropske konvencije i vlastite prakse. Sama činjenica da je odluku donijelo zakonodavno tijelo nema uticaja na odluku Ustavnog suda. Primjera radi, u predmetu broj U-1/11 Ustavni sud je razmatrao ocjenu ustavnosti zakona koji je donijela Narodna skupština Republike Srpske kao zakonodavni organ jednog od entiteta Bosne i Hercegovine. Ustavni sud je u ovom predmetu zaključio kako je entitet Republika Srpska donijela pobijani Zakon o statusu državne imovine koja se nalazi na teritoriji Republike Srpske i pod zabranom je raspolaganja protivno Ustavu Bosne i Hercegovine, jer se radi o isključivoj nadležnosti Bosne i Hercegovine u reguliranju pitanja imovine. Iz ovih razloga, pobijani zakon je proglašen protuustavnim. Ustavni sud je zaključio da cjelokupan zakon ne može ostati na pravnoj snazi.

III. Obim, zakonitost i proporcionalnost prava

17. Da li se vaš sud ikada suzdržao od donošenja odluke u fazi definisanja prava, dajući značaj vladinoj definiciji prava ili primjeni te definicije na činjenice?

Ustavni sud Bosne i Hercegovine nema nadležnosti vezane za preventivnu kontrolu ustavnosti koje bi omogućile da se u postupku donošenja propisa ili definisanja prava otklone eventualne neustavnosti. Ustavni sud Bosne i Hercegovine može reagovati tek ukoliko ovlašteni podnosilac podnese zahtjev za ocjenu ustavnosti zakona koji je donesen i stupio na snagu.

Ukoliko se radi o ostvarivanju određenog, već definisanog prava na osnovu već donesenog zakona, takva se pitanja mogu rješavati kroz apelacionu nadležnost. U oba navedena slučaja, dakle i kroz apstraktnu i kroz apelacionu nadležnost, Ustavni sud Bosne i Hercegovine, kao što je rečeno i u odgovoru na prethodno pitanje, odlučuje na osnovu Ustava Bosne i Hercegovine, standarda koje je utvrdio Evropski sud i vlastite prakse.

18. Da li priroda primjenjivih temeljnih prava utiče na nivo suzdržavanja od donošenja odluke? Smatra li vaš sud neka prava ili određene aspekte nekih prava važnijim tako da zaslužuju rigorozniju kontrolu od drugih?

Jedina „podjela" o kojoj bi se iz prakse Ustavnog suda Bosne i Hercegovine moglo govoriti je gener-

alizovana „podjela" na apsolutna prava i prava koja se mogu ograničiti zakonom samo onda kada je to neophodno u demokratskom društvu. Već je prethodno rečeno da u praksi Ustavnog suda Bosne i Hercegovine generalno ne postoji „politika" suzdržavanja od donošenja odluka, pa se ne može govoriti o suzdržavanju od donošenja odluka ni kada su temeljna prava u pitanju. Štaviše, Ustavni sud Bosne i Hercegovine je u svojoj praksi isticao da standardi koje je uspostavio Evropski sud predstavljaju minimum standarda zaštite određenog prava zagarantiranog Evropskom konvencijom, te da navedeno ni na koji način ne sprečava Ustavni sud da pruži širi obim zaštite od onog koji pružaju standardi ustanovljeni praksom Evropskog suda.[842]

19. Imate li skalu jasnoće kada ocjenjujete ustavnost zakona? Kako odlučujete koliko je zakon jasan? Kada primjenjujete pravilo *In claris non fit interpretatio*?

Standard „kvaliteta zakona" razvijen kroz praksu Evropskog suda Ustavni sud Bosne i Hercegovine je u potpunosti prihvatio u svojim odlukama. Ustavni sud Bosne i Hercegovine u svojoj praksi često naglašava da princip vladavine prava nije ograničen samo na formalno poštivanje ustavnosti i zakonitosti već zahtijeva da svi pravni akti (zakoni, propisi i sl.) imaju određen sadržaj, odnosno kvalitet primjeren demokratskom sistemu, tako da služe zaštiti ljudskih prava i sloboda, u odnosima građana i organa javne vlasti u okviru demokratskog političkog sistema. U vezi s tim, Ustavni sud naglašava da standard kvaliteta zakona traži da zakonska odredba bude dostupna licima na koja se primjenjuje (transparentnost) i da za njih bude predvidljiva, to jeste dovoljno jasna i precizna da oni mogu stvarno i konkretno znati svoja prava i obaveze do stepena koji je razuman u datim okolnostima, kako bi se prema njima mogli ponašati. Osim toga, zakonska odredba treba da bude u skladu sa javnim interesom i njome se pojedincu ne može nametati pretjeran teret, odnosno zakonska odredba mora da bude proporcionalna u odnosu na sve relevantne strane. Prema mišljenju Ustavnog suda, svaka zakonska odredba, bez obzira na to da li se tiče prava koja su zaštićena Evropskom konvencijom, mora u određenom obimu ispunjavati standarde kvaliteta zakona koje je razradio Evropski sud za ljudska prava. Ukoliko se zakonska odredba ne tiče prava i obaveza koji su zaštićeni Evropskom konvencijom, onda, prema mišljenju Ustavnog suda, ispitivanje tih odredaba ne mora dosljedno slijediti smisao, jačinu i obim koji se standardu „kvaliteta zakona" daju u presudama Evropskog suda.[843] U predmetu broj U-5/16 Ustavni sud Bosne i Hercegovine se bavio ocjenom ustavnosti određenih odredaba Zakona o krivičnom postupku Bosne i Hercegovine koje su se, između ostalog, odnosile na određivanje i produženje posebnih istražnih radnji. U ovom predmetu Ustavni sud je, između ostalog, istakao da bi prema standardima Evropskog suda, budući da se radi o tajnim mjerama koje nisu podložne preispitivanju od strane lica na koja se one odnose ili šire javnosti, bilo suprotno vladavini prava da se zakonska diskrecija dodijeljena izvršnoj vlasti ili sudiji očituje u obliku neograničenih ovlaštenja, tako da zakon mora dovoljno jasno propisivati obim takve diskrecije dodijeljene nadležnim tijelima, te način njenog ostvarivanja koji pojedincu jamči odgovarajuću zaštitu od proizvoljnog miješanja. Ustavni sud je u ovom dijelu podsjetio da nije pitanje ustavnosti neodgovarajuća implementacija određenih zakonskih rješenja ako su ta rješenja, sama po sebi, u skladu sa ustavom. U takvim situacijama, u slučaju zloupotrebe u implementaciji zakonskih odredbi postoje drugi odgovarajući mehanizmi zaštite. Međutim, u konkretnom slučaju se ne radi o takvoj situaciji, već o situaciji da su osporene odredbe, same po sebi, u njihovoj implementaciji suprotne Ustavu Bosne i Hercegovine jer osporene odredbe nisu dovoljno jasno propisale obim diskrecije dodijeljene sudiji za prethodni postupak s obzirom na to da se njegova diskrecija očituje u obliku neograničenih ovlaštenja kada tumači te neodređene pravne termine, tj. pretpostavku „iz posebno važnih razloga", tako da ne jamče pojedincu odgovarajuću zaštitu od proizvoljnog miješanja. Stoga je Ustavni sud utvrdio da zakonodavac time što je propisao da se iz posebno važnih razloga, što predstavlja neodređenu pretpostavku, mogu produžiti posebne istražne radnje nije poštovao da zakon mora dovoljno jasno propisivati obim diskrecije dodijeljene nadležnim tijelima.

20. Koliki je intenzitet ocjene vašeg suda u vezi sa nivoom legitimnog cilja?

Generalno bi se mogao izvući zaključak da u praksi Ustavnog suda ne postoji mnogo odluka u kojima

842 Vidi, Ustavni sud BiH, Odluka broj AP-3184/16 od 10.10.2016. godine, tačka 36.

843 Vidi Ustavni sud BiH, Odluka broj U-4/19 od tačke 27, 29. i 30.

je Ustavni sud utvrdio da ne postoji legitiman cilj koji je u javnom interesu za neku vrstu nametnutog ograničenja. Konačna ocjena Ustavnog suda sprovede se uglavnom u fazi ispitivanja proporcionalnosti.

21. Kakav test proporcionalnosti primjenjuje vaš sud? Da li vaš sud primjenjuje sve faze „klasičnog" testa proporcionalnosti (tj. prikladnost, neophodnost, te proporcionalnost u užem smislu)?

Ustavni sud Bosne i Hercegovine primjenjuje „test" koji je razvijen u praksi Evropskog suda a bazira se na sljedeća tri pitanja:

- Je li miješanje bilo utemeljeno na zakonu
- Je li miješanje imalo legitiman cilj
- Je li bilo proporcionalno

22. Da li vaš sud prolazi kroz svaku primjenjivu granu testa proporcionalnosti? Da **23.** Postoje li slučajevi u kojima vaš Sud prihvata da osporena mjera zadovoljava jedan ili više stupnjeva testa proporcionalnosti čak i ako na prvi pogled nema dovoljno dokaza da se to dokaže?

Ne bi se moglo reći da je u dosadašnjoj praksi Ustavnog suda bilo takvih slučajeva.

24. Da li je početak ocjene proporcionalnosti u sudskoj praksi vašeg suda bio paralelan sa porastom doktrine suzdržavanja od donošenja odluka i/ili od intervencije?

Član II Ustava Bosne i Hercegovine proglašava da se Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda i njeni protokoli direktno primjenjuje u BiH i da je nadređena svim ostalim zakonima. Dakle, odredbe Evropske konvencije u Bosni i Hercegovini imaju snagu ustavnih odredaba. U skladu sa ovim, Ustavni sud Bosne i Hercegovine od prvih dana svog postojanja primjenjuje standarde koje je utvrdio Evropski sud kao glavni tumač Evropske konvencije. Jednako tako se u praksi Ustavnog suda i standard proporcionalnosti primjenjuje od samog početka rada Ustavnog suda. To je jedini momenat za koji se može vezati početak ocjene proporcionalnosti u praksi Ustavnog suda Bosne i Hercegovine.

25. Da li sudska praksa ESLjP-a oblikuje pristup vašeg suda suzdržavanju od donošenja odluka/intervencije? Da li je doktrina polja slobodne procjene ESLjP-a domaći ekvivalent slobodnoj sudijskoj ocjeni koju dodjeljuje vaš sud? Ako nije, koliko često se preklapaju pitanja koja se odnose na polje slobodne procjene ESLjP-a s pitanjima sudskog suzdržavanja vašeg suda u sličnim predmetima?

Praksa Evropskog suda je od velikog značaja za donošenje odluka Ustavnog suda. Međutim, kao što je već prethodno navedeno, Ustavni sud Bosne i Hercegovine u svojoj praksi je isticao da standardi koje je uspostavio Evropski sud predstavljaju minimum standarda zaštite određenog prava zagarantiranog Evropskom konvencijom, te da navedeno ni na koji način ne sprečava Ustavni sud da pruži širi obim zaštite od onog koji pružaju standardi ustanovljeni praksom Evropskog suda. Tako npr. prema ustaljenoj praksi Ustavnog suda, državni organi i javna vlast, kao učesnici sudskih postupaka, ne uživaju garancije prava na pravičan postupak i prava na imovinu iz Evropske konvencije ali uživaju pravo na pravičan postupak i pravo na imovinu iz Ustava Bosne i Hercegovine. Ustavni sud Bosne i Hercegovine je u ovim predmetima istakao da član Ustava Bosne i Hercegovine ni u kom slučaju ne dijeli ustavna prava prema prirodi stranaka u postupku, te ukoliko bi Ustavni sud isključio mogućnost državnim organima da podnesu apelaciju, to bi, ustvari, predstavljalo reduciranje njegove apelacione jurisdikcije.[844]

Ustavni sud Bosne i Hercegovine, kada je riječ o javnoj vlasti odnosno nižerangiranim organima i redovnim sudovima, u svojoj praksi također koristi doktrinu polja slobodne procjene. To je vidljivo i iz primjera navedenog u odgovora na pitanje broj 7. u kojem je, između ostalog, navedeno da je javna vlast u boljoj poziciji od sudija Ustavnog suda da riješi pitanja koja se odnose na to ko će primati po-

844 Vidi Ustavni sud, Odluka broj AP-39/03 od 27.2.2004. godine, tačke 14. i 15.

moć u oblasti socijalne zaštite. Ustavni sud je također isticao da porezna politika i modaliteti njezinog provođenja spadaju u široko polje slobodne procjene javne vlasti[845], te da zakonodavac uživa široko polje slobode prilikom donošenja zakonskih rješenja o pitanjima u vezi s isključivanjem određenih kategorija lica iz dodjeljivanja određenih prava (npr. otkup nacionaliziranog stana)[846]. Drugi aspekti javnog interesa poznati iz prakse Ustavnog suda Bosne i Hercegovine je i funkcionalni pravni sistem[847], uspostavljanje pravne sigurnosti propisivanjem rokova zastare[13] i drugi. Radi se, u načelu, o tome da javna vlast uživa široko polje slobodne procjene u izboru metoda i mjera kojima nastoje postići legitiman cilj, a posebno kada su u pitanju značajne ekonomske i socijalne promjene. Praksa Ustavnog suda Bosne i Hercegovine ukazuje na to da se o tome vodi računa kada je riječ o legitimnom interesu, ali da konačna odluka Ustavnog suda na kraju zavisi od pitanja proporcionalnosti.

26. Da li je ESLjP osudio vašu državu zbog suzdržavanja vašeg suda od donošenja odluka ili intervencije u nekom predmetu, sudskog suzdržavanja od donošenja odluke, što ga je učinilo nedjelotvornim pravnim lijekom?

U dva predmeta protiv Bosne i Hercegovine Evropski sud je utvrdio kršenje konvencijskih prava jer je Ustavni sud Bosne i Hercegovine apelacije podnositelja predstavki odbio zbog toga što nije mogao postići većinu u odlučivanju o bilo kojem od razmatranih prijedloga. Apelacije su odbije primjenom člana 40. stav 3. tadašnjih Pravila Ustavnog suda Bosne i Hercegovine koji je glasio:

„Izuzetno, kada u plenarnoj sjednici u donošenju odluke učestvuje manje od ukupnog broja od devet sudija, i to zbog razloga navedenih u članu 93. stav 1. ili članu 99. stav 6. ovih pravila, kao i kada nisu izabrane sve sudije, ili kada je sudija/sudije u dužem periodu, zbog bolesti, spriječen da vrši svoju funkciju, ukoliko najmanje pet sudija ne glasa identično o prijedlogu odluke o zahtjevu/apelaciji, smatra se da je donesena odluka kojom se zahtjev/apelacija odbija."

U predmetu *Avdić i drugi protiv Bosne i Hercegovine*[848] Evropski sud je istakao da iako je Ustavni sud formalno donio odluke povodom apelacija podnositelja predstavki, on je praktično odbio odlučiti o njihovoj dopuštenosti i/ili meritumu. Sporne odluke su sadržavale kako razloge za, tako i razloge protiv utvrđenja o povredi prava, a jedini razlog zbog kojeg su apelacije podnositelja predstavki odbijene je neuspjeh suda da postigne većinsku odluku o bilo kojem od pitanja, čime bi se odlučilo o građanskim pravima i obavezama aplikanata. Drugim riječima, kako je istakao Evropski sud, nije bilo većine niti za odluku o prihvaćanju apelacija, niti za odluku o njihovom odbijanju. Evropski sud je dalje naglasio da ukoliko nema stvarnog „odlučivanja" o građanskim pravima i obavezama, pravo pristupa sudu ostaje iluzorno te je utvrdio povredu prava iz člana 6. Stav 1. Konvencije. U presudi Čović protiv Bosne i Hercegovine[849] Evropski sud je je iz istih razloga utvrdio kršenje člana 5. stav 4 Konvencije.

Član 40. stav 3. više ne postoji u Pravilima Ustavnog suda Bosne i Hercegovine. Članom 42.

stav 5. Pravila koja su donesena 2014. godine je predviđeno sljedeće:

„Izuzetno, kada u Plenarnoj sjednici u donošenju odluke učestvuje manje od ukupnog broja od devet sudija, i to zbog razloga navedenih u članu 90. stav (1) ili članu 98. ovih SADRŽAJ pravila, kao i kada nisu izabrane sve sudije, ili kada je sudija/sudije u dužem periodu, zbog bolesti, spriječen vršiti svoju funkciju, ukoliko najmanje pet sudija ne glasa identično o prijedlogu odluke o zahtjevu/apelaciji, u slučaju iz člana 98. odlučivanje o toj odluci će se odgoditi za jednu od narednih sjednica ali ne duže od šest mjeseci, a ako se ista situacija nakon isteka tog roka ponovi, glas predsjednika Ustavnog suda, odnosno sudije koji ga zamjenjuje, računa se dvostruko."

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845 Vidi Ustavni sud, Odluka broj AP-2620/20 od 6.4.2022. godine

846 Vidi Ustavni sud, Odluka broj AP-2050/19 od 22.12.2020. godine, tačka 48.

847 Vidi Ustavni sud, Odluka broj AP-1105/05, tačka 28. [13] Vidi Ustavni sud, Odluka broj AP-239/03, tačka 21.

848 Presuda od 19.1.2013. godine

849 Presuda od 3.10.2017. godine

IV. **Ostale specifičnosti**

27. Koliko često se postavlja pitanje suzdržavanja od donošenja odluke u predmetima koji se tiču ljudskih prava u slučajevima u kojima odlučuje vaš sud?

28. Da li je vaš sud s vremenom sve više suzdržavao od donošenja odluka ili od intervencije?

29. Zavisi li stav o suzdržavanju od donošenja odluka od broja predmeta pred vašim Sudom?

Odgovori na pitanja 27-29

Zaštita načela vladavine prava nužno uključuje učinkovitu zaštitu ljudskih prava i sloboda i nezaobilazna je obaveza ustavnog sudstva. Ovu svoju zadaću Ustavni sud je izvršavao proaktivnim tumačenje ustavnih normi u pojedinim slučajevima upravo sa ciljem zaštite ljudskih prava i sloboda. Ustavni sud je imao poseban izazov tumačiti svoju nadležnost, između ostalog, u predmetima ocjene ustavnosti podzakonskih akata, koja nije eksplicitno utvrđena Ustavom Bosne i hercegovine. Polazeći od toga da kroz ocjenu ustavnosti Ustavni sud vrši ulogu temeljnog zaštitnika ljudskih prava, Ustavni sud je dijelu teksta člana VI/3. a) Ustava BiH u kojem je propisana nadležnost Ustavnog suda u postupku apstraktne kontrole ustavnosti, a koji završava riječima: *„uključujući, ali ne ograničavajući se na to",* dao određeno ekstenzivno tumačenje i zauzeo stav da može vršiti kontrolu i pravnih akata nižeg ranga od zakona, kada takvi akti pokreću pitanja kršenja ljudskih prava i temeljnih sloboda zaštićenih Ustavom Bosne i Hercegovine i Europskom konvenciju za zaštitu ljudskih prava i temeljnih sloboda. U skladu sa argumentacijom o ljudskim pravima, Ustavni sud, kad god je to moguće, mora interpretirati svoju jurisdikciju tako da dozvoli najširu mogućnost otklanjanja posljedica kršenja tih prava.[850] Ovakvo tumačenje Ustava Bosne i Hercegovine omogućilo je rješavanje značajnih sistemskih pitanja, koja nisu eksplicitno spomenuta u tekstu Ustava BiH. Međutim, Ustavni sud i dalje smatra, da apstraktna nadležnost Ustavnog suda u pravilu treba biti usmjerena na kontrolu zakonodavnih općih akata, a ne i akata organa izvršne vlasti i upravnih organa i drugih pojedinačnih pravnih akata, odnosno da tumačenje njegove nadležnosti u postupku apstraktne kontrole ne smije biti suviše ekstenzivno. Odlukom broj U 1/09 od 29. maja 2009. godine Ustavni sud je odbacio kao nedopušten zahtjev za ocjenu ustavnosti Odluke o davanju suglasnosti na otplatni plan izmirenja obaveza po osnovu emisije obveznica za verificirane račune stare devizne štednje, Odluke o gotovinskoj isplati verificiranih potraživanja računa stare devizne štednje po osnovi planirane emisije obveznica za 2008. godinu i Uredbe o izmjenama Uredbe o postupku verifikacije potraživanja i gotovinskih isplata po osnovu računa stare devizne štednje u Federaciji BiH zbog nenadležnosti Ustavnog suda za odlučivanje. Zahtjevom za ocjenu ustavnosti osporavani su akti niže pravne snage od zakona, tri podzakonska akta Vlade Federacije BiH. I u ovoj je odluci Ustavni sud naglasio kako Ustavni sud može vršiti kontrolu ustavnosti i pravnih akata nižeg ranga od zakona kada takvi akti pokreću pitanja kršenja ljudskih prava i temeljnih sloboda zaštićenih Ustavom Bosne i Hercegovine i Europskom konvencijom. Međutim, u konkretnom slučaju Ustavni sud nije vidio nijedan razlog zbog kojega bi osporeni akti pokretali pitanja kršenja ljudskih prava i temeljnih sloboda, te se oglasio nenadležnim. Dakle, može se zaključiti da je u ovim predmetima Ustavni sud kod donošenja odluke o zasnivanju nadležnosti vodio računa isključivo o pitanju zaštite ljudskih prava. Iz toga se može zaključiti da, kada je riječ o zaštiti ljudskih prava, pitanje suzdržavanja od donošenja odluke generalno nije prisutno u praksi Ustavnog suda niti da postoji „trend" sve većeg suzdržavanja, niti suzdržavanje zavisi od broja predmeta.

30. Može li vaš sud zasnovati svoje odluke na razlozima koje strane nisu iznijele? Može li Sud ponovo klasifikovati razloge navedene u nekoj drugoj ustavnoj odredbi a ne onoj na koju se poziva podnosilac zahtjeva?

Članom 31. Pravila Ustavnog suda utvrđeno je da„pri odlučivanju Ustavni sud Bosne i Hercegovine, u pravilu, ispituje da li postoje samo one povrede koje su iznesene u zahtjevu/apelaciji". U pravilu, Ustavni sud odlučuje samo o navodima (razlozima, argumentima, činjenicama itd.) i o povreda-

850 Odluka Ustavnog suda BiH broj U-4/05 od 22.4.2005., tač. 14. i 16.

ma koje su iznesene u zahtjevu/apelaciji. U jednom od predmeta Ustavni sud je napomenuo da je, prema citiranom članu Pravila Ustavnog suda, „vezan" za navode iz zahtjeva i apelacije u pogledu njihovog sadržaja, odnosno u pogledu činjeničnog supstrata zahtjeva/apelacije. Tako se, kako je istakao Ustavni sud, može desiti da i pored jasnog navoda apelanta, odnosno podnosioca zahtjeva o povredi određenog prava Ustavni sud na osnovu predočenog činjeničnog supstrata istaknuto pravo za koje apelant ili podnosilac zahtjeva smatra da mu je povrijeđeno „podvede" pod neko drugo pravo koje nije navedeno u zahtjevu/apelaciji, a po pravilu iura novit curia (sud zna pravo). Ustavni sud je napomenuo da se to pravilo primjenjuje u svakom predmetu, što znači da Ustavni sud kada dobije predmet na odlučivanje ispita činjenični dio u odnosu na sva prava koja bi potencijalno mogla biti pokrenuta iznijetim činjeničnim navodima, čak i kada nisu eksplicitno navedena, odnosno bez obzira na to pod koja ih je prava apelant ili podnosilac zahtjeva podveo. Dakle, Ustavni sud povodom svakog zahtjeva i apelacije razmotri sve mogućnosti koje proizlaze iz činjeničnog supstrata za koji je striktno vezan, te razmotri navedeni zahtjev odnosno apelaciju sa svih mogućih aspekata koji bi mogli proizlaziti, iako to posebno ne obrazlaže u svojim odlukama, isključivo radi svrsishodnosti. Ustavni sud je također napomenup da nema ex officio pravo da pokreće postupak, ali činjenični supstrat zahtjeva ili apelacije može podvesti pod bilo koje pravo.[851]

31. Može li vaš sud proširiti svoje ustavno preispitivanje na druge odredbe koje pred njim nisu osporene ali imaju veze sa situacijom podnosioca zahtjeva?

U predmetu Ustavnog suda Bosne i Hercegovine broj U-16/11 koji se odnosio na nadležnost iz člana VI/3.c) Ustava Bosne i Hercegovine (pitanje koje proslijedi redovni sud) podnesen je zahtjev za ocjenu ustavnosti člana 4. Zakona o provođenju Aneksa G Sporazuma o pitanjima sukcesije na teritoriji Republike Srpske. Iako podnosilac zahtjeva nije problematizirao pitanje ustavne nadležnosti Republike Srpske za donošenje predmetnog zakona, Ustavni sud je smatrao da se ovo pitanje mora razmotriti u konkretnom slučaju.

Ustavni sud je istakao činjenicu da je Vijeće ministara Bosne i Hercegovine, prije donošenja osporenog zakona, kao institucija Bosne i Hercegovine usvojilo Odluku o provođenju Aneksa G Sporazuma o pitanjima sukcesije na teritoriji Bosne i Hercegovine, te da dakle, postoje dva propisa koja su donijeli zakonodavni organi različitog nivoa, čiji nazivi i sadržaj ukazuju da reguliraju istu materiju. Ustavni sud je istakao da se ne može ograničiti isključivo na navode iz zahtjeva, tj. ispitivati ustavnost pojedinih odredaba Zakona o provođenju Aneksa G Sporazuma o pitanjima sukcesije na teritoriji Republike Srpske bez prethodnog ispitivanja ustavne nadležnosti entitetâ za donošenje ovakvog zakona. Pored toga, istakao je da u kontekstu propisane odredbe člana VI/3.c) Ustava Bosne i Hercegovine, prema kojoj je Ustavni sud nadležan da ispita da li je «zakon [..] kompatibilan sa ovim Ustavom», Ustavnom sudu se, kao prethodno pitanje, neophodno postavlja i pitanje ustavne nadležnosti prema Ustavu BiH donosioca konkretnog zakona. Navedena ustavna odredba, kako je tumači Ustavni sud, u postupku konkretne kontrole ustavnosti daje šire mogućnosti Ustavnom sudu za ispitivanje kompletnog teksta zakona, kao i ustavnog osnova za njegovo donošenje. Ustavni sud je istakao da osporena odredba nekog zakona ne može egzistirati samostalno, nezavisno od konteksta cijelog teksta zakona za koji je Ustavni sud nadležan da prethodno ispita ustavni osnov za njegovo donošenje. Ustavni sud je u odluci u ovom predmetu također istakao da je u svojoj praksi usvojio stav da ne samo pojedine odredbe već i cijeli zakon može biti predmet ocjene ustavnosti, te da je u više predmeta ocjenjivao ustavnost zakona u širem ustavnom kontekstu, ne ograničavajući se na odredbe Ustava BiH koje su navedene u zahtjevu (vidi, mutatis mutandis, Odluku Ustavnog suda broj U 11/08 od 30. januara 2009. godine, tačka 19, i Odluku broj U 6/06 od 18 29. marta 2008. godine, tačka 21). U konkretnom slučaju, Ustavni sud je predmetni zahtjev „razmotrio u širem ustavnom kontekstu" i u konačnici zaključio da osporeni zakon u cjelosti nije saglasan Ustavu Bosne i Hercegovine.

851 vidi Ustavni sud, Odluka o dopustivosti i meritumu broj U 23/18 od 5. jula 2019. godine, tačka 17.

The Constitutional Court of the Republic of Bulgaria

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

No. Question

1. In your jurisdictions, what is meant by "judicial deference"?

No notion identical or close to the one of *judicial deference* has been known in the case-law of the Constitutional Court of the Republic of Bulgaria (the CC).

The Bulgarian Constitutional Court acts upon the initiative of at least one-fifth of all MPs (240), or the President, Council of Ministers, Supreme Court of Cassation, Supreme Administrative Court, or the Prosecutor General. Individual chambers of the supreme courts enjoy limited powers of referral – they may refer to the Constitutional Court applicable laws that are allegedly incompatible with the Constitution. The Ombudsman and Supreme Bar Council may in turn make referrals to the Constitutional Court in case they establish that a law in force violates citizens' rights or freedoms. In a limited number of cases pertaining to conflicts of jurisdiction municipal councils (local governments) may also make referrals to the Constitutional Court. Referrals may be made to the Constitutional Court as regards interpretation of the Constitution, constitutional challenges of National Assembly or presidential acts, conflicts of jurisdiction between executive authorities on national and local level, compatibility of international treaties concluded by the Republic of Bulgaria, and compatibility of laws with generally recognized norms of internal law or with international treaties to which Bulgaria is a party. The Constitutional Court may further rule on disputes pertaining to the constitutionality of political parties and associations, the election of President and Vice President, or Member of Parliament. In addition, the Constitutional Court is competent to rule on alleged infringements by the President or Vice President. The powers of the Bulgarian Constitutional Court are therefore exhaustively and expressly set forth in the Constitution, hence the constitutional procedure leaves no special room for *judicial deference*.

The Constitutional Court of the Republic of Bulgaria reserves the right to rule on the admissibility and the merits of the referrals made to it. It further acknowledges the opinions of the so-called interested parties, which, in case the referrals are made by the executive or the legislature, would be the respective institutions; however, their opinions do not enjoy a privileged procedural or probative status.

The Court also works with the notion of political expediency, refraining to rule on the added value or adequacy of decisions of the executive, thus limiting itself to assessment of constitutionality.

This self-restraint of the Constitutional Court is demonstrated in its practice: the Court would terminate the case if the applicant declares that they do not maintain the application (cf. Ruling No. 7 of 15 September 2016 in constitutional case no. 14/2016 etc.).

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (e.g. questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

The Bulgarian Constitutional Court does not rely in its case-law on *judicial deference*. It reviews every individual case on a case-by-case basis and *ad hoc*. The Constitutional Court is bound by its case-law and recourse to *evolutive* interpretation is made in exceptional cases only: 'when interpreting constitutional provisions, the Constitutional Court inevitably tries to establish the genuine will of its originators. This ensures the legal stability and supremacy of the Basic Law as well as protection of the fundamental ideas and values. *At the same time this approach does not rule out an evolutive and teleological interpretation if the same ideas and values must be protected in essentially different social conditions. To yearn the best possible effect, the Constitution must not be perceived as carved in stone but rather as a living organism. Thus, it is admissible that the Constitutional Court leaves out old interpretations and adopts instead new views on the meaning of individual constitutional norms (see for example the findings in the reasons of Decision no. 3/2015 of the Constitutional Court in constitutional case 13/2014 as regards the interrelation of Decision no. 10/2011 in constitutional case no. 6/2011 and*

the subsequent Interpretative Decision no. 9/2014 in constitutional case no. 3/2014)' (in Ruling no. 3 of 17 September 2015 in constitutional case no. 7/2015. However, gaps in the Basic Law remains outside the scope of the evolutive interpretation and is thus deemed inadmissible in the case-law of the Bulgarian Constitutional Court since to admit it would be tantamount to rendering the Constitutional Court into a positive legislature.

Constitutional review is '*contrived and carried out as a mechanism for settlement of constitutional disputes following legal rules and criteria*' (Decision no. 9/2022 in constitutional case no. 5/2022) and unless violation or restriction of rights is at hand, it stops short of any judgment as to the appropriateness of the legislation. In its case-law the Constitutional Court has outlined the admissible borderlines of legislative expediency: '… *suffice it to recall in this regard that legislative expediency may and should be exercised only within the limits established in the Constitution as the Constitutional Court held in Decision no. 18/1997 in constitutional case no. 12/1997 (cf. Decision no. 7/1995 in constitutional case no. 9/95 as well*). *To hold otherwise would be tantamount to arbitrary legislative activity where the National Assembly would not be deemed bound by constitutional principles and values in its rulemaking activity*.' (in Decision no. 3/2014 in constitutional case no. 10/2013). Furthermore, '… *the Court has reiterated in its case-law that 'it is inadmissible through interpretation to seek to circumvent, substitute or infringe powers established in the Constitution. The Constitutional Court may not give specific instructions to public authorities designated by the Constitution how to act (or refrain from acting)* …' (Decision no. 8/2005 in constitutional case no. 7/2005). In similar vein, '*This concept translates into certain legislative expediency which alone is not subject to review of constitutionality*.' (in Decision no. 5/2011 in constitutional case no. 1/2011). Likewise, '*... in conclusion, the Constitutional Court points out that it is not competent to consider issues pertaining to legislative expediency. To do so would mean to encroach inadmissibly on its powers established by the Constitution*' (in Decision no. 7/2004 in constitutional case no. 6/2004). Furthermore, '… *as to the allegation made in the request that the treaties concluded and their ratification are not in the interest of the Bulgarian State, this is a matter of political and economic expediency, and thus the Constitutional Court is not competent to rule on*' *(*in Decision no. 9/1999 in constitutional case no. 8/1999*).*

The Constitutional Court further specified when economic expediency should be taken into account: '… *In principle differences in the legal regulation in different periods of time are due to a series of economic, political and international factors. Therefore Article 84, item 1 of the Constitution confers to the National Assembly the right not only to adopt laws but to amend, supplement and repeal them as well. Every change in the rules on privatization to some extent or other mitigates or exacerbates the situation for the participants. To endorse the proposition of the applicants would mean to declare every amendment unconstitutional. The conditions for privatization reflect the economic concept endorsed by the privatizing entity and as such it is not subject to review for constitutionality.*' (in Decision no. 2/2003 in constitutional case no. 20/2002)

The Constitutional Court must further on ensure legitimate interest of the referral on which its admissibility would be conditional, that is whether it will move on to review the issues raised on the merits: '*Thus, the lack of a public interest to be satisfied by a ruling of the Constitutional Court on a decision adopted by a dissolved National Assembly or a repealed one makes the request of a group of MPs inadmissible*' (in Ruling no. 3 of 28 March 2013 in constitutional case no. 7/2012).

The Constitutional Court delivered in the last year a series of four rulings that come closest to the notion of *judicial deference*. The Court relies in these constitutional acts on 'political expediency', and thus refuses to judge the decisions of the legislature that concern foreign policy of the Republic of Bulgaria (Ruling no. 2/2023 in constitutional case no. 1/2023), defence and security policy (Ruling no. 4/2023 in constitutional case no. 2/2023), national energy policy (Ruling no. 6/2023 r. in constitutional case no. 3/2023) and 'the various proposals for reform of the judicial system as pronouncing on their relevance or irrelevance from a pragmatic or legal point of view does not fall within the powers conferred on the Constitutional Court' (Ruling no. 5/2023 in constitutional case no. 6/2023). What these acts have in common is that they outline a new trend in the case-law of the Constitutional Court, namely setting boundaries for compliance with the political dimensions of the separation of

powers and political responsibility, which in fact is an expression of judicial deference.

3. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

The Bulgarian Constitutional Court reviews every case individually, in line with its powers set forth in the Constitution (as outlined in the answer to Question no. 1 above).

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

The Bulgarian Constitutional Court adheres to an understanding of the separation of powers that accords certain issues to be dealt by the legislature, thus determining a scope of legislative expediency upon which the Constitutional Court does not encroach. This is described in more detail in the answer to Question no. 2

The Constitutional Court is an interpreter, and a supreme one, but solely of the Constitution and not of any other acts, even such of an international nature. The Constitutional Court may give its own appraisal of such acts (Ruling of 16 September 2022 in constitutional case no. 13/2022) but it may not interpret them: '*… it is clear from the request that it does not concern unclarities of the constitutional norm. Thus, it does not pertain to additional interpretation of Article 99, para 5 of the Constitution but to the consequences of the interpretation made in Decision no. 20/1999 of the Court. These consequences as regards international parliamentarian commitments are most likely regulated by acts (such as statutes, rules of procedure, resolutions etc.) of the international organisations concerned. Involvement in the latter is in accordance to their respective regulations. Such acts of the Council of Europe for example are the Statute of the Council of Europe (SG no. 49/1992), Rules of Procedure of the Assembly, General Agreement on Privileges and Immunities of the Council of Europe (SG no. 57/1992) etc. The applicants themselves point out in their letter of 28 January that other European structures have similar regulations. The issues raised in the request concern the acts of the respective international organisations and their interpretation …. The Constitutional Court is an interpreter, and a supreme one, but solely of the Constitution and not of any other acts, even such of an international nature. The purpose of the request falls outside the competence of the Court.*

The request is inadmissible, and the case must be terminated.' (in Ruling no. 5/1993 in constitutional case no. 35/1992)

5. Are there cases where your Court deferred because there was a risk of judicial error?

The Constitutional Court of the Republic of Bulgaria has not relied on *error juris* or ignorance of the law to dismiss a case for review, or to justify a decision or a ruling in its case-law.

The Bulgarian Constitutional Court has reserved its discretionary powers for individual assessment of the applicable law even in the context of EU law: '*… however, the Constitutional Court is not bound by the appraisal of the referring court as to the law applicable as such an appraisal would infringe on the Constitutional Court's competence to rule on the request made (its jurisdiction), while every court, including the Constitutional Court, renders its own judgment as to its competence to hear a case – Article 13 of the Constitutional Court Act (Ruling no. 2 of 23 March 2010 in constitutional case no. 17/2009, Ruling no. 2 of 24 February 2022 in constitutional case no. 15/2021)*' (as in Ruling of 16 September 2022 in constitutional case no. 13/2022).

6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

The case-law of the Constitutional Court in this matter has been specified in the answer to question no. 2 as regards political expediency in decision-making by the legislature. The Constitutional Court is of the opinion that everything that is not defined or regulated on constitutional level

is a question of legislative expediency: '… *is not regulated on constitutional level, hence it is a question of legislative expediency*' (in Decision no. 6/2018 in constitutional case no. 10/2017).

The Constitutional Court respects the democratic legitimacy of the decision-making body regarding personnel issues: '… *The assessment as to selection or appointment, including the appraisal of appropriate character references, belongs exclusively to the competent authority. It is not subject to constitutional review since it is personal and sovereign. The assessment of the professional qualities and character references is the right and duty of the selecting and respectively appointing body. The constitutional legislature has envisaged such regulation by apparently presuming that the superior position of the selecting/appointing body in the respective hierarchy of the three powers (legislature, executive and judiciary) guarantees excellence of the character references*' (in Decision no. 11/1994 in constitutional case no. 16/1994). Furthermore, '… *the Constitutional Court may not review this appraisal as this would be tantamount to interference by the Court in the powers of the Council of Ministers and the President. What the Constitutional Court is competent to review is whether the appointment or dismissal of the ambassador has been done in compliance with the requirements for issuing presidential decree as laid down in the Constitution – the provisions of Article 98, item 6 and Article 102, para 2 of the Constitution*' (in Decision no. 13/1999 in constitutional case no. 9/1999). The case-law of the Bulgarian Constitutional Court is consistent that: '*The dispute in the case at hand concerns the scope and subject of constitutional review when challenging decisions of the National Assembly. Clearly, the Constitutional Court cannot judge on the facts of the case. We believe that the assessment of the Constitutional Court goes beyond the formal assessment of establishing that a decision of the National Assembly is contrary to a specific norm of the Constitution or that the procedure for adopting that decision has not been complied with. The assessment must be fully premised on the understanding that the decisions of the National Assembly should furthermore not run contrary to the principles and values enshrined in the Constitution*' (in Decision no. 15/2013 in constitutional case no. 19/2013).

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

As mentioned in the answers to questions nos. 2, 4 and 6, the Bulgarian Constitutional Court respects the competence of each of the other powers. It has repeatedly outlined in its case-law a room reserved for political and economic expediency that is not subject to subsequent assessment or judicial revision. The case-law of the Court is consistent in this regard: '*It should be born in mind that Article 76, para 3 of the Constitution empowers the National Assembly to select its President and Vice-Presidents. This is a sovereign right of the Parliament and a question of political will and expediency which is not subject to review by the Constitutional Court. This provision further implies the possibility for the National Assembly to dismiss the President and Vice-Presidents it has elected. Clearly, in the absence of other constitutional provisions, the body that is competent to give mandate on the basis of political expediency is competent to take that mandate on the same grounds*' (in Decision no. 11/2000 in constitutional case no. 13/2000); '*The Constitutional Court cannot afford to judge concepts of governance on which the parliamentarian act is premised when the decision-making body has acted within its competence as set forth by the Constitution as in the present case. This would be tantamount to going beyond the strict boundaries of constitutional review and would constitute an impermissible interference in the sovereignty of the legislature*' (in Decision no. 3/2010 in constitutional case no. 18/2009); '*The Constitutional Court cannot review or rule on such an expediency. It may only assess whether revoking tax exemption for legal representation infringes upon the fundamental legal principles on which the rule of law is based*' (in Decision no. 6/2010 in constitutional case no. 16/2009); '*It is the right of Parliament when acting within its competence as laid down in the Constitution to express through legislative amendments certain political and economic expediency motivated by changes of the public social and economic conditions in the period of transition, which themselves are not subject to constitutional review*' (in Decision no. 8/2017 in constitutional case no. 1/2017); '*To effect the right to social security and assistance which is a projection of the principle of welfare state, the legislature should take individual measures to accomplish the organization of such a social system in the country that guarantees best social justice and security. However, the*

Constitution does not specify the terms and conditions, or principles, or system to exercise and implement in practice this right. These fall within the discretion of the legislature' (Decision no. 21/1998; Decision no. 5/2000; Decision no. 13/2003; Decision no. 3/2019). It is free to judge the demands of those in need and the public resources to arrange as appropriate the social model in the country in compliance with the norms and principles set forth in the Basic Law (Decision no. 10/2012; Decision no. 5/2000; Decision no. 3/2019). ... The Constitutional Court is not competent to judge whether the preferred approach in formulating and structuring the challenged law is appropriate since this would turn it into a positive legislature, which is not the role it has been entrusted by the Constitution. The Constitutional Court is authorized only to check whether the legislature has complied with the principles and norms of the Basic Law in adopting the challenged legal regulation. As demonstrated above, the definition of the social services in Articles 3, 15 and 17 of the Social Services Act does not run contrary to the principle of the rule of law' (in Decision no. 9/2020 in constitutional case no. 3/2020).

The Bulgarian Constitutional Court does not rely on absence of democratic legitimacy but rather acts in accordance with its position in the framework of the constitutional architecture. The specific legitimacy of the Bulgarian Constitutional Court is determined by 'the rule of law'. This means three things: first, establishing the structure and composition of the court should be in accordance with the Constitution and the law. Second, the constitutional proceedings – approach and procedures whereby the Court reaches a decision – should also be in line with the Constitution and the law. And third and most important, the content and spirit of the constitutional decisions should also be in accordance with the Constitution.

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

The Constitutional Court of the Republic of Bulgaria in principle does not stop short of issues pertaining to criminal policy. There is no case in the Court's case-law where the Court dismissed a constitutional challenge of a criminal law provision due to the nature of the provision. The Court acts on a case-by-case basis.

The Court reiterates that '*the National Assembly is a body which, as provided for in the Constitution, determines the criminal policy of the State through the Criminal Code and Criminal Procedure Code*'. The Court further defines criminal policy as '*first, laying down a set of legal (criminal) provisions that determine the types of criminal offences and delimits criminal from non-criminal behaviour, and second, in the framework of what is qualified as criminal behaviour, differentiate among individual offences, and prescribe specific punishment for them*' (Decision no. 13/2022 in constitutional case no. 8/2022). According to this decision, '*both issues are for the legislature to resolve*'. The Court holds in the same decision that '*the decision to criminalise or decriminalize certain acts is in essence political as it is a choice between conflicting interests, values, and views. Being a nation-wide representative body, the democratically elected Parliament is the appropriate forum where, through broad public dialogue, to strike the right balance between conflicting interests and values in criminal law regulation. At the same time in the context of constitutional democracy the legislature's autonomy is curtailed by a series of restrictions set forth in the Constitution and aimed at protecting fundamental values that cannot be relinquished arbitrarily by the political majorities in Parliament.*' The Court considers the specific manifestations of the principle of the rule of law in criminal law and procedure such as Nullum crimen sine lege, Nulla poena sine lege, Nulla poena sine culpa, Non bis in idem as well as fundamental rights and freedoms to be such restrictions. *'[T]he legislature's discretion to determine the criminal policy of the State stops short of the area of values and principles protected by the Basic Law*'.

In another decision the Court holds that *'[o]ne of the essential manifestations of the rule of law is delineating law from politics, which allows to minimize as much as possible that judgments are based on judges' personal values, preferences, and views. The contrary is not only harmful to the administration of justice but what is more, it is a failure for constitutional values and principles as a manifestation of democracy that judges are called to endorse. Constitutional justice is destined to subject legislative acts to scrutiny as to their compliance with these values that the general public at large is bound by and to which the latter has attributed the ranking of supreme law'* (Decision no. 12/2016 in constitutional case no. 13/2015

whereby provisions concerning periods of limitation in criminal prosecution have been declared unconstitutional).

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

There are no circumstances that preclude the Government to disclose information to the Constitutional Court of the Republic of Bulgaria. The Court may request access to any kind of information, including classified, that it deems necessary to pronounce a decision. This applies to the Council of Ministers and any other institution in the Republic of Bulgaria.

Pursuant to Article 20, para 2 of the Constitutional Court Act, no one shall have the right to refuse to transmit the requested information or written evidence, regardless of whether it qualified as classified information representing state or professional secrecy or not.

In case the information is not accessible, the Constitutional Court of the Republic of Bulgaria is authorized request additional written evidence and commission drawing up of expert opinions.

As regards classified information, the terms and procedure set forth in the Protection of Classified Information Act are followed.

There are cases in the case-law of the Constitutional Court where it has refrained from ruling on national security grounds.

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

The Constitutional Court of the Republic of Bulgaria is the guarantor of the supremacy of the Constitution. It does not interfere in politics, even to protect citizens' rights and freedoms.

The Constitutional Court of the Republic of Bulgaria may not through interpretation or interpreting the Constitution to pronounce on issues that fall within the exclusive competence of the National Assembly.

The boundaries of protection of citizens' rights and freedoms have been extended by the provisions of Article 150, para 3 of the Constitution of the Republic of Bulgaria (SG no. 27/2006) and Article 150, para 4 of the Constitution (SG no. 100/2015). These norms allow the Ombudsman and the Supreme Bar Council to seize the Constitutional Court of the Republic of Bulgaria with requests seeking to establish the unconstitutionality of laws that violate citizens' rights and freedoms. This possibility for these two entities to seize the Court is present since they express the will of the people being intermediaries of the public authority and they may turn to the body that guarantees the primacy of the Constitution.

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

To the first question:

Pursuant to Article 149, para 1, item 2 of the Constitution of the Republic of Bulgaria which establishes the powers of the Constitutional Court, the latter rules on requests seeking to establish the unconstitutionality of laws and other acts passed by the National Assembly and the acts of the President. Therefore, the Court may review only acts of the Parliament and President, and not acts of the executive. Pursuant to Article 125, para 2 of the Constitution, '*[T]he Supreme Administrative Court shall rule on all challenges to the legality of acts of the Council of Ministers and the ministers, and any other acts envisaged by the law*'. There is an identical provision in the Administrative Procedure Code, namely Article 132, para 2, item 2, which stipulates that the *Supreme Administrative Court is competent to rule on challenges to acts of the Council of Ministers, the Prime Minister, Deputy Prime Ministers and ministers*

issued in the course of exercising their constitutional powers of governmental management and authority.

As stated in Decision no. 6/2019 in constitutional case no. 6/2019, '*The power of the court' (the Constitutional Court and the Supreme Administrative Court) is part of the control over the legislature and the executive. It is part of the check-and-balances mechanism between the three branches of government*'.

To the second question: cf. the answer to question no. 6

When the Court reviews acts of the legislature, it takes into account its democratic legitimacy. 'Democratic legitimacy' refers to public authority being exercised by representatives elected by the sovereign who, sanctioned by elections, is granted democratic legitimacy to exercise the power belonging to the sovereign when it is not exercised directly by the people.

*'The system of democratic governance there is an established constitutional principle that has been transposed to the Bulgarian Constitution as well, namely that this power (*the power to impose taxes*) shall be exercised by the legislature as the immediate voice of the will of the public authority holder. Parliament enjoys the highest level of democratic legitimacy.* Each citizen has the right 'to ascertain, by himself or through his representatives, the need for a public tax, to consent to it freely, to know the uses to which it is put, and of determining the proportion, basis, collection, and duration' *(Article XIV of the Declaration of the Rights of man and of the Citizen of 1789)… . The requirement that the powers of the executive in the area of taxation and taxpayers' obligations should be set forth in a law is in fact based on that principle – i.e. based on an act adopted by the body with the highest democratic legitimacy where citizens are represented in the most immediate way…. The Constitutional Court has been consistent in its case-law that public receivables by the State or the municipality is established unilaterally by the State or municipality, in a law so as to guarantee taxpayers' rights (Decision no. 3/1996 in constitutional case no. 2/1996). The National Assembly may not delegate this exclusive power to the executive'* (in Decision no. 4/2019 in constitutional case no. 15/2018 which finds certain provisions of the Local Tax and Revenue Act and the Customs Act to be unconstitutional).

‚Following the logic of combining direct and representative exercise of sovereignity, the Constitution and the Citizens' Direct Involvement in Public Authority through Local Governance Act designate the National Assembly as an intermediary in this process precisely due to the high degree of democratic legitimacy it enjoys but also because it expresses and represents the interests of the entire people. It is on these grounds that it is required to guarantee that the holder of the initiative for a national referendum has complied with the requirements set forth in the Constitution' (Decision no. 9/2016 in constitutional case no. 8/2016 whereby the Constitutional Court declares the Decision to hold a national referendum adopted by the 43rd National Assembly unconstitutional).

'In line with the principle of national sovereignty (Article 1, paras 2 and 3), the National Assembly in its capacity of a public authority enjoying the highest democratic legitimacy, both in its rule-making activity and its supervisory one, has bearing to all spheres of public life and in this sense – to 'every aspect of government' (Decision no. 15/2022 in constitutional case no. 10/2022 whereby the Constitutional Court declares unconstitutional a decision of the National Assembly authorising the Road Infrastructure Agency to take action for the maintenance of the national road network).

'Due to its nature of a nation-wide representative establishment, the democratically elected Parliament is the appropriate forum where, through broad public dialogue, to strike the right balance between conflicting interests and values in criminal law regulation' (Decision no. 13/2022 in constitutional case no. 8/2022).

12. What weight does your Court give to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

To identify the genuine and unambiguous will of the legislature when assessing the constitutionality of the acts challenged before it, the Constitutional Court, without trespassing the boundaries of the legislature's political expediency, takes into account as evidence in many of its decisions

the verbatim reports of MPs' deliberations (sessions in plenum or in committees), reports of parliamentary standing committees, or reasons to draft laws, and makes an analysis of the genesis of legislation.

As far as appraisal of the constitutionality of the voting procedure for the adoption of acts of the National Assembly is concerned, the Constitutional Court has repeatedly held that '*it may be based solely on the verbatim records of parliamentary session. The Constitutional Court may not open proceedings challenging these records. Verbatim reports are official documents of the National Assembly, and they have probative value as to the statements reflected therein, including the number of MPs present in the plenary hall (quorum)*'. (Decision no. 1/1999 in constitutional case no. 34/1998; Decision no. 8/2011 in constitutional case no. 5/2011; Decision no. 3/1993 in constitutional case no. 2/1993; Decision no. 6/2007 in constitutional case no. 3/2007). '*As has been clarified so far, verbatim reports are legally relevant for establishing what has been voted in Parliament. Nevertheless, when describing the facts of the case, we pointed out the words of the President of the National Assembly as recorded in the video recording of the parliamentary session*' (Decision no. 8/2011 in constitutional case no. 5/2011).

The following decisions of the Constitutional Court serve as a case in point as regards the significance and role that verbatim reports, reasons to draft laws and the genesis of a piece of legislation play in assessing the constitutionality of challenged provisions:

'It is well known that one judges about the will of the legislature as enshrined in a specific legislative act (in the present case – a law) by the ***reasons of the draft law****, the* ***deliberations*** *of the Standing Parliamentary Committees and the ones conducted in plenary sessions. In the case at hand* ***the genesis of the legislative process*** *that preceded the adoption of Article 245 of the Labour Code, including the part of it that has been challenged, shows that the understanding of the legislature is precisely in support of the view that this is a norm that protects the worker and guarantees his right to remuneration rather than a norm setting forth right to the employer's benefit and the employed persons' disadvantage as the Ombudsman claims in his request.*

The reasons of the draft law amending and supplementing the Labour Code that the Council of Ministers submitted ('the draft law') (registered under No. 302-01-43 of 6 August 2003) and the verbatim reports of the deliberations held cannot justify a conclusion that the purpose of the legislature has been to provide for a new subjective right of the employer unilaterally and acting upon his sole discretion to reduce the workers' remuneration to 60 pct of the size of the workers' gross remuneration but not less than the minimum wage, nor to introduce different periods for payment of that remuneration. On the contrary, the purpose of Article 245, para 1 of the Labour Code is to provide additional guarantees for the payment of the wages, including in cases when the employer experiences certain force majeure circumstances – most frequently termed as financial difficulties that do not yet amount to the employer going bankrupt ... Viewed in historic perspective, the 36th National Assembly deliberates on and adopts a Law Amending and Supplementing the Labour Code. The reform of the 1992 employment relationships thus effected was necessitated by the overall changes in the social and economic conditions that required enhancing the contractual employment, establishing a genuine job market and abandoning in general the principles of the so-called 'Socialist organization of employment', as stated in the reasons of the leading draft law and in the course of plenary deliberations. Presenting the proposed legislative amendments in plenary (verbatim reports of 78th plenary session of 13 May 1992), MPs described in general the need to render the legal regulation in compliance with the changes in social relations during the transition from centralized to market economy. Account was taken of the fact that these conditions require the respective adequate guarantees for workers' rights, including setting forth binding minimum standards for working conditions and employees' remuneration…… An essential part of the reasons for adopting Article 245, para 1 of the Labour Code as amended in 1992 concerned suspension of the then existing malpractice of advance payments whereby employees received in practice remuneration of a completely arbitrary, often purely symbolic amount below the minimum wage level, and at random intervals of time. Therefore, the purpose of the initiated then legislative amendment was crystal clear – to ensure the necessary legal means to eliminate systemic abuse of the rights of economically vulnerable employees. Thus, on 8 October 1992 the revision was adopted at second reading almost unanimously, with only one vote against (cf. the verbatim report of the 133rd plena-

ry session held on 8 October 1992). Unlike other sections of the draft bill, this provision did not garnish any objections' (in Decision no. 1/2018 in constitutional case no. 3/2017).

*'These **dynamics of the legislation**, in addition to the constitutional principle that the basic legal order applies to all legal entities, put forward the question of the prior legality of state requirements (Decision no. 1/2005 in constitutional case no. 8/2004; Decision no. 22/1996 in constitutional case no. 24/1996). As regards the constitutionality and the rights of duly authorised economic operators under the Waste Management Act, account must be taken of the contents and raîson d'être of the **legal regulation in force prior to** the entry into force of the amendments and supplements to the Waste Management Act of 12 April 2011 …… Considering the former regulation of authorization of waste activities under Article 13a, para 3 and Article 54, para 2 (new) of the Waste Management Act, certain unclarities and inconsistencies are established, which gives rise to doubts and insecurity' (in Decision no. 3/2012 in constitutional case no. 12/2011*).

In its Decision no. 15/2010 in constitutional case no. 9/2010 the Constitutional Court holds that the challenged legal regulation (Article 519 Enforcement against Government Institutions and Municipalities and Article 520 Enforcement against Budget-Subsidized Establishments of the Civil Procedure Code) is not a completely new construct in the Bulgarian law. It goes on to review in detail the legislation in this area, from the Constitution of Tarnovo, to the Law on Civil Procedure, a series of special laws in the budgetary field, to different versions of the old and new Civil Procedure Code. '*The Court asks itself why the legislature has provided for this special procedure in the Civil Procedure Code. As stated above, the National Assembly – the holder of legislative power and a party to these proceedings – submits no opinion. Judging from the reasons of the draft laws and the verbatim reports, it is clear that the purpose of the legislature to establish the comprehensive regulation of Articles 519 and 520 of the Civil Procedure Code currently in force is to guarantee effective exercise of the public duties of Government institutions, municipalities and budget-subsidized establishments'.*

'To assess in essence the compliance of the challenged provision with the Constitution, one must consider in-depth the order for payment proceeding, its genesis and variations, its scope of application, and the parties' procedural rights, including the right to defence.

The order for payment proceeding that is functionally related to the enforcement proceedings is regulated in Chapter Thirty-Seven of the Civil Procedure Code currently in force (promulgated SG no. 59/2007, in force as of 1 March 2008, last amended SG no. 49/2012). Although it was absent from the repealed civil procedure law adopted in 1952, it is not a novelty for the Bulgarian civil procedure law tradition. It was introduced by the Law on Order for Payment Proceeding of 1897, and subsequently the enforcement order, albeit with a very limited scope of application, was regulated in the Law on Civil Proceeding of 1934' (Decision no. 12/2012 in constitutional case no. 4/2012 whereby the constitutional challenge of a provision from the chapter on Order of Payment Proceeding of the Civil Procedure Code has been rejected). The Constitutional Court considers the reasons of the draft law as well in order to assess whether the arguments of the applicant were valid.

Assessing the constitutionality of provisions of the Administrative Procedure Code, the Constitutional Court analyses the historic aspect of the norms and holds that '*This chronological review, together with the stated reasons for the amendments under review, demonstrate that the legislature aimed at enhancing citizens' access to justice and achieving a fairer distribution of workload among the administrative courts, and ultimately at guaranteeing a fair administrative trial (verbatim reports of the 154th session of 22 June 2018 of the 44th National Assembly)*. As regards the aims pursued by the legislature and the financial justification, the Constitutional Court considered the reasons of the draft law.

In its Decision no. 17/2018 in constitutional case no. 9/2018 whereby the Constitutional Court dismissed a constitutional challenge submitted by the Supreme Court of Cassation concerning a provision of the Judicial System Act about magistrates' entitlement to financial compensation in case they are relieved from duties, the Court made a historical review of the compensations to which officers in judicial bodies were entitled, from the Constitution of Tarnovo, to the different laws on the organization of courts and the different versions of the Judicial System Act. The Constitutional Court reached

a conclusion that *'[T]he legislature is authorized for reasons of expediency, both social and financial, to determine the conditions for payment of financial compensations to judges, prosecutors and investigators in case they are relieved from duties. This legislative expediency may and should be applied only within the boundaries established by the Constitution (Decision no. 18/97 in constitutional case no/ 12/197 and Decision no. 7/95 in constitutional case no. 9/1995).*

The discretion that the National Assembly enjoys in this area has its boundaries outlined by the fundamental principles enshrined in the constitutional regulation of the judiciary and constituting the basis of the rule of law state'.

In its Decision no. 10/2003 in constitutional case no. 12/2003, when assessing the constitutionality of Article 1, para 1 of the Stamp Duties Act, the Constitutional Court held that: '*The provision in question stipulates that stamp duties shall be collected by bodies and budget-subsidized establishments in 'amounts fixed in tariffs as approved by the Council of Ministers'. Such a delegation can be found as early as the initial version of Article 1, para 1 of the 1951 Stamp Duties Act. It has been preserved through two amendments – the one promulgated in SG no. 55 of 12 July 1991 that entered into force after the Constitution currently in force, and the one of 1996. Thus, since the powers delegated to the Council of Ministers to approve the tariffs for stamp duties has been reproduced in the amendment to Article 1, para 1 of the law, in the context of the current Constitution the question of the application of its § 3 cannot be put forward. The constitutional challenge does not concern a law pre-existing before the 1991 Constitution but rather a law adopted after the Constitution came into force'.*

'Here is the place to consider the argument that the Council of Ministers organizes the management of state assets, while the judiciary is in charge of the administration of justice in the country, i.e. this is a manifestation of the principle of separation of powers: the Court Premises Fund was established in 1925 and so far has always been managed by the Minister of Justice. Thus, historically it has been established that capital expenditure and real estate belonging to the judiciary should be managed by the executive. At present this understanding is based on the provision of Article 106 of the Constitution, more so bearing in mind that substantive laws traditionally define court buildings as public state ownership. Hence the expectation that the principle enshrined in Article 106 of the Constitution should have primacy over the principles set forth in Article 117, paras 2 and 3 for independent judiciary with an independent budget. In response to this argument, it should be reiterated that this understanding has been reached while a different legal regulation existed in place – thus, in none of the three constitutions after the Liberation were there any provisions stipulating that the judiciary is independent and has an independent budget' (in Decision no. 4/2004 in constitutional case no. 4/2004).

In Decision no. 1/2023 in constitutional case no. 17/2022, analysing the reasons of the draft law and the verbatim reports of the deliberations in Parliament on the Draft Law Amending and Supplementing the Criminal Code, the Constitutional Court considers the goals that the participants in the criminal proceedings try to attain and reaches the conclusion that no balance has been struck between the public and the personal interests.

The conclusion the Court reaches in Decision no. 7/2019 in constitutional case no. 7/2019 is a case in point about the significance of reasoning in the context of the legislative process: '*Such an approach (absence of reasons and legislative justification) is but a retreat from the constitutional raîson d'être of due legislative process in the area of fundamental rights*'.

The verbatim reports of the Grand National Assembly from deliberation when adopting the Constitution are essential for deciding on interpretative cases. The Constitutional Court makes a comprehensive analysis of the deliberations of the Grand National Assembly in its Decision no. 13/1996 in constitutional case no. 11/1996. In Decision no. 7/2020 in constitutional case no. 11/2019 (concerning interpretation of a constitutional provision on the reasoning of judicial acts) the Constitutional Court, citing Ruling no. 3 of 17 September 2015 in constitutional case no. 7/2015 held that: '*Interpreting constitutional provisions inevitably implies establishing the true will of the legislature since this is the way to guarantee legal stability and supremacy of the Basic Law as well as of the ideas and values enshrined therein*'.

The analysis of the reasons of the draft law and the verbatim reports of the deliberations and voting in plenary hall allowed the Constitutional Court to reach the conclusions that '*In view of the foregoing, it may be summed up that the challenged provisions of the Bank Insolvency Act when reviewed together are aimed to ensure a number of legal measures and instruments for securing the insolvency estate of a specific bank declared bankrupt*' (Decision no. 8/2021 in constitutional case no. 9/2020 whereby provisions related to bank insolvency have been declared unconstitutional).

Analysing the reasons of the draft law amending and supplementing the Compulsory Social Security Code concerning the second social security pillar (compulsory supplementary pension insurance), the Constitutional Court established that *'[C]learly from the reasons of the draft law and translated for the purpose of the case … the will of the legislature has sought to enhance the public regulation in the area under consideration with a view to protecting the interests of the insured persons. The question follows – how far does this amendment infringe on the basic constitutional principles related to the freedom to pursue an economic or business activity of the Pension Fund (according to the applicants) and the pension insurances in their capacity of commercial entities? Furthermore, are the legitimate interests of the insured persons violated?*' (Decision no. 2/204 in constitutional case no. 2/2004).

The Constitutional Court considers the reasons of draft laws and the deliberations in Parliament when reviewing cases in the area of road traffic rules (Decision no. 1/2012 in constitutional case no. 10/2011, Decision no. 11/2021 in constitutional case no. 7/2021), personal income tax *('It is apparent from the verbatim reports of the 10th plenary session of the 41st National Assembly that the MPs challenged, in the hypothesis of unconstitutionality, the need to introduce this tax and set forth a statutory minimum of taxable income*' – Decision no. 10/2013 in constitutional case no. 8/2013), hunting and protection of game (Decision no. 4/2013 in constitutional case no. 11/2013), elections (Decision no. 3/2017 in constitutional case no. 11/2016), amendments to the Civil Servant Act made by the 2019 National Budget Act *('The Constitutional Court, having considered the arguments and observations made in the requests, the opinions of the institutions constituted as interested parties and the organisations invited to extend their opinion as well as the submitted legal opinions, and* ***relying*** *on the relevant legal regulation and* ***the reasons of the legislature for adopting the challenged provisions, has considered the following with a view to delivering its decision…***' – Decision no. 3/2019 r. in constitutional case no. 16/2018 r.*),* spatial planning (Decision no. 17/2021 in constitutional case no. 11/2021), rules for conducting court hearings via video conference for imposing pre-trial detention orders (Decision no. 13/2021 in constitutional case no. 12/2021), social security (Decision no. 4/2022 in constitutional case no. 14/2021), determination of parentage under the Family Code (Decision no. 11/2022 in constitutional case no. 3/2022), taking part in judicial proceedings through video conference for persons with mental disorders in relation to whom a court order has been issued for compulsory hospital treatment (Decision no. 14/2022 in constitutional case no. 14/2022), the moratorium on acquisition of property rights over state and municipal property by prescription (Decision no. 3/2022 in constitutional case no. 16/2021), maritime and inland ports (Decision no. 5/2005 in constitutional case no. 10/2004), 2018 National Budget Act (Decision no. 4/2018 in constitutional case no. 14/2017, where the legislative process and the mechanism for effecting it are analysed in detail etc.

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

The Bulgarian Constitutional Court is authorized to monitor compliance with the Constitution of the acts challenged before it rather than their correctness or expediency. When reviewing the reasons for adopting one or another legislative decision, it aims at establishing the genuine will of the legislature, and not at assessing the specific legislative decisions. However, if it establishes that a certain legislative decision is not reasoned, it draws a clear dividing line between formally complying with the requirements set forth in the Constitution and doing genuinely so: '*Payable fees must be justified demonstrating an objective and apparent need. Setting the fees requires a transparent procedure since the insecurity in introducing additional unreasoned raises of the extra costs constitute a financial burden for the business in the regulated sectors of the national economy, to the detriment of the*

public interest. 'Complying formally with the constitutional requirements does not suffice when additional financial obligations are being introduced by law for the citizens, thus violating the nature of these obligations' (Decision no. 4/2013 in constitutional case no. 11/2013). The Constitutional Court finds no reasons to revise its case-law and depart from its understanding since the requirements for legal order and stability obligates the Court to have due regard to its former decisions' (in Decision no. 13/2014 in constitutional case no. 1/2014).

The Constitutional Court makes in its most recent case-law an analysis and assessment of the facts and reasons on the basis of which the National Assembly adopts a certain decision, and reaches the conclusion that *'… none of the arguments put forward can stand as a valid legal ground for relieving from duties the chairperson of the Audit Office, which constitutes a violation of the principle of the rule of law'* (in Decision no. 5 of 22 June 2023 in constitutional case no. 5/2023).

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

The Bulgarian Constitutional Court considers the reasoning of draft laws a mandatory part of the legislative process since the Constitution guarantees that the legislative process shall take place in compliance with the law and all rules and requirements for democratic legitimacy, where the pieces of legislation shall be duly reasoned. Thus, the Constitutional Court examines the quality of reasons and the interventions made during plenary sessions not only to establish the genuine will of the legislature as indicated in the answer to question no. 13, but also to ensure that the rules of the legislative process have been fulfilled.

Thus: *'At the same time the Court finds it necessary to point out the following: The historic experience has shown that politically motivated discrimination may, even in the well-established democracies, substantially affect judicial proceedings, thus undermining courts' impartiality and even responsibility. Moreover, politically motivated discrimination has long-term negative consequences, leading to disintegration and opposition in the nation and may undermine the Government legitimacy.*

One of the essential dimension of the rule of law is the separation of law and politics, which allows to minimize chances that the court delivers its judgment based on judges' personal values, preferences and beliefs. The contrary is not only harmful to the administration of justice but what is more, it is a failure for constitutional values and principles as a manifestation of democracy that judges are called to endorse.

Constitutional justice is destined to subject legislative acts to scrutiny as to their compliance with those values that the general public at large is bound by and to which the latter has attributed the ranking of supreme law. The rule of law, by default and by effect, confines state power. It requires an assessment of its acts in the light of the standards related to the key ideas of constitutionalism.

The rule of law principle will not be complied with if the law could be re-written in accordance with the circumstances, and without regard to principles and values enshrined in the Constitution that bind the general public at large out of its free will.

The Court reiterates that it holds firm the position that the search of just solutions in a rule of law state can take us only to the supremacy of the law (in Decision no. 12/2016 in constitutional case no. 13/2015).

'The absence of reasons and legislative justification in support of the proposed text of Article 10, para 1, second sentence of the Customs Act is unconvincing that alternative means have been sought and considered that are more friendly to the labour rights for the purpose of attaining the pursued objective. Such an approach departs from the constitutional raîson d'être *of due democratic legislative process in the area of fundamental rights –through comprehensive debate within the legislative process, with no haste or improvisation, to protect in a balanced manner the rights and freedoms of every member of society'* (in Decision no. 7/2019 in constitutional case no. 7/2019).

'The review of the regulation of compensations as benefits in the Bulgarian legislation shows that the legislature takes a differentiated approach to establishing the criteria that need to be satisfied for the right to

financial compensation to occur, on the one hand, and the criteria that determine the size of that financial compensation, on the other. It takes regard of the nature of service and its significance for the proper functioning of the state apparatus, for guaranteeing the State security and sovereignty and for the protection of the rights and freedoms and legitimate interests of its citizens. This differentiated approach responds perfectly to the discretion that the legislature enjoys in regulating rights not of a constitutional ranking, nor derived from rights guaranteed by the Constitution' (in Decision no. 17/2018 in constitutional case no. 9/2018).

'The reasons of the draft law amending and supplementing the Criminal Code (no. 702-01-01 of 1 August 2017, 44th National Assembly) specify that the primary objective of incriminating illegal production of underground natural resources is to guarantee 'to a substantially greater extent the protection of 'exclusive State ownership, preserving the earth inside, soils, forests and natural resources'. The reasons and the verbatim reports of the deliberations in Parliament show that the participants in the legislative process strive to reduce financial damage amounting to millions of Bulgarian levs as a result of this illegal activity. However, there is no indication in either the reasons of the draft law or the verbatim reports that a balance has been struck between the public and the personal interest in depriving the vehicle or carrier used for the perpetration of the illegal act… No regard has been made to a fair balance in violating the positive right of ensuring access to justice for the protection of the property right and protection against undue exercise of the power to deprive vehicles or carriers. There are no indications throughout the course of the legislative process of the reasons why the court has been deprived of the power to carry out an assessment on a case-by-case basis as to compliance with the principle of proportionality in restricting the right to property' (in Decision no. 1/2023 in constitutional case no. 17/2022).

15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

The case-law of the Constitutional Court does not seem to follow a trend where the Court consistently monitors and takes into account whether in the framework of the parliamentary debates prior to adopting a legislative act opposing views have been exhaustively presented and special regard has been paid to the impact on citizens' rights.

In Decision no. 9/2002 in constitutional case no. 15/2002 the Constitutional Court pays attention to the fact that '*The parliamentary documents – a report of the Legal Affairs Standing Committee, proposals made by the Committee members, and verbatim reports of the plenary sessions, (National Assembly, no. 253-03-23 of 23 April 2002, 39th National Assembly, Verbatim Reports, volume 32, p. 114 et seq., volume 35, p. 44 et seq.) demonstrate a unanimity in endorsing the amendment of Article 47 of the International Commercial Arbitration Act and the related reasons for rationalization, expediency and stabilization of the arbitration proceedings. The amendment concerns only the competent court (Supreme Court of Cassation) to rule on requests seeking repealing of arbitration awards and secondary issues pertaining to the shift in competence. The formal constitutional requirements as regards deliberation and adoption of the amendments have been satisfied'.*

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

Cf. the answer to question no. 11, second part.

The circumstance that the act challenged before the Constitutional Court is one taken by the legislature, respectively adopted following public consultations, does not ascertain outright the democratic legitimacy of the said act. The Constitutional Court is free to judge its constitutionality on a general level, taking into account nevertheless that the act has been adopted by the National Assembly being the highest-ranking public authority as regards democratic legitimacy.

The Constitutional Court observes the following line of thinking in its case-law: '*The fact that the issues proposed to be dealt by a referendum may be formulated by a Steering Board and supported by*

a petition of citizens who reasonably consider themselves to be 'a part of the people', requires in itself an assessment of the National Assembly. The decision under Article 84, item 5 of the Constitution as an act of ex-ante control should guarantee that citizens will take such a decision that the National Assembly will be able to implement. The need for this decision to be in compliance with the constitutional and statutory requirements is among others vested in the principle of the rule of law as set forth in Article 4, para 1 of the Constitution. Compliance with the rule of law principle requires the legislature to abide by the laws it adopts. Thus, by violating the law, namely Article 9, para 1 and para 2, item 1 of the Direct Involvement of Citizens in the State Authority and Local Government Act, alongside the above-mentioned constitutional provisions, and endorsing section 2 of the challenged decision, the National Assembly has violated Article 4, para 1 of the Constitution' (in Decision no. 9/2016 in constitutional case no. 8/2016 whereby the Constitutional Court declares unconstitutional the decision for holding a national referendum adopted by the National Assembly).

'Within the meaning of the Constitution, the decisions of the National Assembly must comply with the laws the latter has adopted. These laws may be adopted, amended, supplemented, or repealed only following the terms and procedure established by the Constitution but not through a decision of the National Assembly that runs contrary to a law it has adopted. Basic constitutional premises have been disregarded here that are intrinsic to the rule of law state and have been enshrined in Article 4, para 1 of the Constitution' (in Decision no. 17/1997 in constitutional case no. 10/1997 whereby the Constitutional Court declares unconstitutional a Decision of the National Assembly of 10 July 1997 concerning changes in the management of the Bulgarian National Radio and the Bulgarian National Television).

'In the context of the modern rationalized parliamentarism, it is the political representation that determines by law the general regulation in any sphere – its principles, content and guidelines, while the executive should have the opportunity to render it in specific terms by clarifying and supplementing it. This distinction between the powers of the legislature and the executive is premised on the need on the one hand to ensure stability and democratic legitimacy of the regulation of enduring social relations that should always take the shape of a law. On the other hand, the dynamics of social needs require that more flexible and simplified procedures are in place for reforming certain sectors of state policy' (in Decision no. 9/2020 in constitutional case no. 3/2020).

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

The Bulgarian Constitutional Court is not competent to monitor the constitutionality of acts of the executive. According to the Constitution, it is the Supreme Administrative Court that is competent to rule on challenges regarding the legality of Council of Ministers acts.

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

The Constitutional Courts are exclusively authorized to assess the weight of competing personal and public interests. In some cases, the Constitutional Courts assess the measures taken by the legislature that must observe a balance when adopting normative acts whereby certain rights are being curtailed. It is precisely in this area that the Constitutional Courts play an extremely important part, namely to establish boundaries in exercising fundamental rights.

The Constitution provides for in a number of its provisions restrictions in exercising some fundamental rights and freedoms. The common constitutional guarantee for exercising fundamental rights is their irrevocability (Article 57, para 1), as well as the prohibition of abuse of rights and exercising rights only insofar as this is not to the detriment of the rights or legitimate interests of others (Article 57, para 2). The principle of irrevocability is premised in the understanding that the fundamental rights are initially inherent and applicable to all human beings. Thus, the Basic Law expressly specifies the admissible restrictions in exercising the rights guaranteed by the Constitution.

'Fundamental rights delimit a certain protected area of freedom or equality; this is the scope of every fun-

damental right. However, this area is neither timelessly nor limitlessly protected; it borders other fundamental rights, hence rights 'live' side by side with their possible limitations. The source of these limitations may be the fundamental rights themselves, the fundamental rights of others, or the welfare protected by the Constitution' (in Decision no. 15/2010 in constitutional case no. 9/2010).

In its interpretative ruling no. 14/1992 in constitutional case no. 14/1992 whereby the Constitutional Court gives an interpretation of Article 6, para 2 of the Constitution (regarding citizens' equality before the law and the prohibition of discrimination based on certain grounds), the Court has held in its reasons that '*limitations on the rights and granting privileges to certain social groups is inadmissible according to the Constitution. It should be reiterated nevertheless that all these hypotheses concern publicly justified restrictions of rights or granting privileges to certain groups of individuals while at the same time preserving the supremacy of the principle of equality of all citizens before the law. Specifying in a precise and exhaustive manner the social grounds that rule out restrictions of the rights or granting of privileges is a guarantee against unfounded expansion of the grounds for admitting restrictions of individual rights or granting of privileges'.*

In its Decision no. 10/2018 in constitutional case no. 4/2017 the Constitutional Court distinguishes among three groups of fundamental rights according to their possible restriction pursuant to the Constitution.

The first group comprises those rights the exercise of which may not be restricted in any way (the so-called absolute rights) – namely those, referred to in Article 57, para 3 of the Constitution. The provision refers exhaustively to specific rights that may not be curtailed, and these are the right to life and the prohibition of torture, the guarantees for the right to personal security, i.e., the right of everyone to be surrendered to the judiciary within the statutory limits, the prohibition for individuals to be convicted solely on the basis of their confessions, the presumption of innocence, personal integrity and freedom of thought, conscience, and religion.

The second group comprises those rights that may be restricted solely on the grounds specified in Article 57, para 3 of the Constitution, namely proclamation of war, martial law, or a state of emergency. Those are the rights enshrined in Article 30, paras 4 and 5 (right to a legal counsel and the individuals' right to a meeting in private with their counsel as well as the right to confidential communication with their counsel), *Article 35, para 2* (the right of every Bulgarian citizen to return to the country), *Article 36, para 2* (citizens whose mother tongue is not Bulgarian shall have the right to study and use their own language alongside the compulsory study of the Bulgarian language), *Article 39, para 1* (the right to express an opinion or to publicise it through words), *Article 40, para 1* (freedom of press and mass media), *Article 41* (the right to seek, obtain and disseminate information), *Article 43, para 3* (no authorization required for meetings held indoors) *and others enshrined in the Constitution.*

The third group comprises those rights that are subject to restriction on other grounds as well – rights that may be restricted on grounds expressly specified in the Constitution (for example Article 34, para 2 – exceptions to the rule of inviolability of correspondence and other communications shall be allowed only with the permission of the judicial authorities for the purpose of discovering or preventing a grave crime), *Article 35, para 1, second sentence the right* – freedom to choose a place of residence and the right to freedom of movement in the territory of the country and freedom to leave the country may be restricted only by virtue of the law for the protection of national security, public health or the rights and freedoms of others, *Article 37, para 2* – freedom of conscience and religion may not be practiced to the detriment of national security, public order, public health and morals, or the rights and freedoms of others, *Article 40, para 2* – suspending and confiscating a print media or any other data media are admissible only on the basis of an act of the judiciary in case of violation of decency laws or incitement of a forcible change of the constitutionally established order, the perpetration of a crime, or the incitement of violence against a person; an injunction suspension shall lose force if not followed by a confiscation within 24 hours, *Article 41, para 1, second sentence* – the right to seek, obtain and disseminate information shall not be exercised to the detriment of the rights and reputation of others, or to the detriment of national security, public order, public health and morality, *Article 42, para 1* - every citizen above the age of 18, with the exception of those placed under

judicial interdiction or serving a prison sentence, shall be free to elect state and local authorities and vote in referendums). Other rights falling in this group are those that may be *restricted or exercised on conditions set forth in a law*, for example Article 25, para 6 – the conditions and procedure for the acquiring, preservation or loss of Bulgarian citizenship shall be established by law, *Article 27, paras 1 and 3* – foreigners residing legally in the country shall not be expelled or extradited to another State against their will, except in accordance with the provisions and the procedures established by law; the conditions and procedure for granting asylum shall be established by law, *Article 30, para 2* – no one shall be detained or subjected to inspection, search or any other infringement of his personal inviolability except on the conditions and in a manner established by law, *Article 31, para 5* – prisoners shall be kept in conditions conducive to the exercise of those of their fundamental rights which are not restricted by virtue of their sentence, *etc.* What applies for all of these rights is that the admissible limitation may be effected only by a law, and this has to be considered for every individual case.

'The principle set forth in Article 57, para 1 stipulating that the fundamental civil rights shall be irrevocable is central, thus Article 57, para 3 prescribing possible temporary restrictions should be applied restrictively' (limitations to the feasible restrictions) – Decision no. 7/1996 in constitutional case no. 1/1996.

Limitations are admissible most often for the protection of public interests. National security, public health, and morality are values whose protection allows restrictions in the exercise of many rights and freedoms.

'The right to life understood as the right to the preservation of life and health is a constitutional right of a higher ranking and a prerequisite for the full exercise of a whole set of fundamental rights. The Constitutional Court prioritises it in its case-law, holding that it is admissible that other rights might be infringed in order to protect it' (Decision no. 10/1995 in constitutional case no. 8/1995).

In its Decision no. 2/2004 in constitutional case no. 2/2204 the Constitutional Court held that *'[T]he right to social security as one of the fundamental individual rights is a higher-ranking right that calls for a priority protection and hence for state regulation and control over the work of the public pension funds in order to safeguard the interests of the insured persons. The right to freely exercise an economic activity is not an absolute one. (The case-law of the Constitutional Court is consistent – Decision no. 6/97 in constitutional case no. 32/96, Decision no. 12/97 in constitutional case no. 6/97, Decision no. 5/2000 in constitutional case no. 4/2000).*

The case-law of the ECtHR and CJEU, like the one of the Constitutional Court establishes '*an equal respect for fundamental rights as a guiding principle in securing a fair balance between different rights*'. Any hierarchy of fundamental rights would run contrary '*to international treaties and the national constitutions of modern democratic rule-of-law states that abide by the equality of rights and rule out any permanency of limitations on rights which would be tantamount to their rejection*' (Decision no. 8/2019 in constitutional case no. 4/2019). In conclusion, in the same constitutional case the Constitutional Court held that '*values of the highest ranking are embodied in the Constitution. They cannot be rejected or amended by the legislature since they are the basis of the established legal order. These values are an integral part of the constitutional imperative and all laws should be subject to an assessment as to their compliance with these values. It is the task of the Constitutional Court to protect the stability of the legal system premised on the constitutional imperatives, and to protect it, including against legislative threats'.*

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

The Bulgarian Constitutional Court makes an assessment in every individual case where a law has been challenged and has not established in its case-law clear criteria to apply universally but rather acts *ad hoc*. What the Court looks into is whether the laws are clear and unambiguous, which is a formal rule-of-law criterion (cf. in this regard Decision no. 1/2005 in constitutional case no. 8/2004; Decision no. 7/2005 in constitutional case no. 1/2005; Decision no. 4/2014 in constitutional case no. 12/2013 etc.).

The Constitutional Court applies a uniform standard as regards unclearly formulated legal provisions

which affect rights or are of a criminal law nature: '*The principle of the rule of law precludes any unclear, ambiguous legal provisions and this is applied strictly when the legislature encroaches on individual rights and freedoms, in particular in the area of criminal repression due to the universally recognized principle of personal criminal liability*' (Decision no. 12/2016 in constitutional case no. 13/2015).

The Constitutional Court has consistently held that where the unclarities or ambiguities of a legal provision are such as to call into question its capability to regulate social relations, it is unconstitutional on grounds of violation of the principle of the rule of law. However, this is presumed automatically: '*Certainly an unclear provision will be interpreted, including through correctional interpretation, and in the absence of a regulation the gaps will be filled in by analogy of legislation or law. As has been demonstrated already, not every contradiction or poor wording of a legal provision automatically means that the principle of the rule of law has been violated. It is only in case of violation of the elements of the principle of the rule of law which due to their significance are enshrined in the Constitution that the issue of the unconstitutionality of the said provision will be raised pursuant to Article 4, para 1 of the Constitution*' (Decision no. 11/2010 in constitutional case no. 13/2010).

According to the case-law of the Constitutional Court: '*Clarity of legal provisions means that they are accessible to their addressees and leave no doubt as to the content of the rights and freedoms they grant or the duties they impose. If by rule of law we mean that all legal entities are equally subject to the law, then the law must be able to steer everyone's conduct. Therefore, the law must be formulated in such a way as to allow people to decipher the prescribed model of behaviour'* (in Decision no. 12/2016 in constitutional case no. 13/2015).

It points our further on that when formulating laws the legislature should avoid legal provisions that initially bring insecurity and whose application require interpretation: '*In a state based on the principle of the rule of law it is inadmissible for the legislature to adopt norms that are initially set to lead to contradictory or incorrect application. This is in stark contrast to Article 4, para 1 of the Constitution since 'the requirement for accessibility and clarity, precision, unambiguity and clarity of laws and thus predictability as to their compliance with the Basic Law are among the most essential of its dimensions'* (in Decision no. 12/2016 in constitutional case no. 13/2015).

20. What is the intensity review of your Court in case of the legitimate aim test?

The Constitutional Court restrains from making an assessment whether an aim is legitimate as it respects the competence of those bodies which by virtue of the Constitution are entrusted to make this assessment. Hence, the control that the Court exercises when assessing the legitimacy of the aim is to confirm or rule out that an aim may be deemed legitimate: '*The case-law of the Constitutional Court is consistent as regards possible restrictions of individual fundamental rights in case of a legitimate aim where this is provided for in a law, within the limits set forth in the Constitution, and is proportional to the aim pursued (Decision no. 20/1998 in constitutional case no. 16/1998 Decision no. 15/2010 in no constitutional case no. 9/2010; Decision no. 2/2011 in constitutional case no. 2/2011; Decision no. 7/2016 in constitutional case no. 8/2015; Decision no. 8/2016 in constitutional case no. 9/2015; Decision no. 3/2019 in constitutional case no. 16/2018). Limitations of the right to free movement in the territory of the country and the right to leave the country would have a legitimate aim within the meaning of Article 35, para 1, second sentence of the Constitution if they are necessary to afford constitutional protection of another interest of constitutional significance, provided that the aim specified in the law is indeed the one pursued by the legislature and the limitations of individual rights are proportionate to the protected interest that is subject to constitutional protection. This interest should pertain to national security, public health or the rights and freedoms of others. No such interest can be established in the present case. By virtue of the challenged provisions, the limitation of fundamental rights is effected in relation to persons whose conduct does not encroach upon the constitutionally recognized values enshrined in Article 35, para 1, second sentence of the Constitution. therefore, the measure cannot be considered an appropriate and proportionate means to attain the constitutionally legitimate aim'* (in Decision no. 3/2021 in constitutional case no. 11/2020).

21. What proportionality test does your Court employ? Does your Court apply all the

stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

The Bulgarian Constitutional Court applies the proportionality test in the context of the rule of law principle: '*The proportionality rule is consistently applied in the case-law of the Bulgarian Constitutional Court as a measure of the boundaries of feasible interference by the State in fundamental rights (Decision no. 20/1998 in constitutional case no. 16/1998, Decision no. 1/2002 in constitutional case no. 17/2001, Decision no. 15/2010 in constitutional case no. 9/2010, Decision no. 2/2011 in constitutional case no. 2/2011, Decision no. 14/2014 in constitutional case no. 12/2014, Decision no/ 2/2015 in constitutional case no. 8/2014 etc.) Решение № 2 от 2015 г. по к. д. № 8/2014 г. и др.). It is further held to be an element of the principle of the rule of*' (in Decision no. 7/2019 in constitutional case no. 7/2019).

Thus, the Constitutional Court sticks to the classical proportionality test: '*… i.e. the classical elements of the requirement for proportionality are taken into account in determining the boundaries of fundamental rights*' (in Decision no. 9/2010 in constitutional case no. 9/2010).

The Bulgarian Constitutional Court applies a three-step examination of compliance with the principle of proportionality. The first step requires that the measures adopted by the legislature do not go beyond what is appropriate and necessary to achieve the legitimate aims pursued by the respective piece of legislation. At this stage the Constitutional Court makes an assessment of the specific legitimate aim as well.

Secondly, the Constitutional Court establishes whether there are alternative measures that can be taken, and which is the least burdening. At this stage, to establish which measure is the least burdening one, the Court clearly and accurately outlines the content and scope of the rights that are or could be affected. An example of the assessment that the Court makes at this stage is the following: '*This unclarity makes it difficult to identify the interests at the core of the rights, and this is important for assessing the compliance of a restrictive measure with the principle of proportionality*' (in Decision no. 8/2019 in constitutional case no. 4/2019).

Thirdly, the Court makes an assessment whether the inconvenience caused is proportionate to the aims pursued, i.e. whether at the end of the day there is a sound balance between measures and results. The Constitutional Court refers to this stage as an act of balancing: '*Balancing is an important part of the assessment of compliance of a restrictive measure regarding a fundamental right, in the present case – the right to freedom of expression – with the principle of proportionality underlying all modern constitutional democracies. It allows to consider the specific circumstances of every individual case*' (in Decision no. 8/2019 in constitutional case no. 4/2019). The Court reaches a similar conclusion in another case as well: '*The aim pursued by the law is legitimate – combating the specified criminal offences in the cases provided for in the Criminal Code. However, the means employed by the legislature does not correspond to the aim pursued insofar as a person whose conduct is not criminal is being sanctioned, thus it is disproportionate*' (in Decision no. 12/2021 in constitutional case no. 10/2021).

'*The assessment whether a legislative solution is proportionate or not is not made in the abstract. The proportionality of the protected aim and the means employed is rather established by juxtaposing the two. Therefore, the constitutionality of the challenged provision of Article 10, para 1, second sentence of the Customs Act will be conditional on the question whether the restriction of the right to work introduced by this provision is necessary, appropriate and proportionate to achieve the result pursued in a state governed by the rule of law that is called to protect the rights and freedoms of all its members in a balanced way (Decision no. 2/2011 in constitutional case no. 2/2011)*' (in Decision no. 7/2019 in constitutional case no. 7/2019).

Furthermore: '*It is essential in the present case to assess whether initially the legislative aim that justified the adoption of the challenged provision is legitimate in the light of the Basic Law, and whether the restriction that has been introduced is a necessary, appropriate and proportionate legal means to achieve the result provided for in the Constitution in the context of a democratic society where individual rights and freedoms must be protected in a balanced way vis-à-vis the public interest. What the Constitutional Court pointed out in its Decision no. 3/2021 in constitutional case no. 11/2020 applies fully to the present case,*

namely that 'limitations of the freedom of movement would pursue a legitimate aim within the meaning of the constitutional provision in question if they are necessary to afford priority protection of another constitutionally significant interest that is subject to constitutional protection, and if the limitation of the individual right is proportionate to the protected interest that is subject to constitutional protection'. In view of the foregoing, no such interest may be identified in the present case since the provision aims solely to ensure better recovery of fines, without effectively ensuring road safety. However, recovery of fines is the subject of an individual regulation which, should be considered ineffective, must be improved by amendments to the respective legislative act. In sum, it must be pointed out that by virtue of the challenged provision the limitation of the specific fundamental right is applied in relation to persons whose conduct does not affect the values that are constitutionally enshrined in Article 35, para 1, second sentence of the Basic Law, namely protection of national security, public health and the rights and freedoms of others. The limitation in Article 159, para 2 of the Road Traffic Act is not an appropriate and proportionate means to achieve a constitutionally legitimate aim in the context of a democratic society which is called to protect the rights and freedoms of all its members in a balanced way' (in Decision no. 6/2023 in constitutional case no. 7/2023).

22. Does your Court go through every applicable limb of the proportionality test?

Yes, as has been explained in detail in the answer to questions nos. 20 and 21.

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

The proportionality test involves an assessment as to whether the aim pursued is constitutional, whether the measures employed for achieving this aim are not excessive, and whether there are alternative measures to achieve the same aim. Such an assessment requires often to enter in specific details of the envisaged measures and their alternatives. In its case-law the Constitutional Court examines the possible existing legislative solutions and their feasible alternatives. Cf. the case-law cited in the answers to questions nos. 20 and 21.

24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

No such trend is being observed.

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

This doctrine is premised on the understanding that the legislature, executive and judiciary of the States parties to the Convention in general act in accordance with the rule of law and human rights, and thus their discretion and description of the national context in cases referred to Strasbourg may be trusted. Since the Constitutional Court is not part of the judiciary and deals with human rights in an abstract manner, compliance with the ECtHR case-law is pursued insofar as the latter is deemed a pan European basic standard that needs to be abided: *'The Constitutional Court has endorsed the following understanding as regards applicability of the case-law of the ECtHR, namely that 'ECHR norms in the area of human rights* have *pan-European and universal significance for the legal order of the States parties to the ECHR, and thus constitute norms of the European social. Therefore, the interpretation of the respective constitutional provisions pertaining to human rights must take the highest possible regard to the interpretation of the ECHR norms. This principle of interpretation in conformity with the ECHR further complies with the compulsory jurisdiction of the European Court of Human Rights as regards interpretation and application of the ECHR that Bulgaria has recognized internationally' (Decision no. 2/1998 in constitutional case no. 15/1997, likewise Decision no. 3/2011 in constitutional case no. 19/2010, Decision no. 1/2012 in constitutional case no. 10/2011, Decision no. 11/2022 in constitutional*

case no. 3/2022)' (in Decision no. 14/2022 in constitutional case no. 14/2022).

The Constitutional Court perceives the margin of appreciation doctrine as an opportunity for the Constitutional Court to interpret rights within the framework of what the Constitution prescribes: '*The foregoing renders the conclusion that the Constitutional Court, in accordance with the competence extended to it by the Constitution, is authorized in the present interpretative proceedings and has the duty to give a binding interpretation of the Basic Law in relation to the notion of gender in line with the understanding of the constitutional legislature whose will it determines whenever it exercises its interpretative powers*' (in Decision no. 15/2021 in constitutional case no. 6/2021).

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

The ECtHR has found no violations in relation to Bulgaria following a decision of the Constitutional Court.

Below are given some examples of judgments of the ECtHR where decisions of the Constitutional Court have been considered.

European Court of Human Rights (Applications nos. 38948/10 and 8954/17) - Court (Fourth Section) - Judgment (Merits and Just Satisfaction) - CASE OF SAKSKOBURGGOTSKI AND CHROBOK v. BULGARIA. The case concerns the attempts of the applicants – the former King and Prime Minister of Bulgaria and his sister – to obtain the restitution of former properties of the Crown that were confiscated by the State after 1946. In its decision of 1998, the Constitutional Court declared unconstitutional the 1947 law whereby the properties of the Crown were declared State property. Subsequently the State sought to restore its ownership of the challenged properties; some of the proceedings ended with judgments in favour of the State. The national courts concluded that the properties were not private property of the kings and in any case, there was no ground for restitution. The applicants relied mostly on Article 1 of Protocol No. 1 (protection of property) to the Convention.

CASE OF A.E. v. BULGARIA (Application no. 53891/20) and CASE OF Y AND OTHERS v. BULGARIA (Application no. 9077/18) In this case in particular the ECtHR does not establish a direct relation between the decision of the Constitutional Court and the direct violation of rights: '*As for the non-ratification of the Istanbul Convention, the Court is mindful of that Convention's importance for raising the standard in the field of protection of women from domestic violence and thus also for the realisation of de iure and de facto equality between women and men. The refusal to ratify the Istanbul Convention could thus be seen as lack of sufficient regard for the need to provide women with effective protection against domestic violence. The Court is however not prepared in this case to draw conclusions from Bulgaria's refusal to ratify that Convention in 2018. Firstly, that refusal took place about seven months after Mrs V.'s killing (see paragraph 71 above). Secondly, the refusal – as can be seen from the reasons for the July 2018 judgment of the Bulgarian Constitutional Court which dealt with the question whether that Convention was compatible with the Bulgarian Constitution (see paragraph 73 above) – was based on considerations which the Court finds unrelated to a reluctance to provide women with proper legal protection against domestic violence. It is in any event not for the Court, whose sole task under Article 19 of the Convention is to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto", and whose jurisdiction only extends, by Article 32 § 1, to "matters concerning the interpretation and application of the Convention and the Protocols thereto", to pronounce, directly or indirectly, on whether a Contracting State should ratify an international treaty, which is an eminently political decision (see paragraph 74 above, and compare, mutatis mutandis, Perinçek, cited above, §§ 101-02).*

131. In the light of the foregoing, the Court is not persuaded that the applicants have succeeded in making a prima facie case of a general and discriminatory passivity on the part of the Bulgarian authorities with respect to domestic violence directed against women.'

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

Individual fundamental rights enjoy the highest level of protection. Thus, the Court exercises no self-restraint but instead determines in every individual case whether the Constitution allows for limitations of a fundamental right. According to the Constitutional Court, it is solely considerations of a constitutional ranking that may justify limitations of citizens' rights enshrined in the Constitution.

The Constitutional Court sets the following standard for fundamental rights protection: '*The case-law of the Constitutional Court is consistent that limitations of fundamental rights are admissible and feasible only when this is necessary for the preservation of superior constitutional values such as protection of the basic constitutional order, including national sovereignty, separation of powers, the form of state organization and state government etc., or to prevent that other essential public interests be affected such as national defence and security or effecting the principles and aims of national foreign policy. It is mandatory however that, in line with the principle of proportionality, these limitations are proportionate to the aim pursued and do not go beyond what is necessary to achieve this aim (Decision no. 12/1997, Decision no. 14/2014 of the Constitutional Court). In the present case the challenged law pursues the afore-mentioned aim of making available jobs for young and highly qualified employees through the so-called 'incompatibility' that it introduces. Thus, it is a disproportionate measure that cannot justify interference with fundamental constitutional rights such as the right to work and the right to social security*' (in Decision no. 3/2019 in constitutional case no. 16/2018).

The Constitutional Court is consistent in its case-law that 'in general limitations of any right are admissible only when this is necessary for the protection of superior constitutional values' (in Decision no. 10/2017 in constitutional case no. 10/2016).

28. Has your Court have grown more deferential over time?

The situation of political instability in the last year in Bulgaria that led to difficulties in forming and preserving parliamentary majority, and subsequently to a number of care-taker governments affected the nature of the requests with which the Constitutional Court was seized. Namely they were of such a nature that the Constitutional Court had to reaffirm clearly its practice to refrain from trespassing the competence of political authorities and to respect the role afforded to them by the Constitution of determining the political agenda of the country.

29. Does the deferential attitude depend on the case load of your Court?

The Constitutional Court policy of deference is not related to its workload. The Constitutional Court guarantees the supremacy of the Constitution and thus reviews a limited number of cases. Cf. the answer to question no. 1 for more details regarding the competence of the Constitutional Court.

Article 30a of the Rules of Procedure of the Constitutional Court stipulates that '*the Court shall deliver a decision within two months unless provided otherwise in a law*'. The Constitutional Court may pronounce its decision after the two-month period in case of substantial legal complexity of the specific legal issues.

Thus, the workload is irrelevant to the Court's policy of deference.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

Pursuant to Article 22, para 1 of the Constitutional Court Act, '*when delivering a decision, the Court shall pronounce only on the request made; it shall not be bound by the alleged incompliance with the Constitution*'. It may review and respectively establish unconstitutionality on grounds on which the applicants do not rely and justify its decisions with arguments which the parties have not raised.

In many of its decisions the Constitutional Court has expressly held that differences between the alleged content of the challenged provision which justifies the applicants' claim of unconstitutionality, and the actual content of the said provision cannot result in discarding the request for a constitutional court ruling as inadmissible. This would be tantamount to the Constitutional Court refusing to ex-

ercise its powers under Article 149, para 1, item 2 of the Constitution. Since the Court may review the request on grounds that are different from the ones stated in the request, per argumentum a fortiori, the Court, even when it establishes incorrect interpretation of the challenged provisions, shall admit the request in order to exercise a review of constitutionality (Decision no. 2/2004 in constitutional case no. 2/2004). Relevant case-law of the Constitutional Court: Decision no. 3/2012 in constitutional case no. 12/2011; Decision no. 30/1998 in constitutional case no. 23/1998; Decision no. 5/2005 in constitutional case no. 10/2004.

'However, when the Constitution itself restricts the procedural legitimacy to address to the Court, the latter ex officio review may not go beyond these. The opposite would result in extending the powers of the applicant that the Basic Law expressly restricts, and would place the applicant on an equal footing with those entities which are authorized to seize the Constitutional Court without any restrictions as to the admissible (Decision no. 11/2018 in constitutional case no. 8/2018).

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

The Constitutional Court of the Republic of Bulgaria pronounces only on the requests made, in accordance with the express provision of Article 22 of the Constitutional Court Act and the decisions delivered pursuant to it: Decision no. 13/2012 in constitutional case no. 6/2012; Decision no. 3/2014 in constitutional case no. 10/2013; Decision no. 9/2002 in constitutional case no. 15/2002; Ruling of 15 January 2002 in constitutional case no. 17/2001 г. (Section B); Decision no. 13/2002 in constitutional case no. 17/2002.

Конституционен Съд на Република България

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

№ Въпрос

1. In your jurisdictions, what is meant by "judicial deference"?

В практиката на Конституционния съд на Република България (КС) не е въведено понятие, което да има значение, съвпадащо или доближаващо се до *judicial deference*.

Българският Конституционен съд действа по инициатива на най-малко една пета от народните представители (общо 240), президента, Министерския съвет, Върховния касационен съд, Върховния административен съд и главния прокурор. С ограничени правомощия за сезиране са отделните състави на върховните съдилища - могат да отнасят до Конституционния съд твърдяни несъответствия на приложим по делото закон с Конституцията. Омбудсманът и Висшият Адвокатски съвет могат да отнасят въпроси до Конституционния съд, в случай че установят, че действа закон, който нарушава права или свободи на граждани. В ограничената хипотеза на спор за компетентност Конституционният съд може да бъде сезиран и от общински съвет (орган на местното самоуправление). Конституционният съд може да бъде сезиран с искания за тълкуване на Конституцията, обявяване на противоконституционност на акт на Народното събрание или президента, искания за разрешаване на спорове за компетентност между органите на изпълнителната власт на централно и местно равнище, произнасяне за съответствие на сключените от Република България международни договори, както и за съответствието на законите с общопризнати норми на международното право и с международните договори, по които България е страна, също така може да се произнася по спорове за конституционността на политическите партии и сдружения, по законността на избора на президент, вицепрезидент и народен представител. Отделно може да се произнася и по обвинения, повдигнати от Народното събрание срещу президента и вицепрезидента. Видно, правомощията на българския Конституционен съд са изрично и изчерпателно изброени в Конституцията и поради тази причина конституционният процес не оставя обособено място за *judicial deference*.

Конституционният съд на Република България запазва за себе си крайната преценка по отношение на допустимостта, така и по основателността на отправените до него искания. Също така приема становища от така наречените заинтересовани страни, които при искания, отправени от изпълнителната и законодателната власт, са съответните институции, но техните становища не се ползват с по-специален процесуален или доказателствен статут.

Също така Съдът работи с концепцията за "политическа целесъобразност", като се въздържа да се произнася по полезността или правилността на решения на законодателната власт, а се ограничава до преценката за конституционосъобразност.

За специфична проява на въздържание може да се възприеме практиката на Конституционния съд да прекратява дела, в случай че искателят обяви, че не поддържа искането. (Определение № 7 от 15.09.2016 г. по к. д. № 14/2016 г. и др.)

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (e.g. questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

Българският Конституционен съд не се позовава в практиката си на *judicial deference*. Всеки случай се разглежда самостоятелно и *ad hoc*. Конституционният съд е обвързан от досегашната си практика, като при изключителни случаи може да прибегне до "еволютивно тълкуване" на Конституцията: "*при тълкуване на конституционните разпоредби Конституционният съд неминуемо изследва и установява действителната воля на техните първоначални създатели. Така се гарантира правната стабилност и върховенството на Основния закон, осигурява се защита на основополагащите конституционни идеи и ценности. Същевременно*

този подход не е несъвместим с еволютивното, телеологичното тълкуване, когато същите идеи и ценности трябва да бъдат защитени при съществено променени обществени условия. За да бъде извлечен максимално възможният позитивен ефект, Конституцията трябва да се възприема не като вкаменена даденост, а като жив организъм. Изоставянето на стари интерпретации и възприемането на нови виждания относно съдържанието на отделни конституционни норми се допуска в практиката на КС (например вж. констатациите в мотивите на Решение № 3 от 2015 г. по к.д. № 13 от 2014 г. на КС относно съотношението между Решение № 10 от 2011 г. по к.д. № 6 от 2011 г. на КС и последвалото Тълкувателно решение № 9 от 2014 г. по к.д. № 3 от 2014 г. на КС)" (из Определение №3 от 17.09.2015 г. по к.д.№7/2015 г.). Извън обхвата на еволютивното тълкуване остава тълкуването на празноти в основния закон, което в практиката на българския Конституционен съд се възприема като недопустимо, защото превръща Конституционния съд в позитивен законодател.

Конституционният контрол е "*замислен и реализиран като механизъм за разрешаване на възникнали конституционноправни спорове по юридически правила и критерии*" (Решение №9/2022 г. по к.д.№5/2022 г.) и, ако не става въпрос за нарушаване или ограничаване на права, се въздържа от преценка на целесъобразността на законодателството. В своята практика той очертава допустимите граници на законодателна целесъобразност: "*...в тази насока е достатъчно да се припомни, че законодателната целесъобразност може и следва да се упражнява само в конституционно установените граници, както е приел Конституционният съд с Решение № 18/1997 г. по к.д. № 12/1997 г. (вж. и Решение № 7/1995 г. по к.д. № 9/95 г.). Обратното виждане означава единствено нормотворчески произвол, при който би се оказало, че, развивайки своята законодателна дейност, Народното събрание не е обвързано от конституционните принципи и ценности.*" (из Решение №3/2014 г. по к.д.№10/2013 г.). Както и че: "*… в практиката си Съдът вече е имал възможност да подчертае, че „недопустимо е чрез тълкуване да се търси или постига заобикаляне, подмяна или нарушаване на конституционно установени правомощия. Конституционният съд не може чрез тълкуване да дава конкретни указания за действие (бездействие) на конституционно определените държавни органи…*" (Решение №8/2005 г. по к.д.№7/2005 г.). Това се потвърждава и от: *"Тази концепция намира израз в определена законодателна целесъобразност, която сама по себе си не подлежи на контрол за конституционност."* (из Решение №5/2011 г. по к.д.№1/2011 г.). Също и: "*... в заключение Конституционният съд отбелязва, че той няма компетентност да обсъжда въпроси, свързани със законова целесъобразност. Ако би го сторил, той ще престъпи недопустимо конституционно установените си правомощия.*" (из Решение №7/2004 г. по к.д.№6/2004 г.) Още: *"... колкото се отнася до твърдението в искането, че сключените договори и тяхната ратификация не били в интерес на българската държава, това е въпрос на политическа и икономическа целесъобразност, по който Конституционният съд не е компетентен да се произнесе." (из Решение №9/1999 г. по к.д.№8/1999 г.)*

Конституционният съд също очертава и запазено поле за отчитане на икономическа целесъобразност: "*... Различието в законовата уредба в различни периоди от време като правило се влияе от редица фактори – икономически, политически, международни и пр., поради което с чл. 84, т. 1 от Конституцията на Народното събрание е дадено право не само да приема закони, но и да ги изменя, допълва и отменя. В една или друга степен всяка промяна на режима на приватизация облекчава или утежнява положението на участващите в нея субекти. При условие, че бъде приета тезата на вносителите, всяка промяна би трябвало да бъде обявена за противоконституционна. При какви условия ще се приватизира, е въпрос на икономическа концепция на този, който приватизира, която не подлежи на контрол за противоконституционност.*" (из Решение №2/2003 г. по к.д.№20/2002 г.)

Конституционният съд следи и за наличието или отсъствието на правен интерес от сезирането, като от това зависи допустимостта, тоест дали ще се премине към разглеждане на повдигнатите въпроси по същество: *"Ето защо отсъствието на публичен интерес, който да бъде удовлетворен с произнасяне на Конституционния съд по решение, взето от разпуснатото Народно събрание или неговото отпадане обуславя недопустимостта на искането на групата народ-*

ни представители." (из Определение №3 от 28.03.2013 г. по к.д.№7/2012 г.).

В последната година Конституционният съд постанови поредица от четири определения, които се доближават най-много до разбирането за *judicial deference*. В тези свои актове съдът се позовава на "политическа целесъобразност", като отказва да навлезе в преценка на решения на законодателния орган, засягащи въпроси на външната политика на Република България (Определение №2/2023 г. по к.д.№1/2023 г.), политиката в областта на сигурността и отбраната (Определение №4/2023 г. по к.д.№2/2023 г.), енергийната политика на страната (Определение №6/2023 г. по к.д.№3/2023 г.) и на *"разнообразните предложения за реформиране на съдебната система, оценката на тяхната състоятелност или несъстоятелност от прагматическа и юридическа гледна точка не попада в правомощията на Конституционния съд"* (Определение № 5/2023 г. по к.д.№6/2023 г.). Общото между тези актове е, че се очертава нова тенденция по отношение на практиката на Конституционния съд, а именно определяне на граници на съблюдаване на политическите измерения на разделението на властите и политическата отговорност, което по своята същност е проява на judicial deference.

3. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

Българският Конституционен съд разглежда всеки случай поотделно, съобразно определената му по Конституция компетентност (очертана във Въпрос №1).

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

Българският Конституционен съд се придържа към разбиране за разделението на властите, което отрежда определени въпроси за решаване и преценка от законодателя, като очертава поле на законодателна целесъобразност, в което не навлиза. По-подробно това е описано във Въпрос №2.

Конституционният съд е тълкувател, и то върховен, но само на Конституцията, но не и на други актове, включително от международноправно естество. Конституционният съд може да извърша собствена преценка (Определение от 16.09.2022 г. по к.д.№13/2022 г.), но не и да ги тълкува: "*... от съдържанието на искането и уточняването му се вижда, че не се касае за неяснота в конституционната норма. Не става дума всъщност за допълнително тълкуване на чл. 99, ал. 5 от Конституцията, а за последиците от вече извършеното тълкуване с решение № 20/1992 г. на съда. Тези последици в областта на международните парламентарни ангажименти са уредени евентуално от актовете (устав, правилници, резолюции и пр.) на съответните международни организации. Участието в последните е в зависимост от собствената им регламентация. Такива актове например на Съвета на Европа са: Статут на Съвета на Европа (ДВ, бр. 49, от 1992 г.), Процедурни правила (регламент) на Асамблеята, Общо споразумение за привилегиите и имунитета на Съвета на Европа (ДВ, бр. 57 от 1992 г.) и пр. Самото писмо от 28 януари от 1993 г. на молителите посочва, че другите европейски структури са с аналогична регламентация. Въпросите, които искането повдига, се отнасят именно до актовете на съответните международни организации и изясняването им…. Конституционният съд е тълкувател, и то върховен, но само на Конституцията, но не и на други актове, включително от международноправно естество. Предметът на искането е извън компетентността на съда.*

Искането е недопустимо и делото трябва да бъде прекратено." (из Определение №5/1993 г. по к.д.№35/1992 г.)

5. Are there cases where your Court deferred because there was a risk of judicial error?

Error juris или незнание на закона не е ползвано като основание да не бъде разгледано дадено дело, нито е имало позоваване в рамките на решение или определение от практиката на Конституционния съд на Република България.

Включително и в контекста на правото на Европейския съюз българският Конституционен съд си запазва правото да може да направи собствена и самостоятелна преценка на приложимото право: *"...но Конституционният съд не е обвързан от преценката на сезиращия съд за приложимото право, защото тази преценка предоставя собствената на Конституционния съд компетентност да се произнесе по направеното искане (неговата юрисдикция), а всеки съд, в т.ч. и Конституционният, сам преценява компетентността си да се произнесе по искане, с което е сезиран – чл. 13 ЗКС (Определение №2 от 23.03.2010 г. по к.д. №17/2009 г., Определение №2 от 24.02.2022 г. по к.д. №15/2021 г.)"*(из Определение от 16.09.2022 г. по к.д.№13/2022 г.)

6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

Практиката на Конституционния съд по този въпрос е посочена във Въпрос №2, в частта, отнасяща се до политическата целесъобразност при вземане на решения от законодателния орган. Конституционният съд счита, че всичко, което не е посочено или дефинирано на конституционно ниво, е въпрос на законодателна целесъобразност: *"... не е уреден на конституционно ниво, поради което е въпрос на законодателна целесъобразност."* (из Решение №6/2018 г. по к.д.№10/2017 г.)

Демократичната легитимност на вземащия решение за персонален избор орган също се зачита от Конституционния съд: "... *Преценката за избор или назначаване, включително и за притежаването на високи нравствени качества принадлежи единствено на органа, оправомощен да я прави. Тя не подлежи на конституционен контрол, защото е лична и суверенна. Личностната преценка за професионалните и нравствените качества е единствено право и отговорност на избиращия, респективно назначаващия орган. Създавайки такава уредба, конституционният законодател очевидно презумира, че наличието на високи нравствени качества се гарантира от високото положение на избиращия (назначаващия) орган, който заема върхово място в съответната йерархия на трите власти - законодателна, изпълнителна и съдебна.*" (из Решение №11/1994 г. по к.д.№16/1994 г.). Така и в: "... *Конституционният съд не може да навлиза в контрол на тази преценка, защото подобен контрол би означавал намеса на съда в правомощията на Министерския съвет и на президента. Конституционният съд може само да контролира дали назначаването или освобождаването от длъжност на посланик е извършено при спазване на конституционно установените изисквания за издаване на указа на президента - разпоредбите на чл. 98, т. 6 и чл. 102, ал. 2 от Конституцията.*" (из Решение №13/1999 г. по к.д.№9/1999 г.).

Последователна е практиката на Конституционния съд на Република България, че: "... *Спорът по това дело е за обхвата и предмета на проверката на Конституционния съд при оспорване конституционосъобразността на решенията на Народното събрание. Безспорно, в подобни производства Конституционният съд не може да действа като съд по фактите. Считаме, че преценката му не може да бъде само формална и да се сведе единствено до установяване на противоречие на решение на Народното събрание с конкретна норма на Конституцията или до неспазване на процедурата по приемане на решението. Преценката трябва да бъде изцяло подчинена на разбирането, че решенията на Народното събрание не бива да противоречат и на принципи и ценности на Конституцията.*" (из Решение №15/2013 г. по к.д.№19/2013 г.).

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

Както беше вече очертано във Въпроси №№2, 4, 6 българският Конституционен съд се съобразява със сферата на компетентност на всяка от останалите власти, като неднократно е очертавал в практиката си поле за разгръщане на политическа и икономическа целесъобразност, неподвластна на последваща преценка и корекция по съдебен ред. Такава е трайно установената практика на съда: "*Следва да се има предвид и чл. 76, ал. 3 от Конституцията, който овластява Народното събрание да избира свои председател и заместник-председатели. Това е суверенно право на парламента и въпрос на политическа воля и целесъобразност, която не може да бъде контролирана от Конституционния съд. В тази разпоредба имплицирано се съдържа и възможността Народното събрание да освободи председателя и заместник-председателите, които е избрало. Очевидно при липса на други конституционни разпоредби в случая, който дава мандат по политическа преценка, той може и да го отнеме на същото основание.*" (из Решение № 11/2000 г. по к.д.№13/2000 г.); "*Конституционният съд не може да си позволи да оценява управленските разбирания, на чиято основа е постановен парламентарният акт, когато решаващият орган е действал в рамките на конституционно определената си компетентност, какъвто е настоящият случай. Това би било напускане на задължителните рамки на контрола за конституционосъобразност и недопустима намеса в суверенитета на законодателната власт.*" (из Решение №3/2010 г. по к.д.№18/2009 г.); "*Тази целесъобразност не може да бъде предмет на обсъждане и решение на Конституционния съд. Съдът може да прецени единствено дали отмяната на данъчното облекчение за процесуалното представителство накърнява границите на основните правни начала, стоящи в основата на правовата държава.*" (из Решение №6/2010 г. по к.д.№16/2009 г.); "*Право на парламента е, когато действа в рамките на конституционно определената му компетентност, чрез законодателните промени да изрази определена политическа и икономическа целесъобразност, мотивирана от променените социално-икономически условия на обществото в периода на преход, и те сами по себе си не подлежат на контрол за конституционосъобразност.*" (из Решение №8/2017 г. по к.д.№1/2017 г.); *"За реализацията на правото на обществено осигуряване и социално подпомагане, което представлява проекция на принципа на социалната държава, законодателят следва да приеме конкретни мерки, с които да съдейства, да създава условия и организация на такава социална система в държавата, която в най-голяма степен да гарантира социална справедливост и социална сигурност. Конституцията обаче не указва реда, начина, принципите и системата на упражняването и практическото прилагане на това право. Преценката е предоставена на законодателя. (Решение № 21/1998 г.; Решение № 5/2000 г.; Решение № 13/2003 г.; Решение № 3/2019). Той е свободен, след като прецени потребностите на нуждаещите се и възможностите на обществото, да уреди по целесъобразност социалния модел в страната при зачитане на нормите и принципите на Основния закон (Решение № 10/2012 г.; Решение № 5/2000 г.; Решение № 3/2019 г.)... Конституционният съд не е компетентен да преценява целесъобразността на избрания подход при формулиране и структуриране на оспорвания закон, тъй като това би го превърнало в позитивен законодател, каквато роля не му е възложена от Конституцията. Конституционният съд е оправомощен единствено да провери дали законодателят се е съобразил с принципите и нормите на Основния закон при приемането на оспорваната правна уредба. Видно от гореизложеното, дефинирането на социалните услуги в чл. 3, чл. 15 и чл. 17 ЗСУ, не е в противоречие с принципа на правовата държава."* (из Решение №9/2020 г. по к.д.№3/2020 г.)

Българският Конституционен съд не се позовава на липса на демократична легитимност, а се съобразява с позицията си в рамките на конституционната архитектура. Специфичната легитимност на българския Конституционен съд се обуславя от „върховенството на закона". Това означава три неща. Първо, конституирането на съда (неговата структура и състав) трябва да бъде в съответствие с Конституцията и закона. Второ, конституционният процес (подходът и процедурите), чрез които се стига до решенията, също трябва да бъде в съответствие с Конституцията и закона. Трето, и най-важното, съдържанието и същността на конституционните решения трябва да са в съответствие с Конституцията.

8. Does your Court accept a general principle of deference in judging penal philosophy

and policies?

Конституционният съд на Република България принципно не се самоограничава по въпросите, свързани с наказателната политика. В практиката си Съдът няма случай, в който да е отклонил искане за оспорване конституционосъобразността на наказателна разпоредба заради характера на разпоредбата. Преценява се във всеки конкретен случай.

В практиката си Съдът подчертава, че *„Народното събрание е орган, който по Конституция чрез Наказателния кодекс и Наказателно-процесуалния кодекс определя наказателната политика на държавата",* и определя понятието за наказателна политика като *„първо, създаването на кръга от законови (наказателни) норми, които определят видовете престъпления и отграничават престъпното от непрестъпното поведение; второ, в рамките на приетото за престъпно поведение да се разграничат (диференцират) отделните престъпления и наказанията за тях"* (Решение №13/2022 г. по к.д.№8/2022 г.). Според възприетото в това решение *„и двата проблема стоят пред законодателя за разрешаване". По-нататък в решението съдът приема, че „[р]ешенията за криминализиране или декриминализиране на определени деяния по своята същност са политически, защото предполагат избор между противоположни интереси, ценности и виждания. Поради характера си на общонационално представително учреждение демократично избраният парламент е точният форум, където в условията на широк обществен диалог да се намери подходящият баланс между сблъскващите се интереси и ценности в сферата на наказателноправното регулиране. Същевременно в конституционната демокрация автономията на законодателя бива балансирана на основата на редица ограничения, записани в Конституцията и предназначени да защитят ценности от висш порядък, които не могат да бъдат „жертвани" произволно от политическите мнозинства в парламента."* За такива ограничения Съдът възприема конкретните проявления на принципа на правовата държава в областта на наказателното право и процес: Nullum crimen sine lege; Nulla poena sine lege; Nulla poena sine culpa; Non bis in idem, както и основните права и свободи. *„[Д]искреционната свобода на законодателя да определя наказателната политика на държавата свършва там, където започва защитеното от Основния закон пространство от ценности и принципи."*

В друго свое решение Съдът посочва, че *"[е]дно от съществените измерения на върховенството на правото е разделянето на правото и политиката, което позволява да се ограничи максимално възможността отсъждането да бъде основано на персоналните ценности на съдиите, на техните предпочитания и идеология. Обратното е не само негатив за правораздаването, то е и провал за конституционните ценности и принципи, за чието утвърждаване като измерение на демокрацията съдилищата имат огромна роля. Конституционното правосъдие е това, което има задължението да подложи на стриктна преценка законодателните актове за спазването на онези ценности, с които цялото общество се е обвързало, придавайки им ранг на върховно право."* (Решение №12/2016 г. по к.д. №13/2015 г., с което са обявени за противоконституционни разпоредби в областта на давността за наказателно преследване).

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

Няма обстоятелства, при които правителството може да откаже разкриването на информация пред Конституционния съд на Република България. Съдът би могъл да изиска достъп до всякаква информация, която му е нужна с оглед постановяването на решение, в това число и класифицирана. Горепосоченото положение важи както за Министерски съвет, така и за всяка друга институция в Република България.

Съгласно разпоредбата на чл. 20, ал. 2 от Закона за Конституционен съд (ЗКС) никой не може да откаже предаването на поискана информация или писмени доказателства независимо от това дали съставляват класифицирана информация, представляваща държавна или служебна тайна.

В случай че тази информация е недостатъчна, в правомощията на Конституционния съд на

Република България е да изиска допълнително писмени доказателства, както и да възложи изготвянето на експертни заключения.

В случаите, в които се касае за класифицирана информация, се спазват условията и реда на Закона за защита на класифицираната информация.

В практиката няма данни за това Конституционният съд да се е въздържал от съображения за национална сигурност.

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

Конституционният съд на Република България е гарант за върховенството на Конституцията. Той не се намесва в политиката, дори и в защита на правата и свободите на гражданите.

Конституционният съд на Република България не може чрез тълкуване или при тълкуване на Конституцията да се произнася по въпроси, които са от изключителната компетентност на Народното събрание.

Границите на защита на правата и свободите на гражданите са разширени с разпоредбите на чл. 150, ал. 3 от Конституцията на Република България (ДВ, бр. 27 от 2006 г.) и чл. 150, ал. 4 КРБ (ДВ, бр. 100 от 2015 г.). С тези норми са предвидени възможности омбудсманът и Висшият адвокатски съвет да могат да сезират Конституционния съд на Република България с искане за установяване на противоконституционност на закон, с който се нарушават права и свободи на гражданите. Предвидената възможност последните два субекта да сезират Съда е налице, защото те изразяват волята на народа като посредници на публичната власт и могат да се обърнат към органа, който гарантира върховенството на Конституцията.

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

Първи подвъпрос:

Съгласно разпоредбата на чл. 149, ал. 1, т. 2 от Конституцията на РБ, където са уредени правомощията на Конституционния съд, той се произнася по искане за установяване на противоконституционност на законите и на другите актове на Народното събрание, както и на актовете на президента. В този смисъл обект на разглеждане от съда могат да бъдат само актове на парламента и на президента, не влизат в обхвата на преценка актовете на изпълнителната власт. Съгласно разпоредбата на чл. 125, ал. 2 от Конституцията *Върховният административен съд се произнася по спорове за законността на актовете на Министерския съвет и на министрите, както и на други актове, посочени в закона.* Аналогична разпоредба има и в Административнопроцесуалния кодекс: чл. 132, ал. 2, т. 2, съгласно която *на Върховния административен съд са подсъдни оспорванията срещу актовете на Министерския съвет, министър-председателя, заместник министър-председателите и министрите, издадени при упражняване на конституционните си правомощия по ръководство и осъществяване на държавното управление.*

Както е посочено в Решение №6/2019 г. по к.д.№6/2019 г.,*„Властта на съда" (Конституционният съд и Върховният административен съд) е част от контрола съответно върху законодателната и върху изпълнителната власт. Той е част от системата на взаимен баланс и възпиране между трите власти."*

Втори подвъпрос: виж и отговора на въпрос №6

Когато Съдът разглежда актове на законодателния орган, той съобразява неговата демократична легитимност. За „демократична легитимност" се говори, когато държавната власт се упражнява от избирани от суверена представители, които по силата на упълномощаването чрез изборите получават демократична легитимност да упражняват принадлежащата на суверена власт,

когато тя не се упражнява пряко от народа.

„В системата на демократичното управление утвърден конституционен принцип, възприет и от българската Конституция, е тази власт (властта за налагане на данъци – бел. моя) *да се осъществява от законодателния орган като най-непосредствен изразител на волята на титуляря на държавната власт. Парламентът има демократична легитимност от най-висока степен. Право на гражданите е «сами или чрез своите представители да установят необходимостта от обществен данък, да го съгласуват свободно, да следят за неговото прилагане и да определят неговия размер, разпределение, изплащане и времетраене» (чл. 14 от Декларацията за правата на човека и гражданина от 1789 г.)….. На този принцип съответства изискването правомощията на изпълнителната власт в данъчната материя и задълженията на данъкоплатците да бъдат уредени в закон – т.е. в акт, приет от органа с най-висока демократична легитимност, в който гражданите са най-непосредствено представени…….. Конституционният съд поддържа последователно в своята практика, че като публичноправно вземане на държавата или общината данъците се установяват едностранно от държавата и само със закон, което гарантира правата на данъкоплатците (Решение № 3 от 1996 г. по к.д. № 2/1996 г.). Народното събрание не може да делегира това свое изключително правомощие на изпълнителната власт."* (из Решение №4/2019 г. по к.д.№15/2018 г., с което се обявяват за противоконституционни разпоредби от Закона за местните данъци и такси и от Закона за митниците).

„Следвайки логиката за съчетаване на прякото и представителното осъществяване на суверенитета, Конституцията и ЗПУГДВМС[852] определят като своеобразен посредник в този процес Народното събрание, именно поради високата степен на неговата демократична легитимност, но и защото изразява и представлява най- непосредствено интересите на целия народ. На това основание от него се изисква да даде своята санкция, че субектът на инициативата за национален референдум е изпълнил произтичащите от Конституцията и закона изисквания." (Решение №9/2016 г. по к.д.№8/2016 г., с което КС обявява за противоконституционно Решение за произвеждане на национален референдум, прието от 43-то Народно събрание).

852 Закон за пряко участие на гражданите в държавната власт и местното самоуправление

„В съответствие с принципа на народния суверенитет (чл. 1, ал. 2 и 3) Народното събрание като държавен орган с най-висока степен на демократична легитимност има отношение – и в своята нормотворческа, и в своята контролна дейност – към всички сфери на обществения живот и в този смисъл – към „всеки аспект на управлението"." (Решение №15/2022 г. по к.д.№10/2022 г., с което КС обявява за противоконституционно Решение на Народното събрание за предприемане на действия от Агенция „Пътна инфраструктура" за осъществяване на дейностите по поддържане на републиканската пътна мрежа)

„Поради характера си на общонационално представително учреждение демократично избраният парламент е точният форум, където в условията на широк обществен диалог да се намери подходящият баланс между сблъскващите се интереси и ценности в сферата на наказателноправното регулиране." (Решение №13/2022 г. по к.д.№8/2022 г.)

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

За да достигне до истинската и недвусмислена воля на законодателя при преценка конституционосъобразността на оспорените пред Съда негови актове, без да преминава границите на неговата политическа целесъобразност, КС взема предвид като доказателствени материали в множество свои решения стенографските протоколи от заседанията на народните представители (пленум в зала или комисия), доклади на парламентарни комисии, мотивите към законопроектите, както и проследява и прави анализ на историята на законодателството.

Що се касае до преценката за конституционосъобразност на процедурата по гласуване и приемане на актовете на Народното събрание, Конституционният съд многократно е приемал, че тя *„може да се основава само на стенографските протоколи за заседанията на парламента. Конституционният съд не може да открива производство по оспорването им. Стенографските протоколи са официални документи на Народното събрание и имат доказателствена сила за отразените в тях изявления, обстоятелства и констатации, включително и за броя на присъстващите в пленарната зала народни представители (кворум)."* (Решение №1/1999 г. по к.д.№34/1998 г., Решение №8/2011 г. по к.д.№5/2011 г., Решение №3/1993 г. по к.д.№2/1993 г., Решение №6/2007 г. по к.д.№3/2007 г.) *„Както бе изяснено, стенографските протоколи са правнорелевантни за установяване на гласуваното в Народното събрание. Независимо от това, при излагането на фактите в решението посочихме и думите на председателя на парламента, както се чуват във видеозаписа на парламентарното заседание."* (Решение №8/2011 г. по к.д.№5/2011 г.)

За значимостта и ролята на стенограмите, мотивите към законопроектите и историята на законодателството спрямо аспекта, в който следва да се преценява конституционосъобразността на оспорените разпоредби, пример са следните решения на КС:

„Известно е, че за волята на законодателя, въплътена в конкретен нормативен акт (в случая закон), се съди от ***мотивите на вносителя на законопроекта*** *(законопроектите),* ***обсъжданията*** *в комисиите на Народното събрание и в пленарна зала. В конкретния случай* ***историческият преглед на развитието на нормотворческия процес****, развил се във връзка с приемането на чл. 245 КТ, вкл. в оспорената му част, показва, че разбирането на законодателя е именно в подкрепа на позицията, че се касае за гаранционна и защитна спрямо работника норма, а не такава, създаваща права в полза на работодателя и в ущърб на наетите лица, както се поддържа в искането на омбудсмана.*

Мотивите, с които е внесен законопроектът от Министерския съвет на Закона за изменение и допълнение на Кодекса на труда (ЗИДКТ) (вх. № 302-01-43 от 6.08.2003 г.), както и стенограмите от проведените обсъждания не могат да обосноват заключението, че целта на законодателя е била да се предвиди ново субективно право на работодателя едностранно и по свое усмотрение да намалява до 60 на сто от брутното трудово възнаграждение на

работника или служителя, но не по-малко от минималната работна заплата, нито пък да въвежда различен срок за неговото изплащане. Напротив, целта на предвиденото с чл. 245, ал. 1 КТ е да се осигури допълнителна гаранция за изплащането на трудовите възнаграждения, включително и в случаите на възникване на определена категория форсмажорни за работодателя обстоятелства – най-често обективирани като финансови затруднения, при които обаче все още не са налице предпоставките за обявяване на работодателя в несъстоятелност…….. Погледнато исторически, Тридесет и шестото Народно събрание обсъжда и приема Закон за изменение и допълнение на Кодекса на труда. Реализираната по този начин реформа на трудовите правоотношения от 1992 г. е наложена поради цялостната промяна на обществено-икономическите условия и свързаните с нея необходимост от разширяване на договорното начало, формирането на пазар на работната сила и като цяло – изоставяне на принципите на т. нар. «социалистическа организация на труда». Това е видно от мотивите към водещия законопроект и неговото обсъждане. При представянето в пленарна зала на предложената законодателна промяна (стенограма от седемдесет и осмото заседание от 13 май 1992 г.) е описана общо необходимостта от съобразяване на правната уредба с промяната в обществените отношения вследствие на прехода от централизирана към пазарна икономика. Отчетено е обаче, че условията налагат да се предвидят съответните, адекватни гаранции за правата на работника или служителя, като императивно се регламентират минималните стандарти за условията за полагане на труд и неговото заплащане…… Съществена част от мотивите за приемане на чл. 245, ал. 1 КТ в редакцията от 1992 г. е преустановяването на съществуващата тогава порочна практика на т. нар. аванси, при което реално на работниците и служителите се изплаща възнаграждение в изцяло произволен, нерядко и символичен, по-малък от минималната работна заплата размер, при това в неясни времеви интервали. В този смисъл целта на предприетото тогава законодателно изменение е пределно ясна – осигуряване на необходимите правни средства за елиминиране на системните злоупотреби с правата на икономически уязвимите трудовонаети лица. Текстът е приет на второ гласуване почти единодушно, само с един глас против, на 8.10.1992 г. (вж. стенограмата от сто тридесет и третото заседание от 8 октомври 1992 г.), като по него, за разлика от ред други параграфи от законопроекта, не са били изразени възражения." (из Решение №1/2018 г. по к.д.№3/2017 г.)

*„Тази **динамика на законодателството** и конституционният принцип, че основите на правовия ред се отнасят до всички правни субекти, поставят въпроса за предварителната законоустановеност на държавните изисквания (Решение № 1 от 2005 г. по к.д. № 8 от 2004 г., Решение № 22 от 1996 г. по к.д. № 24 от 1996 г.). При отговора на въпроса за конституционосъобразността и правата на правомерно лицензираните стопански субекти по ЗУО трябва да се съобрази съдържанието и логиката на **действащата преди** ЗИДЗУО от 12.04.2011 г. **правна уредба**…… Съпоставката с предходната уредба на лицензирането на дейността с отпадъците по чл. 13а, ал. 3 и чл. 54, ал. 2 (нова) ЗУО сочи на неясната и непоследователност, което поражда съмнение и несигурност.*" (из Решение №3/2012 г. по к.д.№12/2011 г.)

В Решение №15/2010 г. по к.д.№9/2010 г. КС установява, че оспорваната законова уредба (чл. 519 „Изпълнение срещу държавни учреждения и общини" и чл. 520 от Гражданскопроцесуалния кодекс „Изпълнение срещу бюджетно субсидирани заведения") не представлява съвсем нова конструкция в българското право и проследява подробно законодателството в тази област (от Търновската конституция, през Закона за гражданското съдопроизводство, поредица от специални закони в бюджетната сфера, до различните текстове на стария и новия ГПК). *„Съдът си поставя въпроса защо законодателят е създал този особен ред по ГПК. Както вече бе посочено, Народното събрание - титулярът на законодателната власт и конституирана страна по това дело, не е представило становище. От мотивите на законопроектите и стенографските протоколи е видно, че целта на законодателя за създаването на сега действащата цялостна уредба на чл. 519 и 520 от ГПК е гарантирането на ефективното осъществяване на публичните функции на държавните учреждения, общините и бюджетно субсидираните заведения."*

*„За да се прецени по същество съответствието на оспорената разпоредба с Конституцията, следва да се обсъди **същността на заповедното производство, неговото историческо развитие** и разновидности, приложното му поле, процесуалните права на страните, включително правото на защита.*

Уреденото по глава XXXVII на действащия ГПК (обн., ДВ. бр. 59/2007 г., в сила от 1.03.2008 г., последно изм., ДВ, бр. 49/2012 г.) и функционално свързано с изпълнителния процес заповедно производство, макар и непознато на отменения процесуален закон, приет през 1952 г., не е новост за българската гражданско-процесуална традиция. То е било въведено със Закона за заповедното съдопроизводство (1897 г.), а впоследствие заповедта за изпълнение, макар и със силно ограничено приложно поле, е регламентирана със Закона за гражданското съдопроизводство от 1934 г." (Решение №12/2012 г. по к.д.№4/2012 г., с което е отхвърлено искането за обявяване противоконституционност на разпоредба от глава „Заповедно производство" на ГПК). За да прецени дали доводите на искателя са основателни, КС взема предвид и мотивите към законопроекта.

При преценка конституционосъобразността на разпоредби от Административнопроцесуалния кодекс КС преглежда историческия аспект на нормите и приема, че *„Този хронологичен преглед, както и заявените мотиви на вносителите на обсъжданите изменения, сочат на намерение на законодателя за улесняване на достъпа на гражданите до правосъдие и по-равномерно разпределение на делата между административните съдилища. Те са израз на стремежа на нормотворeца да гарантира справедлив административния процес (Стенографски протокол от 154-о заседание от 22.06.2018 г. на 44 НС)."* (Решение №5/2019 г. по к.д.№12/2018 г.). Във връзка с целите, преследвани от законодателя, и финансовата обосновка КС е взел предвид мотивите към законопроекта.

В Решение №17/2018 г. по к.д.№9/2018 г., с което КС отхвърля искането на състав на Върховния касационен съд за установяване противоконституционност на разпоредба от Закона за съдебната власт, свързана с правото на освободения от длъжност магистрат да получи парично обезщетение, Съдът прави исторически преглед по въпроса за обезщетенията на работещите по съдебно ведомство, респ. в съдебната власт (от Търновската конституция, през различните закони за устройство на съдилищата, до различните редакции на Закона за съдебната власт). Така КС достига до извода, че *„законодателят е правомощен по съображения за целесъобразност – социална и финансова, да определи условията, при които на съдии, прокурори и следователи да се изплаща парично обезщетение в случаите на прекратяване на тяхното правоотношение. Тази законодателна целесъобразност може и следва да бъде упражнена само в конституционно установените граници (Решение № 18/97 г. по к. д. № 12/1997 г. и Решение № 7/95 г. по к. д. № 9/1995 г.).*

Свободата на преценка на Народното събрание в тази сфера има своите предели, очертани чрез основните начала, които пронизват конституционната уредба на съдебната власт и стоят в основата на правовата държава."

В Решение №10/2003 г. по к.д.№12/2003 г., при преценката си за конституционосъобразност на чл. 1, ал. 1 от Закона за държавните такси (ЗДТ), КС приема, че: *„Разпоредбата постановява, че държавните такси се събират от органи и бюджетни организации в "размери, определени с тарифи, одобрени от Министерския съвет». Дадената делегация съществува още в първоначалната редакция на чл. 1, ал. 1 ЗДТ от 1951 г. Тя е запазена както при изменението на текста, обнародвано в ДВ, бр. 55 от 12 юли 1991 г., влязло в сила след действащата Конституция, така и при изменението от 1996 г. Поради това, че предоставената делегация на Министерския съвет да одобрява тарифите за таксите е възпроизведена и в изменението на чл. 1, ал. 1 от закона, при действие на сегашната Конституция не се поставя въпросът за прилагането на § 3 от нея. Искането не засяга заварен от Конституцията от 1991 г. закон, а се отнася за закон, създаден, след като тя действа."*

„Тук е мястото да се вземе становище по довода, че Министерският съвет организира сто-

панисването на държавното имущество, а съдебната власт осъществява правосъдието в страната, т.е. налице е проявление на принципа на "разделението на властите": Фонд "Съдебни сгради" е създаден още през 1925 г. и досега е управляван от министъра на правосъдието. Така в исторически план се е утвърдила трайна представа, че капиталовите разходи и съдебните имоти трябва да се управляват от изпълнителната власт. Към днешно време схващането се основава на разпоредбата на чл. 106 от Конституцията, още повече че по традиция в материалните закони съдебните сгради са определяни като публична държавна собственост. Оттук и очакването, че залегналият в чл. 106 от Конституцията принцип трябва да има приоритет над принципите, прогласени от чл. 117, ал. 2 и 3 за независима съдебна власт със самостоятелен бюджет. В отговор трябва да се каже, че тази представа е градена при друга нормативна база – в нито една от трите следосвобожденски конституции няма разпоредби, че съдебната власт е независима и има самостоятелен бюджет." (из Решение №4/2004 г. по к.д.№4/2004 г.)

В Решение №1/2023 г. по к.д.№17/2022 г., анализирайки мотивите към законопроекта и стенограмите от обсъждането в Народното събрание на Закона за изменение и допълнение на Наказателния кодекс, КС проверява целите на участниците в законодателния процес и установява, че не е отчетен балансът между обществения и личния интерес.

Доказателство за значимостта на мотивирането в законодателния процес е изводът, до който Съдът е достигнал в Решение №7/2019 г. по к.д.№7/2019 г.: *„Подобен подход* (отсъствието на мотиви и законодателна обосновка – бел.моя) *е отстъпление от конституционния разум за дължим демократичен законодателен процес в сферата на основните права".*

При решаването на тълкувателни дела също от изключителна важност са стенограмите на Великото народно събрание (ВНС) при приемането на текста от Конституцията. Подробен анализ на дискусията във ВНС Конституционният съд прави в Решение №13/1996 г. по к.д.№11/1996 г., а в Решение №7/2020 г. по к.д.№11/2019 г. (дело за тълкуване на конституционна разпоредба за мотивиране на съдебните актове), цитирайки Определение №3 от 17.09.2015 г. по к.д.№7/2015 г., приема: *„Тълкуването на конституционните разпоредби неизбежно е свързано с изследване и установяване на действителната воля на техния създател, тъй като по този начин се гарантира правната стабилност и върховенството на основния закон, както и изобщо закрепените в него идеи и ценности."*

Анализът на мотивите към законопроекта, както и стенограмите от обсъждания и гласувания в пленарна зала позволява на КС да достигне до извода, че *„Посоченото по-горе позволява да се обобщи, че оспорените разпоредби от Закона за банковата несъстоятелност, разглеждани в тяхната връзка, са насочени да осигурят набор от правни мерки и инструменти за попълване на масата на несъстоятелността на една точно определена банка, обявена в несъстоятелност."* (Решение №8/2021 г. по к.д.№9/2020 г., с което са обявени за противоконституционни разпоредби, свързани с банковата несъстоятелност).

Анализирайки мотивите на законопроекта за изменение и допълнение на Кодекса за задължително обществено осигуряване, засягащи втория стълб на общественото осигуряване (допълнителното задължително пенсионно осигуряване), КС установява, *„[в]идно от мотивите и преведено за нуждите на делото"*, че *„волята на законодателя включва известно засилване на държавното регулиране в обсъжданата материя с цел защита интереса на осигурените лица. Следва въпросът - доколко с това изменение се засягат конституционни начала и принципи, свързани със свободната стопанска инициатива, както на пенсионния фонд (според искателите), така и на пенсионноосигурителните дружества като търговски субекти и накърняват ли се законните интереси на осигурените лица."* (Решение №2/2004 г. по к.д.№2/2004 г.)

Проверка на мотиви към законопроект и разисквания в НС се прави от КС и по дела в областта на правилата за движение по пътищата (Решение №1/2012 г. по к.д.№10/2011 г., Решение №11/2021 г. по к.д.№7/2021 г.), данъците върху доходите на физическите лица (*„Видно от сте-*

нографските дневници на десетата сесия на 41-вото Народно събрание, народните представители са дебатирали, включително и от аспекта на противоконституционност, оспорвайки необходимостта от въвеждането на този данък и определянето на задължителен минимум на размера на доходите, които следва да се обложат с данък." – Решение №10/2013 г. по к.д.№8/2013 г.), лова и опазването на дивеча (Решение №4/2013 г. по к.д.№11/2013 г.), изборен процес (Решение №3/2017 г. по к.д.№11/2016 г.), промени в Закона за държавния служител, направени със Закона за държавния бюджет за 2019 г. *(„Конституционният съд, след като обсъди доводите и съображенията, изложени в исканията, в становищата на конституираните институции и поканените организации, в представените правни мнения, и* ***взе предвид*** *релевантната правна уредба и* ***мотивите на законодателя при приемане на оспорените разпоредби, за да се произнесе, съобрази следното…."*** - Решение №3/2019 г. по к.д.№16/2018 г.*),* устройството на територията (Решение №17/2021 г. по к.д.№11/2021 г.), правилата за провеждане на видеоконферентни съдебни заседания при вземане на мярка за неотклонение задържане под стража в досъдебното производство (Решение №13/2021 г. по к.д.№12/2021 г.), социалното осигуряване (Решение №4/2022 г. по к.д.№14/2021 г.), оспорването на произход по Семейния кодекс (Решение №11/2022 г. по к.д.№3/2022 г.), участие в производството пред съда чрез видеоконферентна връзка на лица с психични разстройства, по отношение на които е поискано по съдебен ред настаняване в лечебно заведение за задължително лечение (Решение №14/2022 г. по к.д.№14/2022 г.), мораториума върху придобиването по давност на имоти – частна държавна и общинска собственост (Решение №3/2022 г. по к.д.№16/2021 г.), морските пространства и пристанищата (Решение №5/2005 г. по к.д.№10/2004 г.), Закона за държавния бюджет за 2018 г. (Решение №4/2018 г. по к.д.№14/2017 г., където е направен подробен анализ на механизма за провеждане на законодателния процес) и др.

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

Българският Конституционен съд има правомощието да следи дали оспорените пред него актове са противоконституционни или не, а не дали са правилни или целесъобразни. Когато разглежда мотивите за вземане на едно или друго законодателно решение, целта му е да достигне до автентичната воля на законодателя, а не да направи преценка на конкретните законодателни решения. Когато обаче установи, че дадено законодателно решение е немотивирано, той прокарва разграничителна линия между формалното спазване на изискванията на Конституцията и действителното – спазване: "*Необходимостта от плащането на такса трябва да е обоснована, обективна и очевидна. Определянето на таксите изисква прозрачност на процедурата, защото несигурността от въвеждането на допълнителни, немотивирани увеличения на допълнителните разходи вредят и представляват финансова тежест за бизнеса в регулираните сектори на националната икономика, а това е в ущърб на гражданския интерес. «Формалното спазване на конституционните изисквания е недостатъчно, когато със закон се въвеждат допълнителни финансови задължения за гражданите при нарушаване същността на тези задължения.» (Решение № 4 от 2013 г. по конст. дело № 11 от 2013 г.). Конституционният съд не намира основания да промени досегашната си практика, да се отклонява от това си разбиране, защото изискванията за правов ред и стабилност задължават съда да се съобразява с предишните свои решения.*" (из Решение №13/2014 г. по к.д.№1/2014 г.);

В най-новата си практика Конституционният съд прави анализ и оценка на фактите и мотивите, с които Народното събрание е взело определено решение и стига до извода, че "*... нито един от изтъкнатите мотиви не представлява валидно правно основание за освобождаване от длъжност на председателя на Сметната палата, което е нарушение на принципа на правовата държава.*" (из Решение №5 от 22.06.2023 г. по к.д.№5/2023 г.)

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep

must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

Българският Конституционен съд третира мотивирането на законопроектите като задължителна част от законодателния процес, тъй като Конституцията гарантира, че законодателният процес ще протича законосъобразно, при съблюдаване на всички необходими правила и изисквания за демократична легитимност, както и че законите ще са надлежно мотивирани. Поради тази причина Конституционният съд изследва качеството на мотивите и на изказванията при пленарните гласувания, освен както е посочено по Въпрос №13 с цел да изясни автентичната воля на законодателя, но и да се увери, че правилата на законодателния процес са спазени.

Така: "*Едновременно, съдът намира за необходимо да отбележи следното: Историческият опит показва, че политически мотивираната дискриминация, дори и в утвърдените демокрации, може съществено да повлияе на съдебния процес, подкопавайки безпристрастността и дори отговорността на съдилищата. Нещо повече, политически мотивираната дискриминация поражда негативни дългосрочни последици на разединяване и противопоставяне в нацията и може да подкопае легитимността на управлението.*

Едно от съществените измерения на върховенството на правото е разделянето на правото и политиката, което позволява да се ограничи максимално възможността отсъждането да бъде основано на персоналните ценности на съдиите, на техните предпочитания и идеология. Обратното е не само негатив за правораздаването, то е и провал за конституционните ценности и принципи, за чието утвърждаване като измерение на демокрацията съдилищата имат огромна роля.

Конституционното правосъдие е това, което има задължението да подложи на стриктна преценка законодателните актове за спазването на онези ценности, с които цялото общество се е обвързало, придавайки им ранг на върховно право. По дефиниция, и по своето действие, върховенството на правото е ограничение на държавната власт. То изисква оценка на нейните актове в духа на стандартите, които се свързват с ключовите за конституционализма идеи.

Няма как да бъде спазен принципът на върховенство на правото, ако законът може да бъде пренаписван според обстоятелствата, без да бъдат съобразени конституционно установените принципи и ценности, с които е обвързано обществото по негова собствена воля.

Съдът за пореден път подчертава, че неотклонно стои на позицията, че в правовата държава търсенето на справедливи разрешения не може да ни отведе другаде освен до върховенството на правото. (из Решение №12/2016 г. по к.д.№13/2015 г.)

"Отсъствието на мотиви и законодателна обосновка в подкрепа на възприетото в чл. 10, ал. 1, изречение второ ЗМ (Закон за митниците) разрешение не убеждава, че са потърсени и обсъдени алтернативни и по-щадящи за правото на труд способи за постигане на целения резултат. Подобен подход е отстъпление от конституционния разум за дължим демократичен законодателен процес в сферата на основните права – чрез задълбочен дебат в рамките на законодателния процес, без прибързаност и импровизация, да се защитят балансирано правата и свободите на всеки член на обществото." (из Решение №7/2019 г. по к.д.№7/2019 г.);

"Прегледът на уредбата на обезщетенията с гратификационен характер в българското законодателство показва, че законодателят подхожда диференцирано при установяване на критериите, които предпоставят възникването на правото на парично обезщетение, от една страна и на критериите, съобразно които се определя неговият размер, от друга. Държи се сметка за характера и естеството на упражняваната от работника или служителя трудова дейност, за нейното значение за нормалното функциониране на държавния апарат, за осигуряване на сигурността и суверенитета на държавата и за защитата на правата и

законните интереси на гражданите. Такъв диференциран подход се вписва напълно в свободата на преценка, с която законодателят разполага, когато регламентира права, които не са с ранг на конституционни, нито са производни от гарантирани по Конституция права." (из Решение №17/2018 г. по к.д.№9/2018 г.)

"В мотивите към проекта на Закона за изменение и допълнение на Наказателния кодекс (№ 702-01-10 от 1.08.2017 г., 44-то НС) като основна цел на инкриминирането на незаконния добив на подземни богатства се сочи гарантирането „в значително по-голяма степен защитата на изключителната държавна собственост, опазването на земните недра, земи, гори и природни ресурси". Както в мотивите, така и в стенограмите от обсъждането в Народното събрание е видно, че участниците в законодателния процес искат да ограничат нанасянето на финансови вреди в размер на милиони левове от тази противозаконна дейност. Няма обаче индикации в мотивите към законопроекта и стенограмите да е отчетен балансът между обществения и личния интерес при отнемането на превозното или преносното средство, с което незаконно добитите подземни богатства са транспортирани след извършване на изпълнителното деяние.……Не е отчетен и справедливият баланс при нарушаване на позитивното задължение за предвиждане на достъп до съд за защита на правото на собственост и закрила срещу неправомерно упражняване на правомощието по отнемане на превозните или преносните средства. В хода на законодателния процес няма индикации за мотива, по силата на който съдът е лишен от правомощието да извърши преценка за всеки конкретен случай за спазване на принципа на пропорционалност при ограничаване на правото на собственост." (из Решение №1/2023 г. по к.д.№17/2022 г.:)

15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

От практиката на КС не може да се установи тенденция дали Съдът последователно следи и взема предвид обстоятелството дали в рамките на парламентарния дебат преди приемането на акта са били изчерпателно изразени противоположни становища и дали се обръща специално внимание на последиците върху правата.

В Решение №9/2002 г. по к.д.№15/2002 г. КС обръща внимание на факта, че *"Парламентарните материали - доклад на Комисията по правни въпроси, предложения на членовете на комисията, стенографските протоколи от пленарните заседания (НС, № 253-03-23/23.04.2002 г., 39-то НС, стенографски дневници, книга 32, с.114 и сл., книга 35, с.44 и сл.), показват единодушие при приемане на изменението на чл.47 ЗМТА и свързаните с това мотиви за рационализиране, бързина и стабилизиране на целия арбитражен процес. Изменението засяга само частта относно съдът - ВКС, който е компетентен да се произнася по искане за отмяна на порочни арбитражни решения и свързаните с променената подсъдност акцесорни въпроси. Формалните конституционни изисквания по обсъждане и приемане на измененията са спазени."*

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

Виж и отговора на въпрос №11, втора част.

Обстоятелството, че оспорваният пред Конституционния съд акт е акт на законодателния орган, респ. е взет след обществено обсъждане, не доказва безусловно демократичната легитимност на акта. Конституционният съд е свободен да преценява неговата конституционосъобразност на общо основание, вземайки предвид все пак, че актът е приет от Народното събрание като държавен орган с най-висока степен на демократична легитимност.

В практиката си Конституционният съд разсъждава по следния начин: *"Обстоятелството, че въпросите, предмет на предложение за национален референдум, могат да бъдат формули-*

рани от инициативен комитет и подкрепящи го с подписка граждани, които основателно се определят като „част от народа", само по себе си изисква преценка на Народното събрание. Решението по чл. 84, т. 5 от Конституцията като акт на своеобразен предварителен контрол следва да осигурява гаранция, че гражданите ще вземат такова решение, което да може да бъде изпълнено от Народното събрание. Необходимостта това решение да е съобразено с конституционните и законовите изисквания произтича и от принципа на правовата държава, установен в чл. 4, ал. 1 на Конституцията. Съблюдаването на принципа на правовата държава изисква и от законодателния орган да спазва законите, които приема. По този начин, нарушавайки закона – чл. 9, ал. 1 и ал. 2, т. 1 ЗПУГДВМС, наред с останалите посочени по-горе конституционни норми, приемайки оспореното Решение в частта му по т. 2, Народното събрание е нарушило и чл. 4, ал. 1 от Конституцията." (из Решение №9/2016 г. по к.д.№8/2016 г., с което КС обявява за противоконституционно Решение за произвеждане на национален референдум, прието от 43-то Народно събрание).

"По смисъла на Конституцията решенията на Народното събрание трябва да бъдат съобразени с издадените от него закони. Тези закони могат да бъдат приети, изменени, допълнени или отменени само по реда, установен от Конституцията, а не и чрез решение на Народното събрание, противоречащо на приет от него закон. Нарушени са основни конституционни начала, присъщи на правовата държава, прогласени в разпоредбата на чл. 4, ал. 1 от Конституцията." (из Решение №17/1997 г. по к.д.№10/1997 г., с което КС обявява за противоконституционно Решението на Народното събрание от 10 юли 1997 г. за промени в ръководствата на Българското национално радио и Българската национална телевизия).

"В контекста на модерния рационализиран парламентаризъм политическото представителство е това, което със закон определя общия план на уредбата в една или друга сфера – нейните принципи, съдържание и насоки, а изпълнителната власт следва да има възможност да я конкретизира, поясни и допълни. Смисълът на това разграничение на правомощията на законодателната и изпълнителната власт се състои от една страна в необходимостта да се постигне стабилност и демократична легитимност на уредбата на трайните обществени отношения, която винаги следва да се съдържа в закон. От друга страна динамиката на обществените потребности изисква предвиждането на по-гъвкави и облекчени процедури за реформиране на определени сектори на държавната политика." (из Решение №9/2020 г. по к.д.№3/2020 г.)

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

В компетентността на българския Конституционен съд не попада задължението да следят за конституционосъобразността на актовете на изпълнителната власт. Конституцията предвижда, че по спорове за законността на актове на Министерския съвет се произнася Върховният административен съд.

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

Конституционните съдилища имат изключителното правомощие да направят преценка за тежестта на конкуриращите се помежду си понякога лични и обществени интереси. В решенията си конституционните съдилища в определени случаи правят оценка на мерките, предприети от законодателя, който следва да спазва баланс при приемането на нормативни актове, с които определени права биват ограничени. Именно в тази област конституционните съдилища имат изключително важна задача – да определят границите на упражняването на основните права.

Конституцията предвижда в редица свои разпоредби възможността при необходимост упражняването на някои основни права и свободи да бъде ограничавано. Обща конституционна гаранция за упражняване на основните права е тяхната неотменимост (чл. 57, ал. 1), забраната

за злоупотреба с права, както и тяхното упражняване, ако то накърнява права или законни интереси на други (чл. 57, ал. 2). Принципът за неотменимост произлиза от разбирането, че основните права са изначално присъщи и валидни за всяко живо същество, поради което Основният закон изрично очертава допустимите ограничения при упражняването на конституционно гарантираните права.

„Основните права осигуряват определена закриляна област на свобода или равенство; това е обхватът на всяко основно право. Но тази област не е осигурена вечно и безгранично; нейните граници опират до границите на други основни права, от което следва, че заедно с правата "живеят" и техните възможни ограничения. Източник на ограничения могат да са самите основни права, основните права на другите, както и защитените от Конституцията блага." (Решение №15/2010 г. по к.д.№9/2010 г.)

В Тълкувателно решение №14/1992 г. по к.д. №14/1992 г., с което КС е дал тълкуване на чл. 6, ал. 2 от Конституцията (относно равенството на гражданите пред закона и забраната за дискриминация по определени признаци), в мотивите си съдът приема, че *„ограничения на правата и предоставяне на привилегии на определени социални групи е допустимо според Конституцията. Трябва обаче да се подчертае, че във всички тези случаи се касае за обществено необходими ограничения на правата или предоставяне на привилегии на определени групи граждани при запазване приоритета на принципа за равенство на всички граждани пред закона. Точното и изчерпателно посочване на социалните признаци, които са основание за недопускане ограничения на правата и за предоставяне на привилегии, е гаранция срещу необосновано разширяване на основанията за допускане на ограничения на правата на гражданите или на привилегии."*

В Решение №10/2018 г. по к.д.№4/2017 г. Конституционният съд прави разграничение в три групи на основните права от гледна точка на възможността, уредена в Конституцията, упражняването им да бъде ограничавано.

Първата група включва правата, чието упражняване не може да бъде ограничавано на никакво основание (т.нар. абсолютни права) – тези, посочени в чл. 57, ал. 3 от Конституцията, който изчерпателно изброява отделни права, ограничението на които не се допуска и това са: правото на живот и забраната за мъчения, гаранциите за правото на лична свобода, а именно правото на всеки да бъде предаден на съдебната власт в законно определен срок, забраната за осъждане въз основа на самопризнание, презумпцията за невиновност, неприкосновеността на личния живот и свободата на съвестта, мисълта и избора на вероизповедание.

Втората група включва правата, чието упражняване може да бъде временно ограничено само на основанията по чл. 57, ал. 3 от Конституцията – при обявяване на война, на военно или друго извънредно положение. Такива са правата по чл. 30, ал. 4 и 5 (правото на адвокатска защита и правото на всеки да се среща насаме с лицето, което го защитава, както и тайната на техните съобщения), *чл. 35, ал. 2* (правото на всеки български гражданин да се завръща в страната), *чл. 36, ал. 2* (гражданите, за които българският език не е майчин, имат право наред със задължителното изучаване на българския език да изучават и ползват своя език), *чл. 39, ал. 1* (правото на изразяване и разпространяване на мнение чрез слово), *чл. 40, ал. 1* (свобода на печата и другите средства за масова информация), *чл. 41* (правото на търсене, получаване и разпространяване на информация), *чл. 43, ал. 3* (за събрания на закрито не се изисква разрешение) *и др. от Конституцията.*

Третата група включва правата, които могат да бъдат ограничавани и на други основания. Едните от тях са правата, чиито други основания за ограничаване са пряко посочени в Конституцията (например чл. 34, ал. 2 - изключения от правилото за неприкосновеност на съобщенията и другите съобщения се допускат само с разрешение на съдебната власт, когато това се налага за разкриване или предотвратяване на тежки престъпления, *чл. 35, ал. 1, изр. второ* - правото на всеки свободно да избира своето местожителство, да се придвижва по територията на страната и да напуска нейните предели може да се ограничава само със

закон, за защита на националната сигурност, народното здраве и правата и свободите на други граждани, *чл. 37, ал.2* - свободата на съвестта и на вероизповеданието не може да бъде насочена срещу националната сигурност, обществения ред, народното здраве и морала или срещу правата и свободите на други граждани, *чл. 40, ал. 2* - спирането и конфискацията на печатно издание или на друг носител на информация се допускат само въз основа на акт на съдебната власт, когато се накърняват добрите нрави или се съдържат призиви за насилствена промяна на конституционно установения ред, за извършване на престъпление или за насилие над личността; ако в срок от 24 часа не последва конфискация, спирането преустановява действието си, *чл. 41, ал.1, изр. второ* - осъществяването на правото на всеки да търси, получава и разпространява информация не може да бъде насочено срещу правата и доброто име на другите граждани, както и срещу националната сигурност, обществения ред, народното здраве и морала, *чл. 42, ал. 1* - гражданите, навършили 18 години, с изключение на поставените под запрещение и изтърпяващите наказание лишаване от свобода, имат право да избират държавни и местни органи и да участват в допитвания до народа), а другите – са *правата, конкретизацията на чиито основания за ограничаване или ред за упражняване Конституцията предоставя на закона (чл. 25, ал. 6* - условията и редът за придобиване, запазване и загубване на българското гражданство се определят със закон, *чл. 27, ал. 1 и 3* - чужденците, които пребивават в страната на законно основание, не могат да бъдат изгонвани от нея или предавани на друга държава против тяхната воля, освен при условията и по реда, определени със закон; условията и редът за даване на убежище се уреждат със закон, *чл. 30, ал. 2* - никой не може да бъде задържан, подлаган на оглед, обиск или на друго посегателство върху личната му неприкосновеност освен при условията и по реда, определени със закон, *чл. 31, ал. 5* - на лишените от свобода се създават условия за осъществяване на основните им права, които не са ограничени от действието на присъдата, *и др.)*. Общото в регулирането на тази група права е, че допустимото ограничаване на гарантирано от Конституцията право може да стане само със закон и това трябва да се отчита при всеки конкретен случай в практиката.

„Във всеки случай водещ е принципът на чл.57, ал.1, според който основните права са неотменими, така че възможността по чл.57, ал.3 трябва да се прилага ограничително (ограничение на ограничението)." – Решение №7/1996 г. по к.д.№1/1996 г.

Допустимите ограничения най-често са за защита на публичния интерес. Националната сигурност, народното здраве, общественият ред и моралът са ценности, за защитата на които може да бъде ограничавано упражняването на редица права и свободи.

„[П]равото на живот, разбирано като право на опазване на живота и здравето, е конституционно право от висш порядък и предпоставка за пълноценното упражняване на целия комплекс от основни права. В своята практика КС му отрежда доминираща позиция, като приема, че то има приоритет по отношение на другите права, които, за да бъде опазено, е допустимо да бъдат накърнени" (Решение №10/1995 г. по к.д.№8/1995 г.).

В свое Решение №2/2004 г. по к.д.№2/2004 г. КС приема, че *„[п]осочено сред основните права на гражданите, правото на обществено осигуряване е ценност от по-висш порядък, която приоритетно следва да бъде защитена и което налага държавното регулиране и контролът спрямо дейността на пенсионноосигурителните фондове с цел охраняване интересите на осигурените в тях лица. Правото на свободна стопанска инициатива няма абсолютен характер. (Практиката на КС е постоянна – Решение № 6/97 г. по к.д. № 32/96 г., Решение № 12/97 г. по к.д. № 6/97 г., Решение № 5/2000 г. по к.д. № 4/2000 г.)*.

В практика на ЕСПЧ и СЕС, както и в практиката на Конституционния съд, е утвърдено *„начало на еднакво уважение на основните права, което е водещ момент в балансирането между тях"*. Изграждането на някаква йерархия на основните права би противоречало *„на международните договори и на националните конституции на съвременните демократични правови държави, които установяват равноценност на правата и не позволяват перманентност на ограничителните мерки, тъй като това би било равнозначно на тяхното отхвърляне."* (Решение №8/2019 г. по к.д.№4/2019 г.) В заключение в същото свое решение КС е приел,

че *„Конституцията съдържа висши ценности, които не могат да бъдат отхвърляни или променяни в тяхната същност от законодателя, защото те са фундаментът на установения правния ред. Тези висши ценности са интегрална част от конституционните императиви, за съответствие с които следва да се преценяват всички закони. Задача на Конституционния съд е да брани стабилността на правната система, основана на конституционните императиви, и да я предпазва, включително от законодателна заплаха.“*

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

Българският Конституционен съд преценява всеки случай на оспорен закон поотделно и няма в практиката си изработени критерии за яснота, които да прилага при всеки отделен случай, а действа *ad hoc*. Изискването към нормите, за което Съдът следи, е дали те са определени, ясни и недвусмислени, което е изискване на принципа на правовата държава в нейния формален смисъл (в този смисъл Решение №1/2005 г. по к.д.№8/2004 г.; Решение №7/2005 г. по к.д.№1/2005 г.; Решение №4/2014 г. по к.д.№12/2013 г. и др.)

Конституционният съд поставя един стандарт по отношение на неясно формулирани законови разпоредби, когато те засягат права или имат наказателноправен елемент: "*Правовата държава не търпи формулиране на неясни, двусмислени законови разпоредби и тази нетърпимост е особено строга, когато законодателят навлиза в сферата на правата и свободите на индивида. Това в особено висока степен се отнася до правната уредба в областта на наказателната репресия, предвид възприетия общопризнат принцип за личния характер на наказателната отговорност.*" (Решение №12/2016 г. по к.д.№13/2015 г.)

Конституционният съд е последователен в своята позиция, че когато неясностите или неопределеностите на една законова разпоредба са достатъчно сериозни и поставят под съмнение годността ѝ да регулира обществените отношения, които тя е призвана да уреди, то такава законова разпоредба е противоконституционна на основание нарушаване принципа на правовата държава. Но това не става автоматично: "*Очевидно един текст, който е неясен, ще бъде тълкуван, вкл. чрез изправително тълкуване, а ако липсва уредба, непълнотата ще бъде преодоляна по пътя на аналогията на закона или на правото. Както вече стана ясно не всяко противоречие или лоша редакция на дадена разпоредба автоматически означава, че е нарушен принципът на правовата държава. Единствено нарушаването на компонентите, формиращи принципа на правовата държава, които предвид своето значение са закрепени в Конституцията, могат да поставя директно въпроса за неконституционността на съответната законова разпоредба на основание чл. 4, ал. 1 от Конституцията.*" (из Решение №11/2010 г. по к.д.№13/2010 г.)

Той има практика, според която: "*яснотата на законовите норми означава, че те трябва да бъдат достъпни за адресата, да не оставят съмнения относно съдържанието на предоставяни права и свободи, както и на налаганите задължения. Ако правовата държава означава еднакво подчиняване на всички правни субекти на правото, то тогава законът трябва да е в състояние да ръководи поведението на всеки. Следователно законът трябва да бъде формулиран по такъв начин, че хората да са в състояние да разчетат предписания модел на поведение.*" (из Решение №12/2016 г. по к.д.№13/2015 г.)

Посочва също, че законодателят следва да избягва при формулирането на законите създаването на разпоредби, които изначално внасят несигурност и чието прилагане налага тълкуване: "*В правовата държава е недопустимо законодателят да приема норми, които със самото си създаване да залагат противоречивото им или неправилно прилагане. Това влиза в колизия с чл. 4, ал.1 от Конституцията, тъй като „изискването за достъпност и разбираемост, прецизност, недвусмисленост и яснота на законите, а оттук – и за предвидимост, за съответствието им с принципите и ценностите на основния закон, са сред най-съществените негови измерения*“ (из Решение №12/2016 г. по к.д.№13/2015 г.)

20. What is the intensity review of your Court in case of the legitimate aim test?

По отношение на преценката за това дали една цел е легитимна, българският Конституционен съд се въздържа да прави подробна оценка, тъй като пази компетентността на органите, които по Конституция са натоварени с тази преценка. Затова степента на контрол, която той упражнява върху преценката на легитимната цел, е да потвърди или отхвърли, че съответната цел би могла да се счита за легитимна: *"Трайна е практиката на Конституционния съд по въпроса за възможността упражняването на основните права на гражданите да бъде ограничавано в случаите, когато е налице легитимна цел, основанието е закрепено със закон, в рамките на предвиденото в Конституцията ограничение и е спазен принципът на пропорционалност (съразмерност) на преследваната цел (Решение № 20 от 1998 г. по к.д. № 16/1998 г.; Решение № 15 от 2010 г. по к.д. № 9/2010 г.; Решение № 2 от 2011 г. по к.д. № 2/2011 г.; Решение № 7 от 2016 г. по к.д. № 8/2015 г.; Решение № 8 от 2016 г. по к.д. № 9/2015 г.; Решение № 3 от 2019 г. по к.д. № 16/2018 г.). Ограниченията на правото на свободно придвижване по територията на страната и на напускане на нейните предели биха имали легитимна цел по смисъла на чл. 35, ал. 1, изр. второ от Конституцията, ако те са необходими за приоритетна защита на друг конституционно значим интерес, подлежащ на конституционна закрила, при условие че посочената в закона е действително преследваната от законодателя цел и ако в тези случаи ограничението на правата на гражданите е пропорционално на защитавания интерес, подлежащ на конституционна закрила. Той трябва да бъде свързан с националната сигурност, народното здраве и правата и свободите на останалите граждани. Такъв интерес в конкретния случай липсва. По силата на оспорените разпоредби ограничението на основни права се осъществява по отношение на лица, чието поведение не засяга конституционно признатите в чл. 35, ал. 1, изр. второ от Основния закон ценности. Поради това мярката не съставлява подходящо и съразмерно средство за постигане на конституционно оправдана цел."* (из Решение №3/2021 г. по к.д.№11/2020 г.)

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

Българският Конституционен съд прилага преценката за пропорционалност като част от принципа на правовата държава: "*Постулатът за съразмерност присъства осезаемо в практиката на българския Конституционен съд с познато и утвърдено съдържание като мерило за границите на търпима намеса на държавата в пространството на основните права (Решение № 20 от 1998 г. по к. д. № 16 от 1998 г., Решение № 1 от 2002 г. по к. д. № 17/2001 г., Решение № 15 от 2010 г. по к. д. № 9/2010 г., Решение № 2 от 2011 г. по к. д. № 2/2011 г., Решение № 14 от 2014 г. по к. д. № 12/2014 г., Решение № 2 от 2015 г. по к. д. № 8/2014 г. и др.), и е изведен като компонент на принципа на правовата държава.*" (из Решение №7/2019 г. по к.д.№7/2019 г.).

В този смисъл конституционният съд се придържа към класическия тест за пропорционалност: "*... т.е. изброяват се класическите съставки на конституционното изискване за пропорционалност при определяне границите в упражняването на основните права.*" (из Решение №9/2010 г. по к.д.№9/2010 г.)

Българският Конституционен съд прилага три нива на преглед за съответствие с принципа за пропорционалност. Първото ниво на преценка изисква мерките, които са приети от законодателя, да не надхвърлят границите на това, което е подходящо и необходимо, за да бъдат постигнати целите, които са легитимно целени от съответното законодателство. На този етап Конституционният съд прави преценка и на посочената легитимна цел.

На второ ниво Конституционният съд установява дали има избор между възможни мерки, които да се предприемат, и коя от тях е най-малко обременителна. На този етап, за да може да се прецени коя мярка е най-малко обременителната, Съдът ясно и прецизно очертава съдържанието и обхвата на правата, които са или биха могли да бъдат засегнати. Един от примерите за преценката, която прави Съдът на този етап, е: "*Тази неяснота затруднява идентифицирането на интересите, които стоят в основата на правата, както и определянето на степента на тяхното засягане, което има значение при преценка на*

съответствието на дадена ограничителната мярка с принципа на пропорционалност." (из Решение №8/2019 г. по к.д.№4/2019 г.)

На трето място Съдът също така преценява дали причинените неудобства не са непропорционални на преследваните цели - дали, като се тегли чертата, има разумно съотношение между мерки и резултат. Конституционният съд нарича този етап накратко "балансиране": "*Балансирането е важен момент от преценката за съответствие на ограничителната мярка по отношение на едно основно право, в случая – на правото на свобода на изразяване и информация, с основополагащия за съвременните конституционни демокрации принцип на пропорционалност. То позволява да бъдат отчетени конкретните обстоятелства за всеки отделен случай.*" (из Решение №8/2019 г. по к.д.№4/2019 г.). Подобно заключение Съдът достига и в друго свое решение: "*Въпреки че преследваната от закона цел – борба с посочените престъпления в разглежданите случаи от НК, е легитимна цел, то средството, с което законодателят си е послужил, е чуждо на преследваната цел и нейното постигане, доколкото се санкционира лице, чието поведение не е престъпно и затова се явява изцяло непропорционално и несъразмерно.*" (из Решение №12/2021 г. по к.д.№10/2021 г.)

"*Преценката за пропорционалност на едно или друго законодателно разрешение не се прави абстрактно, а отношението на съразмерност между защитаваната цел и прилаганото средство се установява при съпоставянето им. Затова изходът от повдигнатия спор за конституционосъобразността на чл. 10, ал. 1, изречение второ ЗМ (Законът на митниците) зависи от отговора на въпроса: дали въведеното с тази разпоредба ограничение в правото на труд е необходимо, подходящо и съразмерно средство за постигане на целения резултат в една правова държава, от която се очаква да защитава балансирано правата и свободите на всички свои членове (Решение № 2 от 2011 г. по к. д. № 2/2011 г.).*" (из Решение №7/2019 г. по к.д.№7/2019 г.)

И още: "*Съществена за конкретния случай е преценката дали поначало законодателната цел, обусловила приемането на оспорената разпоредба, е легитимна от гледна точка на Основния закон и дали въведеното ограничение е наложително, подходящо и съразмерно правно средство за постигане на визирания в Конституцията резултат в условията на демократичното общество, което балансирано трябва за защитава правата и свободите на индивида и публичния интерес. В настоящия случай е изцяло приложимо посоченото от Конституционния съд в Решение №3/2021 г. по к.д. №11/2020 г., че „ограниченията на свободата на придвижване биха имали легитимна цел по смисъла на посочената конституционна разпоредба, ако те са необходими за приоритетна защита на друг конституционно значим интерес, подлежащ на конституционна закрила, и ако ограничението на правото на гражданина е пропорционално на защитавания интерес, подлежащ на конституционна закрила". Такъв интерес в конкретния случай, предвид изложеното по-горе, не е налице, тъй като, без да осигурява ефективно безопасността на движението по пътищата, разпоредбата цели единствено по-лесното събиране на вземанията от глоби, а този ред е самостоятелно уреден и ако е недостатъчно ефективен, следва да бъде подобрен чрез изменение на съответния нормативен акт. В обобщение следва да се отбележи, че по силата на оспорената разпоредба ограничението на посоченото основно право на гражданите се осъществява по отношение на лица, чието поведение не засяга конституционно признатите в чл. 35, ал. 1, изречение второ от Основния закон ценности – защита на националната сигурност, на народното здраве и на правата и свободите на други граждани. Съдържащото се в чл. 159, ал. 2 ЗДвП ограничение не съставлява подходящо и съразмерно правно средство за постигане на конституционно оправдана цел в условията на демократичното общество, което трябва да защитава балансирано правата и свободите на всички свои членове.*" (из Решение №6/2023 г. по к.д.№7/2023 г.)

22. Does your Court go through every applicable limb of the proportionality test?

Както е видно от отговорите по Въпроси №№20 и 21 - да.

23. Are there cases where your Court accepts that the impugned measure satisfies one or

more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

Тестът за пропорционалност включва преценка дали преследваната цел е конституционосъобразна и дали мерките, с които е предвидено да бъде постигната тази цел, не са прекомерни, и дали не са налични по-щадящи мерки, с които също да бъде постигната целта. Такава проверка налага в повечето случаи да се навлезе в много конкретни подробности относно предвидените мерки и възможните алтернативи. В практиката си Конституционният съд разглежда възможните съществуващи законови разрешения, както и алтернативни възможности за решенията. Вижте практиката по Въпроси №№20 и 21.

24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

Не се наблюдава такава тенденция.

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

В основата на доктрината стои разбирането, че законодателните, изпълнителните и съдебните органи на държавите страни по Конвенцията като цяло действат в съответствие с върховенството на закона и правата на човека и може да се разчита на тяхната преценка и представяне на националната ситуация по дела, отнесени до Страсбург. Доколкото Конституционният съд не е част от съдебната система и по този повод работи абстрактно с правата, то съобразяването с практиката на Съда по правата на човека е на основание, че на тях се гледа като на общоевропейски базисен стандарт, който трябва да се съблюдава: *"Възприетото разбиране от Конституционния съд по отношение на приложимостта на практиката на ЕСПЧ гласи, че „нормите на ЕКПЧ в материята на правата на човека имат общоевропейско и общоцивилизационно значение за правния ред на държавите – страни по ЕКПЧ, и са норми на европейския обществен ред. Ето защо, тълкуването на съответните разпоредби на Конституцията в материята на правата на човека следва да бъде съобразено във възможно най-голяма степен с тълкуването на нормите на ЕКПЧ. Този принцип на конформно тълкуване съответства и на международно признатата от България задължителна юрисдикция на Европейския съд по правата на човека по тълкуването и прилагането на ЕКПЧ" (Решение №2 от 1998 г. по к.д. №15 от 1997 г., също и според Решение №3 от 2011 г. по к.д. №19 от 2010 г., Решение №1 от 2012 г. по к.д. №10 от 2011 г., Решение №11 от 2022 г. по к.д. №3 от 2022 г.)."* (из Решение №14/2022 г. по к.д.№14/2022 г.)

Конституционният съд третира доктрината за "свобода на преценката" като даваща възможност на Конституционния съд да тълкува правата в рамките на предписаното от Конституцията: "*Изложеното дотук позволява да се обобщи, че съобразно отредената му от Конституцията компетентност в настоящата тълкувателна процедура Конституционният съд може и е длъжен единствено да даде задължително тълкуване на Основния закон относно конституционното понятие «пол» съобразно разбирането на конституционния законодател, чиято воля съдът изследва при упражняване на тълкувателното си правомощие.*" (из Решение №15/2021 г. по к.д.№6/2021 г.)

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

България не е била осъждана от ЕСПЧ за нарушение, произтичащо от решение на Конституционния съд.

По-долу са изведени примери, в които са обсъждани решения на Конституционния съд.

European Court of Human Rights (38948/10, 8954/17) - Court (Fourth Section) - Judgment (Merits

and Just Satisfaction) - CASE OF SAKSKOBURGGOTSKI AND CHROBOK v. BULGARIA. Делото се отнася до молби, подадени от бившия цар и министър-председател на България и неговата сестра във връзка с опитите им да получат реституцията на имоти от бившата корона, отнети от държавата след 1946 г. В решение от 1998 г. Конституционният съд обявява, че законът от 1947 г., с който са обявени за държавни царските имоти, е противоконституционен. Впоследствие държавата претендира собствеността върху спорните имоти и в някои случаи производствата приключиха в нейна полза. Националните съдилища заключиха, че имотите не са били частна собственост на царете и че във всеки случай не е имало основание за реституция. Жалбоподателите се позовават основно на член 1 от Протокол № 1 (защита на собствеността) към Конвенцията.

CASE OF A.E. v. BULGARIA (Application no. 53891/20) и CASE OF Y AND OTHERS v. BULGARIA (Application no. 9077/18) По конкретно това дело ЕСПЧ не установява пряка връзка между постановено от Конституционния съд и директно нарушение на права: "*Що се отнася до нератифицирането на Истанбулската конвенция, Съдът има предвид значението на тази конвенция за повишаване на стандарта в областта на защитата на жените от домашно насилие и по този начин и за реализирането на de iure и de facto равенство между жените и мъжете . Следователно отказът да се ратифицира Истанбулската конвенция може да се разглежда като липса на достатъчно внимание към необходимостта да се предостави на жените ефективна защита срещу домашно насилие. Съдът обаче не е подготвен в този случай да направи изводи от отказа на България да ратифицира тази конвенция през 2018 г. Първо, този отказ се случи около седем месеца след убийството на г-жа В. (вж. параграф 71 по-горе). Второ, отказът – както може да се види от мотивите към решението на българския Конституционен съд от юли 2018 г., което се занимава с въпроса дали тази конвенция е съвместима с българската конституция (вж. параграф 73 по-горе) – се основава на съображения, които Съдът намира за несвързани с нежелание да се предостави на жените подходяща правна защита срещу домашно насилие. Във всеки случай не е за Съда, чиято единствена задача съгласно член 19 от Конвенцията е да „осигури спазването на ангажиментите, поети от Високодоговарящите страни в Конвенцията и протоколите към нея", и чиято юрисдикция се простира само до Член 32 § 1, за „въпроси, свързани с тълкуването и прилагането на Конвенцията и протоколите към нея", за да се произнесе, пряко или косвено, дали договаряща държава трябва да ратифицира международен договор, което е изключително политическо решение (вижте параграф 74 по-горе и сравнете, mutatis mutandis, Perinçek, цитирано по-горе, §§ 101-02).*

131. В светлината на гореизложеното Съдът не е убеден, че жалбоподателите са успели да направят prima facie случай на обща и дискриминационна пасивност от страна на българските власти по отношение на домашното насилие, насочено срещу жени."

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

Основните права на гражданите се ползват с най-висока степен на защита. В този смисъл съдът не се самоограничава или въздържа, а преценява във всеки конкретен случай дали Конституцията допуска ограничаване на основно право. Според Конституционния съд единствено съображения от конституционен порядък могат да оправдаят ограничаване на закрепените в Конституцията права на гражданите.

Конституционният съд поставя следния стандарт за защита на основните права на гражданите: "*Последователна е практиката на съда, че ограничаването на основните права е допустимо и възможно само в случай, когато това се налага, за да бъдат съхранени висши конституционни ценности, т.е. опазване основите на конституционния ред, включващи държавния суверенитет, разделението на властите, формата на държавно устройство и държавно управление и др., както и при необходимост да се предотврати засягането на други обществено значими интереси като отбраната и сигурността на страната и осъществяването на принципите и целите на нейната външна политика. Задължително е обаче, съобразно принципа на пропорционалност, това ограничение да е съразмерно на преследваната цел, а не да надхвърля необходимото за нейното постигане*

(Решение № 12 от 1997 г., Решение № 14 от 2014 г. на Конституционния съд). В конкретния случай посочената по-горе цел на оспорения закон, предвидена да се постигне с въведената „несъвместимост"- да бъдат освободени работни места за млади и висококвалифицирани кадри- е неподходяща и несъразмерна мярка, която не е в състояние да оправдае засягането на основни конституционни права на гражданите, каквито са правото на труд и правото на обществено осигуряване." (из Решение №3/2019 г. по к.д.№16/2018 г.)

Конституционният съд е: "*последователен в своята практика, че „[n]оначало ограничаването на едно основно право е допустимо, но само когато това се налага, за да бъдат охранени висши конституционни ценности."* (из Решение №10/2017 г. по к.д.№10/2016 г.)

28. Has your Court have grown more deferential over time?

Ситуацията, създадена през последната година, отчасти заради нестабилността на политическия контекст в България, който се обективира в трудност за формиране и задържане на парламентарно мнозинство и управление от няколко последователни служебни кабинета, се отрази и на естеството на исканията, с които беше сезиран Конституционният съд. Исканията бяха от такова естество, че да се наложи Конституционният съд да затвърди ясно практиката да се въздържа от навлизане в компетентността на политическите власти и зачете конституционно отредената им роля да поставят и ръководят политическия дневен ред на държавата.

29. Does the deferential attitude depend on the case load of your Court?

Въздържанието на Конституционния съд на Република България няма връзка с неговата натовареност. Той гарантира върховенството на Конституцията и като такъв разглежда ограничен кръг дела. Повече за компетентността на съда във Въпрос №1.

В разпоредбата на член 30а от Правилника за организацията на дейността на Конституционния съд е посочено, че *Съдът се произнася с решение в двумесечен срок, освен ако в закона не е предвидено друго*. Конституционният съд може да се произнесе и след този срок, когато е налице голяма правна сложност.

В този смисъл натовареността на съда не влияе под никаква форма на въздържанието на съда.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

Съгласно чл. 22, ал. 1 от Закона за Конституционен съд с *"решението си Съдът се произнася само по направеното искане, той не е ограничен с посоченото основание за несъответствие с Конституцията."*. Той може да проверява и съответно да намери противоконституционност сам на непосочено от сезиралия го субект основание и да основава решенията си на мотиви, които не са предоставени от страните.

В множество свои решения КС изрично е приел, че различието между твърдението за съдържанието на оспорената разпоредба, от което искателите извеждат основанието за противоконституционност, и действителното съдържание на текста не може да има за последица отклоняването на искането като недопустимо. Това би означавало Конституционният съд да откаже да упражни правомощието си по чл. 149, ал. 1, т. 2 от Конституцията. След като съдът може да разгледа искането и на основание, различно от заявеното, per argumentum a fortiori, съдът, дори и да констатира неправилно тълкуване на оспорения текст, допуска искането, за да осъществи контрол за конституционосъобразност (Решение №2/2004 г. по к.д.№2/2004 г.). Практика на Конституционния съд в този смисъл: Решение №3/2012 г. по к.д.№12/2011 г.; Решение №30/1998 г. по к.д.№23/1998 г.; Решение №5/2005 г. по к.д.№10/2004 г.

"Когато обаче по отношение на определен вносител самата Конституция стеснява възможностите за надлежно сезиране на съда, служебната проверка не може да надхвърля тези рамки. Обратният подход би довел до разширяване на изрично стеснените от Основния закон правомощия на сезиращия субект, което неоправдано би го приравнило на субектите, които могат

да сезират Конституционния съд, без да са ограничени в допустимите основания за това." (Решение №11/2018 г. по к.д.№8/2018 г.)

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

С актовете си Конституционният съд на Република България се произнася само по направеното искане. В този смисъл е изричната разпоредба на член 22 от Закона за Конституционен съд и постановените въз основа на нея решения: Решение №13/2012 г. по к.д.№6/2012 г.; Решение №3/2014 г. по к.д.№10/2013 г.; Решение №9/2002 г. по к.д.№15/2002 г; Определение от 15.01.2002 г. по к.д.№17/2001 г. (буква Б); Решение №13/2002 г. по к.д.№17/2002 г.

The Constitutional Court of the Republic of Croatia

ANSWERS TO THE QUESTIONNAIRE FOR THE XIXth CONGRESS OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS

Subject:

„Forms and Limits of Judicial Deference:

The Case of Constitutional Courts"

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Main abbreviations and acronyms

ECtHR – European Court of Human Rights in Strasbourg

ECJ – Court of Justice of the European Union

EU – European Union

CACC - Constitutional Act on the Constitutional Court

Convention – European Convention on Human Right and Fundamental Freedoms

Constitution – Constitution of the Republic of Croatia

Court – Constitutional Court of the Republic of Croatia

Supreme Court – Supreme Court of the Republic of Croatia

I. Non-justiciable questions and deference intensities

1. In your jurisdictions, what is meant by "judicial deference"?

The doctrine of judicial deference *stricto sensu* does not formally apply in Croatian constitutional law. Rather, the scope of action of the Constitutional Court of the Republic of Croatia (the Court) is based on its jurisdiction as defined by the Constitution of Croatia. This in turn means that the Court can hear on the merits only those acts of the legislative and the executive branches of power or ordinary courts that fall within its specific jurisdiction and raise constitutional issues, in which case it exercises its own independent judgment on these matters. In addition to its formally defined jurisdiction, the Court is also guided by the constitutional values enshrined in Article 3 of the Constitution, which allow it to abandon a formal approach in interpreting the Constitution and laws and consequently to move from the realm of the "negative legislator" to that of the "positive legislator"[853].

As for the legislative branch of power, according to the first indent of Article 2(4) of the Croatian Constitution, it enjoys a wide political margin of appreciation in regulating economic, political and social relations, whereby it has been originally limited by and has dealt with core constitutional substantive[854] and procedural[855] requirements. However, since the entry into force of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) in respect of Croatia, the scope of this margin has continued to vary in individual cases depending on the importance of the interests at stake[856] and the application of the proportionality test[857]. Should the legislator or other decision-maker fail to take these considerations into account, the Court may intervene to invalidate political choices through its legal assessments and, where appropriate, override them with its own value judgments on the reasonedness of a law or other regulation[858].

853 Arlović, M., *Međuodnos između pozitivnog i negativnog zakonodavca u Republici Hrvatskoj*, [Mutual Relationship between the Positive and the Negative Legislator in the Republic Croatia], Journal of Law and Social Sciences of the Law Faculty of the University J.J. Strossmayer in Osijek, Vol. 34, nos. 3-4, 2015, p. 246. See also Omejec, J., *O potrebnim promjenama u strukturi hrvatskog ustavnog sudovanja* (prilog reformi ustavnog sudovanja) [**On Necessary Changes in the Structure of the Croatian Constitutional Judiciary** (**a contribution to the constitutional judiciary reform**), Journal "Hrvatsko ustavno sudovanje" [Croatian Constitutional Judiciary] of the Croatian Academy of Sciences and Arts, 2009, p. 31.

854 Such as "classical" fundamental rights, i.e. constitutional rights, freedoms and values, like the rule of law (decision no. U-I-659/1994 of 15 March 2000 and decision no. U-I-722/2009 of 6 April 2011), democratic multi-party political system (decision no. U-I-1203/1999 of 3 February 2000), the right to a legal remedy (decision no. U-I-248/1994of 13 November 1996), the right to work and the right freely to choose and practice an occupation.

855 Type of procedure, required majority for adoption of a law, etc.

856 ECtHR case *Ivinović v. Croatia*, no. 13006/13, judgment of 18 September 2014, § 37.

857 In decision no. U-I-1156/1999 of 26 January 2000 the Court, modelling its approach patently after the ECtHR case-law and relying on the *argumentum a fortiori*, had applied this principle before it was formally incorporated into the Constitution in 2000 (see Barić, S., *The Transformative Role of the Constitutional Court of the Republic of Croatia: From the ex-Yu to the EU*, Analitika - Centre for Social research, Working Paper 6/2016, p. 16) by stating that although "the Constitution explicitly requires the implementation of the principle of proportionality (the proportionality test) under in exceptional circumstances, [...] this principle should be even more so valid under 'ordinary circumstances' in the country".

858 Burazin L., Gardašević Đ. and Krešić M., *Constitutionalization of the Croatian Legal Order*, Collected Papers of Zagreb Faculty of Law, p. 246.

1. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

The Court will delve neither into resolving moral controversies[859] and social, economic[860] and political issues contained in a piece of legislation, nor into examining (the quality of) the chosen legislative model, its structure or purposefulness, thus maintaining its neutrality in relation to these matters[861]. Instead, it will assess whether the legislator has respected core constitutional principles such as equality and equity in making a political decision [862], has pursued legitimate aim(s), has carried out the proportionality test, i.e. has struck a balance between the competing/conflicting fundamental rights and thus fulfilled its role in protecting human rights,[863] and whether there is an objective and reasonable justification for that decision and aims[864].

Furthermore, the Court lacks jurisdiction for defining the general interest underlying a specific measure. Rather, the Court assesses whether the general interest, as defined by other branches of power, concords with constitutional values[865]. The more sensitive the social, economic and political issues at stake, the greater the legislator's margin of appreciation with regard to the measure to be taken[866].

859 In decision no. U-I-60/1991 et al. of 21 February 2017 which concerned the constitutional review of the Act on Health Measures on the Exercise of the Right to the Freedom of Decision-Making on Giving Birth the Court explicitly stated that it had no jurisdiction to resolve the question of "when life begins", which was at the heart of the moral dispute between the pro-life and pro-choice "camps" involved in the matter (§§ 41 and 45.1). Be that as it may, in such cases, where there is little or no common ground between the member states of the Council of Europe, the State is granted a broad margin of appreciation (ECtHR cases *A, B and C v. Ireland* [GC], no. 25579/05, judgment of 16 December 2010, § 233, and *X, Y and Z v. United Kingdom* [GC], no. 21830/93, judgment of 22 April 1997, § 44).

860 Including, in particular, assessing economic strength of the State (decision no. U-I-673/1996 et al. of 21 April 1999, § 2/6).

861 Decision no. U-I-3685/2015 et al. of 4 April 2017, § 33.3; as opposed to the Constitution itself which is not (value-)neutral (decision no. U-VIIR-4640/2014 of 12 August 2014, § 10.1).

862 Also in tax matters, in which the legislator generally enjoys wider discretionary powers (ruling nos. U-I-2012/2007 and U-I-2013/2007 of 17 June 2009).

863 "[I]n light of the dynamic interpretation of the Constitution in accordance with European legal standards" (decision nos. U-I-3941/2015 of 18 April 2023 et al., § 24, and decision no. U-I-448/2009 of 19 July 2012, § 14.).

864 Decisions nos. U-I-6690/2021 and U-I-7062/2021 of 12 April 2022, § 12, and U-I-4019/2019 of 4 May 2021, § 23.

865 Decision nos. U-I-1694/2017 et al. of 2 May 2018 in which the Court held more specifically that its task "is limited to examining whether the restriction of individual rights and freedoms imposed by the legislator by virtue of its particular economic policy measure is excessive" (§ 29.7).

866 Decision no. U-I-242/2023 et al. of 23 May 2023, §§ 31 and 31.1. This corresponds to the well-established ECtHR's case-law according to which:

> "178. A certain margin of appreciation is, in principle, afforded to domestic authorities as regards that assessment; its breadth depends on a number of

Conversely, the Court will not refrain from dealing with any legal issues over which it has jurisdiction, no matter how controversial such an issue may be. This is perhaps best illustrated by the fate of a former Prime Minister who has was tried and convicted on several charges. Indeed, in relation to one of these charges, the Court declared that the recently introduced constitutional non-application of the statute of limitations to the criminal offence of so-called war profiteering only applies *pro futuro*, i.e. on the condition that such offence has not already become time-barred on the date of the adoption of this constitutional provision[867]. By doing so,[868] the Court suffered a considerable setback from the general public, which took a negative attitude towards it, although it thereby upheld the principles of legal certainty, the prohibition of retroactive prosecution of statute-barred criminal offences and the determinability and foreseeability of criminal offences and penal sanctions.

In certain cases the Court may indicate that there is an alternative to the approach chosen by the legislator[869].

Regarding the allocation of scarce resources, the Court, when reviewing the constitutionality of the Special Tax on Salaries, Pensions and Other Receipts Act,[870] concurred with the Government's assessment that "in the conditions of the economic crisis [which lead to the shortfall in state revenues] it was necessary to act on state revenues in order to fulfil all current obligations of the state and to ensure the unhindered performance of all government functions and tasks and the functioning of all government services, so as to adhere to the above provisions of the Constitution and protect the interests of the Republic of Croatia. It was necessary to achieve the above goal in the shortest possible time, taking special care, inter alia, of any additional expenditure that would slow down, reduce or prolong, i.e. prevent the fulfilment of this goal".

One of the few limits that the Court places on the legislator's margin of appreciation of the is the prohibition of adverse effect on the very essence of a right guaranteed by the Constitution[871].

> factors dictated by the particular case. The margin will tend to be relatively narrow where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will also be restricted. Where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider [...].
>
> 179. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is ‚manifestly without reasonable foundation' [...]." (case *Pojatina v. Croatia*, no. 18568/12, judgment of 9 February 2012, § 76.).

867 Decision no. U-III-4149/2014 of 24 July 2015, §§ 123-124 and 142-160.

868 I.e., by stepping in instead of the Supreme Court and the Zagreb County Court both of which had failed to address applicant's complaint raised regarding the statute of limitations and, consequently, to ascertain as to whether the offense in question had been statute-barred.

869 In respect of modelling of constituencies (ruling no. U-I-4780/2014 of 24 September 2015, § 44).

870 Decision no. U-IP-3820/2009 of 17 November 2009.

871 Decision nos. U-I-988/1998 et al. of 17 March 2010, in which the Court characterised the right to pension as a property right within the meaning of Article 1 of Protocol 1 to the Convention (§ 14.3),

2. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

Regarding the historical experience of deference, prior to the constitutional amendments in 2000, Article 101(1) of the Constitution gave the President of the Republic, as the head of the executive branch of power, a discretions to determine the existence of a state of war or an imminent threat to the independence and unity of the Republic and to issue legislative decrees accordingly.[872] In fact, Croatia had a presidential system at that time and was in midst of the Homeland War. These circumstances required that the executive branch, i.e. the President of the Republic as its head, had the authority to swiftly respond to emergencies without having to refer the matter to the legislature first[873].

With the emergence of the disease caused by the Coronavirus (COVID-19), the state of emergency came back into the spotlight. To that effect the Court maintained[874] that it is exclusively within the competence of the Parliament to decide whether to adopt certain measures to combat pandemic/epidemic of the COVID-19 disease in accordance with Article 16 or Article 17[875] of the Constitution. In line with its settled case-law, the Court preserved its authority to review whether the restrictions on constitutional rights imposed by such measures conform to the Constitution, irrespective of which of the two aforementioned articles of the Constitution serves as their legal basis.

It might be generally argued that, if required, the Court will conduct the proportionality test of restriction(s) of both qualified rights and non-qualified rights that are subject to certain exceptions, i.e. of their distinct aspects, whereas this is not the case for absolute rights.

and ruling no. U-I-949/1995 of 23 November 2005, in which it concluded that various limitations of the right of access to a court may undermine the very essence of that right (§ 4).

872 Ruling no. U-I-179/1991 et al. of 24 June 1992. The Court held, *inter alia*, there was no constitutional requirement that the emergency be declared prior to the adoption of such acts. Nevertheless, there is a doctrinal argument to the contrary, namely that there was no grounds for deference since no state of emergency had ever been officially declared (Barić, *ibid.*, p. 13).

873 After the end of the Homeland War and the introduction of the semi-presidential system, the said discretion was restricted to a certain extent by an amendment to Article 101 of the Constitution in 2000. Since then presidential decree-laws must be adopted within the limits set forth by the Parliament or co-signed by the Government depending on the particular emergency. The initial degree of deference of the Court can also be inferred from the submission that initially "the [...] Court was required to show restraint vis-à-vis the ruling politics and its actors" which "role was intended for it by the 1990 Constitution and the 1991 Constitutional Act on the Constitutional Court [(CACC)] which did not even specify the procedure for the election of judges" despite of which "the first composition of the Court was made up of distinguished and experienced judges and university professors" (Ravlić, S., *Ustavni sud i judicijalizacija politike u Hrvatskoj* [Constitutional Court and Judicialisation of Politics in Croatia] in "25 Years of Croatian Independence - How to Proceed Further?", Centre for Democracy and Law Miko Tripalo, 2017, pp. 71-72).

874 Ruling nos. U-I-1372/2020 et al. of 14 September 2020, § 28.

875 Which is triggered in a state of emergency and therefore requires a larger parliamentary majority for the adoption of measures, because restrictions on rights and freedoms may be based on standards that are lower than those adopted under Article 16 of the Constitution, and in no case may these restrictions apply to provisions of the Constitution that guarantee absolute human rights and freedoms.

Changes in social conditions may be a trigger for the Court to review legislation *proprio motu*. This was the case with demographic trends, which had led to different weight been given to votes in different parts of the State, thus undermining the guarantee of equal and universal suffrage enshrined in Article 45 of the Constitution. This occurrence prompted the Court to repeal the Act on Constituencies for the Election of Members of the House of Representatives of the Croatian National Parliament[876].

In regards to the margin of appreciation of ordinary courts and other national authorities the Court resorts to partial deference, which means that it does not substitute its own judgment for that of these authorities in a given case, since the latter are better placed to assess local needs and conditions due to their direct and constant contact with the parties and local communities[877]. In doing so, they are nevertheless obliged to respect constitutional and Convention rights, for the interpretation and application of which the Court remains the ultimate authority at national level. The Court also respects independence conferred to these bodies[878]. In any event, there must be compelling reasons for the Court to make the substitution in question, which would in effect refute the assumption that, in the event of a clash between two protected private interests, the balancing of the competing Convention rights has been exercised in accordance with the criteria laid down in the ECtHR's case law[879].

3. Are there situations when your Court deferred because it had no institutional competence or expertise?

The most prominent constellation in which the Court has deferred due to its lack of competence is the review of the subject-matter of treaties[880]. Namely, in the case of treaties, the role of the Court is limited to assessing the formal constitutionality of the laws on the basis of which these treaties were enacted. Furthermore, the Court lacks jurisdiction to decide on matters that are more peripheral in respect to it its core function of reviewing the constitutionality, such as the review of general acts of local and regional self-government[881], the Rules of Procedure of the Supreme Court[882],

876 Decision nos. U-I-4089/2020 et al. of 7 December 2023, § 45.

877 Decision no. U-III-2000/2021 of 14 September 2023, § 27. This can be subsumed under normative or merits reasons to defer (Arnardóttir, O. M., *Rethinking the Two Margins of Appreciation*, European Constitutional Law Review, Cambridge University Press, 2016, p. 47, and in the same fashion case *Blečić v. Croatia*, no. 59532/00, judgment of 29 July 2004, § 63, where the ECtHR found that "[the Constitutional C]ourt [had] deferred to the Supreme Court's findings, when ruling that the latter's decision did not constitute a violation of the applicant's constitutional rights".

878 So called systemic or non-merits reasons to defer (decision no. U-III-1662/2023, of 28 March 2023, § 13).

879 Decision no. U-III-2602/2019 of 26 October 2021, § 29, and ECtHR cases *Axel Springer AG v. Germany*, no. 39954/08, judgment of 7 February 2021, § 88, and *Von Hannover v. Germany* (No. 2), nos. 40660/08 and 60641/08, judgment of 7 February 2012, § 107.

880 Rulings nos. U-I-825/2001 of 14 January 2004, no. U-I-1583/2000 and U-I-559/2001 of 24 March 2010, and no. U-I-6738/2010 of 11 June 2013. Nevertheless, it has indirectly derived its jurisdiction to review the conformity of statutes with treaties since the incompatibility of the former with provisions of international law constitutes a violation of the rule of law enshrined in Article 3 of the Constitution (decisions nos. U-I-920/1995, U-I-950/1996, U-I-262/1998 and U-I-322/1998 of 15 July 1998 and no. U-I-745/1999 of 8 November 2000).

881 Ruling no. U-II-5157/2005 of 5 March 2012, whereby the exception thereto represent statutes of those territorial units (§ 3).

882 Decision no. U-I-6950/2021 of 12 April 2022, § 16.

the elections of members of local committees' councils[883], etc.

As for deference due to the lack of expertise, there should generally be no such cases, also due to the fact that the Court can request and rely on expertise of experts specialized in the respective fields. However, in cases of emergency in where there is a general lack or scarcity of expert knowledge combined with time pressure, the decision-maker may be afforded a larger margin of appreciation correlating to a higher level of deference[884].

4. Are there cases where your Court deferred because there was a risk of judicial error?

Taking into account the second limb of the previous answer given as to deference due to the lack of expertise as well as the principle *iura novit curia*, there cannot be any cases in which the Court deferred because there was a risk of judicial error. This is all the more true since the Court relies, as required, on the case-law of other reputable constitutional courts such as the German, Austrian and Hungarian[885].

5. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

The best example of a case in which the Court deferred invoking democratic legitimacy of the decision-maker(s) is the one in which it decided[886] on the petition of an association of citizens that challenged the decision of the Ministry of Justice and Public Administration to deny that association's request to participate in the procedure to verify the number and authenticity of signatures given for the proposed referendum[887]. The Court argued that Parliament not only had the authority to verify the number and authenticity of the signatures (and consequently to authorise the competent ministry to run those checks), but also the duty to do so and that a construction to the contrary would amount to denying the Parliament its democratic legitimacy.

6. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

When it comes to economic and social policy measures, the legislator has relatively wide discretionary authority, so that the Court generally respects the choice of legislative policy in this

883 Decision no. U-VIIA-921/2002 of 30 April 2002.

884 See the concurring opinion of judges Šeparović (President of the Court) and Mlinarić in case no. U-II-7149/2021 et al. of 15 February 2022, § 6.

885 Thus, in decision nos. U-I-763/2009 et al. of 30 March 2011, the Court adopted legal determination of the term "dignity" given by the German Federal Constitutional Court (*Bundesverfassungsgericht* (BVerfG)), whereas in decision nos. U-IP-3820/2009 et al. of 17 November 2009 it stated that BVerfG's settled case-law was applicable in the Croatian constitutional order due to "comparable constitutional foundations" and referred to BVerfG's guidelines to be applied for achieving the equality of burdens in tax matters. Stateside courts' teachings may be valuable comparisonwise for answering this question. Namely, according to Chief Justice Marshall in *Cohens v. Virginia* (19 U.S. (6 Wheat.) 264, 404, (1821)): "The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us".

886 Decision no. U-VIIR-3260/2018 of 18 December 2018, § 9.6.

887 The referendum was aimed at cancelling the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.

area[888], as already stated more generally in the answer to question 2. However, in a more specific context of labour matters, the Court has stated that in seeking a fair balance between the interest of workers and employers, which includes sensitive social, economic and political issues, the legislator generally enjoys a broader margin of appreciation in the choice of measures to regulate freedom of association into unions and the protection of the interests of their members[889].

The courts may not call into question discretionary powers of other branches of power when implementing policies as long as these conform to the law[890]. This in turn does not mean that, although the courts in States with codified law are not to decide on matters of policy[891], they do not have a certain leeway to interpret the relevant legislation[892].

Nonetheless, it might be generally onerous to give a clear-cut answer as to whether the courts should be the ones to (also) decide questions of policy since "[as per observation of Justice Traynor of the California Supreme Court] '[w]e should not be misled by the cliché that policy is a matter for the legislature and not for the courts. There is always an area not covered by legislation in which the courts must revise old rules or formulate new ones, and in that process policy is often an appropriate and even a basic consideration'. Even in an area regulated in detail by legislation, policy may be a factor in the court's decisional process; although the policy ascertained and applied may be that which is deemed to have been the legislature's, rather than the court's, conception of the wisest rule. [...] Policy, in the sense of the motivating equitable and practical reasons behind the development of legal principles, plays a constant although usually imperceptible role in the decisional process. Policy, in the sense that justice is the aim and intent of all legal system and procedures, is the spirit vitalizing the letters of the law[893] [...] The fundamental purpose of all legal systems of Western civilization is to provide just determinations for the practical disputes of mankind. [...] To attempt to understand or explain or apply law without reference to this underlying consideration is to miss the essence of legal systems and the judicial process. Although statutes and precedents are indeed the body of the law, 'policy'-or justice- is its soul"[894]. In light of these considerations, one would *a fortiori* have a hard time blackballing the courts as lacking the democratic mandate to decide questions of policy, where they are an organ which has been "established in accordance with the will of the legislature"[895] and as such would have "the legitimacy required in a democratic society to hear the cases of individuals"[896].

7. Does your Court accept a general principle of deference in judging penal philosophy and policies?

The Court generally defers in regards of reviewing penal policies. Most notably, in its deci-

888 Decision nos. U-I-2665/2009 and U-I-3118/2011 of 30 January 2014, § 10.

889 Decision no. U-I-242/2023 of 23 May 2023, § 31.

890 Judgment of the Supreme Court no. I Kž-Us-76/2020-15 of 7 July 2021, § 49, cited in the decision of the Court no. U-III-6870/2021 of 18 April 2023, § 169, by which the constitutional complaint filed against that judgment was dismissed.

891 Such as e.g. organisation of justice system (see decision no. U-III-5684/2013 of 11 May 2017, § 16, and ECtHR cases *Coëme and others v. Belgium,* nos. 32492/96 et al., judgment of 22 June 2000, § 98).

892 Decision nos. U-I-3941/2015 et al. of 18 April 2023, § 22.

893 Tate, A. Jr., *"Policy" in Judicial Decisions*, Louisiana Law Review, Vol. 20, 1959, pp. 65-67.

894 *Ibid*. 74-75. This final conclusion was preceded by a description of a case before Louisiana Court of Appeal, First Circuit, which served as "a rough illustration of a policy-predicated result influencing the legal characterizations to be applied to decision of the case [under Louisiana civil law modelled after French civil law]" (*ibid*., pp. 72-74).

895 ECtHR case *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, judgment of 2 October 2018, § 138.

896 *Loc. cit*.

sion U-I-448/2009 et al. of 19 July 2012,[897] it stated as follows:

"[...] The policy is decided upon by the Croatian Parliament and the Government of the Republic of Croatia, in accordance with their competences, and not by the Constitutional Court. In other words, the legislator independently and freely, within the framework of the Constitution, selects and regulates a normative framework or a legislative model of criminal procedure or substantive law with a view to protecting individual, social and national property from criminal offences depending on the objectives of the criminal policy.

The freedom to choose a normative framework or a legislative model for criminal procedure is based on the legislator's authority to regulate in the appropriate manner the organisation and competence of the police and law enforcement bodies and criminal courts, and their mutual relations.

The Constitutional Court does not have the authority to influence the issues of state criminal policy, including the normative framework or the legislative model of criminal procedure as its legal form. The choice is under the exclusive competence of the legislator in accordance with the Constitution."

However, this discretionary power is limited by the requirements laid down in the Constitution, notably the requirements stemming from the rule of law and the protection of certain other constitutional assets and values[898], as well as by the Convention in respect of the protection of human rights[899].

8. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

Pursuant to Article 25 of the CACC everyone is obliged to submit to the Court, at its request, the documents and information necessary for the conduct of the proceedings. This provision is binding and as such it leaves no room for exceptions. It follows that the government cannot deny disclosure of any information to the Court, not even on the grounds of national security.

Still, the Court has rarely invoked this provision to that end, seeing that constitutional complaints make up for the majority of the caseload involving national security issues (with cases involving the right of foreigners to enter and reside on Croatian territory being the most common) and that, in connection with the latter, ordinary (administrative) courts are also authorised to seek and obtain classified data. Instead, in such proceedings the Court sanctioned findings of ordinary courts on the content of security screenings based on national security considerations[900] and has limited itself to examining whether those courts adhered to the settled case-law and views of principle it has set in respect of proportionality of the limitations of procedural guarantees to the adversarial procedure and the right to a reasoned court decision for the purposes of pursuing the legitimate aim of national security protection.

In the same context (rights of foreigners to enter and reside in the territory of EU Member States) the Court has refrained from defining the term "national security" and the related term "public order"[901] when examining the legitimate aim of the Act on Aliens, as these two concepts are to be

897 In which it reviewed the constitutionality of the Criminal Procedure Act (CPA).

898 Such as legal certainty of the objective legal order, accessibility, predictability and legal certainty of criminal-law norms, respect for the rights of accused person and the victim as well as procedural equality of the parties in criminal proceedings (*ibid.*, § 10, and decision no. U-I-3843/2007, § 14).

899 Report no. U-X-5464/2012 of 12 June 2014, in particular § 12.3.

900 Carried out by the Office of the National Security Council (ONSC).

901 Decision no. U-I-1007/2012 et al. of 24 June 2020, § 16.

construed in line with the meaning attributed to them by the Court of Justice of the European Union (ECJ) in order to preserve their uniform interpretation throughout the EU, i.e. its Member States.

As regards national security concerns in the context of the right to freedom of expression in conjunction with the right of access to information, the Court verifies justification of the interference with these rights including the legitimacy of its purpose, proportionality and necessity in a free and democratic society[902]. In doing so, the Court has so far deferred to the underlying findings of the ONSC as to whether disclosure of the classified data might undermine the values listed in Article 6 of the Data Secrecy Act[903].

In constitutional and statutory review cases, the Court also invoked national security grounds when limiting the Government's margin of appreciation. Namely, it argued that a narrowed down construction of Government's powers when assessing the onset or imminence of an energy crisis was not necessary because it might prevent the Government from making timely decisions in order to address such a crisis[904].

9. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

The Court has two principal instruments at its disposal to deal with Government and legislature being passive when their action is called for, namely, (a) monitoring of the pursuance of constitutionality and legality on the basis of Article 125 of the Constitution in conjunction with Article 104 of the CACC and reporting to the Parliament on noted instances of unconstitutionality or illegality, and (b) *ex officio* initiation of constitutional and statutory review of regulations foreseen in Article 38(2) of the CACC as an extension of the instrument described under (a).

The Court resorted to these instruments, first of which is only authoritative, on a number of occasions, most notably in the cases of:

- the Courts Act, which the Court found not to fully guarantee an effective right to a trial within a reasonable time, albeit this finding was preceded by its inference that a more stringent scrutiny might be achieved only in the context of a specific constitutional complaint[905],

- the Act on Constituencies for the Election of Members of the House of Representatives of the Croatian Parliament[906], and

- the Agriculture Act and several regulations on implementation of certain measures for rural development, where the Court established the lack of legal protection against decisions of the **Paying Agency for Agriculture, Fisheries and Rural Development,** both on the legislative and case-law level[907].

In addition to the instruments mentioned before, the Court has also used other types of proceedings to prompt the legislator and the local self-government to introduce rights-related reforms. For example, while reviewing a petition for a referendum[908] to amend the Constitutional Act

902 Decision U-III-4572/2018 of 10 March 2020, § 6.2.

903 Namely, the independence, integrity and security of Croatia, its foreign relations, defence capability and the intelligence security system, public security, the foundations of its economic and financial system, as well as scientific discoveries, inventions and technologies of great importance for the national security of the State.

904 Decision no. U-II-3321/2023 of 14 November 2023, § 11.

905 Report no. U-X-4090/2020 of 23 February 2021.

906 For further details see the reply provided under Question 3 above.

907 Decisions no. U-I-4220/2020 of 20 October 2020, §§ 12 and 13, no. U-II-359/2015 and U-II-912/2017 of 20 December 2020, §§ 22 and 23, as well as no U-II-2466/2015 of 20 December 2020, §§ 21 and 22.

908 Petitions for popular vote underlie a stricter scrutiny than legislation (decision no.

on the Rights of National Minorities (CARNM), the Court[909] ordered the Vukovar City Council to, *inter alia*, explicitly provide for and regulate in the City's Statute (i) individual rights of members of national minorities to official use of their language and script and (ii) the public-law obligations of the state and public authorities stemming from the Act on the Official Use of the Language and Script of National Minorities, so as not to undermine the very essence of these rights. The Court also obliged the Parliament to adopt amendments to the CARNM that provide a mechanism for dealing with failure/obstruction of local self-government's representative bodies in implementing (the obligations under) this Act.

In another case, the Court obliged the Parliament to modernise the so-called "abortion law" within a certain period of time by prescribing educational and preventive measures to warrant an exceptional character of abortion[910].

Moreover, while reviewing the constitutionality and legality of the Decision on Introducing, Monitoring and Evaluating the Implementation of the Health Education Curriculum in Primary and Secondary Schools the Court expressed its understanding of the best interests of a child and what course of action is to be taken in order to implement educational programmes that should enable the development of each child's personality in his or her best interests. It also provided guidance to the Ministry of Science, Education and Sport on the procedural and substantive regulation of the acceptable framework for the adoption of a new decision that should pursue the indicated substantive objectives[911].

Finally, in the context of constitutional complaint proceedings the Court ordered the Government to adapt, within appropriate time not exceeding five years, the capacities of Zagreb Prison to the requirements of the accommodation of persons deprived of their liberty taking into account the standards of the Council of Europe and the case-law of the ECtHR[912]. It has done so after finding violations of the prohibition of inhuman or degrading treatment under Articles 23 and 25 of the Constitution and Article 3 of the Convention.

II. The decision-maker

10. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

There is no rule of thumb for the level of deference that would depend on whether an act of the Parliament or a decision of the executive power is in issue. In other words, review of decisions adopted by both the legislative and the executive branch is generally based on the same standards, under condition that the former has provided the latter with sufficient basis for interfering with fundamental rights and freedoms. The Court has consistently held that legislator's wide margin of appreciation afforded to it in deciding on public policy goes hand in hand with its responsibility for the purposefulness of the prescribed statutory measures[913].

U-VIIR-1159/2015 of 8 April 2015, § 13.2).

909 Decision no. U-VIIR-4640/2014 of 12 August 2014, § 32.

910 Ruling no. U-I-60/1991 et al. of 21 February 2017, point II of the operative part and § 50.

911 Decision no. U-II-1118/2013 of 22 May 2013. See also Arlović, M., *Ustavnopravni okvir ustavnosudskog aktivizma u Republici Hrvatskoj*, [Constitutional-law Framework of Constitutional Court Activism in the Republic of Croatia], Collected Papers of International Conference "Constitutional Court between Negative Legislator and Positive Activism", Sarajevo, 2014, p. 204 and fn. 93.

912 Decision nos. U-III-4182/2008 and U-III-678/2009 of 17 March 2009, point IV of the operative part and § 23.

913 Ruling no. U-I-1634/2023 of 19 December 2023, § 10.2.

However, past health and energy crises have shown that decisions to be adopted in order to deal with such crises are not inherent to the legislature, but to the executive branch, as the rapid response is required and only a few experts can provide the necessary expertise[914].

The scope of the Court's jurisdiction to review subordinate legislation was narrowed down to some extent with the introduction of the new Administrative Disputes Act in 2012. Namely, this Act conferred on the High Administrative Court the competence to review the legality of general acts of, *inter alia*, legal persons vested with public powers and legal persons providing public services, i.e. general acts of part of the executive branch.

The Court was also willing to accept the executive's previous experience in combating the COVID-19 disease to justify the necessity of the impugned decision for the pursuit of its aim[915].

11. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

When reviewing the constitutionality of laws, the Court takes the legislative history into account[916]. It does so in order to scrutinise legitimacy of the aim pursued by a particular measure, its justification and its proportionality with regard to human rights. In particular, in its decision no. U-I-2826/2023 of 11 July 2023 (§ 13) the Court gave weight to a major opposition party's amendment to the law under review by pointing out the possibility to the effect that, as opposed to other irregularities indicating a nomotechnical error, the rejection of that amendment may be exhibitive of legislator's intention to have certain type of judicial officials[917] barred from running for judicial office in the first instance thus transgressing the right to equal access to any workplace and any office enshrined in Article 54(2) of the Constitution.

12. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

The Court checks a decision for the degree of justification, in particular with regard to objective pursued, i.e. whether sufficient and relevant reasons have been given. This applies all the more in case of the emergency procedure for the adoption of statutes[918]. In particular the Court verifies whether the decision-maker has reasonably and objectively justified a decision, especially when some members of similar or identical groups are treated differently in similar situations[919] and when a limitation of rights and freedoms is at stake.

The verification whether the decision is one that the Court would have reached had it been a decision-maker itself would require the Court to give its value judgments eventually replacing political choice made by the decision-maker, thus transforming itself into a "positive legislator"[920], although the Court would not venture to hypothesize about it being the decision-maker itself.

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914 Decision no. U-II-7149/2021 of 15 February 2022, § 39.2.

915 Decision no. U-II-5571/2021 et al. of 21 December 2021, § 14.

916 In so doing it relies on *travaux préparatoires* of the Parliament, including, *inter alia*, audio records from parliamentary debates, both Government's and opposition's amendments to statutes and reports of the parliamentary committees.

917 That is, state attorneys.

918 Decision nos. U-I-4537/2013 and U-I-4686/2013 of 21 April 2015, § 11, where the Court stated it would not be satisfied with attempts of the Government to justify the decision subsequently in the judicial review procedure.

919 One of the permissible, i.e. objective and reasonable reasons in respect thereto was found to be "redressing of existing inequalities", (decision nos. U-I-2665/2009 and U-I-3118/2011 of 30 January 2014, § 10).

920 See fn. 1 above.

13. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

The Court may exercise its jurisdiction as to the compatibility of a decision or a measure with fundamental rights regardless of how thoroughly it was inquired into in the procedure leading to its adoption. Still, in matters covered by the scope of EU law the Court is known to have deferred to the views and arguments advocated by the ECJ on the compatibility of national legislation with fundamental freedoms[921].

14. Does your Court analyse whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

It is generally beyond Court's purview to analyse the content of a parliamentary debate from the point of view whether the opposing positions were fully represented or whether the focus was on the general merits or implications for rights. Rather, in constitutional review proceedings it examines if the aim pursued by the legislator is justified and, to this end, takes note of the elements of the legislative procedure (legislative history) that lead up to the adoption of a particular law.

Nevertheless, the Court did observe an alarming tendency of an increasing number of laws to be adopted in emergency procedure. Indeed, the Court found that this could undermine the very essence of parliamentarianism, i.e. standards inherent to democratic procedure, in particular the requirement of a broad public debate[922]. Therefore, the adoption of laws by emergency procedure should be an exception and must be justified by specific and conclusive reasons. It does not appear that in doing so the Court has made a distinction between the general merits and the implication for rights.

One of the most illustrative recent cases in this respect[923] is the one in which the Court, relying on the ECtHR's case-law[924], in the context of the review of the constitutionality, repealed the institute of the "authentic interpretation of laws" vested with the Parliament[925] which had admittedly been applied rather rarely until then. The Court found that such interpretations did not meet the requirements of the rule of law, the separation of powers, the autonomy and independence of the judicial branch of power as well as the protection of the right to a fair trial because they were adopted in a "reduced" parliamentary procedure, lacked required procedural safeguards for all political actors, were located in the part of the Parliament's Rules of Procedure that provides for the adoption of its (internal) acts and not laws, and that the Parliament consequently intervened through this institute (retroactively) in pending court proceedings dealing with the law in question.

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921 Decision nos. U-I-3678/2017 et al. of 3 November 2020.

922 Decision no. U-I-3685/2015 et al. of 4 April 2017, § 11.10, and report no. U-X-99/2013 of 23 January 2013, § 6. In addition, failure to adhere to EU law procedural requirements, such as consultation with the European Central Bank under Council Decision 98/415/EC, may also be regarded as a violation of democratic procedure from the constitutional-law aspect (decision no. U-I-3685/2015, § 24.4).

923 Decision no. U-I-4957/2015 11 July 2023.

924 Cases *Stran Greek Refineries and Stratis Andreadis v. Greece*, no. 13427/87, judgment of 9 December 1994, and *Cicero and others v. Italy,* no. 29483/11, judgment of 30 January 2000.

925 And incorporated into its Rules of Procedure having the force of law.

15. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

In proceedings on the constitutionality of a referendum question[926] the Court outlined the general characteristics of the legislative procedure to be followed, namely that it is the one "characterised by an uninterrupted process of alignment and adjustment of the wording of the draft law, which includes a working group of experts as the competent authority for the project, guidelines of the specialised ministry, an interdepartmental exchange of positions on the draft law, discussions in Government bodies, examination by the Legislation Office, public debates and discussions in competent and interested committees of the Croatian Parliament, and a multi-party parliamentary debate"[927].

The Court furthermore noted that laws enacted in procedures which are not in line with the parliamentary spirit do not fulfil the confidence of citizens and at the same time undermine their confidence in democratic institutions. The Court further stated that in Croatia, the procedures for adopting laws must respect the standards inherent to democratic procedures, especially those of a broad public debate, as well as the parliamentary spirit expressed in the constitutional assumptions regarding Croatia as a democratic multi-party State in which the Parliament is the representative body of the citizens and is entitled to exercise legislative power[928].

III. Rights' scope, legality and proportionality

16. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

The Court deferred to the Minister of Health's declaration of the state of epidemic of the COVID-19 disease[929], which in turn relied on the World Health Organisation's declaration of the state of the pandemic of that same disease. Although this national declaration itself did not contain any definition of rights or applied it to the facts, it did serve as the basis for the ensuing (alleged) interference by the executive branch with various rights, such as the right to freedom of assembly, the right to respect for private and family life, the right to health care, etc.

17. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

The degree of deference might hinge on whether absolute or qualified rights are involved. Moreover, as it appears from the answer to the next question, the scrutiny should be stricter in criminal-law cases, where greater demands are made on the clarity and precision of legal norms. In certain instances restrictions of one aspect of rights garner a more reserved approach while being examined than the other, such as the passive aspect of the rights guaranteed by Article 3 of Protocol No. 1 to the Convention (the right to stand as a candidate for election) compared to the active aspect (the

926 The so-called preventive or *a priori* constitutional review which requires a stricter scrutiny of the constitutionality than the so-called repressive or *a posteriori* constitutional review precisely because of the lack of such a parliamentary procedure (decision no. U-VIIR-1158/2015 of 21 April 2015, § 24.2).

927 *Loc. cit*.

928 Report no. U-X-99/2013 of 23 January 2013, §§ 6 and 7.

929 Ruling no. U-II-1800/2021 of 8 June 2021.

right to vote)[930].

18. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the In claris non fit interpretatio canon?

Clarity and precision of a legal norm is in general terms mandated by the principle of legal certainty as a corollary of the rule of law enshrined in Article 3 of the Constitution. Clarity and precision are intended to prevent arbitrariness in the interpretation and application of the law, i.e. to eliminate uncertainty of addressees in respect of the final effect of a statutory provision directly applicable to them and thereby enable them to comply with the legitimately foreseeable effects of the application of the law in a particular case. Only a law that meets these requirements shall be deemed to exhibit the "quality of the law". This requires the Court to look beyond the mere form and to conduct its review with regard to the realities created by the introduction of the relevant norm or statute[931].

A higher standard as to the specificity and precision of law is warranted in criminal law in which, due to the intensity of limitations of human rights and fundamental freedoms, the principle of legality set forth in Article 31(1) of the Constitution comprises four distinct requirements - a written legal norm (*lex scripta*), prohibition of analogy (*lex stricta*), precise legal classification of criminal offences (*lex certa*) and the prohibition of the retroactive effect (*lex praevia*)[932]. The requirement of the "quality of the law" also means that in case of an insufficiently clear provision serving as the legal basis for an offence there must be an interpretation capable of clarifying the meaning of such a provision and resulting from a consistent practice (case-law) of the domestic authorities[933].

19. What is the intensity review of your Court in case of the legitimate aim test?

First and foremost, the Court checks for the very existence of statute's legitimate aim(s)[934]. Thereafter the Court will verify the clarity of the aim in question failing of which might adversely affect the principle of legal certainty and thus on the rule of law[935]. If the Court finds that the proclaimed legitimate aim is not clear, it can intervene, *inter alia*, by instructing the legislator on how to complement such an unclearly defined aim[936]. National legislation enacted to implement the EU legislation is deemed to pursue a legitimate aim[937].

20. What proportionality test employs your Court? Does your Court apply all the stages of the „classic" proportionality test (i.e. suitability, necessity, and proportionality in the narrower sense)?

The exact scope of the test of proportionality depends on the type of procedure and the

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930 Decision no. U-I-1397/2015 of 24 September 2015, § 40, and ECtHR case *Cernea v. Romania*, no. 43609/10, judgment of 27 February 2018, § 37.

931 Decision no. U-I-448/2009 of 19 July 2012, § 72.1.

932 Decision no. U-I-722/2009 of 6 April 2011, § 5.1.

933 ECtHR case Žaja v. Croatia, no. 37462/09, judgment of 4 October 2016, § 103.

934 It is what the Court calls "the test of basic legitimacy of the legislative aim" (decision no. U-I-2826/2023 of 11 July 2023, § 13).

935 Decision nos. U-I-448/2009 et al. of 19 July 2012, §§ 225 and 225.1. Remarkably, on the Europe-wide level the increased intensity of scrutiny by the ECtHR in terms of the legitimate aim test is selective, i.e. not applied to all states, but seems rather concentrated on certain Southern and Eastern European States, due to significant differences in the ratio of legitimate aim violations to all violations (decided against the state) after 2010 between Northern and Western States, on the one hand, and Southern and Eastern States, on the other (see Orcan, N. U., *Legitimate Aims, Illegitimate Aims and the E.Ct.H.R.: Changing Attitudes and Selective Strictness*, University of Bologna Law Review, Vol. 7, 2022, pp. 10 and 11).

936 Decision nos. U-I-448/2009 et al. of 19 July 2012, § 225.1.

937 Decision no. U-I-1007/2012 of 26 June 2020, et al., § 15.

fundamental rights and freedoms at stake[938] before the Court.

In the context of constitutional review, the Court therefore primarily verifies compliance with the "general" principle of proportionality laid down in Article 16(2) of the Constitution, i.e. whether a legitimate aim of a law was pursued in the public/general interest for its adoption and, if so, whether this aim was necessary, appropriate and proportionate *stricto sensu* so as not to place excessive burden on the addressees of the law[939].

As for constitutional complaints, the application of the principle of proportionality is essentially the same and corresponds to that of the ECtHR, which includes these steps: existence of a legitimate aim provided for by the law, adequacy/suitability, necessity and proportionality *stricto sensu*. However, in such proceedings, the Court applies the test of proportionality only in the alternative (if the state of the proceedings allows it), because, in accordance with the principle of subsidiarity, it is primarily the ordinary courts that are called upon to carry out this test.

21. Does your Court go through every applicable limb of the proportionality test?

The Court regularly applies all limbs of the proportionality test when it comes to the restriction(s) of right(s) – the existence of a legitimate aim in public/general interest (provided for by the law), its necessity, appropriateness/suitability and proportionality in the strict sense, i.e. the question of whether an excessive burden has been imposed on the addressees of a measure.

However, the Court does not scrutinize necessity and proportionality of statutory measures of a general nature which further serve as the basis for the adoption of particular decisions/measures by an authorised person or body, which in turn may be the subject of a separate constitutional proceedings[940]. Moreover, the proportionality test to be applied in case of Article 16 of the Constitution appears to be stricter than the one in respect of Article 17 thereof[941]. Finally, in the field of criminal law the scope of the proportionality test to be applied in a particular case may vary[942].

22. Are there cases where your Court accepts that the impugned measures satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

In the case *Dragojević v. Croatia*[943] the ECtHR noted that "every individual under the jurisdiction of the Croatian authorities, when relying on provisions of the relevant domestic law[944], should be con-

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938 It is mostly not applied in cases such as the prohibition of torture or inhumane or degrading treatment or punishment set forth in Article 17(3) of the Constitution and Article 3 of the Convention (see Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 5th ed., p. 12), exception being e.g. conditions of detention.

939 Decisions nos. U-I-3685/2015 et al. of 4 April 2017, § 27, and nos. U-I-1694/2017 et al. of 2 May 2018, § 30.

940 Ruling nos. U-I-1372/2020 et al. of 14 September 2020, § 29.1.

941 Decision and ruling no. U-II-7149/2021 of 15 February 2022, § 39.2.

942 Depending, for example, on the type of detention involved (decision no. U-III-1157/2015 of 23 March 2015, § 28, and ECtHR case *James, Wells and Lee v. United Kingdom,* nos. 25119/09, 57715/09 and 57877/09, judgment of 18 September 2012, § 195.).

943 No. 68955/11, judgment of 15 January 2015, §§ 92 and 96.

944 According to which the investigating judge's order authorising the use of secret surveillance must be in written form and must contain a statement of reasons specifying: information concerning the person in respect of whom the measures are carried out, relevant circumstances justifying the need for secret surveillance measures, the time-limits in which the measures can be carried out – which must be proportionate to the legitimate aim pursued – and the scope of the measures (Article 182(1) of the CPA (Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999,

fident that the powers of secret surveillance will be subjected to prior judicial scrutiny and carried out only on the basis of a detailed judicial order properly stipulating the necessity and proportionality of any such measure". Thereafter that court went on to conclude that "although [issuing of four secret surveillance orders by the investigating judge in respect of the applicant without any actual details having been provided based on the specific facts of the case and particular circumstances indicating a probable cause to believe that the offences in issue had been committed and that the investigation could not be conducted by other, less intrusive, means] apparently conflicted with the requirements of the relevant domestic law and the [...]cited case-law[945] of the Constitutional Court [...], it appears to have been to have been approved through the practice of the Supreme Court and later endorsed by the Constitutional Court" and that the approach under which "a lack of reasons in the secret surveillance orders, contrary to Article 182 § 1 of the [CCP], could be compensated by retrospective specific reasons with regard to the relevant questions at a later stage of the proceedings by the court being requested to exclude the evidence thus obtained from the case file [...] appears to be accepted by the Constitutional Court, which, in its decision no. U-III-2781/2010 of 9 January 2014, [had] held that if the secret surveillance orders did not contain reasons, under certain conditions reasons could be stated in the first-instance judgment or the decision concerning the request for exclusion of unlawfully obtained evidence [...]". Therefore, this inference of the ECtHR could be construed as though the Court have been found not to require at the material time that the necessity and proportionality of such measures be stipulated already in the reasons of surveillance measures.

23. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of judicial deference doctrine?

It may well be argued that judicial deference actually preceded the proportionality review. Indeed, as mentioned above, the Court already exhibited deference in its early decisions[946].

24. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding the deference of your Court in similar cases?

Seeing that "[t]he domestic margin of appreciation [...] goes hand in hand with European supervision"[947], the influence of the ECtHR's jurisprudence on the Court's approach to deference gained momentum over the last two decades both in cases involving the review of constitutionality and in cases initiated by constitutional complaints. To that end, one must also bear in mind that "although the margin of appreciation is usually considered to be a functional methodology of deference applicable to the relationship between the domestic and international jurisdictions it is, at its core, a hybrid or variation of classical institutional norms of constitutional deference afforded by national courts towards other branches of government, in particular the legislature"[948].

Generally speaking, domestic margin of appreciation is the corollary of the principle of subsidiarity, now anchored in Protocol 15 to the Convention, and may be affected by the degree of common ground between the member States of the Council of Europe as well as by the consensus reflected in the specialised international instruments[949]. Likewise, the breadth of margin of appreciation

58/2002, 143/2002 and 62/2003)).

945 Decision no. U-III-4286/2007 of 10 December 2007, and decision no. U-III-857/2008 of 1 October 2008.

946 Compare answers to questions 2 and 3 as well as fns. 5 and 20 above.

947 ECtHR case *Krušković v. Croatia*, 46185/08, judgment of 21 June 2011, § 29.

948 Spano R., *The Future of the European Court of Human Rights - Subsidiarity, Process-Based Review and the Rule of Law*, Human Rights Law Review, Vol. 18, Issue 3, September 2018, p. 490.

949 Case *Demir and Baykara v. Turkey [GC], no.* 34503/97, judgment of 12 November 2008, § 85.

tion is contingent on the proximity of that right's aspect to its kernel and on its absolute or qualified character[950]. However, since the ECtHR may autonomously interpret the Convention and its concepts, divergence may arise in this respect[951].

Moreover, the Court invoked ECtHR's case-law[952] in arriving to the conclusion that the margin of appreciation happens to be narrower if an impugned legislative measure interferes with the very essence of the rights protected by the Constitution and the Convention[953].

As for constitutional complaints proceedings, the understanding of the Convention as the "subconstitutional" or "quasi-constitutional" instrument, which is directly applicable, has enabled individuals to invoke, by means of constitutional complaints, violations of the provisions of the Convention[954]. As a result, the Court's margin of appreciation largely overlaps with that of the ECtHR. For example, in cases involving the deprivation of legal capacity, the Court[955] concurs with the ECtHR that this is a measure that should only be taken in exceptional cases, i.e. as a measure of last resort.

25. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

In case *Project-Trade d.o.o. v. Croatia*[956] the ECtHR found that the impugned Government decision on restructuring and recovery of a commercial bank had never been subject to judicial review[957] to the extent required by Article 6 § 1 of the Convention. Consequently, it held that "inability to effectively challenge the [said decision] before the courts was in breach of the applicant company's right of access to court"[958]. In reaching this conclusion, the ECtHR recalled that the Court had discontinued proceedings for abstract constitutional review of that decision[959] and subsequently quashed several lower courts judgments that had established unconstitutionality of that decision, thereby declaring in fact "the remedy used by the applicant company [as] lack[ing] any prospects of success and [...] therefore ineffective".

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950 Case *Muhammad and Muhammad v. Romania*, no. 80982/12, § 12. See also Spano, *ibid.*, p. 484.

951 ECtHR case *Micallef v. Malta*, no. 17056/06, judgment of 15 October 2009, § 48.

952 Cases *National Union of Rail, Maritime and Transport Workers v. United Kingdom*, no. 31045/10, judgment of 8 April 2004, §§ 86 and 87, and *Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, judgment of 11 January 2006, § 58.

953 In particular, decision U-I-242/2023 of 23 May 2023 which deals with the right to freedom of association.

954 Bearing in mind that contrariety to the provisions of the Convention and its Protocols entails violation of the provisions of the Constitution (decision no. U-I-745/1999 of 8 November 2000, § 8) and that ECtHR's case-law is an integral part of the Convention system (ECtHR case no. 51166/10, *Habulinec and Filipović v. Croatia*, judgment of 4 June 2013, § 30).

955 Decision and ruling nos. U-I-3941/2015 et al. of 18 April 2023, § 69.3, U-III-1380/2014 of 20 May 2015, § 12, U-III-4536/2012 of 14 January 2016, § 8, and U-III-4928/2020 of 18 March 2021, § 11.1.

956 Case no. 1920/14, judgment of 19 November 2020.

957 Admittedly, by a court of full jurisdiction (as per ECtHR), which is not the case with the Court.

958 *Ibid.*, § 73.

959 Due to repealing of its legal basis, namely, the Recovery and Restructuring of Banks Act of 1994.

IV. Other peculiarities

26. How often does the issue of deference arise in human rights cases adjudicated by your Court?

In a substantial number of cases involving constitutional complaints[960] the Court has dismissed the complaints as manifestly ill-founded, i.e. without examining the merits of the case in question.

27. Has your Court grown more deferential over time?

The tendency appears to be quite the opposite - the Court has gradually grown less deferential as was already observed in the answer under question 1. This is mainly due to the stringent requirements set by the Convention and the ECtHR's case-law. A similar trend has also developed at the "internal" level, i.e. in respect of the procedure before the Court where it has had to fill in the gaps created by scarce regulation so as to defer to provisions of the respective procedural law, such as civil, criminal and administrative procedure or even to create new rules for its procedure[961].

28. Does the deferential attitude depend on the case load of your Court?

In general, the caseload is not the reason for the Court to show deference. However, the Court has indicated at one point that the increasing number of cases, especially constitutional complaints, is interfering with its ability to administer justice, and in particular to exercise the core jurisdiction conferred onto it in the form of constitutional and statutory review[962].

29. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

Pursuant to Article 71(1) of the CACC, the Court examines only the objections raised in the constitutional complaint. This has been interpreted in its case-law as meaning that the Court is bound by the facts presented in the constitutional complaint, but not by their legal qualification. Therefore, the Court may base its legal assessment of the objections on a different provision of the Constitution and/or the Convention than the one invoked by the complainant[963]. This approach is in

960 Around 45 % on annual average of decided cases over the course of the last eight years.

961 Ruling no. U-I-252/1995 of 16 May 1995. The legal basis for so doing represents Article 34 of the CACC pursuant to which provisions of other procedural laws are to be sensibly applied. On a different note the Austrian Constitutional Court Act (*Verfassungsgerichtshofgesetz* (VfGG)) defers in its Article 35(1) explicitly to the Austrian Civil Procedure Act (*Zivilprozessordnung*) for all procedural questions not governed by the VfGG (see Hinghofer-Szalkay, S. G., *The Austrian Constitutional Court: Kelsen's Creation and Federalism's Contribution?* in "Les juridictions constitutionnelles suprêmes dans les États fédéraux : créatures et créateurs de fédéralisme", Journal of the University of Liège, Vol. 17, 2017, p. 5.).

962 Report no. U-X-835/2005 of 24 February 2005, § 2. The legislator heeded the Court's warning and, in the same year, relieved it of the workload to some extent by reorganising the procedure for the protection of the right to a trial within reasonable time, which made a substantial part of constitutional complaints. Be that as it may, there have been certain tendencies to interpret the Court's rejection of petitions for constitutional and statutory review on grounds that a statute or other regulation whose review was sought ceased to be in force as its *de facto* deference attributed to the timing related to certain events such as elections.

963 Decisions nos. U-III-3123/2010 and U-III-3124/2010 of 8 December 2016, § 5,

line with the well-established case-law of the ECtHR[964].

30. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has connection with the applicant's situation?

The Court may extend the constitutional review of its own motion to other legal provisions that have not been contested before it. However, in the so-called abstract constitutional review, the particular situation of the applicant is not relevant.

As for constitutional complaints (so-called specific constitutional review), it follows from the answer to the previous question that the Court is not bound by legal characterisation of the objections raised by the applicant in the constitutional complaint. As a result, the Court can also subsume such objections under other provisions of the Constitution and/or the Convention[965].

U-III-3697/2011 of 13 November 2013, § 6, and U-IIIBi-570/2023 of 29 June 2023, § 18.

964 See, *inter alia*, ECtHR case no. 29889/04, *Vanjak v. Croatia*, judgment of 14 January 2010, § 25.

965 See fn. 102.

The Constitutional Tribunal of Spain

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Constitutional cultures vary and the courts' perceptions of their own role in a constitutional democracy affect the intensity of their scrutiny in fundamental rights cases. Many courts profess judicial deference.

Judicial deference is a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters which are perceived to be beyond their expertise or legitimacy to decide. The tool has been employed, most prominently, in human rights cases. This is due to their transcendent quality, capable of cutting across all substantive areas of public decision-making.

It is said that over-deferential attitude threatens the rule of law and separation of powers as much as excessive judicial activism does. The way judges exercise judicial deference is, therefore, a fundamental matter of constitutional principle that concerns the proper role of each branch of government in relation to significant questions of public policy.

The following questions aim to discover the differences in exercising judicial deference by European constitutional courts.

Questionnaire

for the national reports

I. Non-justiciable questions and deference intensities

In order to try and narrow the notion of "judicial deference" it seems appropriate to start with the definition of "deference" by the Merriam Webster dictionary. According to it, we mean by deference the "affected or ingratiating regard for another's wishes", or the "respect and esteem due a superior or an elder". In what is now strictly relevant, both meanings emphasise the existence of a relationship of otherness informed by respect for the position or way of acting of another.

(A) Deference and assessment of evidence

Assuming, for merely explanatory purposes, the traditional consideration of the judgment – a typical, and in any event final decision that takes place after a trial – as a syllogism, it is important to distinguish the deference in the fixing of the facts from that regarding the determination of the law applicable to the case.

The legal system confers on judges the task of deciding on the facts at issue, for which they are granted a variable freedom of assessment of the evidence taken[966]. Thus, for the trial, the sentencing court is granted an apparently wide margin of assessment, since it is for it to "apprais[e] the evidence given during the trial in good conscience" (Art. 741 of the Criminal Procedure Act - CPA). The rules contained in the Law on Civil Procedure (LCP) are more precise. They are supplementary to all other judicial proceedings in the Spanish legal system, by express provision of Article 4 LCP.

a) In respect of the questioning of the procedural parties, statements that do not contradict other evidence and harm the reporting party are assumed to be certain; as for the rest, they are valued "according to the rules of sound criticism" (Art. 316 LCP)

b) Concerning documentary evidence, the LCP itself gives probative value to public

966 In Spanish law, both the facts and certain sources of law may be the subject of evidence. "Facts that are related to the judicial protection intended to be obtained from the proceedings" shall be proved [Art. 281(1) LCP]. Exceptions to this rule include facts that "are absolutely of public and general knowledge" [Art. 281(4) LCP] and facts the parties fully agree with, except where the subject of the proceedings is outside the power of the litigants to decide, e.g. issues on marital status [Art. 281(3) LCP]. With regard to the sources of law, custom and foreign law shall be proved by the party who pleads them [Art. 281(2) LCP].

documents, including foreign documents (Arts. 319 and 323 LCP), as well as to authenticated private documents, in particular e-documents (Art. 326 LCP).

c) Article 348 LEC states that "the Court shall evaluate expert opinions in accordance with the rules of sound criticism".

d) The same expression is used for the assessment of witness testimonies (Art. 376 LCP). In this case, however, the wide judicial discretion is tempered by the fact that the rules of sound criticism must be applied 'taking into account the reason they have given, the circumstances involved and, as appropriate, the objections formulated and the results of the evidence examined on these.

As can be seen, the Spanish procedural legislation ackowledges a broad discretion regarding the value of evidence other than that strictly documentary. Both in the case of strictly personal evidence (testimonies by parties and witnesses), as well as in the case of expert evidence, procedural law shows that the judge will assess them according to the "rules of sound criticism", although in the case of witnesses some nuances are introduced, as has been mentioned above.

Submitting expert evidence to the scrutiny of "critical health" affirms the judge's central position in setting facts and may help explain his or her role in assessing scientific evidence.

In relation to this, it is true, on the one hand, that the freedom of assessment is considerably tempered, but it is not less so that the distinguishing characteristic of 'the scientific side' is fallibility. Scientific evidence will hardly be conclusive for the fixing of the facts that matter in the process – uniquely, in criminal proceedings – but will provide keys to their proper fixation.

It is necessary to move away from the "mythification that many jurists have made of certain scientific evidence"[967], which comes almost to the point of making it – in particular, DNA testing – a legal test that does not admit rebuttal. Admittedly, if, in certain cases of expert opinion, the judge is in fact able to exercise his superordinate position of *peritus peritorum*, this does not seem feasible in the case of scientific or objective expertise. What is not to be translated, inexorably, into an absolute deference to the opinion of the expert who brings the scientific evidence.

- The "strong" deference, based on plausible epistemic reasons, would entail the risk of dispossessing the judge of the power to fix the facts relevant to the case, an essential task in the exercise of the jurisdictional power, as well as the possibility of the parties to challenge the expert's opinion. From the rigorous case-law analysis of the problems posed by scientific evidence, the combination of "non-deference and education" has been sustained, as premises "of a quality evidentiary decision, based on knowledge and not on pure trust in the expert"[968].

- One could also speak of a weak deference, which would avoid the risk of incurring a double deference. This would be the case if the expertise of the person who informs the judge becomes not only a right to intervene in the proceedings but also a reason for enjoying a reinforced presumption of success. A weak presumption relieves the judge of the burden of entering into discussions from within the scientific guidelines that inform the expert's contribution, but enables him to verify that the person who provides the scientific evidence indeed acts from the exercise of his or her professional expertise in the case. The general scientific capacity that enables the expert to intervene in the process (defined by their studies, professional experience, research activity) must be accompanied by the appropriate indications that that capacity has been used,[969]indications that may be subject

967 In this regard, see Ana SÁNCHEZ RUBIO, *La prueba científica en la justicia penal*, Tirant lo Blanch, Valencia, 2019, p. 320, a rigorous monograph on this type of evidence.
968 Marina GASCÓN ABELLÁN, "Conocimientos expertos y deferencia del juez (Apunte para la superación del problema", en *Doxa, Cuadernos de Filosofía del Derecho*, 39 (2016), p. 364.
969 In this regard, see T.R.S. ALLAN, "Human Rights and Judicial Review: A Critique

to scrutiny by the parties, and whose proper assessment forms part of the "rules of sound criticism" that the judge must use when weighing the scientific evidence.

The possibility of reviewing the evidence of the facts under appeal depends on the legal configuration of the means of challenge.

- In the case of ordinary remedies – notably the appeal – their characteristic of being brought before a higher court and the absence of a cognitive limitation beyond that arising from the claims made by the parties and the causes of action, entails the logical possibility of reviewing the categorisation of the facts. Where the appeal is at issue, the limitations relate not to the possibility of reviewing the facts and their legal classification, but to the probatory means that may be used, in particular by requiring full respect for the principles of immediacy, contradiction and orality, from which the obligation to take evidence in the presence of the parties arises where evidence is not strictly documentary[970].

- When it comes to extraordinary remedies, the limitations are not based on a deferential attitude of respect for the assessment of facts made by the lower courts but on the definition that the procedural legislation makes of the means of challenge itself. The purpose of the extraordinary appeal par excellence, the cassation, is to unify the interpretation of the law and only marginally addresses strictly factual questions: in the appeal in cassation in civil matters, the evaluation of the evidence and the establishment of the facts can only make cassation possible when the problem that it raises constitutes "error of fact, patent and immediately verifiable from the proceedings themselves" [Art. 477(5) LCP] and, in criminal matters, for breach of form, when the deficiencies suffered by the disputed sentence materially affect the rights to effective judicial protection and the presumption of innocence [Arts. 851(1) and (2) CPA][971].

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of Due Deference", *Cambridge Law Journal*, vol. 65 (3) (2006), pp. 689 et seq., and Farrah AHMED and Adam PERRY, "Expertise, Deference, and Giving Reasons", *Oxford Student Legal Research Paper Series Paper* 09/2011 October 2011, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1941674.

970 Constitutional case-law established since CCJ 167/2002, of 18 September (ECLI:ES:TC:2002:167), which reminds us that "where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, the European Court of Human Rights has understood that the appeal cannot be resolved without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence, so in such cases the "the appeal court's re-examination of the conviction at first instance ought to have comprised a full rehearing of the applicant and the complainant" (ECtHR judgments of 26 May 1988 – *Ekbatani v. Sweden*, § 32–; 29 October 1991 –*Helmers v. Sweden*, §§ 36, 37 and 39— 29 October 1991 –*Jan-Äke Andersson v. Sweden*, § 28— 29 October 1991 – *Fejde v. Sweden*, § 32). In this regard, the European Court of Human Rights has recently held in its judgment of 27 June 2000 –*Constantinescu v. Romania,* § 54 and 55, 58 and 59 – that "where an appellate court is called upon to examine a case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence, it cannot, as a matter of fair trial , properly determine those issues without a direct assessment of the evidence given in person by the accused – who claims that he has not committed the act alleged to constitute a criminal offence. In the instant case the Court notes that, having quashed the decision to acquit reached at first instance [...], the appellate court should have heard evidence from the applicant, having regard, in particular, to the fact that it was the first court to convict him in proceedings brought to determine a criminal charge against him."This case-law is reiterated in the Judgment of 25 June 2000 –*Tierce and Others v. San Marino*, § 94, 95 and 96 – in which it states that "it is clear that the mere absence of new facts is not sufficient to warrant departing from the principle that appeal hearings should be held in public in the presence of the accused; the most significant factor is the nature of the questions which the appellate court is to address" [Point of Law (PoL) 10, emphasis added].

971 Admittedly, the so-called extraordinary appeal for review mainly addresses the

- In the case of an appeal for constitutional protection *(amparo appeal)* against judicial actions and judgments, Article 44(1)(b) of the Organic Law on the Constitutional Court (OLCC) is careful to establish that, regarding the facts that gave rise to the judicial proceedings in which the constitutional harm may have occurred, "in no case shall the Constitutional Court intervene". This is a legal limit to the Court's knowledge that is not applicable in any other case of *amparo* – regarding decisions, inactivity or a simple de facto procedure of the administration, or regarding acts without the force of law by parliaments – [Constitutional Court Judgment (CCJ) 2/1982, of 29 January, Point of Law (PoL 2, ECLI:ES:TC:1982:2)]. It is understood that "the prohibition on 'investigating' the facts concerns the technical and procedural meaning of this word, which refers to the attribution of jurisdiction. This is not a prohibition on investigating in the sense of researching or analysing the background, which may prove positive and even necessary to substantiate the judgment" (CCJ 46/1982 of 12 July, PoL 1; ECLI:ES:TC:1982:46). Although these first rulings made the Constitutional Court a judicial body detached from the facts of the judicial proceedings in which the violation of the fundamental right is reported, there have been many other subsequent approximations that have placed the lack of investigation about the facts closer to the deference resulting from the institutional position and the constitutional functions that the ordinary judicial bodies carry out: "the appeal for *amparo* is not a new body reviewing the facts affirmed by the judicial bodies: with the exception of cases of unreasonable, arbitrary or unsupported factual descriptions in judicial proceedings, the assessment of the facts rests with the judges and courts in the exercise of their exclusive jurisdiction under Article 117(3) SC. Therefore, the jurisdiction of the Court is limited in this respect, being obliged to start from the facts as defined in the proceedings by means of the contested decisions" (CCJ 26/2018 of 5 March 2018 PoL 2; ECLI:ES:TC:2018:26). Strictly speaking, as those first decisions pointed out, Article 44(1)(b) OLCC does not prohibit the Court from becoming aware of the facts but to replace the judicial assessment with its own by reviewing the judgment of legality that the judges are responsible for and that the Constitutional Court is detached from. The possibility of "unreasonable factual descriptions" represents an alleged violation of the right to effective judicial protection and not a clause opening the constitutional court's jurisdiction to hear the facts.

(B) Deference and Determination of Law

defects occurred in the establishment of the factual basis of the judgment. But it is also true that this means of challenge has a unique nature, which places the problems that may arise in the area of access to jurisdiction and not of access to the appeal (CCJ 69/2022, of 2 June, ECLI:ES:TC:2022:69, in whose Point of Law 3 we are reminded how "since CCJ 124/1984, of 18 December, PoL 6, this court has been stating that 'the appeal for review, seeking the annulment of a judgment which is final and consequently means a derogation from the preclusive principle of *res judicata,* a requirement of legal certainty, is by its very nature an extraordinary remedy, historically associated with the right of grace and subject to strict filing conditions. It cannot be denied that, as an extraordinary remedy, it deals with the same matters of Art. 24 of the Constitution. Its existence is essentially presented as an imperative of justice, configured by Art. 1(1) of the Constitution, together with freedom, equality and political pluralism, as one of the *higher values* advocated by the social and democratic State of Law in which Spain, by virtue thereof, is constituted. It is a requirement of justice, as understood by the constituent lawmakers, closely linked to human dignity and the presumption of innocence, since the factor by which it was neutralised in the judgment for which revision is requested is in turn annulled by subsequent data that restore it in its incolumity. It can be said that, given the assumptions required for its application, such an action, regardless of those already existing in the proceedings for the purpose of discovering the criminal truth and the achievement of the most appropriate judgment, is an inexcusable postulate of justice, since the circumstance that allows recourse to it implies a fact or means of proof that comes later on to show the error of the judgment. And the end of criminal proceedings, as a means of establishing the truth of the facts and their subsequent legal treatment, cannot lead to the preclusive effect of the conviction being prevailed'").

From a very early date, the Spanish Constitutional Court had the opportunity to emphasise the role of the Constitution of 1978 as a meeting point away from all exclusivism. The Spanish Constitution of 29 December 1978 establishes a new legal system whose higher values are, as proclaimed in Art. 1(2) SC, "freedom, justice, equality and political pluralism". In line with this characterisation of the constitutional text not as a political program but as a framework of encounter and coexistence, the Court pointed out in judgment 11/1981, of 8 April (ECLI:ES:TC:1981:11):

"[O]n one level it is necessary to situate political decisions and the political judgment that such decisions merit and on another different level lies the qualification of unconstitutionality, which should be made in the light of extremely rigorous legal criteria. The Constitution is a framework of coincidences sufficiently broad to provide room for political options of extremely different kinds. The work of interpreting the Constitution does not necessarily consist of closing the door on options or variants imposing one of them in an authoritarian manner. This conclusion should only be reached when the unanimous nature of the interpretation is imposed by the play of interpretive criteria. We wish to state that the political and government options are not previously programmed once and for all, so that all that remains to be done in future is implement that previous programme (PoL 7)".

As a complement of this characterisation of the Constitution as "framework of coincidences sufficiently broad to provide room for political options of extremely different kinds", CCJ 194/1989 of 16 November 1989 (ECLI:ES:TC:1989:194) placed the position of the lawmakers and the Court itself in stark contrast: "The lawmakers are free within the limits established by the Constitution to choose the regulation of the right or legal institution that they deem more appropriate to their own political preferences. It is the Constitutional Court which cannot be carried away in this field" (PoL 2). The broad freedom of configuration granted to the lawmakers is consistent with their attribution of a power of action, of interpretation, of an initial text that employs a language with a singularly open texture (the classic expression of H.L.A. Hart). As a correlate of the above: this openness can only be abolished, reducing axiological diversity to a single fair interpretation in truly exceptional cases, since, as the words of our Constitutional Court show, the key to functional interpretation is not to establish the true meaning of the Constitution, but to judge the sustainability of the lawmakers' work[972]. In the words of the Constitutional Court of Spain, "far from evaluating its convenience, its effects, its quality or perfectibility, or its relation to other possible alternatives, we must only consider its constitutional framework when asked to do so (CCJ 55/1996, of 28 March, PoL 6 [ECLI:ES:TC:1996:55]). We should not forget that, as the Court itself pointed out in Judgment 4/1981, of 2 February, PoL 3 (ECLI:ES:TC:1981:4), "in a system of political pluralism (Art. 1 of the Constitution) the function of the Constitutional Court is to set the limits within which the different political options may legitimately arise, since, in general terms, it is clear that the existence of a single option is the negation of pluralism. Once this criterion is applied to the principle of autonomy of municipalities and provinces, it means that the function of the Court is to set limits whose failure to observe would constitute a negation of the principle of autonomy, but within which the various political options can move freely" [recently, CCJ 34/2023, of 18 April, PoL 5(h): ECLI:ES:TC:2023:34].

This case-law is synthesised in CCJ 191/2016, of 15 November, PoL 3(b) (ECLI:ES:TC:2016:191), where a legal reform of the collegial judicial governing body, the General Council of the Judiciary, was pros-

972 James B. THAYER, in his essential "The Origin and Scope of the American Doctrine of Constitutional Law, Harvard Law Review, vol. II (3) (1893), p. 150 (https://archive.org/details/jstor-1322284/page/n1/mode/2up), distinguishes those cases in which a judge must interpret a text in order to unravel its only possible meaning, from those in which it is not a matter of applying the text but of deciding whether "certain acts of another department, officer, or individual are legal or permissible", in which case *"the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not"* (the original text is in italics). In the most recent Spanish legal dogmatics, Pablo de LORA, "Justicia constitucional y deferencia al legislador", in Francisco J. LAPORTA (ed.), *Constitución: problemas filosóficos*, Center for Political and Constitutional Studies, Madrid, 2003, pp. 345 et seq., has defended what he calls a "weak constitutionalism", which we could also call "strong deference", in honour of Thayer's theses, claiming the central role of the lawmakers in the constitutional rule of law.

ecuted. There the Court declares:

[T]he control over the constitutionality of the laws that corresponds to this Court cannot be carried out without recognising and respecting the very wide margin or freedom of configuration that the lawmakers are entitled to in order to pursue their political options; options that, as we said earlier, are not previously programmed in the Constitution once and for all, as if the only thing that could be done in the future were to develop such a previous programme (...).

It is, therefore, a basic principle for the constitutional interpretation that lawmakers do not implement the Constitution, but create law freely within the framework that it offers (CCJ 209/1987 of 22 December, PoL 3). Its obvious corollary is that, in the trial of the law, this Court should not act as its own lawmaker (CCJs 19/1988, of 16 February, PoL 8, and 235/1999, of 20 December, PoL 13), constraining its freedom to dispose wherever the Constitution does not do so unequivocally.

[I]t can be said that the connection of the law to the Constitution is, here too, negative, excluding any constitutional violation, but not imposing a single configuration of the body [it was referring to the General Council of the Judiciary in this case], and terminated in all its extremes (CCJ 49/2008, of 9 April, PoL 16, on the Organic Law of the Constitutional Court).

It also follows – and this is the second consideration – that it is not possible to assess in law a legal reform of the General Council of the Judiciary on the basis of the provisions of the precisely amended legislation, since in everything that has not been predetermined by the Constitution, the lawmakers, regardless of the impeachment that their work may deserve, are free to return to their previous decisions. In no way can it be inferred from the Constitution, in other words, 'the prohibition of modifying the legislation relating to the government of the judiciary at the time and in the sense that the lawmakers understand more appropriate, and always with respect to the rules of material and formal content defined by the body of constitutionality' (CCJ 238/2012, of 13 December, PoL 8)".

(C) Institutional foundation of deference

Unlike where the fixing of the facts relevant to the proceedings is concerned, in determining the law, which includes the interpretation of the prosecution canon, the deference to the legislature does not result from an alleged epistemic primacy but from its institutional position. This institutional deference is not, of course, exhausted with the lawmakers, but, in what is now strictly relevant, it comprises all those who exercise a function directly and expressly assigned by the constituent power[973].

In the specific case of the legislation, the mitigating presumption of constitutionality attributed to the rules coming from the pre-constitutional order is highly significant: "even if it is affirmed that the promulgation of the Constitution has not broken the continuity of the pre-constitutional legal order except with respect to those rules that cannot be interpreted in accordance with the Constitution, it is no less true that the presumption of constitutionality must be qualified by the different object of these pre-constitutional laws" [CCJ 32/1981, of 28 July, PoL 6 (ECLI:ES:TC:1981:32)].

The minimum content of this presumption of constitutionality is specified in the resistance of the

973 The institutional deference to the other public authorities is constant regarding the functioning of the courts, a clear manifestation of respect for the respective sphere of jurisdiction. In this regard, we can use the enlightening words used by the Criminal Chamber of the Supreme Court in its judgment of 15 June 2023 (ECLI:ES:TS:2023:2822): "[W]e move with great doses of caution to respect a power that the Law grants primarily to the court of instance and that we must not assume. It is not a matter of deciding what penalty we would have imposed, but of finding that the penalty imposed by the Court is not illegal, it does not infringe the law. That is why it is *not unusual for us to validate the penalty imposed by remedying, if it is remediable, the motivating deficit; not necessarily because we think that that was the only concretisation adjusted to legality (which can never be affirmed in that ultimate stronghold of discretion), and certainly not because we come to the conviction that this was the penalty that seems to us to be the most weighted; but simply out of deference to that jurisdiction of the Court of First Instance.* A mere disagreement with the penalty is not a ground of appeal unless it can be said that it contradicts legality" (emphasis added).

rule to its hypothetical challenge, in the following terms:

"[T]here is no room for global challenges lacking a sufficiently developed reasoning, since this Court cannot proceed to a necessarily individual and substantive review of the constitutional adjustment since [...] the corresponding decision can only be made by examining the rules whose basic character is disputed one by one and not by formulating a global judgement on the Law. And [...] it is not enough for the appeal to confine itself to making statements of principle and of an abstract nature on a set of jurisdictional titles and then to conclude that the provisions in question do not respond to the case-law previously established, without any argumental link. "When the refinement of the legal system is at stake, it is the appellants' onus not only to open the way for the court to make a decision, but also to collaborate with the court's justice in a detailed assessment of the serious issues involved" [CCJ 43/1996, of 14 March, PoL 5 (ECLI:ES:TC:1996:43)].

Thus, the minimum content of the presumption of constitutionality preserves the law against generic or devoid challenges of any specific argument that conflicts with the constitutional framework. To that minimum content enhanced protection is added when the work of the "democratic lawmakers", who act under the legitimacy granted to them by the Constitution and within the framework predefined by the latter, is concerned.

The expression "democratic legislator" is used for the first time in CCJ 225/1998 of 25 November (ECLI:ES:TC:1998:225), a judgment dismissing an appeal of unconstitutionality raised in connection with a statutory reform (specifically, the challenge of a provision of Organic Law 4/1996 of 30 December 1996 amending the Statute of Autonomy of the Canary Islands, which affected the autonomous electoral system). Well, as has been advanced, when the work of the democratic lawmakers is concerned, the presumption of constitutionality is reinforced, requiring that the contradiction between the law and the Constitution be "clear and patent". In the words of CCJ 112/2006 of 5 April, PoL 19 (ECLI:ES:TC:2006:112): "Our powers in this field [referring to the constitutionality control of the law] must be administered with exquisite caution and total respect to the democratic lawmakers, so that *only when the contradiction between the law and some constitutional norm is clear and obvious we are given a negative judgment of constitutionality, which cannot be based on reasoning so vague that they are hardly apprehensible*" (emphasis added)[974].

In particular, the Constitutional Court has warned that "the control techniques of the arbitrariness of administrative action are not just simply applicable to the democratic lawmakers".

[CCJ 45/2007 of 1 March, PoL 2 (ECLI:ES:TC:2007:45)]. It rejects the extension to constitutional control of the law of the techniques chosen by administrative guaranteeism. In CCJ 19/2012, of February 15, PoL 10 (ECLI:ES:TC:2012:19), the terms in which it is pertinent to judge the conformity of the work of

974 CCJ 49/2008, of April 9 (ECLI:ES:TC:2008:49) is particularly deferential to the work of the democratic lawmakers. This decision is particularly significant since it was intended to solve the challenge of an amendment to the organic law regulating the Constitutional Court itself (amendment specified in Organic Law 6/2007 of 24 May 2007). After raising the question of the scope and intensity of the legislature's review in this case, two were the positions reflected in the judgment: on the one hand, the majority, anchored in the reinforced presumption of constitutionality of the work of the democratic lawmakers, referred to in the text; on the other hand, the one expressed by Judge Javier Delgado Barrio in his dissenting vote, who postulates a reinforced scrutiny: "Ido not believe that it is possible to classify laws into different categories in order to attribute to them a greater or lesser presumption of constitutionality and therefore a different intensity of control. But, if this different intensity were to be accepted, my conclusion would be exactly the opposite of the one stated in the Judgment: the control of the constitutionality of the OLCC must be particularly incisive and deep, banishing any hint of unconstitutionality in the Law that is to be the basis of the judgments on the constitutionality of all other rules and acts of public power with the force of law". In relation to this judgment, see Ignacio TORRES MURO, "La reforma de la Ley Orgánica del Tribunal Constitucional y del Reglamento del Senado, puesta a prueba (SSTC 49/2008, de 9 de abril, y 101/2008, de 24 de julio)". *Revista General de Derecho Constitucional*, no. 6 (2008), pp. 6 et seq.

the democratic lawmakers with the prohibition of arbitrariness [Article 9(3) SC]:

"[W]hen examining a contested rule from the point of view of arbitrariness, our analysis must focus on verifying whether that provision introduces discrimination, since discrimination always entails arbitrariness, or if, although not establishing it, it lacks any rational explanation, which would also obviously mean arbitrariness, without it being relevant to carry out an in-depth analysis of all the possible reasons for the rule and of all its possible consequences [...]. Notwithstanding the above, it must be borne in mind that if the legislative power opts for a legal configuration of a certain matter or sector of the legal system, mere political discrepancy is not enough to brand the rule as arbitrary, confusing what is legitimate arbitrariness with caprice, inconsistency or incoherence that creates inequality or distortion in the legal effects".

The attribution of the rule to the democratic lawmakers also entails a plus in the possibilities of interpretation in accordance with the Constitution of the contested law[975]: "[I]n the case of the democratic legislature, the presumption of constitutionality occupies a prominent place in this trial, so that 'it is a reiterated case-law of this Constitutional Court that, in an abstract process such as the appeal of unconstitutionality, it is necessary to *exhaust all the possibilities of interpreting the provisions in accordance with the Constitution* and to declare only the repeal of those whose incompatibility with it is unquestionable because it is impossible to carry out such interpretation" (CCJ 101/2008 of 24 July, PoL 9, and case-law cited therein)" [CCJ 14/2015, PoL 5 (ECLI:ES:TC:2015:14)].

Needless to say, that presumption of constitutionality cannot include the normative products of the democratic lawmakers outside the Constitution itself. For instance, this has been the case with the Law of the Parliament of Catalonia 20/2017, of 8 September, called "of legal and foundational transience of the Republic". In this case, as noted by CCJ 124/2017, of 8 November, PoL 4(A)(b) (ECLI:ES:TC:2017:124), a rule that not only does not act within constitutional limits, but consciously and voluntarily transgresses them in order to establish a new legal order, cannot rely on that presumption. Regardless of any other considerations, that task cannot benefit from a presumption that the Constitution legitimises its own dismantling:

"The Law now under consideration attempts to be the foundational rule, on a transitional basis, of a legal system absolutely different from the current system relying on the Spanish Constitution and the Statute of Autonomy of Catalonia (SAC), and also, separated and independent from that one in force in Spain, by introducing an giving rise to an unequivocal continuum. This claim entails two relevant consequences, already mentioned in the CCJ 1142017[976], which should now be recalled.

Firstly, this 'Law does not claim for itself a presumption of constitutionality which generally accompanies any democratic legislative task (inter alia, CCJ 34/2013, of 14 February, PoL 9)', since the autonomous Parliament seeks to act, by issuing it, 'not as a body established by the SAC, a rule whose legal nature relies on the Constitution', but as the representative of the people of Catalonia, on whom sovereignty relies [Articles 2 and 29(1)]".

Returning to the central line of our reflections, that is, the affirmed difference between controlling the lawmakers and the administration, we should mention CCJ 107/1996, of 12 June (ECLI:ES:TC:1996:107), for two reasons. First, because it probably represents the most significant example of strong deference in the case-law of the Constitutional Court of Spain. Second, because this deference is built, paradoxically, by using a classic technique to control administrative arbitrariness.

An adequate understanding of this judgment requires starting from its immediate precedent, CCJ 179/1994, of 23 June (ECLI:ES:TC:1994:179), which solved the question of unconstitutionality – specific control – elevated mainly in relation to two core aspects of the regulations governing the official chambers of commerce, industry and navigation approved before the 1978 Constitution (Law of

975 See Eduardo GARCÍA DE ENTERRÍA, *La Constitución como norma y el Tribunal Constitucional*, 1994 Ed., Civitas, Madrid, pp. 95 et seq.

976 CCJ 114/2017, of 17 October (ECLI:ES:TC:2017:114), upheld the appeal of unconstitutionality raised in respect of the Law of the Parliament of Catalonia 19/2017, of 6 September, called "referendum for selfdetermination",

1911 and Decree-Law of 1929): the mandatory affiliation to chambers with the consequent levy of the "chamber resource", a source of financing for these public corporations. The judgment – to which two dissenting opinions were expressed, one of which was signed by three judges – concluded that the Constitution, by proclaiming the fundamental right of association, and as the essential content of it the negative freedom of association, would have repealed that pre-constitutional legislation which required compulsory affiliation to the chambers.

In CCJ 107/1996 the subject-matter of the proceedings – also a matter of unconstitutionality – was constituted by Basic Law 3/1993, of 22 March, on the official chambers of commerce, industry and navigation; more specifically, by those provisions that provided for forced affiliation. On this occasion, the ruling was dismissed, thus confirming -in what is now strictly relevant- the constitutionality of a substantially identical regulation to the one annulled just two years earlier. Different, however, was the methodology used for its examination, which, on the basis of a scarcely affirmed consideration of the post-constitutional character of the law at issue – which was only fleetingly mentioned in PoL 10(C) – stemmed from the identification of a dialectical tension between "the general principle of freedom and the negative freedom of association, on the one hand" and "the constitutional legitimacy of the corporate administration", to which the performance of juridical-public functions is entrusted. This tension "cannot be resolved from one of its ends, but, on the contrary, and as we have been saying, based on a systematic and global interpretation of the constitutional provisions involved; in other words, it can only be resolved from the principle of unity of the Constitution (CCJs 113/1994 and 179/1994)" (PoL 9). In the following line it is pointed out that the Court "has developed a constitutional criterion [...] that complements the Constitution: compulsory membership of corporate bodies is justified, in what matters now, by the characteristics of the purposes of public interest pursued and from which the difficulty of obtaining such ends without recourse to that affiliation must at least result".

The criterion seems to lead to a judgment of proportionality, or at least of necessity. However, the judgment itself warns that it "does not confine itself to inquiring whether or not it is difficult for a certain activity or function to be carried out without compulsory affiliation, but, more deeply, imposes a study on whether it is difficult for the aims pursued, the intended effects to be achieved, to be achieved without compulsory affiliation' (CCJ 107/1996, PoL 9). We may conclude from the foregoing that "the assessment of the facts made by the legislature is thus subject to the Court's review"; a conclusion which is quite significant, since one of the traditional mechanisms for monitoring the exercise of the discretionary powers of the administration lies precisely in the control of the decisive facts as regulated elements.

In addition to the foregoing, the above judgment makes use of another technique to control administrative action: the handling of indeterminate legal concepts in order to find, as far as possible, a -single- just solution[977]:

"[S]ince the difficulty in achieving certain ends is an indeterminate legal concept, the intensity of this control must be qualified by separating those cases in which it is manifestly clear that there is no difficulty in achieving certain effects without the need for compulsory affiliation - the zone of negative certainty of the indeterminate legal concept - and those in which such difficulty may give rise to doubt - the zone of uncertainty or penumbra of the concept -: whereas, in those cases, the Court is fully entitled to destroy the presumption of constitutionality inherent in the law, on the other hand, it must be borne in mind that the 'Constitutional Court cannot establish itself as an absolute judge of that *difficulty*, whose assessment, by the very nature of the matter, must give the legislature a broad discretion' (CCJs 113/1994 and 179/1994)".

It is precisely in applying that canon that the only reference contained in the judgment to the post-constitutional character of the law at issue is made, unlike the rules challenged in the proceedings decided by CCJ 179/1994. Reference made in the following terms: "Thus, the post-constitutional

977 See Fernando SAINZ MORENO, *Conceptos jurídicos indeterminados y discrecionalidad administrativa*, Civitas, Madrid, 1976, and Eduardo GARCÍA DE ENTERRÍA, *La Constitución como norma*, op. cit., pp. 228, citing Ronald Dworkin.

legislature, with an assessment of the socio-economic reality of the time and expressly contemplating the consequences of the 'integration of Spain into the European Community', has come to the conclusion that the tasks entrusted to the Chambers could not be carried out without a forced affiliation" (PoL 10).

By subjecting the law to the prosecution canon set out in PoL 9, the Court shows a generous deference to the legislature:

"The legislature, in the Preamble of the challenged Law, has expressly stated that it is impossible for the functions attributed to the Chambers to be carried out effectively without compulsory affiliation, on the understanding that only with the subjective fullness that derives from it could the aims to whose effectiveness it aspires be obtained. And so this Court, after examining the aims of legal certainty pursued with the compilation of customs and commercial regulatory practices, or aims regarding efficiency in the administrative action, which are sought through the function of advice and suggestion of reforms, or of promotion of foreign competitiveness with the Chamber Plan, finds no basis for concluding that, clearly, such aims could be easily achieved by a plurality of associations or by the Administration itself precisely in the same terms that are expected from Chambers within which interests, experiences and knowledge that encompass the whole circle of protagonists of an important sector of economic life coexist.

We are not, therefore, in the area of negative certainty of the indeterminate legal concept which is the difficulty and within which it is lawful for this Court to destroy the presumption of constitutionality of the law, but in the area of uncertainty or gloom, in which the legislature must be granted a 'broad discretion' (CCJ 113/1994)" (PoL 10).

It states that this way of prosecuting the work of the post-constitutional lawmakers was not exempt from criticism within the Constitutional Court itself. Thus, in the dissenting opinion made by four judges, the use of deference as a method of resolving doubts as to the validity of the legal rule is challenged:

"In the Judgment from which we dissent, what was previously or was intended to be a self-restriction of the Court, which did not, however, prevent the judgment of unconstitutionality then declared, becomes a sort of canon of constitutionality that is nothing more than the principle of deference towards the legislature, which determines an abdication of our own constitutional jurisdiction over the Law. The Constitutional Court - according to this case-law on 'deference' introduced here - will be relieved of its possible task of identifying *prima facie* the 'impossibility or difficulty' of carrying out the purposes and functions entrusted to the Chambers of Commerce without the need to restrict the (negative) freedom of association, since this judgement is simply left to the lawmakers and to their free discretion, which is thus converted into a constitutionally sufficient cause of justification for the restriction or sacrifice of the fundamental right of freedom affected. In short, a kind of *non liquet* on the part of the Court.

This case-law is, in our view, extremely dangerous and expansive if it is projected on other assumptions of economic or social legislation in which constitutionally guaranteed rights are affected. This Court has constitutionally entrusted the guarantee of the fundamental rights of citizens as one of its primary tasks. When any of these rights is affected by a law, regardless of the justification that the lawmakers wished to give to it, the control by the Constitutional Court is inexcusable, because 'nothing that concerns the exercise by citizens of the rights that the Constitution grants them, can never be considered alien to this Court' (CCJ 26/1981, PoL 14).

In the present case, the case-law affirmed in the Judgment ultimately leaves to the free discretion of the Lawmakers the delimitation of the scope of exercise not only of a fundamental right such as freedom of association in its aspect of negative freedom (art. 22.1 C.E.), whose possibilities of restriction and even sacrifice by the Lawmakers are greatly expanded, but also of another equally sensitive right, which is the right to property, also constitutionally guaranteed against unjustified intrusions by

the Lawmakers (Arts. 33 and 31 SC).

[…]

Apart from the core argument described above, the legal grounds of [the] Judgment do not contain an explanation, not even a brief one, of the purposes and functions of public interest of the Chambers of Commerce in the new Law of 1993 which, by comparison with their previous legal regime that stems from the Law of 1911 and subsequent complementary legislation, would allow, in the light of the case-law maintained by the Constitutional Court in this respect, the conclusion to be drawn that the 'new' functions and aims entrusted to these Corporations serve to justify constitutionally both the obligatory or compulsory affiliation to them, as well as the duty, in addition, to the obligation, by the law, of the Chambers of Commerce to be compulsory or compulsory, to reach the conclusion that the 'new' functions and purposes entrusted to these Corporations serve to constitutionally justify both the obligatory or compulsory affiliation to them, as well as the duty, in addition, to pay a real tax (the so-called 'chamber resource') which is imposed (with an applicability that is clearly excessive and disproportionate in relation to the interests whose pursuit and representation is entrusted to the Chambers) 'on natural or legal persons, national or foreign, exercising commercial, industrial or shipping activities on national territory'.

[…]

[T]he lack of argumentation in the Judgment -with the exception of the brief considerations dedicated in PoL 8(B), to the functions of the Chambers in relation to the promotion of foreign trade and professional training- regarding a comparative examination of the functions of the Chambers in the legislation prior to the current Law of 1993 challenged in these constitutional proceedings is simply explained by the fact that from this examination it can only be concluded that, from the constitutional perspective, there is no substantial difference whatsoever in the functions and purposes of the Chambers of the new Law with respect to those of the previous regime (already examined by the Court in CCJ 179/1994) that would allow the constitutionality of the compulsory affiliation to be based on them".

The length of the quotation is excused by the clarity and rigour of the presentation of the critical arguments with the thesis on which the judgment is based, as well as for the fact of highlighting the richness of the deliberation taken in this case within the Constitutional Court[978]. A deliberation that contradicted a strong deference, which opens a broad discretion granted to the freedom of the legislature, and a weak deference, which leads to the prosecution of the reasons put forward by the legislature without the institutional courtesy due to it being transformed into the justification of its rule.

1. In your jurisdictions, what is meant by "judicial Deference"?

According to the previous pages we can affirm that Spanish law participates in the general notion of *judicial deference*. So the deferential judge will be the one who resolves bearing in mind the plurality of the legal system: if the rules are *grounds for action* (practical reasons), in the well-known characterisation of Joseph RAZ[979], the deferential judge will be very interested in ascertaining and counterbalancing the possible claims of legitimacy concurrent in the case. It will attend to the reasons put forward by the lawmakers, as public power directly placed by the Constitution for the realisation of the fundamental determinations, either to give them a weighting sense (weak deference), or to

978 Among the commentaries on this judgement, those by Joaquín TORNOS MAS, "La sentencia del Tribunal Constitucional 107/1996, de 12 de junio, relativa a las Cámaras de Comercio, Industria y Navegación", *Revista Jurídica de Catalunya*, no. 1 (1997), pp. 79 et seq., should now be highlighted, and Luis María CAZORLA PRIETO, "La constitucionalidad de la adscripción obligatoria a las cámaras de comercio, industria y navegación o el principio de la deferencia hacia el legislador (Comentario a la sentencia del Tribunal Constitucional 107/1996, de 12 de junio de 1996)", *Actualidad Jurídica Aranzadi*, no. 260 (year VI), 12 September 1996.

979 Joseph RAZ, Razón práctica y normas, translated by Juan Ruiz Manero, Centro de Estudios Constitucionales, Madrid, 1991.

recognise them an unconditioned authoritative preeminence (strong deference)[980]. For if the rules are grounds for action, they are also reasons for justifying the same action.

In recent times, Pedro da SILVA MOREIRA has recalled to what extent the best defence of the judicial guarantee of the Constitution has been built from the awareness of the risks involved, in what has come to be called the "counter majority objection"[981]. Thus, Hans KELSEN, in his indispensable *La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)* of 1928, warned of the irrepressible extension of jurisdiction in the interpretation of supra-positive norms or principles:

"[W]hen, as is sometimes the case, the Constitution itself refers to these principles and invokes the ideals of equity, justice, freedom, equality, morality, etc., without specifying at all the content of these formulas. If underneath these expressions lies nothing more than the usual political ideology with which every legal order tries to endow itself, the invocation of equity, freedom, equality, justice, morality, etc., only means, in the absence of a greater precision of these values, that the legislature and the law enforcement bodies are empowered to discretionally fill the space given to them by the Constitution and the law.

The conceptions of justice, freedom, equality, morality, etc., differ in such a way that, if positive law does not enshrine any of them, any law rule can be justified by one of these competing conceptions. [...] These formulas generally lack great significance; they add nothing to the actual state of law.

It is precisely in the field of constitutional law that the use of these formulas may be most at risk. Thus, the provisions of the Constitution that invite the legislature to conform to the values of justice, equity, equality, freedom, morality, etc., could be interpreted as guidelines regarding the content of laws. Evidently by mistake, since this would be the case only when the Constitution established a precise meaning, when it was the Constitution itself that provided these formulas with an objective criterion. [...] it would not be impossible for a constitutional court called to decide on the constitutionality of a law to nullify it by considering it unjust, with Justice being a constitutional principle that that same court is called upon to apply. The power of such a court would be unbearable. The conception of the justice of the majority of the judges of that court could be in complete contradiction with the conception of the majority of the population and, therefore, with that of the majority of Parliament that has voted on the law. It is obvious that the Constitution did not intend, by using a word as vague and misleading as that of justice or any other similar word, to make the fate of any law voted by Parliament depend on the goodwill of a bench of judges composed in a more or less arbitrary manner, from the political point of view, such as the constitutional court. To avoid such a shift of power - which the Constitution does not want and which, politically, is completely counter-indicated - from Parliament to a body which is alien to it and which can become the representative of political forces diametrically different from those expressed in Parliament, the Constitution must, especially if it creates a Constitutional Court, refrain from such phraseology, and if it wishes to establish principles concerning the content of laws, formulate them as precisely as possible[982]".

It was precisely on the occasion of the review of a law in particularly sensitive matters and prone to these supra-positive assessments, such as abortion, that the Spanish Constitutional Court had to face considerable difficulties in carrying out its function.

Thus, CCJ 53/1985, of 11 April (ECLI:ES:TC:1985:53), prosecuted the constitutionality of an amendment of the Criminal Code that decriminalised abortion in certain cases (system of indications). The judgment declared the constitutionality of the core aspects of the contested law, but found it con-

980 Alison L. YOUNG, "In Defense of Due Deference", *The Modern Law Review* (2009) 72(4), pp. 554 et seq., echoes the distinction made by David Dyzenhaus between deference as respect and deference as submission.

981 Pedro da SILVA MOREIRA, *Deferencia al legislador: la vinculación del juez a la ley en el Estado constitucional*, Centro de Estudios Políticos y Constitucionales, Madrid, 2019.

982 Hans KELSEN, "La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)", *Révue du Droit Public et de la Science Politique en France et à l'Étranger*, April-June 1928, pp. 240 et seq.

trary to the Constitution in relation to guarantees in cases of therapeutic and eugenic abortion (PoL 12 of the judgment, to which the judgment expressly refers). It was precisely this what led to several concurring and dissenting opinions. All these opinions agree in criticising the judgment for overreaching the exercise of judicial power.

The reproaches can be grouped into two large blocks, even if a close connection is appreciated between the two.

On the one hand, it is worth mentioning the criticisms of the oblivion of the role and limits that the Constitutional Court has to play and respect as a "negative legislature". Thus, Judge Jerónimo Arozamena Sierra recalls that "what the Court is not permitted to do is to establish amendments or additions to the contested text or to establish or add other precepts". On the other hand, Judges Ángel Latorre Segura and Manuel Díez de Velasco understand that the Court would have assumed "the function of introducing amendments to the draft laws subjected to its opinion" (in this case, by means of a preliminary appeal of unconstitutionality, which perhaps led to the overreach criticised). "Such a function exceeds the already extensive remit which, not only the Constitution but also the OLCC assign to this Constitutional Court, whose actions cannot approximate to that of a "third Chamber" without causing a dangerous imbalance in our legal and political system by encroaching on powers which are the prerogative of legislature".

On the other hand, different judges questioned the very construction of the trial canon. For instance, Judge Francisco Tomás y Valiente began by recognising that "I have never been an enthusiast of the philosophy of values", and added that "perhaps this is why I do not share (and here my differences begin) the numerous axiological considerations included in findings 3, 4 and 5. Apart from the inaccuracies or unsteady terminology they contain and which would be too protracted and pointless to refer to here, I do not find a legal-constitutional point, a single pertinent one, to state as the statement effectively does, that human life 'is a higher value of the constitutional legal system' (point of law 3) or a 'fundamental value' (point of law 5) or a 'central value' (point of law 9). That the concept of person is the support and prius logico of all rights seems clear to me and I maintain as such herein. However, this statement does not authorise dangerous axiological hierarchical structuring, which, furthermore, has nothing to do with the text of the Constitution, where in fact in its Art. 1(1) it states that the highest values of the legal system are freedom, justice, equality and political pluralism: These and only these. In view of the abstract considerations on life as a value, it is a striking fact that the Judgment does not formulate any comments on the first of those values considered as higher by the Constitution, namely, Freedom. It is perhaps as a result of this omission, which I have not forgotten, that scant attention is paid to the rights of freedom of pregnant women." Also, Judge Francisco Rubio Llorente said:

"Interpreters of the Constitution cannot make a separate consideration from the precepts of the Constitution of the value or values which, in their opinion, are "enshrined" in such precepts, in order to subsequently deduce from them now, as pure abstractions, legislative obligations which are not supported by any particular constitutional text. This is not even a question of making value case-law but simply and smoothly supplanting legislature, or perhaps going even further and superseding constitutional power. The values which inspire a particular precept may server in the best of cases to interpret that precept, not to deduce from it obligations (nothing less than the legislature, representative of the people!) which the precept in some way imposes. Through this channel it is clear that the Constitutional Court contrasting the Laws with the abstract values that the Constitution effectively proclaims (which obviously do not include that of life, as life is something more than a mere 'legal value') invalidating any law on the grounds that it is incompatible with one's one sentiment of freedom, equality, justice or political pluralism. The regulatory planning of constitutionally enshrined values corresponds to the legislature not to the Judge".

In this same vein, Judge Luis Díez-Picazo stressed that "unconstitutionality as contradiction of a law with a Constitutional mandate should result from an immediate contrast between the two texts. It could be admitted that it follows an intermediate constructive regulation established by the interpreter. Conversely, an unlimited or too remote extension of the constructive rules deriving from the

Constitution appear to me to be very difficult in order to claim unconstitutionality through contradiction of the law judged herein in with the last of the constructive deductions."

It is not surprising that in the recent CCJ 44/2023 of 9 May (ECLI:ES:TC:2023:44), dismissing the appeal of unconstitutionality filed against Organic Law 2/2010 of 3 March 2010, which introduced the system of deadlines for the voluntary termination of pregnancy, similar methodological problems have been raised again. In this case, three Judges (Enríquez Sancho, Arnaldo Alcubilla and Tolosa Tribiño) claim, in their dissenting opinion, that "the judgment from which we dissent does not limit itself to analysing whether the specific regulatory option set out by the legislator in the legal text subject to trial respects or exceeds the constitutional limits, but rather, exceeding the scope and limits of the control of constitutionality that corresponds to this Court, recognises a new fundamental right, which it identifies as "a woman's right to self-determination regarding the termination of pregnancy", anchored in Article 15 SC [in conjunction with Art. 1(1) SC and Art. 10(1) SC], from which follows the constitutional duty of the public authorities (in particular, the legislature) to guarantee its effectiveness, which is nothing more than a way of affirming the benefit nature of this new right constructed completely anew by the judgement. With this, under the pretext of the alleged "evolutionary interpretation" of the Constitution, a step further is taken than the aforementioned CCJ 198/2012, which at no time went so far as to deduce an alleged fundamental right of persons of the same sex to contract marriage from the constitutional text". They subsequently declare:

"Let's remember once again that in our legal system, a fundamental right is a right created by the Constitution (a constitutional right) and therefore binding on all public authorities. In other words, a right which, by virtue of its definition in the Constitution, the supreme rule of the legal system, is imposed even on the legislature, and certainly also on the supreme interpreter of the Constitution. Therefore, it is not for the Constitutional Court to rewrite the Constitution in order to create, discover or deduce new fundamental rights, replacing the permanent constituent power. Social realities may even lead to the recognition of new fundamental rights, but constitutional reform is foreseen for this purpose. When examining a law, the Constitutional Court must limit itself to examining whether the specific legislative option embodied in the contested law respects or contradicts the Constitution. Any other operation exceeds the scope and limits of the constitutional review of the Court. Moreover, it should be noted that when this Court reviews the constitutionality of laws and reaches the conclusion that the legislator has not violated the Constitution, its function is not to assess and declare that the law in question is "constitutional", but rather that it is "not unconstitutional'".

The review of the dissenting opinions expressed in these two judgments has no other purpose than to illustrate the existence within the Spanish Constitutional Court of a constant interest in the basis and limits of its judicial function.

2. *Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (e.g. questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?*

For purely expository purposes, we can differentiate the normative limits to the activity of the Court and those derived from the exclusive use of the legal method.

- As has already been stated above, the judicial role played by the Constitutional Court entails the formulation of a judgment on the adequacy of the act of public authority with the constitutional rule that serves as a parameter of validity. In the case of the Spanish Constitutional Court, its jurisdiction extends essentially to the following cases:

(a) Control of the constitutionality of the law through abstract control (appeal of unconstitutionality) or specific control (incidental question of unconstitutionality that can be

raised by judicial bodies when they doubt the conformity with the Constitution of the rule with the force of law that they must apply to the case and on whose validity depends the final decision they are called upon to adopt).

(b) Protection of the fundamental rights of citizens through *amparo* appeals against acts, omissions or simple actions without legal warrant, judicial resolutions and acts without the force of law of the existing parliaments in Spain.

(c) Constitutional conflicts, which can be either positive (when both parties claim for themselves the ownership and exercise of jurisdiction, in a true *vindicatio potestatis)* or negative; conflicts of attributions between constitutional bodies (Government, General Council of the Judiciary, Congress and Senate) and conflicts of protection of local or regional autonomy.

The scenario is completed with the process of challenging provisions without the force of law and decisions of the Autonomous Communities, which completes the system of legality controls -*lato sensu*-[983] and the prior declaration on the constitutionality of international treaties.

- In all matters of its jurisdiction, the Constitutional Court is called upon to carry out a strict legal check, or to bring the rule, decision or act subject to examination to the enabling rule. In this respect, it is worth recalling that the Spanish Constitutional Court had the opportunity to warn early on that the controls of legality or normativity are specific controls, which can only be exercised within the scope of the assigned jurisdiction and which must safeguard the autonomy of the subject or subjects that issued the controversial rule or decision; on the contrary, the controls of opportunity, due to their generic and indeterminate nature, place the controlled subject "in a position of subordination or quasi-hierarchical dependence" with respect to the one that controls them [CCJ 4/1981, of 2 February, PoL 3 (ECLI:ES:TC:1981:4)].

Most recently, in CCJ 237/2012 of 13 December (ECLI:ES:TC:2012:237), concerning the modification of the National Hydrological Plan, the Court stated:

"Once again we must emphasise that the canons to which we are to abide in the exercise of our jurisdictional function are not so lax as to allow an assessment in terms of political opportunity or technical goodness of the decisions submitted to us. Rather, we are obliged to exercise control over those decisions that does not entail the supplanting of functions assigned to other bodies and which guarantees, at the same time, the proper balance of powers. In the case at hand, the service of this function requires that we adhere to an 'external control' of the rationality of the measures in question and not to a strict control of quality, perhaps of perfection, nor to a comparison between alternatives when all of them have a place, as is the case here, in the constitutional text" (PoL 12).

Thus, it is not a question of identifying areas that are insurmountable for constitutional jurisdiction, but rather the subjection of the Court's activity to the formulation of trials of strict legality, that is, the carrying out of an *external review* of the rationality of the contested decision from the perspective of the preservation of the order of distribution of powers [CCJ 63/2023, of 24 May (ECLI:ES:TC:2023:63)]. The use of a rationality canon represents a clear example of deference or polite respect for the func-

983 The Spanish Constitution refers separately to the control "by the Constitutional Court [of] the constitutionality" of autonomous provisions with the force of law [Art. 153 (a)], a control that is complemented by the generic provision of the appeal of unconstitutionality with respect to laws and regulatory provisions with the force of law [Art. 161(1)(a)], and to the control of "the provisions and decisions adopted by the Autonomous Communities" [Art. 161(2) SC]. The Organic Law has also conferred on the Constitutional Court the jurisdiction to judge the constitutionality of *acts* with the force or value of law, which allows for a legal control of both the declarations of states of emergency and any extensions that may be granted [in this regard, CCJ 148/2021, of 14 July, PoL 2 (ECLI:ES:TC:2021:2021)], and the authorisation that may be granted by the Senate for the application of measures of State coercion adopted under Article 155 SC [CCJ 89/2019, of 2 July, PoL 2 (b) (ECLI:ES:TC:2019:89)].

tions performed by other public authorities, whose decisions are not of a precautionary nature, in need of confirmation by the Constitutional Court, but definitive when they are formulated within the scope of their respective powers.

The general application of an external control of rationality, which excludes the substitution of one's own judgement for that of others under the guise of an alleged epistemic superiority or in search of the constitutional optimum, represents the common form of constitutional judgment of the decisions of the public authorities.[984]. It is understood that this minimum does not exhaust the possibilities of constitutional scrutiny and does not exclude the formulation, where appropriate, of proportionality or weighting judgments between constitutional rights and values concurrent in the case.

3. *Are there factors to determine when and how your Court should defer (e.g. the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; if the subject-matter of the case involves changing social conditions and attitudes)?*

The polite respect shown by the Constitutional Court towards other public authorities responds to the scrupulous observance of the institutional framework in which one and the other carry out their functions and not to the incidence of extra-legal reasons or factual conditioning factors. When the legislature does not even empower the Court to review the decisions adopted by other bodies - as is the case with the establishment of the facts which are the object of the *amparo* process ex Art. 44(1)(b) OLCC, already mentioned - it is not even possible to speak of deference, but rather, more precisely, of an absence of jurisdiction.

In the question we are asked, factors of very different nature are listed. The culture and conditions of the country, as well as historical experiences, can be considered both explanatory reasons for the disputed norm, and even for the decision finally taken on its validity, as well as meta-legal elements that help to understand the evolution of certain legal institutions. But they cannot be used as reasons for not deciding or not exercising the jurisdictional power entrusted to the Court by the constituent power itself, in view of the prohibition of not deciding *(non liquet)* that governs contemporary legal systems[985].

The fundamental nature of the rights concerned in the proceedings is inherent to the cases in which the Court is called upon to resolve. In fact, the first of the requirements that an application for *amparo* must satisfy refers to the need for it to concern the possible infringement of one of the fundamental rights, that is, those proclaimed by the Constitution, "susceptible of constitutional protection" [Art. 41(1) OLCC], otherwise the application will be rejected out of hand [Art. 50(1)(a) OLCC]. Moreover, when it comes to the content of fundamental rights, lawmakers are not only limited in their powers by the need to respect their "essential content" [Art. 53(1) SC], but also, looking at the matter from another perspective, they are called upon to provide their reasons for determining the content of

984 The impossibility of requiring a "constitutional optimum" is not so much epistemic but institutional in nature, as can be seen from the following passage of CCO 186/2009 of 16 June (ECLI:ES:TC:2009:186A): "[I]t is not up to this Constitutional Court to establish what could be called the 'constitutional optimum' (CCJ 47/2005, of 3 March, PoL 10 *in fine*), 'because otherwise the judgement of validity that this Constitutional Court is called upon to make would be transformed into a judgement of perfection, a transformation that would affect the very essence of the Constitution, which is not a closed programme but an open text, a framework of coincidences broad enough to include different options within it' (CCJ 197/1996, 28 November, PoL 8)' (inter alia, CCJ 404/2006, of 8 November, PoL 2)" (PoL 3).

985 The courts must *always* respond to the claims brought before them in due time, otherwise the action for protection brought before them will not be satisfied. In the case of collegiate bodies, the procedural legislation establishes rules for the formation of the body's will in all cases, in particular by resolving cases of a tie, either by attributing a rejection of the appeal to the tie, or by recognising the vote of the body's president as the casting vote. This is what happens in the Spanish Constitutional Court because it is expressly provided for in Article 90(1) OLCC.

the right. In particular, when it comes *to legal configuration* rights. This is the case, notably, with entitlements to benefits, as is the case, for instance, with the right to effective judicial protection [CCJ 99/1985, of 30 September, PoL 4 (ECLI:ES:TC:1985:99)], or with the additional contents of freedom of association [CCJ 30/1992, of 18 March, PoL 4 (ECLI:ES:TC:1992:39)]. In these cases, in addition to the lawmakers' interpretation of the constitutional law, the interpretation made by the judges who critically applied the law is also important: "[F]aced with two divergent interpretations -and they are not the only possible ones-, regarding a guarantee created by the lawmakers in their task of configuring the fundamental right, the mission of this Constitutional Court is not to lean aprioristically towards the one that is more beneficial, without further ado, for the holder of the fundamental right, but, more correctly, to ascertain whether the interpretation carried out by the Judge or Court, in its function of protecting legitimate rights and interests [Art. 24(1) SC], sufficiently safeguards or not, in its substantial or basic content, the said legal guarantee. For this Court, the interpretation of the scope of rights carried out by the ordinary courts is not indifferent, particularly insofar as what is involved is the interpretation of legality" [CCJ 287/1994, 27 October, PoL 4 (ECLI:ES:TC:1994:287)]. The caution shown by the Constitutional Court when it comes to constitutional hermeneutics is a sign of its awareness of the difficulties involved in this task.[986]

In conclusion, it should be borne in mind that contemporary law is not limited to providing power with legitimacy through coercion, but also serves other promotional or directive functions. The Constitutional Court had to judge the constitutionality of various rules which, in accordance with the directive function of the law, sought to introduce profound changes in social habits and conduct in order to better serve constitutional values. This was the case in judgment 198/2012 of 6 November (ECLI:ES:TC:2012:198), which upheld the constitutionality of Law 13/2005 of 1 July introducing same-sex marriage; the judgment concluded that the extension of marriage was not contrary to the institutional guarantee of this figure set out in Article 32 of the Constitution. It was also the case of the aforementioned CCJ 19/2023, of 22 March (ECLI:ES:TC:2023:19), on euthanasia. In both cases, the Court - both in the operative part and in the separate, concurring and dissenting opinions - formulated judgments of constitutionality, of the conformity of the law in question with the Constitution, without entering into the tempestuous question of social attitudes, which it is not its task to assess.

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

The presentation of the constitutional case-law with which the section containing this question opens highlights that the deference shown by the Constitutional Court throughout its history has always responded to institutional reasons. Both in the most significant case of strong deference (CCJ 107/1996, of 12 June, official chambers of commerce, industry and navigation) and in the numerous cases of weak deference, the polite respect shown towards the lawmakers is explained by the consideration of the constitutional order of distribution of powers.

In the case of the constitutional jurisdiction, precisely because it is responsible for carrying out an external control of the exercise of powers attributed to other bodies and not substituting them in carrying out assessments of opportunity or correctness, deference is not based on epistemic reasons but on strictly institutional ones. Since the *constitutional optimum* is not sought, it is not even possible to speak of the formulation of epistemic superiority judgements. In the words of the Court itself, referring to the core of the dogmatic part of our fundamental law, "the Constitution, and very particularly fundamental rights, inspire and encourage our entire system, right down to its last or most modest manifestations, without this implying, however, that this Court is called upon to impose the extent to which each and every interpretation of the so-called ordinary legality must be influenced by constitutional content. One thing is, in fact, the guarantee of fundamental rights, as entrusted to

986 As Odo MARQUARD, *Adiós a los principios,* Institució Alfons el Magnànim, Valencia, 2000, p. 125, has pointed out, "hermeneutics is the art of extracting from a text something that is not contained within it". Particularly useful for the jurist who exercises his activity in a system with a rigid Constitution, difficult to amend but flexible in interpretation, is the consideration that "hermeneutics succeeds in transforming where change is not possible" (p. 133). Finally, the author also refers to the potential of a pluralising hermeneutics, which traces many possibilities of meaning (p. 146).

it, and another of the maximum irradiation of constitutional contents in the various cases of interpretation of legality (cf. CCJ 160/1997, PoL 4)" [CCJ 48/1998 of 2 March, PoL 3 (a) (ECLI:ES:TC:1998:48)].

It seems appropriate to recall the wording of the passage of judgment 160/1997 to which CCJ

48/1998 expressly refers, since it clearly defines the field of action of the Constitutional Court:

"We should note [...] that when this Court, on countless occasions, declares that a given question of law is 'of ordinary legality' or a similar expression, with the ineluctable consequence of declaring it to be outside its own jurisdiction, and exclusively that of the ordinary Courts, it is not for that reason stripping that question of any consideration of constitutionality. On the contrary, the Constitution, and in particular fundamental rights, inspires and encourages our entire system, up to its last or most modest manifestations. However, this cannot imply that this Court is called upon to impose its criterion by determining, to the very end, the extent to which each and every interpretation of the so-called ordinary legality must be influenced by constitutional content. This would be tantamount to extending the scope of the 'constitutional guarantees' [Art. 123(1) SC] which marks the limit of our jurisdiction to the interpretation of the entire legal system.

The consequence of all this is that this Court, in some cases, may come to understand that interpretations of ordinary legality different from those that were made in the case submitted for its consideration may perhaps have responded more fully to the values incorporated in the constitutional provisions and, in particular, to those relating to fundamental rights, which may lead it to feel distanced from the solution reached. But one thing is the guarantee of fundamental rights as entrusted to it and another, necessarily different, that of the maximum irradiation of constitutional contents in each and every case of interpretation of legality; the latter may not occur without this always implying the violation of a fundamental right" [CCJ 160/1997 of 2 October, PoL 4 (ECLI:ES:TC:1997:160)].

5. *Are there cases where your Court deferred because there was a risk of judicial error?* In order to answer this question, it is appropriate to begin by recalling the meaning of the expression "judicial error" in the Spanish legal system. A meaning that sets out precisely the judgment issued by the Administrative Chamber of the Supreme Court of 27 March 2018 (ECLI:ES:TS:2018:1178).

In this decision, handed down in an action for recognition of a judicial error, it is emphasised that the purpose of this procedure "is to determine whether the judicial decision that constitutes its object complies with the parameters of logic and reasonableness that are inexcusable in any judicial decision and responds to a hermeneutic or applicative criterion which, although it may be the subject of controversy, can be traced back to one of those recognised by the legal system. Therefore, *only that which ostensibly and unequivocally shows a disregard for the legal system, through the failure to apply the rule that must necessarily be observed in the case in question or through its arbitrary infringement, deserves to be strictly classified as a judicial error*" (PoL 7, emphasis added).

On the basis of that premise, the case-law is structured as follows:

- "In judicial error proceedings it is not a question of evaluating the mistake of a judicial decision but its maintenance within the limits of logic and reasonableness in the appreciation of the facts and the interpretation of the law, in such a way that only a crass, evident and unjustified error can give rise to the declaration of a judicial error..."

- "[T]he conditions for a judicial error to be considered as such are as follows: it must be patent, undoubted and indisputable..."

- "[I]t can only succeed when the possible lack of adequacy between what should have been decided and what was decided is so ostensible and clear that any person versed in

law could so appreciate it, without the possibility that it could be considered correct from any point of view that can be defended in law..."

- "It consists of a blatant disregard of the legal system and, therefore, a clear failure to apply the rule applicable to the case or an arbitrary violation of that rule..."

- "There is no judicial error when the court maintains a rational and explicable criterion within the rules of legal hermeneutics..."

- "A judicial error is reserved for decisions that are unjustifiable as a matter of law..."

Considering the question before us from the perspective provided by the figure of judicial error, we reach the same conclusion we previously stated: Since it is not appropriate to make judgements of epistemic superiority, the deference that the judge may show towards other public bodies that act in the exercise of the functions entrusted to them by the legal system always responds to a constitutional basis. The legislature is not only called upon to start the regulation of matters conferred upon it by the constituent; it is called upon to proceed to its definitive regulation. The eventual judgment of constitutionality is not an assumption of falsification of the legislative proposal but a genuine check of compliance of the secondary rule with the primary rule.

The Court can never rely on the obscurity of the rule which serves as a parameter of control in order to avoid the responsibility of prosecuting the subject matter of the proceedings. The *non liquet* is a denial of justice to the parties and a disregard for the role attributed to the Constitutional Court as "supreme interpreter of the Constitution" by Art. 1(1) of its organic law.

6. *Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?*

Again, it is pertinent to insist that the aforementioned assumptions of judicial deference respond to constitutional reasons, of distribution of powers. These reasons are reinforced, as has also been noted, when it is the democratic legislature the one that acts within the scope of the powers conferred by the Constitution.

When the act subject to control by the Constitutional Court emanates from the administration or the judiciary, institutions that cannot invoke first-degree democratic legitimacy, both the legislature and the Court itself have taken care to carry out a clear demarcation of the scope of intervention. As regards the former, it should be stressed that the Court cannot review the facts at issue in the proceedings, which means that it is not entitled to reconstruct the factual background or to examine it from the point of view of strict ordinary legality. With regard to the second, the aforementioned distinction between the external control of the Constitutional Court with regard to the preservation of the essential content of fundamental rights, and the maximum irradiation of constitutional provisions, delimits the playing field of the different bodies called upon to materialise the real and effective protection of fundamental rights. Later on, reference will be made to the deference that the Constitutional Court may show towards instances endowed with second-degree democratic legitimation (the government) when it acts with powers immediately conferred by the constitutional text.

7. *"The more legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, courts because are unelected, and they lack the democratic mandate to decide questions of policy?*

As stated above, the Constitutional Court judges the constitutionality of legal provisions and acts (where appropriate, of omissions or simple actions without legal warrant, when the public authorities are constitutionally obliged to intervene or have done so in complete disregard of the legally established procedure), never of public policies. These public policies are embodied in rules, the conformity of which with the Constitution can be brought before the Court. But it is in no case for this Court to pronounce on the public policy in question, but rather to examine whether the specific provisions in which it has been enshrined fall within the sphere of powers held by the body that approved them.

Moreover, it is interesting to note that Chapter III of Title I of the Constitution sets out a series of "guiding principles of social and economic policy". In relation to these and in coherence with the provisions of Art. 53(3) SC, the Constitutional Court has recognised a greater freedom of configuration to the lawmakers [CCJ 116/1999, of 17 June (ECLI:ES:TC:1999:116), in relation to assisted reproduction

techniques][987].

The need to stick to this area of action is all the more so since the Spanish democracy is not a *militant democracy*: "There is no room in our constitutional system for a model of 'militant democracy' [...], that is, a model in which no respect for, but positive adherence to the system and, first and foremost, to the Constitution, is imposed. The inexcusable premise of the existence of a normative core inaccessible to constitutional amendment procedures that, by its simple intangibility, could be set up as an autonomous parameter of legal correctness, so that the mere attempt to affect it would render the conduct unlawful, even if it nevertheless scrupulously complied with the normative procedures" [CCJ 48/2003, of 12 March, PoL 7 (ECLI:ES:TC:2003:48)].

The absence of an unavailable core for the power of amendment does not in any way diminish the Court's tasks. On the contrary, in the examination of the rules in which the different political options are embodied, it is up to the Constitutional Court to delimit those cases in which the change requires an amendment of the fundamental text itself, the ultimate solution to the political problems that could derive from a possible negative judgment contrasting the enabling constitutional rule and the contested secondary rule.

It is not for the Constitutional Court to participate in the process of positive definition of public policies but exclusively to formulate a judgment – as "negative legislature" – on respect for constitutional limits. Thus, there is no doubt that the Court is obliged to respect and preserve the basis of the social and democratic rule of law founded by the Spanish Constitution itself [Art 1(1)]. Non-delegable legislation constitutes a reservation of procedure and of public and transparent deliberation of matters that concern the citizens as a whole.

In the words of the aforementioned CCJ 11/1981, of 8 April, PoL 7 (ECLI:ES:TC:1981:11), "on one level it is necessary to situate political decisions and the political judgment that such decisions merit and on another different level lies the qualification of unconstitutionality, which should be made in the light of extremely rigorous legal criteria. The Constitution is a framework of coincidences sufficiently broad to provide room for political options of extremely different kinds. The work of interpreting the Constitution does not necessarily consist of closing the door on options or variants imposing one of them in an authoritarian manner. This conclusion should only be reached when the unanimous nature of the interpretation is imposed by the play of interpretive criteria. We wish to state that the political and government options are not previously programmed once and for all, so that all that remains to be done in future is implement that previous programme."

8. *Does your Court accept a general principle of Deference in judging criminal philosophy and policies?*

In relation to the criminal assessment of proportionality, the Spanish Constitutional Court has issued case-law summarised in CCJ 127/2009 of 26 May (ECLI:ES:TC:2009:127). In this judgment, the constitutionality of the definition of the offence of minor coercion in cases of gender violence is examined when the passive subject of the offence is a woman and the active subject is a man, and provided that she has been his wife or a person linked by an analogous relationship of affection, even without cohabitation. Finally, PoL 8 of this judgment declares that that proportionality review must start with the recognition "of the exclusive power of the lawmakers to configure the criminally protected rights, the criminally punishable conduct, the kind and amount of criminal sanctions, and the proportion between the conduct it seeks to prevent and the penalties with which it intends to achieve it", and that in this configuration, "which involves a *complex judgment of opportunity,* the lawmakers enjoy a wide margin of freedom, so that the judgment of this court must therefore be very cautious". It merely verifies that the criminal rule does not produce a manifestly useless waste of coercion that renders the rule arbitrary and undermines the elementary principles of justice inherent in the dignity of the person and the rule of law'. The proportionality of a penal reaction can be affirmed when the

987 In general, the Constitutional Court recognises broad freedom of configuration to the lawmakers where the constituent power has limited itself to defining the guiding principles of an institution. Inter alia, CCJ 45/1989, of 20 February (ECLI:ES:TC:1989:45), in relation to the tax system.

rule pursues 'the preservation of rights or interests that are neither constitutionally proscribed nor socially irrelevant', and when the penalty is 'instrumentally suitable for this pursuit', and necessary and proportionate in this sense. 'From a constitutional perspective, it will only be possible to classify the criminal rule or penalty as unnecessary when, in the light of logical reasoning, of uncontroversial empirical data and of the set of penalties that the lawmakers themselves have deemed necessary to achieve similar aims of protection, the manifest sufficiency of an alternative means which is less restrictive of rights for the equally effective achievement of the aims desired by the lawmakers is evident ...and the criminal rule or punishment can only be considered disproportionate when there is a patent and excessive or unreasonable imbalance between the punishment and the purpose of the rule, based on the constitutionally indisputable axiological guidelines and their implementation in the legislation' (CCJ 136/1999, of 20 July, PoL 23; also, CCJs 55/1996, of 28 March, PoLs 6 et seq; 161/1997, of 2 October, PoLs 9 et seq; CCOs 233/2004, of 7 June, PoL 3; 332/2005, of 13 September, PoL 4)"[988].

Of particular interest is CCJ 169/2021 of 6 October 2021 (ECLI:ES:TC:2021:2021). On this occasion it was not just the classification of criminal offences but, in particular, the introduction of a new penalty (reviewable permanent imprisonment), whose compliance with the constitutional prohibition of inhuman and degrading punishment (Art.15 SC) was in dispute.

In this respect, the judgment starts by identifying the scope of the jurisdiction attributed to the Constitutional Court and the parameters it must use in the exercise of this jurisdictional power:

"The examination of the criminological justification of a penalty must start from an adequate consideration of the limitations presented by the function of abstract control of the law which falls to this court, limitations which we have emphasised in many previous pronouncements, when we point out that '[t]he processes of authentic criminalisation and decriminalisation, or of increase or reduction of penalties, respond to a series of circumstances which generally affect social sensitivity, in the face of certain behaviours that, when captured by the lawmakers at each historical moment, gives rise to a different reaction of the legal system, from the criminal perspective which is of interest to us here' (CCJ 129/1990, PoL 4), so that 'if in a democratic system the law is the *expression of the popular will*, as stated in the preamble of our Constitution (CCJ 108/1988, 26 July), whoever alleges the arbitrariness of a given law or legal provision is obliged to reason it in detail and offer evidence which in principle is convincing (CCJs 239/1992 of 17 December and 73/2000 of 14 March)' (CCJ 120/2000, of 10 May, PoL 3)" (PoL 6).

Further developing this idea, citing CCJ 55/1996, the 2021 judgment emphasises that '[t]he exercise of its competence to select the legal rights arising from a given model of social coexistence and the conduct that infringes them, as well as to determine the criminal penalties necessary for the preservation of that model, the legislature enjoys, within the limits established in the Constitution, a wide margin of freedom derived from its constitutional position and, ultimately, from its specific democratic legitimacy. It can therefore be affirmed not only that, as it cannot be otherwise in a social and democratic State governed by the rule of law, it is the exclusive responsibility of the lawmakers to design criminal policy, but also that, with the exception imposed by the aforementioned elementary guidelines that emanate from the Constitution, they are totally free to do so. Hence, in concrete terms, the relationship of proportion that a criminally typical behaviour must have with the sanction assigned to it will be the result of a complex judgment of opportunity by the legislature

988 In CCJ 136/1999 of 20 July (ECLI:ES:TC:1999:136), the appeal for *amparo* made by the members of the national bureau of Herri Batasuna was upheld against the conviction imposed on them for the commission of an offence of collaboration with an armed gang; the ruling noted that an "unnecessary or excessive sacrifice of rights may occur either because a criminal reaction is unnecessary or because the amount or extent of the penalty is excessive in relation to the offence (disproportion in the strict sense)" (PoL 22). CCJ 55/1996, of 28 March (ECLI:ES:TC:1996:55) aimed at regulating criminal offences related to the right of conscientious objection to military service. CCJ 161/1997, of 2 October (ECLI:ES:TC:1997:161), aimed at regulating criminal offences related to the refusal to undergo an alcohol test.

which, although it cannot disregard certain constitutional limits, these do not impose a precise and univocal solution." As we have said repeatedly, the definition of such a public policy is not subject to prosecution by the Constitutional Court, since "[a]s we stated in CCJ 11/1981, 'on one level it is necessary to situate political decisions and the political judgment that such decisions merit and on another different level lies the qualification of unconstitutionality, which should be made in the light of extremely rigorous legal criteria. The Constitution is a framework of coincidences sufficiently broad to provide room for political options of extremely different kinds. The work of interpreting the Constitution does not necessarily consist of closing the door on options or variants imposing one of them in an authoritarian manner.' (PoL 7). Therefore, far from evaluating its convenience, its effects, its quality or perfectibility, or its relation to other possible alternatives, we must only consider its constitutional framework when asked to do so. Hence, a hypothetical rejection of a questioned criminal rule affirms nothing more or less than its subjection to the Constitution, without implying, therefore, in any way, any other type of positive assessment of it".

Finally, the control of the constitutionality of the rules that specify this criminal policy is delimited by the recognition "of the exclusive power of the lawmakers to configure the criminally protected rights, the criminally punishable conduct, the kind and amount of criminal sanctions, and the proportion between the conduct it seeks to prevent and the penalties with which it intends to achieve it, and that in this configuration, which involves a complex judgment of opportunity, the lawmakers enjoy a wide margin of freedom, so that the judgment of this court must therefore be very cautious". (CCJ 169/2021, PoL 6).

9. *There may be narrow circumstances where the government can reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?*

The legal configuration of the constitutional processes existing in the Spanish legal system makes it particularly difficult to create a situation such as that described in the question. This does not mean that there is no example of judicial review of the exercise of the power to classify information in the interests of preserving national security.

This is the case of the judgment of the Plenum of the Administrative Chamber of the Supreme Court of 4 April 1997 (ECLI:ES:TS:1997:2389), which challenged the declaration as secrets of certain documents whose knowledge was relevant for the cleansing of criminal responsibilities. On that occasion the Supreme Court began by admitting "the objective existence of acts of political leadership of the Government in principle immune to judicial review of legality, although not to other reviews, such as those derived from political responsibility or the judicial treatment of compensation that may give rise" (PoL 7). In the Court's opinion, this admission did not prevent it from assuming this control "when the legislature has defined, by means of *judicially accessible concepts*, the limits or prerequisites to which these acts of political direction must be subject. In that case, the Courts must accept the examination of the possible excesses or non-compliance with the prerequisites that the Government may have incurred in taking the decision". It is this idea of *judicially accessible concepts* that leads us to state that if we clearly established the link between the documents, their classification as secrets and the security of the State, there is no reason for us not to consider that it is also accessible for us to negatively determine the concurrence of elements that either completely eliminate the impact on that security or reduce it in terms that – by weighing the legal interests at stake – allow us to give precedence, where appropriate, to the constitutional right to effective judicial protection invoked by the appellants to request declassification"[989].

10. *Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rightscompliant reforms?*

989 In relation to this judgment, Nuria GARRIDO CUENCA, "El episodio judicial de la desclasificación de los papeles del CESID: las sentencias del Tribunal Supremo de 4 de abril de 1997. Paradojas y paralogismos de un conflicto entre la función de gobierno y el derecho a la tutela judicial efectiva", Revista de Administración Pública, no. 143 (1997), pp. 229 et seq.

In the case-law of the Spanish Constitutional Court, we observe that the identification of areas where particularly strict control is applicable is made by reference to the case-law developed in this respect by the European Court of Human Rights. Suffice to review the following examples:

- In CCJ 136/1999, of 20 July (ECLI:ES:TC:1999:136), it recalls that, according to the Strasbourg Court's case-law, "interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court *(Castells v. Spain*, cited above, § 42 and *Incal*, § 46)" [PoL 24, also, CCJ 45/2022, of 23 March, PoL 13(3)(4)(B)(b) (ECLI:ES:TC:2022:45)].

- In CCJ 70/2021, of 18 March (ECLI:ES:TC:2021:70), it held that "the Strasbourg court carries out a particularly strict control when it comes to parliamentary minorities. It recognises that opinions contrary to the political system in question must always be protected, even when they seek its total transformation, but, it warns, always with democratic loyalty: 'It is of the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself' (ECtHR judgment [GC] *Freedom and Democracy Party (ÖZDEP) v. Turkey,* 8 December 1999)" [PoL 3 (B)(a); in the same sense, see the same passage from CCJ 71/2021 of 18 March (ECLI:ES:TC:2021:71).

The cases in which the legislature makes use of the *categories suspected of being discriminatory* set forth in Article 14 SC are also subject to stricter scrutiny [CCJ 67/2022, of 2 June (ECLI:ES:TC:2022:67), PoL 2]:

"The virtuality of Art. 14 SC is not exhausted [...] in the general clause of equality with which its content begins, but the constitutional provision goes on to refer to the prohibition of a series of specific grounds or reasons for discrimination. 'This express reference to those grounds or grounds of discrimination does not imply the establishment of a closed list of cases of discrimination (CCJ 75/1983 of 3 August, PoL 6), but does represent an explicit interdiction of certain historically entrenched differences which have placed, both by the action of the public authorities and by social practice, sectors of the population in positions, not only disadvantageous, but contrary to the dignity of the person recognised by Article 10(1) EC (CCJs 128/1987 of 16 July 1987, PoL 5. 166/1988 of 26 September, PoL 2; 145/1991 of 1 July, PoL 2). In this sense, the Constitutional Court, either in general terms regarding the list of grounds or reasons for discrimination expressly prohibited by Article 14 SC, or in particular terms, has declared the constitutional illegitimacy of differentiated treatment with respect to those that operate as determining factors or appear to be based only on the specific grounds or reasons for discrimination prohibited by the aforementioned provision.' (CCJ 200/2001, PoL 4). However, as the judgment cited above points out, "this Court has also admitted that the grounds of discrimination prohibited by that constitutional provision may be used exceptionally as a criterion of legal differentiation (in relation to sex, inter alia, CCJs 103/1983 of 22 November, PoL 6; 128/1987 of 26 July, PoL 7; 229/1992 of 14 December, PoL 2; 126/1997, of 3 July, PoL 8...), although in such cases the control canon is much stricter when assessing the legitimacy of the difference and the requirements of proportionality, as well as the burden of proving the justified character of the differentiation" [CCJ 67/2022 of 2 June (ECLI:ES:TC:2022:67), PoL 2].

Moreover, with regard to the judicial review of the so-called "legislative omissions", it seems appropriate to refer to the paper submitted by the Spanish Constitutional Court to the XIV Conference of European Constitutional Courts, held in Vilnius in May 2008, both dedicated, paper and conference, to the problems of legislative omission in constitutional justice[990].

990 See "The problems of legislative omission in constitutional jurisprudence (Vilna, 2008). Paper from the Constitution Court of Spain", written by Juan Luis REQUEJO PAGÉS, available at https://www.tribunalconstitucional.es/es/publicaciones/Publicaciones/Coedicion-TCEuropeos-II.pdf, both in Spanish (pp. 4 et seq.) and in English (pp. 39 et seq.).

II. The decision-maker

In his study on the judicial guarantee of the Constitution published in 1928, Hans KELSEN included within the jurisdiction of the constitutional court not only formal laws but also other parliamentary acts which, without taking the form of laws, were necessary by constitutional provision (he expressly mentioned the budget). He added that the powers of constitutional jurisdiction should not be limited to the control of the constitutionality of laws, but they "should [also] be extended to regulations with the force of law, acts immediately subordinate to the Constitution and whose validity depends exclusively on their constitutionality.[991]" For the Austrian jurist, there would be an "intimate affinity" between the review of the constitutionality of laws and the legality of regulations, which would be based on consideration in both cases of general rules.

In his view, there would be two competing views that would postulate the competency of constitutional justice: "on the one hand, the pure notion of guaranteeing the Constitution, which would lead to including in its object the control of all acts immediately subject to the Constitution and only of them; on the other hand, the opposition between general acts and individual acts, which would lead to equating the control of laws and regulations"[992].

In the Spanish legal system, the acts of the public authorities enjoy a presumption of legitimacy, which must be rebutted by whoever challenges them: "acts or rules emanating from legitimate powers enjoy a presumption of legitimacy, which, although it can be challenged by anyone whose rights are violated by them (and in the case of laws, also by those entitled to bring an action of unconstitutionality), makes it necessary to consider the possibility of suspending their validity or enforceability as exceptional. This presumption is, moreover, all the stronger the more direct the connection of the organ with the will of the people is, and therefore reaches its highest degree in the case of the lawmakers, who are precisely the representatives of that will." [CCJ 66/1985, of 23 May (ECLI:ES:TC:1985;66), PoL 3].

The review of the legality of acts of public administrations, as well as the exercise of regulatory powers, corresponds in principle to the administrative judicial system. By express provision of the Constitution, this control is of a jurisdictional nature, since Art. 106(1) SC provides that "the courts" are the ones who "control the regulatory power and the legality of administrative action, as well as its compliance with the purposes that justify it". With specific reference to the control of particular territorial administrations -the autonomous administrations-, Art. 153 (c) SC provides that "the contentious-administrative jurisdiction" will control "the autonomous administration and its regulatory norms".

In development of these constitutional determinations, which incorporate an authentic institutional guarantee of a specialised jurisdictional system, the Organic Law of the Judiciary proclaims in Article 9(4) that the courts and tribunals of the contentious-administrative system:

"[S]hall hear claims arising in respect of the action of the Public Authorities subject to

Administrative Law, with the general provisions of lower rank than law and with Legislative Decrees in the terms established in Article 82(6) of the Constitution, pursuant to the terms of the Law of that jurisdiction. It shall also hear appeals against the inactivity of the Authorities and against their material actions which constitute action without legal warrant. Direct or indirect actions brought against the Tax Foral Rules of the General Bureaus of the Historical Territories of Álava, Guipúzcoa and Vizcaya, which shall correspond exclusively to the Constitutional Court, in the terms established by the fifth additional provision of its Organic Law, are excluded from their jurisdiction[993].

991 See Hans KELSEN, "La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)", *op. cit.*, p. 229.

992 Hans KELSEN, *ibid*, p. 234.

993 Similarly, Article 1(1) of Law 29/1998 of 13 July 1998 regulating the contentious-administrative jurisdiction: "The Courts and Tribunals of the administrative system shall be aware of the claims which are made in relation to the performance of the public administrations subject to the Administrative Law, with the general provisions of a lower ranking to the Law and the Legislative Decrees when they exceed the limits of

Thus, in Spanish law, the Constitutional Court is reserved exclusively for the control of certain *legislative provisions* with the rank or force of law approved by the Government (decree-laws), an exclusiveness that is denied when the delegated legislation (legislative decrees) is concerned. With regard to *acts* with legal value emanating from the Government (declaration of states of emergency), the guarantee of its judicial review passes through the monopoly recognised by the Constitutional Court, to which reference has already been made above. In the case of regulatory rules, their jurisdictional review is in principle attributed to the contentious-administrative system, with the Constitutional Court being able to exercise subsidiary jurisdiction by way of *amparo*, or alternatively if the regulation is the object of a constitutional conflict of powers that pits the State against an autonomous community or two autonomous community bodies against each other[994].

In the case of foral tax rules, Organic Law 1/2010, of 19 February, attributes to the

Constitutional Court the non-exclusive jurisdiction - STC 118/2016, of 23 June (ECLI:ES:TC:2016:118), PoL 3 (d) - of directly challenging them and of preliminary rulings on their validity that may be raised by courts and tribunals. These are very unique rules because they are dictated in an area where there is an effective regulatory reserve in our territorial Constitution. This reserve is the result of the attribution of exclusive competences to the historical territories by Art. 37 of the Statute of Autonomy of the Basque Country. Thus, we find ourselves with general provisions for the direct development of constitutional provisions - here, of the territorial Constitution, made up of the 1978 Constitution and the 1979 Statute of Autonomy for the Basque Country - without there being any intermediary rule between the primary constitutional rule and the secondary regulatory fiscal rule[995].

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the delegation". The exclusion of the control of the foral tax rules appears in Art. 3 (d) of this same jurisdictional law.

994 The regulations referred to here are those issued by public administrations in the exercise of regulatory power, the exercise of which, in the case of the General State Administration, is entrusted directly to the national government by Art. 97 SC. Some passages in the Constitutional Court's case-law may lead to confusion about the nature of the so-called parliamentary regulations, which are not rules subordinate to the law but are a direct development of the Constitution or the corresponding Statute of Autonomy in the specific sphere of parliamentary life. This is the case of CCJ 188/1999, of 25 October, PoL 9 (ECLI:ES:TC:1999:188). The confusion is dispelled in CCJ 136/2011, of 13 September (ECLI:ES:TC:2011:136), PoL 6, where parliamentary regulations are characterised as *provisions with the force of law* and it is affirmed that they can integrate the constitutionality block in order to judge the validity of the law when they are interposed between the Constitution (or the Statute of Autonomy) and the specifically contested law in the process concerned: "Among these provisions [having the force of law] are those of parliamentary regulations, 'which in some cases may be considered as rules interposed between the Constitution and the laws and are therefore, in such cases, a condition of the constitutional validity of the latter.' (CCJ 227/2004, 29 November, PoL 2). Thus, although Art. 28(1) OLCC does not mention the parliamentary regulations among those rules whose infringement may lead to the unconstitutionality of the law, 'there is no doubt that, both because of the invulnerability of such procedural rules against the action of the legislature and, above all, because of the instrumental nature that these rules have with respect to one of the highest values of our legal system, that of political pluralism [Art. 1(1) SC], the non-observance of the provisions that regulate the legislative procedure could vitiate the law of unconstitutionality when that non-observance substantially alters the process of will formation within the Chambers' [CCJs 99/1987, of 11 June, PoL 1 (a); and 103/2008, of 11 September, PoL 5]. Regarding the control of the constitutionality of infra-legal norms, see, for example, Francisco CAAMAÑO, *El control de constitucionalidad de disposiciones reglamentarias,* Centro de Estudios Constitucionales, Madrid, 1994.

995 A critique of the solution devised in Organic Law 1/2010, insofar as it involves attributing the status of law to the foral tax rules, thereby altering the system of jurisdictional competences for their control, in Luis María DIEZ PICAZO, "Notas sobre el blindaje de las normas forales fiscales", Indret 3/2010 (https://www.raco.cat/index.php/InDret/article/view/226147/307720).

Among the cases mentioned so far, it seems appropriate to briefly examine the deference shown by the Spanish Constitutional Court when judging the constitutionality of the rules with the rank or force of law most frequently approved by the national government and, to a lesser extent, by the regional governments: the decree laws[996].

Article 86 of the Spanish Constitution authorises the Government to issue regulations with the force of law – which must be validated by Congress within thirty days – "in case of extraordinary and urgent need". In controlling the exercise of this regulatory power, the Constitutional Court has developed a consolidated case-law on the control of an entitling premise - the extraordinary and urgent need - and of the connection of meaning between this premise and the measures adopted to address it.

The case-law on the entitling premise starts from CCJ 29/1982, of 31 May (ECLI:ES:TC:1982:29), which makes clear the already mentioned exclusion of control techniques from administrative discretion, also when the exercise of an emergency regulatory power is concerned. Specifically, in PoL 3 of this decision, it is proclaimed that "in the assessment of what is to be considered a case of extraordinary and urgent necessity, it is compulsory to defer to the purely political judgment of the bodies responsible for the political direction of the State", a deference that "cannot be an obstacle to also extending the examination of the enabling competence to the knowledge of the Constitutional Court, insofar as this is necessary to guarantee a use of the Decree-Law that is in accordance with the Constitution". More specifically, it is stated that the Court "may, in cases of abusive or arbitrary use, reject the definition by the political bodies of a given situation as a case of extraordinary and urgent need, of such a nature that it cannot be dealt with by the emergency legislative procedure. It is clear that the exercise of this power of control by the Court implies that the definition is explicit and reasoned and that there is a meaningful connection between the situation defined and the measures adopted in the Decree-Law". The relevant reasons for assessing the observance of the constitutional limits of this authorisation are those specifically put forward by the Government itself "in the preamble of the regulation, throughout the parliamentary debate on validation, and in the actual drafting" of the disputed regulation (PoL 4).

As can be seen, the Court recognises that the Government has a wide margin of intervention to identify the existence of the entitling premise - extraordinary and urgent need - which also has the limitation of the control to an external review that avoids an "abusive or arbitrary use" of the decree law [CCJ 60/1986, of 20 May (ECLI:ES:TC:1986:60), PoL 3]. It is also important to note that the only valid reasons are those set out in the preamble to the decree-law, the debate on parliamentary validation and those contained in the drafting of the rule, "'since different reasons could never be offered or alter the reasons given at the time" [CCJ 182/1997 of 28 October (ECLI:ES:TC:1997:182), PoL 4].

The reasons for the use of this emergency legislation must refer both to the use of the authorisation contained in Art. 86 SC and to the specific circumstances of the case that justify dispensing with the ordinary parliamentary procedure, with the consequent lack of publicity in the debate, as well as to the specific measures agreed. [CCJ 137/2003, of July 3 (ECLI:ES:TC:2003:137), PoL 5]. With respect to these, the Constitutional Court is empowered to verify the existence of an appropriate relationship "between the defined situation that constitutes the entitling premise and the measures adopted in the Decree-Law (CCJ 29/1982, PoL 3), in such a way that the latter have a direct or congruent relationship with the situation that is to be addressed' (CCJ 182/1997, of 28 October, PoL 3)" [CCJ 196/2015 of 24 September 2015 (ECLI:ES:TC:2015:196), PoL 3 (b)]. The Court referred early on to the importance of this connection of meaning or relationship of appropriateness in its judgment 6/1983,

996 The Spanish Constitution entered into force on 29 December 1978. From 1 January 1979 until 31 December 2022, the central authorities of the State have issued a total of 2767 regulations with the force of law. The National Parliament (Cortes Generales) has passed a total of 1913 laws (1533 ordinary laws and 380 organic laws) and the Government has issued 754 regulations with the force of law (684 royal decrees and 70 royal legislative decrees). This means that 27.24 percent of the rules with the force of law passed in democracy have emanated directly from the Government, representing no less than 24.71 percent of the urgent rules approved by the Government. These percentages are significant to say the least.

of 4 February (ECLI:ES:TC:1983:6), PoL 5, stating that "although observance of the generic limits of Art. 86 of the Constitution may have existed and the Congress of Deputies may have approved the Decree-Law, *it will always have to be the appropriate regulatory response in accordance with the situation of need alleged as the entitling premise for the implementation of this source of Law"* (emphasis added)[997].

11. *Does your Court pay greater Deference to an act of Parliament than to a decision of the executive? Does your Court defer depend on the degree of democratic accountability of the original decision maker?*

As has been noted, it is not for the Constitutional Court to make judgments of epistemic superiority. It is therefore inappropriate to establish a kind of scale of deference between public authorities.

The Constitutional Court only tries in sole instance governmental acts or provisions when the government is acting under powers expressly conferred by the Constitution. The institutional basis of deference is fully operative here, given that the parameter of control must be sought in the constitutional bloc itself[998]. A hypothetical imputation of mediate unconstitutionality of the governmental act does not in itself exclude recourse to a weak deference, in the terms we have been dealing with, given that the reasons that the government or the administration may provide to support the constitutional legitimacy of its intervention deserve to be subjected to a judgment of rationality. Obviously, the measures specifically challenged may be subject to a proportionality test. In these cases, the measures will be subject to the usual test in which, having established the legitimacy of the aim pursued, their suitability to achieve that aim, their necessity in the absence of any other less incisive measure on the fundamental rights concerned, and their reasonableness or proportionality in the strict sense of the term, since they are more beneficial to the general interest than harmful to the right at stake, will be examined successively [CCJ 88/2023, of 18 July (ECLI:ES:TC:2023:88), PoL 5 (B)].

Having established the inescapable premise that all public authorities must exercise their powers within the constitutional framework and that the jurisdictional guarantee of the Constitution allows for the supervision of this adequacy, the Constitutional Court is called upon to ensure constitutional supremacy. Of course, that supremacy does not always lead to the subjection of the contested act to particularly intense scrutiny and, in particular, it is not for the Court to invade the space of fiduciary relations between powers and transform it into an area of strict judicial review.

12. *What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?*

The Constitutional Court has been cautious in using the parliamentary background of the rules, in particular the Constitution itself. In this regard, it is worth mentioning the following cases:

- In two judgments of 1986, the Court refused to carry out the examination of that background where it was not relevant to rule on the constitutionality of the specifically contested legal provision [CCJs 60/1986 of 20 May (ECLI:ES:TC:1986:60) and 108/1986, of 29 July (ECLI:ES:TC:1986:108)].

- In CCJ 128/1987, of 16 July (ECLI:ES:TC:1987:128) it was emphasised that "the ex-

997 Both approaches critical of the practice of the decree law can be found in two not coincidentally overlapping title studies: Manuel ARAGÓN REYES, *Uso y abuso del decreto ley. Una propuesta de reforma constitucional*, Iustel Madrid, 2016 and Luis MARTÍN REBOLLO, "Uso y abuso del Decreto-ley (un análisis empírico), en *Revista Española de Derecho Administrativo*, núm. 174 (2015), pp. 23 et seq.

998 Around the elusive figure of the constitutionality bloc, it is essential to read the opinions expressed by Louis FAVOREU and Francisco RUBIO LLORENTE in their monograph from the Spanish-French seminar that addressed the issue, *El bloque de la constitucionalidad*, Civitas, Madrid, 1991. More recently, Itziar GÓMEZ FERNÁNDEZ, "Redefinir el bloque de la constitucionalidad veinticinco años después", Estudios de Deusto 98, Vol. 54/1, Bilbao, January-June 2006, pp. 61 et seq., stressed the difficulties in characterising the bloc.

press exclusion of discrimination on the basis of sex finds its specific reason, as it results from the same *parliamentary precedents of Art. 14 SC*, and is unanimously admitted by scientific doctrine, in the desire to put an end to the historical situation of inferiority in which, in social and legal life, the female population had been placed: a situation which, in the area of concern here, results in specific difficulties for women in accessing work and promoting at it" [PoL 5, emphasis added; in the same vein, CCJ 166/1988 of 26 September (ECLI:ES:TC:1988:166), PoL 2, or CCJ 17/2003, of 30 January (ECLI:ES:TC:2003:17), PoL 3].

- CCJ 227/1988, of 29 November (ECLI:ES:TC:1988:227), made use of the parliamentary precedents of Art. 132 SC to appraise the notion of natural public domain (PoLs 14 and 15).

- For its part, in CCJ 137/1989, of 20 July (ECLI:ES:TC:1989:137), PoL 3, it is stated that Art. 149(1)(3) SC, "a provision of perfectly meditated and unequivocal scope, as can be deduced from its parliamentary precedents", "has reserved exclusively to the central organs of the State the totality of the competencies regarding international relations". Similarly, CCJ 188/1989, of 16 November (ECLI:ES:TC:1989:188) makes use of the parliamentary precedents to conclude that the economic planning procedure of Art. 131(2) SC is only required in cases of joint or general planning.

- In CCJ 16/2003, of 30 January (ECLI:ES:TC:2003:16), parliamentary precedents are used to conclude the feasibility of a possible state reform of the economic and fiscal regime of the Canary Islands following an autonomous report.

Historical law has served to delimit the regional competence for the "conservation, modification and development" of civil law itself *ex* Article 149(1)(8) SC. The Constitutional Court has defined this *guarantee of civil forality* from the actual existence, in historical law, of the civil institution that is to be regulated in each case [inter alia, CCJ 88/1993, of 12 March (ECLI:ES:TC:1993:88)]. The same applies to the regional regime of the historical territories of the Basque Country [CCJ 76/1988 of 26 April 1988 (ECLI:ES:TC:1988:76)]. The aforementioned CCJ 227/1988 uses the Historical Water Law to approximate the current legal regime; the same does the CCJ 140/1990, of 20 September (ECLI:ES:TC:1990:140), with respect to the historical forality of Navarre regarding public service, without prejudice to stress that the sole source of legitimacy of power must be sought in the decision of the constituent power embodied in the Spanish Constitution of 1978 [in this regard, see CCJ 118/2016, of 23 June (ECLI:ES:TC:2016:118), PoL 4: "the historical rights of the regional (foral) territories referred to in that first additional provision cannot be regarded as an autonomous title from which specific competences can be derived, since the provision itself establishes that the update shall be carried out within the framework of the Constitution and the Statutes of Autonomy"].

Especial attention to historical law was shown in CCJ 126/1997, of 3 July (ECLI:ES:TC:1997:126), in order to resolve the question of unconstitutionality raised regarding, among other provisions, Article 13 of the Detaching Law of 1820, Laws 8 and 9 of Title XVII of Book X of the Ninth Collection of the Laws of Spain of 1805, and Law 2 of Title XV of the Second Partida approved by King Alfonso X in the middle of the 13rd century, which established the preference of men over women in succession in the nobiliary titles.

13. *Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it been the decision maker?*

By presenting above the constitutional case-law on the justification of the concurrence of the entitling premise of extraordinary and urgent need that empowers the Government to dictate rules with the rank or force of law, it has realised the motivational burden that weighs on the Government and that is called to satisfy to avoid the misuse of this source of law. The standard examination canon is the reasonableness test of the external review which it is for the Court to carry out.

However, scrutiny is most intense when the issue brought to the Court's consideration concerns a conflict between fundamental rights and values of constitutional significance. This is the case,

notably, when communicative freedoms (freedoms of expression and information) and the rights to honour and personal and family privacy collide. A recent judgment [CCJ 8/2022, 27 January (ECLI:ES:TC:2022:8), PoL 4] summarises the case-law in these terms:

"This judgment, as set out in CCJ 93/2021 of 10 May, is not limited to assessing the argumental adequacy, reasonableness or sufficient grounds of the decisions at issue, having regard to the substantive nature of the fundamental rights alleged and the content of the *amparo* jurisdiction. In these cases, it must be insisted that 'the function of this court is not limited to making a simple external judgment of the decisions issued by ordinary judges and courts. Linked to the facts judicially declared proven [Art. 44(1)(b) OLCC and CCJ 25/2019, of February 25, PoL 2(g)], we must apply the requirements arising from the Constitution to the facts from which those decisions are based in order to determine whether, in judging them, they have been respected or not, even if for this purpose it is necessary to use different criteria from those applied in the instance' (CCJ 93/2021, PoL 3, and case law cited therein)".

The realisation of stricter scrutiny is explained in these cases by the concurrence of constitutional reasons faced in the weighting of which the Constitutional Court has full cognition.

14. *Does your Court defer depend on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?*

When it comes to the preservation of fundamental rights, it should be recalled that the Constitutional Court has declared from its first judgments that "nothing which concerns the exercise by citizens of the rights conferred on them by the Constitution can ever be regarded as alien to this Court" [CCJ 26/1981, of 17 July (ECLI:ES:TC:1981:26), PoL 14]. Based on that premise, it should be noted that even in the most significant case of "strong deference" – CCJ 107/1996, already mentioned, on compulsory affiliation to the official chambers of commerce, industry and navigation – the recognition of a wide margin of decision to the legislature is not explained by the intensity or depth of the study on the adequacy of the rule dealt with in the Constitution, but by the existence of a broad discretion in the hands of the legislature, which, in any event, has moved within the area of uncertainty. Therefore, they are not the means – the study prior to the approval of the standard – but the result – the effectively approved standard – the object and reason for deciding: Object, because the dispute concerns the legal provision adopted by the legislature; reason, because it is for the Court to examine the absence of an insurmountable contradiction of the legal provision questioned with the Constitution. The obligation on the lawmakers not to violate the Constitution is not an obligation to the means but to the results.

15. *Does your Court analyse whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?*

The Constitutional Court has been particularly attentive to the preservation of the rights of parliamentary minorities. This is demonstrated by its case-law on the material limits of the annual budget laws and the right to amend during the parliamentary processing of laws.

- In relation to the laws that approve the general budgets annually, both of the State and of the different autonomous communities, the Constitutional Court has differentiated (a) a necessary content, whether its own or the "essential core of the budget", "consisting of the forecast of revenue and the allocation of expenditure for a financial year, as well as the rules that directly develop and clarify the encrypted statements, that is, the budgetary allocations themselves. This content is essential because it forms the very identity of the budget, so it is not available to the lawmakers (CCJ 152/2014, PoL 3)" [CCJ 145/2022 of 15 November (ECLI:ES:TC:2022:145), PoL 2 (a)(ii)] and (b) a possible content that allows the incorporation of those matters that are directly related to income and expenditure into the budget laws and whose inclusion "is justified as a complement to the economic policy criteria for which that budget is the instrument, on the one hand, and on the other hand,

that it is a necessary complement for the greater intelligence and for the better execution of the budget and, in general, of the government's economic policy" [CCJ 234/1999, of 16 December

(ECLI:ES:TC:1999:234), PoL 4]. The same judgment explains the material limitation of budget laws as follows: "The inclusion in the annual Budget Law of matters in which these conditions are not met is contrary to the Constitution, for implying an illegitimate *restriction of the powers of the legislature, by diminishing its powers of review and amendment without constitutional basis* and for affecting the principle of legal certainty guaranteed by our Constitution [Art. 9(3) SC], that is to say, the certainty of the Law which requires that a law of constitutionally defined content, as is the General Budget Law, should not contain more provisions than those corresponding to its institutional function delimited by Art. 134(2) SC, due to the uncertainty that a regulation unrelated to that function may cause" (loc. cit., emphasis added). So the constitutionally legitimate content of budget laws is directly related to the limitation of constitutionally established powers of review, amendment and approval.

- With regard to the general limitation of the right to amend, case-law starts with CCJ 119/2011, of 5 July (ECLI:ES:TC:2011:119). On that occasion, the constitutionality of

an amendment of the criminal code introduced by way of amendment to an arbitration law was examined; having discussed the material correlation between the amendment and the amended object, the Court stated:

"Constitution [...] has no express rule concerning the material limits of the right of amendment in the Senate. Nor do Arts. 106 and 107 of the Senate Rules of Procedure, when regulating in a brief manner the procedure for the presentation of amendments in the legislative process in the Senate, include any provision of a material nature referring to the content of those amendments. This, however, does not imply that from the constitutional perspective the *general requirement of connection or homogeneity between the amendments and the texts to be amended* cannot be extracted.

The need for a certain substantive connection between the amendment and the amended text "derives, firstly, from the subsidiary nature of any amendment to the amended text. [. . .]

In fact, amending, both conceptually and linguistically, implies the modification of something pre-existing, the object and nature of which has been determined beforehand; only that which has already been defined is amended. The amendment cannot be used as a mechanism to give life to a new reality, which must also be born of a new proposal. This, transferred to the legislative sphere, means that on the basis of a bill of law, the configuration of what is intended to be a new rule is carried out through its parliamentary discussion by the Chamber in the debate of totality as a decision of the representatives of the popular will to initiate the discussion of this initiative, which responds to certain assessments of those who can do so on their opportunity and on its general lines; having taken that first decision, it opens its parliamentary discussion to outline its specific content through the debate. Now it is indeed possible to introduce changes through the exercise of the right of amendment and by democratically legitimising the rule that is to be born first through public discussion and then through the vote or votes of the rule, according to its nature, as a manifestation of the general democratically configured will" (PoL 6).

Thus, in proceedings of unconstitutionality, the Court has ensured the preservation of the powers of the legislative chambers, which is as much as affirming the rights of minorities to expose their views. It goes without saying that through the appeal of *amparo* against acts without the value of law by parliamentary chambers (Art. 42 OLCC), the Court can also hear the possible complaint of an illegitimate limitation of the rights of the representative function that corresponds to parliamentarians.

16. *Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?*

The original wording of the Organic Law of the Constitutional Court provided for the existence of a preliminary appeal of unconstitutionality against draft statutes of autonomy and organic laws. In the specific case of the statutes of autonomy, the subject-matter of the appeal was constituted, in

what is now strictly relevant, by "the finaltext of the draft Statute to be submitted to a referendum in the territory of the respective Autonomous Community" [Article 79(1)(a) OLCC, in its first drafting]. This provision was repealed in 1985 by an organic law (Organic Law 4/1985 of 7 June 1985) which was the subject of a preliminary appeal of unconstitutionality dismissed by CCJ 66/1985, of 23 May (ECLI:ES:TC:1985:66). It should be noted that the *punctum dolens* of the repeal, as the applicants put forward, did not affect the statutes of autonomy that required ratification by referendum so much, but the non-delegable organic legislation for the development and regulation of fundamental rights, a non-delegation that could be conditioned, as the applicants say, by the repeal of this remedy. This claim was answered in the following terms by the Court:

"The starting point of reasoning, the 'greater value' of fundamental rights, is certainly correct, but not the deduction that is constructed from it. The privileged place that in the general economy of our Constitution occupy the fundamental rights and public freedoms enshrined in it, is beyond doubt. The result is not only the unconstitutionality of all those acts of power, whatever their nature and rank, which harm them, but also the need, so often proclaimed by this Court, to interpret the Law in the manner most favourable to the maximisation of its content. However, it is not possible to deduce from this 'higher value' the 'implicit constitutional requirement' of an institution which, like that of the previous appeal, is not intended to ensure judicial protection for citizens who effectively feel that their fundamental rights have been injured, but to resolve in that jurisdiction the existing differences between constitutional bodies (or parts thereof) as regards the interpretation of constitutional provisions, thus extending, not against the Constitution, but beyond it, the scope of the appeal of unconstitutionality that it instituted [Arts. 161(1)(a) and 162(1)(a)]. If, as we have stated (CCJ 42/1982, PoL 3) the constitutional enshrinement of a right is not enough to create non-existent remedies by itself, neither does 'the greater value' of fundamental rights as a whole allow us to consider implicit in the Constitution institutions of guarantee that it has not explicitly created" (PoL 2).

Subsequently, several appeals of unconstitutionality were raised before the Constitutional

Court that challenged the amendment of different statutes of autonomy. Among them, the new Statute of Autonomy of Catalonia approved by Organic Law 6/2006, of 19 July 2006 should be mentioned, as it has been challenged in seven appeals of unconstitutionality[999].

Finally, Organic Law 12/2015, of 22 December, reintroduced the figure of the preliminary appeal, although limited to the draft organic laws approving autonomous statutes and their amendment. In the preamble to the Law, it is stated as an objective "to guarantee the, not always easy, balance between the special legitimacy that the Statutes of Autonomy have as the basic institutional rule of the Autonomous Communities, in whose approval the Autonomous Communities and the State intervene and, on occasions, the electoral body through referendum, and the respect of this text for the constitutional framework built around the Constitution as the fundamental rule of the State and of our legal system"[1000].

999 Those appeals were resolved by CCJs 31/2010 of 28 June (ECLI:ES:TC:2010:31), which partially upheld the appeal brought by more than fifty deputies of the Popular Party; 46/2010, of 8 September (ECLI:ES:TC:2010:46), which dismissed the appeal raised by the Government of Aragon; 47/2010 of 8 September (ECLI:ES:TC:2010:47), dismissing the appeal brought by the Government of the Balearic Islands; 48/2010 of 8 September (ECLI:ES:TC:2010:48), rejecting the appeal raised by the Government of the Valencian Community, although an interpretation of conformity was introduced; 49/2010, of 29 September (ECLI:ES:TC:2010:49), dismissing the one promoted by the Government of the Region of Murcia; 137/2010, of 16 December (ECLI:ES:TC:2010:137), rejecting the appeal promoted by the Ombudsman, but also with an interpretation of conformity, and 138/2010, of 16 December (ECLI:ES:TC:2010:138), rejecting the appeal filed by the Government of La Rioja.

1000 Early on, Fernando SANTAOLALLA LÓPEZ, "Problemas del recurso previo de inconstitucionalidad", *Revista de Derecho Político*, no. 18-19 (1983), p. 189, warned about the disadvantages of this procedural mechanism, which called into question the principle of majority rule. Subsequently, Pedro CRUZ VILLALÓN, "El control previo, a los veinte años de su suspensión", in *Fundamentos*, no. 4 (2006), p. 288 et seq., pointed to the convenience of integrating prior control with the

III. Rights' scope, legality and proportionality

17. *Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?*

The answers given to the previous sixteen questions have sought to illustrate how the Spanish Constitutional Court has been acting in the definition and preservation of the fundamental rights enshrined in the Constitution. An example of "strong deference" is CCJ 107/1996, of 12 June, cited many times, concerning compulsory affiliation to the official chambers of commerce, industry and navigation and its controversial compatibility with the negative freedom of association. In view of the constitutionally legitimate aims pursued, the Constitutional Court understood that the lawmakers had acted in a manner not reprehensible regarding the uncertainty of the possible collision between compulsory affiliation and negative freedom of association.

The other cases, even those in which the contested decision has been subject to a proportionality review, would find a more appropriate classification as examples of weak deference, where courtesy is shown vis-à-vis the reasons put forward by the body responsible for the contested provision (as far as is now strictly relevant, the lawmakers, including the Government under this group when acting as an emergency lawmaker). However, this should not entail the refusal to review the rule or to prosecute its conformity with the Constitution. In these cases, the Court, when accepting the reasons of the author of the rule, does not act with "strong deference", but rather endorses those reasons and incorporates them, as *ratio decidendi*, into its body of caselaw.

18. *Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more Deserving of rigorous scrutiny, than others?*

There have been occasions to point out the differences between the essential content of the fundamental right, an absolute limit to the freedom of configuration of the democratic lawmakers, and the effect of maximum irradiation of the contents of the fundamental right. If in the first case the scrutiny of the Constitutional Court must be particularly intense, in the second case the Court is called upon to ensure a content that, although imposed on the judicial bodies (Art. 5 of the Organic Law of the Judiciary), does not prevent further developments or interpretations more favourable to the full development of the constitutional rule.

With regard to the essential content, the following case-law was established in CCJ 11/1981 of 8 April (ECLI:ES:TC:1981:11), cited above:

"In order to approach the idea of 'essential content' which in Art. 53 of the Constitution refers to all the fundamental rights and which may refer to any subjective rights, irrespective of whether or not they are constitutional, there are two possible courses of action. The first is to attempt to make use of what is generally called legal nature or the means of perceiving or configuring each right. According to this idea it will be necessary to establish a relation between the language used by normative provisions and what some authors term meta-language, or generalised ideas and convictions usually admitted among legal professionals, judges and in general, specialists in law. Often the *nomen* and scope of a subjective right exist prior to the moment when that right is regulated by specific lawmakers. The abstract classification of the law conceptually pre-dates the legislative moment and in this respect it is possible to speak of a *recognisability of this abstract type* in the specific regulation. Law specialists may respond if what lawmakers have regulated is or is not adjusted to what is generally understood by a right of this type. The essential content of a subjective right constitutes those faculties or possibilities of action necessary for the right to be recognisable as pertinent to the type described and without which it would no longer belong to this type, and it has to be included

power of amendment. Shortly before the reintroduction of the prior control of statutes of autonomy and amendment proposals, Javier TAJADURA TEJADA, "El control previo de constitucionalidad una propuesta de reforma constitucional", *El Cronista del Estado Social y Democrático de Derecho*, no. 43 (2014), pp. 56 et seq. reflected on the scope and limits of this way of controlling the constitutionality of acts emanating from Parliament.

in another, thus denaturalising it, in a manner of speaking. All this refers to the historic moment in time when each case is addressed and the conditions inherent in democratic societies, in the case of constitutional rights.

The second possible course of action for defining the essential content of a right consists in attempting to seek what a significant tradition has called *legally protected interests* as a nucleus and core of subjective rights. It is therefore possible to speak of the essential nature of the content of the right in order to refer to that part of the content of the right which is absolutely necessary for the legally protectable interests, which give rise to the right, to be real, concrete and effectively protected. In this way, the essential content is exceeded or is unknown, when the right is subject to restrictions which make it impracticable, and which hinder it beyond reasonable bounds or deprive it of the requisite protection.

The two courses of action proposed in order to attempt to define what may be understood by 'essential content' of a subjective right are not alternative, nor yet unethical, in fact on the contrary they may be considered as complementary, so that when required to determine the essential content of each specific right they may be used together to contrast the results achieved by either means." (PoL 8, emphasis added).

Recognisability or recognition of the right and preservation of legally protected interests as the core of the essential content. This being the case, it is difficult for the Constitutional Court to waive the exercise of its jurisdictional power and to renounce establishing both the preunderstanding of the law and the identity of those different legally protected interests. This does not mean that in the exercise of this function it does not weigh the reasons put forward by those public authorities – in particular, the Parliament – called by the Constitution itself from the definition of the right in question.

Answering the question about the existence of more important rights in the Spanish Constitution, it is enough to point out that the differences between constitutional rights have nothing to do with their importance, nor does there exist a distinct hierarchy of fundamental rights. These differences allude to the direct effectiveness of the rights of freedom, which do not require legislative intermediation, as is the case with the rights of provision, to the nondelegable legislation of organic law or ordinary law for the normative development of the right and, finally, to the mechanisms of procedural protection of the rights proclaimed in Arts. 14 to 29 (equality, personal, ideological, freedom of expression...), which incorporate the possibility of recourse to the Constitutional Court in *amparo*. The Constitution must be interpreted jointly and systematically to resolve apparent antinomies. Since there is no unavailable core for the power of amendment, it is idle to consider, also from this perspective, the already rejected hierarchy of constitutional rights.

19. *Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the In claris non-fit interpretatio canon?*

Given that the constitutional provisions are characterised by a particularly open texture, an extreme already mentioned above, it is not possible to resort to aphorism *in claris non-fit interpretatio*. It will not be surprising that when the Constitutional Court has invoked this rule it has done so in the interpretation of legal norms. This has been the case of the contrast of state and regional rules where there is a manifest contradiction [CCJs 388/1993, of 23 December (ECLI:ES:TC:1993:388), and 31/2006, of 1 February (ECLI:ES:TC:2006:31)], the determination of the place and deadline for submitting candidates in electoral processes [CCJs 83/2003 of 5 May 2003 (ECLI:ES:TC:2003:83), and 26/2004 of 26 February (ECLI:ES:TC:2004:26)], or the finding of the existence of provisions, in urban matters, "whose literality is clear and leaves no room for alternative interpretations" [CCJs 148/2012 of 5 July (ECLI:ES:TC:2012:128), PoL 10, and 76/2022 of 15 June (ECLI:ES:TC:2022:76), PoL 4].

The requirement of "quality of the law" refers to the need for possible limitations of freedoms to be accessible to the citizen, that is, in the words of CCJ 184/2003 of 23 October (ECLI:ES:TC:2003:184), PoL 3, "that the rules be precise, clear and detailed". Thus, if the canon *in claris non fit intepretatio* lays down a hermeneutic rule, the quality requirement of the law, as set out in the case-law of the European Court of Human Rights, is a guarantee of the rights of citizens.

The quality requirement of the law refers to the burden placed on the lawmakers to "make the greatest possible effort to ensure legal certainty or, in other words, the *reasonably well-founded expectation of the citizen in what the action of the power in application of law should be*" [CCJ 34/2010, of 19 July (ECLI:ES:TC:2010:34), PoL 5, emphasis added]. Therefore, where limitations to fundamental rights are concerned, it is necessary that the lawmakers not only define precisely the aim justifying intervention in the sphere of freedoms of individuals, but also that the regulation of intervention be made in such terms as to safeguard the predictability of the actions of the public authorities so that citizens can freely program their conduct [CCJ 145/2014, of 22 September (ECLI:ES:TC:2014:145), PoL 7].

The Constitutional Court has emphasised that the requirements of this principle operate with particular intensity in the criminal or sanctioning field [CCJs 219/2016 (ECLI:ES:TC:2016:219), and 220/2016 of 19 December (ECLI:ES:TC:2016:220), PoL 5(a) of both], that in others, where the regulatory requirement is not increased by comparison with the requirement arising from the principle of legal certainty in its subjective aspect (CCJ 135/2018, of 13 December (ECLI:ES:TC:2018:135), PoL 6)[1001].

20. *What is the intensity review of your Court in case of the legitimate aim test?*

In the processes of constitutionality of laws, the Spanish Constitutional Court has hardly needed to deepen the requirement that restrictive measures of law pursue a constitutionally legitimate aim. Thus, it is sufficient to point out that in CCJ 60/2015, of 18 March (ECLI:ES:TC:2015:60), PoL 5, it has been stated that, in the case of tax measures establishing a different tax treatment, the lawmakers must provide not only the identification of the constitutionally legitimate aim but also the reasons justifying that difference in treatment.

In any case, the starting point must be sought in the need for any measure limiting fundamental rights to pursue, as an inexorable premise, the realisation or protection of a constitutionally legitimate aim or be aimed at "the protection or safeguarding of a constitutionally relevant good, for 'although this Court has stated that the Constitution does not prevent the State from protecting rights or legal interests at the cost of sacrificing others that are equally recognised and, therefore, that the lawmakers may impose limitations on the content of fundamental rights or their exercise, we have also specified that, in such cases, these limitations must be justified in the protection of other constitutional rights or interests' (CCJs 104/2000, of 13 April, PoL 8 and those cited therein) and, in addition, must be proportionate to the aim pursued (CCJs 11/1981, PoL 5, and 196/1987, PoL 6)' (CCJ 292/2000, PoL 15)." [CCJ 76/2019 of 22 May (ECLI:ES:TC:2019:76), PoL 5].

In *amparo* proceedings, the Constitutional Court has been more incisive in monitoring the concurrence of the constitutionally legitimate aim limiting the measure that restricts the right, requiring, first, that the judicial decision agreeing or ratifying it identifies the constitutionally legitimate aim pursued [CCJ 61/2001, of 6 February (ECLI:ES:TC:2001:61), PoL 4]. If there is no justification, there are grounds to invalidate the decision (CCJ 27/2008 of 11 February (ECLI:ES:TC:2008:27)).

In the area of pre-trial detention, the Constitutional Court has clearly defined the limits of judicial discretion by reducing the constitutionally legitimate aims that can be pursued by this measure to those relating to the prevention of the risk of absconding, the risk of reoffending or the proper administration of justice, as would be the case if the person under investigation were able to steal evidence or unlawfully impede the investigation [CCJ 128/1995, of 26 July (ECLI:ES:TC:1995:128)].

On the other hand, the Court has been particularly rigorous in the requirement to identify the constitutionally legitimate aim when measures like wiretapping [CCJ 49/1999, of 5 April (ECLI:ES:TC:1999:49), PoL 7] or entering a domicile [CCJ 8/2000, of 17 January (ECLI:ES:TC:2000:8), PoL 4] are ordered. It is true that the rigour of the requirement parallels the generosity in considering the effective concur-

1001 CCJ 273/2000, of 15 November (ECLI:ES:TC:2000:2000) distinguished for the first time the subjective and objective aspects of the principle of legal certainty, proclaimed by Article 9(3) SC. The certainty of the rule would be included on the objective side, and the certainty of the effects of its application by the public authorities on the subjective side (PoL 9). As can be seen, the delimitation of those contents overlaps, at least partially, with those included in the principle of quality of the law.

rence of that constitutionally legitimate aim since the Constitutional Court has concluded that the investigation of crimes is of this nature [CCJ 104/2006, of 3 April (ECLI:ES:TC:2006:104), PoL 3]. In the same vein, CCJ 207/1996, of 16 December (ECLI:ES:TC:1996:207), PoL 4(A) understood that there was a constitutionally legitimate aim in bodily interventions (hair samples) when they were carried out for the purpose of the investigation. Thus, after recognising that the Spanish Constitution does not provide for the existence of any constitutionally legitimate aim that allows to limit the right to physical integrity, as it does, for example, in the case of home inviolability, "the public interest inherent in the investigation of an offence, and, more specifically, the determination of facts relevant to the criminal proceedings are, of course, a legitimate cause that may justify the carrying out of corporal intervention, provided that such a measure is laid down by law". Similarly, DNA sampling has been understood to pursue a constitutionally legitimate aim because this has been established by the European Court of Human Rights in its case-law: "we have already noted that the European Court of Human Rights agrees that these analyses are legitimate when they pursue the aim of linking a particular person to the particular crime of which he or she is suspected (ECtHR of 4 December 2008, *S. and Marper v. the United Kingdom*, § 100)" [CCJ 199/2013 (ECLI:ES:TC:2013:199), 5 December 2013, PoL 8].

The identification of the constitutionally legitimate aim allows for a real and effective protection of the fundamental rights of prisoners in penitentiary institutions, since that aim must be identified in any measure of interception of the communications of inmates [CCJ 201/1997, of 25 November (ECLI:ES:TC:1997:201), PoL 7], as well as in measures that restrict the privacy of prisoners. This is the case of prison records, in relation to which the Court has declared, in CCJ 89/2006, of 27 March (ECLI:ES:TC:2006:89), PoL 3, that those records affect the right of inmates to privacy. While "it is not an absolute right, as is none of the fundamental rights, [and can] be upstaged against constitutionally relevant interests, [the requirement] that the cut that it is to experience is revealed to be necessary to achieve a constitutionally legitimate aim, proportionate to achieving it and, in any event, be respectful of the essential content of the law, [must] always be fulfilled".

21. *What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (i.e. suitability, necessity, and proportionality in the narrower sense)?*

22. *Does your Court go through every applicable limb of the proportionality test?*

As we have already pointed out above, the Spanish Constitutional Court submits the restrictive measures of fundamental rights to the "classical" proportionality review. Thus, as recalled in the aforementioned CCJ 88/2023, of 18 July (ECLI:ES:TC:2023:88), PoL 5(B), having established the constitutional legitimacy of the aim pursued, the following are subsequently examined: its suitability to achieve that purpose, its necessary character in the absence of another less sharp on the fundamental rights concerned and its reasonableness or proportionality in the strict sense because it derives more benefits in the general interest than damage to the committed right. Obviously, the application of that proportionality review means that the Court must make the measure at issue subject to an examination of compliance with each of the conditions governing it.

23. *Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?*

Based on the principle of the presumption of constitutionality of legislation, it is for those who maintain their unconstitutionality to provide the reasons on which their judgment of invalidity is based. From the perspective of the applicant, the Constitutional Court has spoken "of a genuine 'procedural burden of claiming and proving' that the applicant must provide not only in order to 'collaborate' with constitutional justice 'by means of a detailed analysis of the questions raised' (inter alia, CCJ 152/2017, of 21 December, PoL 1), but also to enable the parties to appear and exercise their right of defence (CCJ 118/1996, of 27 June, PoL 2, among others), a right which does not allow this court to 'reconstruct the claim or to satisfy the applicant's reasons *sua sponte*' (CCJ 65/2020, of 18 June, PoL 9, citing others)" [CCJ 34/2023 of 18 April (ECLI:ES:TC:2023:34), PoL 2 (c)]. However, having lifted that burden and accepted the possibility of formulating the constitutionality judgment, it is for the authority which issued the contested measure 'to provide the reasons which, on the basis of con-

stitutional criteria of proportionality, explain that the right [...] must be limited" [CCJ 88/2023, of 18 July (ECLI:ES:TC:2023:88), PoL 4 (c)]. Consequently, the Constitutional Court cannot consider satisfied the burden placed on the person who complains of the unconstitutionality of a particular measure, giving the reasons that the applicant does not give, and it cannot provide *sua sponte* the reasons not provided by the authority responsible for the measure in question.

24. *Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial Deference doctrine?*

The first time that the expression "proportionality review" appears in the case-law of the Spanish Constitutional Court is in CCJ 104/1984, of 26 November (ECLI:ES:TC:1984:104), PoL 4. Since then the mention has been constant, reaching almost 300 decisions. It is important to note that on that first occasion the Court did not use the expression to refer to its own jurisdiction but to refer to the usual techniques of judicial protection of fundamental rights. This means that the Constitutional Court assumed, from the first years of its existence, that the proportionality test is an instrument capable of assessing the adequacy of the decision specifically at issue with the parameter of constitutionality in each applicable case.

Some of the cases in which the Constitutional Court has referred to the concurrence of a constitutionally legitimate purpose as an unavoidable premise of the proportionality review of rules and decisions have been described above. Earlier and more recent judgments have been mentioned therein, which means that the Court has been making use of this monitoring technique on the constitutionality of decisions of public authorities practically since its inception.

On the other hand, although it is true that the proportionality review allows to act with a greater degree of deference, it should be borne in mind that it makes it possible to monitor the very purposes of the measures, their suitability, necessity and proportionality in the strict sense. With regard to the control of purposes, it should be recalled that the work of the lawmakers is subject to an end only in negative terms, so that it cannot use the technique of controlling administrative discretion known as "misuse of power". However, to the extent that the Court can judge the constitutional legitimacy of the end, it is provided with another instrument for monitoring the constitutionality of the measure, including the parliamentary rule, which is subject to its scrutiny. In addition, the possibility of assessing alternative measures places the Constitutional Court in a complex position where it could run the risk of not making judgments towards the past (the very essence of the judicial power on the irrevocable determination of law in concrete terms) but of selecting alternatives (a more typical area of politics).

25. *Has the jurisprudence of the ECtHR shaped your Court's approach to Deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding Deference of your Court in similar cases?*

Article 10(2) of the Spanish Constitution states that "the principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain". This constitutional openness to international and European human rights law[1002] has favoured the incorporation of the case-law of the European Court of Human Rights into the canon of judgments used by the Constitutional Court. As it itself has stated, "this court has at all times been aware of the value that, by virtue of Art. 10(2) SC, must be recognised to the case-law of the European Court of Human Rights in its interpretation and protection of fundamental rights (inter alia, CCJ 35/1995, of 6 February, PoL 3)" [CCJ 119/2001, of 24 May (ECLI:ES:TC:2001:119), PoL 6; in a case in which the possibility that environmental noise in a private home could affect the rights to physical integrity and to privacy in the home, in connection with the right to health, was being elucidated].

1002 In this regard, it is necessary to quote Alejandro SAIZ Arnáiz's monograph, *La apertura constitucional al derecho internacional y europeo de los derechos humanos: el artículo 10.2 de la Constitución española*, Consejo General del Poder Judicial, Madrid, 1999.

From the outset, the Spanish Constitutional Court has been aware of the existence of many areas in which a certain discretion must be recognised to public authorities. Specifically, in CCJ 62/1982 of 15 October (ECLI:ES:TC:1982:62), it identified the concurrence of a double discretion: on the one hand, the "discretion which corresponds to the decision of the lawmakers for the fixing of sentences" (PoL 6) and, on the other hand, the discretion enjoyed by judges in the formulation of the proportionality judgment (PoL 5). It should be noted that that decision gave consideration to the principle of proportionality as an indeterminate legal concept, which allowed for a prudent balance between the recognition of a margin of intervention by judges and the possibility of monitoring that intervention from the constitutional perspective, given that those same judges, while exercising the *ius puniendi* of the State, act as guarantors of the fundamental rights of citizens [in CCJ 180/1999, of 11 October (ECLI:ES:TC:1999:180), the term used is "legislative legal concept" in relation to honour, a fundamental right recognised in Article 18 of the Spanish Constitution, in whose delimitation judges enjoy discretion in the case, subject to review by the Constitutional Court]. This duality is reflected, in relation to the limitations on communicative freedoms, among others, in CCJs 206/1990, of 17 December (ECLI:ES:TC:1990:206); 127/1994 of 5 May (ECLI:ES:TC:1994:127) and 235/2007 of 7 November (ECLI:2007:235).

The Constitutional Court mentioned, although not as a *ratio decidendi*, the case-law of the European Court of Human Rights on the discretion of the national authorities in CCJ 198/2012 of 6 November (ECLI:ES:TC:2012:198), in relation to the regulation of same-sex marriage. As an argument *ex abundantia,* in CCJ 41/2013, of 14 February (ECLI:ES:TC:2013:41), it declared unconstitutional the requirement of having children in common for the benefit of a widow's pension, since it constitutes a situation of discriminatory and unfavourable treatment for same-sex couples.

In CCJ 140/2018, of 20 December (ECLI:ES:TC:2018:140), the Constitutional Court prosecuted the constitutionality of the regulation of universal justice contained in the Organic Law on the Judiciary. This judgment recalls that there is no single model for the universal extension of jurisdiction in the Council of Europe's human rights system, which is expressed mainly through the case-law of the European Court of Human Rights, which, assuming that the procedural guarantees set out in Article 6 ECHR would not make any sense if the right of access to courts were not previously protected; that is to say, the right of access to jurisdiction as an element inherent in the guarantees enshrined in Article 6 ECHR recognises that this is "a right which is devoid of an absolute nature and that it is subject to the limitations implicitly admitted in so far as it requires regulation on the part of States which enjoy a certain discretion in the development of such regulation [...] Such discretion cannot, on the other hand, lead to limitations restricting access to the jurisdiction of the individual in such a way that the right is affected in its essence" (PoL 5).

26. *Has the ECtHR condemned your State of the Deference given by your Court in a specific case, a Deference that you have made it an ineffective remedy?*

Spain has been convicted twice by the European Court of Human Rights in cases where the violation of the 1950 Convention was directly and immediately related to the action of the Constitutional Court: In its judgment of 23 June 1993, *Ruiz Mateos v. Spain*, the Strasbourg Court found that the applicant's right to a public trial with full guarantees had been infringed because the national procedural law had not allowed him to appear in the question of unconstitutionality raised in relation to a particular decree-law governing the expropriation of the group of undertakings of which he was the owner. In the judgment of 22 June 2023, *Lorenzo Bragado et al. v. Spain*, the same right, proclaimed in the article of the 1950 Convention, was violated in relation to the inadmissibility of an *amparo* appeal filed in relation to the delay in the renewal of the General Council of the Judiciary.

As can be seen, none of these two cases corresponds to the assumptions referred to in the question.

IV. **Other peculiarities**

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

28. *Has your Court have grown more deferential over time?*

29. *Does the deferential attitude depend on the case load of your Court?*

It is clear from the above statement that the Spanish Constitutional Court has shown from a very early stage its institutional courtesy both in the processes of unconstitutionality and in others that have as their immediate purpose the protection of the fundamental rights and public freedoms of citizens. With some significant exception [CCJ 107/1996, of 12 June (ECLI:ES:TC:1996:107), concerning compulsory affiliation to the official chambers of commerce, industry and navigation, an example of strong deference], the Court has been demonstrating what has come to be called *weak deference*. It weighs the reasons put forward by the author of the rule or decision, acting against them with the appropriate institutional respect, which does not imply the leaving of judicial power in the hands of the person responsible for issuing the provision or decision whose constitutionality is disputed in the case[1003].

There are no statistical data that allow us to draw the evolutionary line of the deferential attitude shown by the Constitutional Court in its forty-two years of operation. However, it is possible to state, without risk of error, that this deference has no connection with the workload of the Court. The response to the increase in the demand for constitutional justice has been sought in the procedural tools, particularly in the process of granting *amparo* appeals (Organic Law 6/2007, of 24 May, which introduced the motion to vacate proceedings as an ordinary remedy for possible violations of fundamental rights and objected to this procedure of admission with the requirement of special constitutional significance), and even in the search for alternative solutions to appeals of unconstitutionality regarding conflicts of power (Organic Law 1/2000, of 7 January, which extended the time limits to file appeals when it came to the negotiation of the territorial powers –between the State and the autonomous communities– in order to solve the conflict of powers). Note, however, that, at the same time, the lawmakers, making use of the power conferred on them by Article 161(1)(d) of the Spanish Constitution, has given the Court new powers to hear the conflict in defence of local autonomy (Organic Law 7/1999 of 21 April 1999), or the proceedings that may be impeded in relation to the fiscal rules approved by the Basque historical territories (Organic Law 1/2010 of 19 February 2010). Thus, the lawmakers' own assessment of the Court's workload does not seem conclusive, since the introduction of mechanisms to lighten it has usually been accompanied by the creation of new procedures and, therefore, by an increase in the demand for constitutional justice.

30. *Can your Court base its decisions on that reasons are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?*

According to Article 39(2) of its organic law, the Constitutional Court "may ground the declaration of unconstitutionality on the violation of any constitutional provision, regardless of whether it was invoked during the proceedings". A legal provision conferring on the Court powers to act *sua sponte* which must be in line with the provisions of article 84 of its organic law. According to this provision, the Court "may, at any time prior to delivering judgment, inform the parties to constitutional proceedings of the possible existence of other grounds, different from those invoked, of sufficient importance to warrant an appropriate ruling on admissibility and rejection and, when appropriate, on the granting or dismissal of the constitutional complaint". The first rule [Art. 39(2) OLCC] is established for unconstitutionality proceedings (appeal and question of unconstitutionality), while the scope of application of the second rule (Art. 84 OLCC) extends to all constitutional proceedings.

At least two problems arise from these legal provisions: the material limits of the change in the canon of prosecution and the possibility of dispensing the procedure to the parties in the proceedings

1003 In the scientific doctrine, Víctor FERRERES COMELLA, *Justicia constitucional y democracia*, Centro de Estudios Políticos y Constitucionales, Madrid, 2012, 2nd edition, provides very solid reasons in favour of a weak deference such as that shown by the Spanish Constitutional Court and which provides incentives for the lawmakers to weigh in particular the constitutional framework in which they are called to perform their powers and functions.

of unconstitutionality, particularly in the case of questions of unconstitutionality.

Regarding the first one, it appears that the *ex officio* extension of the trial canon is intended to realise the principle of unity of the Constitution, the full content of[1004]which must be taken into account by the applicants when initiating the proceedings, as well as, obviously, by the Court in resolving it. That said, it does not seem that the power conferred by Article 39(2) OLCC allows the Constitutional Court to declare the unconstitutionality –and, where appropriate, nullity– of legal provisions for reasons which are outside the very object of the process in which that power is used –i.e. violation of constitutional rules. For example, this possibility of extending the canon could not be used to declare a certain legal provision unconstitutional for material or substantive reasons where the positive conflict of jurisdiction has been processed as an appeal of unconstitutionality in accordance with the provisions of Article 67 OLCC. In that case, the parameter of validity of the legal rule would have to adhere to those provisions of the body of constitutionality that distribute competences between the State and the autonomous communities. The same applies to the internal question of unconstitutionality provided for in Article 75 quinque (6) OLCC, where the only defect to raise should be, in coherence with the regulation of the specific constitutional process, the violation of the principle of local autonomy.

With respect to the possibility of making use of the power of Art. 39(2) OLCC without starting the hearing of the parties (Art. 84 OLCC) in unconstitutionality proceedings, it is appropriate to begin by recalling the full applicability of the first of these provisions to the question of unconstitutionality, even though the order raised by the promoting judicial body -which does not have and cannot have the procedural status of party- delimits the object of the constitutional proceedings. This "does not mean that the power governed by Article 39(2) OLCC, included in a chapter common to unconstitutionality proceedings in which the questions of unconstitutionality are included, should not be exercised by the Court in cases where, with a *certain degree of initial certainty,* it can be seen that the rule at issue may incur unconstitutionality by breach of a constitutional provision other than that invoked by the questioning judicial body" (CCJ 113/1989 of 22 June, PoL 2). In the same vein, CCJ 295/2006, of 11 October, PoL 5)" [CCJ 196/2014, of 4 December (ECLI:ES:TC:2014:196), PoL 5, emphasis added].

That reference to the *initial certainty* that must characterise the ground of unconstitutionality makes it possible to incardinate both legal rules, so that when it is found, already in the admission procedure, that the legal provision in question can – with a high degree of probability – incur a defect of unconstitutionality for a reason other than the alleged one and as long as that defect is related to the judicial process in which the question was raised, the Court may hear the parties involved, including those who were also in the ordinary judicial proceedings and have made use of the power conferred on them by Article 37(2) OLCC . Moreover, in unconstitutionality proceedings, the hearing will take place when the Court finds that there is a defect not alleged by the applicants, and not necessarily in the case of a mere divergence in the classification which does not affect the ground of unconstitutionality specifically raised[1005].

31. *Can your Court extend its constitutionality review to other legal provision that you have not been contested before it, but has a connection with the applicant's situation?*

According to Article 39(1) of its organic law, when the Constitutional Court annuls any legal provision "it shall also declare invalid [...] any other provisions of the same law, regulation or enactment having the force of law to which it must be extended by association or consequence". In what is now of interest, this legal provision presents three relevant notes: First, the power mentioned here can only be used in unconstitutionality proceedings and with respect to rules or acts with the force of law. Second, the extension of the effects of the judgment is, in any event, limited to the same law of which the provision specifically at issue forms part, without it being capable of reaching other legal

1004 Javier JIMÉNEZ CAMPO, "Consideraciones sobre el control de la constitucionalidad de la ley en el Derecho español", in AA. VV., La jurisdicción constitucional en España: la Ley Orgánica del Tribunal Constitucional, 1979-1994 (Coloquio internacional. Madrid, 13-14 October 1994), Centro de Estudios Constitucionales, Madrid, 1995, p. 94.

1005 See Javier JIMÉNEZ CAMPO, *ibid*., pp. 94 et seq.

texts, however intense the material connection that may be established between the legal provision at issue and those contained in the other legal texts. Finally, there must be an identity of reason (connection) or the provision to be annulled under Art. 39(1) OLCC must be entirely deprived of meaning (consequence). Thus, the applicants' situation is not the basis to extend the nullity to provisions that were not expressly challenged, or whose challenge was inadmissible; the basis is the fact of having the same defect of unconstitutionality[1006].

The judgment to be delivered in *amparo* proceedings must contain the provisions of Article 55(1) OLCC: (a) recognition of the fundamental right or freedom violated, (b) declaration of nullity of the decision, act or resolution that impeded the full exercise of protected rights and freedoms and (c) full restoration of the applicant's right or freedom "and adoption, where appropriate, of measures for its preservation". The Court has been wary of using this power; from CCJ 211/1989 of 19 December (ECLI:ES:TC:1989:211) on, it has made use of it to annul "the judicial proceedings that took place from the moment the defencelessness originated, declaring the nullity even of the final judgment that terminated the proceedings, *not because of its intrinsic content, but because it was the culmination of a flawed procedure*" (PoL 3; emphasis added). The same criterion has been maintained in respect of decisions prior to that in which the harm materialises, with the exception that, for practical reasons, this annulment does not imply a complete resumption of the proceedings where there is a decision to satisfy the fundamental right infringed in the least onerous way possible [CCJ 71/1991, of 8 April (ECLI:ES:TC:1991:71), on that occasion in employment matters, or CCJ 367/1993, of 13 December (ECLI:ES:TC:1993:367), in civil proceedings].

It should be noted that the "appropriate measures" for the preservation of the fundamental right referred to in Art. 55(1)(c) OLCC do not include, in accordance with the case-law of the Constitutional Court, reparation by means of the delivery of an economic equivalent. The refusal to grant compensation is based, from the outset, on the lack of jurisdiction of the Constitutional Court to determine the amount of compensation: "it is not for this Court to rule on damages" [inter alia, CCJ 87/1998, of 1 April (ECLI:ES:TC:1998:87), PoL 7][1007]. This formula is also used in CCJ 87/2004, of 10 May (ECLI:ES:TC:2004:87), which nuances it by making express reference to the circumstances of the case: "the measures that... correspond to the re-establishment of the appellant's right, given the circumstances prevailing in the present case, must be the responsibility of the judicial bodies" (PoL 6; the proceedings were then taken back to the moment before the appeal judgment was handed down, which could be ruled, with full cognition, on all the factual and legal aspects of the proceedings). Of particular interest is CCJ 144/2005 of 6 June (ECLI:ES:TC:2004:144), where, exceptionally, the possible claim for damages is connected with Article 55(1)(c) OLCC, in the following terms:

"As we have pointed out on as many occasions as the issue has been brought before us, this Constitutional Court lacks jurisdiction to resolve, as if it were a new instance, petitions for recognition of compensation for damages, since a pronouncement of this type, aimed at obtaining restitution, compensation or reparation as a substitute, does not correspond to any of those that this Court can make when resolving appeals for *amparo*, as enumerated in Art. 55 OLCC (CCJ 37/1982, of 16 June,

1006 In CCJ 365/2006, of 21 December (ECLI:ES:TC:2006:365), the Constitutional Court rejected the challenge of a large number of provisions of the Law on spatial planning and urban planning of Castilla-La Mancha, which were subsequently annulled by connection or consequence.

1007 Some authors -Germán FERNÁNDEZ FARRERES, *El recurso de amparo según la jurisprudencia constitucional*, Marcial Pons, Madrid, pp. 366 et seq., or Carmen CHINCHILLA MARÍN, comentario al artículo 58 en Juan Luis Requejo Pagés (coordinator), *Comentarios a la Ley Orgánica del Tribunal Constitucional*, Tribunal Constitucional/Boletín Oficial del Estado, Madrid, 2001, p. 927- have pointed to the birth of an alternative line of case-law, soon to wither away. With regard to undue delays, CCJ 36/1984, of 14 March (ECLI:ES:TC:1984:36), stated that "injuringthe right to a trial without undue delay creates, by mandate of the Constitution, a right to be compensated for the damages that such violation produces, when it cannot be otherwise remedied. The law may regulate the scope of that right and the procedure to enforce it, but its very existence stems from the Constitution and is to be declared by us" (PoL 4).

PoL 6), and as is also deduced from Art. 58 OLCC, which defers to the ordinary jurisdiction its declaration in a particular case whose raison d'être can be extended to the entire institution" (PoL 9). Article 58 OLCC refers to the judicial bodies the knowledge of the claims for damages deducted in connection with the precautionary measures that may be taken by the Constitutional Court in *amparo* proceedings. The mention of the *raison d'être* alludes to the exception that Art. 58 OLCC represents with respect to the general rule that attributes jurisdiction to resolve this issue to the judicial body that has jurisdiction to resolve the main claims (e.g. Art. 742 LCP).

Supreme Court of the Republic of Estonia

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Constitutional cultures vary and the courts' perceptions of their own role in a constitutional democracy affect the intensity of their scrutiny in fundamental rights cases. Many courts profess judicial deference.

Judicial deference is a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters which are perceived to be beyond their expertise or legitimacy to decide. The tool has been employed, most prominently, in human rights cases. This is due to their transcendent quality, capable of cutting across all substantive areas of public decision-making.

It is said that over-deferential attitude threatens the rule of law and separation of powers as much as excessive judicial activism does. The way judges exercise judicial deference is, therefore, a fundamental matter of constitutional principle that concerns the proper role of each branch of government in relation to significant questions of public policy.

The following questions aim to discover the differences in exercising judicial deference by European constitutional courts.

Questionnaire

for the national reports

I. Non-justiciable questions and deference intensities

1. In your jurisdictions, what is meant by "judicial deference"?

There is no concept of judicial deference that has been construed or defined in an unambiguous manner. In the field of constitutional review, judicial deference is generally understood to mean the court's deliberate avoidance of interference in the legislature's freedom of choice in those matters in which the Constitution leaves the legislature (political) discretion – i.e. the freedom to make choices, none of which is in conflict with the Constitution. Judicial deference is associated with the constitutional principle of the separation of powers.

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (e.g. questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

Yes, the Supreme Court has found that the extent of judicial review in the context of constitutional review may vary in scope or depth, depending on the field. For example, in the case of restrictions of fundamental social rights (fundamental right to positive actions by the state), judicial review is more limited than in the case of restrictions of the fundamental right to freedom. At the same time, the Supreme Court has not completely excluded any area of legislative drafting from judicial review (creating so-called inviolable areas).

3. Are there factors to determine when and how your Court should defer (e.g. the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

The scope of deference depends primarily on the area in which the judicial review is carried out. Deference is wider in scope in areas where the Constitution leaves the legislature a wider margin of discretion (in particular in matters relating to fundamental social rights and the general right to equality).

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

Insufficient factual knowledge can affect decision-making in more complex cases. This may pose a problem, in particular, in the second stage of the proportionality test (necessity), where the Court may not have sufficient factual knowledge to assess whether there are alternative measures to achieve the legislature's objectives. The Court sometimes has to act in a situation where none of the parties to the proceedings is interested in proposing alternatives. It may also render the resolution of a case difficult (and therefore lead to judicial deference) if the impact of a disputed provision has to be predicted. There have been cases such as the ones described above in the case law of the Supreme Court.

5. Are there cases where your Court deferred because there was a risk of judicial error?

The circumstances indicated in the previous point (lack of information concerning alternatives, difficulty in predicting the future) can, among other things, create a risk of errors.

6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

There have been cases where the Court has found that the legislature has a number of options, none of which would be in conflict with the Constitution, leaving the decision to the legislature as the branch of power legitimised by the people.

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

The Supreme Court has said that the legislature has extensive discretionary powers in guaranteeing social rights and the courts cannot start making social policy decisions instead of the legislator. The precise scope of fundamental social rights also depends on the economic situation of the country. At the same time, choices based on the state's social policy considerations must not result in a situation where limited resources are distributed in violation of the fundamental right to equality under subsection 12 (1) of the Constitution.

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

The Supreme Court has said that the legislature has exclusive competence to impose penal sanctions and that the legislature has a wide margin of discretion in defining the punishment corresponding to an offence (sentence limits). The scale of penalties depends on the values held by society, and it is the legislative power that is competent to express them. It also allows the Parliament to shape the national penal policy and influence criminal behaviour. It follows from the principle of the separation of powers that the courts cannot start to shape the system of sanctions instead of the legislature, taking abstract penal policy objectives as the basis. However, the legislature's wide discretion does not exclude the competence of the courts to assess the compliance of a rule of penal law, including a sanction, with the Constitution (section 152 of the Constitution).

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

No, at least no court judgement has been made on such grounds. It is not known whether security considerations have been a hidden reason for opting for one solution or the other.

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

Reforms are carried out through legislative drafting, just like the operations of the state in stable times. The protection of fundamental rights should neither be stronger nor weaker in the course of reforms, but reforms may render it necessary to pay heightened attention to the protection of fundamental rights.

II. The decision-maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

It cannot be said that the Supreme Court clearly applies more intensive scrutiny in the case of regulations than in the case of laws. The intensity of scrutiny does not directly depend on the legitimacy of the issuer of the legislation. However, there is a different control scheme for laws and regulations (e.g. inspecting whether the limits of authorisation are adhered to). When reviewing administrative acts, the Supreme Court, as a higher administrative court, also proceeds from the margin of discretion of the administrative authority, which it does not interfere with.

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

The positions taken in the course of the process of drafting laws are considered as part of the historical interpretation of legislation. Debates held in Parliament and explanatory memoranda of draft laws are examined, in particular, to determine the purpose of the law.

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

The Court examines the justifications given by the legislature upon issuing legislation. The Court does not place itself in the role of a political decision-maker, but when assessing the constitutionality of a provision, it may also take into account considerations and objectives which may also be objectively relevant, although not clearly apparent in the materials concerning the compilation of the draft.

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

The Court will take into consideration all the justifications put forward by the legislature, but will not be bound by them and may also use any other reasons and arguments it considers appropriate. The depth of the legislature's analysis in itself is not an argument that determines whether or in which manner the Court will take the legislature's views into consideration. In some cases, the Supreme Court has emphasised, inter alia, the thoroughness of the analysis carried out by the legislature when confirming the constitutionality of a provision.

15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

The assessment of the constitutionality of a provision is not directly linked to the depth of the legislature's analysis or the extent or nature of the debate in Parliament.

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitima-

cy?

In the case of laws adopted by the legislature, decisions are presumed to be legitimate (if the formal requirements of the legislative process have been met). In Estonia, the public is not generally involved in parliamentary proceedings in a manner that would allow to draw conclusions regarding the legitimacy of a decision.

III. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

The Supreme Court has not limited itself to one possible interpretation of a provision merely because the government has interpreted or applied that provision in a certain way.

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

Yes, in order to assess the substantive constitutionality of infringements of various fundamental rights, the Supreme Court applies different control schemes, which also means that the intensity of scrutiny varies.

In the case of infringements of the fundamental right to freedom, there must be a legitimate objective for the infringement to be substantively lawful, and the infringement must be proportionate to that objective, i.e. suitable, necessary and proportional (so-called strict constitutional review).

In the event of a breach of the general fundamental right to equality, the level of scrutiny is lower and the Supreme Court applies the test of reasonable and relevant cause. State aid in cases of deprivation (social protection) is insufficient if the discrepancy between what is established by the legislature and what is required by the Constitution is obvious.

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the In claris non fit interpretatio canon?

The Supreme Court is of the opinion that legal clarity means that legislation must be sufficiently clear and understandable so that everyone can reasonably foresee the state's activities and adjust their activities accordingly.

The degree of clarity required for all provisions by the Constitution is not the same. Provisions that allow the restriction of a person's rights and the imposition of obligations on them must be clearer and more precise.

The person must be able to reasonably foresee – where necessary, with appropriate advice – the consequences of a particular activity, taking into consideration the circumstances. These consequences do not have to be foreseeable with absolute certainty.

Based on the principle of democracy, the grammatical interpretation argument carries more weight, i.e. if the wording of the provision is clear, it must be followed.

20. What is the intensity review of your Court in case of the legitimate aim test?

There are no different degrees of intensity in identifying a legitimate aim. If the issuer of the provision has not expressed its aim, the Court will find it out on its own (the Court will not infer that there was no aim or it was not legitimate). The Court has also mostly considered aims to be legitimate, as they can usually be linked to a more general constitutional principle. In a situation where the Court itself identifies the aim, it would also be difficult to then find that it is not legitimate.

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (i.e. suitability, necessity, and proportionality in the nar-

rower sense)?

Yes, the Supreme Court applies a three-stage (suitable, necessary and proportional) control scheme when carrying out a proportionality test concerning the fundamental right to freedom.

22. Does your Court go through every applicable limb of the proportionality test?

The Supreme Court examines proportionality at all stages of the review. If a restriction is found to be disproportionate at any stage of the review, the Court will declare the provision unconstitutional without further review.

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

Providing evidence in the proportionality test is a complex matter, since in the case of suitability and necessity, proof of the circumstances precluding them should rather be provided (suitability must be presumed unless it is demonstrated that the measure does not achieve the objective; in order to rule out necessity, the existence of alternative measures must be proved), while the assessment of proportionality is largely a matter of judgement. The Court uses verifiable facts and evidence as much as possible in decision-making, but in many cases the decision may not be based on clearly verifiable facts.

24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

It is difficult to assess, as constitutional review is a relatively young field in Estonia and the proportionality test has been used since its early days (there is no previous case law to compare it with).

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

As the Estonian system of constitutional review is young, the case law of the ECtHR, including in the aspect of judicial deference, has had a significant impact on the Estonian case law. Although it may not be directly apparent from the motivation for decisions, the Court will often take into consideration the possible solution of the dispute before the ECtHR when making a decision, and in most cases the Court's assessment of the 'margin of discretion' overlaps with the potential assessment of the ECtHR.

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

Yes, a dispute about the internet ban for prisoners could be highlighted as such a case. In this case, the ECtHR criticised Estonia for not sufficiently substantiating the Supreme Court's decision (in particular, the legitimate aims of the ban, i.e. the risks that could be posed by allowing prisoners to have access to the internet). This suggests that, in the ECtHR's view, the Estonian court had limited itself too much by accepting, without further justification, the explanations of the legislative and executive powers as to the aims and justification of the internet ban.

IV. Other peculiarities

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

No issues of that kind have arisen in constitutional review cases.

28. Has your Court have grown more deferential over time?

It cannot be said that the level of scrutiny has decreased over time; it is rather the opposite.

29. Does the deferential attitude depend on the case load of your Court?

There is no noticeable connection between the number of cases and judicial deference, although of course it cannot be excluded that excessive workload may affect the quality of the Court's work.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

Yes, the Court can also find objectives and other justifications on its own. Yes, the Court is not bound by the specific constitutional provision invoked by the applicant.

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

Yes, the Court is bound by the application for constitutional review submitted to it, but, in the proceedings of a specific review of a legal provision (i.e. in the case of constitutional review initiated by courts), it is not bound by provisions with respect to which a constitutional review has been requested. In addition to the provisions indicated in the application, the Supreme Court may, for example, extend the review to provisions laid down in the same or another legal act which are so closely related to the disputed provision that their continued validity would lead to legal uncertainty.

In the proceedings of an abstract review of a legal provision (at the request of the President or the Chancellor of Justice), the Court is bound by the provisions disputed in the application and cannot change the subject matter of the application.

Le Conseil constitutionnel de la République française

Formes et limites de la déférence judiciaire : le cas des cours constitutionnelles

Les cultures constitutionnelles varient et la perception qu'ont les cours constitutionnelles quant à leur rôle dans une démocratie constitutionnelle affecte l'intensité de leur analyse dans les affaires qui impliquent des droits fondamentaux. De nombreux tribunaux font preuve de déférence judiciaire.

La déférence judiciaire représente un outil juridique inventé par les juges pour maintenir la séparation des pouvoirs et s'abstenir d'intervenir dans des affaires qu'ils considèrent aller audelà de leur expertise ou de leur légitimité à trancher. L'instrument a surtout été utilisé dans des affaires qui impliquent des droits fondamentaux. Et ce en raison de leur qualité transcendante, de leur capacité à traverser tous les domaines substantiels du processus décisionnel public.

On dit qu'une attitude trop déférente met en danger la prééminence du droit et la séparation des pouvoirs autant qu'un activisme judiciaire excessif. La manière dont les juges exercent leur déférence est donc une question fondamentale de principe constitutionnel, qui concerne le rôle approprié de chaque branche du gouvernement par rapport à des questions importantes de politique publique.

Les questions suivantes cherchent à découvrir les différences entre les manières dont les cours constitutionnelles européennes exercent la déférence judiciaire.

Questionnaire

Pour les rapports nationaux

I. Matières non justiciables et intensités de déférence

1. Qu'entend-on par « déférence judiciaire » dans vos juridictions ?

La notion de « déférence » ne trouve place ni dans la pratique ni dans la jurisprudence du Conseil constitutionnel. Plus largement, la déférence, qui peut être définie en français comme une « *considération respectueuse* »[1008] ou comme une « *condescendance mêlée d'égards et dictée par un motif de respect* »[1009], échappe au vocabulaire juridique français.

Compte tenu de la place de la Constitution au sommet de la hiérarchie des normes dans l'ordre juridique français, la référence à une telle notion ne peut qu'interroger en son principe même. Le Conseil constitutionnel juge en effet que *"la loi n'exprime la volonté générale que dans le respect de la Constitution* »[1010]. La notion de déférence peinerait à trouver place dans l'office du juge constitutionnel, auquel la Constitution impartit le rôle de contrôler que le législateur ne franchit pas les limites résultant de la Constitution.

Le Conseil constitutionnel ne peut dès lors que requalifier la terminologie du présent questionnaire pour se placer sur le terrain de la limitation de l'office du juge constitutionnel par le Constituant lui-même et, dans des hypothèses déterminées, par sa propre jurisprudence.

Ainsi, il est possible de relever que le Conseil constitutionnel se montre, non déférent, mais respectueux de la liberté d'action du législateur en refusant de trancher des choix qui relèvent par nature de marge d'appréciation de ce dernier, en jugeant que la Constitution « ne [lui] confère pas un pouvoir général d'appréciation et de décision identique à celui du Parlement ».

Néanmoins, le recours jurisprudentiel à cette formule justifiant une autolimitation du juge constitutionnel n'est pas systématique ; il « *prend naissance dans un contexte particulier et ne s'observe que dans un dixième des décisions.* [Il] *ne peut donc être assimilé à une retenue globale du juge constitutionnel puisqu'il en fait un usage sectoriel et choisit, dans des hypothèses précises, de mettre en avant la différence*

1008 Trésor de la langue française informatisé, disponible en ligne : http://atilf.atilf.fr/

1009 Dictionnaire Littré, disponible en ligne : https://www.littre.org/

1010 Décision n°85-197 du 23 août 1985 relative à la loi sur l›évolution de la Nouvelle-Calédonie.

qui opère entre son pouvoir d'appréciation et celui du Parlement »[1011].

Un tel énoncé apparaît en présence d'une « question de société », d'une donnée scientifique ou technique indisponible ou lorsqu'est en cause le principe de nécessité des délits et des peines (examen du grief tiré de l'article 8 de la Déclaration des droits de l'homme et du citoyen).

Les « questions de société » concernent essentiellement l'état des personnes[1012] et les questions de bioéthique qui engendrent un débat de société tenant à l'évolution des mœurs et impliquent des « *considérations éthiques et sociales* »[1013], lesquelles relèvent de la « *seule* »[1014] appréciation du Parlement. Le Conseil constitutionnel a ainsi « *toujours veillé à ne pas entrer dans un débat qui est philosophique et politique* »[1015].

Diverses formules utilisées par le Conseil constitutionnel renvoient à l'appréciation du Parlement vue comme une limite à la sienne propre. Depuis sa décision n° 74-54 DC du 15 janvier 1975 sur la loi relative à l'interruption volontaire de la grossesse, le Conseil constitutionnel affirme régulièrement, selon une formule demeurée intacte depuis lors, que l'article 61 de la Constitution[1016], en vertu duquel il se prononce sur la constitutionnalité des lois avant leur entrée en vigueur dès lors qu'il en est saisi, « ne [lui] confère pas un pouvoir général d'appréciation et de décision identique à celui du Parlement ». Il lui donne uniquement « *compétence pour se prononcer sur la conformité à la Constitution des lois déférées à son examen* ».

Au nombre des « questions de société » auxquelles le Conseil constitutionnel applique la formule précitée, peuvent être citées celles de de l'adoption au sein d'un couple non marié[1017], de la pénalisation des clients de personnes se livrant à la prostitution[1018], de l'assistance médicale à la procréation ou du mariage des couples de personnes de même sexe[1019].

Lorsqu'il est confronté à une question « scientifique ou technique », le Conseil constitutionnel emploie une formule qui diffère quelque peu : « *Considérant qu'il n'appartient pas au Conseil constitutionnel, qui ne détient pas un pouvoir d'appréciation et de décision identique à celui du Parlement, de remettre en cause, au regard de l'état des connaissances et des techniques, les dispositions ainsi prises par le législateur* »[1020].

1011 M. Talon, « Le Conseil constitutionnel ne dispose pas d'un pouvoir général d'appréciation et de décision de même nature que celui du Parlement : un mythe du droit constitutionnel », *Revue de droit public*, n° 1, 2020, p. 137

1012 Comme cela est précisé dans le commentaire de la décision n° 2016-739 DC du 17 novembre 2016, « *ainsi que l'a jugé le Conseil constitutionnel dans sa décision n° 2013-669 DC du 17 mai 2023 relative à la loi ouvrant le mariage aux couples de personnes de même sexe, en matière d'état des personnes, le législateur bénéficie d'une large marge d'appréciation* ».

1013 Cons. const., déc. n° 2010-2 QPC du 11 juin 2010, *Mme Vivianne L. [Loi dite « anti-Perruche »]*, cons. 14

1014 *Ibid.*

1015 V. le commentaire de la décision n° 2010-2 QPC du 11 juin 2010, *Mme Vivianne L. [Loi dite « anti-Perruche »]*,

1016 La même formule trouve également à s'appliquer aux décisions prises sur le fondement de l'article 61-1 de la Constitution depuis l'entrée en vigueur de la question prioritaire de constitutionnalité en mars 2010.

1017 Cons. const., déc. n° 2010-39 QPC du 6 octobre 2010, *Mmes Isabelle D. et Isabelle B. [Adoption au sein d'un couple non marié]*, cons. 5

1018 Cons. const., déc. n° 2018-761 QPC du 1er février 2019, *Association Médecins du monde et autres [Pénalisation des clients de personnes se livrant à la prostitution]*, paragr. 12

1019 Cons. const., déc. n° 2013-669 DC du 17 mai 2013, *Loi ouvrant le mariage aux couples de personnes de même sexe*

1020 Formule utilisée par le Conseil constitutionnel pour la première fois dans sa décision n° 94-343/344 DC du 27 juillet 1994, *Loi relative au respect du corps humain et loi relative au don et à l'utilisation des éléments et produits du corps humain, à l'assistance*

Au nombre des « questions scientifiques ou techniques » auxquelles le Conseil constitutionnel applique cette formulation figurent[1021] l'interdiction de commercialisation de tout conditionnement à vocation alimentaire contenant du bisphénol A[1022] et la réduction des déchets plastiques[1023], la réalisation de tests osseux aux fins de détermination de l'âge[1024], l'obligation de vaccination[1025] ou encore l'interdiction des néonicotinoïdes[1026].

L'« autolimitation » du juge constitutionnel dans son contrôle de l'appréciation du Parlement peut concerner les motifs pour lesquels le législateur adopte un texte, le contenu de ce dernier ou le but qu'il poursuit. En effet, selon sa jurisprudence constante, le Conseil constitutionnel « ne saurait rechercher si les objectifs que s›est assignés le législateur auraient pu être atteints par d›autres voies, dès lors que les modalités retenues par la loi ne sont pas manifestement inappropriées à l›objectif visé ».

La distinction ainsi établie entre l'office du juge constitutionnel et les prérogatives constitutionnelles du Parlement prévient tout risque de« gouvernement des juges ».

Votre Cour envisage-t-elle un éventail de déférence ? Existe-t-il des zones „interdites", ou des zones prédéterminées de non-responsabilité, ou des questions non justiciables pour votre Cour (par exemple, des questions morales controversées, des sensibilités politiques, des controverses sociétales, l'allocation de ressources limitées, des implications financières importantes pour le gouvernement, etc.) ?

Cf. la réponse à la question n° 1.

Existe-t-il des facteurs qui déterminent comment et quand votre Cour doit faire preuve de déférence (par exemple, la culture et les conditions de votre pays ; les expériences historiques de votre pays ; le caractère absolu ou restreint des droits fondamentaux en question ; la question débattue devant la Cour ; si les circonstances de l'affaire impliquent un changement des conditions sociales et des attitudes) ?

Cf. la réponse à la question n° 1.

Existe-t-il des situations dans lesquelles votre Cour a fait preuve de déférence parce qu'elle ne disposait pas de la compétence ou de l'expertise institutionnelle nécessaire ? Cf. la réponse à la question n° 1.

L'expertise scientifique apparaît essentielle à la création du droit dans certains domaines - notamment dans les domaines sanitaire, environnemental et technologique - comme, parfois, à son application.

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médicale à la procréation et au diagnostic prenatal, cons. 10

1021 V. les commentaires des décisions n° 2018-761 QPC du 1er février 2019, *Association Médecins du monde et autres [Pénalisation des clients de personnes se livrant à la prostitution]*, n° 2018-768 QPC du 21 mars 2019, *M. Adama S. [Examens radiologiques osseux aux fins de détermination de l'âge]* et n° 2019-808 QPC du 11 octobre 2019, *Société Total raffinage France [Soumission des biocarburants à base d'huile de palme à la taxe incitative relative à l'incorporation de biocarburants]*

1022 Cons. const., déc. n° 2015-480 QPC du 17 septembre 2015, *Association Plastics Europe [Suspension de la fabrication, de l'importation, de l'exportation et de la mise sur le marché de tout conditionnement à vocation alimentaire contenant du Bisphénol A]*

1023 Cons. const., déc. n° 2018-771 DC du 25 octobre 2018, *Loi pour l'équilibre des relations commerciales dans le secteur agricole et alimentaire et une alimentation saine, durable et accessible à tous*

1024 Cons. const., déc. n° 2018-768 QPC du 21 mars 2019, *M. Adama S. [Examens radiologiques osseux aux fins de détermination de l'âge]*

1025 Cons. const., déc. n° 2015-548 QPC du 20 mars 2015, Époux L. [Obligation de vaccination]

1026 Cons. const., déc. n° 2016-737 DC du 4 août 2016, *Loi pour la reconquête de la biodiversité, de la nature et des paysages*

Le recours à l'expertise scientifique, en ce qu'elle détermine ou oriente une politique publique, relève d'abord du pouvoir d'appréciation du législateur. Ainsi, à cet effet, le Parlement français s'est doté notamment de l'Office parlementaire d'évaluation des choix scientifiques et technologiques (OPECST) qui a pour mission d'informer les parlementaires sur les conséquences de leurs choix afin d'éclairer leurs décisions.

Lorsqu'il s'agit de contrôler les choix faits par le législateur face à des situations dont l'appréciation dépend de l'état des connaissances scientifiques, le contrôle du Conseil constitutionnel est limité à l'erreur manifeste d'appréciation. Pour opérer son contrôle sur la manière dont l'appréciation du législateur a pris en compte les conclusions de l'expertise scientifique, le Conseil constitutionnel peut prendre appui sur le débat contradictoire qui se noue devant son prétoire. Les règlements de procédure du Conseil constitutionnel aménagent en outre la possibilité de mesures d'instruction propres à faire venir jusqu'à lui des expertises.

Avez-vous des cas où votre Cour a fait preuve de déférence parce qu'il y avait un risque d'erreur judiciaire ?

Cf. la réponse à la question n° 1.

Y a-t-il des cas où votre Cour a fait preuve de déférence en invoquant la légitimité institutionnelle ou démocratique du décideur ?

Cf. la réponse à la question n° 1.

„Plus la législation concerne une question de politique sociale publique au sens large, moins le tribunal sera disposé à intervenir." Est-ce une norme valide pour votre Cour ? Votre Cour partage-t-elle le point de vue selon lequel les questions d'ordre public devraient être tranchées par des processus démocratiques parce que les tribunaux ne sont pas élus et n'ont pas le mandat démocratique de trancher les questions d'ordre public ?

Cf. la réponse à la question n° 1.

Votre Cour accepte-t-elle un principe général de déférence dans le jugement des politiques et de la philosophie criminelles ?

L'exigence de la nécessité des peines procède de l'article 8 de la Déclaration des droits de l'homme et du citoyen de 1789, selon lequel la loi ne doit établir que des peines strictement et évidemment nécessaires. Il en est de même de l'exigence de proportionnalité des peines.

Le Conseil constitutionnel n'exerce qu'un contrôle de l'erreur manifeste de l'adéquation de la sanction à l'infraction : il vérifie ainsi « *l'absence de disproportion manifeste entre l'infraction et la peine encourue* »[1027]. Le contrôle ainsi exercé est dit restreint.

Il peut y avoir des circonstances plus strictes dans lesquelles le gouvernement ne peut pas divulguer des informations à la Cour, en particulier dans le contexte d'affaires de sécurité nationale impliquant des informations classifiées. Votre Cour a-t-elle déjà fait preuve de déférence pour des raisons de sécurité nationale ?

Le Conseil constitutionnel opère un contrôle dit abstrait des dispositions législatives, qui ne vise pas à trancher un conflit subjectif entre deux prétentions opposées mais à confronter la loi aux exigences de la Constitution.

De par sa nature abstraite, ce contrôle des dispositions législatives n'est pas susceptible de compromettre le caractère secret des informations protégées par le secret de la défense nationale de telle sorte que la question ne se pose pas. Il est ainsi possible de mentionner, à titre d'exemple, que le Conseil constitutionnel, dans sa décision n° 2022-987 QPC du 8 avril 2022, a pu examiner les conditions de recours aux moyens des services de l'État soumis au secret de la défense nationale dans le cadre de certaines procédures pénales.

1027 Décision n° 86-215 DC du 3 septembre 1986, *Loi relative à la lutte contre la criminalité et la délinquance*, cons. 7.

Compte tenu du rôle des cours constitutionnelles en tant que gardiennes de la Constitution, devraient-elles interférer avec des politiques publiques prétendument inconstitutionnelles lorsque les gouvernements sont passifs dans la mise en œuvre des réformes des droits fondamentaux ?

Cf. la réponse à la question n° 1.

II. Décideur

11. Votre Cour témoigne-t-elle plus de déférence à une loi du Parlement qu'à une décision de l'exécutif ? Votre Cour fait-elle preuve de déférence en fonction du niveau de responsabilité démocratique du décideur initial ?

Le contrôle de constitutionnalité opéré par le Conseil constitutionnel, ainsi qu'il est prévu par les articles 61 et 61-1 de la Constitution du 4 octobre 1958, ne porte que sur les actes ayant une valeur législative.

Concernant le contrôle *a priori* de la constitutionnalité des lois, c'est-à-dire, avant leur promulgation et leur entrée en vigueur, , l'article 61 de la Constitution dispose que « Les lois organiques, avant leur promulgation, les propositions de loi mentionnées à l›article 11 avant qu›elles ne soient soumises au référendum, et les règlements des assemblées parlementaires, avant leur mise en application, doivent être soumis au Conseil constitutionnel, qui se prononce sur leur conformité à la Constitution. Aux mêmes fins, les lois peuvent être déférées au Conseil constitutionnel, avant leur promulgation, par le Président de la République, le Premier ministre, le Président de l›Assemblée nationale, le Président du Sénat ou soixante députés ou soixante sénateurs […] ».

Quant au contrôle *a posteriori*, c'est-à-dire, après l'entrée en vigueur de la loi, l'article 61-1 de la Constitution indique que « *Lorsque, à l'occasion d'une instance en cours devant une juridiction, il est soutenu qu'une disposition législative porte atteinte aux droits et libertés que la Constitution garantit, le Conseil constitutionnel peut être saisi de cette question sur renvoi du Conseil d'État ou de la Cour de cassation qui se prononce dans un délai déterminé […]* ». Tel est le fondement constitutionnel de la « question prioritaire de constitutionnalité » (QPC).

Le Conseil constitutionnel ne connaît pas en principe des actes émanant du pouvoir exécutif, dont le contentieux relève traditionnellement de la juridiction administrative. C'est le Conseil d'État qui est compétent en premier et en dernier ressort pour connaître du contentieux des ordonnances du Président de la République, des décrets, des actes réglementaires des ministres ainsi que des circulaires et des instructions de portée générale.

Le contrôle des ordonnances non ratifiées incorpore néanmoins une exception à ce principe. À l'égard de ce type d'actes, pris par le pouvoir exécutif dans le domaine législatif en vertu d'une habilitation donnée par le Parlement, le Conseil constitutionnel s'est reconnu compétent pour contrôler, par la voie du contrôle *a posteriori* permis par la QPC, la conformité aux droits et libertés que la Constitution garantit des dispositions d'une ordonnance non ratifiée, à la double condition que ces dispositions interviennent dans des matières relevant du domaine de la loi et que le délai d'habilitation fixé par le Parlement ait expiré[1028].

Quel poids votre Cour accorde-t-elle au processus législatif ? Quelle pertinence juridique, le cas échéant, l'analyse parlementaire devrait-elle avoir pour l'analyse par les juges de la compatibilité avec les droits fondamentaux ?

Le Conseil constitutionnel contrôle la clarté et la sincérité du débat parlementaire. Cette exigence est déduite par le Conseil constitutionnel de l'article 6 de la Déclaration des droits de l'homme et du citoyen de 1789, aux termes duquel « La loi est l'expression de la volonté générale [...] », et du premier alinéa de l'article 3 de la Constitution, aux termes duquel « La souveraineté nationale appartient au peuple qui l'exerce par ses représentants [...] ». Il juge que « ces dispositions imposent le respect des exigences de clarté et de sincérité du débat parlementaire ».

1028 Cons. const., déc. n° 2020-843 QPC du 28 mai 2020, *Force 5 [Autorisation d'exploiter une installation de production d'électricité]*.

Le principe de clarté et de sincérité s'impose au débat parlementaire en son ensemble. Il protège la minorité contre les abus éventuels de la majorité mais permet également aux assemblées de mettre en œuvre des procédures destinées à garantir le bon déroulement de leur travail. Le Conseil constitutionnel a intégré le principe de clarté et de sincérité parmi les normes de référence des décisions rendues sur les règlements des assemblées[22].

Au nombre des vices pouvant affecter la loi dans des conditions de nature à porter atteinte aux droits fondamentaux, le Conseil constitutionnel s'attache à vérifier si le législateur a bien épuisé sa compétence. Il peut ainsi être appelé à censurer des dispositions législatives ayant pour défaut de priver de garanties légales ou d'assortir de garanties insuffisantes la protection des droits et libertés protégés par la Constitution.[1029].

Votre Cour vérifie-t-elle si le décideur a justifié sa décision ou s'il s'agit d'une décision que la Cour elle-même aurait rendue si elle avait été le décideur ?

Comme il est indiqué dans la réponse à la question n° 1, le Conseil constitutionnel n'a pas vocation à substituer son appréciation à celle du législateur. Aussi affirme-t-il régulièrement qu'il ne dispose pas d'un « pouvoir général d'appréciation et de décision identique à celui du Parlement » et qu'il « ne saurait rechercher si les objectifs que s›est assignés le législateur auraient pu être atteints par d›autres voies, dès lors que les modalités retenues par la loi ne sont pas manifestement inappropriées à l›objectif visé ».

Votre Cour fait-elle preuve de déférence quant à la mesure dans laquelle la décision ou la mesure a été précédée d'une analyse approfondie de la compatibilité avec les droits fondamentaux ? Quelle doit être, par exemple, la profondeur de l'analyse du législateur pour que votre Cour lui donne du poids ?

Cf. les réponses aux questions n° 1 et 17.

Votre Cour examine-t-elle si les points de vue opposés ont été pleinement représentés dans le débat parlementaire lors de l'adoption d'une mesure ? Suffit-il qu'il y ait eu un débat approfondi sur le contenu général de la législation, ou faut-il qu'il y ait eu une considération spéciale des implications sur les droits ?

Cf. la réponse à la question n° 12.

Le fait que la décision appartienne au pouvoir législatif ou qu'elle ait été prise après des consultations publiques ou des débats publics est-il une preuve concluante de la légitimité démocratique de la décision ?

Cf. les réponses aux questions n° 1 et 11.

III. Le champ d'application des droits, légalité et proportionnalité

Votre Cour a-t-elle déjà fait preuve de déférence à l'étape de la définition des droits, en donnant du poids à la définition des droits du gouvernement ou à son application aux faits en cause ?

Lors de l'instruction des affaires, le Conseil constitutionnel prend en considération, dans le cadre de la procédure contradictoire qu'il organise, aussi bien les observations présentées par le Gouvernement que celles présentées par les autres parties. Pour autant, le Conseil constitutionnel reste seul compétent pour apprécier la constitutionnalité des dispositions qui lui sont déférées et ne saurait donc être lié par les éventuelles définitions proposées par le Gouvernement ou par les autres parties.

Des droits applicables affectent-ils l'intensité de la déférence ? Votre Cour considère-telle que certains droits ou aspects de droits sont plus importants et que, par conséquent, les ingérences dans leur exercice méritent un examen plus rigoureux que d'autres ?

La Constitution française n'a pas établi de hiérarchie formelle entre les différentes normes et les droits et libertés qu'elle garantit.

1029 Cons. const., déc. n° 2005-530 DC du 29 décembre 2005, cons. 77 à 89.

Le contrôle du Conseil constitutionnel porte donc en large partie sur a conciliation entre ces exigences constitutionnelles, à travers, notamment, le contrôle de proportionnalité.

Disposez-vous d'une échelle de clarté lors du contrôle de constitutionnalité d'une loi ? Comment décidez-vous de la clarté d'une loi ? Quand appliquez-vous la règle d'interprétation *In claris non fit interpretatio* ?

Par sa décision n° 2006-540 DC du 27 juillet 2006, le Conseil constitutionnel a consacré l'objectif de valeur constitutionnelle d'intelligibilité et d'accessibilité de la loi, qui découle des articles 4, 5, 6 et 16 de la Déclaration des droits de l'homme et du citoyen de 1789, en jugeant qu'il impose au législateur d'adopter des dispositions suffisamment précises et des formules non équivoques. Le législateur doit en effet prémunir les sujets de droit contre une interprétation contraire à la Constitution ou contre le risque d'arbitraire, sans reporter sur des autorités administratives ou juridictionnelles le soin de fixer des règles dont la détermination n'a été confiée par la Constitution qu'à la loi.

Quelle est l'intensité du contrôle de votre Cour au stade de l'établissement du but légitime ?

Si elle est absente en tant que telle de la jurisprudence du Conseil constitutionnel, la notion de buts légitimes paraît pouvoir renvoyer aussi bien à la catégorie des objectifs de valeur constitutionnelle, qui sont déduits par le Conseil constitutionnel et s'imposent au législateur pour le guider dans l'édiction d'une législation conforme à la Constitution, qu'à la notion d'objectifs d'intérêt général.

A titre d'exemples, constituent des objectifs de valeur constitutionnelle « *la lutte contre la fraude fiscale* »[1030] ou « *la possibilité pour toute personne de disposer d'un logement décent* »[25].

Quel test de proportionnalité votre Cour applique-t-elle ? Votre Cour applique-t-elle toutes les étapes du test classique de proportionnalité (c'est-à-dire satisfaire à une triple exigence d'adéquation, de nécessité et de proportionnalité au sens strict) ?

Bien qu'aucun texte ne l'impose, le recours au contrôle de proportionnalité innerve largement la jurisprudence du Conseil constitutionnel. Ce contrôle consiste à vérifier l'adéquation entre les objectifs de valeur constitutionnelle ou d'intérêt général et les moyens mis en œuvre pour atteindre ces objectifs.

Par sa décision n° 2008-562 DC du 21 février 2008 sur la loi relative à la rétention de sûreté, le Conseil constitutionnel a inauguré un contrôle approfondi de proportionnalité combinant les critères d'adéquation, de nécessité et de proportionnalité proprement dite, qui se déploie notamment dans le champ des atteintes à la liberté individuelle et à la liberté d'expression.

De telles mesures doivent être adéquates, c'est-à-dire appropriées, ce qui suppose qu'elles soient *a priori* susceptibles de permettre ou de faciliter la réalisation du but recherché par son auteur ;

Elles doivent être nécessaires au sens où elles ne doivent pas excéder ce qu'exige la réalisation du but poursuivi, d'autres moyens appropriés, mais qui affecteraient de façon moins préjudiciable les personnes concernées ou la collectivité, ne devant pas être envisageables.

Elles doivent enfin être proportionnées au sens strict : elles ne doivent pas, par les charges qu'elles créent, être hors de proportion avec le résultat recherché.

Votre Cour passe-t-elle par chaque étape applicable du test de proportionnalité ?

Tel est bien dans le cas dans le champ du triple contrôle, sauf à ce que la mesure législative doive être jugée contraire à un seul des trois critères pris isolément.

Existe-t-il des affaires dans lesquelles votre Cour admet que la mesure litigieuse satisfait à une ou plusieurs étapes du test de proportionnalité, même s'il n'y a manifestement pas suffisamment de preuves pour démontrer ce fait ?

Si l'intensité du contrôle de constitutionnalité peut varier comme il a été indiqué dans la réponse à la

1030 Cons. const., déc. n° 2010-19/27 QPC du 30 juillet 2010, Époux P. et autres [Perquisitions fiscales], cons. 9 [25] Cons. const., déc. n° 94-359 DC du 19 janvier 1995, *Loi relative à la diversité de l'habitat*, cons. 7.

question n° 22, il ne saurait être question pour le Conseil constitutionnel de considérer que l'une des conditions posées par le « test de proportionnalité » ne peut pas être étayée. À cet égard, il convient de souligner néanmoins que le caractère abstrait du contrôle opéré par le Conseil constitutionnel (cf. réponse à la question n° 9) rend la question des « preuves » moins pertinente.

L'apparition du contrôle de la proportionnalité dans la jurisprudence de votre Cour a-telle coïncidé avec l'essor de la théorie de la déférence judiciaire ?

Non. Cf. les réponses aux questions n° 1 et 21.

La formule jurisprudentielle de 1975, qui a accédé au « *panthéon des phrases classiquement attribuées au Conseil constitutionnel* »[1031], selon laquelle « *l'article 61 de la Constitution ne confère pas au Conseil constitutionnel un pouvoir général d'appréciation et de décision identique à celui du Parlement, mais lui donne seulement compétence pour se prononcer sur la conformité à la Constitution des lois déférées à son examen* », « *s'inscrit dans un contexte institutionnel, juridique et politique particulier, propice à son autolimitation* ».[27]

Deux bouleversements successifs sont depuis lors venus profondément modifier la portée du contrôle de constitutionnalité qui était exercé par le Conseil constitutionnel au début des années 1970. La première étape de cette évolution est la décision du Conseil constitutionnel du

16 juillet 1971, par laquelle il élève le principe de la liberté d'association au rang des « principes fondamentaux reconnus par les lois de la République » mentionné dans le Préambule de la Constitution de 1946. Désormais, son contrôle ne sera plus limité à la lettre de la Constitution de la Ve République ; par référence à la Déclaration des droits de l'homme et du citoyen de 1789, du Préambule de la Constitution de 1946 et des « principes politiques économiques et sociaux nécessaires à notre temps » qu'énonce ce dernier, et depuis 2004, de la Charte de l'environnement, le Conseil constitutionnel reconnaît la valeur constitutionnelle de nouveaux droits. L'ensemble des normes susmentionnées constitue désormais le « *bloc de constitutionnalité* », selon l'expression de Louis Favoreu[1032].

Ensuite, en ouvrant à une minorité parlementaire la possibilité de saisir le Conseil constitutionnel, la révision constitutionnelle de 1974, charge « *d'une balle supplémentaire* « le canon braqué vers le Parlement » »[29], selon l'expression de Charles Eisenmann.

Le premier usage par le Conseil constitutionnel d'une formule justifiant l'encadrement de ses pouvoirs au profit de ceux du Parlement s'explique donc notamment par un certain contexte institutionnel, mais n'a pas à proprement parler coïncidé avec l'apparition du contrôle de proportionnalité dans sa jurisprudence.

25. La jurisprudence de la Cour européenne des droits de l'homme a-t-elle façonné l'approche de votre Cour en matière de déférence ? La doctrine de la Cour européenne des droits de l'homme sur la marge d'appréciation est-elle l'équivalent national de la marge d'appréciation que votre Cour accorde ? Si non, à quelle fréquence les considérations relatives à la marge d'appréciation de la Cour européenne des droits de l'homme recoupent-elles les considérations relatives à la déférence de votre Cour dans des affaires similaires ?

Comme il a été indiqué dans la réponse à la question n° 1, le Conseil constitutionnel, sans faire application d'une notion liée à la déférence, s'attache à assurer le respect du pouvoir d'appréciation et la liberté du législateur en refusant de trancher des choix qui relèvent par nature des prérogatives de ce dernier

En ce qui concerne le contrôle de conventionnalité, par sa décision du 15 janvier 1975 sur la loi rela-

1031 M. Talon, *op. cit*. [27] *Ibid*.

1032 L. Favoreu, « Le principe de constitutionnalité. Essai de définition d'après la jurisprudence du Conseil constitutionnel », in *Recueil d'études en hommage à Charles Eisenmann*, 1977, pp. 33-48 [29] M. Talon, *op. cit.*

tive à l'interruption volontaire de grossesse, le Conseil constitutionnel a jugé que, malgré le principe de la primauté des traités sur les lois énoncé par l'article 55 de la Constitution, il n'était pas compétent pour examiner la conformité des lois avec les engagements internationaux de la France et, notamment, avec la Convention européenne des droits de l'homme. En effet il a jugé qu'« il n›appartient pas au Conseil constitutionnel, lorsqu›il est saisi en application de l›article 61 de la Constitution, d›examiner la conformité d›une loi aux stipulations d›un traité ou d›un accord international ».

Cela étant, même si le Conseil constitutionnel et la Cour européenne des droits de l'homme suivent leur propre trajectoire en toute indépendance, il n'en reste pas moins que les questions posées dans les deux Cours sont très voisines et, en règle générale, il est possible de déceler des convergences entre les réponses apportées.

Les jurisprudences portant sur les exigences d'indépendance et d'impartialité des juridictions, le respect du contradictoire et des droits de la défense, la dignité de la personne humaine, le droit au recours effectif ou encore la portée du principe *ne bis in idem* constituent des exemples de cette résonance. Ce « dialogue sans paroles », permis à travers l'étude des jurisprudences, trouve d'ailleurs son prolongement dans la désignation du Conseil constitutionnel français comme haute juridiction nationale au sens du protocole n° 16 à la

Convention de sauvegarde des droits de l'Homme et des libertés fondamentales.

En ce qui concerne les considérations relatives à la marge d'appréciation que la Cour européenne des droits de l'homme reconnaît aux autorités des États lors de l'application qu'elles font des obligations découlant de la Convention européenne des droits de l'homme, même si quelques similitudes conceptuelles abstraites peuvent être conçues *mutatis mutandis* avec le pouvoir d'appréciation et de décision que la Constitution et le Conseil constitutionnel reconnaissent au législateur national, il n'est que de souligner qu'il s'agit de considérations de nature différente, les unes ayant trait au droit international et les autres au droit constitutionnel, à la séparation des pouvoirs et à l'exercice de la souveraineté nationale.

26. La Cour européenne des droits de l'homme avait-elle condamné votre Etat en raison de la déférence dont votre Cour a fait preuve dans une affaire précise, déférence qui en a fait un recours inefficace ?

Non. Cf. la réponse apportée à la question antérieure, n° 25.

IV. Autres particularités

À quelle fréquence la question de la déférence se pose-t-elle dans les affaires relatives aux droits de l'homme jugées par votre Cour ?

Cf. la réponse à la question n° 1.

Votre Cour est-elle devenue plus déférente avec le temps ?

Cf. la réponse à la question n° 1.

L'attitude déférente dépend-elle du nombre d'affaires inscrites au rôle de la Cour ?

Non. Le Conseil constitutionnel ne conçoit guère qu'une corrélation puisse s'établir entre l'intensité du contrôle effectué par une juridiction constitutionnelle et le nombre d'affaires dont elle aurait à trancher.

Votre Cour peut-elle fonder ses décisions sur des motifs non avancés par les parties ? Votre Cour peut-elle recadrer les motifs avancés en vertu d'une disposition constitutionnelle différente de celle invoquée par le demandeur ?

Tant dans son examen *a priori* que dans son examen *a posteriori* de la constitutionnalité des dispositions législatives, le Conseil constitutionnel peut soulever de lui-même (et donc d'office) des moyens non évoqués par la saisine et statuer sur des dispositions de la loi non contestées par les requérants.

Dans le cadre de l'examen *a priori*, les moyens soulevés d'office découlent de la plénitude de compétence du Conseil constitutionnel et de l'examen complet de la loi qu'il opère dès lors qu'il en est saisi avant son entrée en vigueur. En effet, la saisine du Conseil constitutionnel a pour effet de mettre en œuvre « la vérification par le Conseil constitutionnel de toutes les dispositions de la loi déférée y compris de celles qui n›ont fait l›objet d›aucune critique de la part des auteurs de la saisine[1033] ». Le Conseil constitutionnel peut, dans ce cas, demander au Gouvernement de produire des observations, qui sont versées au débat contradictoire.

Dans le cadre de l'examen *a posteriori* des dispositions législatives, l'article 7 de la décision du 4 février 2010 portant règlement intérieur sur la procédure suivie devant le Conseil constitutionnel pour les questions prioritaires de constitutionnalité dispose que « les griefs susceptibles d›être relevés d›office sont communiqués aux parties et autorités mentionnées à l›article 1*er pour qu'elles puissent présenter leurs observations dans le délai qui leur est imparti* ».

L'utilisation de griefs soulevés d'office ne conduit pas nécessairement à une déclaration d'inconstitutionnalité. En effet, le Conseil peut soulever d'office une question de constitutionnalité pour faire ressortir au contraire la conformité à la Constitution d'une disposition législative ou en donner une interprétation conforme à la Constitution pour en préciser les effets[1034].

31. Votre Cour peut-elle étendre son contrôle de constitutionnalité à une autre loi non contestée devant elle mais liée à la situation du requérant ?

Il n'est pas prévu que le Conseil constitutionnel puisse s'auto-saisir, *ab initio* ou au cours d'une procédure déjà entamée, d'une loi qui ne lui a pas été déférée.

Tout au plus, selon une jurisprudence ancienne et surnommée « néo-calédonienne » issue de la décision n° 85-187 DC du 25 janvier 1985, *Loi relative à l'état d'urgence en NouvelleCalédonie et dépendances*, le Conseil juge-t-il que « *la régularité au regard de la Constitution des termes d'une loi promulguée peut être utilement contestée à l'occasion de l'examen de dispositions législatives qui la modifient, la complètent ou affectent son domaine* ».

Le Conseil en fait application pour remédier à une difficulté constitutionnelle préexistant à la loi déférée. Il en va toujours ainsi lorsque la loi nouvelle « modifie » la loi en vigueur sans remédier à son inconstitutionnalité (décisions n° 2012-654 DC du 9 août 2012 et n° 2013672 DC du 13 juin 2013) et même lorsqu'elle contribue à en limiter l'inconstitutionnalité qui demeure cependant (décision n° 2013-667 DC du 16 mai 2013). La déclaration d'inconstitutionnalité porte alors tant sur la disposition de la loi nouvelle que sur la disposition en vigueur.

1033 V., parmi d'autres formulations similaires, la décision n° 96-386 DC du 30 décembre 1996, *Loi de finances rectificative pour 1996*.

1034 V. p. ex. la décision n° 92-316 DC du 20 janvier 1993.

The Constitutional Court of Georgia

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Questionnaire

Non-justiciable questions and deference intensities

1. *In your jurisdictions, what is meant by "judicial deference"?*

In accordance with the jurisprudence established by the Constitutional Court of Georgia

(hereinafter referred to as the "Constitutional Court" or "the Court"), the term "judicial deference" pertains to specific circumstances, in which the Constitutional Court recognizes the competence of another branch of the state that is better suited to regulate a particular issue, consequently leading to a reduced level of scrutiny by the Court.

For example, the Constitutional Court assesses the constitutionality of criminal and administrative punishments/sanctions in exceptional circumstances where the punishment/sanction is clearly unreasonable and disproportionate, leading to a violation of Paragraph 2 of Article 9 of the Constitution of Georgia (prohibition of inhuman, cruel, or degrading treatment or punishment).[1035]

In this regard, the Constitutional Court has held that "in comparison to the judiciary, whose function is the administration of justice, the Parliament is more closely connected and has more mechanisms to objectively assess specific social dangers and, based on empirical conclusions, define efficient ways to address them."[1036]

The Constitutional Court has ruled that "Determination of an act as an offence, setting the sanction and determination of its severity is an exclusive competence of the state (legislator) ... Although the legislator has a wide margin of appreciation in the determination of the size of a sanction, volume, and severity, its discretionary power is not unlimited. The legislator is obliged to respect the principle of proportionality while setting sanctions for offenses. The administrative sanction prescribed by the law should not be clearly unreasonable and disproportionate means for the achievement of the aim designed by the legislator and accordingly should not result in violation of the constitutional rights and freedoms of individuals. Although acts of the legislator should always be aimed towards setting adequate administrative penalties for acts violating the rights of others and harming society, the size of the administrative penalty might become the subject of assessment by the Constitutional Court only in exceptional circumstances ... The Constitutional Court will consider the administrative penalty to be within the ambit of an individual's constitutional right only if it constitutes a clearly unreasonable and disproportionate measure of achieving legitimate aim designed by the legislator."[1037]

Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (e.g., questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government, etc.)?

The Constitutional Court, in its case law, has defined particular circumstances where it generally acknowledges a wide margin of appreciation for another branch of the state to regulate the matter, resulting in reduced scrutiny by the Court. These circumstances include when the case involves: a)

1035 See e.g. N1/4/592 Judgment of the Constitutional Court (October 24, 2015), N1/8/696 Judgment of the Constitutional Court (July 13, 2017), N1/9/701,722,725 Judgment of the Constitutional Court (July 14, 2017), N3/1/1239,1642,1674 Judgment of the Constitutional Court (April 21, 2022).

1036 N1/10/703 Judgment of the Constitutional Court, chap II, para. 37 (October 13, 2017).

1037 N4/482,483,487,502 Recording Notice of the Constitutional Court of Georgia, chap II, para. 8 (November 10, 2010).

the social, economic, and fiscal policy of the state;[1038] b) the constitutionality of the sanctions;[1039] c) the defence and administration of military forces by the state;[1040] d) exhaustible state resources;[1041] e) the choice of the election system and its administration;[1042] f) content-neutral restrictions on freedom of expression;[1043] g) Legitimate expectations with regard to the right to property;[10] h) unequal treatment based on nonenumerated criteria or cases of non-intense unequal treatment.[11]

It should be highlighted that the practice of the Constitutional Court does not establish any "nogo" areas. Rather, as mentioned above, in the indicated circumstances, the Court usually applies lessened scrutiny. However, this does not mean the Court relinquishes complete control over the matter. In many of the cases cited above the Constitutional Court deemed the disputed law unconstitutional.

Are there factors to determine when and how your Court should defer (e.g., the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

As already mentioned in answer 2 of this questionnaire, according to the practice established by the Constitutional Court, there are specific circumstances where the Court acknowledges the competence of another branch of the state that is better suited to regulate a particular issue which leads to lessened scrutiny by the Court. However, this does not mean the Constitutional Court relinquishes control over the disputed norm. Instead, this factor is taken into consideration when assessing the norm based on the principle of proportionality.

For example, one case[1044] brought before the Constitutional Court concerned whether foreign citizens (citizens of the Russian Federation and Armenia) who permanently resided in Georgia should have the right to free secondary education. When assessing the proportionality of the restriction, the Court first highlighted the importance of education in enabling individuals to fully develop their skills and abilities, engage in critical analysis, integrate into society, foster understanding and tolerance, and lead independent and financially stable lives. The Court emphasised that the full realisation of the right to education is vital for the development of a democratic society, while limiting accessibility to education permanently deprives individuals of a fulfilling life.[1045]

However, the right to receive free general secondary education, despite its extreme importance, is not absolute. The representative of the Georgian Parliament cited limited state funds as the legitimate purpose for the norm. The Court acknowledged that the state has a broad margin of appreciation when it comes to managing limited resources and economic planning. However, the Court emphasised that existing resources should primarily be allocated to effectively realise fundamental human rights. The Court underscored that elementary and secondary education equips individuals

1038 See e.g., N2/3/540 Judgment of the Constitutional Court (September 14, 2014), N2/3/630 judgment of the Constitutional Court (July 31, 2015), N2/7/667 of the Constitutional Court (December 28, 2017).

1039 See e.g., N4/482,483,487,502 Recording notice of the Constitutional Court of Georgia (November 10, 2010), N1/4/592 Judgment of the Constitutional Court (October 24, 2015).

1040 N1/7/580 Judgment of the Constitutional Court (September 30, 2016).

1041 N1/3/611 Judgment of the Constitutional Court (September 30, 2016).

1042 N3/3/763 Judgment of the Constitutional Court (July 20, 2016), N1/1/539 Judgment of the Constitutional Court (April 11, 2013).

1043 N1/1/468 Judgment of the Constitutional Court (April 11, 2012). [10] N2/3/522,553 Judgment of the Constitutional Court (December 27, 2013) [11] N1/1/477 Judgment of the Constitutional Court (December 22, 2011).

1044 N2/3/540 Judgment of the Constitutional Court (September 14, 2014).

1045 N2/3/540 Judgment of the Constitutional Court, chap II, paras 16-18 (September 14, 2014), [14] Ibid, paras 30-31 [15] Ibid para. 33.

with basic knowledge and invaluable skills necessary for personal development. The inability to read and write significantly hampers a person's everyday life. Additionally, restricting the right to education leads to lowered social status for adolescents and the stigma of being "uneducated," which can have lifelong consequences. This creates the risk of a "shadow society" within the country, negatively impacting not only the individuals themselves but also the economic well-being of the nation and potentially contributing to a higher crime rate. Therefore, saving resources on education can result in higher future costs caused by a lack of education.[14]

Furthermore, the Court determined that by 2013, a total of 467 individuals had requested financing from the Ministry of Science and Education under the disputed norm, and the total amount paid out by the state equalled GEL 117,497 and 75 Tetris. In the Court's opinion, this amount could not be considered a significant burden on the State budget. Consequently, the Court concluded that the restriction of the right to education for foreigners residing in Georgia was disproportional, and the relevant part of the disputed norm was declared unconstitutional with regard right to free education of the Constitution of Georgia.[15]

Sometimes, a state is granted a wide margin of appreciation based on the intensity of the measure it has imposed on a specific right. In cases involving unequal treatment, the Constitutional Court applies a strict scrutiny test based on the proportionality principle if the ground for differentiation falls within the categories specified in Article 11 of the Constitution (such as race, colour, sex, origin, religion, etc.) or if the disputed provision interferes with the protected right with high intensity. In such cases, the state is required to provide a strong justification for the differentiated treatment.[1046]

However, if the ground for differentiation does not fall within the specified categories and the interference with the right is not intense, the Court applies a less stringent standard of scrutiny known as the "rational differentiation test." Under this test, it is sufficient for the state to demonstrate the rationality of a differentiated treatment, including the need for the imposed measure and the existence of a rational connection between the objective reason for differentiation and its impact.[1047]

Are there situations when your Court deferred because it had no institutional competence or expertise?

One of the cases before the Constitutional Court involved the assessment of unequal treatment of men, as the law subjected them to the military draft while women were exempted from compulsory service.[18] The Constitutional Court emphasised that the Constitution grants exclusive competence to the highest state organs to regulate matters related to state defence and security, military forces, issues pertaining to war and truce, and the determination and implementation of a state of emergency and martial law. It is a legitimate interest of the state to establish and support the formation of military forces, and the state possesses significant discretion in this regard.[19]

The Constitutional Court further ruled that the decisions related to military forces, including matters such as the military draft, recruitment, training, equipping, budgeting, and ensuring combat efficiency, rely on specific and specialised assessments provided by experts and relevant government agencies. Therefore, the legislature holds exclusive authority, based on national security and requirements, to determine the structure of the military draft. The constitution grants the state the discretion, in times of necessity, to conscript every capable citizen for compulsory military service, irrespective of their sex. However, the Constitution also provides the state with the discretion to determine, based on its needs, whether an equal number of men and women is necessary in the military at any given time.[20] Therefore, the Court did not find discrimination in this case.

Are there cases where your Court deferred because there was a risk of judicial error?

There has been no such case.

1046 N 2/4/603 Judgment of the Constitutional Court, chap II, para. 8 (October 28, 2015).
1047 N2/3/522,553 Judgment of the Constitutional Court, chap II, para. 15 (December 27, 2013). [18] N1/7/580 Judgment of the Constitutional Court (September 30, 2016). [19] Ibid, chap II, para. 27. [20] Ibid 28-29.

Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

In cases concerning the constitutionality of criminal punishments, the Court has explicitly affirmed that the lawmaker, as the organ endowed with democratic legitimacy, has the right to make fundamental decisions regarding the types and severity of punishable acts, based on criminal policy objectives, as well as the challenges involved.[1048]

"The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

The Court has never emphasised the lack of a democratic mandate in this regard. However, when the case concerns the social policy of the state, particularly the reasonableness of tax policy, the Court acknowledges the state's competence and a wide margin of appreciation in this regard.

For instance, in one of the cases,[22] the Court held that Article 94 of the Constitution recognises the right of the state to impose taxes and carry out effective administration in this regard. At the same time, the amount of tax required for the state to fulfil its various functions depends on many factors, including the fiscal policy chosen by the state. Different states impose different tax burdens. In some cases, states impose high taxes to finance various public services, while others impose lower taxes to encourage private initiatives. The decision of which social needs the state faces and how much tax it should collect is within the state's discretion.[23]

Therefore, the Court noted that it is evident that the state has wide discretion in imposing a certain amount of taxes. It is difficult in constitutional adjudication to assess how reasonably the state determines the necessary funds for the state budget. The Court also cannot evaluate which fiscal policy of the state is better for the welfare of the country. Thus, within constitutional adjudication, it is impossible to assess whether a particular amount of tax is the least restrictive measure regarding the right to property. However, it should be highlighted that this does not grant the state absolute discretion when imposing a tax regime. The state is obliged to create a tax system that does not undermine the nature of the right to property. The law imposing taxes should be reasonable and should not make it impossible to enjoy the right to property. Therefore, based on these criteria, the Constitutional Court will assess the disputed norm.[1049]

Does your Court accept a general principle of deference in judging penal philosophy and policies?

For example, in one of its landmark cases,[1050] the Constitutional Court had to check the constitutionality of criminal punishment – imprisonment from 7 to 14 years for purchasing and possession of up to 70 grams of dried leaves of cannabis for personal use, with respect to the prohibition of inhuman, cruel or degrading treatment or punishment.

The Constitutional Court held that the criminalisation of certain acts and the determination of punishment thereof fall within the scope of state policy. The state should have effective means to combat the dangers arising from these acts and, based on their severity and seriousness, criminalise them and determine the appropriate extent of punishment to effectively address these dangers. However, the nature of a crime and legal interests affected by it should be the primary consideration.[1051]

Furthermore, the determination of these matters should be based on historical experience, the

1048 N3/1/1239,1642,1674 Judgment of the Constitutional Court, chap II, para. 4 (April 24, 2022). [22] N2/7/667 Judgment of the Constitutional Court (December 28, 2017). [23] Ibid, chap. II, para. 10.

1049 Ibid para. 13.

1050 N1/4/592 Judgment of the Constitutional Court (October 24, 2015).

1051 N1/4/592 Judgment of the Constitutional Court, chap. II, para. 33 (October 24, 2015).

culture of the state, societal values, and legal sentiment. Nevertheless, the margin of appreciation granted to the state cannot be unlimited. Regardless of the state's motivations and the importance of the values underlying the regulations aimed at protecting the state, the state is not exempt from the responsibility to act strictly within the boundaries set by the Constitution and unconditionally respect the fundamental rights of individuals. In a democratic and rule-oflaw-based state, there is no aim or interest, even if it involves protecting human rights, that would grant the state the legitimate right to violate the right to liberty of certain individuals.[1052]

Therefore, there is a threshold that the state is not allowed to exceed. Accordingly, the Constitutional Court is obligated to assess the policy of punishment in extreme cases where it results in the violation of a human right. This does not mean that the Constitutional Court is potentially authorised to assess the constitutionality of every measure used as a punishment. Such an approach would disrupt the balance between the competencies of the court and the legislature and create a temptation for the judiciary to replace the legislator.[1053]

However, the restraint shown by the judiciary in not involving itself in this sphere becomes groundless and inappropriate in cases where the magnitude of punishment is clearly unreasonable and disproportionate. The court is authorised and, in fact, obligated to assess the constitutionality of punishment when its inadequacy and disproportionality reach a certain level, and when the imbalance is evident. In such cases, the punishment goes beyond its intended purpose and unjustifiably restricts constitutional rights.[1054]

There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

There has been no such case.

Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rightscompliant reforms?

According to Paragraph 4 (a) of Article 60 of the Constitution of Georgia, the Constitutional Court reviews the constitutionality of a normative act in relation to the fundamental human rights enshrined in Chapter Two of the Constitution based on a claim submitted by a natural person, a legal person, or the Public Defender. Therefore, in cases where the government does not take proactive steps to introduce any form of normative act, the Court cannot engage in constitutional adjudication proactively.

However, if the Court had to check the constitutionality of normative acts that fail to meet the human rights standards set by the Constitution, the Court obviously engages in constitutional adjudication and might use strict scrutiny as it depends on what the subject matter in the case is. For example, the Constitutional Court uses strict scrutiny when the disputed law concerns content regulation of the freedom of expression.[1055]

The decision-maker

Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

According to paragraph 3 of Article 4 of the Constitution of Georgia, the exercise of state authority is based on the principle of the separation of powers. Therefore, in case of a dispute, firstly, the Constitutional Court determines which state body has the constitutional mandate to decide on a particular matter and renders its decision accordingly.

1052 Ibid.
1053 Ibid para. 34.
1054 Ibid.
1055 N1/1/468 Judgment of the Constitutional Court (April 11, 2012).

For instance, in one of its cases,[1056] the Constitutional Court established that content regulation of freedom of speech must be exclusively carried out by the Parliament of Georgia, and this power cannot be delegated to the executive branch. The underlying issue before the Constitutional Court of Georgia was whether the Georgian National Communications Commission had the authority to impose content-based restrictions on online speech in compliance with Article 17 (freedom of expression) of the Constitution of Georgia. The Court emphasised that although the Communications Commission is an important governmental body, imposing content-based restrictions on freedom of expression is a matter of significant public interest, and thus, it is a function that only the Parliament can undertake. Therefore, the exclusive right to regulate the content of speech, following the wide and transparent political debate, lies with the Parliament, and the delegation of this function is prohibited.[1057]

In another instance, when the Court had to decide on the constitutionality of night curfews imposed to stop the spread of the Covid-19 in relation to the freedom of movement, the Constitutional Court ruled that the Executive's power to impose curfews did not violate the freedom of movement of persons. The Court reasoned that this power could not effectively be exercised by the legislature due to the rapidly changing situation with the coronavirus, requiring prompt decision-making that cannot be realised through parliamentary sessions. Furthermore, the Court emphasised that granting the executive the power to impose curfews does not imply that it has acquired the essential power of the parliament. The executive's power was limited in terms of time, related to the end of the coronavirus situation, and did not significantly impact the state's social, economic, cultural, legal, and political spheres in the long term.[1058]

What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

According to Paragraph 3 of Article 26 of the Organic Law on the Constitutional Court of Georgia, when evaluating a normative act, the Constitutional Court considers not only the literal meaning of the disputed provision, but also the expressed intent, practical application, and the essence of the relevant constitutional standard. When deemed necessary, the Constitutional Court may interpret the norm, including by referring to legislative history, among other sources of interpretation.[34]

Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

The Constitutional Court, based on the proportionality test, examines whether a decision maker has provided justification for its decision to restrict a specific right.[1059]

Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

No.

Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

When the Constitutional Court assesses individual applications submitted by individuals or legal entities, the focus of the adjudication is the compatibility of the norms in question with the human rights enshrined in the Constitution. The Court examines whether the contested norms infringe

1056 N1/7/1275 Judgment of the Constitutional Court (August 2, 2019).

1057 Ibid, chap II, para. 41-42.

1058 N1/5/1499 Judgment of the Constitutional Court, chap II, para. 17-24 (December 16, 2021). [34] N2/3/540 Judgment of the Constitutional Court (September 14, 2014).

1059 E.g., N3/1/512 Judgment of the Constitutional Court, chap II, para. 60 (June 26, 2012).

upon or violate the constitutionally guaranteed human rights and freedoms of the applicants. This involves evaluating the conformity of the norms with the relevant constitutional provisions and principles and ensuring that they do not unjustifiably restrict or infringe upon the protected rights and freedoms.

Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

There has been no such case.

Rights' scope, legality and proportionality

Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

The Constitutional Court of Georgia, as the guarantor of the Constitution, has the exclusive competence to interpret the Constitution and the human rights enshrined therein.[1060]

Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

In this regard, it is important to note that the intensity and nature of the disputed measure/law play a significant role in determining the level of scrutiny applied by the Constitutional Court, rather than the relative importance of the rights involved. While certain rights may be considered more fundamental to individuals, the Court's scrutiny primarily focuses on the proportionality of the disputed measure and the careful balancing of various interests. The aim is to ensure that the interference with a person's rights is no greater than necessary and does not undermine the essence or meaning of those rights.

For instance, when it comes to content-neutral restrictions on freedom of expression, the Constitutional Court's scrutiny is not as strict. In one of its cases[1061], the Court recognised that the state enjoys a relatively wide margin of appreciation when determining the timeframe for granting licenses for broadcasting through cable networks or satellite, compared to contentbased restrictions on freedom of speech. The Court noted that it is inherently challenging to define an exact timeframe that would be deemed proportional for granting broadcasting licenses. However, in exceptional circumstances where a specific timeframe for granting a license is unreasonably long and imposes unjustifiably heavy burdens on broadcasters, the Court acknowledges that it would infringe on the freedom of expression.[38]

Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the In claris non fit interpretatio canon?

When interpreting the content of a disputed law, the Constitutional Court commonly utilises different methods, including systemic interpretation. For example, in of its cases, where the definition of espionage in Georgia's criminal code was challenged by an applicant due to its alleged vagueness, the Court applied systemic interpretation to assess the disputed norm. After considering the broader context and interconnection of legal provisions, the Court concluded that the definition of espionage in the law was foreseeable and comprehensible for a rational person.[1062]

What is the intensity review of your Court in case of the legitimate aim test?

The legitimate aim test is indeed one of the steps in the proportionality principle used by the Constitutional Court to assess the compatibility of a disputed law with the human rights enshrined in the Constitution. If a law is found to lack a legitimate aim, the Court considers it arbitrary and therefore

1060 Article 60 of the Constitution of Georgia
1061 N 1/1/468 Judgment of the Constitutional Court (April 11, 2012) [38] Ibid chap. II, para. 81.
1062 N2/2/516,542 Judgment of the Constitutional Court, chap II, para. 21 (May 14, 2013).

unconstitutional. The Court has established that if there is no valid and justifiable legitimate aim for restricting human rights, there is no need to further analyse the proportionality of the measure itself. In such cases, the Court can declare the norm unconstitutional based on the absence of a legitimate aim alone.[1063]

What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (i.e. suitability, necessity, and proportionality in the narrower sense)?

The Constitutional Court applies the classic proportionality test, which involves evaluating the legitimate aim, rational connection, necessity, and proportionality in a narrow sense (stricto sensu) of a measure. The Court examines whether there is a legitimate aim behind the measure, whether there is a rational connection between the measure and the aim, whether the measure is absolutely necessary to achieve the aim, and whether the measure is proportionate to the aim pursued.[1064]

Does your Court go through every applicable limb of the proportionality test?

Yes, however, if a measure does not meet one of the steps, the court does not continue to evaluate the remaining steps and deems the norm unconstitutional.

Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

There have been no such cases.

Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

No, however, the Court usually takes into consideration the margin of appreciation given to a state in a particular matter when assessing the proportionality of the disputed norm.

Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

The doctrine of margin of appreciation of the ECtHR has some similarities with the Constitutional Court's doctrine of margin of appreciation, as both recognise that the competence of the state to regulate matters, including social and economic aspects of the state.[1065]

Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

There has been no such case.

Other peculiarities

How often does the issue of deference arise in human rights cases adjudicated by your Court?

The Constitutional Court does not maintain statistics on this matter. However, as mentioned previously, whether the Court acknowledges a wide margin of appreciation for another state organ depends on the specific subject matter of the case.

Has your Court have grown more deferential over time?

No.

1063 N 2/4/570 Judgment of the Constitutional Court (August 4, 2016).

1064 E.g., N3/1/512 Judgment of the Constitutional Court, chap II, para. 60 (June 26, 2012).

1065 See e.g., N2/3/540 Judgment of the Constitutional Court (September 14, 2014), N2/3/630 judgment of the Constitutional Court (July 31, 2015), N2/7/667 of the Constitutional Court (December 28, 2017).

Does the deferential attitude depend on the case load of your Court?

No.

Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

Article 2 of the Organic Law on the Constitutional Court of Georgia establishes that the Court conducts its activities based on principles of legality, collegiality, openness, equal treatment, and adversarial proceedings. However, it is important to note that the Court also possesses strong inquisitorial powers. While the Court typically considers the arguments presented by the parties, it is not limited to relying solely on those arguments and can reach its own conclusions as well. Moreover, Paragraph 6 of Article 29 of the Organic Law explicitly states that the admission of the claim by the respondent does not lead to the termination of proceedings in the Constitutional Court. Therefore, the Constitutional Court continues its constitutional adjudication even if the respondent agrees with the claimant and deems the law unconstitutional.

Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

No. Paragraph 1 of Article 26 of the Organic Law on the Constitutional Court of Georgia states that "The Constitutional Court shall have no right to judge the compliance of an entire law or other normative act with the Constitution if a claimant or an author of the submission demands that only a certain provision of the law or other normative act be recognised as unconstitutional." Thus, the Court cannot do it on its initiative (sua sponte).

The Constitutional Court of Hungary

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Constitutional cultures vary and the courts' perceptions of their own role in a constitutional democracy affect the intensity of their scrutiny in fundamental rights cases. Many courts profess judicial deference.

Judicial deference is a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters which are perceived to be beyond their expertise or legitimacy to decide. The tool has been employed, most prominently, in human rights cases. This is due to their transcendent quality, capable of cutting across all substantive areas of public decision-making.

It is said that over-deferential attitude threatens the rule of law and separation of powers as much as excessive judicial activism does. The way judges exercise judicial deference is, therefore, a fundamental matter of constitutional principle that concerns the proper role of each branch of government in relation to significant questions of public policy.

The following questions aim to discover the differences in exercising judicial deference by European constitutional courts.

Questionnaire

for the national reports

Non-justiciable questions and deference intensities

In your jurisdictions, what is meant by "judicial deference"?

In the practice of the Hungarian Constitutional Court, the Fundamental Law is the basis of its practice. According to the Fundamental Law, the Hungarian Constitutional Court is the supreme body for the protection of the Fundamental Law [Article 24 (1)]. In the exercise of its powers, judicial deference is manifested, on the one hand, in the fact that it has no legislative competence to judge the conformity of the Fundamental Law with the legislation examined by the Hungarian Constitutional Court. Judicial deference is thus primarily exercised against the legislative power. If, in the course of its proceedings, the Hungarian Constitutional Court detects a problem of constitutionality that can only be remedied by legislation, it declares that the legislator has failed to act in violation of the Fundamental Law and calls on the legislator (and sets a time limit for this) to enact legislation. Judicial deference also applies to issues in which petitioners request the Hungarian Constitutional Court to interpret the law or to review or reconsider the interpretation of the law in decisions of the courts. The Hungarian Constitutional Court, in its defence of the Fundamental Law, states as a matter of principle that the interpretation and application of the law is a matter for the ordinary courts, and that it is not the competence of the Hungarian Constitutional Court to decide on questions of interpretation of the law (related dissenting opinions, questions of evidence). Resolving conflicts of interpretation of law between ordinary courts is also not the task of the Constitutional Court, but of the Curia (Hungarian Supreme Court), in accordance with Article 25(3) of the Fundamental Law.

In summary, judicial deference applies to the legislative power in legislative matters (and also to the executive power when it has legislative competence), as well as to the judicial power in the application and interpretation of the law.

Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

For the Hungarian Constitutional Court, there is no such thing. The Hungarian Constitutional Court decides on constitutional questions on the basis of the Fundamental Law. The Fundamental Law itself sets limits.

According to Article 37(4) of the Fundamental Law: 'As long as the public debt exceeds half of the total gross domestic product, the Constitutional Court shall, in accordance with Article 24 of the Fundamental Law. The Constitutional Court may review the conformity of the laws on the central budget, on the implementation of the central budget, on central taxes, on fees and contributions, on customs duties and on the central conditions of local taxes with the Fundamental Law only in connection with the right to life and human dignity, the right to the protection of personal data, the right to freedom of thought, conscience and religion or the rights related to Hungarian citizenship, and may annul them for infringement of these rights. The Constitutional Court may also annul laws in this field without restriction if the procedural requirements of the Fundamental Law concerning the enactment and promulgation of the law have not been fulfilled."

According to point 5 of the Final Provisions of the Fundamental Law: 'Constitutional Court decisions taken before the entry into force of the Fundamental Law shall cease to have effect. This provision shall not affect the legal effects of such decisions." The reason for this provision of the Fundamental Law is the change in the constitutional yardstick, the change in the Fundamental Law and the change in the powers of the Constitutional Court. The Constitutional Court's practice applies a test to this. The 13/2013 (VI. 17.) CC Decision has set out the criteria for using its previous decisions on a case-by-case basis in the event of substantive similarity between the previous and existing constitutional provisions.

According to the common rules of each special legal order:

Article 52 of the Fundamental Law "(2) In a special legal order, the exercise of fundamental rights, with the exception of the fundamental rights laid down in Articles II and III and Article XXVIII(2) to (6), may be suspended or restricted beyond the limits set out in Article I(3)."

Accordingly, the Fundamental Law sets a different standard for the exercise of fundamental rights for the special legal order.

In its practice, the Hungarian Constitutional Court applies a filter to the cases it judges. According to the Constitutional Court Act

"Section 29 The Constitutional Court shall accept the constitutional complaint in the case of an infringement of the Fundamental Law or a question of fundamental constitutional significance which has a substantial impact on the judicial decision." The Hungarian Constitutional Court thus determines on a case-by-case basis whether or not there is a constitutionally significant question.

As shown above, the Hungarian Constitutional Court abstains from reviewing the interpretation of the law by the ordinary courts. The Hungarian Constitutional Court, in its defence of the Fundamental Law, states as a matter of principle that the interpretation and application of the law is a matter for the ordinary courts, and that it is not for the Hungarian Constitutional Court to decide on questions of interpretation of the law (related dissenting opinions, questions of evidence). The resolution of conflicts of interpretation of law between ordinary courts is also not the task of the Hungarian Constitutional Court, but of the Curia, in accordance with Article 25(3) of the Fundamental Law.

3. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

Not self-limiting, but the constitutional argument is determined by two factors.

Article R of the Fundamental Law stipulates that.

"(3) The provisions of the Fundamental Law shall be interpreted in accordance with their purpose, the National Creed and the constitutional foundations of our historic Constitution."

Thus, in the practice of the Constitutional Court, the preamble of the constitutional text (the National Creed), forms part of the criteria to be applied in the determination of the constitutionality dispute.

For many centuries in its history, Hungary has not had a cartel constitution, but the individual constitu-

tional principles have been developed by several sources of law in the course of historical development. The Fundamental Law has created continuity between the earlier constitutional principles and the cartel constitution, so in interpreting the Fundamental Law the Hungarian Constitutional Court must interpret it in accordance with the acquis of our historical constitution.

Are there situations when your Court deferred because it had no institutional competence or expertise?

The examination of jurisdiction is a legal question of a technical nature, as defined in the Fundamental Law and the Constitutional Courts Act. It is the duty of the Hungarian Constitutional Court to examine this, if it does not do so, its operation would be in breach of the law.

However, in the practice of the Hungarian Constitutional Court, there have been cases where it has suspended its proceedings pending the decision of another judicial forum (the Court of Justice of the European Union). It could thus take its decision in the light of the decision of the international forum.

Are there cases where your Court deferred because there was a risk of judicial error?

No. The Hungarian Constitutional Court is not a court of fact, the facts are established by the ordinary courts and cannot be reviewed by the Hungarian Constitutional Court. Error of fact is excluded in the proceedings of the Hungarian Constitutional Court.

Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

No.

"The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

The Hungarian Constitutional Court is not a political body and does not take political responsibility. The Hungarian Constitutional Court acts according to the procedures and standards laid down in the Fundamental Law and deals with cases that have a fundamental rights relevance. The Hungarian Constitutional Court thus decides on technical issues of fundamental rights, which may have political implications, but never on the content of the argument.

Does your Court accept a general principle of deference in judging penal philosophy and policies?

The Hungarian Constitutional Court has not encountered any such problems in its work to date.

There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

The Hungarian Constitutional Court has not encountered any such problems in its work to date.

Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

If the Hungarian Constitutional Court detects a constitutional problem in the course of its proceedings that can only be remedied by legislation, it will declare an unconstitutional omission and call on the legislator (and set a deadline) to enact the legislation.

The Hungarian Constitutional Court also has the possibility, if there is a constitutional scope of interpretation in the interpretation of a law under review, to determine a constitutional requirement for the protection of the Fundamental Law without annulling the law under review. The Hungarian Constitutional Court can only do this in a specific case, and the parties cannot initiate the procedure.

The Hungarian Constitutional Court can only establish the constitutional requirement and the omission ex officio.

The decision-maker

Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

No, there is no substantive difference in the degree of judicial deference in the Hungarian Constitutional Court's decision-making regarding legislative acts and decisions of the executive. Thus, the Constitutional Court does not take into account the question of democratic accountability in its examination, but applies a uniform standard of review to both legislative and executive acts, examining their constitutionality according to the same criteria.

What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

The Hungarian Constitutional Court does not, as a general rule, carry out impact assessments, and does not examine the minor circumstances of the legislative process, or parliamentary considerations. However, the compliance with the constitutional guarantees of the legislative process always falls within the Constitutional Court's focus, which is an exception to this general rule. In the case of particularly serious procedural irregularities, the guarantees of the rule of law and legal certainty are infringed. In such a case, a so-called "public law (formal) invalidity" is declared and the rule adopted in breach of the procedural rules must be annulled ex tunc.

Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

Regarding the lawmaker as the decision-maker, the Hungarian Constitutional Court attaches a certain importance to the legislator's reasoning. On one hand, it takes the legislative reasoning into account during the conduct of the necessity-proportionality test, since the legislative reasoning generally covers the reasons for and the necessity of the enactment of the law. On the other hand, when applying the public interest test for a restriction on the right to property, the Constitutional Court may also take the legislative reasoning into account. In the case of property deprivation and expropriation, it is sufficient, in view of the socio-economic role of property, if the state intervention is justified in the public interest and does not infringe any other fundamental right. The public interest is generally referred to in legislative reasoning. Thirdly, within the framework of Article 28 of the Fundamental Law, the legislative reasoning must also be accorded significance as a constitutional obligation in the context of the identification of the legislative intent when interpreting legislation, since the purpose of the legislation can and must be read from it.

If we consider the decision-maker to be an adjudicating judge, the Constitutional Court attaches importance to the reasoning of judicial decisions. In accordance with the settled practice of the Constitutional Court, the constitutional requirement of a fair trial and the right to a reasoned decision, identified as a partial right within the right to a fair trial, impose a minimum requirement on the court to examine in depth the parties' observations on the merits of the case and to state its assessment in its decision. The constitutional requirement of a reasoned decision is an absolute limit on the court's freedom of decision, namely that it must give reasons for its decision in accordance with procedural laws. A breach of the obligation to a reasoned decision, in a constitutional sense, means an unconstitutional application of a procedural rule. Consequently, the obligation on the courts to give proper reasoning does not entail an obligation to rebut each and every point raised by the parties, especially not to present a system of arguments of depth satisfying the subjective expectations of the applicant, and therefore the mere brevity and conciseness of the reasoning cannot be a ground for the infringement of the right to a reasoned decision. Moreover, the Constitutional Court never examines whether the evidence and arguments set out in the reasoning of the decision are well-founded, nor does it examine whether the judge correctly assessed the evidence and arguments put forward in the proceedings or whether the facts established in the specific case as a result of the judicial discretion are well-founded. Establishing the facts, assessing and weighing the evidence is

a task reserved to the legal practitioner by the procedural rules. The mere fact that the petitioner considers the argumentation set out in the reasoning of the court judgment to be erroneous and detrimental to him is not in itself a question of constitutionality.

According to the Act on the Constitutional Court, the Constitutional Court is the guardian of the internal consistency of the legal system and the ultimate enforcer of the principle of the division of powers. Accordingly, it can never take into account what decision it would make if it were in a decision-making position, as this would exceed its constitutional powers and violate the principle of the division of powers.

Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

Any potential deference is not affected by the thoroughness of the legislative assessment of compatibility with fundamental rights.

Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

The details of the political debate in concrete proceedings are not essentially examined by the Constitutional Court, as its examination always covers aspects of constitutional law only, and it cannot and does not take into account other aspects in its decisionmaking, given its tasks and powers. To date, no case of this type has arisen in the practice of the Constitutional Court.

Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

The very fact that the legislator makes a decision in a constitutional procedure proves its democratic legitimacy, since the legislator, by its very nature, has the necessary democratic legitimacy.

Rights' scope, legality and proportionality

Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

It is the task of the Constitutional Court to develop, define and shape the content of fundamental rights as a framework, which can be done within the limits of the Fundamental Law and the Constitutional Court's own previous jurisprudence, taking into account the international and regional human rights conventions that Hungary has recognised as binding on itself. (In the context of the previous jurisprudence of the Constitutional Court, it should be noted that by the test devised by the Constitutional Court after the fourth amendment of the Fundamental Law {see HCC Decision 22/2012. (V. 11.), Reasoning [40], HCC Decision 13/2013. (V. 17.), Reasoning [28]-[34]}, the Constitutional Court upheld its previous decisions repealed by the amendment of the Fundamental Law. The decisions, which were made before the entry into force of the Fundamental Law, can be upheld if the arguments contained therein can be used "on the basis of the specific provisions and rules of interpretation of the Fundamental Law, which are identical or similar in the content to those contained in the previous Constitution.) However, it is for the legislator to give this framework concrete content, but here again, the limitation that regulation affecting the essential content of fundamental rights can only be laid down by act. This limitation was developed by the previous practice of the Constitutional Court, later declared by the Fundamental Law.

Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

Partially yes, for example, in the case of second-generation fundamental rights, the enforceability of these rights may be justified on the basis of the country's economic capacity, which is primarily a matter for the

Government and secondarily for the National Assembly. Consequently, only in exceptional cases can a fundamental right violation based purely on these basic rights be established. Such an enforceable case is the state guarantee of the subsistence minimum, which was extracted from the Constitution by combining the right to social security and the right to human dignity [HCC Decision 32/1998 (VI 25.)]. Apart from the extreme cases, the Constitutional Court cannot assess whether the extent of the fundamental right in question, as the petitioner requested, is within the capacity of the state. Nonetheless, the Constitutional Court protects the right to human dignity in a broader and more prominent way, as a general right of personality, as a subsidiary fundamental right [for the first time in HCC Decision 8/1990]. (IV. 23.)]. Freedom of expression also receives similar special treatment as a "mother right" of the fundamental rights of communication [for the first time in HCC Decision 30/1992. (V. 26.)]. In the latter case, the decisive criterion is that it is the basis for democratic participation in public affairs and is intended to define the values of a pluralist society, and therefore "must yield to very few rights".

Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

There is no specific scale, but a certain gradation is evident in the practice of the Constitutional Court: the mere fact that a norm requires interpretation does not in itself cause a breach of legal certainty, since it cannot be expected from the legislator to define each concept separately in each piece of legislation [HCC Decision 71/2002. (XII. 27.)]. If, on the other hand, "the legislation is uninterpretable for the legislator or shall give way to diverging interpretations, and as a result, the effect of the norm is unpredictable and unforeseeable for the addressees, or the overly general wording of the norm leaves room for the subjective, arbitrary application of the law." [HCC Decision 56/2010. (V. 5.)]. Thus, a regulation is considered to be contrary to the

Fundamental Law if "its content is so vague or its provisions are so contradictory that the interpretation is no longer sufficient to resolve the ambiguity" {HCC Decision 3462/2022. (XI. 17.), Reasoning [16]}. The standard of clarity is special if it is expected from the addressees to have the special expertise for the interpretation {HCC Decision 20/2020 (VIII. 4), Reasoning [68]}. The Constitutional Court itself acknowledged in HCC Decision 47/2003 (X. 27.) that it relies on the available ordinary courts' case law to assess whether the challenged rule is sufficiently clear. For example, in HCC Decision 4/2013 (II. 21.), the Constitutional Court annulled the use of authoritarian symbols in the previous Criminal Code on the grounds of the lack of compliance with the requirements of constitutional criminal law, also taking into account the divergent ordinary court decisions. In the context of criminal law, it should also be noted that these offences are subject to higher standards of clarity, given the severely fundamental right-restrictive nature of the sanctions. In addition to these aspects, the Constitutional Court may consider formulating a constitutional requirement instead of annulling the norm, which would allow the Constitutional Court to "clarify" and limit the constitutional conform interpretation of the challenged norm. "The constitutional requirement is not a new rule, but a correct interpretation based directly and unambiguously on a provision of the Fundamental Law, inherent in the norm, which is only recognised and declared by the Constitutional Court." {HCC Decision 3407/2022 (X. 21.), Reasoning [37]}.

With regard to the application of the principle of "in claris non fit interpretatio" (a clear rule does not require interpretation), the Constitutional Court, in its decisions, gives, if it has the possibility to do so in respect of the provision under review, a constitutional interpretation of the norm, thus proving that there is no constitutional justification for the annulment of the challenged provision. Consequently, the Constitutional Court will endeavour to provide sufficiently detailed reasoning for the constitutionality of the challenged norm (including its clear and unambiguous parts).

What is the intensity review of your Court in case of the legitimate aim test?

It is not enough to state abstract values (such as public safety, public health, etc.) as a legitimate aim, or more precisely, only those reasons are acceptable which are backed by an identifiable constitutional value [HCC Decision 30/1992 (V. 26.)]. The purpose of the examination is to exclude arbitrary restriction of rights, for example, the Constitutional Court declared the generally mandatory statutory rules requiring prior voter registration to be unconstitutional, inter alia, because they restricted the right to vote as a fundamental right in the absence of a legitimate aim [HCC Decision 1/2013. (I. 7.)] In the Fundamental Law [Article I (3)],

the previous case law of the Constitutional Court has been declared that a fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value. Within this scope, the legislator has wide discretion as to how it wishes to give effect to a given fundamental right or constitutional value. Consequently, if no fundamental right or constitutional value can be identified behind the provision under examination, then the regulation has no constitutionally justifiable, legitimate reason, and is therefore considered to be unconstitutional.

What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

It applies all the steps of the classic necessity-proportionality test (legitimate aim, adequacy, necessity and proportionality). There are also fundamental rights-specific tests, e.g. the public interest test for the right to property, and the reasonableness test for equal treatment. These are not different measures from the proportionality test but special versions of it.

In case the challenged regulation constitutes a restriction on the right to property that does not rise to the level of expropriation, the "public interest proportionality" test must be applied, given the specific public nature of the restriction on the property." According to the consistent practice of the Constitutional Court, the constitutional test for a restriction of property rights under Article XIII (1) of the Fundamental Law, when examining the basis of the restriction of rights, is less stringent than the necessity test for fundamental rights under Article I (3) of the Fundamental Law, since in this case, it is sufficient to demonstrate the existence of public interest." {HCC Decision 30/2022 (XII. 6.), Reasoning [83]}. In the case of expropriation, Article XIII (2) of the Fundamental Law is applicable, according to which "property may be expropriated only exceptionally, in the public interest and in those cases and ways provided by an Act, subject to full, unconditional and immediate compensation."

In applying the reasonableness test, the following questions need to be considered: a) Is there a difference in treatment, i.e. is there a distinction? b) Does this difference in treatment disadvantage the person concerned, i.e. is the distinction disadvantageous?

c) Are the persons concerned in a comparable situation, i.e. the persons who have been treated differently belong to a homogeneous group? (d) Does the requirement of equal treatment extend to the case in question? e) Is the discrimination justified (i.e. reasonable) or unconstitutional?

The application of the reasonableness test differs in the case of petitions for review of an act and constitutional complaints against the decisions of the ordinary courts (see Section 27 of Act CLI of 2011 on the Constitutional Court). In the case of petitions for review of an act, the distinction is deemed unreasonable if there is no objectively reasonable justification for the distinction, i.e. an arbitrary three-step analysis: legitimate aim, appropriateness, whether the circle of persons targeted by the legitimate aim pursued coincides with the circle of persons affected by the measure. In the case of a constitutional complaint against ordinary court decisions, the Constitutional Court examines: a) whether the law applied by the court can be interpreted in different ways; b) whether the court has chosen an interpretation which is in conformity with the Fundamental Law; c) whether the court has, by the content of the interpretation, made a distinction between persons in comparable situations which does not necessarily follow from the law applied, so that the interpretation has led to an arbitrary result.

In the case of public debates, the Constitutional Court has developed a special test for public figures in the case of a conflict between freedom of expression and privacy, according to the following criteria: a) Does the public communication expressing an opinion reflect a position expressed in a public debate (discussion of public affairs)? b) Does the public communication concern a public figure? c) Does the public communication involve a statement of fact or value judgment? (d) Does the public communication violate the right to dignity, reputation or integrity of the person concerned?

In addition, the "clear and present danger" test, adopted from the jurisprudence of the SCOTUS (Supreme Court of the United States), has been applied in a number of cases concerning the freedom of expression and the right to assembly.

The last, specific balancing aspect of the general necessity-proportionality test is the "comparative burden

test" for restrictions on the freedom of conscience and religion. This requires taking into account whether a given provision, which may be considered neutral, imposes a disproportionate burden on someone because of his/her conscience or religious convictions.

Does your Court go through every applicable limb of the proportionality test?

No, it has been the consistent practice of the Constitutional Court from the outset to assess the elements of the fundamental rights test as successive steps. Thus, if one of the steps/conditions is not fulfilled, it does not examine the subsequent step(s) but considers the restriction of fundamental rights as unconstitutional. For example, the justification for the restriction is legitimate and the restriction is suitable for the purpose pursued, but there are less restrictive means available to achieve the purpose. Consequently, the restriction is not necessary, and the Constitutional Court no longer examines its proportionality.

Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

The legitimate reasons for a restriction of a fundamental right can be wide-ranging and are essentially a matter of legislative discretion. The limits set by the pre-Fundamental Law case law of the Constitutional Court, which was subsequently declared by the constitutional legislator in the Fundamental Law. Namely that a fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value. These are considered to be legitimate reasons. Here, reference to more abstract values (such as public security, public order, public interest, etc.) is not sufficient; more concrete proof is required from the legislator. In the case of adequacy, which is primarily intended to detect factual errors by the legislator, there are also several adequate solutions, where the legislator has a wide margin of discretion, which can only be challenged by the Constitutional Court in flagrant cases.

At the steps of necessity and proportionality, the Constitutional Court is stricter, because if there is a less stringent means to protect/enforce a limited fundamental right or constitutional value, the legislator/practitioner must choose that.

Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

Yes, the Constitutional Court has consistently applied the necessity-proportionality test and the doctrine of judicial deference in its practice from the outset. The Constitutional Court, for example, in its Decision 16/1991. (IV. 20.), in the procedure which was requested by fifty-two Members of the Parliament during the detailed parliamentary debate on the bill under attack, the Constitutional Court recognised that during the preliminary review of bills (see Section 33 of the Act XXXII of 1989 on the Constitutional Court, also known as previous Act on the CC), the Constitutional Court would interfere in the legislative process, becoming a legislator itself or an advisor to the Parliament. Thus, the Constitutional Court would exceed its statutory mandate and violate the constitutional principle of separation of powers. (This practice is maintained by the Hungarian rules legislation on norm control after the entry into force of the Fundamental Law.) The consistent jurisprudence of the Constitutional Court influenced the declaration of necessity-proportionality test in the Fundamental Law.

Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

Overall, the Hungarian Constitutional Court is paying attention to the practice of the ECtHR, and the citation of ECtHR decisions in the case law of the Constitutional Court is gradually increasing. As regards judicial deference, for example, the Constitutional Court has repeatedly stated, with reference to ECtHR case law, that "the Constitutional Court is not intended to establish guilt", since the purpose of a constitutional complaint against decisions of the ordinary courts is to provide legal protection against decisions of courts or authorities against petitioners who have suffered a violation of fundamental rights by virtue of the acts and/or decisions of the courts or authorities in question [HCC Order 3392/2022 (X. 12.)].

For example, the Constitutional Court has the discretion to decide on the admissibility of constitutional

complaints. In addition, the scope of constitutional review is limited, as the Constitutional Court cannot review the findings of fact, the consideration of arguments or evidence presented in ordinary court proceedings. Similarly, to ECtHR case law, the margin of appreciation is limited by the nature and the particular importance of the fundamental right under review. Thus, as in the ECtHR case law, the legislator and the practitioner have less leeway when it comes to restricting freedom of expression.

Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

Yes, for example, in 2014 in the case Könyv-tár Kft. and others v. Hungary (application no. 21623/13), because the Constitutional Court [in HCC Order 3108/2014 (IV. 17.)] terminated the proceedings without examining the merits, on the grounds that the law (Act XXXVII of 2001 on the regulation of the textbook market) challenged by the constitutional complaint had been replaced by a new law (Act CCXXXII of 2013 on the supply of textbooks for national public education), and thus cannot intervene because "in the case under review, the Constitutional Court does not act in the abstract ex-post review of norms, but in the complaint competence under Article 26 (2) of the Act on the Constitutional Court [the so-called direct constitutional complaint], and therefore did not extend its constitutionality review to the provisions of the Nktv [of the new act]." {HCC Order 3108/2014 (IV. 17.), Reasoning [14]}

However, in 2019, in the case of Szalontay v. Hungary (application no. 71327/13), the ECtHR ruled out that a constitutional complaint is an effective domestic remedy, so the preliminary procedure of the Constitutional Court is a precondition for a petitioner to recourse to the ECtHR.

Other peculiarities

How often does the issue of deference arise in human rights cases adjudicated by your Court?

Not relevant.

Has your Court have grown more deferential over time?

It is difficult to judge, given that the relevant legal environment was completely different at the beginning of the Constitutional Court's existence than it is now. It could be argued that the Constitutional Court was considerably more activist in the 1990s, but the nature of its powers and the range of possible petitioners were different then, and the fresh characteristics of the change of regime also affected the activism. The emergence of the legal institution of the constitutional requirement may reflect, to some extent, the strengthening of judicial deference, as via this constitutional legal consequence the court limits itself to applying a lighter legal sanction in order to spare the norm when a stronger legal sanction is not necessary.

Does the deferential attitude depend on the case load of your Court?

No, the case load has absolutely no effect on judicial deference.

Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

No, the Constitutional Court is bound by the petition, and accordingly, a decision cannot be based on grounds not put forward by the petitioner. On the contrary, the Constitutional Court has the possibility to "switch" from one fundamental right to another within a narrow range of closely related fundamental rights, if it can be clearly established from the petition that the provision invoked does not correspond to the intention of the petitioner (e.g. switching from the right to a fair procedure before a public authority to the right to a fair trial before a court).

Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

Yes, the Constitutional Court may, by constitutional mandate, extend its examination to legal provisions

not originally included in the petition, which are closely related in substance to the provisions challenged. A close substantive connection exists if one legal provision cannot be interpreted or applied without the other, the annulment of one renders the other void in terms of its content.

The Supreme Court of Ireland

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Constitutional cultures vary and the courts' perceptions of their own role in a constitutional democracy affect the intensity of their scrutiny in fundamental rights cases. Many courts profess judicial deference.

Judicial deference is a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters which are perceived to be beyond their expertise or legitimacy to decide. The tool has been employed, most prominently, in human rights cases. This is due to their transcendent quality, capable of cutting across all substantive areas of public decision-making.

It is said that over-deferential attitude threatens the rule of law and separation of powers as much as excessive judicial activism does. The way judges exercise judicial deference is, therefore, a fundamental matter of constitutional principle that concerns the proper role of each branch of government in relation to significant questions of public policy.

The following questions aim to discover the differences in exercising judicial deference by European constitutional courts.

QUESTIONNAIRE

(FOR THE NATIONAL REPORTS)

I. NON-JUSTICIABLE QUESTIONS AND DEFERENCE INTENSITIES

In your jurisdictions, what is meant by "judicial deference"?

'Deference' in the Irish jurisdiction describes the situation where the decision-maker puts aside the possibility of reaching an authoritative independent decision on the matter and defers it to the decision of some institution or body in respect of the contentious matter at hand.[1066] This sort of deference is total deference. Deference does not have to be practised in this way; a judge may defer by attaching different degrees of weight to the views of the primary decision-maker. The greater the weight attached, the more deferential the approach and vice versa.

Recently, Humphreys J. (High Court judge) in *Four Districts Woodland Habitat Group & Ors v. An Bord Pleanála & Ors* [2023] IEHC 335 provided a definition of deference as:

"Deference: meaning weight in the context where the decision-maker has a degree of expertise. Where that entity is quasi-judicial this is sometimes grandly called "curial deference", but that concept, deference simpliciter or common or garden weight all amount to the same thing, and derive ultimately from the separation of powers rather than being necessarily dependent on the decision-maker being a highly specialised expert. Even non-expert decision-makers are entitled to weight being given to their factual conclusions. A licence granted by a clerical officer or other generalist public servant attracts a presumption in its favour as does a reasoned written decision by a legally qualified quasi-judicial tribunal member."[1067]

Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.,* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

Yes, deference is not a static concept – there are degrees to which one can defer.[1068] The deference

1066 Perry, 'Protecting Human Rights in a Democracy: What Role for the Courts?', (2003), *Wake Forest Law Review, Vol. 38, pp. 635-696.*

1067 *Four Districts Woodland Habitat Group & Ors v. An Bord Pleanála & Ors [2023] IEHC 335*, para. 40

1068 Perry, 'Protecting Human Rights in a Democracy: What Role for the Courts?', (2003), *Wake Forest Law Review, Vol. 38, pp. 635-696.*

is particularly marked in areas which the Irish Constitution commits to the elected and legislative branches of government, such as, for example, the conduct of foreign affairs, the fairness of taxation measures or the allocation of scarce resources.

While there are some judicial comments to the effect that the courts should be slow to interfere with the findings of expert independent bodies such as regulators and statutory administrative tribunals (the doctrine of "curial deference"), in practice this is confined to decisions calling for a high degree of judgments from experts. Questions of statutory interpretation and vires are exclusively a matter for the courts. See, for example, *Henry Denny & Sons (Ireland) Ltd. v. The Minister for Social Welfare* [1998] 1 IR 34.

Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

Judicial deference in Ireland is quite limited. See, for example, *Foy v. Governor of Cloverhill Prison* [2010] IEHC 529, where Charleton J. remarked:

"The decisions which are made by a governor result from many years of experience of practical work within a context that demands expertise through experience … The analysis which the court can bring to bear on the problem is, however, limited to the facts of particular cases."[1069]

The deference will be accorded only on matters within a decision-maker's jurisdiction and that jurisdiction is determined by the courts without reference taken by the decision-maker.

Are there situations when your Court deferred because it had no institutional competence or expertise?

There are no situations when an Irish court has deferred because it had no institutional competence or experience. Irish courts have traditionally shown judicial restraint when asked to interfere with the decisions of expert Executive appointed bodies. The Supreme Court in the 1990s took the opportunity to clarify the basis for the operation of deference in Ireland. Firstly, in the case of *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39, Finlay C.J. stated broadly, in respect of requests of the Superior Courts to interfere with the decisions of An Bord Pleanála (a statutory planning appeals body), as follows:

"Under the provisions of the Planning Acts the legislature has unequivocally and firmly placed questions of balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the Board, which are expected to have special skill, competence and experience in planning matters."[1070]

From this, the courts will respect the delegation by the legislature or executive to the expert body of the task or function of determining the sectoral or regulatory issue. In this way, judicial deference can be seen to be located within the separation of powers doctrine. Furthermore, the courts will recognise the special skill and confidence that the delegated body has in the area in which that body has been called upon to regulate.

Are there cases where your Court deferred because there was a risk of judicial error?

There are no situations where the Irish Courts deferred because there was a risk of judicial error. In cases that appear before the High Court, there is an appeal procedure available in certain circum-

1069 See, to like effect, *Hogan v. Governor of Mountjoy Prison* [2016] IEHC 273, para.9; *Kivlehan v. Radió Telefís Éireann* [2016] IEHC 88; *Kelly v. Minister for Justice and Equality* [2017] IEHC 805, paras 41–42 (accepting the need for deference towards "editorial choice" in selecting which political parties could be included in a General Election debate; and the need for the approach of RTÉ to be fluid, to reflect the change in the fortunes of a party since the previous General Election).

1070 *O'Keeffe v. An Bord Pleanala* [1993] 1 IR 39, para. 71.

stances where the party can appeal the matter to the Court of Appeal. The Irish Constitution also provides for a direct appeal from the High Court to the Supreme Court in exceptional circumstances (if satisfied that the matter is of "general public importance", or it is "necessary in the interests of justice" that there be an appeal).

Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

There are no cases where the court deferred, which involved the institutional or democratic legitimacy of the decision maker. There are, however, cases, particularly in spheres such as the allocation of resources and foreign affairs (see, for example, *Horgan v. An Taoiseach* [2003] 2 IR 468), where the courts, conscious of issues of democratic legitimacy and lack of expertise will generally be reluctant to interfere.

"The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

In general, the Irish courts will not be deterred from pronouncing constitutional questions even where the matter concerns one of broad social policy. Even still, the courts have occasionally shown deference because there is a matter of broad social policy: examples include a reluctance to invalidate on equality grounds the differing treatment of girls from boys in matters of underage sexual activity. See, for example, *MD v. Ireland* [2012] 1 IR 697.

Does your Court accept a general principle of deference in judging penal philosophy and policies?

Judges in Irish courts do not have a general principle of deference in judging penal philosophy and policies.

There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

While the Irish courts have been conscious of the national security questions, they have not, in general, deferred on these questions. For example, in 2019, the Supreme Court held that an applicant could not be refused naturalisation on national security grounds without first disclosing the broad contours of the case against him so that he could comment on it. See *P v. Minister for Justice and Equality* [2019] IESC 47.

Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

Irish courts have not adopted a fixed position on this question. It is, however, possible to say that where the Oireachtas (Parliament) has legislated on a particular topic and sought to balance competing rights and interests, the courts will generally defer to that judgment unless it is manifestly at odds with the effective protection of constitutional rights. See, for example, *Tuohy v. Courtney* [1994] 3 IR 1.

II. THE DECISION-MAKER

Does your Court pay greater deference to an Act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

Irish courts do not pay greater deference to Acts of Parliament than to decisions of the executive. The Court does not defer depending on the degree of democratic accountability. Again (as mentioned above), the Irish Courts will only interfere with executive powers of Government where they have

failed in accordance with the mandates of the Irish Constitution. See *Burke v. Minister for Education and Skills* [2022] IESC 1, where O'Donnell C.J. provides:

"It is also arguably consistent with this approach, that where the Constitution calls for a broad-based judgment [by the Government], and does not constrain it by any specific restrictions or standards, that the primary accountability for such action lies under Article 28 with the Dáil, and that this reinforces the analysis of the judicial role as arising only in the cases of clear disregard. These cases illustrate circumstances where the courts have been called on to review the actions of the Government in different spheres, where it is contended the Government has failed to act in accordance with the express or implied mandates of the Constitution, and have held that the court may only interfere in an exercise of power consigned by the Constitution to the Government where there has been clear disregard of such express or implied mandate."

What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

Irish Courts can review legislative history in deciding the outcome of a case; particularly in cases where the court is asked to consider a piece of legislation, the courts will often look at what went before in order to understand the intention of the Oireachtas. For example, in *Grace and Sweetman v. An Bord Pleanála* [2017] IESC 10, the Supreme Court (in reaching their conclusion) placed emphasis on the legislative history, which involved the introduction of an express statutory requirement for prior participation under the original version of the Planning and Development Act 2000, and the subsequent repeal of that provision under the Planning and Development (Strategic Infrastructure) Act 2006. The Supreme Court also stated that, given this legislative history, the judgment in *Lancefort Ltd v. An Bord Pleanála* [1999] 2 IR 270 can no longer be held as providing authority for "any general preclusion of standing in the absence of prior participation or an appropriate explanation for the lack of it".

The courts will, however, not look at parliamentary debates to ascertain the meaning of legislation (see, for example, *Crilly v. TJ Farrington Ltd.* [2001] 3 IR 251). Still less will they look at those debates in order to see the extent to which (for example) legitimate constitutional or human rights concerned were addressed by the Oireachtas (see, for example, *Controller of Patents, Designs and Trade Marks v. Ireland* [2001] 4 IR 229).

Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

The Irish courts will examine whether or not the decision maker has complied with the duty to give reasons for the particular decision which they have reached. The judiciary in Ireland are expressly licensed to engage in judicial review by the Irish Constitution itself, and the judiciary are guided in the practice of judicial review by the substantive provisions of the Irish Constitution in respect of what legislation is permissible or not.

Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

Not as such. If, however, a legislative measure had given effect to a reform recommended by an expert body such as the Law Reform Commission this would be a matter to which the courts might pay weight. Conversely, the fact that the Oireachtas had failed to give effect to an obvious reform that had been recommended by such an expert body would be a reason in practice for a slightly higher degree of preparedness for judicial intervention on the part of the courts.

Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive

debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

The Irish courts do not go to these lengths to understand the legitimacy of a measure. This is because Ireland has a separation of powers; therefore there is a limit to the amount for which it could look behind the decisions of the legislative and executive branches.

Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

Under the separation of powers system, when the legislature has performed its function (i.e., passed the law through both Houses of the Oireachtas – the Dáil and the Seanad), the executive then brings this new legislation into operation. Therefore, that is how matters gain their legitimacy, without any function for the public to be consulted or to have an opportunity to deliberate on a particular matter.

III. RIGHTS' SCOPE, LEGALITY AND PROPORTIONALITY

Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

The Irish courts deferring at the rights definition stage by giving weight to the government's definition of the right or its application to the facts can be seen in the following case. In *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, it was held by the Supreme Court that there was nothing in the caselaw of the court which would exclude the court from applying the principle of proportionality in cases where it could be considered to be relevant. It was not necessary to adopt the formula of «anxious scrutiny» into Irish law. The Minister was required to consider the circumstances of each case where there were grounds to prevent him under s. 5 from making the deportation order. The Minister did not have to enter into detailed correspondence with an individual outlining why refoulement did not arise in the case but had broad discretion as to s. 3(6) reasons. The decision of the Minister, pursuant to s. 5, was so vague and opaque that its underlying rationale could not be deduced. The appellant had established «substantial grounds» for impugning the decision of the Minister, and the appeal would be allowed and leave granted to bring judicial review as to the s. 5 ground only. Per Fennelly J.: The judgments here did not express or imply any view as to how a Minister should decide deportation cases. Matters of policy were for the Minister. Equally, the judgments implied no view as to how the application for judicial review in the proceedings at hand would be decided in the High Court. Per Denham J.: The existing test included the implied constitutional limitation of jurisdiction entailing that a decision maker should not disregard fundamental reason or common sense in reaching the decision and the duty to protect constitutional rights.

Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

As already noted, there is no uniform approach to judicial deference (i.e., no express statutory or constitutional basis for its operation). In cases where the courts must balance claims based on fundamental rights against public interest considerations (applying, as they may, a proportionality test) they are certainly, to a degree, deferential.[1071]

Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

When a court is reviewing the constitutionality of a law, it does so by first employing the 'natural and ordinary' meaning approach to interpretation. This means giving the words their regular meaning in order to understand the intention of the particular provision.

See also the Interpretation Act 2005, which provides general rules on the interpretation of statutes and gives general direction to the Irish Courts on such interpretation.

1071 De Balcam, 'Judicial Review', 3rd Ed., 2017, p.466.

What is the intensity review of your Court in case of the legitimate aim test?

The courts utilise the proportionality test. This is a method employed by the Irish courts in constitutional matters where there are two or more rights invoked by the parties.

What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.,* suitability, necessity, and proportionality in the narrower sense)?

The proportionality test that the Irish courts employ is adopted from Canadian jurisprudence (*R v. Chaulk* [1990] 3 SCR 1303) by Costello J. in *Heaney v. Ireland* [1994] 3 IR 593. In this case, the plaintiffs› challenge, based on the constitutionally protected right to silence, was to legislation requiring arrested persons to give an account of their movements in certain circumstances. Costello J. held that if it was established that legislation restricted a constitutional right, the court must then examine the validity of such restrictions. He set out the test in the following terms:

"The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionality protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test They must:

(a) Be rationally connected to the objective and not be arbitrary, unfair, or based on irrational considerations,

(b) Impair the right as little as possible, and

(c) Be such that their effects on rights are proportional to the objective."[1072]

The proportionality test can be regarded as having four elements: i) Legitimate aim; ii) Rational connection; iii) Minimum impairment of the right; and iv) Overall balance.

See the recent case of *Donnelly v. Minister for Social Protection, Ireland, and the Attorney General and the Irish Human Rights and Equality Commission* [2022] IESC 31.

Does your Court go through every applicable limb of the proportionality test?

The Irish courts go through every limb of the proportionality test in its application. The test itself is outlined above.

Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

No. The Irish courts must be satisfied that the measure satisfies one or more limbs of the proportionality test before it will be accepted.

Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

Yes. The inception of the proportionality review test has been concomitant with the rise of the judicial deference doctrine.

Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

The ECtHR's jurisprudence has not shaped the Irish court's approach to deference. The ECtHR's doctrine of the margin of appreciation is very similar to the domestic equivalent doctrine of the margin of appreciation. In the case of *Connelly v. an Bord Pleanála* [2018] IESC 31 it was held: "decision makers are normally afforded a significant margin of appreciation within the parameters of the legal frame-

1072 *Heaney v. Ireland* [1994] 3 IR 593, [607].

work within which a particular decision has to be taken."[1073]

Note: Article 29.3 of the Irish Constitution provides that "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States." Ireland, although legally bound by the obligations set out in treaties that it has ratified, has a dualist system which means that sources of international law do not have direct application in Irish law unless they are incorporated in domestic legislation. This is provided under Article 29.6 of the Irish Constitution, which states: "[n]o international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas".

Before the European Convention of Human Rights Act 2003 was enacted in Ireland, the ECHR and the decisions of the European Court of Human Rights were not binding in Ireland but were referred to by the courts. However, since this enactment, the courts are obliged, so far as possible, to interpret statutory provisions and rules of law in a manner compatible with the State's obligations under the Convention provisions. Where no other remedy is adequate or available a declaration may be made that the statute or rule of law is incompatible with those obligations. They are also obliged to take judicial notice of the Convention and of declarations, decisions, advisory opinions and judgments of the ECtHR, decisions, and opinions of the Commission on any question in respect of which it had jurisdiction, and any decision of the Committee of Ministers on any question in respect of which it has jurisdiction. Organs of the State are obliged to perform their functions in a manner with the State's obligations. See section 2 and section 3(1) of the European Convention of Human Rights Act 2003.

Of particular note for this question, is that section 4 of the European Convention of Human Rights Act 2003 provides that judicial notice shall be taken of the Convention provisions and of (a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights, (b) any decision or opinion of the European Commission of Human Rights, and (c) any decision of the Committee of Ministers established under the Statute of the Council of Europe and that a court shall when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments.

Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

To date, there is no case that was before an Irish court where the ECtHR condemned the Irish state because of the deference given by the court in a specific case that made the remedy an ineffective one.

IV. OTHER PECULIARITIES

How often does the issue of deference arise in human rights cases adjudicated by your Court?

Human Rights cases do not generally experience the issue of deference when they arise before the Irish courts.

Has your Court have grown more deferential over time?

It can be argued that the Irish courts have grown more deferential over time as a result of more government bodies who are charged with making decisions, ultimately being reviewable by the courts.

See, for example, *Orange Communications Ltd. v Director of Telecommunications Regulation (No.2)* [2000] 4 IR 159. This case is often referred to as the "Orange Test", where the appellant must establish, as a matter of probability that the decision reached by the respondent was vitiated by a serious and significant error or a series of such errors, and in concluding such an issue, the court must have regard to the degree of expertise and specialised knowledge available to the tribunal/decision-maker. Keane CJ. acknowledged that an appeal was not intended to take the form of a re-examination of the entire case, but that in this case, they submitted that the appellant is asking the court to re-examine the merits of the case and not just the law.

1073 *Connelly v. an Bord Pleanála* [2018] IESC 31, [10.2]

Does the deferential attitude depend on the case load of your Court?

The deferential attitude does not depend on the case load of the court.

Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

The Irish courts cannot base their decisions on reasons that are not advanced by the parties. It must rely strictly on the submissions that are made by counsel in the matter before the court.

Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

The Irish courts are not in a position to extend its constitutionality review to other legal provision that has not been contested before it but has a connection with the applicant's situation. The court can only deal with matters which are raised by the parties either by way of legal submissions that are submitted or when counsel is making submissions while in court.

The Constitutional Court of the Republic of Italy

Forms of and Limits to Judicial Deference: The Case of Constitutional Courts

Questionnaire for the National Reports

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I. Non-justiciable questions and deference intensities

1. In your jurisdictions, what is meant by "judicial deference"?

Judicial deference, which is not a category of positive law, generally indicates the deferential attitude displayed by the judiciary towards a legislative provision, consistent with the general principle of the separation of powers.

In the Italian legal system, Article 101 of the Constitution expressly enshrines the principle that judges are subject only to the law, including for the purpose of protecting the autonomy and independence of the judiciary as a whole and of each individual member thereof.

With specific regard to the Constitutional Court, judicial deference can be viewed as the respect shown by the 'judges of the laws' for the discretionary nature of the choices made by the representative institutions, parliament and the executive, in the implementation of the Constitution and the policy direction expressed by the majorities that democratically succeed each other in leading the country.

A trace of this deference can be found in Article 28 of Law No 87/1953, in which it is expressly provided that the Constitutional Court's review of the constitutionality of a law or an act having the force of law "excludes any assessment of a political nature and any review of the use of Parliament's discretionary power". However, the principle of constitutionality – which underlies the entire design of the Constitution and is borne out not only by the latter's supremacy over ordinary law but also by the provision for a strengthened constitutional review procedure and for guardians of the Constitution (the President of the Republic and the Constitutional Court) – requires that political discretion must always be exercised in keeping with constitutional norms and that the actions and behaviour of central, regional and local government must be informed by the dictates of the Constitution. Therefore, although the aforementioned Article 28 expresses a principle of respect for the decision-making autonomy of the representative institutions, it does not prevent nor has it ever prevented the Court from fully exercising its role of guardian of the Constitution in relation to acts that, like laws in particular, are of an intrinsic and highly political nature. Ultimately, it contains a clause intended to ensure that the exercise of the Court's functions and, in particular, the constitutional review of laws and governmental measures equated with them, is guided by legal canons prescribed by the Constitution rather than by purely political ones.

Deference is significantly recessive even in areas characterised by a notable level of discretion in legislative choices, where the Court's intervention is generally conditioned by how much room there is for finding a sole constitutionally mandated solution or, according to a more recent but now well-established line of authority, pinpointing a suitable constitutionally compatible solution from among those already existing within the legal framework governing the specific matter under scrutiny.

Emblematic in this sense is the direction inaugurated, when reviewing the legislature's choices as regards the penalties to be imposed in both the criminal and administrative sphere, by Judgment No 236/2016, an approach further elaborated on in Judgments Nos 222/2018, 284/2019 and 185/2021. In particular, Judgment No 222/2018 stated that where "the punishment provided for by law for a particular manifestation of an offence proves to be manifestly unreasonable, being evidently disproportionate with the severity of the conduct, the Constitutional Court may take corrective action, provided that the punishment may be replaced on the basis of 'precise points of reference, already traceable in the legislative system', which are construed as 'existing [punitive] solutions that are suitable to eliminate or mitigate the alleged manifest unreasonableness'".

Therefore, in order for the Court to be able to intervene in a case involving an established violation of the principle of proportionality and that the punishment must necessarily be tailored to the individual circumstances, "it is not necessary for there to be one single constitutionally mandated solution within the system that is capable of replacing that ruled unconstitutional, such as one provided for under a provision with an identical structure and rationale, which is capable of being used as a comparator. In order for the Court to review the suitability of the punishment provided for in relation to a given offence, it is essential and sufficient that the system overall offers the Court 'precise points of reference' and 'already traceable' solutions [...] – which are themselves constitutionally sound, even if not 'mandated by the Constitution' – which may replace the punishment declared unconstitutional, so as to enable this Court to provide an immediate remedy for the violation ascertained, without creating any unsustainable unregulated areas in terms of the protection of interests from time to time protected by the incriminating provision considered in its ruling. This is without prejudice, on the other hand, to the possibility for the legislator to take action at any time, exercising its own discretion, to identify any other – presumably more suitable – punishment, provided that it complies with constitutional principles. The aim of all of the above is to achieve effective protection for the fundamental principles and rights affected by the choices regarding punishment made by the legislator, which would risk remaining without any practical possibility of protection were the involvement of this Court to be restricted – as it was for a long time in the past – to an inflexible requirement of the 'constitutionally mandatory solution' when identifying the sanction to be applied in place of that ruled unconstitutional".

Judgment No 185/2021 also clarified that the need to "resort to a manipulative ruling, which replaces the contested provision imposing a penalty with another one that complies with the Constitution, arises only when the punishability gap that would result from an ablative ruling, which cannot be filled through the expansion of existing provisions, proves to be a harbinger of unsustainable gaps in safeguarding the interests protected by the rule at stake [...]: for example, when it would result in an impairment of the protection of fundamental rights of the individual or of goods of particular importance for the entire community in the face of serious forms of aggression, with a possible consequent violation of constitutional or supranational obligations. In such cases, the legal void resulting from the pure and simple removal of the provision under scrutiny would not be tolerable, not even temporarily: all the more if one considers that any legislative action designed to fill the gap, however immediate, would operate, of necessity, only for the future (given the mandatory principle of non-retroactivity of criminal law to the detriment of offenders). It would not thus have any effect on a past event, which, following the declaration of unconstitutionality, would automatically and definitively become devoid of any criminal implications, even in the presence of a final conviction, the effects of which would cease" (Article 30(4) of Law No 87/1953).

In those cases, "the removal of the constitutional infringement remains necessarily conditioned by the identification of solutions regarding the punishment to be imposed", which – in line with the limits of the Court's powers "that exclude intervention of a creative nature" – "may replace the contested one: solutions that can be found (according to the most recent case law [...] informed by the need to avoid the creation of 'no-go' areas immune from a review of constitutionality) even outside the traditional sole constitutionally mandated solution approach by relying on precise points of reference offered by the existing regulatory framework, including selecting from an array of options, without prejudice to the prerogative of Parliament to legislate differently provided that its solution respects the Constitution".

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2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (e.g. questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

The Court does not envisage different degrees of deference in its case law. On the contrary, it has been consistent in its stance towards preventing and counteracting the formation of 'no-go' areas immune from a review of constitutionality, especially when what is at stake are fundamental rights and the principle of equality, which embodies the mode of being of those rights (Judgment No 63/2021). And likewise in areas such as the criminal law where the need to ensure effective protection against harm stemming from the choices of the legislature is more pressing (Judgment No 242/2019), in contexts closely connected with the democratic structure of the system (Judgment No 48/2021), in relation to spending rules that affect the public finances, giving rise to interests worthy of constitutional protection (Judgment No 253/2022).

The above-mentioned direction is intended to reaffirm in their fullness the principles of constitutional legality and supremacy and to preserve to the greatest extent possible the effectiveness of the review referred to the Court. Relevant decisions in this regard touch upon multiple and important topics or matters such as, for example, legal aid (Judgment No 157/2021), assisted suicide (Judgment No 242/2019), criminal proceedings (Judgment No 252/2020), enforcement of sentences (Judgment No 99/2019), electoral legislation (Judgments Nos 35/2017 and 1/2014) and the funding of the inalienable rights of people with disabilities (Judgment No 275/2016).

The Court, when it is duly seised of a question, fully exercises its functions as guarantor of the constitutional order respecting the discretionary choices made by the political decision-maker but always verifying that the discretion has been exercised in compliance with constitutional principles and rules. If it finds an infringement of the Constitution, in general and if the conditions therefor are met, the Court intervenes to rectify it without regard per se to the fact that the issues in question are morally or socially controversial or politically sensitive, involve the allocation of scarce resources or entail substantial financial implications for the government. In the latter regard, it is true that budgetary choices "involve decisions of a political-economic nature which, by reason of that nature, are constitutionally reserved to the determination of governments and parliamentary assemblies, inasmuch as they are choices which, being the fruit of an unquestionable political discretion, call for particular and substantial respect including on the part of the Constitutional Court, although they cannot, of course, constitute a 'no-go' area escaping any review" (Judgment No 84/2018).

However, it is well-settled that "in financial matters there is no absolute limit to the Constitutional Court's jurisdiction to review the constitutionality of laws. On the contrary, to hold that review of such matters is contemplated by the Constitution can have no meaning other than to affirm that it falls within the overall table of constitutional values, such that it cannot be supposed that the law approving the budget [...] or any other law affecting it constitutes a 'no-go' area exempt from any review by the Constitutional Court since there cannot be any constitutional value whose implementation can be held to be exempt from the inviolable safeguard that constitutional review proceedings constitute" (Judgment No 10/2016).

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3. Are there factors to determine when and how your Court should defer (e.g. the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

There are no factors laid down by law that (authorise or) oblige the Court to refrain from making a ruling. On the contrary, a number of provisions imply a general principle of compulsoriness in adjudicating the issues submitted to it (amongst others, Articles 16 and 18 of Law No 87/1953 and Article 20 of the Supplementary Rules[1074]). Nonetheless, the special nature of certain questions may affect the outcome of the proceedings and even preclude an immediate ruling on the merits where what is at stake are principles strongly rooted in the culture and historical experience of the country or involving delicate balancing choices that are primarily a matter for the legislature's discretion.

Italian family law has inherited from the Roman law tradition the heterosexual connotation of marriage and the automatic rule of patronymic in the transmission of surnames to children.

Regarding the first issue, Judgment No 138/2010, noting that Article 29 of the Constitution intended to refer to marriage in its traditional meaning of the union of a man and a woman, clarified that the right of persons of the same sex to freely live together as a legally recognised couple is constitutionally safeguarded in Article 2, which protects the inviolable rights of the individual and requires that the matter be regulated by positive laws enacted by Parliament subject to the margin of appreciation that the latter enjoys in view of the multiple models that can be adopted and have been adopted in other States and that do not contemplate the paradigm of matrimony. Following the Constitutional Court's ruling that the questions raised in the case were either unfounded or inadmissible, the legislature followed up by fully regulating civil unions, including between persons of the same sex, with Law No 76/2016.

Regarding the second issue, the patronymic rule – which clearly infringes the constitutional principle of equality between spouses as well as the child's right to personal identity and which can be considered to be a legacy of a patriarchal conception of the family that has gone by the wayside – led the Court to call for a thorough review of the rules on several occasions (Judgments Nos 286/2016 and 61/2006 as well as Orders Nos 145/2007 and 176/1988). As the legislature's inertia persisted, Judgment No 131/2022 finally overturned the automatic granting of only the father's or husband's surname to the child (born in wedlock, recognised or adopted), introducing – pending more complete legislative action – the rule of a double surname in the agreed order unless the parents decide otherwise.

In other cases, the sensitivity of the issues has prevented the Court from ruling on the merits for the time being, in the absence of a sole constitutionally mandated solution or at the very least suitable

1074 Article 16(3) of Law No 87/1953 provides that "decisions shall be deliberated upon in chambers by the judges present at all the hearings of the proceedings and shall be adopted by an absolute majority of the votes cast", subject to the casting vote of the President in the event of a tie. Article 18(1) states as follows: "The Court shall give a final decision by way of judgment. All other measures within its jurisdiction shall be adopted by order". Finally, the first three paragraphs of Article 20 of the Supplementary Rules read as follows: "1. Judgments and orders shall be deliberated upon in chambers by open vote. […] 2. After the Judge-Rapporteur's report, the President shall chair the discussion and put the issues to the vote. 3. The Judge-Rapporteur shall vote first, followed by the other Judges starting with the most recently appointed Judge. The President shall have the final vote. In the event of a tied vote, the President's vote shall prevail".

constitutionally compatible solutions, enabling it at most to address strong warnings to the legislature.

Judgment No 84/2016 declared inadmissible questions concerning the statutory prohibition on performing clinical or experimental research on embryos not aimed at their protection. The conflict, fraught with "serious ethical and legal implications between the law applicable to science (and the research benefits associated with it) and the rights of the embryo in terms of the protection (weak or strong) due to it on account of and in relation to the (greater or lesser) degree of subjectivity and anthropological dignity recognised to it", can be settled in any number of ways on which "lawyers, scientists and civil society itself are profoundly divided regarding the solution". Indeed, "the reconciliation between opposing interests [...] pertains to the area of legislation within which the legislator, acting as the interpreter of the general will, is required to strike a balance through legislation between the fundamental values that are in conflict, taking account of the views and calls for action that it considers to be most deeply rooted at any given moment in time within the social conscience".

More recently, Judgments Nos 32/2021 and 33/2021 likewise ruled inadmissible questions concerning, respectively, the inability of a child born as a result of heterologous medically assisted reproduction undertaken by a same-sex couple to be granted the status of child recognised also by the intended mother and the prohibition on recognising a foreign court order providing for the inclusion of the intended parent on the birth certificate of a child born through recourse to surrogacy. Both decisions emphasised the constitutional imperative of adequately protecting the child's interest in the fullness of parental relations, regardless of the specific configuration of the relevant family or civil union, the personal circumstances of the parents and even recourse to a practice considered unlawful by the legal system, such as surrogacy. However, the variety of conceivable solutions led the Court to defer to the legislature's primary assessment, while reminding it of the need for urgent action and warning it of the intolerability of any prolonged inertia.

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4. Are there situations when your Court deferred because it had no institutional competence or expertise?

Once duly seised of questions as to the constitutionality of laws and acts having the force of law, applications to resolve disputes between State institutions in connection with the separation of powers or disputes between the State and the Regions or between the Regions concerning their respective powers that exhibit a genuinely constitutional dimension, and proceedings to review the admissibility of requests for abrogative referendums, the Court has never refrained from rendering its decision for lack of the necessary institutional competence or expertise.

It is worth pointing out that the Court has wide-ranging powers of investigation, which may be exercised informally or by interlocutory measures. Article 13 of Law No 87/1953 provides that the Court may order the hearing of witnesses and, even overriding statutory prohibitions, the disclosure of documents or records. Article 14 of the Supplementary Rules provides that the Court must provide by order that any evidence deemed appropriate be taken and must lay down the relevant time limits and procedures to be observed.

A significant new development occurred – in connection with supplementing, where necessary, the knowledge that may be useful for the Court in deciding cases – with the recent introduction (by resolution of 8 January 2020) of the figure of experts who may be called upon to offer their contribution at the preparatory stage of the proceedings. Indeed, the current Article 17 of the Supplementary

Rules (as per the version approved by resolution of 22 July 2021) provides that if the Court deems it necessary to obtain domain-specific information, it must provide by order that distinguished experts be heard at a dedicated session in chambers, at which the parties may put questions to the experts. The Court may also order that documents or written reports be obtained from the experts heard.

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5. Are there cases where your Court deferred because there was a risk of judicial error?

The Court has never refrained from ruling because of the risk of a judicial error.

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6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

The Court has never refrained from ruling by invoking the institutional or democratic legitimacy of the decision-maker. By express constitutional provision (Article 134), it is called upon to rule on the constitutionality of the acts and behaviour of the representative institutions as well as regional and local government.

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7. "The more the legislation concerns matters of broad social policy, the less ready a court will be to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

The above criterion is not applied by the Court which, when correctly seised of the matter, judges the constitutionality of the social policy choices made by both national and regional lawmakers. In this regard, it is worth noting the conspicuous case law that distinguishes between social benefits inherent to the basic needs of the person, as such intended also for foreigners regardless of a qualifying period of residence in Italy (civil disability pension for the deaf and communication allowance: Judgment No 230/2015; disability pension and allowance for the blind: Judgment No 22/2015; carer's allowance and disability pension: Judgment No 40/2013; disability allowance: Judgment No 187/2010), and the additional benefits that such a period by contrast requires (inclusion income: Judgment No 34/2022; citizen's income subsidy: Judgment No 19/2022; social allowance: Judgment No 50/2019).

The questions within the Court's jurisdiction are intrinsically political in nature because they involve acts of a political nature, such as, first and foremost, laws and governmental measures equivalent thereto, and the very behaviour of central, regional and local government. The Court's judgment, however, has an exquisitely legal value because it takes the Constitution and the set of constitutional rules as a yardstick and is exercised in a manner that behoves the judicial function. Such a configura-

tion of the Italian system of constitutional justice is consistent with the elevated role of guardian of the Constitution assigned to the Court, a body with technical-professional and non-elective legitimacy, vis-à-vis the institutions of representative democracy, which are required to operate in compliance with the Constitution in accordance with the principle of constitutional legality.

In the performance of its duties, the Court is well aware that the balancing of constitutional rights and principles and the full implementation thereof is a matter in the first instance for the discretion of the democratically elected political decision-maker. This is borne out not only by the rulings of inadmissibility stemming from the impossibility of remedying a situation of doubtful constitutionality with a sole constitutionally mandated solution or even only a suitable constitutionally compatible solution (Judgments Nos 183/2022 on compensation for unlawful dismissal by small businesses, 22/2022 on residential facilities to enforce psychiatric safety orders, 151/2021 on time limits for imposing administrative sanctions, 33/2021, 32/2021 and 230/2020 on same-sex parents, and 84/2016 on the prohibition of clinical or experimental research on embryos), but also and no less significantly by the rulings that find an infringement and remedy it on an interim basis while awaiting more comprehensive legislative action (Judgments Nos 149/2022 on dual-track criminal and administrative sanctions in the matter of copyright, 131/2022 on double surnames, 20/2019 on the publication of information on the income and assets of public-sector executives, 170/2014 on divorce by operation of law as consequence of a spouse no longer identifying as heterosexual, 1/2014 on the electoral law for Parliament, and 113/2011 on the reopening of criminal proceedings where the original judgment had been held to be unfair by the ECtHR), sometimes solicited in vain by adjourning the constitutional proceedings (Judgments Nos 150/2021 on punishment for defamation through the press and 242/2019 on assisted suicide). In any case, when faced with a constitutional violation, the Court has never failed to restore constitutional legality, if necessary by making up for the inertia of the legislature when the conditions therefor are met and the need for a remedy is established.

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8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

The Court incisively performs its function as guarantor of the constitutional order also in the sensitive area of criminal law, thus not envisaging any general principle of refraining from adjudication and at the same time undoubtedly ensuring compliance with the principles enshrined in this regard in the Constitution. Prominent among these is the principle of the legality of crimes and punishments (Article 25(2) of the Constitution: "No one may be punished except on the basis of a law in force at the time the offence was committed"), which vests in Parliament, the seat of the political representation of the nation, all decisions on what conduct is to constitute a criminal offence and how it is to be punished, with the associated complex balancing of rights and opposing interests. Accordingly, the Court is precluded from adopting *in malam partem* rulings. In other words, it may not create new offences or extend existing ones to unforeseen cases, and it may not impose a harsher punishment than that established by law or decide in a manner that worsens the offender's situation as regards other aspects of punishability (most recently, Judgment No 8/2022).

However, it is precisely the respect for the principles of legality and equality that permits, in certain cases, the adoption of rulings with adverse effects in the field in question. In particular, the preclusion of *in malam partem* rulings is not taken into account when formal defects or a lack of competence are at issue, relating to the procedure for the enactment of the contested legislation and the legitimacy of the body that adopted it. If the preclusion of such rulings is intended to safeguard Parliament's monopoly on criminal policy choices, it would be illogical to exempt from the Court's review

of constitutionality whatever legislation may have been adopted by those who have no power to do so but at the same time seek to neutralise the choices made by those who hold that monopoly. This occurs if the government adopts a legislative decree without the support of a statute enacted by Parliament delegating it such power (Judgments Nos 189/2019 and 5/2014) or if the Regions unduly legislate in criminal matters, which they are not empowered to do (Judgment No 46/2014). Similarly, it would be illogical to exempt from the Court's review of constitutionality any legislation made without complying with the correct procedures, a process that acts as a specific safeguard within the framework of the law-making monopoly, related to the fact that the legislative process involves debate from the outset between all political forces, including the minority, and, albeit indirectly, with public opinion (Judgment No 230/2012), thus allowing both to make a key contribution to the choices implemented by the majority (Judgment No 487/1989).

This applies also and specifically to criminal provisions introduced by decree-law. Therefore, notwithstanding the possible *in malam partem* effects stemming from a finding of unconstitutionality, the Court has scrutinised issues aimed at censuring the inclusion in the statute into which Parliament converts a decree-law of 'isolated' criminal provisions, i.e. that bear no logical-legal relationship with the original text of the converted decree-law (Judgment No 32/2014), a tactic that unduly undermines parliamentary debate. The Court has also ruled on questions alleging that the conditions of extraordinary necessity and urgency that must be fulfilled in order for the government to be able to exercise its exceptional power to adopt acts with the force of law in the absence of a parliamentary delegation of power in advance (Judgment No 330/1996; Orders Nos 90/1997 and 432/1996). In a different respect, the Court has reviewed favourable criminal provisions (Judgments Nos 394/2006 and 148/1983) that establish, for certain persons or cases, more lenient criminal treatment than that which would result from the application of general or common rules in the system. In such a case, the *in malam partem* effect of the declaration of unconstitutionality of the rules at issue does not undermine the legislature's monopoly on establishing criminal offences and determining the associated punishment but is a consequence of the automatic reapplication of the general or common rule, laid down by the legislature itself, to a case that enjoys an unwarranted exception.

Moreover, the principle of legality, which delimits and conditions the scope of the review of constitutionality in criminal matters, has been adequately valued by the Court, which has clarified and enriched its scope. Significant in this regard are, first of all, decisions that have not hesitated to ascribe the rules on the statute of limitations for offences to the principle of legality itself and its corollaries (prohibition on the retroactive application of criminal law to the detriment of offenders and the requirement that the conduct constituting a criminal offence must be described in exhaustive and precise terms in law) and that have held that the principle of legality as enshrined in the Constitution is broader compared to the corresponding supranational and conventional protections, which are limited to the provisions describing the offences and setting the applicable penalties (Judgments Nos 140/2021, 278/2020 and 115/2018, and Order No 24/2017). Second, of note is the line of case law that, reconsidering the issue, has brought within the scope of the *nulla poena sine lege* principle rules on the enforcement of sentences that transform the nature of the punishment and its impact on the liberty of the convicted person (Judgments Nos 183/2021, 17/2021, 193/2020 and 32/2020), emphasising the radical difference between custodial and non-custodial sentences and the negative impact of the former on a successful outcome to the offender's journey towards resocialisation informed by the rehabilitative function served by punishment.

Lastly, with regard to the latitude of the review of the legislature's choice of punishment, Judgment No 136/2020 remarked that constitutional case law has gradually uncoupled scrutiny of compliance with the principle of proportionality of the sentence from the constraints marked by the need to identify a precise *tertium comparationis* from which to borrow the sentencing framework intended to replace the one declared to be unconstitutional. Starting from Judgment No 343/1993, the Court has often favoured a model of review of the intrinsic proportionality of the penalty, which – without prejudice to the wide discretion enjoyed by the legislature in determining sentencing ranges – directly

assesses whether the penalty imposed should be considered manifestly excessive in relation to the offence and thereafter, if necessary, seeks benchmarks already existing in the legal system in order to reconstruct, on an interim basis, a new sentencing framework in place of the one struck down as unconstitutional, pending ever-possible legislative action aimed at redetermining the measure of the penalty in compliance with the constitutional principles.

Please refer to the answer to Question 1 for further recent rulings that have theorised the feasibility of corrective action by the Court provided that suitable constitutionally compatible solutions can be found in the fabric of the system and not necessarily just a sole constitutionally mandated one, i.e. precise legislative provisions that can be drawn from in order to shape the operative part of the ruling of unconstitutionality.

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9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

There are no cases in which the Court has ever refrained from ruling on national security grounds. That said, national security and the related concepts of State secrecy have come to the Court's attention, mostly on the occasion of resolving disputes in connection with the separation of powers arising between the judiciary and the executive in circumstances where the latter has classified facts and circumstances potentially relevant to the decision in a criminal trial as secret (Judgments Nos 24/2014, 40/2012, 106/2009, 487/2000, 410/1998 and 110/1998). The Court has always ruled on the merits of such disputes, generally upholding the lawfulness of governmental action and annulling decisions of the judiciary deemed to infringe the powers of the executive in terms of protecting State security.

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10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

The Court exercises its role as guardian in the forms, within the limits and subject to the conditions laid down in the Constitution and in the constitutional and ordinary laws relating to it.

Any deficits in the protection of fundamental rights do not entitle the Court to intervene in political dynamics, to which it is and remains extraneous by the clear will expressed by the constituent assembly. A shortcoming may form the basis for declarations of unconstitutionality when a question is duly brought to its attention and an infringement of the Constitution is actually established.

II. The decision-maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision-maker?

Pursuant to the first indent of Article 134 of the Constitution, the Court adjudicates on "controversies on the constitutional legitimacy of laws and enactments having the force of law issued by the State and the Regions". It is clear from the provision that, apart from the Court's other jurisdiction (disputes between State institutions in connection with the separation of powers, disputes between the State and the Regions or between the Regions concerning their respective powers, impeachment of the President of the Republic, and admissibility of requests for abrogative referendums), no distinction is made between the types of primary legislation open to constitutional review. It may, in fact, concern both statute law passed by Parliament – the highest representative body of popular sovereignty – and equivalent governmental measures, i.e. legislative decrees and decree-laws.

Referring one to the answer to Question 24 as far as the evolution of the Court's deferential attitude towards Parliament is concerned, at this juncture case law developments regarding decree-laws are worth highlighting. Decree-laws are measures that, pursuant to Article 77 of the Constitution, may be adopted by the government in extraordinary cases of necessity and urgency and must be converted into an act of parliament within 60 days, failing which they are devoid of effect from their inception.

Judgment No 29/1995 opened up the possibility of ascertaining whether or not the requirements of necessity and urgency were met, albeit limited to cases of clear non-fulfilment. On that occasion, the Court refuted the view that it was beyond its powers and that it was up to Parliament at the time of conversion of the decree into a statute to politically assess whether the requirements had in fact been met. This position, upheld in the past, ignored the fact that "the pre-existence of a factual situation entailing the necessity and urgency to provide for it through the use of an exceptional instrument like a decree-law constitutes a requirement of constitutional validity" of the adoption of the measure. Thus meaning that "the possible evident non-fulfilment of that prerequisite implies both a defect of constitutionality of the decree-law itself, adopted outside the scope of the constitutionally permissible cases of application, as well as a procedural defect in the statute into which it has been converted on the basis that by erroneously assessing the fulfilment of conditions of validity which in reality were not met, Parliament converted into a statute a decree that could not lawfully be so converted. Therefore, the Constitutional Court is not precluded from examining the decree-law and/or the statute into which it has been converted from the point of view of meeting the requirements of constitutional validity consisting of the existence of an extraordinary case of necessity and urgency, since the correlative examination by Parliament at the time of conversion entails an entirely different assessment and, precisely, one of a purely political nature".

Judgment No 171/2007 – in striking down for the first time an urgent measure adopted in the absence of the relevant prerequisites – clarified that the constitutional framework governing the sources of primary law not only concerns the separation of powers but also serves to protect rights. "The assertion that the conversion law in any case remedies any defects in the decree would imply the concrete attribution to ordinary legislation of the power to modify the constitutional division of competences between Parliament and the government as regards the production of primary legislation. In addition, where consideration is given to the fact that in a parliamentary republic, such as Italy, the government must enjoy the confidence of the Houses of Parliament and it is considered

that the decree-law involves a particular acceptance of responsibility [...] the constitutionality of the provisions of the conversion law cannot be assessed as such [...] in isolation from those of the decree itself".

In fact, "the decree's immediate effectiveness, which makes it capable of creating even irreversible changes to society and to the legal order places particular conditions on Parliament's activities when converting the decree into law compared to the constraints on ordinary legislative activity", thus also making clear the rationale of Article 77(1) of the Constitution, which confers on the government the responsibility for the issue of the decree. "Parliament thus ends up making its own assessments and debating with reference to a situation which has been changed by legislation introduced by a body which as a rule, as the holder of executive power, is not entitled to enact legislation with the force of law". Moreover, "the conversion law was characterised in its passage through Parliament by a wholly unusual situation, so much so that the presentation of the decree for conversion involves the reconvening of the Houses where they are still in recess and its passage through Parliament is regulated by rules different from those governing the procedure for draft bills proposed by the government".

The Court has developed a suitable test to establish whether the requirements of necessity and urgency are fulfilled, zeroing in on provisions that bear no relationship to the subject matter of the decree as a whole. Indeed, the content and/or purpose of the decree-law must be homogeneous, and likewise the relationship between the latter and the statute into which it is converted. In this regard, Judgment No 22/2012 clarified that no provisions may be introduced during conversion that have no connection with the provisions of the underlying decree. The preclusion of amendments to the statute into which the decree is converted that are totally unrelated to the content and purpose of the original text of the decree not only satisfies the requirements of good regulatory technique but is also prescribed by Article 77(2) of the Constitution itself, "which establishes a functional inter-relationship between the decree-law, adopted by the government and issued by the President of the Republic, and the statute into which it is converted, characterised by a special approval procedure that differs from the ordinary one".

First of all, the bill for the statute into which the decree-law will be converted is a matter falling within the purview of the government, which must introduce it in Parliament on the same day as the urgent measure is adopted. The procedure is also particularly fast since the Houses of Parliament, even if dissolved, are convened for the purpose and meet within five days.

Consistent with the necessarily expedited procedure, parliamentary regulations provide for specific rules aimed at allowing conversion by the constitutional deadline of 60 days. "Parliament is called upon to convert, or not, into a statute a measure, considered as a whole, containing provisions deemed urgent by the government due to the very nature of the matters regulated or the purpose intended to be pursued": the subject matter of the decree tends to coincide with that of the statute into which it is converted. "However, it cannot be ruled out that the Houses may, in the exercise of their ordinary legislative power, make amendments to the text of the decree-law, which are intended to modify the rules set forth therein (on foot of parliamentary evaluations that differ in relation to the merits of the said rules) in relation to the same subject matter or with a view to the same purposes. The text may also be amended for purely technical or formal requirements. What, on the other hand, goes beyond the typical sequence outlined in Article 77(2) of the Constitution is the alteration of the basic homogeneity of the urgent legislation, as disclosed by the original text, where it, in turn, possesses that characteristic".

In short, the grafting of the ordinary legislative function into the conversion process "can certainly be carried out, for reasons of procedural economy, provided that the essential link between the emergency decree and the power of conversion is not broken. If this link is broken, Article 77(2) of the Constitution is infringed not by virtue of the lack of the prerequisites of necessity and urgency for the added heterogeneous provisions, which, precisely because they are extraneous and inserted

subsequently, cannot be linked to those prerequisites [...], but due to the improper use by Parliament of a power that the Constitution grants to it, subject to special procedures, for the typical purpose of converting, or not, a decree-law into a statute".

On the other hand, a real limit to the Court's review of constitutionality would seem to exist in the case of acts that are intrinsically and exquisitely political.

Judgment No 52/2016 is emblematic: it granted an application concerning a dispute between State institutions that was filed by the President of the Council of Ministers and consequently annulled the Court of Cassation's contested judgment holding that the government's refusal to open negotiations for the conclusion of an agreement with the Union of Atheists and Rationalist Agnostics was subject to judicial review. The ruling pointed out that it fell to the Council of Ministers "to assess whether it is appropriate to launch negotiations with a particular association with a view to achieving, upon conclusion thereof, the bilateral drafting of special provisions governing reciprocal relations", i.e. one of the agreements that Article 8(3) of the Constitution provides for as the basis for the legislative regulation of relations between the State and non-Catholic religious confessions. "The government may be held responsible on a political level for that decision – and in particular [...] for the decision not to launch negotiations – before Parliament, but not before the courts".

The Court did not find a "legally enforceable claim to the launch of negotiations with a view to the conclusion of a concordat" affording the ordinary courts grounds to review any governmental refusal to accede to a request made by an association alleging its religious character. Indeed, the bilateral method that permeates the constitutional model of relations between the State and religious denominations "requires a joint intention of the parties not only to conduct and conclude negotiations, but also to launch them in the first place".

A ruling that the refusal to open negotiations was justiciable, with the ensuing possibility of mandatory enforcement of the recognised right and the matching obligation of the government, would have been "at odds with the bilateral method". From a broader institutional and constitutional standpoint, "the identification of the individuals who may be allowed to engage in negotiations" and their "subsequent actual launch" were considered to be important decisions for the government within which "its political discretion is already engaged, along with the responsibility that normally results within a system of parliamentary government". The changing and unpredictable reality of domestic and international political relations offers a copious series of reasons and events, extremely varied and insusceptible of typification, that may induce the government, in the exercise of a broad discretion limited only by constitutional principles, to deem it inappropriate to open negotiations with an association that so requests.

On the contrary, a rejection can be found in Judgment No 7/1996 concerning a dispute between State institutions raised by the Minister of Justice against the Senate, the President of the Council of Ministers and the President of the Republic, in relation to a motion of no-confidence that had been tabled against him and had been passed. The Court observed that the collegial action of the government and the individual action of the single minister, "pursued in harmony with one another", "are linked to the unitary objective of achieving the policies set by Parliament and the government. In the event of a break down in that link, the legal system provides for tools to resolve the conflict politically, through means at the disposal of both the executive, through the resignation of the entire government or of the individual minister, and Parliament, through a motion of no-confidence capable of affecting, depending on the case, the government as a whole or the individual minister". A motion of no-confidence "entails a purely political judgment", with the result that the grounds for and the purpose of the initiative taken by the Senate cannot be challenged. A motion of no-confidence is an act that can be counted "among the tools that are functional to Parliament's role of checking consonance with the government as regards political direction [...]. Parliament's scrutiny, precisely because it is political, thus encounters no limits, covering the exercise of all the minister's powers".

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12. What weight does your Court give to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

The Court is undoubtedly entitled to check compliance with the constitutional rules concerning the legislative process, as they can serve as a yardstick for assessment. The Constitution regulates, in broad terms, the various legislative procedures and sets limits and rules, to be specified in parliamentary regulations. Compliance with the constitutional rules is a condition for the lawfulness of the acts passed, as already clarified in Judgment No 9/1959 in which the Court affirmed its jurisdiction to "check whether the process of making a law has been carried out in accordance with the rules by which the Constitution directly regulates that process".

On the other hand, the provisions of the parliamentary regulations themselves are not open to scrutiny as they are laid down by acts that do not have the force of law within the meaning of the first indent of Article 134 of the Constitution (Judgment No 237/2022). The need to safeguard the autonomy and independence of Parliament underlies the principle that the *interna corporis* are not open to review by the courts thereby removing from any external scrutiny the acts and proceedings that take place in parliamentary assemblies.

On this point, important statements are contained in Judgment No 379/1996 concerning a dispute between State institutions, in which the Court ruled in favour of the Chamber of Deputies against a judicial authority that had opened an investigation into certain parliamentarians for having fraudulently impersonated absent colleagues and voted in their stead using their badges. Indeed, the principle of equality "does not go so far as to postulate the ability of the criminal law to penetrate every area of parliamentary life. An all-pervasive vision of criminal law clashes with the principle of the autonomy of Parliament and the related guarantee of non-interference of the judiciary in the activity of representative institutions". The autonomy of parliamentary assemblies is defined and delimited by a unitary and systematic set of constitutional provisions; Articles 64 and 72 of the Constitution provide that parliamentary regulations are to govern internal organisation and regulation of legislative proceedings for matters not directly regulated by the Constitution.

In conclusion, "the boundary between the autonomy of Parliament and the principle of legality is immediately and certainly delineated [...]. When the conduct of a parliamentarian falls entirely and without residue under the rules of parliamentary law and gives rise to a breach thereof, the principle of legality and the many values associated with it [...] must give way in the face of the principle of the autonomy of Parliament and the pre-eminent value of the freedom of Parliament [...]. If, on the other hand, any aspect of such conduct falls outside the scope of the parliamentary rules and cannot be entirely subsumed under them (because it involves personal property of other parliamentarians or property that belongs to third parties), the great principle of the rule of law must prevail and the ensuing judicial system to which all legal property and all rights are normally subject" (Articles 24, 112 and 113 of the Constitution). The boundary between the two distinct values (the autonomy of Parliament, on the one hand, and legality-jurisdiction of the courts, on the other) is overseen by the Court, which may be seised of the matter, in the event of a dispute regarding the separation of powers, by the State institution that claims to have been harmed or damaged by the activity of the other.

Parliamentary debates do not have a specific relevance for the purpose of examining the compatibility of legislation with human rights also because in the Italian legal system the approval of a law is not accompanied by express reasoning. However, the *travaux préparatoires* are of undoubted value in aiding the reconstruction and interpretation of the legal framework. In fact, it is also possible

to deduce the rationale and purpose of legislation from the debate that preceded its enactment. This applies in particular to tailor-made laws (*leggi-provvedimento*) and authentic interpretation laws (*leggi di interpretazione autentica*) (and the related assessment of compatibility with the principles of equality and reasonableness), regarding which reference is made to the answer to Question 18.

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13. Does your Court verify whether the decision-maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision-maker?

With regard to the relevance of the reasons given by the political decision-maker, please refer to the answer to Question 12 above. It should also be noted that the Court is a guardian of the Constitution, and as such cannot be equated with the political decision-maker.

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14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

The Court reviews the constitutionality of laws regardless of the complexity and depth of the *travaux préparatoires*. That said, a failure to consider adequately or at all guidelines developed by competent authorities in scientific circles may be an indicator of unreasonableness. In this regard, see the answers to Questions 20 and 22 in relation to some recent rulings on vaccines for the prevention of SARS-CoV-2 infection.

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15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

Although recent constitutional case law, developed in the context of proceedings to resolve disputes between State institutions in connection with the separation of powers, does not afford any importance to the holding of a debate on the general content of legislation or its implications for rights, the Court has begun to examine more closely respect for the prerogatives of individual parliamentarians, which include the power to take part in debates and deliberations by expressing opinions and casting votes and, before that again, the power of legislative initiative, including the tabling of amendments.

In this regard, Order No 17/2019 clarified that due respect for the autonomy of Parliament does not preclude a review by the Court, albeit "strictly limited to defects that result in manifest violations of the constitutional prerogatives of parliamentarians", which must "already be evident during summary

deliberation". In essence, in accordance with the principle of the autonomy of Parliament, "for the purposes of admissibility of the question regarding the dispute, it is not sufficient for the individual parliamentarian to complain about any type of defect occurring during the legislative process, but rather it is necessary that they allege and prove a substantial denial or an evident impairment" of a function constitutionally vested in them.

The recognition of standing to file an application with the Court to resolve such a dispute, reaffirmed by subsequent case law, has not to date led to the actual hearing of applications filed by individual parliamentarians since no manifest violations of their prerogatives have been found in practice.

Several decisions can be mentioned in this regard. Order No 80/2022 declared inadmissible an application filed by a parliamentarian against the government in relation to the approval process of eleven bills, designated as matters of confidence, to convert into statutes eleven decree-laws adopted to deal with the emergency caused by the spread of the SARS-CoV-2 virus. Order No 274/2019 held inadmissible an application filed by two senators against Parliament and the government alleging abuse of the legislative process consisting in the inclusion, during the conversion of a decree-law into a statute, of an amendment that bore no relationship to the subject matter and purpose of the decree. The previously mentioned Order No 17/2019 ruled inadmissible an application filed by several opposition senators in relation to the manner in which the budget law had been passed (vote of confidence on a government amendment to replace the entire text of the bill).

Despite the outcome of inadmissibility, Order No 17/2019 did however draw "attention to the need that the constitutional role granted to Parliament in the law-making process be not only observed in name but also in substance. Article 70 of the Constitution vests the legislative function in the two Houses while Article 72 provides that each bill is to be considered in two stages, first by a committee and then by the House concerned, which approves it section by section and with a final vote. These principles are intended to allow all political forces, both majority and minority, and their constituent individual parliamentarians, to work together *cognita causa* in the finalisation of the text, especially at the committee stage, through debate and the tabling of alternative wording and amendments. The procedural steps outlined by Article 72 of the Constitution set out some key phases in the legislative process that the Constitution itself calls for compliance with at all times in order to protect Parliament as a place of debate and discussion between the various political forces as well as a place where individual legislative acts are voted on. And also to safeguard the system as a whole, which is premised on the assumption that there is ample opportunity for all representatives to contribute to the formation of the legislative will. This is particularly true with reference to the approval of the annual budget law, in which the fundamental policy choices are concentrated and in which the citizens' contribution to the State's revenue and the allocation of public resources are decided: decisions that have constituted the historical core of the functions entrusted to political representation since the establishment of the first parliaments and that must be preserved to the utmost". Moreover, "the procedure for the formation of the budget law has always been accompanied by special safeguards, since it is one of those laws that, pursuant to Article 72(4) of the Constitution, require the ordinary procedure to ensure the widest participation of all political actors in their drafting".

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16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

These factors are not relevant in constitutional review proceedings.

III. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

The Court has never refrained from adopting a ruling on the merits once the conditions therefor were met, even when the protection of rights in the process of being (better or more fully) defined was involved.

Of particular importance is Judgment No 255/1992. Although handed down seven years before the constitutionalisation of the principles of due process in criminal proceedings, it declared unconstitutional the prohibition for a court to evaluate the statements previously made by witnesses neither during searches nor at the place of the event and in the immediate aftermath thereof contained in the prosecutor's file if used for the purposes of the indictment.

On that occasion, it was specified that "orality, taken as the principle informing the new system, is not the exclusive vehicle for the formation of evidence at trial under the Code; this is because [...] the primary and inescapable purpose of the criminal trial cannot but remain that of the search for the truth [...], so that in certain cases where the evidence cannot in fact be produced orally, importance is given, within the limits and under the conditions specified from time to time, to elements formed before and outside the trial. That the legislature's will also expresses a principle of preservation of the means of evidence is clear from all those principles that preserve for the trial file and hence for use as evidence all those elements that cannot be substituted (or fully and genuinely substituted) by trial evidence". In short, "the accusatory system established by law has chosen the dialectic of the adversarial debate as the criterion that best meets the need for the search for the truth; but alongside the principle of orality there is, in the new procedural system, the principle of preservation of the means of evidence that cannot be fully (or not genuinely) acquired orally".

Such statements are very much in keeping with the fourth and fifth paragraphs of Article 111 of the Constitution, as amended by Constitutional Law No 2/1999: "In criminal law proceedings, the formation of evidence is based on the principle of adversary hearings. The guilt of the defendant cannot be established on the basis of statements by persons who, out of their own free choice, have always voluntarily avoided undergoing cross-examination by the defendant or the defence counsel. The law regulates the cases in which the formation of evidence does not occur in an adversary proceeding with the consent of the defendant or owing to reasons of ascertained objective impossibility or proven illicit conduct."

Another significant example of the influence of constitutional case law on the arising and definition of new rights is offered by Judgment No 138/2010 on the prohibition of same-sex marriage, regarding which reference should be made to the answer to Question 3.

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18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

In principle, the nature of the applicable fundamental rights does not affect the Court's degree of deference. However, the involvement of competing or even conflicting rights and principles in the framework under scrutiny often sees the Court engaged in a delicate balancing exercise. Indeed, while constitutional rights and freedoms, expressed as principles, never clash with one another in theory, it is a different matter in practice.

In this regard, Judgment No 85/2013 clearly stated that all fundamental rights protected by the Constitution "are mutually related to one another and it is thus not possible to identify any one of them in isolation as prevailing absolutely over the others. Protection must at all times be 'systematic and not fragmented into a series of rules that are uncoordinated and potentially conflict with one another' [...]. If this were not the case, the result would be an unlimited expansion of one of the rights, which would 'tyrannise' other legal interests recognised and protected under constitutional law, which constitute as a whole an expression of human dignity".

In other words, the Court adopts a criterion of maximum expansion of protections that requires the broadest level of protection referring, however, not to the individual right, interest or principle considered in isolation but to the ensemble of constitutionally relevant goods in a systemic and non-fragmented vision thereof. That maximum expansion informs the balancing of the interests at stake, allowing for each of them only the sacrifice strictly necessary to ensure the greater contextual protection of the others.

There are, however, some areas in which the Court has theorised and employs a more incisive review of constitutionality than the standard one. This occurs, in particular, in relation to tailor-made laws and retroactive laws, including authentic interpretation laws, which are subject to scrutiny that is, from time to time, labelled as "strict", "severe", "rigorous" or "stringent".

Judgment No 186/2022 affirmed that it will be a case of a tailor-made law if "by means of a provision with precise and concrete content, a law or one of its provisions affects a limited number of addressees or even a single legal position [...], drawing into the legislative sphere what is normally entrusted to an administrative authority". It is an "*ad personam* rule" – "governing an individual or exclusive case – and of a character that is, properly speaking, personal, renouncing its natural aptitude for generality". Tailor-made laws "are not per se incompatible with the system of powers established by the Constitution. However, in view of the danger of unequal treatment inherent in provisions of this kind, they must be subjected to a strict scrutiny of constitutionality, in terms of establishing that the legislative choice is neither arbitrary nor unreasonable". Their constitutionality must be assessed in relation to their specific content, and the criteria informing the choices made therewith and the manner in which they are implemented must be apparent. The Court's review "does not stop [...] at an assessment of the legislature's intention, i.e. verification of a sufficient reason capable of justifying the decision to intervene by means of a tailor-made law, but extends to an evaluation of whether the means adopted are consistent with the aim pursued and an evaluation of the proportionality of the measure selected in order to achieve that aim. The former is intended to check that the means are consistent with the ends while the latter serves to test the reasonable proportionality between the tool chosen and the needs to be satisfied, with a view to ensuring the least possible sacrifice of other constitutionally protected principles or values".

As for retroactive laws, Judgment No 210/2021 confirmed the need for "retroactivity not to conflict with other constitutionally protected values and interests". The Court "identified a number of general limits to the retroactive effect of laws pertaining to the safeguarding of constitutional principles and

other legal values, including respect for the general principle of reasonableness, which is reflected in the prohibition on introducing unjustified unequal treatment; the protection of the legitimate expectations of individuals as a principle inherent in the rule of law; the coherence and certainty of the legal system; and respect for the functions constitutionally vested in the judiciary". These statements are fully reflected in the well-settled case law of the ECtHR. Accordingly, the legislature, "subject to the limit set for criminal matters by Article 25 of the Constitution, may enact retroactive legislation, including for authentic interpretation purposes, provided that the retroactivity is adequately warranted by the need to protect principles, rights and goods of constitutional importance, which constitute overriding reasons relating to public interest within the meaning of the European Convention on Human Rights".

Finally, with reference to authentic interpretation laws, Judgment No 104/2022 recalled, in general, that "a provision may qualify as an authentic interpretation when it selects one of the plausible meanings of a previous provision, the one interpreted, which is originally characterised by a certain degree of lexical ambiguity and hence is capable of expressing several meanings according to the ordinary canons for construing the law. In this sense, the interpretative provision merely extracts one of the possible variants of meaning from the text of the provision interpreted. The rule, which stems from the combining of the two provisions, takes on that meaning from the outset, giving rise to a retroactivity that, in the logic of the unitary syntagma, is only apparent. It is so in the sense that the coming into being of the interpretative provision neither nullifies nor replaces the provision interpreted, but the two are welded together in a unitary normative precept". The legislative function can thus sometimes express itself "also in the interpretation of previous normative acts, which, by virtue of the fact that it comes from the same legislative power that has laid down the rule interpreted, is characterised as authentic interpretation". Interpretative provisions "do not escape [...] a review of constitutionality by reason of the general scope of the principle of reasonableness, with specific regard [...] to the protection of the expectations that may have arisen in those to whom they are addressed".

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19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear a law is? When do you apply the In claris non fit interpretatio canon?

In the review of the constitutionality of laws, the clarity of the challenged rule is one of the elements that may be taken into consideration when assessing whether the proceedings brought before the Court are admissible.

Constitutional case law, albeit with a significant evolution aimed at broadening scrutiny on the merits, requires the referring court, as a condition of admissibility of the question raised incidentally, to make a preliminary and dutiful attempt to seek a conforming interpretation of the rule suspected to be unconstitutional, in other words, an interpretation consistent with Constitution. In order for the question of constitutionality to be admissible, it is necessary and sufficient that the referring court have explored the feasibility of an interpretation conforming to the Constitution and have consciously, explicitly or implicitly, ruled it out ("even if only because it is improbable or difficult": Judgment No 89/2021) or have carefully examined the alternatives thrown up by the debate on interpretation (Judgment No 59/2021). Indeed, checking the existence, lawfulness, correctness, persuasiveness and uniqueness of the interpretative option chosen by the referring court goes to the merits of the case (Judgments Nos 219/2022, 193/2022, 178/2022, 91/2022, 64/2022 and 10/2022). Previously, scrutiny was precluded not only by the absence but also by the "inadequate testing, by the referring court, of the possibility of an interpretative solution different from that underlying the stated doubts of con-

stitutionality and such as to dispel those doubts or in any event render them irrelevant in the main proceedings" (Judgment No 91/2018). In any event, it has been consistently held that any attempt to resolve the doubt of constitutionality through interpretation has an insurmountable limit and, in accordance with the canon that judges are subject only to the law (Article 101 of the Constitution), must give way to the Court's review in cases where the provision at issue has an unequivocal literal meaning (Judgments Nos 214/2022, 203/2022, 150/2022 and 18/2022).

In direct constitutional review proceedings, where there is no prior judicial examination of the contested provisions owing to the limited time limit for filing the application, the interpretation of the provision under scrutiny becomes especially important for the purpose of identifying its material scope, i.e. whether it falls within exclusive State competence, concurrent competence or residual regional competence. In this regard, settled case law, employing criteria that examine both subject matter and purpose, holds that it is necessary to take into account the rationale of the provision, "the purpose it pursues, its content and subject matter" and to disregard "marginal aspects and knock-on effects so as to identify correctly and fully the interest protected" (Judgment No 70/2022). Consequently, how the legislation labels itself "is not of prescriptive and binding character" (Judgment No 44/2021), and both the preamble to the law and the *travaux préparatoires* are of merely ancillary interpretative value.

In particular, Judgment No 141/2020 recalled that "on several occasions, the preamble has proved important as a factor enabling the purpose and/or aim of the provisions under examination to be clarified"; Judgment No 143/2020, for its part, clarified that although *travaux préparatoires* "do not legitimise interpretations that conflict with the content of the provisions approved as inferable from the wording, they are nevertheless elements that contribute to the correct interpretation of the latter". It is also worth noting that the body filing the direct application, "unlike the referring court in incidental constitutional review proceedings, does not bear the burden of having to attempt to interpret the challenged provision in conformity with the Constitution, since in direct constitutional review proceedings even issues raised on an interlocutory and hypothetical basis may be considered, provided that the interpretations put forward are not implausible and are reasonably linkable to the challenged provisions" (Judgment No 37/2021).

The *in claris non fit interpretation* maxim is not cited in any constitutional case law.

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20. What is the intensity review of your Court in case of the legitimate aim test?

Verifying the legitimacy of the aim pursued by the legislature is the first step in the review of reasonableness frequently entrusted to the Court and carried out by it, independently of an explicit and prior theorisation of the relevant criteria.

Judgment No 44/2020 stated that typically the review carried out under Article 3(1) of the Constitution is undertaken by the Court "in accordance with the typical structure of review [...], which starts by identifying the rationale of the reference provision and then considers whether that rationale is consistent with the selective criterion stipulated". More extensively, Judgment No 6/2019 clarified how it is possible to derive from Article 3 of the Constitution "a canon of rationality of the law that is not dependent on the existence of a comparative norm, it being sufficient to review compliance with criteria of logical, teleological and historical-chronological consistency". Therefore, the principle of reasonableness is "infringed when the existence of an intra-legislative irrationality is ascertained, in the sense of an intrinsic contradiction between the overall purpose pursued by the legislature and

the provision expressed by the challenged rule". In such cases, "the assessment of reasonableness consists in an appreciation of conformity between the rule introduced and the normative purpose that must support it" (see also Judgments Nos 223/2022 and 195/2022). Judgments Nos 236/2018 and 137/2018 more explicitly referred to the "achievement of legitimately pursued aims" by the legislature as a condition for moving on to the subsequent limbs of the proportionality test, which pertain specifically to the necessity of the specific measure under scrutiny, its fitness for purpose and its appropriateness judged against the aim pursued and other principles or rights of constitutional rank involved.

In the copious case law on Article 3 of the Constitution in the context of the assessment of the reasonableness of laws, there are many references to the legitimacy of the aim pursued by the legislature in decisions holding the questions as to constitutionality to be well founded or unfounded, depending on whether or not the legitimate aim was in fact pursued with appropriate and proportionate measures.

Among the most significant decisions ruling out unconstitutionality, which held that not only was the aim legitimate but also that the measure adopted was appropriate, are Judgments Nos 14/2023 and 15/2023. These decisions recognised that legislative provisions on mandatory vaccination against SARS-CoV-2 for healthcare workers and personnel employed in residential health and social care facilities pursued the legitimate aim of containing the spread of the virus, to protect the health of some of the categories most exposed to contagion, to protect those who come into contact with them (patients, including very frail ones, and family members), and to avoid the interruption of essential services for the community, especially at a time when the health system was in the front line in dealing with the pandemic.

Among decisions finding that the aim pursued was legitimate but nonetheless ruling that the specific measure in which the legislature had sought to balance the relevant principles was unconstitutional, worthy of note are Judgments Nos 35/2017 and 1/2014. In holding that certain provisions of the laws for elections to the Chamber of Deputies and the Senate of the Republic were unlawful, the Court nevertheless recognised that they were intended to achieve an objective of constitutional importance, namely the stability of the country's government and the efficiency of the decision-making processes in the parliamentary sphere.

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21. What proportionality test does your Court employ? Does your Court apply all the stages of the "classic" proportionality test (i.e. suitability, necessity, and proportionality in the narrower sense)?

The Court applies all stages of the classic proportionality test (suitability, necessity and proportionality in the narrower sense), in a manner not unlike the ECtHR and the CJEU, without prejudice to the special features of constitutional review proceedings which are concerned exclusively with acts having the force of law and are intended to safeguard the system as a whole.

Judgments Nos 23/2015, 162/2014 and 1/2014, in reaffirming and expressing a well-established line of authority, efficaciously emphasised the logic employed and the checks carried out in the review of reasonableness-proportionality. In reviewing reasonableness, the Court "must satisfy itself that the balance between constitutionally significant interests has not been struck in such a manner as to cause one of these interests to be sacrificed or impaired to an excessive degree, such as to render it incompatible with the requirements of the Constitution. Such assessments must involve 'a con-

sideration of the proportionality of the means chosen by the legislator when exercising its absolute discretion vis-à-vis the objective requirements to be met or the goals it intends to pursue, taking account of the specific circumstances and restrictions that obtain'". In this regard, "the proportionality test may be used for this purpose, along with the reasonableness test, which requires an assessment as to whether the contested provision, having regard to the scope and manner of application provided for, is necessary and appropriate in order to achieve legitimately pursued objectives in that, out of the various appropriate measures, it requires the one that entails the least restriction on rights and imposes burdens that are not disproportionate having regard to the pursuit of those objectives" (the Court has expressed itself in a similar vein in Judgments Nos 102/2021, 253/2020, 212/2020, 56/2020 and 20/2019, amongst others).

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22. Does your Court go through every applicable limb of the proportionality test?

The Court goes through every applicable limb of the proportionality test, as is well illustrated in some of the decisions cited in the answer to Question 20.

After recognising the legitimate aims pursued by the rules on mandatory vaccination against SARS-CoV-2 for certain categories of individuals, in Judgments Nos 14/2023 and 15/2023 the Court also held that the provisions under scrutiny passed the proportionality test.

In the first judgment, relating to the vaccination of health professionals and healthcare sector workers, the Court maintained, first of all, that the measure was consistent with the medical-scientific data establishing the full efficacy of vaccines, that the vaccination obligation was suited to the aim of reducing the circulation of the virus and that the requirement was not unreasonable. It then positively assessed compliance with the principle of proportionality having regard to the aim pursued. As regards that aspect, "it must be concluded that the measure is not disproportionate, first of all because at the relevant time no alternative measures were available that were equally appropriate for the purpose set by the legislator of combatting the pandemic". Moreover, "the consequence of the failure to comply with the requirement is suspension of the right to practise the medical profession, followed by reinstatement once the obligation no longer applies, or in any case once the epidemiological crisis has passed. This choice – which does not entail a sanction as such – has been made in accordance with the responsibility of the legislator to identify a nuanced consequence in terms of the encroachment on the rights of the healthcare worker that is strictly conducive to the aim of reducing the spread of the virus".

Similarly, in the second judgment, concerning workers employed in residential health and social care facilities, the Court held that the legislature's decision to introduce mandatory vaccination was not unreasonable "insofar as it is supported by the indications of the competent national and supranational authorities in light of the seriousness of the situation that such a vaccination was intended to address" and is "reasonably correlated to the objective pursued of reducing the spread of the virus through the administration of vaccines". Moreover, it was "a decision suited to the purpose that the legislature had set itself, in that the vaccination requirement for health workers made it possible to pursue, in addition to protecting the health of one of the categories most exposed to contagion, the dual purpose of protecting those who come into contact with them and avoiding the interruption of services that are essential for society at large". Finally, the decision was "not disproportionate. The consequence of failure to comply with the obligation is suspension from the right to practice as a health professional, which will cease if the obligation is complied with and, in any case, once epidemiological crisis has passed. The correlated sacrifice of the health professional's right does not have

the nature and effects of a sanction [...], does not exceed what is necessary to achieve the public purpose of reducing the spread of the virus, has been constantly nuanced on the basis of the development of the health situation and is also appropriate and necessary for that aim".

By contrast, Judgments Nos 35/2017 and 1/2014 held that the legitimate aims of ensuring the stability of the country's government and the efficiency of parliamentary decision-making processes had been achieved by the electoral rules under scrutiny but through disproportionate measures (and hence contrary to the Constitution) with respect to the necessary safeguarding of the competing principles of representativeness of the Houses, equality and freedom of the vote.

Judgment No 35/2017, inter alia, struck down as unconstitutional a provision (contained in a regulatory framework that had never been applied for elections to the Chamber of Deputies, in view of the lack of popular approval of a constitutional amendment law aimed at overcoming perfect bicameralism) establishing that, in cases in which no single list had reached the forty percent minimum threshold necessary to receive the majority bonus, there would be a runoff round of voting between the two lists winning the most votes, at the end of which the one that had attained at least the threshold of 50% plus one of the votes, calculated in relation to the valid votes cast and not the eligible voters, would be considered the winner. In the name of governability, the mechanism excessively impaired the representative character of the elected assembly and the equality of the vote. The runoff, in fact, was not conceived as a new ballot compared to the first round, but as its continuation (with the exclusion of links or relationships between lists) and served to identify the winning list to be awarded the majority bonus. In other words, the bonus awarded at the outcome of the runoff could artificially transform even a small list into an absolute majority. This was deemed incompatible with the prevailing proportional logic of the law, as well as contrary to the principle of equality of the vote, which constitutes the main instrument of expression of popular sovereignty.

Judgment No 1/2014, on the other hand, concerned rules that governed three national elections from 2006 to 2013. This was a proportional electoral law with a majority bonus and lists that did not enable voters to express a preference. Part of it was declared unconstitutional by the Court, which annulled the majority bonus and introduced the possibility of expressing a preference. In particular, the rules establishing a majority bonus in the Chamber of Deputies by awarding the coalition of lists or the list that had won a relative majority the number of seats necessary to reach the figure of 340 deputies (out of a total of 630) and in the Senate by awarding the list or coalition that had received most votes 55% of the seats provided for at regional constituency level were declared to be unconstitutional. In view of the failure to set a minimum threshold of votes as a prerequisite for eligibility for the majority bonus, the Court considered the system to be a harbinger of an excessive over-representation of the relative majority list and entailed the risk of a clear distortion between votes cast and the allocation of seats. Moreover, by compromising the representativeness of the parliamentary assemblies and distorting the democratic system, it conflicted with the principle of equality of the vote, which requires that each vote potentially contribute with equal effectiveness to the formation of the elected bodies, even if the actual result depends on the system adopted by the legislature. The unlimited impairment of the representativeness of parliamentary assemblies was also deemed incompatible with the central role that they play in the Italian legal system, due to the fundamental functions that they exercise (legislation, direction and oversight of the government, amendment of the Constitution). In conclusion, the legislature did not correctly balance the interests and constitutional values at stake, giving excessive weight to the stability of the government and the efficiency of the decision-making processes in Parliament.

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23. Are there cases where your Court accepts that the contested measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

The examples given in the answers to Questions 20 and 22 show that the test of reasonableness-proportionality is conducted by means of logically distinct, albeit closely interrelated, assessments, which may at times give rise to inconsistent results. In particular, a finding that the aim pursued is legitimate does not always necessarily go hand in hand with a finding that the means chosen by the legislature are proportional.

However, the Court's judgment is based on a full appreciation, achieved through the proper investigation of the case, and excludes any margin of uncertainty.

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24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

Constitutional case law has never developed a comprehensive doctrine of deference.

The necessary respect for legislative discretion, expressly codified by Article 28 of Law No 87/1953, on the one hand, and the theorisation and use of the yardstick of reasonableness-proportionality, on the other, identify distinct but closely linked aspects of a broader issue that concerns the relationship between the legislature, as a political decision-maker with democratic legitimacy, and the Constitutional Court, as a guarantor of the constitutional order whose legitimacy stems from its expertise.

Both aspects have evolved significantly over the more than sixty years of the Court's existence.

In its early years, the Court exhibited an attitude of marked deference towards Parliament's discretion, based on an implicit need to make a prudent and orderly entrance into institutional dynamics and also apparent from the adoption of decisions holding that questions entailing complex balancing exercises and multiple options available to the legislature were inadmissible, at most accompanied by solicitations or warnings to the legislature to intervene to remedy situations of dubious constitutionality (Judgments Nos 137/1981 and 102/1977).

The tendency for inertia on the part of Parliament has certainly encouraged the gradual development of increasingly sophisticated types of decision-making apt to expand the review of constitutionality to the maximum at the expense of unsustainable 'no-go' areas free from review. Thus, as early as the 1970s, innovative decisions embodying 'manipulative' declarations of constitutionality came to be adopted. Premised on a distinction between provision and rule (on which the rulings partially repealing the preceptive content of the challenged provision are based), those decisions remedied legislative omissions, relying on 'additive' judgments (Judgment No 190/1970), including ones that added guiding principles rather than rules (Judgment No 215/1987), or replaced rules found to be unconstitutional with others that could be derived from or were mandated by the Constitution and then set out in the operative part of the decision, relying on 'substitutive' judgments (Judgment No 110/1974).

Such decisions declare a provision unconstitutional, respectively, insofar as it (i) does not provide for a certain rule required by the Constitution (and inferable from the system according to the well-

known canon of 'prescribed verse', which circumscribes the powers of the Court and postulates that the rule introduced must necessarily be derived from other already existing similar ones that disclose a sole constitutionally mandated solution), (ii) does not establish a principle (i.e. a general rule that needs to be fleshed out in legislation, the enunciation of which is sometimes accompanied by indications to the courts regarding how it is to be initially applied) or (iii) provides for the challenged rule rather than the rule required by (or conforming to) the Constitution. Subsequently, especially in the field of the review of the constitutionality of the legislature's choices regarding the penalties to be imposed for offences, we have witnessed the superseding of the doctrine of 'prescribed verse' inasmuch as the admissibility of questions is "conditioned not so much by the existence of a sole constitutionally mandated solution as by the existence in the system of one or more constitutionally suitable solutions that fit into the regulatory fabric consistent with the logic pursued by the legislature" (Judgment No 46/2023).

Lastly, the continuation of legislative inertia despite the Court's warnings and solicitations or inadequate implementation of constitutional principles has contributed to the development and use of a further and more refined type of decision-making, based on a reasoned exercise of the powers of management of constitutional review proceedings and borrowed from the experience of other constitutional courts. In other words, 'prospective unconstitutionality' in which the Court recognises a certain violation of the constitutional provisions invoked from time to time but, instead of limiting itself to a ruling of inadmissibility of the question due to the lack of a sole constitutionally mandated solution or the objective difficulty of finding constitutionally suitable solutions combined with an unenforceable warning to the legislature (which would in any case leave the suspected unconstitutional rule in place until at least the question is raised again), it stays the proceedings and adjourns the hearing granting, in a spirit of sincere institutional cooperation, the political decision-maker a reasonable period of time to take action to remedy the alleged infringement. In the meantime, the rule suspected to be unconstitutional cannot be applied in the main proceedings and the staying of the incidental constitutional proceedings is likely to lead to the staying of similar proceedings in progress or to an assessment of whether to raise the same or similar questions in those proceedings. If the legislature has remained inactive at the expiry of the deadline, the Court will proceed to rule on the question, providing an initial response to the request for constitutional justice without prejudice to the power of the legislature to comprehensively regulate the matter.

So far, the technique in question has been used on three occasions relating to principles and issues primarily involving the margin of appreciation enjoyed by political decision-makers: assisted suicide (Order No 207/2018 and Judgment No 242/2019), custodial sentences for defamation committed through the press (Order No 132/2020 and Judgment No 150/2021) and whole-life sentences that preclude access to prison benefits and alternative sentencing (Orders Nos 97/2021, 122/2022 and 227/2022). In the first two cases, the expiry of the period of time afforded to Parliament without the latter having taken any action in the meantime led to declarations of unconstitutionality on the grounds and in the terms highlighted in the referral orders. In the third, after a further and more limited adjournment of the hearing, the government regulated the matter by means of an emergency measure, leading the Court to remand the case back to referring court for a renewed assessment of the issues.

With regard to the other aspect of the assessment of reasonableness-proportionality, an early affirmation of how it is conceptually separate from a review centred on equality and the complex steps involved can be seen as far back as Judgment No 14/1964 on the subject of the expropriation of electricity companies, where the criteria of illogicality, arbitrariness or contradictory nature are mentioned, albeit in order to find that they had not been contravened in the case at issue. "In order to be able to say that the challenged law does not serve purposes of general interest within the meaning of Article 43 of the Constitution, it would have to be found that the legislative body failed to make an assessment of those purposes and of the means of achieving them, or that that assessment was vitiated by illogical, arbitrary or contradictory criteria, or that the assessment was manifestly at odds

with the factual assumptions. It would also be a case of unconstitutionality if it were found that the law had provided for means wholly unsuitable for or contrary to the purpose it was intended to achieve or if it were found that the legislative bodies had used the law to achieve an end other than that of general interest referred to in constitutional provision cited".

The first explicit theorisation of the review on grounds of intrinsic reasonableness as a general canon of constitutional review proceedings dates back to Judgment No 1130/1988. While referring to the parameter of Article 97 of the Constitution and to the principle of efficiency of public administration, the Court clearly clarified that "the review of reasonableness, far from entailing recourse to absolute and abstractly pre-determined assessment criteria, is carried out by scrutinising the proportionality of the means chosen by the legislature in its unquestionable discretion judged against the objective needs to be satisfied or the aims that it intends to pursue, taking account of the circumstances and the limitations that effectively exist". Subsequently, the assessment of reasonableness was explicitly traced back to the paradigm of Article 3 of the Constitution, whose preceptive scope was stretched far beyond the sole ambit of the principle of equality to express "a canon of rationality of the law that is not dependent on the existence of a comparative norm, it being sufficient to review compliance with criteria of logical, teleological and historical-chronological consistency" (Judgments Nos 6/2019 and 87/2012), or a canon of consistency of the entire system (Judgment No 204/1982). The most recent decisions on the assessment of reasonableness-proportionality, cited in the answers to Questions 20 and 21, have benefited from being able to rely on what is by now a well-established approach and a certain uniformity in its application as well as on the corresponding doctrines on interpretation offered by the CJEU and the ECtHR.

The case law developments described above, taken as a whole, attest to a certain protagonism of the Court in the function of upholding the Constitution, including from a proactive standpoint, and to a progressively more incisive scrutiny of the correct use of the legislature's political discretion.

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25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

An examination of constitutional case law reveals some notable examples of the influence of the ECtHR's jurisprudence.

Among the most recent cases is Judgment No 25/2019, which declared that Article 75(2) of Legislative Decree No 159/2011 (Anti-Mafia Code) was contrary to Article 117(1) of the Constitution, Article 7 ECHR and Article 2 of Protocol 4 ECHR, insofar as it made it a criminal offence for a person subject to the preventive measure of special supervision and residence-related obligations to fail to comply with the prescriptions to lead an honest and law-abiding life. The issue arose "at the point of confluence of the jurisprudence" of three courts: the Constitutional Court (Judgment No 282/2010), the ECtHR (Grand Chamber judgment, *de Tommaso v. Italy*, of 23 February 2017) and the Court of Cassation (Joint Criminal Divisions Judgment No 40076/2017). The principle of legality of criminal offences requires the law to provide that the act committed be punished as a criminal offence: hence the corollaries of the principles of legal certainty and precision in criminal matters.

Judgment No 282/2010 had held that this principle was not infringed by the rule (which was merged into the 2011 Anti-Mafia Code) that punished with a term of imprisonment ranging from one to

five years non-compliance with the obligations and prescriptions inherent in the measure of special supervision and residence-related obligations, including the requirement to lead an honest and law-abiding life. In this regard, it was observed that the "laws" are all the rules with a preceptive content and not only those whose violation attracts criminal liability. And that the obligation to "lead an honest life" must be viewed in the context of all the prescriptions given to the addressee of the measure and serving merely as a strong reminder without constituting a separate duty.

On the contrary, the *de Tommaso* judgment censured the national system of preventive measures for being formulated in vague and excessively broad terms to the extent that it did not comply with the criterion of foreseeability of the conduct punished with the restriction of personal liberty: in particular, the obligations to lead an honest and law-abiding life were not sufficiently delimited. The European ruling was decisive in guiding the judgment of the Court of Cassation, which proceeded to reinterpret domestic law in accordance with the ECHR, coming to the conclusion that the requirement to lead an honest and law-abiding life was not encompassed in the criminal offence under Article 75(2) of Legislative Decree No 159/2011. Although the Court of Cassation had already completed the process of adaptation to ECHR principles, the Constitutional Court ruled out that there was an *abolitio criminis* by succession in time of the law. The statement that the new judicial interpretation did not constitute a *ius superveniens* led to the emergence of an area in which the Constitutional Court could still be called upon to intervene, i.e. the area of enforcement of sentences. The question was thus viewed as the "completion of the operation of adapting the domestic legal system to the ECHR, already carried out by the Joint Divisions of the Court of Cassation to the extent to which a court's interpretation can reshape the criminal offence by excluding therefrom conduct that was previously thought to be included therein". The completion was made possible because the decision of the ECtHR expressed a consolidated right and because the systemic protection of constitutional values, institutionally incumbent on the Italian court, did not impede the full deployment of the ECHR guarantee in the sense of an overall increase in the levels of protection.

Equally important, amongst others, was Judgment No 120/2018, which ruled that Article 1475(2) of Legislative Decree No 66/2010 (Armed Forces Code) was unconstitutional on the grounds of infringement of Article 117(1) of the Constitution, Article 11 ECHR and Article 5 of the European Social Charter, insofar as it provided that military personnel could not establish professional trade union associations or join other trade union associations rather than providing that military personnel could establish professional trade union associations in accordance with the conditions and subject to the limits laid down by law, provided always that they could not join other trade union associations.

Previously, Judgment No 449/1999 had ruled out any unconstitutionality when a similar question had been raised with exclusive reference to domestic provisions (Articles 3, 39 and 52(3) of the Constitution). The different result was also due to subsequent ECtHR jurisprudence (judgments of 2 October 2014, *Matelly v. France* and *Association de Défense des Droits des Militaires v. France*), which recognised that also military personnel had a right of trade union association, ruling out that national systems could deny it or provide for restrictions on its exercise that were such as to entail a blanket ban.

Urged to re-examine the various ECHR provisions, the Constitutional Court ruled that the prohibition in question was unconstitutional. Moreover, the ECtHR has held that Article 11(1) ECHR envisages freedom of trade union association as a special form or aspect of freedom of association while Article 11(2) does not exclude any professional category from its scope of application. Moreover, with respect to members of the armed forces, the police or public authorities. States may at most introduce legitimate restrictions but without calling into question their members' right to freedom of association. Nor may States impose restrictions affecting the essential elements of the freedom, without which the content thereof, such as the right to form and join trade unions, would be lost.

The ECHR system allows for the implementation of its provisions in domestic law with a significant margin of appreciation. Similarly, the Constitutional Court grants the legislature wide discretion in

balancing constitutional rights and principles. That same discretion is typically equivalent to the margin of appreciation that the ECHR grants the Contracting States in the implementation of the corresponding protections. Constitutional case law has also recognised that the Constitutional Court itself has considerable room for manoeuvre in its interpretation of ECtHR judgments in order to ensure that the ECHR's provisions are suited, from a systemic perspective of maximum expansion of protections, to serve as an interposed parameter for the constitutionality of domestic legislation.

Particularly noteworthy in this regard is Judgment No 317/2009, in which it was stated that the Court "not only cannot permit Article 117(1) of the Constitution applying to determine a lower level of protection compared to that already existing under internal law, but neither can it be accepted that a higher level of protection which it is possible to introduce through the same mechanism should be denied to the holders of a fundamental right". Consequently, "the comparison between the Convention protection and constitutional protection of fundamental rights must be carried out seeking to obtain the greatest expansion of guarantees, including through the development of the potential inherent in the constitutional norms which concern the same rights. The concept of maximum expansion of protections must include [...] a requirement to weigh up the right against other constitutionally protected interests, that is with other constitutional rules which in turn guarantee the fundamental rights which may be affected by the expansion of one individual protection. This balancing is to be carried out primarily by the legislature", but it is also a matter for the Court when interpreting constitutional law. "The reference to the national 'margin of appreciation' – elaborated by the Strasbourg Court in order to temper the rigidity of the principles formulated on European level – is primarily manifested through the legislative function of Parliament, though it must always be present in the assessments" of the Constitutional Court, "which is not unaware that the protection of fundamental rights must be systematic and not broken down into a series of provisions that are uncoordinated and potentially in conflict with one another".

In that same judgment the Constitutional Court further stated that "naturally, it is for the European Court to decide on the individual case and the individual fundamental right, whilst the national authorities have a duty to prevent the protection of certain fundamental rights – including from the general and unitary perspective of Article 2 of the Constitution – from developing in an unbalanced manner to the detriment of other rights also protected by the Constitution and by the European Convention. The overall result of the supplementation of the guarantees under national law must be positive, in the sense that the impact of individual ECHR rules on Italian law must result in an increase in protection for the entire system of fundamental rights". Moreover, the Court "cannot substitute its own interpretation of a provision of the ECHR for that of the Strasbourg Court, thereby exceeding the bounds of its own powers, and violating a precise commitment made by the Italian state through signature and ratification of the Convention without any derogations [...]; however, it may assess how and to what extent the results of the interpretation of the European Court interact with the Italian constitutional order. Since an ECHR provision effectively supplements Article 117(1) of the Constitution, it receives from the latter its status within the system of sources, with all implications in terms of interpretation and balancing", which are the ordinary operations that the Court is required to carry out in all proceedings falling within its jurisdiction. In short, "the national 'margin of appreciation' can be determined having regard above all to the overall body of fundamental rights, the detailed and overall consideration of which is a matter for the legislature, the Constitutional Court and the ordinary courts", each within the ambit of its own jurisdiction.

These statements were taken up and expanded upon in, amongst others, Judgments Nos 236/2011 and 264/2012. The former pointed out that it is for the Constitutional Court "to assess the European case law on the interposed rule in a manner which respects its substantive content, but with a margin of appreciation and adaptation which enables it to take account of the special features of the legal order within which the Convention provision is destined to be applied". The latter emphasised that the purpose of the interpretation and balancing functions entrusted to the Constitutional Court "is not to assert the primacy of the national legal system, but rather to supplement protection" and

that, unlike the ECtHR, it carries out "a systemic and not an isolated assessment of the values affected by the provisions reviewed from time to time, and is therefore required to carry out that balancing operation, which falls to this Court alone".

Subsequently, Judgment No 49/2015 appropriately clarified that the Constitutional Court is bound only by "'consolidated law' resulting from the case law of the European Court on which the national courts are required to base their interpretation, whilst there is no obligation to do so in cases involving rulings that do not express a position that has not become final.

Besides, this assertion is not only consistent with constitutional principles, paving the way for constructive dialogue between the national courts and the European Court concerning the meaning to be given to human rights, but is also suited to the organisation of the Strasbourg Court. It is in fact structured into sections, allows dissenting opinions and operates a mechanism capable of resolving contrasts within ECHR case law by referral to the Grand Chamber.

It is thus the ECHR itself that postulates the progressive nature of the formation of case law, incentivising dialogue until the force of argument has resulted in a definitive choice in favour of one approach as opposed to another. Moreover, that perspective does not involve solely a dialectical relationship between the members of the Strasbourg Court, but by contrast – at least ideally – involves all courts required to apply the ECHR, including the Constitutional Court [...]. This feature confirms an option that favours an initial engagement based on argumentation within a perspective of cooperation and dialogue between the courts rather than the hierarchical imposition of a particular interpretation concerning questions of principle which have not yet become established within case law and thus have questionable resolutive status for the national courts". Moreover, it is not always immediately clear "whether a certain interpretation of the provisions of the ECHR has become sufficiently consolidated at Strasbourg, especially in cases involving rulings intended to resolve cases that turn on highly specific facts, which have moreover been adopted with reference to the impact of the ECHR on legal systems different from that of Italy.

In spite of this, there are without doubt signs that are capable of directing the national courts during their examination: the creativity of the principle asserted compared to the traditional approach of European case law; the potential for points of distinction or even contrast from other rulings of the Strasbourg Court; the existence of dissenting opinions, especially if fuelled by robust arguments; the fact that the decision made originates from an ordinary division and has not been endorsed by the Grand Chamber; the fact that, in the case before it, the European court has not been able to assess the particular characteristics of the national legal system, and has extended to it criteria for assessment devised with reference to other member states which, in terms of those characteristics, by contrast prove to be little suited to Italy.

When all or some of these signs are apparent, as established in a judgment which cannot disregard the specific features of each individual case, there is no reason to require the ordinary courts to use the interpretation chosen by the Strasbourg Court in order to resolve a particular dispute, unless it relates to a 'pilot judgment' in a strict sense". The latter is a particular ruling used by the ECtHR, when faced with a structural problem in the legislation of a particular State, to indicate the most appropriate measures to prevent systematic violations of the Convention. "The Italian courts will only be obliged to implement the provision identified at Strasbourg in cases involving 'consolidated law' or a 'pilot judgment' by adjusting their criteria for assessment in line with it in order to resolve any contrast with national law, primarily using 'any interpretative instrument available' or, if this is not possible, by referring an interlocutory question of constitutionality".

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26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

There are no cases in which the ECtHR has found Italy liable as a result of the fact that the Court has refrained in a specific case from ruling on the merits.

IV. Other peculiarities

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

It is not possible to offer reliable statistical data on how often the topic of deference in human rights cases arises.

The complexity of the economic and social reality that legislation is called upon to govern and consequently also the choices made by the political decision-maker allied to the emergence of new interests and unprecedented aspirations in society as a whole mean that the Court is increasingly often faced with questions involving a delicate balancing of competing or even conflicting constitutional rights and principles. It is when striking balances and choosing the form that they materially take that one typically witnesses the exercise of the discretion enjoyed by the legislature, on which the onus of fully implementing the constitutional design lies in the first place, as the Court itself has acknowledged.

In all areas characterised by legislative discretion (from civil or ethical-social relations to economic and political relations), unambiguous solutions imposed by the Constitution may be lacking. Moreover, "all fundamental rights protected by the Constitution are mutually related to one another and it is thus not possible to identify any one of them in isolation as prevailing absolutely over the others" (Judgment No 85/2013). The Court is therefore "called upon to carry out a systemic and not a piecemeal assessment of the rights affected by the rule being scrutinised from time to time, engaging in the necessary balancing so as to ensure the maximum expansion of the guarantees of all the relevant rights and principles" (Judgment No 46/2021). In the face of effectively established violations, the restoration of constitutional legality requires finding precise reference points in the legal system, that is to say, precepts that are in any event capable of fitting harmoniously into the regulatory fabric, albeit provisionally pending unavoidable legislative action. Faced with questions requiring highly discretionary appreciations of the part of the legislature and options among several practicable solutions, the possibility that the Court will be precluded, at least in the near future, from making a ruling on the merits is more pronounced.

Another relevant factor for the adoption of rulings that are not merely procedural is the correct wording of the questions of constitutionality, which, in incidental proceedings that primarily invoke the constitutional protection of fundamental rights, implies an accurate description of the case at issue in the main proceedings, a full statement of reasons as to the relevance and non-manifest groundlessness of the question, the unsuccessful preliminary attempt to interpret the challenged rule in conformity with the Constitution and the submission of an unequivocal and sufficiently clear prayer for relief.

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28. Has your Court grown more deferential over time?

As observed in the answers to Questions 2, 11 and 24, the history of constitutional jurisprudence is marked by a constant affirmation of the Court's role as guardian of the Constitution designed to prevent the creation of 'no-go' areas free from constitutional review and to ensure the widest pos-

sible review even of legislative choices entailing a high degree of discretion, albeit within the limits applicable to the reasonableness-proportionality test. Therefore, over time, the attitude of deference, understood as refraining from a ruling on the merits of issues, has waned considerably.

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29. Does the deferential attitude depend on the case load of your Court?

The deferential attitude towards the legislature does not depend on the Court's caseload but rather on the nature of the questions submitted to it. Please refer to the answer to Question 27.

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30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

Subject to what will be said in the answer to Question 31 below, constitutional review proceedings are informed by the maxim *non ultra petita*, in other words, the principle of party disposition. There is a trace of it, first of all, in the first sentence of Article 27 of Law No 87/1953 whereby the Court, "when it accepts a petition or an application relating to the constitutionality of a law or an act having the force of law, declares, within the limits of the challenge, which legislative provisions are unlawful". The reference to the limits of the challenge makes it clear that the terms of the proceedings are defined in the act that initiates it, i.e. a referral order in incidental proceedings and an application filed by the State, a Region or an Autonomous Province in direct proceedings. Moreover, the aforementioned principle of party disposition is also applicable in proceedings before the Court by virtue of Article 22(1) of Law No 87/1953, which provides that the provisions of the rules of procedure for proceedings before the Council of State exercising judicial functions are to apply insofar as they are applicable to the Constitutional Court. These rules have been incorporated into the Code of Administrative Procedure, which refers to the provisions of the Code of Civil Procedure that are compatible with or expressive of general principles: these include Article 112, which clearly defines the principle of party disposition as meaning the court's duty to "rule on the entire claim and not beyond the limits thereof".

Settled case law is in line with the above-mentioned legislative provisions.

In incidental constitutional review proceedings, which are of an objective nature and are not affected by the events of the main proceedings in which the question of constitutionality arises, the subject-matter is "limited to the provisions and parameters indicated in the referral orders. Accordingly, no further questions or aspects of constitutionality raised by the parties may be taken into consideration, whether they have been pleaded but not adopted by the referring court as its own or whether they are aimed at subsequently extending or modifying the content of the orders" (Judgment No 180/2022). In direct constitutional review proceedings, which can be disposed of by parties and are typically proceedings between parties, not open to the participation of entities without legislative power, "the matter for decision is established by the initial application, in accordance with the decision of the political body, and cannot be extended to cover further aspects, neither with the pleadings submitted in the run up to the hearing, nor much less so during the hearing" (Judgment No 29/2021).

Generally speaking, therefore, the Court may not base its decision on grounds not raised in the referral order or application initiating the constitutional review proceedings or base its reasoning on a constitutional provision other than the one relied on, unless a correct interpretation of the order or application initiating the proceedings reveals a desire to seek scrutiny with reference to a specific provision, even if not expressly mentioned in the operative part of the referral order in incidental proceedings or the prayer for relief in the application in direct proceedings. In such cases the Court does not unduly extend the subject-matter of the proceedings beyond the limits of what has been submitted to it, but rather at the outset clarifies the subject-matter and terms of the review, correctly interpreting the substance of the request for constitutional justice and eschewing formalities that impede an examination of the merits.

In this regard, there are some interesting statements regarding incidental constitutional review proceedings. The "discrepancies between the reasoning and the operative part of the referral order may be resolved by using the ordinary canons of interpretation, when a coordinated reading of the two parts of the order reveals the actual intention of the referring court" (Judgment No 228/2022). The question must also be examined with regard to the constitutional provisions "not formally referred to but unequivocally inferable from the referral order, where the latter makes clear, albeit implicit, reference to them by mentioning the principles set out therein" (Judgment No 35/2021). In direct constitutional review proceedings, the Court usually glosses over any clerical errors made by legal counsel in specifying the constitutional provisions (Judgment No 58/2023) or conducts the scrutiny with regard to the provision that is clearly, even if only implicitly, invoked (Judgment No 42/2021).

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31. Can your Court extend its constitutionality review to another legal provision that has not been contested before it, but has a connection with the applicant's situation?

There are two exceptions to the general principle of party disposition that enable the Court to extend its review of constitutionality to a provision that is not contested by the referring court or the applicant as the case may be but is nevertheless related to the provision expressly complained of. These are declarations of consequential unconstitutionality and the Court's power to raise questions of its own motion.

Regarding the first exception, the second sentence of Article 27 of Law No 87/1953 provides that in finding the questions to be well founded, the Court "shall also declare the other legislative provisions the unconstitutionality of which derives as a consequence of the decision adopted". The rule makes it possible to extend the effects of the declaration of unconstitutionality to provisions other than those challenged which, if subjected to scrutiny, would suffer the same fate. That power, which the Court often exercises, including for the purposes of trial economy and the ensuring of effectiveness of the system of constitutional justice, aims at purging the legal system of rules destined to remain inoperative following the declaration of the unconstitutionality of the challenged precept (to which they are intimately or inseparably connected inasmuch as of an ancillary or merely implementing nature), since they express the same principle found to be incompatible with the Constitution or they have become untenable because they irreconcilably conflict with what has been held in the judgment.

In relation to incidental constitutional review proceedings, the Court has clarified that the appreciation required by Article 27 of Law No 87/1953 "does not presuppose the relevance of the rules for the purposes of the decision in the main proceedings but pertains to the relationship with which they are concatenated in the system, with regard to the effects produced by the judgments declaring un-

constitutionality" (Judgment No 37/2015). With regard to direct constitutional review proceedings, Judgment No 68/2022 recalled "the very special cases in which the declaration of unconstitutionality should consequently extend to provisions that are not challenged but are bound by a close and exclusive functional dependence on the challenged provision [...] or on ancillary provisions that have no independent importance", stating that it is not the Court's task "either to complete the subject-matter of an application" or "to extend the application or to supplement it beyond the terms in which it is brought".

Regarding the second exception concerning the raising of questions of its own motion, like any court seised of the main proceedings, the Constitutional Court itself raises the question as to the constitutionality of a rule other than that actually challenged, which however it is called upon to apply in order to reach a decision on the specific question put to it or which is a logical premise of the provision challenged by the referring court or the applicant. Raising a question of its own motion constitutes an exercise of an exceptional power, in derogation from the principle of party disposition, warranted only by a "connection of necessary instrumentality or logical antecedence" (Judgment No 198/2022), so that the question must be presented as one "preliminary to the decision of the main question and instrumental to the decision" (Judgments Nos 230/2021, 218/2021 and 203/2021). In practice, raising a question of its own motion is not accompanied or justified by explicit assertions as to the Court's standing as a "court" acting in the course of "proceedings". As a rule, the self-referral is made after it is established that the question is relevant and not manifestly unfounded.

La Corte costituzionale della Repubblica italiana

Forme e limiti della deferenza giudiziaria: il caso delle Corti costituzionali

Questionario per le relazioni nazionali

INDICE

I. Non-justiciable questions and deference intensities

1. In your jurisdictions, what is meant by "judicial deference"?

La deferenza giudiziaria, che non è una categoria di diritto positivo, indica in generale l'atteggiamento di rispetto del giudice nei confronti del testo normativo, coerentemente con il principio generale di separazione dei poteri.

Nell'ordinamento italiano, l'art. 101 Cost. sancisce espressamente il principio di esclusiva soggezione dei giudici alla legge, anche a tutela dell'autonomia e dell'indipendenza della magistratura, come ordine e nei singoli suoi componenti.

Con specifico riguardo alla Corte costituzionale, la deferenza giudiziaria può essere declinata come rispetto, tenuto dal giudice delle leggi, della discrezionalità delle scelte assunte dalle istituzioni rappresentative, Parlamento e Governo, nell'attuazione della Carta fondamentale e dell'indirizzo politico espresso dalle maggioranze che si succedono democraticamente alla guida del Paese.

Una traccia di questa deferenza è rinvenibile nell'art. 28 della legge n. 87 del 1953 ove è esplicitamente disposto che il controllo di legittimità della Corte costituzionale su una legge o un atto avente forza di legge "esclude ogni valutazione di natura politica e ogni sindacato sull'uso del potere discrezionale del Parlamento". Tuttavia, il principio di legalità costituzionale – sotteso all'intero disegno della Costituzione e palesato dal carattere sovraordinato della stessa rispetto alla legge ordinaria nonché dalla previsione di un procedimento rafforzato di revisione e di appositi organi di garanzia (il Presidente della Repubblica e la Corte) – impone che la discrezionalità politica si eserciti sempre nel rispetto delle norme costituzionali e che le azioni e i comportamenti dei poteri statali e degli enti costitutivi della Repubblica si sviluppino secondo le coordinate tracciate dalla Carta. Pertanto, il citato art. 28, pur esprimendo un principio di rispetto dell'autonomia decisionale delle istituzioni rappresentative, non impedisce né ha mai precluso alla Corte di esercitare pienamente la sua funzione di garanzia su atti che, come innanzitutto le leggi, presentano un intrinseco ed elevato tasso di politicità. In definitiva, esso contiene una clausola rivolta a orientare secondo canoni giuridici, dettati dalla Costituzione, anziché puramente politici, l'esercizio delle funzioni della Corte e, in particolare, del sindacato di legittimità costituzionale delle leggi e degli atti governativi equiparati alle stesse.

La deferenza risulta significativamente recessiva anche in ambiti caratterizzati da uno spiccato livello di discrezionalità delle scelte legislative nei quali l'intervento della Corte è in genere condizionato dalla possibilità di individuare una soluzione imposta dalla Costituzione ovvero, secondo un orientamento più recente ma divenuto ormai costante, una soluzione adeguata e costituzionalmente compatibile presente nella disciplina della specifica materia oggetto di scrutinio.

Emblematico in tal senso è l'indirizzo inaugurato, in sede di sindacato sulle scelte sanzionatorie, penali e anche amministrative, del legislatore dalla sentenza n. 236 del 2016 e ulteriormente precisato, tra le altre, dalle sentenze nn. 222 del 2018, 284 del 2019 e 185 del 2021. In particolare, la sentenza n. 222 del 2018 ha affermato che, laddove "il trattamento sanzionatorio previsto dal legislatore per una determinata figura di reato si riveli manifestamente irragionevole a causa della sua evidente sproporzione rispetto alla gravità del fatto, un intervento correttivo del giudice delle leggi è possibile a condizione che il trattamento sanzionatorio medesimo possa essere sostituito sulla base di precisi punti di riferimento, già rinvenibili nel sistema legislativo, intesi quali soluzioni sanzionatorie già esistenti, idonee a eliminare o ridurre la manifesta irragionevolezza lamentata". Pertanto, a consentire l'intervento di fronte a un riscontrato *vulnus* ai principi di proporzionalità e individualizzazione del trattamento sanzionatorio, "non è necessario che esista, nel sistema, un'unica soluzione costituzionalmente vincolata in grado di sostituirsi a quella dichiarata illegittima, come quella prevista per una norma avente identica struttura e *ratio*, idonea a essere assunta come *tertium comparationis*. Essenziale, e sufficiente, a consentire il sindacato della Corte sulla congruità del trattamento sanzionatorio previsto per una determinata ipotesi di reato è che il sistema nel suo complesso offra alla Corte

precisi punti di riferimento e soluzioni già esistenti (…) – esse stesse immuni da vizi di illegittimità, ancorché non costituzionalmente obbligate – che possano sostituirsi alla previsione sanzionatoria dichiarata illegittima; sì da consentire (…) di porre rimedio nell'immediato al *vulnus* riscontrato, senza creare insostenibili vuoti di tutela degli interessi di volta in volta tutelati dalla norma incriminatrice incisa dalla propria pronuncia. Resta ferma, d'altra parte, la possibilità per il legislatore di intervenire in qualsiasi momento a individuare, nell'ambito della propria discrezionalità, altra – e in ipotesi più congrua – soluzione sanzionatoria, purché rispettosa dei principi costituzionali. Tutto ciò in vista di una tutela effettiva dei principi e dei diritti fondamentali incisi dalle scelte sanzionatorie del legislatore, che rischierebbero di rimanere senza possibilità pratica di protezione" laddove l'intervento della Corte "restasse vincolato, come è stato a lungo in passato, ad una rigida esigenza di 'rime obbligate' nell'individuazione della sanzione applicabile in luogo di quella dichiarata illegittima". La sentenza n. 185 del 2021 ha altresì chiarito che l'esigenza di "far ricorso a una pronuncia di tipo manipolativo, che sostituisca la sanzione censurata con altra conforme a Costituzione, si pone imprescindibilmente solo allorché la lacuna di punibilità che conseguirebbe a una pronuncia ablativa, non colmabile tramite l'espansione di previsioni sanzionatorie coesistenti, si riveli foriera di insostenibili vuoti di tutela per gli interessi protetti dalla norma incisa (…): come, ad esempio, quando ne derivasse una menomata protezione di diritti fondamentali dell'individuo o di beni di particolare rilievo per l'intera collettività rispetto a gravi forme di aggressione, con eventuale conseguente violazione di obblighi costituzionali o sovranazionali. In simili ipotesi, il vuoto normativo conseguente alla rimozione pura e semplice della disposizione scrutinata non sarebbe tollerabile, neppure temporaneamente: ciò, tanto più alla luce della considerazione che un intervento legislativo inteso a colmare la lacuna, per quanto immediato, opererebbe, di necessità, solo per il futuro (stante l'inderogabile principio di irretroattività della norma sfavorevole in materia punitiva). Esso non avrebbe, quindi, alcun effetto sui fatti pregressi, i quali, a seguito della declaratoria di illegittimità costituzionale, diverrebbero automaticamente e definitivamente privi di ogni rilievo penale, persino in presenza di una sentenza irrevocabile di condanna, i cui effetti verrebbero a cessare" (art. 30, quarto comma, della legge n. 87 del 1953). In tali casi, "la rimozione del *vulnus* costituzionale resta necessariamente condizionata all'individuazione di soluzioni sanzionatorie" che – nel rispetto dei limiti ai poteri della Corte, "che escludono interventi di tipo creativo" – "possano sostituirsi a quella censurata: soluzioni rinvenibili – secondo la più recente giurisprudenza (…) ispirata dall'esigenza di evitare la creazione di zone franche intangibili dal controllo di legittimità costituzionale – anche fuori dal tradizionale schema delle 'rime obbligate', facendo leva su precisi punti di riferimento offerti dal sistema normativo vigente, anche alternativi tra loro, salvo un sempre possibile intervento legislativo di segno differente, purché rispettoso della Costituzione".

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2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (e.g. questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

La Corte non prevede nella sua giurisprudenza diversi gradi di deferenza. Al contrario, è costante il suo orientamento a prevenire e a contrastare la formazione di "zone franche" immuni dal sindacato di legittimità costituzionale, specialmente ove siano coinvolti i diritti fondamentali e il principio di uguaglianza, che incarna il modo di essere di tali diritti (sentenza n. 63 del 2021), in settori, come quello penale, in cui è più impellente l'esigenza di assicurarne una tutela effettiva a fronte di lesioni derivanti dalle scelte del legislatore (sentenza n. 242 del 2019), in ambiti strettamente connessi con l'assetto democratico dell'ordinamento (sentenza n. 48 del 2021), in relazione a norme di spesa che

incidono sui beni della finanza pubblica, presidiati dai precetti costituzionali, rispetto ai quali si configurino interessi adespoti (sentenza n. 253 del 2022).

Il riferito indirizzo è inteso a riaffermare nella loro pienezza i principi di legalità e supremazia costituzionale e a preservare nella massima misura possibile l'effettività del sindacato rimesso alla Corte. Le pronunce rilevanti in proposito attengono a molteplici e significativi temi o materie come, ad esempio, il patrocinio a spese dello Stato (sentenza n. 157 del 2021), il suicidio assistito (sentenza n. 242 del 2019), il procedimento (sentenza n. 252 del 2020) e l'esecuzione (sentenza n. 99 del 2019) penale, la legislazione elettorale (sentenze nn. 35 del 2017 e 1 del 2014), il finanziamento dei diritti incomprimibili dei disabili (sentenza n. 275 del 2016).

La Corte, ove ritualmente investita di una questione, esercita pienamente le sue funzioni di organo di garanzia, rispettando le discrezionali scelte del decisore politico ma sempre verificando che tale discrezionalità si dispieghi nel rispetto dei principi e delle norme costituzionali. Qualora ravvisi una lesione della Costituzione, la Corte, di regola e sussistendone le condizioni, interviene a sanarla, non rilevando di per sé la circostanza che si tratti di questioni controverse sul piano morale o sociale o politicamente sensibili né che siano in gioco l'attribuzione di risorse limitate o implicazioni finanziarie significative per le autorità di governo. A tale ultimo riguardo, vero è che le scelte di bilancio "comportano decisioni di natura politico-economica che, in ragione di questo carattere, sono costituzionalmente riservate alla determinazione dei governi e delle aule assembleari, in quanto si tratta di scelte che, essendo frutto di un'insindacabile discrezionalità politica, esigono un particolare e sostanziale rispetto anche da parte del giudice di legittimità costituzionale, pur non potendo, naturalmente, costituire una zona franca sfuggente a qualsiasi sindacato" (sentenza n. 84 del 2018). Tuttavia, è costante l'insegnamento secondo cui "nella materia finanziaria non esiste un limite assoluto alla cognizione del giudice di costituzionalità delle leggi. Al contrario, ritenere che il sindacato sulla materia sia riconosciuto in Costituzione non può avere altro significato che affermare che esso rientra nella tavola complessiva dei valori costituzionali, cosicché non si può ipotizzare che la legge di approvazione del bilancio (…) o qualsiasi altra legge incidente sulla stessa costituiscano una zona franca sfuggente a qualsiasi sindacato del giudice di costituzionalità, dal momento che non vi può essere alcun valore costituzionale la cui attuazione possa essere ritenuta esente dalla inviolabile garanzia rappresentata dal giudizio di legittimità costituzionale" (sentenza n. 10 del 2016).

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3. Are there factors to determine when and how your Court should defer (e.g. the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

Non sono normativamente previsti fattori che (legittimino o) impongano alla Corte di astenersi dal giudizio. Al contrario, numerose disposizioni sottintendono un principio generale di obbligatorietà della decisione delle questioni pervenute (tra gli altri, artt. 16 e 18 della legge n. 87 del 1953, 20 delle norme integrative[1075]). Ciò nondimeno, la peculiarità di talune questioni può incidere sull'esito del

1075 L'art. 16 della legge n. 87 del 1953 prevede, al terzo comma, che "Le decisioni sono deliberate in Camera di consiglio dai giudici presenti a tutte le udienze in cui si è svolto il giudizio e vengono prese con la maggioranza assoluta dei votanti", salva la prevalenza del voto del Presidente in caso di parità. Il successivo art. 18, al primo comma, stabilisce che "La Corte giudica in via definitiva con sentenza. Tutti gli altri provvedimenti di sua competenza sono adottati con ordinanza". Infine, l'art. 20 delle norme integrative così recita nei primi tre commi: "1. Le sentenze e le ordinanze sono deliberate in camera di consiglio con voti espressi in forma palese. (…) 2. Il Presidente,

giudizio e persino precludere nell'immediato una pronuncia di merito laddove siano in gioco istituti fortemente radicati nella cultura e nell'esperienza storica del Paese ovvero implicanti delicate scelte di bilanciamento rimesse primariamente alla discrezionalità del legislatore.

Il diritto di famiglia italiano ha ereditato fin dalla tradizione romanistica la connotazione eterosessuale del matrimonio e la regola automatica del patronimico nella trasmissione del cognome ai figli. Nel primo caso, la sentenza n. 138 del 2010, nel prendere atto che l'art. 29 Cost. ha inteso riferirsi al matrimonio nel suo significato tradizionale di unione di un uomo e di una donna, ha chiarito che il diritto delle persone di orientamento omosessuale di vivere liberamente una condizione di coppia giuridicamente riconosciuta trova copertura costituzionale nell'art. 2, che tutela i diritti inviolabili dell'individuo, ed esige una regolamentazione di diritto positivo affidata all'apprezzamento discrezionale del legislatore, in considerazione dei plurimi modelli adottabili e adottati in altri Stati e non necessariamente riducibili al paradigma matrimoniale. Alla pronuncia di rigetto e inammissibilità delle questioni il legislatore ha dato seguito normando compiutamente le unioni civili, anche tra persone dello stesso sesso, con la legge n. 76 del 2016. Quanto al patronimico, la regola, evidentemente lesiva del principio costituzionale di uguaglianza tra i coniugi, oltre che del diritto all'identità personale del figlio, e ritenuta retaggio di una tramontata concezione patriarcale della famiglia, ha indotto più volte la Corte a sollecitare una profonda rivisitazione della disciplina (sentenze nn. 286 del 2016 e 61 del 2006; ordinanze nn. 145 del 2007 e 176 del 1988). Perdurando l'inerzia del legislatore, la sentenza n. 131 del 2022 ha finalmente travolto l'automatica attribuzione al figlio (nato nel matrimonio, riconosciuto o adottato) del solo cognome del padre o del marito, introducendo, in attesa di un più compiuto intervento normativo, la regola del doppio cognome nell'ordine concordato, salva diversa determinazione dei genitori.

In altri casi, la delicatezza delle questioni ha impedito, al momento, alla Corte di pronunciarsi nel merito, in mancanza di soluzioni costituzionalmente obbligate o quanto meno adeguate, consentendole, al più, di rivolgere forti richiami al legislatore.

La sentenza n. 84 del 2016 ha dichiarato inammissibili questioni aventi ad oggetto il divieto legislativo di eseguire ricerche cliniche o sperimentali sugli embrioni, non finalizzate alla loro tutela. Il conflitto, "gravido di implicazioni etiche oltreché giuridiche, tra il diritto della scienza (e i vantaggi della ricerca ad esso collegati) e il diritto dell'embrione, per il profilo della tutela (debole o forte) ad esso dovuta in ragione e in misura del (più o meno ampio) grado di soggettività e di dignità antropologica che gli venga riconosciuto", può essere composto in molteplici modi su cui "i giuristi, gli scienziati e la stessa società civile sono profondamente divisi". Invero, "la linea di composizione tra gli opposti interessi (…) attiene all'area degli interventi, con cui il legislatore, quale interprete della volontà della collettività, è chiamato a tradurre, sul piano normativo, il bilanciamento tra valori fondamentali in conflitto, tenendo conto degli orientamenti e delle istanze che apprezzi come maggiormente radicati, nel momento dato, nella coscienza sociale". Più recentemente, le sentenze nn. 32 e 33 del 2021 hanno del pari giudicato inammissibili questioni aventi ad oggetto, rispettivamente, la preclusione al minore, nato a seguito di procreazione assistita eterologa praticata da una coppia omosessuale, del riconoscimento del rapporto di filiazione con la madre d'intenzione e il divieto di riconoscere il provvedimento giudiziario straniero relativo all'inserimento del genitore d'intenzione nell'atto di stato civile di un minore nato da maternità surrogata. Entrambe le pronunce hanno sottolineato l'imperativo costituzionale di tutelare adeguatamente l'interesse del minore alla pienezza delle relazioni genitoriali, indipendentemente dalla specifica configurazione della relativa famiglia o unione civile, dalle vicende personali dei genitori e finanche dal ricorso a una pratica considerata illecita dall'ordinamento, quale è la maternità surrogata. Tuttavia, la varietà delle soluzioni ipotizzabili ha spinto la Corte a rimettersi alla prioritaria valutazione del legislatore, pur richiamandolo a un intervento indifferibile e ammonendolo circa l'intollerabilità di un'eventuale protrazione della sua inerzia.

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dopo la relazione, dirige la discussione e pone in votazione le questioni. 3. Il relatore vota per primo; votano poi gli altri giudici, cominciando dal meno anziano per nomina; per ultimo vota il Presidente. In caso di parità di voti, il voto del Presidente prevale".

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4. Are there situations when your Court deferred because it had no institutional competence or expertise?

La Corte, se ritualmente investita di questioni di legittimità costituzionale delle leggi e degli atti con forza di legge, di ricorsi per conflitto di attribuzione tra poteri dello Stato o tra enti, aventi effettivamente tono costituzionale, ovvero del controllo di ammissibilità delle richieste di *referendum* abrogativo, non si è mai astenuta dal rendere il proprio giudizio per difetto della necessaria competenza o esperienza istituzionale.

È utile precisare che la Corte dispone di ampi poteri istruttori, esercitabili informalmente o con appositi provvedimenti interlocutori. L'art. 13 della legge n. 87 del 1953 stabilisce che la Corte può disporre l'audizione di testimoni e, anche in deroga ai divieti di legge, il richiamo di atti o documenti. L'art. 14 delle norme integrative prevede che la Corte dispone con ordinanza i mezzi di prova che ritenga opportuni e fissa i termini e i modi da osservarsi per la loro assunzione.

Una significativa innovazione si è registrata – sul piano dell'integrazione, ove necessaria, delle conoscenze utili alla Corte per la definizione delle questioni – con la recente introduzione (con delibera dell'8 gennaio 2020) della figura degli esperti che possono essere chiamati a offrire il proprio contributo nella fase istruttoria del giudizio. L'attuale art. 17 delle norme integrative (nel testo approvato con delibera del 22 luglio 2021) prevede, infatti, che la Corte, ove ritenga necessario acquisire informazioni attinenti a specifiche discipline, dispone con ordinanza che siano ascoltati esperti di chiara fama in apposita adunanza in camera di consiglio nella quale le parti costituite possono formulare domande; inoltre, la Corte può disporre l'acquisizione dagli esperti ascoltati di documenti o di una relazione scritta.

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5. Are there cases where your Court deferred because there was a risk of judicial error?

La Corte non si è mai astenuta dal pronunciarsi a causa del rischio di un errore giudiziario.

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6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

La Corte non si è mai astenuta dal giudizio invocando la legittimità istituzionale o democratica del decisore. Per espresso dettato costituzionale (art. 134), essa è chiamata a pronunciarsi sulla conformità a Costituzione degli atti e dei comportamenti delle istituzioni rappresentative e degli enti territoriali costitutivi della Repubblica.

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7. "The more the legislation concerns matter of broad social policy, the less ready a court will be to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

L'indicato criterio non è applicato dalla Corte che, ove correttamente chiamata in causa, giudica della compatibilità costituzionale delle scelte di politica sociale assunte dal legislatore, statale e regionale. In proposito, si segnala la cospicua giurisprudenza che distingue le prestazioni sociali inerenti ai bisogni primari della persona, come tali destinate anche agli stranieri a prescindere da un radicamento qualificato in Italia (pensione di invalidità civile per i sordi e indennità di comunicazione: sentenza n. 230 del 2015; pensione di invalidità e indennità per i ciechi: sentenza n. 22 del 2015; indennità di accompagnamento e pensione di inabilità: sentenza n. 40 del 2013; assegno sociale per invalidità: sentenza n. 187 del 2010), dalle prestazioni ulteriori che tale radicamento invece esigono (reddito di inclusione: sentenza n. 34 del 2022; reddito di cittadinanza: sentenza n. 19 del 2022; assegno sociale: sentenza n. 50 del 2019).

Le questioni di competenza della Corte presentano intrinsecamente un carattere politico perché investono atti di natura politica, quali innanzitutto le leggi e gli atti governativi ad esse equiparati, e gli stessi comportamenti dei poteri dello Stato e degli enti costitutivi della Repubblica. Il giudizio della Corte, tuttavia, ha una valenza squisitamente giuridica perché assume a parametro di riferimento la Costituzione e il complesso delle norme costituzionali e si svolge nelle forme proprie della funzione giurisdizionale. Simile configurazione del sistema italiano di giustizia costituzionale è coerente con le elevate funzioni di garanzia assegnate alla Corte, organo a legittimazione tecnico-professionale e non elettiva, nei confronti degli organi e degli enti della democrazia rappresentativa, tenuti a operare nel rispetto della Carta fondamentale in ossequio al principio di legalità costituzionale.

Nell'adempimento delle sue funzioni, la Corte è ben consapevole che il bilanciamento tra diritti e principi costituzionali e la piena attuazione degli stessi sono rimessi in prima battuta alla discrezionalità del decisore politico democraticamente legittimato. Ciò affiora non solo nelle pronunce di inammissibilità motivate con l'impossibilità di sanare una situazione di dubbia costituzionalità con una soluzione costituzionalmente obbligata o anche solo adeguata (sentenze nn. 183 del 2022 sull'indennità per il licenziamento illegittimo intimato da datori di lavoro di piccole dimensioni; 22 del 2022 sulle residenze per l'esecuzione delle misure di sicurezza; 151 del 2021 sul termine del procedimento amministrativo sanzionatorio; 33 e 32 del 2021, 230 del 2020 sulla omogenitorialità; 84 del 2016 sul divieto di ricerche cliniche o sperimentali sugli embrioni), ma anche, e non meno significativamente, nelle pronunce di accoglimento che rimediano a un *vulnus* accertato ma pur sempre in via interinale e nell'attesa di un più compiuto disegno legislativo (sentenze nn. 149 del 2022 in tema di doppio binario sanzionatorio, penale e amministrativo, nella materia del diritto d'autore; 131 del 2022 sul doppio cognome; 20 del 2019 sulla pubblicazione dei dati reddituali e patrimoniali dei dirigenti pubblici; 170 del 2014 sul divorzio imposto in conseguenza del venir meno dell'eterosessualità del matrimonio; 1 del 2014 sulla legge elettorale per le Camere; 113 del 2011 sulla revisione del processo penale convenzionalmente non equo), talvolta vanamente sollecitato con il rinvio della trattazione della questione (sentenze nn. 150 del 2021 sul trattamento sanzionatorio della diffamazione a mezzo stampa e 242 del 2019 sul suicidio assistito). In ogni caso, posta di fronte a una lesione costituzionale, sussistendone i presupposti e constatata l'indifferibilità di un rimedio, la Corte non ha mai mancato di ripristinare la legalità costituzionale, se del caso supplendo all'inerzia del legislatore.

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8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

La Corte svolge incisivamente la propria funzione di garanzia costituzionale anche nel delicato ambito del diritto penale, non ammettendo dunque un principio generale di astensione dai giudizi e assicurando senz'altro il rispetto dei principi dettati in proposito dalla Costituzione. Tra questi spicca il principio di legalità dei reati e delle pene (art. 25, secondo comma, Cost.: "Nessuno può essere punito se non in forza di una legge che sia entrata in vigore prima del fatto commesso") che demanda al Parlamento, sede della rappresentanza politica della Nazione, le scelte di criminalizzazione, con i relativi complessi bilanciamenti tra diritti e interessi contrapposti, e preclude alla Corte, in virtù della riserva assoluta di legge, l'adozione di pronunce con effetti *in malam partem* e, quindi, sia di creare nuove fattispecie o di estendere quelle esistenti a casi non previsti, sia di incidere *in peius* sulla risposta punitiva o su aspetti inerenti alla punibilità (da ultimo, sentenza n. 8 del 2022). Tuttavia, proprio il rispetto dei principi di legalità e di uguaglianza consente, in determinate ipotesi, l'adozione di decisioni con effetti sfavorevoli nella materia in questione. In particolare, la preclusione delle pronunce *in malam partem* non viene in considerazione quando si discuta di vizi formali o di incompetenza, relativi al procedimento di formazione dell'atto legislativo e alla legittimazione dell'organo che lo ha adottato. Se l'esclusione delle dette pronunce mira a salvaguardare il monopolio del Parlamento sulle scelte di politica criminale, sarebbe illogico sottrarre al sindacato della Corte interventi normativi operati da soggetti non legittimati, i quali pretendano di neutralizzare le scelte effettuate da chi quel monopolio detiene. È il caso del Governo, ove si serva dello strumento del decreto legislativo senza il supporto della legge di delegazione (sentenze nn. 189 del 2019 e 5 del 2014), o delle Regioni, che legiferino indebitamente nella materia penale, loro preclusa (sentenza n. 46 del 2014). Parimenti illogico sarebbe sottrarre al sindacato della Corte interventi normativi operati senza il rispetto del corretto *iter* procedurale, che assume una specifica valenza garantistica nella cornice della riserva di legge, connessa al fatto che il procedimento legislativo implica un preventivo confronto dialettico tra tutte le forze politiche, incluse quelle di minoranza, e, sia pure indirettamente, con la pubblica opinione (sentenza n. 230 del 2012), consentendo, così, alle une e all'altra un apporto critico alle scelte assunte dalla maggioranza (sentenza n. 487 del 1989). Tutto ciò vale anche e specificamente per le norme penali introdotte mediante decreto-legge. Sono state perciò scrutinate nel merito, malgrado i possibili effetti *in malam partem* conseguenti al loro accoglimento, non solo questioni volte a censurare l'inserimento in sede di conversione di norme penali "intruse", prive cioè di ogni collegamento logico-giuridico con il testo originario del decreto-legge convertito (sentenza n. 32 del 2014) – operazione che menoma indebitamente il dibattito parlamentare, comprimendolo all'interno dei tempi contingentati correlati alla breve vita provvisoria dell'atto governativo – ma anche, e prima ancora, questioni intese a denunciare la carenza dei presupposti di straordinaria necessità e urgenza, ai quali è subordinata l'eccezionale legittimazione del Governo ad adottare atti con forza di legge in assenza di delegazione parlamentare (sentenza n. 330 del 1996; ordinanze nn. 90 del 1997 e 432 del 1996). Sotto un diverso profilo, la giurisprudenza costituzionale ha altresì ammesso la sindacabilità delle norme penali di favore (sentenze nn. 394 del 2006 e 148 del 1983) che stabiliscono, per determinati soggetti o ipotesi, un trattamento penalistico più favorevole di quello che risulterebbe dall'applicazione di norme generali o comuni presenti nell'ordinamento. In tal caso, l'effetto *in malam partem* della dichiarazione di illegittimità costituzionale di simili norme non vulnera la riserva al legislatore delle scelte di criminalizzazione, rappresentando una conseguenza dell'automatica riespansione della norma generale o comune, dettata dallo stesso legislatore, al caso già oggetto di ingiustificata disciplina derogatoria.

Peraltro, il principio di legalità, che delimita e condiziona l'ambito del sindacato di costituzionalità in materia penale, è stato adeguatamente valorizzato dalla Corte che ne ha precisato e arricchito la portata. Significative, in tal senso, sono, innanzitutto, le pronunce che non hanno esitato ad ascrivere al principio stesso e ai suoi corollari (il divieto di applicazione retroattiva *in peius* e la determinatezza delle fattispecie) le norme sulla prescrizione dei reati, conferendo a tale istituto una dimensione sostanziale e non processuale e alla garanzia costituzionale un'estensione più ampia rispetto alle

omologhe tutele sovranazionali e convenzionali, limitate alle norme incriminatrici che descrivono le fattispecie illecite e definiscono il quadro sanzionatorio (sentenze nn. 140 del 2021, 278 del 2020, 115 del 2018; ordinanza n. 24 del 2017). In secondo luogo, è degno di nota il filone giurisprudenziale che, operando una rilevante rimeditazione, ha ricondotto all'ambito di operatività del divieto di retroattività sfavorevole le norme sull'esecuzione penale che trasformano la natura della pena e la sua incidenza sulla libertà del condannato (sentenze nn. 183 e 17 del 2021, 193 e 32 del 2020), sottolineando la radicale differenza tra esecuzione carceraria ed extramuraria e il negativo impatto della prima sulla fruttuosa riuscita dei percorsi di risocializzazione del reo ispirati al principio del finalismo rieducativo della pena.

Infine, in merito alla latitudine del sindacato sulle scelte sanzionatorie del legislatore, la sentenza n. 136 del 2020 ha rammentato che la giurisprudenza costituzionale ha gradatamente affrancato la verifica di conformità al principio di proporzione della pena edittale dalle strettoie segnate dalla necessità di individuare un preciso *tertium comparationis* da cui mutuare la cornice sanzionatoria destinata a sostituirsi a quella dichiarata illegittima. A partire dalla sentenza n. 343 del 1993, essa ha spesso privilegiato un modello di sindacato sulla proporzionalità intrinseca della pena, che – ferma restando l'ampia discrezionalità di cui il legislatore gode nella determinazione delle cornici edittali – valuta direttamente se la pena comminata debba considerarsi manifestamente eccessiva rispetto al fatto sanzionato, ricercando, poi, se del caso, punti di riferimento già esistenti nel sistema per ricostruire in via interinale un nuovo quadro sanzionatorio in luogo di quello colpito dalla declaratoria di incostituzionalità, nelle more di un sempre possibile intervento legislativo volto a rideterminare la misura della pena, nel rispetto dei principi costituzionali. Si rinvia alla risposta alla domanda n. 1 per il riferimento a ulteriori recenti pronunce che hanno teorizzato la praticabilità di interventi correttivi della Corte a condizione che siano reperibili nell'ordinamento soluzioni costituzionalmente adeguate, e non già solo obbligate, cioè precisi punti di riferimento legislativi sui quali modellare il dispositivo di accoglimento.

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9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

Non risultano casi in cui la Corte si sia mai astenuta dal giudizio per ragioni di sicurezza nazionale. La sicurezza nazionale e il connesso istituto del segreto di Stato sono comunque pervenuti all'attenzione della Corte per lo più in occasione di conflitti di attribuzione tra poteri dello Stato insorti tra l'autorità giudiziaria e l'autorità di governo che ha apposto o confermato il segreto su fatti e circostanze potenzialmente rilevanti per la definizione di un giudizio penale (sentenze nn. 24 del 2014, 40 del 2012, 106 del 2009, 487 del 2000, 410 e 110 del 1998). La Corte ha sempre e comunque deciso nel merito tali conflitti, generalmente riconoscendo la legittimità dell'operato dell'autorità di governo e annullando gli atti del potere giudiziario ritenuti lesivi delle attribuzioni del potere esecutivo in materia di tutela della sicurezza dello Stato.

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10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

La Corte esercita le proprie funzioni di garanzia nelle forme, nei limiti e alle condizioni di cui alla Costituzione e alle leggi costituzionali e ordinarie che la riguardano.

Eventuali deficit di tutela dei diritti fondamentali non legittimano interventi della Corte nelle dinamiche politiche, alle quali è e rimane estranea per chiara volontà espressa dai Costituenti, e possono fondare dichiarazioni di illegittimità costituzionale ove una questione sia ritualmente portata alla sua attenzione e sia effettivamente accertata una lesione della Carta fondamentale.

II. The decision maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

Ai sensi dell'art. 134, primo alinea, Cost., la Corte giudica "sulle controversie relative alla legittimità costituzionale delle leggi e degli atti, aventi forza di legge, dello Stato e delle Regioni". Dalla disposizione emerge con chiarezza che, in disparte le altre competenze della Corte (conflitti di attribuzione tra enti e tra poteri dello Stato, giudizi di accusa contro il Presidente della Repubblica e di ammissibilità delle richieste di *referendum* abrogativo), non è operata alcuna distinzione tra gli atti normativi primari soggetti al sindacato di legittimità costituzionale. Esso può, infatti, riguardare tanto le leggi approvate dal Parlamento, massimo organo rappresentativo della sovranità popolare, quanto gli atti del Governo ad esse equiparati, cioè i decreti legislativi e i decreti-legge.

Rinviando alla risposta alla domanda n. 24 per quanto concerne l'evoluzione dell'atteggiamento di deferenza della Corte nei confronti del Parlamento, merita una particolare sottolineatura la traiettoria giurisprudenziale in materia di decreti-legge. Si tratta di atti che, ai sensi dell'art. 77 Cost., possono essere adottati dal Governo in casi straordinari di necessità e urgenza e che devono essere convertiti dal Parlamento entro 60 giorni, pena la perdita di efficacia sin dall'inizio.

La sentenza n. 29 del 1995 ha aperto alla possibilità di accertare la sussistenza o meno dei requisiti di necessità e urgenza, sia pure limitatamente all'ipotesi di evidente mancanza. Nell'occasione la Corte ha smentito la tesi secondo cui esulerebbe dai suoi poteri e sarebbe rimessa alla valutazione politica del Parlamento, in sede di conversione, verificare la presenza in concreto dei detti presupposti. Questa posizione, condivisa in passato, ignorava che "la pre-esistenza di una situazione di fatto comportante la necessità e l'urgenza di provvedere tramite l'utilizzazione di uno strumento eccezionale, quale il decreto-legge, costituisce un requisito di validità costituzionale" dell'adozione dell'atto, di modo che "l'eventuale evidente mancanza di quel presupposto configura tanto un vizio di legittimità costituzionale del decreto-legge, in ipotesi adottato al di fuori dell'ambito delle possibilità applicative costituzionalmente previste, quanto un vizio *in procedendo* della stessa legge di conversione, avendo quest'ultima, nel caso ipotizzato, valutato erroneamente l'esistenza di presupposti di validità in realtà insussistenti e, quindi, convertito in legge un atto che non poteva essere legittimo oggetto di conversione. Pertanto, non esiste alcuna preclusione affinché la Corte costituzionale proceda all'esame del decreto-legge e/o della legge di conversione sotto il profilo del rispetto dei requisiti di validità costituzionale relativi alla preesistenza dei presupposti di necessità e urgenza, dal momento che il correlativo esame delle Camere in sede di conversione comporta una valutazione del tutto diversa e, precisamente, di tipo prettamente politico".

La sentenza n. 171 del 2007 – nel pronunciare per la prima volta l'illegittimità di una norma urgente adottata in carenza dei relativi presupposti – ha precisato che la disciplina costituzionale delle fonti primarie non solo concerne il rapporto tra gli organi ma è altresì funzionale alla tutela dei diritti. "Affermare che la legge di conversione sana in ogni caso i vizi del decreto significherebbe attribuire in concreto al legislatore ordinario il potere di alterare il riparto costituzionale delle competenze del Parlamento e del Governo quanto alla produzione delle fonti primarie. Inoltre, se si ha riguardo al fatto che in una Repubblica parlamentare, quale quella italiana, il Governo deve godere della fiducia delle Camere e si considera che il decreto-legge comporta una sua particolare assunzione di responsabilità, (…) le disposizioni della legge di conversione (…) non possono essere valutate, sotto il profilo della legittimità costituzionale, autonomamente da quelle del decreto". Infatti, "l'immediata efficacia di questo, che lo rende idoneo a produrre modificazioni anche irreversibili sia della realtà materiale, sia dell'ordinamento", mentre rende evidente la ragione dell'inciso dell'art. 77 Cost. che at-

tribuisce al Governo la responsabilità dell'emanazione del decreto, "condiziona nel contempo l'attività del Parlamento in sede di conversione in modo particolare rispetto alla ordinaria attività legislativa. Il Parlamento si trova a compiere le proprie valutazioni e a deliberare con riguardo ad una situazione modificata da norme poste da un organo cui di regola, quale titolare del potere esecutivo, non spetta emanare disposizioni aventi efficacia di legge". Del resto, "la legge di conversione è caratterizzata nel suo percorso parlamentare da una situazione tutta particolare, al punto che la presentazione del decreto per la conversione comporta che le Camere vengano convocate ancorché sciolte (...) e il suo percorso di formazione ha una disciplina diversa da quella che regola l'*iter* dei disegni di legge proposti dal Governo".

Un indice idoneo ad accertare la mancanza del requisito di necessità e urgenza è stato individuato dalla giurisprudenza costituzionale nella ritenuta estraneità di una determinata disposizione rispetto alla restante disciplina del decreto. Invero, l'omogeneità di disciplina, dal punto di vista dei contenuti e/o delle finalità, deve essere presente non solo all'interno del decreto-legge ma anche nei rapporti tra quest'ultimo e la legge di conversione. Al riguardo, la sentenza n. 22 del 2012 ha chiarito che, in sede di conversione, non possono essere introdotte previsioni prive di collegamento con le disposizioni del decreto. L'esclusione della possibilità di inserire nella legge di conversione emendamenti del tutto estranei all'oggetto e alle finalità del testo originario non risponde soltanto a esigenze di buona tecnica normativa ma è imposta dallo stesso art. 77, secondo comma, Cost., "che istituisce un nesso di interrelazione funzionale tra decreto-legge, formato dal Governo ed emanato dal Presidente della Repubblica, e legge di conversione, caratterizzata da un procedimento di approvazione peculiare rispetto a quello ordinario". Innanzitutto, il disegno di legge di conversione appartiene alla competenza riservata del Governo, che deve presentarlo alle Camere il giorno stesso dell'emanazione dell'atto urgente. Anche i tempi del procedimento sono particolarmente rapidi, giacché le Camere, anche se sciolte, sono convocate appositamente e si riuniscono entro 5 giorni. In coerenza con la necessaria accelerazione del procedimento, i regolamenti delle Camere prevedono norme specifiche, mirate a consentire la conversione nel termine costituzionale di 60 giorni. "Il Parlamento è chiamato a convertire, o non, in legge un atto, unitariamente considerato, contenente disposizioni giudicate urgenti dal Governo per la natura stessa delle fattispecie regolate o per la finalità che si intende perseguire": l'oggetto del decreto tende a coincidere con quello della legge di conversione. "Non si può tuttavia escludere che le Camere possano, nell'esercizio della propria ordinaria potestà legislativa, apportare emendamenti al testo del decreto-legge, che valgano a modificare la disciplina normativa in esso contenuta, a seguito di valutazioni parlamentari difformi nel merito della disciplina, rispetto agli stessi oggetti o in vista delle medesime finalità. Il testo può anche essere emendato per esigenze meramente tecniche o formali. Ciò che esorbita invece dalla sequenza tipica profilata dall'art. 77, secondo comma, Cost., è l'alterazione dell'omogeneità di fondo della normativa urgente, quale risulta dal testo originario, ove questo, a sua volta, possieda tale caratteristica". In definitiva, l'innesto nell'*iter* di conversione dell'ordinaria funzione legislativa "può certamente essere effettuato, per ragioni di economia procedimentale, a patto di non spezzare il legame essenziale tra decretazione d'urgenza e potere di conversione. Se tale legame viene interrotto, la violazione dell'art. 77, secondo comma, Cost. non deriva dalla mancanza dei presupposti di necessità e urgenza per le norme eterogenee aggiunte, che, proprio per essere estranee e inserite successivamente, non possono collegarsi a tali condizioni preliminari (…), ma per l'uso improprio, da parte del Parlamento, di un potere che la Costituzione gli attribuisce, con speciali modalità di procedura, allo scopo tipico di convertire, o non, in legge un decreto-legge".

Per contro, un vero e proprio limite al sindacato della Corte sembra ravvisabile a fronte di atti intrinsecamente e squisitamente politici.

Emblematica è la sentenza n. 52 del 2016 che ha accolto un ricorso per conflitto di attribuzione tra poteri dello Stato proposto dal Presidente del Consiglio dei ministri e, conseguentemente, annullato l'impugnata sentenza della Corte di cassazione in cui si affermava la sindacabilità giurisdizionale del diniego del Governo ad avviare le trattative per la stipula di un'intesa con l'Unione degli Atei e degli Agnostici Razionalisti. La pronuncia ha puntualizzato che al Consiglio dei ministri spetta "valutare l'opportunità di avviare trattative con una determinata associazione, al fine di addivenire, in esito ad

esse, alla elaborazione bilaterale di una speciale disciplina dei reciproci rapporti", cioè ad una delle intese che l'art. 8, terzo comma, Cost. prevede quale base per la regolazione legislativa dei rapporti tra Stato e confessioni acattoliche. "Di tale decisione – e, in particolare, (…) della decisione di non avviare le trattative – il Governo può essere chiamato a rispondere politicamente di fronte al Parlamento, ma non in sede giudiziaria". La Corte non ha riscontrato una "pretesa giustiziabile all'avvio delle trattative preordinate alla conclusione di un'intesa" la quale avrebbe postulato la sindacabilità, da parte dei giudici comuni, dell'eventuale diniego governativo a fronte di una richiesta avanzata da un'associazione che alleghi il proprio carattere religioso. Invero, il metodo della bilateralità, che permea il modello costituzionale delle relazioni tra Stato e confessioni religiose, "pretende una concorde volontà delle parti, non solo nel condurre e nel concludere una trattativa, ma anche, prima ancora, nell'iniziarla". L'affermazione di una sindacabilità giurisdizionale del diniego di avvio delle trattative, con conseguente possibilità di esecuzione coattiva del riconosciuto diritto e del correlativo obbligo del Governo, avrebbe inserito "un elemento dissonante rispetto al metodo della bilateralità". Sotto un più ampio profilo istituzionale e costituzionale, "l'individuazione dei soggetti che possono essere ammessi alle trattative" e il loro "successivo effettivo avvio" integrano importanti determinazioni del Governo, nelle quali sono "impegnate la sua discrezionalità politica, e la responsabilità che normalmente ne deriva in una forma di governo parlamentare". La realtà mutevole e imprevedibile dei rapporti politici interni e internazionali offre una copiosa serie di motivi e vicende, estremamente vari e insuscettibili di tipizzazione, che possono indurre il Governo, nell'esercizio di un'ampia discrezionalità limitata solo dai principi costituzionali, a ritenere inopportuno concedere all'associazione, che lo richiede, l'avvio delle trattative.

Un esito di rigetto si è, invece, riscontrato nella sentenza n. 7 del 1996 avente ad oggetto un conflitto di attribuzione tra poteri dello Stato sollevato dal Ministro di grazia e giustizia nei confronti del Senato, del Presidente del Consiglio dei ministri e del Presidente della Repubblica, in relazione alla mozione di sfiducia individuale presentata nei suoi confronti e approvata. La Corte ha osservato che l'attività collegiale del Governo e individuale del singolo ministro, "svolgendosi in armonica correlazione", "si raccordano all'unitario obiettivo della realizzazione dell'indirizzo politico a determinare il quale concorrono Parlamento e Governo. Al venir meno di tale raccordo, l'ordinamento prevede strumenti di risoluzione politica del conflitto a disposizione tanto dell'esecutivo, attraverso le dimissioni dell'intero Governo ovvero del singolo ministro; quanto del Parlamento, attraverso la sfiducia, atta ad investire, a seconda dei casi, il Governo nella sua collegialità ovvero il singolo ministro". La sfiducia "comporta un giudizio soltanto politico", con conseguente insindacabilità delle ragioni e del fine dell'iniziativa assunta dal Senato. La mozione di sfiducia è un atto annoverabile "fra gli strumenti funzionali al ruolo proprio delle Camere di verificare la consonanza con il Governo rispetto all'indirizzo politico (…). Il controllo del Parlamento, proprio perché politico, non incontra dunque limiti, investendo l'esercizio di tutte le competenze del ministro".

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12. What weight does your Court give to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

La Corte è senz'altro legittimata a verificare il rispetto delle norme costituzionali attinenti al procedimento legislativo, potendo le stesse fungere da parametro di giudizio. La Costituzione disciplina, per grandi linee, i diversi procedimenti legislativi e pone limiti e regole, da specificarsi nei regolamenti parlamentari. Il rispetto delle norme costituzionali è condizione di legittimità degli atti approvati, come ebbe a chiarire già la sentenza n. 9 del 1959 nella quale la Corte affermò la propria competenza a "controllare se il processo formativo di una legge si è compiuto in conformità alle norme con le quali la Costituzione direttamente regola tale procedimento".

Diversamente, le norme dei regolamenti parlamentari non sono sindacabili in quanto poste da atti non annoverabili tra quelli aventi forza di legge ai sensi dell'art. 134, primo alinea, Cost. (sentenza n. 237 del 2022). L'esigenza di salvaguardare l'autonomia e l'indipendenza delle Camere è alla base del principio di insindacabilità degli *interna corporis* che consiste nella sottrazione a qualsiasi controllo esterno degli atti e dei procedimenti che si svolgono nelle assemblee parlamentari.

Sul punto, importanti affermazioni sono contenute nella sentenza n. 379 del 1996 con cui la Corte ha accolto un ricorso per conflitto di attribuzione tra poteri dello Stato sollevato dalla Camera dei deputati nei confronti dell'autorità giudiziaria che aveva avviato un'indagine a carico di taluni parlamentari per essersi falsamente attribuiti la qualifica e l'identità di colleghi assenti, votando in luogo di questi con l'utilizzo della loro tessera magnetica. Invero, il principio di uguaglianza "non si spinge fino al punto di postulare l'attitudine della legge penale a penetrare in ogni ambito della vita parlamentare. Ad una visione onnipervasiva del diritto penale si oppone il principio della autonomia delle Camere e la correlativa garanzia della non interferenza della giurisdizione nell'attività delle istituzioni rappresentative". Lo statuto di garanzia delle assemblee parlamentari risulta definito e delimitato da un insieme unitario e sistematico di disposizioni costituzionali; gli artt. 64 e 72 Cost. riservano ai regolamenti parlamentari l'organizzazione interna e la disciplina del procedimento legislativo per la parte non direttamente regolata dalla Costituzione. In conclusione, "si delinea in maniera immediata e certa (…) il confine tra l'autonomia del Parlamento e il principio di legalità. Allorché il comportamento di un componente di una Camera sia sussumibile, interamente e senza residui, sotto le norme del diritto parlamentare e si risolva in una violazione di queste, il principio di legalità ed i molteplici valori ad esso connessi (...) sono destinati a cedere di fronte al principio di autonomia delle Camere e al preminente valore di libertà del Parlamento (…). Se viceversa un qualche aspetto di tale comportamento esuli dalla capacità classificatoria del regolamento parlamentare e non sia per intero sussumibile sotto la disciplina di questo (perché coinvolga beni personali di altri membri delle Camere o beni che comunque appartengano a terzi), deve prevalere la grande regola dello Stato di diritto ed il conseguente regime giurisdizionale al quale sono normalmente sottoposti (…) tutti i beni giuridici e tutti i diritti" (artt. 24, 112 e 113 Cost.). Il confine tra i due distinti valori (autonomia delle Camere, da un lato, e legalità-giurisdizione, dall'altro) è posto sotto la tutela della Corte, che può essere investita, in sede di conflitto di attribuzione, dal potere che si ritenga leso o menomato dall'attività dell'altro.

La discussione parlamentare non ha una specifica rilevanza ai fini dell'esame della compatibilità della legislazione con i diritti umani anche perché nell'ordinamento italiano l'approvazione di una legge non è corredata da una sua espressa motivazione. I lavori preparatori hanno comunque un'indubbia valenza di ausilio per la ricostruzione e l'interpretazione del quadro normativo. Infatti, è possibile desumere la *ratio* e le finalità di una disciplina anche dal dibattito che ha preceduto il varo del testo. Ciò vale in particolare con riferimento alle leggi-provvedimento e alle leggi di interpretazione autentica (e alla relativa valutazione di compatibilità con i principi di uguaglianza e di ragionevolezza), per le quali si rinvia alla risposta alla domanda n. 18.

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13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

Con riguardo alla rilevanza delle motivazioni addotte dal decisore politico, si rinvia alla risposta alla precedente domanda n. 12. Si precisa, altresì, che la Corte è organo di garanzia costituzionale, come tale non assimilabile al decisore politico.

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14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

La Corte verifica la legittimità costituzionale delle leggi a prescindere dalla complessità e dal livello di approfondimento dei lavori preparatori. Peraltro, un indice di irragionevolezza può essere riscontrato nella mancata o inadeguata considerazione degli indirizzi elaborati dalle competenti autorità in ambiti scientifici. In proposito, si vedano le risposte alle domande nn. 20 e 22 con riguardo alle recenti sentenze sui vaccini per la prevenzione dell'infezione da SARS-CoV-2.

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15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

La recente giurisprudenza costituzionale, formatasi in sede di giudizio per conflitto di attribuzione tra poteri dello Stato, pur negando rilievo allo svolgimento di un dibattito sul contenuto generale della legislazione ovvero sulle implicazioni per i diritti, ha iniziato a operare una più puntuale verifica del rispetto delle prerogative dei singoli parlamentari, tra cui rientrano la facoltà di partecipare alle discussioni e alle deliberazioni esprimendo opinioni e voti e, prima ancora, il potere di iniziativa legislativa, comprensivo della presentazione di emendamenti.

In proposito, l'ordinanza n. 17 del 2019 ha precisato che il dovuto rispetto dell'autonomia del Parlamento non esclude un sindacato della Corte, pur se "rigorosamente circoscritto ai vizi che determinano violazioni manifeste delle prerogative costituzionali dei parlamentari", le quali devono essere "rilevabili nella loro evidenza già in sede di sommaria delibazione". In sostanza, in ossequio al principio di autonomia delle Camere, "ai fini dell'ammissibilità del conflitto, non è sufficiente che il singolo parlamentare lamenti un qualunque tipo di vizio occorso durante l'*iter* legislativo, bensì è necessario che alleghi e comprovi una sostanziale negazione o un'evidente menomazione" di una funzione costituzionalmente attribuita.

Il riconoscimento della legittimazione attiva al conflitto, ribadito dalla giurisprudenza successiva, non ha ad oggi condotto all'accoglimento di ricorsi proposti da singoli parlamentari, non essendo state riscontrate in concreto violazioni manifeste delle loro prerogative.

Diverse pronunce possono essere al riguardo menzionate. L'ordinanza n. 80 del 2022 ha dichiarato inammissibile il ricorso presentato da una deputata, nei confronti del Governo, in relazione all'*iter* di approvazione, con apposizione della questione di fiducia, di undici disegni di legge di conversione di altrettanti decreti-legge adottati per fronteggiare l'emergenza provocata dalla diffusione del virus SARS-CoV-2. L'ordinanza n. 274 del 2019 ha ritenuto inammissibile il ricorso proposto da due senatori nei confronti delle Camere e del Governo per il presunto abuso del procedimento legislativo consumatosi con l'inserimento, in sede di conversione di un decreto-legge, di un emendamento estraneo all'oggetto e alla finalità dello stesso. La citata ordinanza n. 17 del 2019 ha giudicato inammissibile un ricorso promosso da numerosi senatori di opposizione in relazione alle modalità di approvazione della legge di bilancio (voto di fiducia su maxi-emendamento governativo).

Nonostante l'esito di inammissibilità, l'ordinanza n. 17 del 2019 ha, comunque, richiamato "l'attenzione sulla necessità che il ruolo riservato dalla Costituzione al Parlamento nel procedimento di forma-

zione delle leggi sia non solo osservato nominalmente, ma rispettato nel suo significato sostanziale. L'art. 70 affida la funzione legislativa alle due Camere e il successivo art. 72 Cost. articola l'esame di ogni progetto di legge in una fase da svolgersi in commissione e in una che coinvolge l'intera assemblea ed esige che la votazione si svolga dapprima articolo per articolo e poi sul testo finale. Tali principi sono volti a consentire a tutte le forze politiche, sia di maggioranza sia di minoranza, e ai singoli parlamentari che le compongono, di collaborare *cognita causa* alla formazione del testo, specie nella fase in commissione, attraverso la discussione, la proposta di testi alternativi e di emendamenti. Gli snodi procedimentali tracciati dall'art. 72 Cost. scandiscono alcuni momenti essenziali dell'*iter legis* che la Costituzione stessa esige che siano sempre rispettati a tutela del Parlamento inteso come luogo di confronto e di discussione tra le diverse forze politiche, oltre che di votazione dei singoli atti legislativi, e a garanzia dell'ordinamento nel suo insieme, che si regge sul presupposto che vi sia un'ampia possibilità di contribuire, per tutti i rappresentanti, alla formazione della volontà legislativa. Ciò vale in particolare in riferimento all'approvazione della legge di bilancio annuale, in cui si concentrano le fondamentali scelte di indirizzo politico e in cui si decide della contribuzione dei cittadini alle entrate dello Stato e dell'allocazione delle risorse pubbliche: decisioni che costituiscono il nucleo storico delle funzioni affidate alla rappresentanza politica sin dall'istituzione dei primi parlamenti e che occorre massimamente preservare". Del resto, "il procedimento di formazione della legge di bilancio è da sempre circondato da particolari garanzie, trattandosi di una di quelle leggi che, ai sensi dell'art. 72, quarto comma, Cost., esigono il procedimento ordinario a tutela della più ampia partecipazione di tutti i soggetti politici alla loro elaborazione".

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16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

Gli elementi indicati non rilevano nel giudizio di legittimità costituzionale.

III. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

La Corte non si è mai astenuta, ricorrendone i presupposti, dall'adottare una pronuncia di merito, anche ove implicata dalla tutela di diritti in via di (migliore o più compiuta) definizione.

Di particolare rilievo appare la sentenza n. 255 del 1992 che, pur precedendo di sette anni la costituzionalizzazione dei principi del giusto processo penale, ha considerato illegittimo il divieto per il giudice di valutare le dichiarazioni precedentemente rese dai testimoni non nel corso di perquisizioni né sul luogo e nell'immediatezza del fatto e contenute nel fascicolo del pubblico ministero, se utilizzate per le contestazioni. Nell'occasione, si precisò che "l'oralità, assunta a principio ispiratore del nuovo sistema, non rappresenta, nella disciplina del codice, il veicolo esclusivo di formazione della prova nel dibattimento; ciò perché (…) fine primario ed ineludibile del processo penale non può che rimanere quello della ricerca della verità (…), di guisa che in taluni casi in cui la prova non possa, di fatto, prodursi oralmente è dato rilievo, nei limiti ed alle condizioni di volta in volta indicate, ad atti formatisi prima ed al di fuori del dibattimento. Che la volontà del legislatore esprima anche un principio di non dispersione dei mezzi di prova emerge con evidenza da tutti quegli istituti che recuperano al fascicolo del dibattimento, e quindi alla utilizzazione probatoria, atti non suscettibili di essere surrogati (o compiutamente e genuinamente surrogati) da una prova dibattimentale". In definitiva, "il sistema accusatorio positivamente instaurato ha prescelto la dialettica del contraddittorio dibattimentale quale criterio maggiormente rispondente all'esigenza di ricerca della verità; ma accanto al principio dell'oralità è presente, nel nuovo sistema processuale, il principio di non dispersione degli elementi di prova non compiutamente (o non genuinamente) acquisibili col metodo orale".

Simili enunciazioni trovano significativa corrispondenza nei commi quarto e quinto dell'art. 111 Cost., come novellato dalla legge costituzionale n. 2 del 1999: "Il processo penale è regolato dal principio del contraddittorio nella formazione della prova. La colpevolezza dell'imputato non può essere provata sulla base di dichiarazioni rese da chi, per libera scelta, si è sempre volontariamente sottratto all'interrogatorio da parte dell'imputato o del suo difensore. La legge regola i casi in cui la formazione della prova non ha luogo in contraddittorio per consenso dell'imputato o per accertata impossibilità di natura oggettiva o per effetto di provata condotta illecita".

Un altro esempio dell'influenza della giurisprudenza costituzionale sull'emersione e sulla definizione di nuovi diritti è offerto dalla sentenza n. 138 del 2010 relativa al divieto di matrimonio tra persone dello stesso sesso, per la quale si rinvia alla risposta alla domanda n. 3.

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18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

In linea di principio, la natura dei diritti fondamentali applicabili non incide sul grado di deferenza della Corte. In ogni caso, il coinvolgimento nella disciplina scrutinata di diritti e principi concorrenti o persino confliggenti impegna spesso la Corte in delicate operazioni di bilanciamento. Infatti, i diritti e le libertà costituzionali, espressi come principi, se in astratto non collidono mai tra di loro, possono

in concreto entrare in contrasto.

Al riguardo, la sentenza n. 85 del 2013 ha chiaramente affermato che tutti i diritti fondamentali tutelati dalla Costituzione "si trovano in rapporto di integrazione reciproca e non è possibile pertanto individuare uno di essi che abbia la prevalenza assoluta sugli altri. La tutela deve essere sempre sistemica e non frazionata in una serie di norme non coordinate ed in potenziale conflitto tra loro (…). Se così non fosse, si verificherebbe l'illimitata espansione di uno dei diritti, che diverrebbe tiranno nei confronti delle altre situazioni giuridiche costituzionalmente riconosciute e protette, che costituiscono, nel loro insieme, espressione della dignità della persona".

In altri termini, la Corte adotta un criterio di massima espansione delle tutele che esige il più ampio livello di protezione riferito, però, non già al singolo diritto, interesse o principio considerato isolatamente, bensì al complesso dei beni costituzionalmente rilevanti, in una visione sistemica e non frammentata dei medesimi. La massima espansione delle garanzie orienta il bilanciamento tra gli interessi in gioco, ammettendo per ciascuno di essi soltanto il sacrificio strettamente necessario per assicurare la maggiore contestuale tutela degli altri.

Esistono, peraltro, alcuni ambiti in cui la Corte ha teorizzato e impiega un controllo di costituzionalità più incisivo di quello ordinario. Si allude, in particolare, alle leggi-provvedimento e alle leggi retroattive, comprese quelle di interpretazione autentica, accomunate dalla soggezione a uno scrutinio, di volta in volta, qualificato come "stretto", "severo", "rigoroso" o "stringente".

La sentenza n. 186 del 2022 ha affermato che la fattispecie della legge (o norma)-provvedimento ricorre se, "con previsione dal contenuto puntuale e concreto, una legge o una sua disposizione incidono su un numero limitato di destinatari o finanche su una singola posizione giuridica (…), attraendo nella sfera legislativa quanto normalmente affidato all'autorità amministrativa". Si tratta di una "norma singolare" – "del caso singolo o a fattispecie esclusiva – e dal carattere, propriamente, personale, che rinuncia alla sua naturale attitudine alla generalità". Disposizioni legislative a carattere provvedimentale "non sono di per sé incompatibili con l'assetto dei poteri stabilito dalla Costituzione. Tuttavia, in considerazione del pericolo di disparità di trattamento insito in previsioni di questo tipo, esse devono soggiacere a uno scrutinio stretto di costituzionalità, sotto i profili della non arbitrarietà e della non irragionevolezza della scelta legislativa". La loro legittimità costituzionale deve essere valutata in relazione allo specifico contenuto, dovendo risultare i criteri che ispirano le scelte con esse realizzate e le relative modalità di attuazione. Il sindacato della Corte "non si arresta (…) alla valutazione del proposito del legislatore cioè alla verifica di una ragion sufficiente, che basti a giustificare la scelta di intervenire con legge-provvedimento, ma si estende al giudizio di congruità del mezzo approntato rispetto allo scopo perseguito e al giudizio di proporzionalità della misura selezionata in vista dell'ottenimento di quello scopo. Il primo è teso a verificare la conformità del mezzo al fine, mentre il secondo è volto a saggiare la ragionevole proporzione tra lo strumento prescelto e le esigenze da soddisfare, in vista del minor sacrificio possibile di altri principi o valori costituzionalmente protetti".

Quanto alle leggi retroattive, la sentenza n. 210 del 2021 ha confermato la necessità che "la retroattività non contrasti con altri valori e interessi costituzionalmente protetti". La Corte "ha individuato una serie di limiti generali all'efficacia retroattiva delle leggi attinenti alla salvaguardia di principi costituzionali e di altri valori di civiltà giuridica, tra i quali sono ricompresi il rispetto del principio generale di ragionevolezza, che si riflette nel divieto di introdurre ingiustificate disparità di trattamento; la tutela dell'affidamento legittimamente sorto nei soggetti quale principio connaturato allo Stato di diritto; la coerenza e la certezza dell'ordinamento giuridico; il rispetto delle funzioni costituzionalmente riservate al potere giudiziario". Tali enunciazioni trovano piena rispondenza nella costante giurisprudenza della Corte europea dei diritti dell'uomo. Così il legislatore, "nel rispetto del limite posto per la materia penale dall'art. 25 Cost., può emanare norme retroattive, anche di interpretazione autentica, purché la retroattività trovi adeguata giustificazione nell'esigenza di tutelare principi, diritti e beni di rilievo costituzionale, che costituiscono altrettanti motivi imperativi di interesse generale, ai sensi della Convenzione europea dei diritti dell'uomo".

Infine, in relazione alle leggi di interpretazione autentica, la sentenza n. 104 del 2022 ha rammentato, in generale, che "una disposizione può qualificarsi di interpretazione autentica quando opera la selezione di uno dei plausibili significati di una precedente disposizione, quella interpretata, la quale sia originariamente connotata da un certo tasso di polisemia e, quindi, sia suscettibile di esprimere più significati secondo gli ordinari criteri di interpretazione della legge. In tal senso, la disposizione interpretativa si limita ad estrarre una delle possibili varianti di senso dal testo della disposizione interpretata e la norma, che risulta dalla saldatura tra le due disposizioni, assume tale significato sin dall'origine, dando luogo ad una retroattività che, nella logica del sintagma unitario, è solo apparente. Lo è nel senso che il sopravvenire della disposizione interpretativa non fa venir meno, né sostituisce, la disposizione interpretata, ma l'una e l'altra si saldano in un precetto normativo unitario". La funzione legislativa può dunque esprimersi talora "anche nella interpretazione di precedenti atti normativi, la quale, per il fatto di provenire dallo stesso potere legislativo che ha posto la norma interpretata, si connota come interpretazione autentica". Le disposizioni interpretative "non si sottraggono (…) al sindacato di costituzionalità in ragione della generale portata del principio di ragionevolezza, con riguardo specificamente (…) alla tutela dell'affidamento in ipotesi sorto nei destinatari delle stesse".

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19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear a law is? When do you apply the In claris non fit interpretatio *canon?*

Nel controllo di costituzionalità delle leggi, la chiarezza della norma denunciata rappresenta uno degli elementi suscettibili di considerazione ai fini della valutazione della corretta instaurazione del giudizio demandato alla Corte.

La giurisprudenza costituzionale, sia pure con una significativa evoluzione tesa ad ampliare lo scrutinio di merito, richiede al giudice rimettente, come condizione di ammissibilità della questione sollevata in via incidentale, l'esperimento del preliminare e doveroso tentativo di ricercare un'interpretazione adeguatrice, cioè conforme a Costituzione, della norma sospettata di illegittimità. La consapevole, espressa o anche implicita, esclusione della praticabilità di un'interpretazione costituzionalmente orientata ("anche sol perché improbabile o difficile": sentenza n. 89 del 2021), così come l'accurato esame delle alternative esegetiche offerte dal dibattito giurisprudenziale (sentenza n. 59 del 2021), è sufficiente ai fini dell'ammissibilità della questione. Attiene, infatti, al merito la verifica dell'esistenza, della legittimità, della correttezza, della condivisibilità e dell'unicità dell'opzione ermeneutica prescelta dal rimettente (sentenze nn. 219, 193, 178, 91, 64 e 10 del 2022). In precedenza, lo scrutinio era precluso non soltanto dalla mancata ma anche dalla "inadeguata sperimentazione, da parte del giudice *a quo*, della possibilità di una soluzione interpretativa diversa da quella posta a base dei prospettati dubbi di legittimità costituzionale e tale da determinarne il loro superamento o da renderli comunque non rilevanti nel procedimento *a quo*" (sentenza n. 91 del 2018). In ogni caso, per costante indirizzo, il tentativo di risolvere in via interpretativa il dubbio di legittimità costituzionale trova un limite invalicabile e, in ossequio al canone di soggezione del giudice alla legge (art. 101 Cost.), deve cedere il passo al sindacato della Corte in presenza dell'univoco tenore letterale della norma oggetto della questione (sentenze nn. 214, 203, 150 e 18 del 2022).

Nei giudizi in via principale, rispetto ai quali difetta un'esegesi delle disposizioni denunciate in ragione del ristretto termine decadenziale di impugnazione, l'interpretazione della norma in scrutinio assume speciale rilievo ai fini dell'identificazione dell'ambito materiale, di competenza esclusiva statale, concorrente o residuale regionale, cui la stessa deve essere ricondotta. In proposito, la giurisprudenza consolidata, impiegando congiuntamente criteri di carattere oggettivo e finalistico, afferma la necessità di tener conto della *ratio* della disposizione, "della finalità che persegue, del contenuto e dell'oggetto" e di tralasciare "gli aspetti marginali e gli effetti riflessi in modo da identificare così

correttamente e compiutamente l'interesse tutelato" (sentenza n. 70 del 2022). Conseguentemente, l'autoqualificazione legislativa "non ha carattere precettivo e vincolante" (sentenza n. 44 del 2021) e tanto il preambolo della legge quanto i relativi lavori preparatori hanno una valenza ermeneutica soltanto ausiliaria. In particolare, la sentenza n. 141 del 2020 ha rammentato che "più volte il preambolo ha assunto rilievo come fattore che consente di chiarire le finalità e/o lo scopo delle disposizioni che vengono in esame"; la sentenza n. 143 del 2020 ha, dal canto suo, chiarito che i lavori preparatori, "sebbene non legittimino interpretazioni contrastanti con il tenore delle disposizioni approvate, quale emergente dal loro testo, costituiscono pur sempre elementi che contribuiscono alla corretta interpretazione di quest'ultimo". Giova altresì sottolineare che l'ente ricorrente, "a differenza del giudice rimettente nell'incidente di costituzionalità, non ha l'onere di esperire un tentativo di interpretazione conforme a Costituzione della disposizione impugnata, potendo trovare ingresso, nel giudizio in via principale, anche questioni promosse in via cautelativa ed ipotetica, purché le interpretazioni prospettate non siano implausibili e siano ragionevolmente collegabili alle disposizioni impugnate" (sentenza n. 37 del 2021).

Nella giurisprudenza costituzionale non constano citazioni espresse del brocardo "*in claris non fit interpretatio*".

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20. What is the intensity review of your Court in case of the legitimate aim test?

La verifica della legittimità dello scopo perseguito dal legislatore rappresenta il primo *step* del sindacato di ragionevolezza frequentemente demandato alla Corte e da essa compiuto, indipendentemente da un'esplicita e preliminare teorizzazione dei relativi criteri.

La sentenza n. 44 del 2020 ha affermato che, nella sua struttura tipica, il sindacato svolto ai sensi dell'art. 3, primo comma, Cost. "muove dall'identificazione della *ratio* della norma di riferimento e passa poi alla verifica della coerenza con tale *ratio* della specifica previsione sottoposta a scrutinio". Più diffusamente, la sentenza n. 6 del 2019 ha chiarito come dall'art. 3 Cost. sia desumibile "un canone di razionalità della legge svincolato da una normativa di raffronto, essendo sufficiente un sindacato di conformità a criteri di coerenza logica, teleologica e storico-cronologica"; pertanto, il principio di ragionevolezza è "leso quando si accerti l'esistenza di una irrazionalità *intra legem*, intesa come contraddittorietà intrinseca tra la complessiva finalità perseguita dal legislatore e la disposizione espressa dalla norma censurata"; in questi casi, "il giudizio di ragionevolezza consiste in un apprezzamento di conformità tra la regola introdotta e la causa normativa che la deve assistere" (così anche le sentenze nn. 223 e 195 del 2022). Le sentenze nn. 236 e 137 del 2018 si sono più esplicitamente riferite al "conseguimento di obiettivi legittimamente perseguiti" dal legislatore quale condizione per passare alle successive fasi del test di proporzionalità, che attengono propriamente alla necessità della specifica misura in scrutinio, alla sua idoneità allo scopo e alla sua congruità rispetto al fine e ad altri principi o diritti di rango costituzionale coinvolti.

Nella copiosa giurisprudenza formatasi sull'art. 3 Cost. in sede di giudizio di ragionevolezza delle leggi, sono molteplici i richiami alla legittimità dello scopo avuto di mira dal legislatore e sono rinvenibili in pronunce tanto di rigetto quanto di accoglimento, a seconda che il fine legittimo sia stato in concreto perseguito o meno con misure congrue e proporzionate.

Tra le più rilevanti decisioni di rigetto, che hanno riscontrato, oltre alla legittimità dello scopo, anche l'adeguatezza della misura disposta, si rammentano le sentenze nn. 14 e 15 del 2023. Tali pronunce hanno riconosciuto alle previsioni legislative degli obblighi vaccinali per la prevenzione dell'infezione da SARS-CoV-2, in capo agli esercenti le professioni sanitarie nonché ai lavoratori impiegati in strutture residenziali, socio-assistenziali e socio-sanitarie, le legittime finalità di contenere la diffu-

sione del virus, di tutelare la salute di alcune tra le categorie più esposte al contagio, di proteggere quanti entrano in contatto con esse (pazienti, anche molto fragili, e familiari) e di evitare l'interruzione di servizi essenziali per la collettività, specialmente in un momento in cui il sistema sanitario era in prima linea nel fronteggiare la pandemia.

Quanto alle decisioni di accoglimento che, pur riscontrando la legittimità dello scopo perseguito, hanno sanzionato la specifica misura in cui si è concretizzato il bilanciamento legislativo dei principi coinvolti, un esempio significativo può essere rinvenuto nelle sentenze nn. 35 del 2017 e 1 del 2014. Queste pronunce, nel giudicare illegittime talune norme delle leggi per l'elezione della Camera dei deputati e del Senato della Repubblica, hanno comunque riconosciuto ad esse lo scopo di realizzare un obiettivo di rilievo costituzionale, qual è quello della stabilità del governo del Paese e dell'efficienza dei processi decisionali in ambito parlamentare.

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21. What proportionality test does your Court employ? Does your Court apply all the stages of the "classic" proportionality test (i.e. suitability, necessity, and proportionality in the narrower sense)?

La Corte applica tutte le fasi del test "classico" di proporzionalità (idoneità, necessità e proporzionalità in senso stretto), in modo non dissimile dalle Corti europee, fermi restando i tratti identificativi peculiari del giudizio di legittimità costituzionale che ha ad oggetto esclusivamente atti aventi forza di legge ed è posto a salvaguardia dell'ordinamento nel suo complesso.

Le sentenze nn. 23 del 2015, 162 e 1 del 2014, nel ribadire ed esprimere un indirizzo consolidato, hanno efficacemente rimarcato gli snodi logici e le verifiche compiute nel sindacato di ragionevolezza-proporzionalità. Lo scrutinio di ragionevolezza "impone alla Corte di verificare che il bilanciamento degli interessi costituzionalmente rilevanti non sia stato realizzato con modalità tali da determinare il sacrificio o la compressione di uno di essi in misura eccessiva e pertanto incompatibile con il dettato costituzionale. Tale giudizio deve svolgersi attraverso ponderazioni relative alla proporzionalità dei mezzi prescelti dal legislatore nella sua insindacabile discrezionalità rispetto alle esigenze obiettive da soddisfare o alle finalità che intende perseguire, tenuto conto delle circostanze e delle limitazioni concretamente sussistenti". In proposito, è "utilizzato il test di proporzionalità, insieme con quello di ragionevolezza, che richiede di valutare se la norma oggetto di scrutinio, con la misura e le modalità di applicazione stabilite, sia necessaria e idonea al conseguimento di obiettivi legittimamente perseguiti, in quanto, tra più misure appropriate, prescriva quella meno restrittiva dei diritti a confronto e stabilisca oneri non sproporzionati rispetto al perseguimento di detti obiettivi" (in termini simili si sono espresse, tra le altre, le sentenze nn. 102 del 2021, 253, 212 e 56 del 2020, 20 del 2019).

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22. Does your Court go through every applicable limb of the proportionality test?

La Corte passa in rassegna tutte le componenti del test di proporzionalità, come è ben evidenziato in talune delle pronunce citate nella risposta alla domanda n. 20.

Le sentenze nn. 14 e 15 del 2023, dopo aver riconosciuto le finalità legittimamente perseguite dalle norme impositive a determinate categorie dell'obbligo vaccinale per la prevenzione dell'infezione da SARS-CoV-2, hanno altresì ritenuto che le disposizioni in scrutinio superassero il test di proporzionali-

tà. La prima decisione, relativa alla vaccinazione degli esercenti le professioni sanitarie e degli operatori di interesse sanitario, ha reputato, innanzitutto, la misura coerente con il dato medico-scientifico che attesta la piena efficacia dei vaccini, l'idoneità dell'obbligo vaccinale rispetto alla finalità di ridurre la circolazione del virus e la non irragionevolezza del ricorso ad esso. Poi, ha positivamente valutato l'osservanza del principio di proporzionalità rispetto alle finalità. Sotto tale aspetto, "la misura deve ritenersi non sproporzionata, in primo luogo, perché non risultavano, a quel tempo, misure altrettanto adeguate rispetto allo scopo prefissato dal legislatore per fronteggiare la pandemia". Inoltre, "la conseguenza del mancato adempimento dell'obbligo è rappresentata dalla sospensione dall'esercizio delle professioni sanitarie, con reintegro al venir meno dell'inadempimento dell'obbligo e, comunque, dello stato di crisi epidemiologica. La scelta – che non riveste natura sanzionatoria – si muove nell'ambito della responsabilità del legislatore di individuare una conseguenza calibrata, in termini di sacrificio dei diritti dell'operatore sanitario, che sia strettamente funzionale rispetto alla finalità perseguita di riduzione della circolazione del virus". Allo stesso modo, la seconda pronuncia, riguardante i lavoratori impiegati in strutture residenziali, socio-assistenziali e socio-sanitarie, ha giudicato non irragionevole la decisione del legislatore di introdurre l'obbligo vaccinale, "in quanto è sorretta dalle indicazioni delle competenti Autorità nazionali e sovranazionali alla luce della gravità della situazione che tale vaccinazione era destinata ad affrontare" ed è "ragionevolmente correlata al fine perseguito di ridurre la circolazione del virus attraverso la somministrazione dei vaccini". Inoltre, si è trattato di "decisione idonea allo scopo che il legislatore si era prefisso, in quanto l'obbligo vaccinale per gli operatori sanitari ha consentito di perseguire, oltre che la tutela della salute di una delle categorie più esposte al contagio, il duplice scopo di proteggere quanti entrano con loro in contatto e di evitare l'interruzione di servizi essenziali per la collettività". Infine, la decisione è risultata "non sproporzionata. La conseguenza del mancato adempimento dell'obbligo è rappresentata dalla sospensione dall'esercizio delle professioni sanitarie, che è destinata a venire meno in caso di adempimento dell'obbligo e, comunque, per la cessazione dello stato di crisi epidemiologica. Il correlato sacrificio del diritto dell'operatore sanitario non ha la natura e gli effetti di una sanzione (...), non eccede quanto necessario per il raggiungimento degli scopi pubblici di riduzione della circolazione del virus, è stato costantemente modulato in base all'andamento della situazione sanitaria e si rivela altresì idoneo e necessario a questo stesso fine".

Per contro, le sentenze nn. 35 del 2017 e 1 del 2014 hanno ritenuto che le legittime finalità di garantire la stabilità del governo del Paese e l'efficienza dei processi decisionali in ambito parlamentare fossero state realizzate, nelle norme elettorali sottoposte a scrutinio, con misure sproporzionate (e perciò contrarie a Costituzione) rispetto alla necessaria salvaguardia dei concorrenti principi di rappresentatività delle Camere, uguaglianza e libertà del voto.

La sentenza n. 35 del 2017 ha, tra l'altro, accolto una questione avente ad oggetto la previsione (contenuta in una disciplina peraltro mai applicata per l'elezione della Camera dei deputati, in considerazione della mancata approvazione popolare di una legge di revisione costituzionale intesa a superare il bicameralismo perfetto) di un turno di ballottaggio, ove non fosse stato assegnato al primo turno il premio di maggioranza, tra le due prime liste, all'esito del quale sarebbe stata considerata vincente quella che avesse conseguito almeno la soglia del 50% più uno dei voti, calcolata sui voti validi espressi e non sugli aventi diritto. Tale meccanismo comprimeva eccessivamente il carattere rappresentativo dell'assemblea elettiva e l'uguaglianza del voto in nome della governabilità. Il ballottaggio, infatti, non era costruito come una nuova votazione rispetto al primo turno, ma come la sua prosecuzione (con esclusione di collegamenti o apparentamenti tra liste) e serviva a individuare la lista vincente destinataria del premio di maggioranza. In altri termini, il premio attribuito all'esito del ballottaggio poteva trasformare in modo artificioso una lista anche esigua in maggioranza assoluta. Ciò è stato ritenuto incompatibile con la prevalente logica proporzionale della legge, oltre che in contrasto con il principio di uguaglianza del voto, il quale costituisce il principale strumento di manifestazione della sovranità popolare. La sentenza n. 1 del 2014 ha avuto, invece, ad oggetto norme che hanno regolato ben tre tornate elettorali politiche, dal 2006 al 2013. Si trattava di una legge elettorale proporzionale con premio di maggioranza e liste bloccate, parzialmente dichiarata illegittima dalla Corte che ha annullato il premio di maggioranza e ha introdotto la possibilità di esprimere un

voto di preferenza. In particolare, sono state ritenute incostituzionali le norme che stabilivano alla Camera un premio di maggioranza con l'attribuzione alla coalizione di liste o alla lista di maggioranza relativa di un numero di seggi necessario per raggiungere la consistenza di 340 deputati (su un totale di 630) e al Senato un premio di maggioranza consistente nell'assegnazione alla lista o coalizione più votata del 55% dei seggi previsti a livello di circoscrizione regionale. La Corte, in considerazione della mancata fissazione di una soglia minima di voti, ha reputato il sistema foriero di un'eccessiva sovra-rappresentazione della lista di maggioranza relativa e comportante il rischio di un'evidente distorsione tra voti espressi e attribuzione di seggi. Esso, inoltre, comprimendo la rappresentatività delle assemblee parlamentari e alterando il circuito democratico, si poneva in contrasto con il principio di uguaglianza del voto il quale esige che ciascun voto contribuisca potenzialmente con pari efficacia alla formazione degli organi elettivi, anche se il risultato concreto dipende dal sistema adottato dal legislatore. L'illimitata compressione della rappresentatività delle assemblee parlamentari è risultata, inoltre, incompatibile con il ruolo centrale che esse hanno nell'ordinamento italiano, in ragione delle funzioni fondamentali che esercitano (legislazione, indirizzo e controllo del Governo, revisione della Costituzione). In conclusione, il legislatore non ha operato un corretto bilanciamento degli interessi e dei valori costituzionali in gioco, conferendo un peso eccessivamente prevalente alla stabilità del Governo e all'efficienza dei processi decisionali nel Parlamento.

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23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

Gli esempi indicati nelle risposte alle domande nn. 20 e 22 attestano che la verifica di ragionevolezza-proporzionalità è condotta attraverso valutazioni logicamente distinte, benché strettamente correlate, che possono dar luogo anche a esiti non concordanti. In particolare, all'accertata legittimità dello scopo perseguito non corrisponde sempre necessariamente il positivo riscontro della proporzionalità dei mezzi prescelti dal legislatore.

Il giudizio della Corte si fonda comunque su un apprezzamento pieno, formatosi attraverso l'adeguata istruzione della causa, ed esclude ogni margine di incertezza.

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24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

La giurisprudenza costituzionale non ha mai elaborato una compiuta dottrina della deferenza.

Il necessario rispetto della discrezionalità legislativa, espressamente codificato dall'art. 28 della legge n. 87 del 1953, da un lato, e la teorizzazione e l'impiego del giudizio di ragionevolezza-proporzionalità, dall'altro, identificano profili, distinti ma intimamente legati, di un tema più ampio che attiene al rapporto tra il legislatore, quale decisore politico democraticamente legittimato, e la Corte costituzionale, organo di garanzia legittimato sul piano tecnico-professionale.

Sia l'uno che l'altro aspetto hanno conosciuto una significativa evoluzione nell'arco degli oltre sessanta anni di vita della Corte.

Nel primo periodo di attività, la Corte ha esibito un atteggiamento di marcato ossequio nei confronti

della discrezionalità del Parlamento, motivato dall'implicita esigenza di un suo prudente e ordinato ingresso nelle dinamiche istituzionali e reso evidente anche dall'adozione di pronunce di inammissibilità di questioni implicanti bilanciamenti complessi e plurime opzioni rimesse al legislatore, al più accompagnate da sollecitazioni o moniti a intervenire per sanare situazioni di dubbia costituzionalità (sentenze nn. 137 del 1981 e 102 del 1977). La tendenziale inerzia delle Camere ha sicuramente stimolato la progressiva elaborazione di tipologie decisorie sempre più sofisticate e idonee a garantire la massima espansione del sindacato di costituzionalità a scapito di insostenibili "zone franche". Così, già a partire dagli anni settanta del secolo scorso, sono affiorate innovative pronunce di accoglimento di natura manipolativa che, anche muovendo dalla distinzione tra disposizione e norma (su cui si basano le stesse pronunce parzialmente ablative del contenuto precettivo della disposizione censurata), hanno sanzionato omissioni legislative, come nel caso delle sentenze additive (sentenza n. 190 del 1970), anche di principio (sentenza n. 215 del 1987), ovvero hanno sostituito norme giudicate illegittime con altre puntuali ricavabili o imposte dalla Costituzione ed enunciate in dispositivo, come nell'ipotesi delle sentenze sostitutive (sentenza n. 110 del 1974). Simili pronunce dichiarano incostituzionale una disposizione, rispettivamente, nella parte in cui non prevede una certa regola imposta dalla Costituzione (e ricavabile dall'ordinamento secondo il noto canone delle "rime obbligate", che circoscrive i poteri della Corte e postula la necessaria desumibilità della norma introdotta da altre analoghe già esistenti), nella parte in cui non stabilisce un principio (cioè una regola generale, bisognosa di svolgimento in sede legislativa, la cui enunciazione è accompagnata talvolta da indicazioni rivolte ai giudici comuni per una prima applicazione) e nella parte in cui prevede la norma censurata, anziché quella imposta dalla (o conforme alla) Costituzione. In seguito, si è assistito, soprattutto nel campo del sindacato sulle scelte sanzionatorie del legislatore, al superamento della dottrina delle "rime obbligate" in quanto l'ammissibilità delle questioni risulta "condizionata non tanto dall'esistenza di un'unica soluzione costituzionalmente obbligata, quanto dalla presenza nell'ordinamento di una o più soluzioni costituzionalmente adeguate, che si inseriscano nel tessuto normativo coerentemente con la logica perseguita dal legislatore" (sentenza n. 46 del 2023). Da ultimo, il protrarsi delle inerzie legislative rispetto ai moniti e ai richiami della Corte ovvero a situazioni di inadeguata attuazione dei principi costituzionali ha concorso all'elaborazione e all'impiego di un'ulteriore e più raffinata tipologia decisoria, fondata su un motivato esercizio dei poteri di gestione del processo costituzionale e mutuata dalle esperienze di altre Corti costituzionali. Si allude alle ipotesi di "incostituzionalità prospettata" in cui la Corte ravvisa una sicura violazione dei parametri costituzionali di volta in volta evocati ma, anziché limitarsi ad assumere una pronuncia di inammissibilità per assenza di soluzioni costituzionalmente obbligate o per l'obiettiva difficoltà di reperire soluzioni costituzionalmente adeguate e a rivolgere un monito non coercibile al legislatore (ciò che lascerebbe comunque in vita la norma contraria a Costituzione quanto meno fino a una nuova proposizione del quesito), sospende il giudizio e rinvia la trattazione della questione, concedendo, in uno spirito di leale collaborazione istituzionale, al decisore politico un congruo lasso di tempo per intervenire a sanare il riscontrato *vulnus*. Nelle more, la norma sospettata di illegittimità non potrà trovare applicazione nel processo *a quo* e la sospensione dell'incidente di costituzionalità verosimilmente indurrà a sospendere analoghi giudizi in corso o a valutare in essi il promovimento di questioni identiche o similari. Se alla scadenza del termine assegnato il legislatore rimane inerte, la Corte procede all'accoglimento della questione, fornendo una prima risposta alla domanda di giustizia costituzionale e lasciando comunque impregiudicata una compiuta e articolata regolamentazione della materia. Finora, la tecnica in parola è stata adoperata in tre occasioni relative a istituti e questioni coinvolgenti primariamente l'apprezzamento discrezionale della politica: il suicidio assistito (ordinanza n. 207 del 2018 e sentenza n. 242 del 2019), la pena detentiva per la diffamazione a mezzo stampa (ordinanza n. 132 del 2020 e sentenza n. 150 del 2021) e il regime dell'ergastolo "ostativo" all'accesso ai benefici penitenziari e alle misure alternative (ordinanze nn. 97 del 2021, 122 e 227 del 2022). Nei primi due casi il vano decorso del termine concesso al Parlamento ha condotto a dichiarazioni di illegittimità costituzionale per i motivi e nei termini evidenziati nelle ordinanze di rinvio; nel terzo, dopo un ulteriore e più contenuto differimento della trattazione, il Governo ha disciplinato la materia con provvedimento d'urgenza, inducendo la Corte a restituire gli atti al rimettente per una rinnovata valutazione delle questioni.

Per quanto concerne l'altro profilo del giudizio di ragionevolezza-proporzionalità, una precoce affermazione della sua autonomia concettuale dal sindacato di uguaglianza e dei suoi complessi passaggi può essere colta già nella sentenza n. 14 del 1964, in tema di espropriazione delle imprese elettriche, ove sono menzionati, sia pure per escluderli, i criteri di illogicità, arbitrarietà o contraddittorietà. "Per potere affermare che la legge denunziata non risponda a fini di utilità generale ai sensi dell'art. 43 della Costituzione, bisognerebbe che risultasse: che l'organo legislativo non abbia compiuto un apprezzamento di tali fini e dei mezzi per raggiungerli o che questo apprezzamento sia stato inficiato da criteri illogici, arbitrari o contraddittori ovvero che l'apprezzamento stesso si manifesti in palese contrasto con i presupposti di fatto. Ci sarebbe anche vizio di legittimità se si accertasse che la legge abbia predisposto mezzi assolutamente inidonei o contrastanti con lo scopo che essa doveva conseguire ovvero se risultasse che gli organi legislativi si siano serviti della legge per realizzare una finalità diversa da quella di utilità generale che la norma costituzionale addita". La prima teorizzazione esplicita del sindacato di ragionevolezza intrinseca, quale canone generale del giudizio di costituzionalità, risale alla sentenza n. 1130 del 1988. Essa, pur riferendosi al parametro dell'art. 97 Cost. e al principio di buon andamento della pubblica amministrazione, ha limpidamente chiarito che "il giudizio di ragionevolezza, lungi dal comportare il ricorso a criteri di valutazione assoluti e astrattamente prefissati, si svolge attraverso ponderazioni relative alla proporzionalità dei mezzi prescelti dal legislatore nella sua insindacabile discrezionalità rispetto alle esigenze obiettive da soddisfare o alle finalità che intende perseguire, tenuto conto delle circostanze e delle limitazioni concretamente sussistenti". In seguito, il giudizio di ragionevolezza è stato esplicitamente ricondotto al paradigma dell'art. 3 Cost. la cui portata precettiva è stata dilatata ben oltre il solo ambito presidiato dal principio di uguaglianza per arrivare a esprimere "un canone di razionalità della legge svincolato da una normativa di raffronto, essendo sufficiente un sindacato di conformità a criteri di coerenza logica, teleologica e storico-cronologica" (sentenze nn. 6 del 2019 e 87 del 2012), ovvero un canone di coerenza dell'intero ordinamento (sentenza n. 204 del 1982). Le più recenti enunciazioni in ordine al giudizio di ragionevolezza-proporzionalità, riportate nelle risposte alle domande nn. 20 e 21, si sono giovate del consolidamento dell'indirizzo in questione e della coerenza dei suoi esiti applicativi, oltre che delle corrispondenti elaborazioni ermeneutiche offerte dalla Corte di giustizia dell'Unione europea e dalla Corte europea dei diritti dell'uomo.

Le descritte traiettorie giurisprudenziali, nel loro complesso, attestano un sicuro protagonismo della Corte nella funzione di garanzia della Costituzione, anche in un'ottica propulsiva, e un sindacato progressivamente più incisivo sul corretto uso della discrezionalità politica del legislatore.

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25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

L'esame della giurisprudenza costituzionale rivela notevoli esempi dell'influenza esercitata dagli orientamenti della Corte EDU.

Tra i casi più recenti si segnala la sentenza n. 25 del 2019 che ha dichiarato illegittimo, per violazione degli artt. 117, primo comma, Cost., 7 CEDU e 2 del Protocollo addizionale n. 4, l'art. 75, comma 2, del d.lgs. n. 159 del 2011 (codice antimafia), nella parte in cui puniva come delitto l'inosservanza delle prescrizioni di vivere onestamente e rispettare le leggi da parte di soggetto sottoposto alla misura di prevenzione della sorveglianza speciale con obbligo o divieto di soggiorno. La questione si è posta "nel punto di confluenza della giurisprudenza" di tre Corti: la Corte costituzionale (sentenza n. 282 del 2010), la Corte EDU (sentenza della Grande Camera, de Tommaso contro Italia, del 23 febbraio

2017) e la Corte di cassazione (sentenza delle sezioni unite penali n. 40076 del 2017). Il principio di legalità penale esige che sia la legge a prevedere che il fatto commesso sia punito come reato: da ciò discendono i corollari di tassatività e determinatezza della fattispecie penale. La sentenza n. 282 del 2010 ha ritenuto la conformità a tale principio della norma (confluita nella disposizione del 2011) che sanzionava con la reclusione da uno a cinque anni l'inosservanza degli obblighi e delle prescrizioni inerenti alla sorveglianza speciale con obbligo o divieto di soggiorno, ivi compreso l'obbligo di vivere onestamente e rispettare le leggi. Al riguardo, si è osservato che le "leggi" sono tutte le norme a contenuto precettivo e non solo quelle la cui violazione è sanzionata penalmente; e che l'obbligo di "vivere onestamente" deve essere collocato nel contesto di tutte le prescrizioni impartite al destinatario della misura, avendo solo il valore di un monito rafforzativo senza un autonomo contenuto. Diversamente, la sentenza de Tommaso ha censurato il sistema nazionale delle misure di prevenzione per essere formulato in termini vaghi ed eccessivamente ampi, tali da non rispettare il criterio di prevedibilità della condotta sanzionata con la restrizione della libertà personale: in particolare, gli obblighi di vivere onestamente e rispettare le leggi non risultavano delimitati in modo sufficiente. La pronuncia europea è stata decisiva nell'orientare la sentenza della Corte di cassazione, la quale ha proceduto a una rilettura del diritto interno aderente alla CEDU, pervenendo alla conclusione che le prescrizioni di vivere onestamente e rispettare le leggi non possono integrare la norma incriminatrice di cui all'art. 75, comma 2, del d.lgs. n. 159 del 2011. Per quanto la giurisprudenza di legittimità avesse già compiuto il processo di adeguamento ai principi convenzionali, la Corte costituzionale ha escluso che si fosse di fronte a un'*abolitio criminis* per successione nel tempo della legge. L'affermata non riconducibilità allo *ius superveniens* del sopravvenuto orientamento giurisprudenziale ha fatto emergere un'area di persistente rilevanza del dubbio di costituzionalità, rappresentata dall'esecuzione del giudicato di condanna. La questione si è così posta come "completamento dell'operazione di adeguamento dell'ordinamento interno alla CEDU, già fatta dalle Sezioni unite nei limiti in cui l'interpretazione giurisprudenziale può ritagliare la fattispecie penale escludendo dal reato condotte che prima si riteneva vi fossero comprese". Il completamento si è reso possibile poiché la decisione della Corte di Strasburgo esprimeva un diritto consolidato e la tutela sistemica dei valori costituzionali, istituzionalmente spettante alla Corte italiana, non ostava al pieno dispiegarsi della garanzia convenzionale nel senso di un complessivo innalzamento dei livelli di protezione.

Di pari rilievo è risultata, tra le altre, la sentenza n. 120 del 2018 che ha giudicato illegittimo, per contrasto con gli artt. 117, primo comma, Cost., 11 CEDU e 5 della Carta sociale europea, l'art. 1475, comma 2, del d.lgs. n. 66 del 2010 (codice dell'ordinamento militare), in quanto prevedeva che i militari non potessero costituire associazioni professionali a carattere sindacale o aderire ad altre associazioni sindacali, anziché stabilire che essi possono costituire associazioni professionali a carattere sindacale alle condizioni e con i limiti fissati dalla legge, fermo il divieto di adesione ad altre associazioni sindacali. In precedenza, la sentenza n. 449 del 1999 aveva rigettato analoga questione sollevata con esclusivo riferimento a parametri interni (artt. 3, 39 e 52, terzo comma, Cost.). Il diverso esito di accoglimento è maturato anche grazie alla sopravvenuta giurisprudenza della Corte europea dei diritti dell'uomo (sentenze del 2 ottobre 2014, Matelly contro Francia e Association de Défense des Droits des Militaires contro Francia) che ha riconosciuto anche ai militari il diritto di associazione sindacale, escludendo la possibilità per gli ordinamenti nazionali di negarlo o di prevedere restrizioni al suo esercizio tali da comportarne la sostanziale soppressione. Sollecitata a un nuovo scrutinio in relazione ai diversi parametri convenzionali, la Corte italiana ha statuito l'illegittimità del divieto in parola. La giurisprudenza europea ha, del resto, affermato che l'art. 11 CEDU, al par. 1, delinea la libertà di associazione sindacale come una forma o un aspetto speciale della libertà di associazione e, al par. 2, non esclude alcuna categoria professionale dal proprio ambito di applicazione. Peraltro, rispetto ai membri delle Forze armate, della polizia o dell'amministrazione dello Stato, gli Stati possono, al più, introdurre restrizioni legittime, ma senza mettere in discussione il diritto alla libertà di associazione, né possono imporre restrizioni che riguardano gli elementi essenziali della libertà, senza i quali verrebbe meno il relativo contenuto, quale è il diritto di costituire un sindacato e di aderirvi.

Il sistema CEDU ammette che le garanzie convenzionali siano attuate nell'ordinamento interno con un significativo margine di apprezzamento. Similmente, la Corte costituzionale riconosce al legisla-

tore ampi spazi di discrezionalità nel bilanciamento di diritti e principi costituzionali.

In questa stessa discrezionalità si esprime tipicamente il margine di apprezzamento che la Convenzione europea dei diritti dell'uomo accorda agli Stati contraenti nell'implementazione delle corrispondenti tutele. La giurisprudenza costituzionale ha, altresì, riconosciuto alla Corte stessa cospicui spazi di apprezzamento delle interpretazioni del giudice europeo al fine di verificare l'idoneità delle norme convenzionali, in un'ottica sistemica e di massima espansione delle tutele, a fungere da parametro interposto della costituzionalità della legislazione interna.

In proposito, particolarmente degna di nota è la sentenza n. 317 del 2009 ove si è affermato che la Corte "non solo non può consentire che si determini, per il tramite dell'art. 117, primo comma, Cost., una tutela inferiore a quella già esistente in base al diritto interno, ma neppure può ammettere che una tutela superiore, che sia possibile introdurre per la stessa via, rimanga sottratta ai titolari di un diritto fondamentale". Di conseguenza, "il confronto tra tutela convenzionale e tutela costituzionale dei diritti fondamentali deve essere effettuato mirando alla massima espansione delle garanzie, anche attraverso lo sviluppo delle potenzialità insite nelle norme costituzionali che hanno ad oggetto i medesimi diritti. Nel concetto di massima espansione delle tutele deve essere compreso (…) il necessario bilanciamento con altri interessi costituzionalmente protetti, cioè con altre norme costituzionali, che a loro volta garantiscano diritti fondamentali che potrebbero essere incisi dall'espansione di una singola tutela. Questo bilanciamento trova nel legislatore il suo riferimento primario", ma spetta anche alla Corte nella sua attività interpretativa delle norme costituzionali. "Il richiamo al margine di apprezzamento nazionale – elaborato dalla stessa Corte di Strasburgo, come temperamento alla rigidità dei principi formulati in sede europea – trova la sua primaria concretizzazione nella funzione legislativa del Parlamento, ma deve essere sempre presente nelle valutazioni" della Corte costituzionale, "cui non sfugge che la tutela dei diritti fondamentali deve essere sistemica e non frazionata in una serie di norme non coordinate ed in potenziale conflitto tra loro. Naturalmente, alla Corte europea spetta di decidere sul singolo caso e sul singolo diritto fondamentale, mentre appartiene alle autorità nazionali il dovere di evitare che la tutela di alcuni diritti fondamentali (…) si sviluppi in modo squilibrato, con sacrificio di altri diritti ugualmente tutelati dalla Carta costituzionale e dalla stessa Convenzione europea. Il risultato complessivo dell'integrazione delle garanzie dell'ordinamento deve essere di segno positivo, nel senso che dall'incidenza della singola norma CEDU sulla legislazione italiana deve derivare un *plus* di tutela per tutto il sistema dei diritti fondamentali". Inoltre, la Corte "non può sostituire la propria interpretazione di una disposizione della CEDU a quella della Corte di Strasburgo, con ciò uscendo dai confini delle proprie competenze, in violazione di un preciso impegno assunto dallo Stato italiano con la sottoscrizione e la ratifica, senza l'apposizione di riserve, della Convenzione (…), ma può valutare come ed in qual misura il prodotto dell'interpretazione della Corte europea si inserisca nell'ordinamento costituzionale italiano. La norma CEDU, nel momento in cui va ad integrare il primo comma dell'art. 117 Cost., da questo ripete il suo rango nel sistema delle fonti, con tutto ciò che segue, in termini di interpretazione e bilanciamento", che sono le ordinarie operazioni cui la Corte costituzionale è chiamata nei suoi giudizi. In sintesi, "il margine di apprezzamento nazionale può essere determinato avuto riguardo soprattutto al complesso dei diritti fondamentali, la cui visione ravvicinata e integrata può essere opera del legislatore, del giudice delle leggi e del giudice comune", ciascuno nell'ambito delle proprie funzioni.

Le riferite enunciazioni sono state riprese e sviluppate, tra le altre, dalle sentenze nn. 236 del 2011 e 264 del 2012. La prima ha puntualizzato che alla Corte compete "apprezzare la giurisprudenza europea consolidatasi sulla norma conferente, in modo da rispettarne la sostanza, ma con un margine di apprezzamento e di adeguamento che le consenta di tener conto delle peculiarità dell'ordinamento giuridico in cui la norma convenzionale è destinata a inserirsi". La seconda ha sottolineato che le operazioni di interpretazione e di bilanciamento demandate alla Corte sono "volte non già all'affermazione della primazia dell'ordinamento nazionale, ma alla integrazione delle tutele" e che, a differenza della Corte EDU, il giudice delle leggi compie "una valutazione sistemica, e non isolata, dei valori coinvolti dalla norma di volta in volta scrutinata, ed è, quindi, tenuta a quel bilanciamento, solo ad essa spettante".

In seguito, la sentenza n. 49 del 2015 ha opportunamente precisato che la Corte costituzionale è vincolata solo dal "diritto consolidato, generato dalla giurisprudenza europea, che il giudice interno è tenuto a porre a fondamento del proprio processo interpretativo, mentre nessun obbligo esiste in tal senso, a fronte di pronunce che non siano espressive di un orientamento oramai divenuto definitivo. Del resto, tale asserzione non solo si accorda con i principi costituzionali, aprendo la via al confronto costruttivo tra giudici nazionali e Corte EDU sul senso da attribuire ai diritti dell'uomo, ma si rivela confacente rispetto alle modalità organizzative del giudice di Strasburgo. Esso infatti si articola per sezioni, ammette l'opinione dissenziente, ingloba un meccanismo idoneo a risolvere un contrasto interno di giurisprudenza, attraverso la rimessione alla Grande Camera. È perciò la stessa CEDU a postulare il carattere progressivo della formazione del diritto giurisprudenziale, incentivando il dialogo fino a quando la forza degli argomenti non abbia condotto definitivamente ad imboccare una strada, anziché un'altra. Né tale prospettiva si esaurisce nel rapporto dialettico tra i componenti della Corte di Strasburgo, venendo invece a coinvolgere idealmente tutti i giudici che devono applicare la CEDU, ivi compresa la Corte costituzionale (…). Questo tratto conferma un'opzione di favore per l'iniziale confronto fondato sull'argomentare, in un'ottica di cooperazione e di dialogo tra le Corti, piuttosto che per l'imposizione verticistica di una linea interpretativa su questioni di principio che non hanno ancora trovato un assetto giurisprudenziale consolidato e sono perciò di dubbia risoluzione da parte dei giudici nazionali". Peraltro, non sempre è di immediata evidenza "se una certa interpretazione delle disposizioni della CEDU abbia maturato a Strasburgo un adeguato consolidamento, specie a fronte di pronunce destinate a risolvere casi del tutto peculiari, e comunque formatesi con riguardo all'impatto prodotto dalla CEDU su ordinamenti giuridici differenti da quello italiano. Nonostante ciò, vi sono senza dubbio indici idonei ad orientare il giudice nazionale nel suo percorso di discernimento: la creatività del principio affermato, rispetto al solco tradizionale della giurisprudenza europea; gli eventuali punti di distinguo, o persino di contrasto, nei confronti di altre pronunce della Corte di Strasburgo; la ricorrenza di opinioni dissenzienti, specie se alimentate da robuste deduzioni; la circostanza che quanto deciso promana da una sezione semplice, e non ha ricevuto l'avallo della Grande Camera; il dubbio che, nel caso di specie, il giudice europeo non sia stato posto in condizione di apprezzare i tratti peculiari dell'ordinamento giuridico nazionale, estendendovi criteri di giudizio elaborati nei confronti di altri Stati aderenti che, alla luce di quei tratti, si mostrano invece poco confacenti al caso italiano. Quando tutti, o alcuni di questi indizi si manifestano, secondo un giudizio che non può prescindere dalle peculiarità di ogni singola vicenda, non vi è alcuna ragione che obblighi il giudice comune a condividere la linea interpretativa adottata dalla Corte EDU per decidere una peculiare controversia, sempre che non si tratti di una sentenza pilota in senso stretto". Quest'ultima è una particolare pronuncia impiegata dalla Corte EDU, di fronte a un problema strutturale della legislazione di un determinato Stato, per indicare le misure più idonee a prevenire sistematiche violazioni della Convenzione. "Solo nel caso in cui si trovi in presenza di un diritto consolidato o di una sentenza pilota, il giudice italiano sarà vincolato a recepire la norma individuata a Strasburgo, adeguando ad essa il suo criterio di giudizio per superare eventuali contrasti rispetto ad una legge interna, anzitutto per mezzo di ogni strumento ermeneutico a sua disposizione, ovvero, se ciò non fosse possibile, ricorrendo all'incidente di legittimità costituzionale".

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26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

Non constano casi in cui la Corte EDU abbia condannato l'Italia in conseguenza del fatto che la Corte si sia astenuta in un caso specifico da una pronuncia di merito.

IV. Other peculiarities

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

Non è possibile offrire sicuri dati statistici sulla ricorrenza del tema della deferenza nelle cause riguardanti i diritti umani.

La complessità della realtà economica e sociale che la legislazione è chiamata a governare e, conseguentemente, delle scelte assunte dal decisore politico, così come l'emersione di nuovi interessi e inedite aspirazioni nella coscienza collettiva, comportano che la Corte sia sempre più spesso investita di questioni implicanti delicati bilanciamenti tra diritti e principi costituzionali concorrenti o persino confliggenti. In simili bilanciamenti e nelle scelte in cui essi si concretizzano si dispiega tipicamente la discrezionalità del legislatore, cui la Corte riconosce in prima battuta l'onere della piena attuazione del disegno costituzionale. In tutti gli ambiti connotati dalla discrezionalità legislativa (dai rapporti civili o etico sociali a quelli economici e politici) può accadere che facciano difetto soluzioni univoche imposte dalla Costituzione. Del resto, "tutti i diritti fondamentali tutelati dalla Costituzione si trovano in rapporto di integrazione reciproca e non è possibile (…) individuare uno di essi che abbia la prevalenza assoluta sugli altri" (sentenza n. 85 del 2013). La Corte è perciò "chiamata a svolgere una valutazione sistemica e non frazionata dei diritti coinvolti dalla norma di volta in volta scrutinata, effettuando il necessario bilanciamento in modo da assicurare la massima espansione delle garanzie di tutti i diritti e i principi rilevanti" (sentenza n. 46 del 2021). A fronte di lesioni effettivamente accertate, il ripristino della legalità costituzionale richiede di rinvenire nell'ordinamento precisi punti di riferimento, cioé precetti comunque idonei a inserirsi armonicamente, pur se provvisoriamente in attesa dell'ineludibile intervento legislativo, nel tessuto normativo. Posta innanzi a questioni evocanti apprezzamenti altamente discrezionali del legislatore e opzioni tra plurime soluzioni praticabili, più accentuata risulta la possibilità che alla Corte sia preclusa, quanto meno nell'immediato, una pronuncia di merito.

Altro fattore rilevante per l'adozione di pronunce non meramente processuali è la corretta prospettazione delle questioni che, nei giudizi incidentali che primariamente chiamano in causa la garanzia costituzionale dei diritti fondamentali, implica un'accurata descrizione della fattispecie controversa nel processo *a quo*, una compiuta motivazione sulla rilevanza e sulla non manifesta infondatezza del quesito, l'infruttuoso esperimento del preliminare tentativo di interpretazione conforme della norma denunciata e la formulazione di un *petitum* univoco e sufficientemente determinato.

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28. Has your Court grown more deferential over time?

Come osservato nelle risposte alle domande nn. 2, 11 e 24, la storia della giurisprudenza costituzionale è attraversata da una costante affermazione del ruolo di garanzia della Corte, intesa a scongiurare la formazione di "zone franche" dal controllo di costituzionalità e ad assicurare il più ampio sindacato anche su scelte legislative ad alto tasso di discrezionalità, sia pure nei limiti tracciati per il giudizio di ragionevolezza-proporzionalità. Pertanto, nel tempo, l'atteggiamento di deferenza, inteso come astensione da una pronuncia sul merito delle questioni, ha registrato un sensibile affievolimento.

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29. Does the deferential attitude depend on the case load of your Court?

L'atteggiamento di deferenza verso il legislatore non dipende dal numero di casi pendenti bensì dalla natura delle questioni sottoposte alla Corte. Si rinvia alla risposta alla domanda n. 27.

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30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

Salvo quanto si dirà nella risposta alla successiva domanda n. 31, il giudizio costituzionale è ispirato al principio di corrispondenza tra chiesto e pronunciato. Di esso vi è traccia, innanzitutto, nell'art. 27, primo periodo, della legge n. 87 del 1953 in virtù del quale la Corte, "quando accoglie una istanza o un ricorso relativo a questione di legittimità costituzionale di una legge o di un atto avente forza di legge, dichiara, nei limiti dell'impugnazione, quali sono le disposizioni legislative illegittime". Il riferimento ai limiti dell'impugnazione rende palese che i termini del giudizio sono definiti nell'atto che lo promuove, vale a dire l'ordinanza di rimessione nel processo in via incidentale e il ricorso dello Stato o della Regione o di una Provincia autonoma in quello in via principale. Inoltre, il citato principio di corrispondenza trova ingresso nei giudizi rimessi alla Corte per il tramite dell'art. 22, primo comma, della legge n. 87 del 1953 che dispone l'osservanza, in quanto applicabili, anche delle norme del regolamento per la procedura innanzi al Consiglio di Stato in sede giurisdizionale. Tali norme sono confluite nel codice del processo amministrativo che richiama le disposizioni del codice di procedura civile compatibili o espressive di principi generali: tra esse può annoverarsi l'art. 112 cod. proc. civ. che limpidamente declina il principio di corrispondenza tra chiesto e pronunciato come dovere del giudice di "pronunciare su tutta la domanda e non oltre i limiti di essa".

In linea con i riferiti dati normativi risultano taluni costanti indirizzi giurisprudenziali.

Nel giudizio in via incidentale, che ha carattere obiettivo e non risente delle vicende del processo in cui la questione è sorta, l'oggetto è "limitato alle disposizioni e ai parametri indicati nelle ordinanze di rimessione. Pertanto, non possono essere presi in considerazione ulteriori questioni o profili di costituzionalità dedotti dalle parti, sia che siano stati eccepiti ma non fatti propri dal giudice *a quo*, sia che siano diretti ad ampliare o modificare successivamente il contenuto delle stesse ordinanze" (sentenza n. 180 del 2022). Nel giudizio in via principale, che ha carattere disponibile ed è tipicamente un giudizio tra parti, non aperto alla partecipazione di soggetti privi di potestà legislativa, "il *thema decidendum* è fissato dal ricorso introduttivo, in conformità alla delibera dell'organo politico, e non può essere esteso ad ulteriori profili, né con le memorie presentate in prossimità dell'udienza, né tanto meno nel corso dell'udienza" (sentenza n. 29 del 2021).

In generale, dunque, la Corte non può basare la propria decisione su motivi non dedotti negli atti di promovimento né ricondurre la motivazione a una disposizione costituzionale diversa da quella invocata, a meno che una corretta interpretazione degli stessi atti faccia emergere la volontà di richiedere lo scrutinio in riferimento a un determinato e specifico parametro, anche se non espressamente menzionato nel dispositivo dell'ordinanza di rimessione o nelle conclusioni di un ricorso in via principale. In queste ipotesi la Corte non opera un indebito ampliamento dell'oggetto del giudizio oltre i limiti di quanto le è devoluto, ma effettua piuttosto un chiarimento preliminare dell'ambito e dei termini del suo sindacato, interpretando correttamente la sostanza della domanda di giustizia

costituzionale e rifuggendo da formalismi impeditivi dell'esame di merito.

In proposito, si registrano alcune interessanti affermazioni riguardanti il giudizio in via incidentale. Le "discrepanze tra la motivazione e il dispositivo dell'ordinanza di rimessione possono essere risolte tramite l'impiego degli ordinari criteri ermeneutici, quando dalla lettura coordinata delle due parti dell'atto emerga l'effettiva volontà del rimettente" (sentenza n. 228 del 2022); la questione deve essere scrutinata con riguardo anche ai parametri "non formalmente evocati ma desumibili in modo univoco dall'ordinanza di rimessione, qualora tale atto faccia a essi chiaro, sia pure implicito, riferimento mediante il richiamo ai principi da questi enunciati" (sentenza n. 35 del 2021). Nei giudizi in via principale la Corte è solita negare rilevanza a eventuali errori materiali delle difese nell'indicazione dei parametri (sentenza n. 58 del 2023) ovvero condurre lo scrutinio con riguardo al parametro chiaramente, pur se solo implicitamente, denunciato (sentenza n. 42 del 2021).

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31. Can your Court extend its constitutionality review to another legal provision that has not been contested before it, but has a connection with the applicant's situation?

Due istituti integrano altrettante deroghe al generale principio di corrispondenza tra chiesto e pronunciato e consentono alla Corte di estendere il proprio sindacato a una disposizione non contestata dall'autorità giudiziaria rimettente o dall'ente ricorrente ma comunque collegata a quella espressamente denunciata. Si tratta della dichiarazione di illegittimità costituzionale in via consequenziale e del potere di autorimessione delle questioni.

L'art. 27, secondo periodo, della legge n. 87 del 1953 prevede che la Corte, in sede di accoglimento delle questioni, "dichiara, altresì, quali sono le altre disposizioni legislative, la cui illegittimità deriva come conseguenza dalla decisione adottata". La norma permette di estendere gli effetti della pronuncia di accoglimento a disposizioni ulteriori e diverse da quelle denunciate che, ove sottoposte a scrutinio, subirebbero la medesima sorte; il potere da essa attribuito, di cui la Corte non di rado fa uso, mira, anche in un'ottica di economia dei giudizi e di effettività del sistema di giustizia costituzionale, a depurare l'ordinamento di contenuti normativi destinati a rimanere inoperanti a seguito della declaratoria di illegittimità del precetto impugnato (cui sono intimamente o inscindibilmente connessi, avendo carattere accessorio o meramente attuativo), espressivi del medesimo principio ritenuto incompatibile con la Costituzione ovvero divenuti illegittimi perché in contraddizione insanabile con quanto affermato nella sentenza. In relazione al giudizio incidentale, la Corte ha chiarito che l'apprezzamento richiesto dall'art. 27 della legge n. 87 del 1953 "non presuppone la rilevanza delle norme ai fini della decisione propria del processo principale, ma cade sul rapporto con cui esse si concatenano nell'ordinamento, con riguardo agli effetti prodotti dalle sentenze dichiarative di illegittimità costituzionale" (sentenza n. 37 del 2015). Per quanto concerne i giudizi in via principale, la sentenza n. 68 del 2022 ha rammentato "le ipotesi del tutto particolari in cui la dichiarazione d'illegittimità costituzionale dovrebbe conseguenzialmente estendersi a disposizioni non impugnate ma avvinte da stretta ed esclusiva dipendenza funzionale con quella (…) censurata, oppure a norme accessorie, prive di autonomo rilievo", precisando che non appartiene ai compiti della Corte "né completare l'oggetto di un ricorso", "né (…) estendere l'impugnativa o integrarla al di là dei termini in cui essa è proposta".

Nella diversa ipotesi dell'autorimessione, la Corte, al pari di ogni giudice *a quo*, solleva innanzi a sé la questione di legittimità costituzionale di una norma diversa da quella denunciata, che, tuttavia, è chiamata ad applicare per arrivare alla decisione sullo specifico quesito che le è stato rivolto ovvero è logicamente presupposta dalla disposizione censurata dal rimettente o dal ricorrente. L'autorimessione integra l'esercizio di un potere eccezionale, in deroga al principio di corrispondenza tra chiesto e pronunciato, che è giustificato soltanto da un "nesso di necessaria strumentalità o di pregiudizialità

logica" (sentenza n. 198 del 2022), sicché la questione deve presentarsi come "pregiudiziale alla definizione della questione principale e strumentale rispetto alla decisione" (sentenze nn. 230, 218 e 203 del 2021). Nella prassi, l'autorimessione non risulta accompagnata o sorretta da affermazioni esplicite circa la legittimazione della Corte, quale "giudice" operante nel corso di un "giudizio"; di regola, è semplicemente disposta previo accertamento dei requisiti di rilevanza e non manifesta infondatezza della questione che ne è oggetto.

The Constitutional Court of the Republic of Latvia

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Constitutional cultures vary and the courts' perceptions of their own role in a constitutional democracy affect the intensity of their scrutiny in fundamental rights cases. Many courts profess judicial deference.

Judicial deference is a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters which are perceived to be beyond their expertise or legitimacy to decide. The tool has been employed, most prominently, in human rights cases. This is due to their transcendent quality, capable of cutting across all substantive areas of public decision-making.

It is said that over-deferential attitude threatens the rule of law and separation of powers as much as excessive judicial activism does. The way judges exercise judicial deference is, therefore, a fundamental matter of constitutional principle that concerns the proper role of each branch of government in relation to significant questions of public policy.

The following questions aim to discover the differences in exercising judicial deference by European constitutional courts.

Questionnaire

Non-justiciable questions and deference intensities

In your jurisdictions, what is meant by "judicial deference"?

The Constitutional Court of the Republic of Latvia[1076] refers to "self-limitation" to explain certain areas in which it exercises judicial review to a limited extent. This does not mean that the Court refrains from examining certain types of issues but rather that it considers that the legislator has a wider margin of discretion in those areas. A classic example in this regard are issues that are considered more political than legal. The following quote explains the rationale behind this approach:

> The Constitutional Court has held that to a certain extent the content of provisions of the Constitution can always be assessed from the legal perspective. There is no doubt that within the framework of the fundamental law the concepts of law and politics are closely linked, since in a state governed by the rule of law politics can never be completely free from the law and the legislator and the executive power are also bound by the requirements of the Constitution [..].
>
> However, the competence of the Constitutional Court is not unlimited: it may examine a specific case only insofar as arguments of law (legal arguments) may be applied to such a case, separating legal arguments from arguments of legal policy. Arguments of legal policy are based on a specific model of society – a paradigm that fosters the transformation of the model of society [..]. Thus, considerations of legal policy establish the aim to be achieved, i.e., a general improvement of economic, political, and social aspects of the life of the society. Legal considerations establish rules that are to be complied with not because they by themselves will ensure the attainment of the desired economic, political, and social situation but because this is required by the rule of law [..]. Legal argumentation is primarily based on the interpretation of legal provisions and identifying the contents of legal principles. When legal argumentation is applied, the result of the case is not foreseeable at the outset.
>
> Thus, regarding issues which may not be decided based on sufficiently strict legal categories and standards but instead the conclusions to be drawn primarily depend on the political expediency, decisions should be made by democratically legitimated political

1076 Translations of the case-law of the Court, as well as those of legislative acts included in the responses to the questionnaire have either been carried out by the Court or might have been edited for brevity and clarity.

state bodies, first of all – the legislator [..].

The limits of competence of the Constitutional Court are established by the Constitutional Court Law and this law does not authorize the Constitutional Court to assess the political expediency of actions of other constitutional institutions of state power.[1077]

Nevertheless, even "pronouncedly "political" decisions", such as the state budget law, do not escape the scrutiny of the Constitutional Court entirely. The Court has indicated:

in a democratic state governed by the rule of law, while drafting, adopting, implementing the state budget law and then while controlling its implementation, legality must be complied with. Pursuant to Article 85 of the Constitution, the Constitutional Court's task is to review cases regarding the compliance of laws with the Constitution. Since the Parliament [adopts state] budget [..] in the form of a law, the Constitutional Court has full competence to verify whether the Constitution has been complied with in preparing and adopting [such a] law [..]. In the present case, the Constitutional Court is not asked to and it will not examine whether the policy developed by the contested regulation is correct.[1078]

Thus, in the case-law of the Constitutional Court of the Republic of Latvia the concept of "judicial deference" or "self-limitation" of the Court is intrinsically linked to the issue of the margin of discretion left to the legislator, which, in turn, is in part determined on the basis of the extent of the "political dimension" of the particular issue under review. As the Court itself has pointed out, "the narrower the margin of discretion the Constitution endows the legislator with, the stricter the Constitutional Court shall control use of this discretion, and vice versa: the more extensive the margin of discretion of the legislator, the less the Constitutional Court shall interfere in the use of this discretion".[1079]

Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

There are no "no-go" areas that can be identified in the case-law of the Constitutional Court of Latvia. However, as pointed out in the response to question 1, the degree of scrutiny exercised by the Court is inversely proportional to the extent to which a particular issue is considered more political than legal. This approach has manifested itself in several fields, such as, for instance, social rights,[1080]

1077 Decision of the Constitutional Court of 20 January 2009 to terminate the proceedings in case no. 2008-08-0306, para. 12. The decision is only available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-08-0306_Lemums_izbeigsana.pdf.

1078 Judgment of the Constitutional Court of 29 October 2020 in case no. 2019-29-01, para. 16. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/11/2019-29-01_Judgment.pdf.

1079 Judgment of the Constitutional Court of 8 November 2006 in case no. 2006-04-01, para. 15.3. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2006/03/2006-04-01_Spriedums_ENG.pdf.

1080 "[U]sually the political dimension of the decisions of the state and especially its legislator in realization of social rights is important, namely, decisions in this field are usually adopted more on the basis of political and not legal considerations; and they in their turn depend on the conception of the legislator about the principles of rendering state social services, economic situation of the state and the particular need of the public or its part for aid or support of the state.
Thus, in the field of realization of social rights one cannot advance the same strict requirements as those advanced regarding non-interference in realization of civil and political rights"

healthcare,[1081] penal policy,[1082] taxation,[1083] or state budget.[1084]

From the examples mentioned in the question, only the issue of financial implications of the Court's judgment has come up in the case-law of the Constitutional Court. However, such implications have not meant that the Court has resorted to judicial deference; the financial consequences of a ruling by the Court are rather taken into account when the Court is deciding upon the temporal effect of a judgment of unconstitutionality, i.e., the moment when the legal provision found to be unconstitutional becomes inapplicable. Such was the case, for instance, with regard to old-age pensions that were severely reduced as an austerity measure during the time of the economic crisis of 2008-2009. While the Court found the reduction to be unconstitutional, it also observed that an immediate enforcement of the judgment would have very serious budgetary repercussions and therefore established a mechanism for repaying the withheld pensions gradually.[1085]

Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

As indicated in the response to question 2, for the Constitutional Court of the Republic of Latvia the

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(judgment of the Constitutional Court of 8 November 2006 in case no. 2006-04-01, para. 16. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2006/03/2006-04-01_Spriedums_ENG.pdf).

1081 "The Constitutional Court has already indicated that it is not possible to assess the financial possibilities of the state, economic situation, priorities of legal policy and particular needs of certain social groups by means of legal argumentation. All these considerations affect the decision of the legislator [..] to provide certain services and the scope of such services [..].
[C]ourt proceedings are not appropriate for dealing with an issue regarding priorities in health care [..].
Consequently, the possibilities of the Constitutional Court to assess whether [..] the benefit gained by the society is greater than the harm done to a person are restricted. The Constitutional Court can, however, assess whether [..] the [..] restriction is reasonably founded" (judgment of the Constitutional Court of 29 December 2008 in case no. 2008-37-03, para. 12.4. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2008/09/2008-37-03_Spriedums_ENG.pdf).

1082 See the response to question 8 for more details.

1083 "[T]he state, in the implementation of taxation policy, enjoys broad discretion [..]. Thus, the legislator has the right also to choose a solution for ensuring revenue into the state basic budget that is required to provide for the inhabitants' growing needs for social security and for decreasing inequality. However, in the implementation of taxation policy, the legislator's actions must comply with general principles of law and provisions of the Constitution. This follows from the basic norm and the principle of a socially responsible state that is included in the preamble to the Constitution. Likewise, in exercising its discretion in the field of taxation policy, the legislator must comply with the principles of effectiveness, fairness, solidarity, and timeliness" (judgment of the Constitutional Court of 19 October 2017 in case no. 2016-14-01, para. 26. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/07/2016-14-01_Solidaritates-nodokla-likums-fiziskas-personas_ENG.pdf).

1084 Judgment of the Constitutional Court of 29 October 2020 in case no. 2019-29-01, para. 16. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/11/2019-29-01_Judgment.pdf.

1085 Judgment of the Constitutional Court of 21 December 2009 in case no. 2009-43-01, paras 34 and 35. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/07/2009-43-01_Spriedums_ENG.pdf.

degree of the "judicial deference" primarily depends on the subject-matter of the specific case and on whether legal arguments or arguments concerning political expediency are at the core of the case.

Undoubtedly, the history of Latvia shapes the reasoning of the Court to a certain extent as well. A classic example in this regard would be a series of cases decided by the Court with regard to restrictions of passive election rights to formerly active members of various Soviet state institutions.[1086] The Court in these cases which pertain to dealing with the heritage of the Soviet Union defers, to some extent, to the legislator:

> the procedure of elections is closely linked to the historical development, political situation and a number of other factors in each country [..]. The European Court of Human Rights has recognised that the restriction included in the contested norm should be examined by taking into account the state's broad discretion in establishing such restrictions [..]. Hence, the Constitutional Court, in considering whether no more lenient measures exist for reaching the legitimate aim, must take into account that the state enjoys broad discretion in organising its system of elections.[1087]

Another area in which the Constitutional Court has traditionally left a rather broad discretion to the legislator is the protection of Latvian language as the official language of the state. This deferential approach has been explained by the Court in the following way:

> Taking into account the fact that the Latvian language is an integral part of the constitutional identity[1088] and the common language of communication and democratic participation of the society, as well as the fact that, in the conditions of globalisation, Latvia is the only place in the world where the existence and development of the Latvian language and, consequently, of the fundamental nation can be guaranteed, narrowing of the use of the Latvian language as the official language in the territory of the state is [..] considered as a threat to the democratic state order.[1089]

Are there situations when your Court deferred because it had no institutional competence or expertise?

As long as a particular case falls within the competence of the Constitutional Court of Latvia, it has never deferred for want of institutional competence or expertise. The Court in its case-law has con-

1086 See the judgment of the Constitutional Court of 15 June 2006 in case no. 2005-13-0106 (available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2005/06/2005-13-0106_Spriedums_ENG.pdf) judgment of 29 June 2018 in case no. 2017-25-01 (available in English translatiuon: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/10/2017-25-01_Judgment_ENG.pdf). See also the judgment of the Grand Chamber of the ECtHR in *Ždanoka v. Latvia*, 16 March 2006, application no. 58278/00, and judgment in *Ādamsons v. Latvia*, 24 June 2008, application no. 3669/03, in particular the concurring opinion of judge Garlicki, joined by judges Zupančič and Gyulumyan, which concludes with the following sentence: "We are experts of law and lawfulness but not of politics and history and we should not venture in these two latter domains unless it turns out to be absolutely necessary" ("*Nous sommes des experts en droit et en légalité, mais non en politique et en histoire, et nous ne devrions nous aventurer dans ces deux derniers domaines que lorsque cela se révèle absolument nécessaire*").

1087 Judgment of the Constitutional Court of 29 June 2018 in case no. 2017-25-01, para. 23. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/10/2017-25-01_Judgment_ENG.pdf).

1088 In this respect, see also the judgment of the Court of Justice of the European Union of 7 September 2022 in the case *Boriss Cilevičs and Others*, C-391/20, paras. 68 and 83.

1089 Judgment of the Constitutional Court of 9 February 2023 in case no. 2020-33-01, para. 30. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/06/2020-33-01_Judgement.pdf.

sistently reiterated that "[t]he task of the Constitutional Court is, within the limits of its competence, to ensure the existence of a legal system in which legal provisions that do not comply with the Constitution or other legal provisions (acts) of a higher legal force at the fullest and most exhaustive level possible, as well as to provide its opinion regarding constitutionally important issues".[1090]

Once a case has been initiated by the Constitutional Court, the Court does not restrict itself to examining the arguments submitted by the parties to the case – it also seeks arguments on its own initiative. The essence of the proceedings before the Constitutional Court is intimately linked to the active role of the Court in establishing the legally significant considerations that are relevant to the case. If it is necessary, the Court may[1091] invite any person or institution to submit their observations on the case or specific questions relevant to the resolution of the case.[1092] Furthermore, if the establishment of relevant facts requires special knowledge in a certain area (science, art, etc.), the Court may request an expert opinion.[1093]

Are there cases where your Court deferred because there was a risk of judicial error?

The Court has never explicitly referred to a judicial error; however, it would appear that its refusal to re-examine the political expediency of the decisions of the legislator is the absence of "sufficiently strict legal categories and standards"[1094] against which to measure this expediency. In other words, it is impossible for the Court to have certainty that its considerations of political expediency are more correct than the ones of the legislator. Judicial decisions that are taken without a clear legal basis are bound to be to some extent arbitrary and hence prone to judicial error.

Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

Yes, essentially all of the previously listed examples of situation in which the Constitutional Court has referred to the wide discretion of the legislator pertain to the democratic legitimacy of the legislator: "The Constitutional Court examines issues within its jurisdiction insofar legal arguments can be applied, separating them from legal policy arguments. Democratically legitimised political state bodies, first of all the legislator, should decide on issues to be solved by political means". [1095]

"The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

This accurately describes the approach of the Constitutional Court of the Republic of Latvia. As mentioned previously, the Court itself has explicitly indicated that "the narrower the margin of discretion the Constitution endows the legislator with, the stricter the Constitutional Court shall control use of

1090 Judgment of the Constitutional Court of 7 April 2009 in case no. 2008-35-01, para. 11.2. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2008/09/2008-35_01_ENG.pdf.

1091 See Article 22(2)(2) and 22(3) of the Constitutional Court Law, available in English translation: https://likumi.lv/ta/en/en/id/63354-constitutional-court-law.

1092 This is done routinely, in virtually every case examined by the Court.

1093 See Article 22(2)(3) of the Constitutional Court Law; this option is exercised very seldomly.

1094 Decision of the Constitutional Court of 20 January 2009 to terminate the proceedings in case no. 2008-08-0306, para. 12. The decision is only available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-08-0306_Lemums_izbeigsana.pdf.

1095 Decision of the Constitutional Court of 19 December 2012 to terminate the proceedings in case no. 2012-03-01, para. 13.4. The decision is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2012/01/2012-03-01_Lemums_izbeigsana_ENG.pdf.

this discretion, and vice versa: the more extensive the margin of discretion of the legislator, the less the Constitutional Court shall interfere in the use of this discretion".[1096]

Does your Court accept a general principle of deference in judging penal philosophy and policies?

Yes, it does. The Court has described its approach to penal policy in the following manner:

> The Constitutional Court examines and assesses a specific case only insofar it is possible to apply legal (juridical) arguments, separating these from legal policy considerations. The legal policy considerations define the aim to be reached, i.e., economic, political and social changes of general nature. On the other hand, the outcome of juridical considerations are rules which must be abided by not because they in themselves would ensure he desirable economic, political, and social situation, but because it is required by the rule of law. The principle of rule of law, *inter alia*, requires that the body taking decisions, when adopting new regulation or amending the existing legal regulation, would comply both with the appropriate procedure and the requirements of legal provisions with a higher legal force.
>
> However, the legal system comprises also issues for which strict legal limits have not been set, but the adopted decisions predominantly depend upon political expediency. Political bodies of the state which have been legitimised in a democratic way, first of all the legislator, should decide upon these issues [..].
>
> The Constitutional Court notes that the legislator has broad discretion to establish penalties for specific offences, as well as to envisage conditions for releasing a person from liability for such offences. In adopting such regulation, the legislator usually takes into account the opinions, views, and values which have been accepted by the society and which the legislator has the right to express in a normative way. By creating penal policy, the legislator sets the framework for a person's behaviour, thus protecting public safety. [..]
>
> This means that the verification which falls within the jurisdiction of the Constitutional Court reaches only as far as assessing whether the legislator has not manifestly overstepped the limits of the discretion granted to it by the Constitution [..]. For example, a situation in which a legal provision poses serious threat to fundamental rights should be considered as overstepping the limits of discretion defined in the Constitution.[1097]

There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

Such situations have never occurred in the practice of the Constitutional Court of Latvia.

Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

Normally the legislator's passiveness in implementing rights-compliant reforms does not affect the degree of scrutiny applied by the Constitutional Court. Frequently the Court points out the need to carry out reforms in *obiter dicta*.[1098]

1096 Judgment of the Constitutional Court of 8 November 2006 in case no. 2006-04-01, para. 15.3. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2006/03/2006-04-01_Spriedums_ENG.pdf.

1097 Judgment of the Constitutional Court of 19 November 2013 in case no. 2013-09-01, para. 10. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2013/05/2013-09-01_Spriedums_ENG.pdf.

1098 See, for instance, the judgment of the Constitutional Court of 11 October 2018 in case no. 2017-30-01, para. 19 (available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2017/11/2017-30-01_Judgment.pdf): "However, the Constitutional

A notable exception is a case concerning inheritance duty payable with respect to inheritance received from a same-sex partner.[1099] In that case the Court noted that the Parliament had not yet developed a system of legal recognition and protection of families formed by same-sex partners.[1100] Due to that, the Court simply pointed out that at the relevant time the state was "legally blind" with respect to same-sex families and found the contested provision to be unconstitutional for exactly that reason.

The decision-maker

Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

As it derives from the answers provided in part I of this questionnaire, in the case-law of the Constitutional Court of the Republic of Latvia the degree of "judicial deference" primarily depends on the subject-matter of the case. However, it is true that the deference is dictated by the consideration that some issues have to be decided politically by a democratically legitimated legislator. The degree of democratic legitimization is lower in case of normative acts adopted by other state bodies and in these cases the Constitutional Court strictly controls whether these bodies have abided by the limits set to their powers by the legislator.

For instance, with respect to normative acts adopted by municipalities the Court has held as follows:

> Pursuant to Article 64 of the Constitution the right to legislate is vested in the people and the Parliament. To ensure a more effective exercise of the state power, it is permissible for the legislator, in the process of legislating, to decide on the most important issues, but to delegate to the Cabinet of Ministers or other institutions of public administration the drafting of more detailed regulations and technical norms necessary for implementing laws [..]. The legislator may also transfer the taking of decisions on some issues to the competence of local governments. Thus, a local government council also has the right to adopt generally binding (external) regulatory legal acts, within the limits of its authorisation. However, a local government council does not enjoy the discretion of a legislator and it has the right to adopt regulatory legal enactments only in

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Court draws attention to the fact that as a result of the rapid development of information technologies, the possibilities of courts to access various databases have also significantly expanded, while the regulation included in the contested provisions regarding the role of the court in civil proceedings has not changed in its essence for a certain period of time. The Constitutional Court has already noted many times that the legislator is obliged to periodically consider whether a given legal regulation is still effective, appropriate and necessary and whether it should be improved in any way [..]. The evolution of technology, the judicial system and legal relations between members of society can make legal frameworks that were once in conformity with higher-ranking legal rules obsolete and ultimately even violate fundamental personal rights". See also the judgment of 2 May 2012 in case no. 2011-17-03, para. 14.1 (available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2011/08/2011-17-03_Spriedums_ENG.pdf).

1099 Judgment of the Constitutional Court of 8 April 2021 in case no. 2020-34-03, para. 13 (available only in Latvian: https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/07/2020-34-03_spriedums.pdf).

1100 In an earlier case (judgment of 12 November 2020 in case no. 2019-33-01, available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/12/2019-33-01_Judgment.pdf) the Court had recognised that an obligation to establish such a system derived from Article 110 of the Constitution of Latvia. By the time case 2020-34-03 was decided by the Court, the transitional period granted to the legislator for amending the legislation in judgment in the case no. 2019-33-01 had not yet expired.

cases and within the scope specified in laws [..]. The scope of authorisation determines the extent to which a local government council may act in drafting and adopting legal provisions.[1101]

What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

Taking into account the legislative history is one of the four methods of interpretation applied by the Constitutional Court. All four methods are applied and none of them is more dominant than the others: "grammatical interpretation is only one of interpretation methods, and it would not be correct to rely solely on the literal meaning of a legal provision. Interpretation of a legal provision requires the use also of other methods of interpreting legal provisions, i.e. the historical, systemic and teleological methods".[1102]

The Court does analyse legislative history when assessing whether a disputed provision has been adopted in a proper legislative procedure.[1103]

Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

Pursuant to the principle of justification, any decision of a state institution needs to be justified, since this is the only way how a court may verify the absence of arbitrariness in the actions of that institution. The only exception is purely political decisions without a legal dimension which may not be verified by courts. The Constitutional Court in its proceedings requires the institution which has adopted the contested legal act to indicate the justification for its decision. For instance, in the case of restriction of fundamental rights the institution is required to demonstrate that the restriction serves a legitimate aim and that it is proportionate. On the other hand, one the basis of the principle of objective investigation, the Court is bound to assess not only the justification provided by the institution but also to view all the circumstances of the case in combination and provide its own opinion on the existence / absence of a legitimate aim and proportionality. Generally, the court does not seek to identify the decision it would have reached if it were a legislator, just the opposite: "[i]n assessing whether a less restrictive solution exists, the Court cannot act in the place of the legislator and the government and seek optimal solutions, since this is the task of the author of the legal provision".[1104]

Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

The Constitutional Court of the Republic of Latvia has never explicitly stated that it would give wider discretion to the legislator in case of a sufficiently deep legislative inquiry. In fact, the opposite is true: the principle of good legislative procedure[1105] requires the legislator to give an assessment to all the

1101 Judgment of the Constitutional Court of 12 February 2016 in case no. 2015-13-03, para. 14.1. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2015/05/2015-13-03_Spriedums_ENG.pdf.

1102 Judgment of the Constitutional Court of 11 December 2020 in case no. 2020-26-0106, para. 16.2. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-26-0106_Judgement.pdf.

1103 On the application of the principle of good legislative process by the Constitutional Court see more details in the responses to questions 14 and 15.

1104 Judgment of the Constitutional Court of 16 May 2019 in case no. 2018-17-03, para. 20.2. The judgment is only available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/08/2018-17-03_Spriedums.pdf.

1105 First identified by the Court in its judgment of 6 March 2019 in case no. 2018-11-01. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2018/07/2018-11-01_Judgement.pdf.

essential information, including the compliance of the proposed legal provisions with fundamental rights. If the Constitutional Court comes to a conclusion that the inquiry has not been sufficiently deep and this could have led to a different outcome of the legislative process, the Court concludes that a substantial violation of the principle of good legislative process has been violated, which is, in itself, a reason to declare the legislative provision in question to be invalid. To reach such a conclusion, the Constitutional Court has to conclude that: (1) the legislator had an obligation to review the compatibility with fundamental rights; (2) the legislator has not carried out such a review at all or the review has not been carried out properly; and (3) if the review had been carried out (properly), this would have led to a different outcome.

Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

In assessing whether the legislative process has complied with the principle of good legislative procedure, the Court does require that the Parliament ought to give full opportunity to all members of the Parliament to express their views.[1106] There is no formal requirement that human rights implications of draft laws should be discussed during parliamentary debates. However, it should be seen that such implications have been known to the Parliament and have in fact been taken into account. For instance, it might be sufficient that the compatibility of draft law with fundamental rights has been analysed in the annotation of a draft law. If members of the Parliament are satisfied with such an analysis, there is no requirement to mention it during the parliamentary debate. The Constitutional Court has explained that the legislative materials should "allow [the general public] to understand why the legislature has established a specific restriction of fundamental rights and what are the considerations that permit such a restriction in a democratic state governed by the rule of law. These requirements must be observed in establishing any restriction of fundamental rights".[1107]

Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

Public consultation or deliberation is certainly one of the elements of the legislative process that form the basis of democratic legitimacy.[1108] However, the fact that public consultation is not always a conclusive proof that a decision has democratic legitimacy and vice versa – the fact that public consultation has not taken place does not always mean that the decision in question lacks democratic legitimacy. For instance, in Covid-19 related cases the Constitutional Court took into account the urgency of the situation and did not find the absence of public consultation to be a violation of the principle of a good legislative procedure in itself.[1109] In summary, the obligation to hold public

1106 See, for instance, the judgment of the Constitutional Court of 6 March 2019 in case no. 2018-11-01, para. 18.1. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2018/07/2018-11-01_Judgement.pdf. See also the judgment of 7 December 2023 in case no. 2022-20-01, para. 15. For now the judgment is only available in Latvian: https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/06/2022-20-01_Spriedums.pdf.

1107 Judgment of the Constitutional Court of 27 May 2021 in case no. 2020-49-01, para. 24.2. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/09/2020-49-01_Judgment.pdf.

1108 See, for example, the judgment of the Constitutional Court of 5 April 2013 in case no. 2012-20-03, para. 10. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2012/10/2012-20-03_Spriedums_ENG.pdf.

1109 See, for instance, the judgment of the Constitutional Court of 11 December 2020 in case no. 2020-26-0106, para. 16.1. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-26-0106_Judgement.pdf.

consultations is seen by the Constitutional Court as a substantive obligation, and not a formal one: what is relevant is that the legislator ought to have in their possession as much relevant information and arguments as is possible within the particular context of a decision that has to be taken.

Rights' scope, legality and proportionality

Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

No, this is not the case. The Constitutional Court sees it as its obligation to give its own interpretation to the scope of fundamental rights guaranteed by the Constitution. On the other hand, the situation with regard to the interpretation of sub-constitutional legal provisions is different. The Court has repeatedly found that it is impossible to properly understand a legal provision by looking at it in isolation of how it is applied in practice and outside the legal system in which it functions.[1110] This means that occasionally the Court will choose not to question the interpretation of a disputed legal provision but will defer to the interpretation given to such a provision by actors which apply it on a regular basis. On the other hand, such an approach is not absolute – the Court frequently opts for an autonomous interpretation.

Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

As noted in response to the previous question, the Constitutional Court does not exhibit deference with regard to determining the scope of fundamental rights; any deference that is displayed is with regard to the margin of appreciation left to the legislator when deciding upon restrictions of fundamental rights. As noted in the response to question 2, this is the case with regard to, for instance, social rights, healthcare issues, penal policy, taxation, or state budget.

Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

The Constitutional Court has interpreted Article 90 of the Constitution (the right to know about one's rights) as implying a duty of the legislator to ensure that legal provisions are sufficiently clear.[1111] This means that legal provisions have to be formulated so unambiguously that they should be capable of being correctly interpreted.[1112] On the other hand, the Court has recognised the self-evident truth that because by their legal nature laws are abstract, they can never be formulated with an absolute precision.[1113]

The standard that the Court applies when assessing the clarity of laws is that provisions that restrict fundamental rights have to be formulated sufficiently precisely, so that a person could regulate their

1110 See, for instance, the judgment of the Constitutional Court of 28 June 2013 in case no. 2012-26-03, para. 12.1. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2012/12/2012-26-03_Spriedums_ENG.pdf.

1111 Judgment of the Constitutional Court of 20 December 2006 in case no. 2006-12-01, para. 16. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2006/07/2006-12-01_Spriedums_ENG.pdf.

1112 Judgment of the Constitutional Court of 19 June 2010 in case no. 2010-02-01, para. 9.4.1. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/01/2010-02-01_Spriedums_ENG.pdf.

1113 Judgment of the Constitutional Court of 21 February 2019 in case no. 2018-10-0103, para. 18.1. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2018/06/2018-10-0103_Judgment.pdf.

berhaviour, if necessary after receiving appropriate consultation.[1114] Approaching the issue of clarity from the opposite end, the Court has held that a legal provision is to be deemed unclear if it is impossible to establish its real meaning by using methods of legal interpretation.[1115]

With regard to a scale of clarity, the Court has only stated that higher degree of clarity is required from legal provisions that provide for a criminal liability, since criminal liability is the most severe possible type of legal responsibility.[1116]

Finally, the Constitutional Court of Latvia has never mentioned the i*n claris non fit interpretation* canon. Quite to the contrary, possibly drawing inspiration from Aharon Barak's writings, the Court has emphasised that any legal provision always has to be subjected to interpretation: "regardless of how precisely and clearly legal provisions have been formulated, their content is always to be established by means of interpretation".[1117]

What is the intensity review of your Court in case of the legitimate aim test?

The Constitutional Court has repeatedly established that it is the institution which has adopted the legal act disputed before the Court that has the obligation to indicate the legitimate aim for an interference with fundamental rights.[1118] Nevertheless, the Court is not bound by the position of the legislator in this respect, it has pointed out that the Constitutional Court has an obligation to carry out an *ex officio* review of all the relevant circumstances of each case and establish the existence or the lack of a legitimate aim.[1119] In practice this means that the Court can agree or disagree with the opinion of the legislator or even come to a conclusion that a legitimate aim exists, even if this has not been pointed out by the legislator. In line with the duty of the legislator to periodically reassess the necessity for continued restrictions of fundamental rights, the Constitutional Court assesses the existence or lack of a legitimate aim at the time when it is examining a case, „taking into account the present stage of developement of the society and democracy in the state".[1120] This means that there may be situations where a legitimate aim might have existed at the time when the disputed provision was adopted but has ceased to exist at the time when the Court examines the respective case.[1121]

What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

This is exactly the test employed by the Constitutional Court.[1122]

1114 Judgment of the Constitutional Court of 30 March 2011 in case no. 2010-60-01, para. 15.2. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/08/2010-60-01_Spriedums_ENG.pdf.

1115 *Ibid*.

1116 Judgment of the Constitutional Court of 21 February 2019 in case no. 2018-10-0103, para. 13.2. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2018/06/2018-10-0103_Judgment.pdf.

1117 Judgment of the Constitutional Court of 21 February 2019 in case no. 2018-10-0103, para. 18.1. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2018/06/2018-10-0103_Judgment.pdf.

1118 Judgment of the Constitutional Court of 8 June 2007 in case no. 2007-01-01, para. 23. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/01/2007-01-01_Spriedums_ENG.pdf.

1119 *Ibid*.

1120 Judgment of the Constitutional Court of 3 November 2022 in case no. 2021-43-01, para. 13. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/12/2021-43-01_Judgment.pdf.

1121 See, for instance, the judgment of the Constitutional Court of 2 February 2010 in case no. 2009-46-01, para. 12. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/07/2009-46-01_Spriedums_ENG.pdf.

1122 See, for instance, the judgment of the Constitutional Court of 22 December 2022 in

Does your Court go through every applicable limb of the proportionality test?

For reasons of efficiency of the procedure before the Constitutional Court, normally the Court does not analyze other limbs of proportionality test if it finds an incompatibility with one of them.[1123] However, it is to be noted in this respect that the Court always reviews the proportionality test in exactly the same order: 1) suitability, 2) necessity, and 3) proportionality in the narrower sense. Thus, even if the Court were to consider that a restriction of fundamental rights was not necessary, it would nevertheless not skip the suitability limb.

Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

No examples of such an approach can be found within the case-law of the Constitutional Court. Pursuant to the principle of objective investigation the Constitutional Court will always gather the necessary information ("evidence") *proprio motu*, if necessary.

Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

As can be seen from the previous responses, it is difficult to identify a particular "rise of the judicial deference doctrine" in the case-law of the Constitutional Court, therefore it is not possible to speculate on a correlation between that phenomenon and the development of the proportionality doctrine (first applied by the Court in 2000,[1124] less than two years after the adoption of the Fundamental Rights chapter of the Constitution).

Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

It is to be reiterated again that there is no consistent judicial deference doctrine that can be identified in the case-law of the Constitutional Court. There is a certain overlap between the areas where the ECtHR grants a wide margin of appreciation to the Member States and the Constitutional Court recognizes a wider discretion of the legislator (for instance with regard to the organization of the healthcare system); however, it can be said rather to be a coincidence rather than a causation because the rationale behind the ECtHR's approach to margin of appreciation (subsidiarity) and the reasons for relying on the legislator's discretion (separation of powers, democratic legitimacy) is very different.

Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

While the ECtHR has occasionally disagreed with the Constitutional Court's assessment of the merits of certain cases (for example, in *Andrejeva v. Latvia*), this has not been due to excessive deference displayed by the Constitutional Court. In certain situations the effectiveness of the Constitutional

case no. 2022-09-01, para. 16. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/03/2022-09-01_Judgment.pdf.

1123 See, for instance, the judgment of the Constitutional Court of 11 October 2018 in case no. 2017-30-01, para. 15 (available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2017/11/2017-30-01_Judgment.pdf). There have been occasional exceptions from this approach, however: see, for instance, the judgment of 11 October 2018 in case no. 2007-23-01, paras 16.2 and 16.3 (available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/10/2007-23-01_Spriedums_ENG.pdf), where the Court proceeded to the analysis of proportionality in the narrower sense even after having established that less restrictive alternatives existed.

1124 Judgment of the Constitutional Court of 30 August 2000 in case no. 2000-03-01. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2000/03/2000-03-01_Spriedums_ENG.pdf.

Court has been questioned due to allegedly excessively strict application of admissibility criteria by the Court (*Ēcis v. Latvia*), however, this is unrelated to deference.

Other peculiarities

How often does the issue of deference arise in human rights cases adjudicated by your Court?

See responses to questions 1 and 2. Most of the cases examined by the Constitutional Court are cases concerning the compatibility of legal provisions with human rights. No particularities can be identified specifically with respect to human right cases. The Court has indicated that one of its tasks is to ensure that human rights and freedoms would be protected.[1125] This might be an indirect indication that it would be more reluctant to display deference in human rights cases.

Has your Court have grown more deferential over time?

As indicated before, it is difficult to measure the degree of deference of the Constitutional Court of Latvia over time. If anything, the Court could be characterized as becoming more active over time (a good example is the identification by the Court of the principle of good legislative procedure described in responses to questions 14 and 15 above).

Does the deferential attitude depend on the case load of your Court?

No such correlation can be identified.

Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

Yes, the Court is guided by the principle of objective investigation. This means that the arguments of the parties are just some of the considerations that the Court takes into account.[1126] The principle of objective investigation means that the Court by itself identifies the arguments and evidence necessary for resolving a case.[1127] A typical example of this are the situations when the Court does not limit itself to analyzing alternative solutions that would be less restrictive of fundamental rights that have been advanced by the applicant but instead identifies such less restrictive alternatives by itself.[1128]

With respect to reclassification of the applicants' arguments, the Court will usually not initiate a case concerning constitutional provisions that have not been invoked by the applicant. I.e., if the applicant will dispute the compatibility of a particular legal provision with, for instance, the right to a fair trial, the Court will not by its own initiative initiate a case concerning the compatibility of the disputed provision with, for example, the right to inviolability of private life. Nevertheless, since, as indicated above, the Court uses the arguments advanced by the applicant only as some of the considerations to be taken into account, nothing prevents it from reclassifying the applicants' arguments when examining the case on the merits.

Can your Court extend its constitutionality review to other legal provision that has not been contest-

1125 Judgment of the Constitutional Court of 3 February 2012 in case no. 2011-11-01, para. 11.1. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2011/05/2011-11-01_Spriedums_ENG.pdf.

1126 Judgment of the Constitutional Court of 15 June 2017 in case no. 2016-11-01, para. 12.1. The judgment is available only in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/07/2016-11-01_Spriedums-1.pdf.

1127 Judgment of the Constitutional Court of 27 October 2022 in case no. 2021-31-0103, para. 24. The judgment is only available in Latvian: https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/07/2021-31-0103_Spriedums.pdf.

1128 See, for instance, the judgment of the Constitutional Court of 9 February 2023 in case no. 2020-33-01, para. 33.4. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/06/2020-33-01_Judgement.pdf.

ed before it, but has a connection with the applicant's situation?

Yes, the Court can do so and has done so on more than 20 occasions. The reason for doing so is twofold. First, as indicated above, the Constitutional Court sees its task as ensuring "the existence of a legal system in which legal provisions that do not comply with the Constitution or other legal provisions (acts) of a higher legal force at the fullest and most exhaustive level possible, as well as to provide its opinion regarding constitutionally important issues".[1129] Second, the principle of procedural economy dictates that it would not be expedient for the Constitutional Court to repeatedly decide on issues that may be resolved within the framework of a case that has already been initiated.[1130]

However, the limit of this approach is the so-called "concept of a close link", according to which, when deciding whether it is possible and necessary to extend the scope of the case, the Court establishes "first, whether the legal provision with respect to which the scope of the case is extended is so closely related to the legal provision which has been *expressis verbis* disputed in the particular case that it is possible to assess [its constitutionality] on the basis of the arguments already expressed in the case or it is necessary to examine [its constitutionality] to decide on the outcome of the case and, second, whether the extension of the scope of the case is necessary from the point of view of the principles of constitutional proceedings".[1131]

For instance, in the above-cited case which pertained to the recognition of arbitral awards in Latvian civil proceedings the provisions with respect to which the case had been initiated (and which were found unconstitutional by the Constitutional Court) had been duplicated in another law that was to enter into force after the date of the judgment of the Constitutional Court. In order to eliminate the need to initiate a new procedure concerning the new law, the Constitutional Court extended the scope of the case under examination and declared the unconstitutionality of the new law at the same time.

1129 Judgment of the Constitutional Court of 7 April 2009 in case no. 2008-35-01, para. 11.2. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2008/09/2008-35_01_ENG.pdf.

1130 Judgment of the Constitutional Court of 14 October 2021 in case no. 2021-03-03, para. 25. The judgment is only available in Latvian: https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/01/2021-03-03_Spriedums.pdf.

1131 Judgment of the Constitutional Court of 28 November 2014 in case no. 2014-09-01, para. 23. The judgment is available in English translation: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2014/03/2014-09-01_Spriedums_ENG.pdf.

Latvijas Republikas Satversmes Tiesa

Tiesu pašierobežošanās veidi un robežas: konstitucionālo tiesu piemērs

Konstitucionālās kultūras atšķiras, un tas, kā tiesas uztver savu lomu konstitucionālajā demokrātijā, ietekmē pārbaudes intensitāti pamattiesību lietās. Daudzas tiesas atbalsta tiesu pašierobežošanos.

Tiesu pašierobežošanās ir tiesnešu izdomāts juridisks instruments, lai atbalstītu varas dalīšanu un aturētos no iejaukšanās jautājumos, kas tiek uztverti kā tādi, kas ir viņpus to kompetences vai leģitimitātes, lai tās lemtu. Šis instruments visuzskatāmāk izmantots cilvēktiesību lietās. Tas izskaidrojams ar to transcendentālo dabu, spēju caurvīties visām publisko lēmumu pieņemšanas būtiskajām jomām.

Ir teikts, ka pārlieku pašierobežojoša attieksme apdraud tiesiskumu un varas dalīšanu tikpat lielā mērā kā pārmērīgs tiesu aktīvisms. Tāpēc tas, kā tiesneši īsteno tiesu pašierobežošanos, ir pamatjautājums attiecībā uz konstitucionālo principu, kas nosaka katra valdības atzara pienācīgo lomu attiecībā uz būtiskiem politikas jautājumiem.

Turpmāko jautājumu mērķis ir noskaidrot atšķirības tajā, kā Eiropas konstitucionālās tiesas īsteno tiesu pašierobežošanos.

Jautājumi

Neiztiesājami jautājumi un pašierobežošanās intensitāte

Ko jūsu jurisdikcijā saprot ar "tiesu pašierobežošanos"?

Latvijas Republikas Satversmes tiesa[1132] atsaucas uz "pašierobežošanos", lai izskaidrotu noteiktas jomas, kurā tā veic ierobežotu tiesas kontroli. Tas nenozīmē, ka tiesa atsakās izskatīt noteikta veida jautājumus, bet drīzāk, ka tā uzskata – šajās jomās likumdevējam ir plašāka rīcības brīvība. Klasisks piemērs šajā ziņā ir jautājumi, kurus uzskata par drīzāk politiskiem nevis tiesiskiem. Sekojošajā citātā izskaidrots šīs pieejas loģiskais pamatojums:

> Satversmes tiesa ir atzinusi, ka Satversmes normu saturu noteiktā apjomā vienmēr iespējams vērtēt no tiesību viedokļa. Nav šaubu par to, ka tiesības un politika pamatlikumā ir cieši saistīti jēdzieni, jo tiesiskā valstī politika nevar būt pilnīgi brīva no tiesībām un arī likumdevēju varu un izpildvaru saista Satversmes prasības [..].
>
> Tomēr Satversmes tiesa savās pilnvarās nav neierobežota, proti, tā konkrētu lietu ir tiesīga izvērtēt tikai tiktāl, ciktāl uz to iespējams attiecināt tiesību (juridiskos) argumentus, tos atdalot no tiesībpolitiskiem argumentiem. Tiesībpolitiskie argumenti ir balstīti uz konkrētusabiedrības modeli, t.i., paradigmu, kas veicina sabiedrības modeļa transformāciju [..]. Tātad tiesībpoliskie apsvērumi nosaka sasniedzamo mērķi, t.i., vispārēju – ekonomisko, politisko un sociālo sabiedrības dzīves aspektu uzlabojumu. Juridiskie apsvērumi paredz noteikumus, kas ir jāievēro nevis tāpēc, ka tie paši par sevi nodrošinās vēlamo ekonomisko, politisko un sociālo situāciju, bet tādēļ, ka to prasa tiesiskums [..]. Juridiska argumentācija visupirms balstās uz normu interpretāciju un tiesību principu satura noskaidrošanu. Izmantojot juridisko argumentāciju, lietas rezultāts sākotnēji nav paredzams.
>
> Tātad par jautājumiem, kuru izlemšanai nav noteiktas pietiekami stingras juridiskas kategorijas un standarti, bet kuros izdarāmie secinājumi pārsvarā ir atkarīgi no politiskās lietderības, jālemj demokrātiski leģitimētiem, politiskiem valsts orgāniem, pirmām kārtām –likumdevējam [..].
>
> Satversmes tiesas kompetences robežas noteic Satversmes tiesas likums, un tas nepiešķir Satversmes tiesai tiesības vērtēt citu valsts varas konstitucionālo institūciju rīcī-

1132 Angļu valodas versijas atbildēs uz anketas jautājumiem iekļautie tiesas prakses piemēri, kā arī tiesību akti ir vai nu tulkoti tiesā vai arī var būt tikuši rediģēti lakonisma un skaidrības apsvērumu dēļ.

bas politisko lietderību.[1133]

Tomēr pat "izteikti "politiski" lēmumi", tādi kā valsta budžeta likums, nevar pilnībā izvairīties no Satversmes tiesas pārbaudes. Tiesa ir norādījusi:

demokrātiskā tiesiskā valstī valsts budžeta likuma sagatavošanā un pieņemšanā, izpildē un izpildes kontrolē ir jāievēro tiesības. Saskaņā ar Satversmes 85. pantu Satversmes tiesas uzdevums ir izskatīt lietas par likumu atbilstību Satversmei. Tā kā [..] Saeima [pieņem budžetu] likuma formā, Satversmes tiesai ir pilnīga kompetence pārbaudīt to, vai likuma [..] sagatavošanā un apstiprināšanā ir ievērota Satversme. Šajā lietā Satversmes tiesa nav aicināta vērtēt un arī nevērtēs to, vai ar apstrīdēto regulējumu veidotā politika ir pareiza.[1134]

Tādējādi Satversmes tiesas praksē "tiesas pašierobežošanās" jēdziens ir nesaraujami saistīts ar likumdevējam atstāto rīcības brīvību, ko savukārt daļēji nosaka, pamatojoties uz to, cik liela ir konkrētā izskatāmā jautājuma "politiskā dimensija". Kā norādījusi pati tiesa, "jo mazāku rīcības brīvību Satversme piešķir likumdevējam, jo stingrāk Satversmes tiesai jākontrolē šīs brīvības izmantošana, un otrādi: jo plašāka ir likumdevēja rīcības brīvība, jo mazāk Satversmes tiesai jāiejaucas šīs brīvības izmantošanā".[1135]

Vai jūsu tiesā ir pašierobežošanās spektrs? Vai jūsu tiesai ir "neskaramas jomas" vai noteiktas tiesiskās neatbildības zonas vai neiztiesājami jautājumi (piem., morāli pretrunīgi, politiski jūtīgi, pretrunīgi sociāli jautājumi, ierobežotu resursu sadale, būtiskas finansiālas sekas valdībai, utt.)?

Satversmes tiesas judikatūrā nav konstatējamas "neskaramas jomas". Taču, kā norādīts atbildē uz 1. jautājumu, tiesas veiktās pārbaudes līmenis ir apgriezti proporcionāls tam, cik lielā mērā konkrētais jautājums tiek uzskatīts drīzāk par politisku nevis tiesisku. Šī pieeja parādījusies vairākās

1133 Satversmes tiesas 2009. gada 20. janvāra lēmuma par tiesvedības izbeigšanu lietā nr. 2008-08-0306 12. punkts. Lēmums ir pieejams tikai latviešu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-08-0306_Lemums_izbeigsana.pdf.

1134 Satversmes tiesas 2020. gada 29 oktobra sprieduma lietā nr. 2019-29-01 16. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/11/2019-29-01_Judgment.pdf.

1135 Satversmes tiesas 2006. gada 8. novembra sprieduma lietā nr. 2006-04-01 15.3. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2006/03/2006-04-01_Spriedums_ENG.pdf.

jomās, piemēram, sociālajās tiesībās,[1136] veselības aprūpē,[1137] sodu politikā,[1138] nodokļos[1139] vai valsts budžetā.[1140]

Tikai viens no jautājumā ietvertajiem piemēriem ir parādījies Satversmes tiesas judikatūrā, proti, tiesas sprieduma finansiālā ietekme. Taču šī ietekme nav nozīmējusi to, ka tiesa būtu pašierobežojusies; tiesas nolēmuma finansiālās sekas drīzāk tiek ņemtas vērtā, tiesai lemjot par sprieduma par neatbilstību Satversmei spēku laikā, proti, brīdi, no kura par Satversmei neatbilstošu atzītā tiesiskā norma zaudē spēku. Šāda lieta bija, piemēram, par būtiski samazinātām vecuma pensijām kā taupības pasākumu 2008.-2009. gada ekonomiskās krīzes laikā. Kaut gan tiesa atzina samazinājumu par nekonstitucionālu, tā arī piebilda, ka tūlītēja sprieduma izpilde ļoti būtiski ietekmētu budžetu, un tāpēc paredzēja

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1136 "[V]alsts un it īpaši tās likumdevēja lēmumiem par sociālo tiesību īstenošanu parasti nozīmīga ir politiskā dimensija, proti, lēmumi šajā jomā parasti tiek pieņemti, vadoties ne tik daudz no juridiskiem, bet vairāk no politiskiem apsvērumiem, kas savukārt ir atkarīgi no likumdevēja priekšstata par valsts sociālo pakalpojumu sniegšanas principiem, valsts ekonomiskās situācijas un sabiedrības vai kādas tās daļas īpašas nepieciešamības pēc valsts palīdzības vai atbalsta.
Līdz ar to sociālo tiesību īstenošanas jomā likumdevējam nevar izvirzīt tikpat stingras prasības kā attiecībā uz tā neiejaukšanos personas pilsonisko un politisko tiesību īstenošanā. Tomēr tas apstāklis, ka Satversmē ekonomiskās, sociālās un kultūras tiesības ir garantētas, noteic zināmas likumdevēja rīcības brīvības robežas arī šajā jomā." (Satversmes tiesas 2006. gada 8. novembra sprieduma lietā nr. 2006-04-01 16. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2006/03/2006-04-01_Spriedums_ENG.pdf).

1137 "Satversmes tiesa jau ir norādījusi, ka juridiskās argumentācijas ceļā nav iespējams izvērtēt valsts finansiālās iespējas, ekonomisko situāciju, tiesībpolitikas prioritātes un atsevišķu sociālo grupu īpašās vajadzības. Visi šie apsvērumi ietekmē likumdevēja [..] izšķiršanos, paredzot noteiktus pakalpojumus un to apmēru [..].
[T]iesas process nav piemērots tam, lai risinātu jautājumu par prioritātēm veselības aprūpē [..]
Līdz ar to Satversmes tiesas iespējas izvērtēt, vai [..] sabiedrības ieguvums ir lielāks nekā indivīdam nodarītais kaitējums, ir ierobežotas. Taču Satversmes tiesa var izvērtēt, vai [..] noteiktais ierobežojums ir saprātīgi pamatots." (Satversmes tiesas 2008. gada 29. decembra sprieduma lietā nr. 2008-37-03 12.4. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2008/09/2008-37-03_Spriedums_ENG.pdf).

1138 Sīkāk skat. atbildi uz 8. jautājumu.

1139 "[T] [V]alstij, īstenojot nodokļu politiku, ir plaša rīcības brīvība. [..]
Tātad likumdevējs ir tiesīgs arī izvēlēties risinājumus, kā nodrošināt valsts pamatbudžeta ieņēmumus, kas nepieciešami iedzīvotāju pieaugošo sociālās aizsardzības un nevienlīdzības mazināšanas vajadzību finansēšanai. Tomēr, īstenojot nodokļu politiku, likumdevēja rīcībai ir jāatbilst vispārējiem tiesību principiem un Satversmes normām. Tas izriet no pamatnormas un Satversmes ievadā iekļautā demokrātiskas sociāli atbildīgas valsts principa. Tāpat likumdevējam, īstenojot savu rīcības brīvību nodokļu politikas jomā, ir jāievēro efektivitātes, taisnīguma, solidaritātes un savlaicīguma principi." (Satversmes tiesas 2017 gada 19. oktobra sprieduma lietā nr. 2016-14-01 26. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/07/2016-14-01_Solidaritates-nodokla-likums-fiziskas-personas_ENG.pdf).

1140 Satversmes tiesas 2020. gada 29. oktobra sprieduma lietā nr. 2019-29-01 16. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/11/2019-29-01_Judgment.pdf.

mehānismu ieturēto pensiju pakāpeniskai atmaksai.[1141]

Vai ir faktori, kas nosaka, kad un kādā veidā tiesai vajadzētu pašierobežoties (piem., jūsu valsts kultūra un apstākļi; jūsu valsts vēsturiskā pieredze, attiecīgo pamattiesību absolūtā vai kvalificētā daba; tiesas izskatāmā jautājuma būtība; vai lietas būtība saistīta ar mainīgiem sociālajiem apstākļiem un attieksmēm)?

Kā norādīts atbildē uz 2. jautājumu, Satversmes tiesai "tiesas pašierobežošanās" pakāpe primāri ir atkarīgā no konkrētās lietas būtības un tā, vai lietā centrālie ir tiesiski argumenti vai argumenti attiecībā uz politisko lietderību.

Neapšaubāmi, arī Latvijas vēsture zināmā mērā iespaido tiesas argumentāciju. Šajā ziņā klasisks piemērs būtu virkne tiesas izspriesto lietu attiecībā uz dažādu padomju valsts institūciju kādreizējo aktīvu biedru pasīvajām vēlēšanu tiesībām.[1142] Tiesa šajās lietās, kuras saistītas ar rīcību attiecībā uz Padomju Savienības mantojumu, kaut kādā mērā pašierobežojas attiecībā uz likumdevēju:

Vēlēšanu kārtība ir cieši saistīta ar katras valsts vēsturisko attīstību, uzbūvi, politisko situāciju un virkni citu faktoru [..]. Eiropas Cilvēktiesību tiesa ir atzinusi, ka apstrīdētajā normā ietvertais ierobežojums jāizvērtē, ievērojot valsts plašo rīcības brīvību šādu ierobežojumu noteikšanā [..]Tādēļ Satversmes tiesai, apsverot to, vai nepastāv saudzējošāki līdzekļi leģitīmā mērķa sasniegšanai, jāievēro, ka valstij ir plaša rīcības brīvība savas vēlēšanu sistēmas organizēšanā.[1143]

Cita joma, kurā Satversmes tiesa tradicionāli atstājusi plašu rīcības brīvību likumdevējam, ir latviešu valodas kā oficiālās valsts valodas aizsardzība. Šo pašierobežojošo attieksmi tiesa skaidrojusi šādi:

Ievērojot to, ka latviešu valoda ir neatņemama konstitucionālās identitātes sastāvdaļa[1144] un sabiedrības kopējā saziņas un demokrātiskās līdzdalības valoda, kā arī to, ka globalizācijas apstākļos Latvija ir vienīgā vieta pasaulē, kur var tikt garantēta latviešu valodas un līdz ar to pamatnācijas pastāvēšana un attīstība, latviešu valodas kā valsts valodas lietošanas sašaurinājums valsts teritorijā uzskatāms arī par demokrātiskas valsts iekārtas apdraudējumu.[1145]

1141 Satversmes tiesas 2009. gada 21. decembra sprieduma lietā nr. 2009-43-01 34. un 35. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/07/2009-43-01_Spriedums_ENG.pdf.

1142 Skat. Satversmes tiesas 2006. gada 15. jūnija spriedumu lietā nr. 2005-13-0106 (pieejams tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2005/06/2005-13-0106_Spriedums_ENG.pdf); 2018. gada 29. jūnija spriedumu lietā nr. 2017-25-01 (pieejams tulkojums angļu valodā https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/10/2017-25-01_Judgment_ENG.pdf). Skat. arī ECT Lielās palātas 2006. gada 16. marta spriedumu lietā *Ždanoka pret Latviju*, pieteikums nr. 58278/00, un 2008. gada 24. jūnija spriedumu lietā *Ādamsons pret Latviju*, , pieteikums nr. 3669/03, it īpaši tiesneša Garlicka atsevišķās piekrītošās domas, kurām pievienojās tiesneši Zupančičs un Gjulumjana un kuru noslēdzošais teikums ir šāds: "Mēs esam tiesību un likumības, nevis politikas un vēstures eksperti, un mums nevajadzētu iejaukties šais pēdējās jomās, ja vien tas neizrādās absolūti nepieciešami." ("*Nous sommes des experts en droit et en légalité, mais non en politique et en histoire, et nous ne devrions nous aventurer dans ces deux derniers domaines que lorsque cela se révèle absolument nécessaire*").

1143 Satversmes tiesas 2018. gada 29. jūnija sprieduma lietā nr. 2017-25-01 23. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/10/2017-25-01_Judgment_ENG.pdf).

1144 Attiecībā uz to skat. arī Eiropas Savienības Tiesas 2002. gada 7. septembra sprieduma lietā *Boriss Cilevičs un citi*, C-391/20, 68 un 83. punktus.

1145 Satversmes tiesas 2023. gada 9. februāra sprieduma lietā nr. 2020-33-01 30. punkts.

Vai ir situācijas, kurās jūsu tiesa ir pašierobežojusies, jo tai nebija institucionālās kompetences vai speciālo zināšanu?

Ja vien konkrētā lieta ir Satversmes tiesas kompetencē, tā nekad nav pašierobežojusies institucionālās kompetences vai speciālo zināšanu trūkuma dēļ. Tiesa savā praksē ir konsekventi atkārtojusi, ka "Satversmes tiesas uzdevums atbilstoši tās kompetencei ir nodrošināt tādas tiesību sistēmas pastāvēšanu, kurā pēc iespējas pilnīgāk un aptverošāk tiktu novērsts regulējums, kas neatbilst Satversmei vai citām augstāka juridiskā spēka tiesību normām (aktiem), kā arī dot savu vērtējumu konstitucionāli nozīmīgos jautājumos".[1146]

Kad lieta ir ierosināta Satversmes tiesā, tiesa neaprobežojas ar lietas dalībnieku iesniegto argumentu izvērtējumu, tā meklē argumentus arī pēc savas iniciatīvas. Satversmes tiesas procesa būtība ir cieši saistīta ar tiesas aktīvo lomu, konstatējot lietā svarīgus, tiesiski nozīmīgus apsvērumus. Ja nepieciešams, tiesa var[1147] pieaicināt jebkuru personu vai institūciju sniegt savu viedokli par lietu vai lietas atrisināšanai būtiskiem specifiskiem jautājumiem.[1148] Tāpat arī, ja būtisko faktu konstatācijai ir nepieciešamas speciālas zināšanas kādā jomā (zinātnes, mākslas, utt.), tiesa var lūgt ekspertu sniegt viedokli.[1149]

Vai ir lietas, kurās tiesa pašierobežojās, jo pastāvēja tiesas kļūdas risks?

Tiesa nekad nav tieši atsaukusies uz tiesas kļūdu; taču šķiet, ka tās atteikšanās pārvērtēt likumdevēja lēmumus par politisko lietderību ir "pietiekami stingru juridisko kategoriju un standartu"[1150], pēc kuriem vērtēt šo lietderību, neesamība. Citiem vārdiem sakot, tiesa nevar būt pārliecināta par to, ka tās apsvērumi par politisko lietderību būtu pareizāki par likumdevēja apsvērumiem. Bez skaidra tiesiska pamata pieņemti tiesas lēmumi neizbēgami būs kaut kādā mērā patvaļīgi un tāpēc disponēti uz tiesas kļūdu.

Vai ir lietas, kurās tiesa pašierobežojās, atsaucoties uz lēmuma pieņēmēja institucionālo vai demokrātisko leģitimitāti?

Jā, būtībā visas iepriekšējās kā piemēri minētās situācijas, kurās Satversmes tiesa atsaucās uz likumdevēja plašo rīcības brīvību, attiecas uz likumdevēja demokrātisko leģitimitāti: "Satversmes tiesa tās kompetencē esošu jautājumu vērtē tiktāl, ciktāl uz to iespējams attiecināt juridiskos argumentus, tos nošķirot no tiesībpolitiskajiem argumentiem. Par politiski risināmiem jautājumiem jālemj demokrātiski leģitimētiem politiskiem valsts orgāniem, pirmām kārtām likumdevējam". [1151]

"Jo lielākā mērā likumdošana attiecas uz plašas sociālās politikas jautājumu, jo mazāk tiesa būs gatava iejaukties." Vai šis standarts pastāv attiecībā uz jūsu tiesu? Vai jūsu tiesa atbalsta nostāju, ka politiskie

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Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/06/2020-33-01_Judgement.pdf.

1146 Satversmes tiesas 2009. gada 7. aprīļa sprieduma lietā nr. 2008-35-01, 11.2. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2008/09/2008-35_01_ENG.pdf.

1147 Skat. Satversmes tiesas likuma 22. panta otrās daļas 2. punktu un trešo daļu, pieejams tulkojums angļu valodā: https://likumi.lv/ta/en/en/id/63354-constitutional-court-law.

1148 Tā ir ierasta prakse, praktiski visās tiesas izskatītajās lietās.

1149 Skat. Satversmes tiesas likuma 22. panta otrās daļas 3. punktu; šī iespēja tiek izmantota ļoti reti.

1150 Satversmes tiesas 2009. gada 20. janvāra lēmuma par tiesvedības izbeigšanu lietā nr. 2008-08-0306 12. punkts. Lēmums pieejams tikai latviešu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-08-0306_Lemums_izbeigsana.pdf.

1151 Satversmes tiesas 2012. gada 19. decembra lēmuma par tiesvedības izbeigšanu lietā nr. 2012-03-01 13.4. punkts. Pieejams lēmuma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2012/01/2012-03-01_Lemums_izbeigsana_ENG.pdf.

jautājumi ir jāizlemj demokrātiskos procesos, jo tiesas nav ievēlētas un tās nav demokrātiski pilnvarotas izlemt politiskus jautājumus?

Tas precīzi apraksta Satversmes tiesas pieeju. Kā minēts iepriekš, tiesa pati ir skaidri norādījusi, ka, "jo mazāku rīcības brīvību Satversme piešķir likumdevējam, jo stingrāk Satversmes tiesai jākontrolē šīs brīvības izmantošana, un otrādi: jo plašāka ir likumdevēja rīcības brīvība, jo mazāk Satversmes tiesai jāiejaucas šīs brīvības izmantošanā".[1152]

Vai jūsu tiesa pieņem vispārējo pašierobežošanās principu, spriežot par sodu filozofiju un politiku?

Jā, pieņem. Tiesa ir šādi raksturojusi savu pieeju sodu politikai:

Satversmes tiesa izskata un izvērtē konkrēto lietu tikai tiktāl, ciktāl uz to iespējams attiecināt tiesību (juridiskos) argumentus, tos atdalot no tiesībpolitiskiem argumentiem. Tiesībpolitiskie apsvērumi nosaka sasniedzamo mērķi, t.i., vispārēja rakstura ekonomiskās, politiskās vai sociālās izmaiņas. Savukārt juridisko apsvērumu rezultāts ir noteikumi, kas jāievēro nevis tādēļ, ka tie paši par sevi nodrošinātu vēlamo ekonomisko, politisko un sociālo situāciju, bet gan tādēļ, ka to prasa tiesiskums. Proti, tiesiskuma princips citastarp prasa, lai, pieņemot jaunu regulējumu vai arī grozot spēkā esošo tiesisko regulējumu ,lēmuma pieņēmējs ievērotu gan atbilstošu procedūru, gan augstāka juridiskā spēka tiesību normu prasības. Tomēr tiesību sistēmā ietilpst arī tādi jautājumi, kuru izlemšanai nav noteiktas stingras juridiskās robežas, bet kuros pieņemamie lēmumi ir atkarīgi galvenokārt no politiskās lietderības. Par šādiem jautājumiem ir jālemj demokrātiski leģitimētiem politiskiem valsts orgāniem, pirmām kārtām –likumdevējam [..]

Satversmes tiesa norāda, ka likumdevējam ir plaša rīcības brīvība noteikt sodus par konkrētiem nodarījumiem, kā arī paredzēt nosacījumus personas atbrīvošanai no atbildības par tiem. Šādu regulējumu pieņemot, likumdevējs parasti balstās uz priekšstatiem, uzskatiem un vērtībām, ko akceptējusi sabiedrība un ko tas ir tiesīgs izteikt normatīvā veidā. Likumdevējs, veidojot sodu politiku, nosaka personas uzvedības ietvarus, tādējādi aizsargājot sabiedrības drošību.[..]

Tas nozīmē, ka Satversmes tiesas kompetencē ietilpstošā pārbaude sniedzas vienīgi tiktāl, lai izvērtētu ,vai likumdevējs nav acīmredzami pārkāpis tam Satversmē noteiktās rīcības brīvības robežas [..]

[..] Par Satversmē noteikto rīcības brīvības robežu pārkāpšanu būtu uzskatāma, piemēram, tāda situācija, ka tiesību norma būtiski apdraud personas pamattiesības.[1153]

Iespējami izņēmuma apstākļi, kad valdība nevar atklāt tiesai informāciju, it īpaši nacionālās drošības kontekstā, saistībā ar slepenu operatīvo informāciju. Vai jūsu tiesa ir pašierobežojusies, pamantojot to ar nacionālās drošības apsvērumiem?

Satversmes tiesas praksē šādas situācijas nav bijušas.

Ņemot vērā tiesu kā konstitūcijas sarga lomu, vai tām vajadzētu spēcīgāk iejaukties politikā (veikt stingrāku pārbaudi), kad valdības ir pasīvas attiecībā uz cilvēktiesībām atbilstošu reformu ieviešanu?

Parasti likumdevēja pasivitāte, ieviešot tiesībām atbilstošas reformas, neietekmē Satversmes tiesas pārbaudes līmeni. Tiesa bieži norāda uz nepieciešamību veikt reformas kā *obiter dicta*.[1154]

1152 Satversmes tiesas 2006. gada 8. novembra sprieduma lietā nr. 2006-04-01 15.3. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2006/03/2006-04-01_Spriedums_ENG.pdf.

1153 Satversmes tiesas 2013. gada 19. novembra sprieduma lietā nr. 2013-09-01 10. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2013/05/2013-09-01_Spriedums_ENG.pdf.

1154 Skat, piemēram, Satversmes tiesas 2018. gada 11. oktobra sprieduma lietā nr. 2017-30-01 19. punktu (pieejams tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2017/11/2017-30-01_Judgment.pdf): "Tomēr Satversmes

Nozīmīgs izņēmums ir lieta par nodevas maksāšanu par mantojumu, kas saņemts no viendzimuma partnera.[1155] Šajā lietā tiesa norādīja, ka Saeima vēl nav izveidojusi sistēmu viendzimuma partneru veidotu ģimeņu tiesiskai atzīšanai un aizsardzībai.[1156] Tāpēc tiesa vienkārši norādīja, ka attiecīgajā laikā valsts bijusi "tiesiski akla" attiecībā uz viendzimuma partneru ģimenēm, un tieši šī iemesla dēļ atzina apstrīdēto normu par neatbilstošu Satversmei.

Lēmumu pieņēmējs

Vai jūsu tiesa pašierobežojas vairāk attiecībā uz parlamenta pieņemtu likumu nekā izpildvaras lēmumu? Vai jūsu tiesas pašierobežošanās pakāpe ir atkarīga no sākotnējā lēmuma pieņēmēja demokrātiskās atbildības pakāpes?

Kā izriet no šīs anketas I daļā sniegtajām atbildēm, Satversmes tiesas praksē "tiesas pašierobežošanās" pakāpe ir primāri atkarīga no lietas būtības. Taču tiesas pašierobežošanos patiešām nosaka apsvērumi par to, ka daži jautājumi ir politiski jāizlemj demokrātiski leģitimētam likumdevējam. Demokrātiskās leģitimitātes līmenis ir zemāks tad, ja normatīvos aktus ir pieņēmuši citi valsts orgāni, un šajos gadījumos Satversmes tiesa stingri kontrolē, vai šie orgāni ir ievērojuši likumdevēja noteiktās to pilnvarojuma robežas.

Piemēram, attiecībā uz pašvaldību pieņemtajiem normatīvajiem aktiem, tiesa ir spriedusi šādi:

> Atbilstoši Satversmes 64. pantam likumdošanas tiesībaspieder tautai un Saeimai. Lai nodrošinātu efektīvāku valsts varas īstenošanu, ir pieļaujams, ka likumdevējs likumdošanas procesā izlemj svarīgākos jautājumus, bet detalizētāku noteikumu un likumu ieviešanai dzīvē nepieciešamo tehnisko normu izstrādāšanu deleģē Ministru kabinetam vai citām valsts institūcijām [..]. Likumdevējs atsevišķu jautājumu izlemšanu var nodot arī pašvaldību kompetencē. Tātad arīpašvaldības domeipilnvarojuma robežās ir tiesības izdot vispārsaistošus (ārējus) normatīvostiesībuaktus. Tomēr pašvaldības domei nav likumdevēja rīcības brīvības un tā ir tiesīga izdotārējos normatīvos tiesību aktustiesa vērš uzmanību uz to, ka informācijas tehnoloģiju straujās attīstības rezultātā ir būtiski paplašinājušās arī tiesu iespējas piekļūt dažādām datubāzēm, bet apstrīdētajās normās ietvertais regulējums attiecībā uz tiesas lomu civilprocesā pēc savas būtības zināmā laika posmā nav mainījies. Satversmes tiesa jau daudzkārt norādījusi, ka likumdevējam ir pienākums periodiski apsvērt, vai konkrētais tiesiskais regulējums joprojām ir efektīvs, piemērots un nepieciešams un vai tas kādā veidā nebūtu pilnveidojams [..]. Tehnoloģiju, tiesu sistēmas un sabiedrības locekļu savstarpējo tiesisko attiecību attīstības rezultātā tiesiskais regulējums, kas savulaik bijis atbilstošs augstāka juridiska spēka tiesību normām, var novecot un galu galā pat pārkāpt personas pamattiesības". Skat. arī 2012. gada 2. maija sprieduma lietā nr. 2011-17-03 14.1. punktu (pieejams tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2011/08/2011-17-03_Spriedums_ENG.pdf).

1155 Satversmes tiesas 2021. gada 8. aprīļa sprieduma lietā nr. 2020-34-03 13. punkts (pieejams tikai latviešu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/07/2020-34-03_spriedums.pdf).

1156 Agrākā lietā (2020. gada 12. novembra spriedums lietā nr. 2019-33-01, pieejams tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/12/2019-33-01_Judgment.pdf) tiesa atzinusi, ka pienākums izveidot šādu sistēmu izriet no Latvijas Satversmes 110. panta. Līdz brīdim, kad tiesa izsprieda lietu nr. 2020-34-03, likumdevējam piešķirtais pārejas periods likumdošanas grozīšanai, kas bija noteikts spriedumā lietā nr. 2019-33-01, vēl nebija beidzies.

kai likumos noteiktajos gadījumos un apjomā [..]. Pilnvarojuma apjoms nosakato, ciktāl pašvaldības dome var rīkoties, izstrādājot un izdodot tiesību normas.[1157]

Kādu nozīmi jūsu tiesa piešķir likumdošanas vēsturei? Cik tiesiski nozīmīgi ir , ja vispār ir, parlamenta apsvērumi, tiesai vērtējot atbilstību cilvēktiesībām?

Likumdošanas vēstures vērā ņemšana ir viena no Satversmes tiesas izmantotajām četrām iztulkošanas metodēm. Tiek piemērotas visas četras metodes, neviena no tām nav pārāka par citām: "gramatiskā iztulkošanas metode ir tikai viena no iztulkošanas metodēm un nav pareizi vadīties vienīgi pēc tiesību normas vārdiskās jēgas. Interpretējot tiesību normu, nepieciešams izmantot arī citas tiesību normu interpretācijas metodes –vēsturisko, sistēmisko un teleoloģisko metodi. Norma ir atzīstama par neskaidru tad, ja ar iztulkošanas paņēmienu palīdzību nav iespējams noskaidrot tās patieso jēgu".[1158]

Tiesa analizē likumdošanas vēsturi, vērtējot, vai apstrīdēta norma ir pieņemta pienācīgā likumdošanas procesā.[1159]

Vai jūsu tiesa pārliecinās par to, vai lēmuma pieņēmējs ir pamatojis savu lēmumu un vai šis ir lēmums, kuru būtu pieņēmusi tiesa, ja tā būtu bijusi lēmuma pieņēmēja?

Atbilstoši pamatošanas principam jebkuram valsts institūcijas lēmumam jābūt pamatotam, jo tikai tādējādi tiesa var pārliecināties, ka šīs iestādes darbībā nav pieļauta patvaļība. Vienīgais izņēmums ir tīri politiski lēmumi bez tiesiskās dimensijas, kurus tiesas nevar pārbaudīt. Satversmes tiesa savā procesā prasa institūcijai, kas pieņēmusi apstrīdēto tiesību aktu, norādīt sava lēmuma pamatojumu. Piemēram, ja ir ierobežotas pamattiesības, institūcijai ir jāparāda, ka ierobežojumam ir leģitīms mērķis un ka tas ir samērīgs. No otras puses, pamatojoties uz objektīvas izmeklēšanas principu, tiesai jāvērtē ne tikai institūcijas sniegtais pamatojums, bet arī jāapskata visi lietas apstākļi kopsakarā un jāsniedz savs viedoklis par leģitīmā mērķa pastāvēšanu/ nepastāvēšanu un ierobežojuma samērīgumus. Vispār tiesa nemēģina konstatēt, kādu lēmumu tā būtu pieņēmusi, ja tā būtu likumdevējs, gluži pretēji: "noskaidrojot saudzējošāka risinājuma iespējamību, tiesa nevar darboties likumdevēja un valsts pārvaldes vietā un pati meklēt optimālus risinājumus, jo tas ir tiesību normas pieņēmēja uzdevums".[1160]

Vai tiesa pašierobežojas, atkarībā to tā, cik lielā mērā pirms lēmuma vai pasākuma pieņemšanas tika veikta pilnvērtīga atbilstības pamattiesībām izpēte? Cik dziļai jābūt likumdošanas izpētei, piemēram, pirms jūsu tiesa, galu galā, uzskatīs to par nozīmīgu?

Satversmes tiesa nekad nav skaidri paudusi, ka tā atstātu likumdevējam plašāku rīcības brīvību, ja likumdošanas izpēte bijusi pietiekami dziļa. Patiesībā ir tieši pretēji: laba likumdošanas procesa princips[1161] prasa, lai likumdevējs izvērtētu visu būtisko informāciju, ieskaitot tiesību normas projekta atbilstību pamattiesībām. Ja Satversmes tiesa secina, ka izpēte nav bijusi pietiekami dziļa un tas būtu varējis novest pie cita likumdošanas procesa iznākuma, tiesa secina, ka ir pieļauts būtisks laba likumdošanas procesa principa pārkāpums, kas pats par sevi ir iemesls atzīt attiecīgo tiesību normu par spēkā neesošu. Lai nonāktu pie šāda secinājuma, Satversmes tiesai ir jāatzīst, ka: (1) likumdevējam bija pienākums izvērtēt atbilstību pamattiesībām; (2) likumdevējs vispār nav veicis šādu izvērtējumu

1157 Satversmes tiesas 2016. gada 12. februāra sprieduma lietā nr. 2015-13-03 14.1. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2015/05/2015-13-03_Spriedums_ENG.pdf.

1158 Satversmes tiesas 2020. gada 11. decembra sprieduma lietā nr. 2020-26-0106 16.2. punkts. Pieejams sprieduma tulkojums angļu valodā https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-26-0106_Judgement.pdf.

1159 Vairāk par to, kā Satversmes tiesa piemēro labas likumdošanas procesa principu, atbildēs uz 14. un 15. jautājumu.

1160 Satversmes tiesas 2019. gada 16. maija sprieduma lietā nr. 2018-17-03 20.2. punkts. Spriedums pieejams tikai latviešu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/08/2018-17-03_Spriedums.pdf.

1161 Pirmo reizi tiesa to identificēja savā 2019. gada 6. marta spriedumā lietā nr. 2018-11-01. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2018/07/2018-11-01_Judgement.pdf.

vai izvērtējums nav veikts pienācīgi un (3) ja šis izvērtējums būtu (pienācīgi) veikts, tad iznākums būtu bijis citādāks.

Vai jūsu tiesa analizē to, vai, pieņemot kādu tiesību normu, parlamenta debatēs bija pilnībā atspoguļoti pretējie viedokļi? Vai pietiek ar to, ka bijušas plašas vispārīgas debates par likumprojektu, vai arī uzmanība mērķtiecīgāk jāpievērš ietekmei uz tiesībām?

Vērtējot, vai likumdošanas process atbildis labas likumdošanas procesa principam, tiesa prasa, lai parlaments būtu devis pilnvērtīgu iespēju visiem parlamenta locekļiem paust savus uzskatus.[1162] Taču nepastāv formāla prasība, ka parlamenta debatēs būtu jāapspriež likumprojektu ietekme uz cilvēktiesībām. Taču ir jāredz, ka parlaments ir zinājis par šādu ietekmi un ka šis fakts ir ņems vērā. Piemēram, var pietikt ar to, ka likumprojekta atbilstība cilvēktiesībām ir analizēta likumprojekta anotācijā. Ja parlamentārieši ir apmierināti ar šādu analīzi, netiek prasīts to pieminēt parlamenta debatēs. Satversmes tiesa ir skaidrojusi, ka likumdošanas materiāliem ir jādod sabiedrībai "iespēja saprast, kāpēc likumdevējs noteicis konkrētu pamattiesību ierobežojumu un kādu apsvērumu dēļ šāds ierobežojums demokrātiskā tiesiskā valstī ir pieļaujams. Šīs prasības ir jāievēro, nosakot jebkuru pamattiesību ierobežojumu".[1163]

Vai tas, ka lēmumu pieņēmis likumdevējs vai ka tas pieņemts pēc konsultācijām ar sabiedrību vai sabiedrisku apspriešanu, ir pārliecinošs pierādījumus lēmuma demokrātiskajai leģitimitātei?

Konsultācijas ar sabiedrību vai apspriešana noteikti ir viens no likumdošanas procesa elementiem, kas veido demokrātiskās leģitimitātes pamatu.[1164] Taču tas, ka ir notikušas konsultācijas ar sabiedrību, ne vienmēr ir pārliecinošs pierādījums tam, ka lēmums ir demokrātiski leģitīms, un otrādi – tas, ka konsultācijas ar sabiedrību nav notikušas, ne vienmēr nozīmē, ka attiecīgajam jautājumam trūkst demokrātiskās leģitimitātes. Piemēram, ar Covid19 saistītajās lietās Satversmes tiesa ņēma vērā situācijas steidzamību un nesecināja, ka konsultāciju ar sabiedrību neesamība kā tāda būtu labas likumdošanas principa pārkāpums.[1165] Kopumā Satversmes tiesa raugās uz pienākumu konsultēties ar sabiedrību kā uz saturisku, nevis formālu pienākumu: ir svarīgi, lai likumdevēja rīcībā būtu tik daudz būtiskas informācijas, cik tas ir iespējams kontekstā, kurā jāpieņem lēmums.

Tiesību tvērums, leģitimitāte un samērība

Vai jūsu tiesa ir kādreiz pašierobežojusies tiesību definēšanas stadijā, ņemot vērā valdības piedāvāto tiesību definīciju vai šīs definīcijas faktisko piemērošanu?

Nē, tā tas nav. Satversmes tiesa uzskata par savu pienākumu sniegt savu Satversmes garantēto pamattiesību tvēruma interpretāciju. No otras puses, situācija ir citāda attiecībā uz tādu tiesību normu interpretāciju, kas ir zemākā līmenī par konstitucionālo. Tiesa ir vairākkārt konstatējusi, ka ir neiespējami pienācīgi izprast tiesību normu, apskatot to izolēti no tās piemērošanas praksē un ārpus tās tiesību sistēmas, kurā tā darbojas.[1166] Tas nozīmē, ka reizēm tiesa izvēlēsies neapšaubīt apstrīdētas tiesību

1162 Skat., piemēram, Satversmes tiesas 2019. gada 6. marta sprieduma lietā nr. 2018-11-01 18.1. punktu. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2018/07/2018-11-01_Judgement.pdf. Skat arī 2023. gada 7. decembra sprieduma lietā nr. 2022-20-01 15. punktu. Pagaidām spriedums pieejams tikai latviešu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/06/2022-20-01_Spriedums.pdf.

1163 Satversmes tiesas 2021. gada 27. maija sprieduma lietā nr. 2020-49-01 24.2. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/09/2020-49-01_Judgment.pdf.

1164 Skat., piemēram, Satversmes tiesas 2013. gada 5. aprīļa sprieduma lietā nr. 2012-20-03 10. punktu,=. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2012/10/2012-20-03_Spriedums_ENG.pdf.

1165 Skat., piemēram Satversmes tiesas 2020. gada 11. decembra sprieduma lietā nr. 2020-26-0106 16.1. punktu. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-26-0106_Judgement.pdf.

1166 Skat., piemēram, Satversmes tiesas 2013. gada 28. jūnija sprieduma lietā nr. 2012-26-

normas interpretāciju, bet pašierobežosies, pieņemot to, kā to interpretējuši šīs normas pastāvīgie piemērotāji. No otras puses, šāda pieeja nav absolūta – tiesa bieži izvēlas autonomu interpretāciju.

Vai piemērojamo pamattiesību raksturs ietekmē pašierobežošanās pakāpi? Vai jūsu tiesa uzskata dažas tiesības vai tiesību aspektus par svarīgākiem un tāpēc par tādiem, kas pelnījuši stingrāku pārbaudi nekā citi?

Kā norādīts atbildē uz iepriekšējo jautājumu, Satversmes tiesa neveic pašierobežošanos attiecībā uz pamattiesību tvēruma noteikšanu; jebkura izrādīta pašierobežošanās attiecas uz likumdevējam atstāto rīcības brīvību, lemjot par pamattiesību ierobežojumiem. Kā norādīts atbildē uz 2. jautājumu, tā tas ir attiecībā uz, piemēram, sociālajām tiesībām, veselības aprūpes jautājumiem, sodu politiku, nodokļiem vai valsts budžetu.

Vai, vērtējot likuma konstitucionalitāti, jums ir skaidrības skala? Kā jūs izlemjat, cik skaidrs ir likums? Vai piemērojat kanonu *in claris non fit interpretatio* ?

Satversmes tiesa ir interpretējusi Satversmes 90. pantu (tiesības zināt savas tiesības) tādējādi, ka no tā izriet likumdevēja pienākums nodrošināt, lai tiesību normas būtu pietiekami skaidras.[1167] Tas nozīmē, ka tiesību normas ir jāformulē tik vienozīmīgi, ka tās iespējams interpretēt pareizi.[1168] No otras puses, tiesa ir atzinusi pašsaprotamu patiesību, ka likumi to tiesiskās dabas dēļ ir abstrakti un ka tos nav iespējams formulēt ar absolūtu precizitāti.[1169]

Standarts, ko tiesa piemēro, vērtējot likumu skaidrību, ir tas, ka pamattiesības ierobežojošajai normai ir jābūt formulētai pietiekami precīzi, lai persona varētu regulēt savu rīcību, nepieciešamības gadījumā saņemot atbilstošas konsultācijas.[1170] Pievēršoties jautājumam par skaidrību no pretējās puses, tiesa ir lēmusi, ka tiesību norma ir jāatzīst par neskaidru, ja, izmantojot tiesību interpretācijas metodes, nav iespējams konstatēt tās patieso nozīmi.[1171]

Attiecībā uz skaidrības skalu tiesa ir tikai norādījusi, ka lielāka skaidrības pakāpe tiek prasīta no tiesību normām, kas paredz kriminālatbildību, jo kriminālatbildība ir vissmagākais iespējamais tiesiskās atbildības veids.[1172]

Visbeidzot, Satversmes tiesa nekad nav pieminējusi kanonu *in claris non fit interpretatio*. Gluži pretēji, iespējams, iedvesmojoties no Ārona Baraka darbiem, tiesa uzsvērusi, ka ikviena tiesību norma vienmēr ir jāinterpretē: "lai cik precīzi un skaidri būtu formulētas tiesību normas, to saturs vienmēr būs noskaidrojams interpretācijas ceļā".[1173]

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03 12.1. punktu. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2012/12/2012-26-03_Spriedums_ENG.pdf.

1167 Satversmes tiesas 2006. gada 20. decembra sprieduma lietā nr. 2006-12-01 16. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2006/07/2006-12-01_Spriedums_ENG.pdf.

1168 Satversmes tiesas 2010. gada 19. jūnija sprieduma lietā nr. 2010-02-01 9.4.1. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/01/2010-02-01_Spriedums_ENG.pdf.

1169 Satversmes tiesas 2019. gada 21. februāra sprieduma lietā nr. 2018-10-0103 18.1. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2018/06/2018-10-0103_Judgment.pdf.

1170 Satversmes tiesas 2011. gada 30. marta sprieduma lietā nr. 2010-60-01 15.2. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/08/2010-60-01_Spriedums_ENG.pdf.

1171 *Ibid*.

1172 Satversmes tiesas 2019. gada 21. februāra sprieduma lietā nr. 2018-10-0103 13.2. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2018/06/2018-10-0103_Judgment.pdf.

1173 Satversmes tiesas 2019. gada 21. februāra sprieduma lietā nr. 2018-10-0103 18.1. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/wp-

Cik intensīva ir jūsu tiesas veiktā kontrole, pārbaudot leģitīmo mērķi?

Satversmes tiesa ir vairākkārt norādījusi, ka institūcijai, kas ir pieņēmusi tiesā apstrīdēto tiesību aktu, ir pienākums norādīt, kāds ir pamattiesību aizskāruma leģitīmais mērķis.[1174] Tomēr tiesai nav saistoša likumdevēja nostāja šajā ziņā; Satversmes tiesa ir norādījusi, ka tai ir pienākums pēc savas iniciatīvas veikt visu lietā būtisko apstākļu izvērtējumu un konstatēt leģitīmā mērķa esamību vai neesamību.[1175] Praksē tas nozīmē to, ka tiesa var piekrist vai nepiekrist likumdevēja viedoklim vai pat secināt, ka leģitīmais mērķis pastāv, pat ja likumdevējs nav to norādījis. Atbilstoši likumdevēja pienākumam regulāri pārvērtēt, vai nepieciešams turpināt ierobežot pamattiesības, Satversmes tiesa vērtē leģitīmā mērķa esamību vai neesamību laikā, kad tā skata lietu, "ievērojot pašreizējo sabiedrības un valsts demokrātiskās attīstības pakāpi".[1176] Tas nozīmē, ka ir iespējamas situācijas, kad leģitīmais mērķis ir pastāvējis pirms laika, kad tika pieņemtā apstrīdēta norma, bet vairs nepastāv laikā, kad tiesa skata attiecīgo lietu.[1177]

Kādu samērības pārbaudi tiesa izmanto? Vai jūsu tiesa piemēro visus "klasiskās" samērības pārbaudes posmus (proti, piemērotība, nepieciešamība un samērība šaurā izpratnē)?

Satversmes tiesa izmanto tieši šo pārbaudi.[1178]

Vai jūsu tiesa izskata visus piemērojamos samērības pārbaudes soļus?

Satversmes tiesas procesa efektivitātes apsvērumu dēļ parasti neanalizē citus samērības pārbaudes soļus, ja konstatē neatbilstību vienam no tiem.[1179] Taču jāatzīmē, ka tiesa vienmēr veic samērības pārbaudi precīzi vienā secībā: 1) piemērotība, 2) nepieciešamība un 3) samērība šaurākā izpratnē. Tātad, pat ja tiesa uzskatītu, ka pamattiesību ierobežojums nav bijis nepieciešams, tā tik un tā neizlaistu piemērotības soli.

Vai ir gadījumi, kad jūsu tiesa pieņem, ka apstrīdētais mērs atbilst vienam vai vairākiem samērības pārbaudes soļiem, pat ja varētu šķist, ka tam nav pietiekamu pierādījumu?

Satversmes tiesas praksē nav atrodami šādas pieejas piemēri. Atbilstoši objektīvas izmeklēšanas principam, ja nepieciešams, Satversmes tiesa vienmēr apkopo nepieciešamo informāciju ("pierādījumus") pēc savas iniciatīvas.

Vai samērības izvērtējuma uzsākšana jūsu tiesas judikatūrā notikusi līdztekus tiesu pašierobežošanās

-content/uploads/2018/06/2018-10-0103_Judgment.pdf.

1174 Satversmes tiesas 2007. gada 8. jūnija sprieduma lietā nr. 2007-01-01 23. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/01/2007-01-01_Spriedums_ENG.pdf.

1175 *Ibid*.

1176 Satversmes tiesas 2022. gada 3. novembra spriedums lietā nr. 2021-43-01, 13. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/12/2021-43-01_Judgment.pdf.

1177 Skat., piemēram, Satversmes tiesas 2010. gada 2. februāra spriedumu lietā nr. 2009-46-01, 12. punkts. Pieejams sprieduma tulkojums angļu valodā https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/07/2009-46-01_Spriedums_ENG.pdf.

1178 Skat., piemēram Satversmes tiesas 2022. gada 22. decembra sprieduma lietā nr. 2022-09-01 16. punktu. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/03/2022-09-01_Judgment.pdf.

1179 Skat., piemēram,, Satversmes tiesas 2018 gada 11. oktobra sprieduma lietā nr. 2017-30-01 15. punktu (pieejams tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2017/11/2017-30-01_Judgment.pdf). Tomēr reizēm no šīs pieejas bijuši pieļauti izņēmumi; skat., piemēram, 2018. gada 11. oktobra sprieduma lietā nr. 2007-23-01 16.2. un 16.3. punktus (pieejams tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/10/2007-23-01_Spriedums_ENG.pdf), kurā tiesa turpināja samērīguma šaurākā izpratnē analīzi, kaut arī bija konstatējusi, ka pastāv mazāk ierobežojošas alternatīvas.

doktrīnas uzplaukumam?

Kā parāda iepriekšējās atbildes, Satversmes tiesas judikatūrā ir grūti konstatēt īpašu "pašierobežošanās doktrīnas uzplaukumu", tāpēc nav iespējams izteikt pieņēmums par korelāciju starp šo parādību un samērības doktrīnas attīstību (ko tiesa pirmo reizi piemēroja 2000.g.,[1180] mazāk nekā divus gadus pēc Satversmes Pamattiesību nodaļas pieņemšanas).

Vai ECT judikatūra ir ietekmējusi jūsu tiesas pieeju attiecībā uz pašierobežošanos? Vai ECT rīcības brīvības doktrīna ir ekvivalenta tai valsts rīcības brīvībai, ko pieļauj jūsu tiesa? Jā nē, cik bieži ECT apsvērumi attiecībā uz rīcības brīvību pārklājas ar jūsu tiesas apsvērumiem par pašierobežošanos līdzīgās lietās?

Te vēlreiz jāatkārto, ka Satversmes tiesas judikatūrā nav konstatējama konsekventa tiesas pašierobežošanās doktrīna. Ir zināma pārklāšanās starp jomām, kurās ECT piešķir dalībvalstīm lielāku rīcības brīvību, un kurās Satversmes tiesa atzīst plašāku likumdevēja rīcības brīvību (piemēram, attiecībā uz veselības aprūpes sistēmas organizāciju); tomēr jāteic, ka tā drīzāk ir sakritība nevis cēloņsakarība, jo ECT rīcības brīvības pamatojums (subsidiaritāte) un iemesli, kāpēc notiek paļaušanās uz likumdevēja rīcības brīvību (varas dalīšana, demokrātijas leģitimitāte) ir ļoti atšķirīgi.

Vai ECT ir atzinusi jūsu valsti par vainīgu jūsu tiesas izrādītās pašierobežošanās konkrētā lietā dēļ, tādas pašierobežošanās, kas padarījusi to par neefektīvu tiesību aizsardzības līdzekli?

Kaut arī ECT reizēm nav piekritusi Satversmes tiesas dažu lietu vērtējumam pēc būtības (piemēram, *Andrejeva pret Latviju*), tas nav bijis Satversmes tiesas pārliekas pašierobežošanās dēļ. Noteiktās situācijās ir apšaubīta Satversmes tiesas efektivitāte, it kā tāpēc, ka tiesa pārāk stingri piemērojusi pieņemamības kritērijus, taču tas nav saistīts ar pašierobežošanos.

Citas īpatnības

Cik bieži pašierobežošanās jautājums parādās jūsu tiesas izspriestajās cilvēktiesību lietās?

Skat. atbildes uz 1. un 2. jautājumu. Vairums Satversmes tiesas izskatīto lietu ir saistītas ar tiesību normu atbilstību cilvēktiesībām. Nekādas īpatnības saistībā tieši ar cilvēktiesību lietam nav konstatējamas. Tiesa ir norādījusi, ka tās galvenais uzdevums ir nodrošināt cilvēktiesību un brīvību aizsardzību.[1181] Tā varētu būt netieša norāde par to, ka tā daudz nelabprātāk izrādītu pašierobežošanos cilvēktiesību lietās.

Vai jūsu tiesas pašierobežošanās ir pastiprinājusies laika gaitā?

Kā norādīts iepriekš, ir grūti izmērīt Latvijas Satversmes tiesas pašierobežošanās pakāpi laika gaitā. Iespējams, varētu pat teikt, ka tiesa laika gaitā kļuvusi aktīvāka (labs piemērs ir tiesas identificētais laba likumdošanas procesa princips, kas aprakstīts atbildēs uz 14. un 15. jautājumu).

Vai pašierobežojošā attieksme ir atkarīga no jūsu tiesas noslodzes?

Šāda korelācija nav konstatējama.

Vai jūsu tiesa var balstīt savus lēmumus pušu neizvirzītos argumentos? Vai tiesa var pārklasificēt sniegtos argumentus atbilstoši citai konstitūcijas normai nevis tai, uz kuru atsaucies pieteikuma iesniedzējs?

Jā, tiesa vadās pēc objektīvās izmeklēšanas principa. Tas nozīmē, ka pušu argumenti ir tikai viens

1180 Satversmes tiesas 2000. gada 30. augusta spriedums lietā nr. 2000-03-01. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2000/03/2000-03-01_Spriedums_ENG.pdf.

1181 Satversmes tiesas 2012. gada 3. februāra sprieduma lietā nr. 2011-11-01 11.1. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2011/05/2011-11-01_Spriedums_ENG.pdf.

no apsvērumiem, kurus tiesa ņem vērā.[1182] Objektīvās izmeklēšanas princips nozīmē, ka tiesa pati konstatē lietas atrisināšanai nepieciešamos argumentus un pierādījumus. [1183] Tipisks piemērs tam ir situācijas, kurās tiesa neaprobežojas ar pieteicēja izvirzīto pamattiesības mazāk ierobežojošo alternatīvo risinājumu analīzi, bet tā vietā pati identificē saudzējošākas alternatīvas.[1184]

Kas attiecas uz pieteikuma iesniedzēju argumentu pārkvalificēšanu, tiesa parasti neierosina lietu saistībā ar tādām konstitucionālajām normām, uz kurām pieteikuma iesniedzējs nav atsaucies. Proti, ja pieteikuma iesniedzējs apstrīd noteiktas tiesību normas atbilstību, piemēram, tiesībām uz taisnīgu tiesu, tad tiesa pēc savas iniciatīvas neierosinās lietu par apstrīdētās normas atbilstību, piemēram, tiesībām uz privātās dzīves neaizskaramību. Tomēr, kā norādīts iepriekš, tā kā tiesa izmanto pieteikuma iesniedzēja minētos argumentus kā vienus no vērā ņemamiem apsvērumiem, nekas to nekavē pārkvalificēt pieteicēja argumentus, skatot lietu pēc būtības.

Vai jūsu tiesa var paplašināt konstitucionalitātes kontroli attiecībā uz citu tiesību normu, kas nav tiesā apstrīdēta, bet kura ir saistīta ar pieteikuma iesniedzēja situāciju?

Jā, tiesa var to darīt un ir darījusi vairāk nekā 20 reizes. Tam ir divējādi iemesli. Pirmkārt, kā norādīts iepriekš, Satversmes tiesa uzskata par savu pienākumu nodrošināt "tādas tiesību sistēmas pastāvēšanu, kurā pēc iespējas pilnīgāk un aptverošāk tiktu novērsts regulējums, kas neatbilst Satversmei vai citām augstāka juridiskā spēka tiesību normām (aktiem), kā arī dot savu vērtējumu konstitucionāli nozīmīgos jautājumos".[1185] Otrkārt, procesuālās ekonomijas princips noteic, ka nebūtu lietderīgi, ka Satversmes tiesai nāktos atkārtoti lemt par jautājumiem, kurus iespējams atrisināt jau ierosinātas lietas ietvarā.[1186]

Taču šo pieeju ierobežo tā dēvētā "ciešās saistības koncepcija", atbilstoši kurai, lemjot, vai ir iespējams un nepieciešams paplašināt lietas tvērumu, tiesa konstatē, "pirmkārt, vai tā norma, attiecībā uz kuru prasījums tiek paplašināts, ir tik cieši saistīta ar lietā *expressis verbis* apstrīdēto normu, ka tās [konstitucionalitātes] izvērtēšana iespējama tā paša pamatojuma ietvaros vai nepieciešama konkrētās lietas izlemšanai, un, otrkārt, vai prasījuma robežu paplašināšana ir nepieciešama Satversmes tiesas procesa principu ievērošanai".[1187]

Piemēram, iepriekš citētā lieta, kas attiecās uz šķīrējtiesu spriedumu atzīšanu Latvijas civilprocesā, normas, attiecībā uz kurām lieta bija ierosināta (un kuras Satversmes tiesa atzina par nekonstitucionālām), bija atkārtotas citā likumā, kam bija jāstājas spēkā pēc Satversmes tiesas sprieduma stāšanās spēkā. Lai novērstu nepieciešamību uzsākt jaunu procesu saistībā ar jauno likumu, Satversmes tiesa paplašināja izskatāmās lietas tvērumu un vienlaikus atzina arī jauno likumu par neatbilstošu Satversmei.

1182 Satversmes tiesas 2017. gada 15. jūnija sprieduma lietā nr. 2016-11-01 12.1. punkts. Spriedums pieejams tikai latviešu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/07/2016-11-01_Spriedums-1.pdf.

1183 Satversmes tiesas 2022. gada 27. oktobra sprieduma lietā nr. 2021-31-0103,24. punkts. Spriedums pieejams tikai latviešu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/07/2021-31-0103_Spriedums.pdf.

1184 Skat., piemēram, Satversmes tiesas 2023. gada 9. februāra sprieduma lietā nr. 2020-33-01, 33.4. punktu. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/06/2020-33-01_Judgement.pdf.

1185 Satversmes tiesas 2009. gada 7. aprīļa sprieduma lietā nr. 2008-35-01, 11.2. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2008/09/2008-35_01_ENG.pdf.

1186 Satversmes tiesas 2021. gada 14. oktobra sprieduma lietā nr. 2021-03-03 25. punkts. Spriedums pieejams tikai latviešu valodā: https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/01/2021-03-03_Spriedums.pdf.

1187 Satversmes tiesas 2014. gada 28. novembra sprieduma lietā nr. 2014-09-01 23. punkts. Pieejams sprieduma tulkojums angļu valodā: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2014/03/2014-09-01_Spriedums_ENG.pdf.

The State Court of the Principality of Liechtenstein

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Constitutional cultures vary and the courts' perceptions of their own role in a constitutional democracy affect the intensity of their scrutiny in fundamental rights cases. Many courts profess judicial deference.

Judicial deference is a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters which are perceived to be beyond their expertise or legitimacy to decide. The tool has been employed, most prominently, in human rights cases. This is due to their transcendent quality, capable of cutting across all substantive areas of public decision-making.

It is said that over-deferential attitude threatens the rule of law and separation of powers as much as excessive judicial activism does. The way judges exercise judicial deference is, therefore, a fundamental matter of constitutional principle that concerns the proper role of each branch of government in relation to significant questions of public policy.

The following questions aim to discover the differences in exercising judicial deference by European constitutional courts.

Questionnaire

for the national reports

Non-justiciable questions and deference intensities

In your jurisdictions, what is meant by "judicial deference"?

It appears sensible to provide an overview of the various forms of self-restraint practiced by the Liechtenstein Constitutional Court (Staatsgerichtshof; StGH) in response to this introductory question. This will also address numerous other questions either fully or partially, where reference can be made to the following introductory explanations. They are structured as follows:

Comprehensive Competencies of the Constitutional Court

Limited judicial self-restraint

Self-restraint towards EEA Law

Variants of gradual constitutional judicial restraint

aa) Restraint in Norm Control

aaa) Graduated Restraint According to the Nature of Fundamental Rights

bbb) Scope of Discretion and Prognostic Freedom of Law and Ordinance Makers

ccc) Constitutional Interpretation

ddd) Appeals to the Legislature

bb) Restraint towards Court Decisions

aaa) Graduated Restraint According to the Nature of Fundamental Rights

bbb) Restraint towards Arbitration Decisions

Comprehensive Competencies of the Constitutional Court

The Constitutional Court, similar to the German Federal Constitutional Court but decades earlier, was endowed with comprehensive competencies for both norm control and the control of court decisions through Article 104 of the 1921 Constitution (LV; Legal Gazette [LGBl.] 2021 No. 15).[1188]

According to Article 15(1) of the Constitutional Court Act (StGHG; LGBl. 2004 No. 32), any decision definitively concluding a civil, criminal, or administrative procedure can be challenged with a constitutional complaint ("individual complaint") to the Constitutional Court. According to Article 18 ff. StGHG, the Constitutional Court also has an extensive abstract and concrete norm control function with respect to laws and ordinances, as well as a concrete norm control function with respect to treaties.[1189]

Accordingly, the question of constitutional self-restraint in the Constitutional Court, as with the German Federal Constitutional Court, is of particular relevance. According to the German Federal Constitutional Court, the principle of judicial self-restraint does not imply a reduction or weakening of its competence, but rather the renunciation of "engaging in politics."[1190] In contrast, the Constitutional Court emphasizes that "the boundary between law and politics is fluid," especially in the realm of public law. Thus, the principle of judicial self-restraint or judicial self-restraint has less clear contours in relation to this criterion, as a constitutional court is consistently exposed to the latent accusation of "engaging in politics".[1191]

a) Limited Judicial Self-Restraint

The term "judicial self-restraint" is used by the Constitutional Court primarily in cases where the political character of the decision matter is particularly evident, specifically in the realm of foreign policy. The Constitutional Court also relies on Article 29(2) of the Administrative Procedure Act (LVG; LGBl. 1922 No. 24), which states that matters of "foreign administration" are not justiciable.

In practice, the Constitutional Court has only been confronted with politically sensitive questions related to foreign law, particularly those within the context of Liechtenstein's membership in the European Economic Area (EEA) due to Liechtenstein's high percentage of foreign residents. Strictly implementing of Article 29(2) LVG, the Constitutional Court considers this area as an application of comprehensive judicial self-restraint. For instance, it declined to subject an extension of the ex-

1188 See Hilmar Hoch, Verfassungsgerichtsbarkeit im Kleinstaat, ZöR 2021, 1289 (1297 et seq.).

1189 See Hoch, Verfassungsgerichtsbarkeit (note 1), 1293 et seq.

1190 BVerfGE 36, 1 (14 et seq.).

1191 StGH 2009/117, para. 2.5 (*www.gerichtsentscheide.li); referring to Jutta Limbach, Standort der Verfassungsgerichtsbarkeit in der Demokratie, LJZ 1997, 1 (4 et seq.), and Karl-Georg Zierlein, Das Bundesverfassungsgericht an der Schnittstelle von Recht und Politik, LJZ 1997, 72 [passim].* For a current overview of this still controversial discussion, see Dieter Grimm, Constitutional Adjudication - Law or Politics?, in: Verfassungsgerichtshof (ed.), „100 Jahre Verfassungsgerichtshof 1920-2020", Vienna 2021, 67 et seq.; for more references see also Dieter Grimm, Recht oder Politik?, Berlin 2020, 29 et seq.

emption period regarding freedom of movement within the EEA, negotiated by the Liechtenstein government, to constitutional review.[1192] The Constitutional Court also considered the government's approval of allowing foreign officials in a legal assistance measure as a non-judicially reviewable (foreign) political or raison d'état-based act.[1193] In a recent decision, the Constitutional Court, again referring to Article 29(2) LVG, stated that the "Constitutional Court's enforcement of a consistent equal treatment of foreign and Liechtenstein citizens, as well as of individuals of different nationalities among each other, is not permissible. […] If it were otherwise, the Constitutional Court would be encroaching on the competences of the executive and legislative branches to shape Liechtenstein's relations with other states, in violation of the separation of powers."[1194]

Its limited understanding of judicial self-restraint in relation only to politically sensitive questions is emphasized by the Constitutional Court, using this term practically synonymously with the "political question doctrine" developed by the American Supreme Court and also adopted by the German Federal Constitutional Court.[1195]

Finally, certain acts of sovereignty are not judiciable. E.g. actions of princely pardon according to Article 12 LV are entirely beyond (constitutional) judicial evaluation.[1196]

b) Self-Restraint towards EEA Law

Furthermore, as a consequence of Liechtenstein's EEA accession the Constitutional Court has generally recognized the primacy of EEA law over domestic law under Article 7 of the EEA Agreement.[1197] However, this restraint in judicial review of EEA law has been qualified – similar to the "Solange doctrine" of the German Federal Constitutional Court in relation to EU law – with the reservation that it would intervene (only) in the unlikely event that EEA law would violate "fundamental principles and core content of the fundamental rights of the national constitution."[1198]

1192 StGH 1998/056, para. 2.6, LES 2000, 107 (110 et seq., para. 2.6); see also Hilmar Hoch, Schwerpunkte in der Entwicklung der Grundrechtsprechung des Staatsgerichtshofes, in: Herbert Wille (ed.), Verfassungsgerichtsbarkeit im Fürstentum Liechtenstein, LPS Vol. 32, Vaduz 2001, 65 (83).

1193 StGH 2002/029, para. 2.1; cf. StGH 2009/168, para. 2.3.1 in fine (both www.gerichtsentscheide.li).

1194 StGH 2021/024, 2.5, with reference to StGH 2011/103, para. 6.2 (both www.gerichtsentscheide.li).

1195 StGH 2021/024, 2.5; StGH 2011/103, para. 6.2 (www.gerichtsentscheide.li); StGH 1998/56, para. 2.6, LES 2000, 107 (110 et seq., para. 2.6).

1196 This applies not only to the princely act of grace itself but also to judicial opinions submitted to the Prince; see StGH 2012/051, para. 1.5 (www.gerichtsentscheide.li). Without explicitly referring to its judicial self-restraint/political question jurisprudence, the Constitutional Court in para. 1.4 classifies the right to pardon as a typical (and thus immune from constitutional review) prerogative of a head of state. There is no relevant case law on other such judicially non-justiciable acts of sovereignty („gerichtsfreie Hoheitsakte"), such as appointments, legislative initiatives of parliament or the government; see, however, Report and Proposal („Bericht und Antrag") of the Government to parliament of August 12, 2003, 2003 No. 45, 40 et seq.

1197 Agreement of May 2, 1992 on the European Economic Area, LGBl. 1995 No. 68.

1198 See StGH 1998/061, LES 2001, 126 et seq., and Hilmar Hoch, "Grundprinzipien

The Constitutional Court, however, has not linked this far-reaching variant of constitutional self-restraint with its other case law regarding judicial self-restraint or the political question doctrine. Instead, in its leading case StGH 1998/061, it primarily relied on reasoning analogous to the Swiss EEA accession (which was eventually rejected in a national referendum).[1199]

c) Variants of Gradual Constitutional Judicial Restraint

Various other forms of constitutional judicial restraint that are only gradual but still more or less far-reaching can be observed both in norm control and the review of court decisions. In these cases the Constitutional Court mostly refrains from referring to the judicial self-restraint or political question doctrine. [1200] The aim of this gradual restraint exercised by the Constitutional Court is to prevent the dilution of the core objectives of fundamental rights protection, namely safeguarding aspects of human dignity and the democratic rule of law, from being compromised.[1201] The details are as follows:

aa) Restraint in Norm Control

The Constitutional Court typically practices this kind of graduated restraint in its norm control function due to considerations of the separation of powers, especially concerning laws (Article 18 ff. StGHG), given the unique democratic legitimacy of the legislature. It is not the role of the (constitutional) court, but of the elected legislature, to "implement fundamental decisions and objectives of the constitution. Since the legislature has the 'decision prerogative' [‚Entscheidungsprärogative'], it is entrusted with balancing conflicts of fundamental rights according to its own objectives."[1202]

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und Kerngehalte der Grundrechte der Landesverfassung". Der EWR-Vorbehalt des Staatsgerichtshofes als materielle Verfassungsänderungsschranke, in: Hilmar Hoch/Christina Neier/Patricia M. Schiess Rütimann (eds.), 100 Jahre liechtensteinische Verfassung. Funktion, Entwicklungen und Verhältnis zu Europa, LPS Vol. 62, Gamprin-Bendern 2021, 51 (53 et seq.), inter alia with reference to BVerfGE 73, 339 (Solange II) and 15 BVerfGE 123, 267 (Lissabon).

1199 *StGH 1998/061, LES 2001, 126 (130, para. 3.1) with reference to the Message („Botschaft") of the Swiss Federal Council on the EEA, BBl 1992 IV 92, and to Daniel Thürer, Liechtenstein und die Völkerrechtsordnung, Archiv für Völkerrecht (AVR) 36 (1998), 98 (120 et seq.).* However, there is no explicit reference to the Solange jurisprudence of the German Federal Constitutional Court in the reasons or the two references. See also Hoch, Grundprinzipien (note 11), 54 et seq.

1200 However, see StGH 1994/19, LES 1997, 73 (76, para. 7), where the Constitutional Court also speaks about judicial self-restraint of judicial self-restraint in the context of "recognition of fundamental rights claims with particularly serious and financially unmanageable burdens on the public purse". *See also Herbert Wille, Verfassungsgerichtsbarkeit im Fürstentum Liechtenstein – Entstehung, Ausgestaltung, Bedeutung und Grenzen, in: Herbert Wille (ed.), Verfassungsgerichtsbarkeit im Fürstentum Liechtenstein, 75 Jahre Staatsgerichtshof, LPS Vol. 32, Vaduz 2001, 9 (50).*

1201 See StGH 2007/061, para. 2.1; StGH 2000/060, para. *2.1; Hoch, Schwerpunkte (note 5), 79.*

1202 *StGH 2012/166, para.* 9.9; StGH 2010/32, para. 4.1; StGH 2007/118, para. 3 (all www.gerichtsentscheide.li). However, when the Constitutional Court emphasizes

When it comes to socially and politically sensitive regulations, questions of such nature should ideally be decided by the democratically legitimized legislature. Consequently, the Constitutional Court also demands that questions of "legal-political significance" („rechtspolitische Brisanz") should not be decided by ordinance makers but should primarily be regulated by law.[1203] On the other hand, the more detailed a regulation is stipulated by the legislature, the more the ordinance maker also participates in the increased democratic legitimacy of the legislature.[1204]

aaa) Gradual Restraint According to the Nature of Fundamental Rights

The Constitutional Court exercises the least restraint when it comes to norm control regarding an interference with fundamental rights that is assessed using established criteria. In such cases, it assesses whether the legislature (or ordinance maker) adhered to the classical criteria for infringement of fundamental rights, such as (legitimate) public interest and proportionality, and whether the core content of the respective fundamental right has been respected.[1205]

This is primarily the case with classical civil liberties conceived as defensive rights against the state (such as the freedom of expression, freedom of religion, or right to property). The Constitutional Court carries out such differentiated scrutiny of infringement even for individual procedural fundamental rights, as long as they have a sufficiently clearly defined scope, similar to civil liberties. This applies to rights like the right of appeal and the right to access records, which is part of the right to be heard.[1206] However, even when the Constitutional Court conducts a proportionality review, the legislature has "considerable leeway for political design. Legislation necessarily involves assessments, predictions, and evaluations, primarily the responsibility of the legislature itself. The Constitutional Court as a supervisory body can only intervene if the legislature exceeds its scope for design."[1207]

Less extensive than with other fundamental rights is the review of norms in light of the prohibition of arbitrariness or the principle of equality. In these cases, the legislative scope is "particularly broad."[1208] Under the prohibition of arbitrariness, only a review of reasonableness ("Vertretbarkeit") is conducted. Similarly, the principle of equality does not offer greater protection under the judicial review of norms than the prohibition of arbitrariness. According to constant case law of the Constitutional Court, the principle of equality is limited to whether the corresponding norm treats similar

the special democratic legitimacy of the legislature, it abstracts from the fact that the Prince must sanction every law according to Art. 9 and 65 para. *1 LV. See Herbert Wille, Probleme des gesetzgeberischen Unterlassens in der Verfassungsrechtswissenschaft (Landesbericht Liechtenstein), EuGRZ 2009, 441 (453 note 139).*

1203 StGH 2018/133, para. 3.1 (www.gerichtsentscheide.li); with numerous references to literature and case law.

1204 See StGH 2021/082, para. 3.3 (www.gerichtsentscheide.li).

1205 See Hilmar Hoch, Kriterien der Einschränkung von Grundrechten in der Praxis der Verfassungsgerichtsbarkeit (Landesbericht Liechtenstein), EuGRZ 2006, 640 (641 f.).

1206 See Hilmar Hoch, Einheitliche Eingriffskriterien für alle Grundrechte? in: Liechtenstein-Institut (Hrsg.), Beiträge zum liechtensteinischen Recht aus nationaler und internationaler Perspektive, Festschrift zum 70. Geburtstag von Herbert Wille, Schaan 2014, 183 (193 ff.).

1207 StGH 1985/011, LES 1988, 94 (99, para. 16); also see StGH 2014/025, para. 5.2.2; StGH 2004/76, para. 8d (both www.gerichtsentscheide.li) as well as Wolfram Höfling, Die liechtensteinische Grundrechtsordnung, LPS Bd. 20, Vaduz 1994, 200 f. and below the answer to 24.

1208 StGH 2009/113a, para. 3.2 (www.gerichtsentscheide.li).

circumstances or groups of people unequally without a reasonable justification – thus arbitrarily.[1209] However, the Constitutional Court does conduct a differentiated equality review when a discrimination is at stake which affects human dignity based on factors such as gender, religion, ethnic origin, or language.[1210]

Irrespective of the affected fundamental right, it is not relevant for the Constitutional Court whether "a statutory regulation is particularly expedient or whether another regulation would be desirable from a legal policy perspective. The decision on this is the responsibility of the legislature, and the Constitutional Court should not substitute itself for it."[1211]

bbb) Scope for Assessment and Prognosis by the Legislature and Regulatory Authority

Furthermore, the Constitutional Court acknowledges a "prerogative of assessment" for the legislature and a "scope for assessment and prognosis" for the regulatory authority in complex matters – as recently seen in the context of the COVID-19 pandemic. In such dynamic areas reliant on current scientific knowledge and statistical data, the courts are unable to conduct a thorough review with the tools available to them.[1212]

ccc) Constitutional Interpretation

As an expression of the separation of powers, the Constitutional Court also attempts to avoid repealing a provision of a law or regulation by means of an interpretation in conformity with the constitution. This approach is justified for the legislature due to its democratic legitimacy. Such an interpretation also arises from the primacy of the constitution and the unity of the legal system. However, a constitutional interpretation is not permissible when both the wording of the norm and the intent of the legislature or regulatory authority oppose such an interpretation. In this case, the norm must be declared unconstitutional.[1213]

1209 StGH 2020/008, LES 2020, 188 (189, para. 4.1); StGH 2017/087, para. 4.1.2; StGH 2016/024, para. 2.2 (all www.gerichtsentscheide.li); see also Hugo Vogt, Das Willkürverbot und der Gleichheitsgrundsatz in der Rechtsprechung des liechtensteinischen Staatsgerichtshofes, LPS Vol. 44, Schaan 2008, 75 ff.

1210 StGH 2021/082, para. 4.6.1; StGH 2016/024, para. 2.2; StGH 2014/027, para. 2.3.1; StGH 2013/009, para. 4.1 (all www.gerichtsentscheide.li); see also Jasmin Beck, Was es bedeutet, gleich zu sein. Die Rechtsprechung des Staatsgerichtshofs, menschenrechtliche Verpflichtungen und rechtspolitische Handlungsfelder für ein Liechtenstein der Gleichberechtigung und Nichtdiskriminierung, in: Hilmar Hoch/Christina Neier/Patricia M. Schiess Rütimann (eds.), 100 Jahre liechtensteinische Verfassung. Funktion, Entwicklungen und Verhältnis zu Europa, LPS Vol. 62, Gamprin-Bendern 2021, 215 (221 f.).

1211 StGH 2017/148, para. 3; StGH 2016/024, para. 2.3 (www.gerichtsentscheide.li); see also StGH 1998/002, LES 1999, 158 (163 f., para. 4.3) with reference to StGH 1982/065/V, LES 1984, 3 (4) and StGH 1988/016, LES 1989, 115 ff. as well as Jutta Limbach (note 4), 9.

1212 StGH 2021/082, para. 3.1 (www.gerichtsentscheide.li) with references to relevant case law of neighboring states. Similarly, in StGH 1985/011, LES 1988, 94 (100), the Court stated: "Legislative decisions are necessarily based on assessments, forecasts, and evaluations to which primarily the legislature itself is called"; see Andreas Kley, Grundriss des liechtensteinischen Verwaltungsrechts, LPS Bd. 23, Vaduz 1998, 227 and Wolfram Höfling, Schranken der Grundrechte, in: Andreas Kley/Klaus Vallender (eds.), Grundrechtspraxis in Liechtenstein, LPS Bd. 52, Schaan 2012, 83 (106, para. 46).

1213 See StGH 2022/029, para. 4.5; StGH 2020/008, para. 4.4; StGH 2018/038, para.

ddd) Appeals to the legislature

So-called appeals to the legislature („Appellentscheidungen") can also serve to spare the legislature – and also, but more rarely, the regulatory authority.[1214] The Constitutional Court subsumes under this term cases where the legal situation is problematic but still constitutional,[1215] as well as situations where the legal situation is already unconstitutional but the norm is not overturned.[1216] This second case corresponds to the declaration of unconstitutionality or incompatibility of the German Federal Constitutional Court.[1217]

The Constitutional Court Act does not provide for such appeals to the legislature. The Constitutional Court fills this legal loophole. In its view, "appeals to the legislature represent a pragmatic solution that allows the Constitutional Court to unambiguously fulfill its constitutional role and identify unconstitutional legal norms even if repealing them is not feasible for substantial practical or constitutional policy reasons."[1218] To be precise, to speak of constitutional restraint or sparing the legislature is only justified in the context of "constitutional policy reasons" – not when repeal is impossible for practical reasons.[1219]

3.12.1; StGH 2014/061, para. 6.2 (all www.gerichtsentscheide.li); see also Tobias Michael Wille, Verfassungs- und Grundrechtsauslegung in der Rechtsprechung des Staatsgerichtshofes, in: Liechtenstein-Institut (ed.), Beiträge zum liechtensteinischen Recht aus nationaler und internationaler Perspektive: Festschrift zum 70. Geburtstag von Herbert Wille, LPS Vol. 54, Schaan 2014, 131 (170 ff. with further references). As to the exception of unconstitutional so-called "qualified silence" of the legislature see below at note 80.

1214 See concerning an ordinance the recent decision StGH 2020/075, para. 2.6 (www.gerichtsentscheide.li).

1215 StGH 1985/001, LES 1986, 108 (112); StGH 1993/003, LES 1994, 37 (38 f., para. 2.2 ff.).

1216 StGH 1995/020, LES 1997, 30 (38, para. 4.5); StGH 1989/015, LES 1990, 135 (141, para. 4.3.2 ff.). For these two variants of appeals to the legislature, see also the explanations in section 10 below. Yet another variant of appeal to the legislature was the basis of the decision StGH 2003/065 (www.gerichtsentscheide.li): The Constitutional Court deemed a significant change in the case law on foundations as constitutional, but not its application to existing foundations, the majority of which would have been threatened in their existence. Therefore, the Court urgently demanded the creation of a legal regulation with a transition period for the rehabilitation of existing foundations (see there para. 2.7).

1217 See Wille, Probleme (note 15), 449 ff. Critique of this variant of appeal to the legislature can be found in the Report and Proposal of the Government to the Parliament of November 4, 2003, 2003 No. 95, 43; Wille, Probleme (note 15), 453 f.; Herbert Wille, Die liechtensteinische Staatsordnung – Verfassungsgeschichtliche Grundlagen und oberste Organe, LPS Bd. 57, Schaan 2015, 673.

1218 StGH 1995/020, LES 1997, 30 (38, para. 4.5); already in this 1996 decision, the Constitutional Court noted a "well-established practice of so-called appeals to the legislature" (referring to StGH 1981/018, LES 1983, 39; StGH 1984/012, LES 1986, 70; StGH 1989/015, LES 1990, 135; StGH 1993/003, LES 1994, 39); extensively on this, see Wolfram Höfling, Die Verfassungsbeschwerde zum Staatsgerichtshof, LPS Bd. 36, Schaan 2003, 194 ff.; see also Andreas Kley, Die Beziehungen zwischen dem Liechtensteinischen Staatsgerichtshof und den übrigen einzelstaatlichen Rechtsprechungsorganen, einschliesslich der diesbezüglichen Interferenz des Handelns der europäischen Rechtsprechungsorgane (Landesbericht Liechtenstein), EuGRZ 2004, 43 (53).

1219 For the issue of justiciability, see the subsequent explanations in 2.b).

In the last two decades, however, there have been no cases where the Constitutional Court found a norm to be unconstitutional but still refrained from repealing it.[1220] There have also been no admonitions to the legislature to rectify problematic but still constitutional regulations in due course. However, the Constitutional Court in several cases has deemed laws to be constitutional but has nonetheless shown understanding for criticism directed at them. Such criticism, though, is of a political nature and therefore only relevant "de lege ferenda", i.e., relevant for future lawmaking.[1221]

bb) Restraint Toward Court Decisions

Finally, the Constitutional Court exercises restraint when reviewing court decisions.[1222] This is done – as by other constitutional courts with similar review powers – to prevent it from becoming a de facto appellate court.[1223]

aaa) Gradual Restraint According to the Nature of the Fundamental Right

When court decisions intrude upon the substantive scope, particularly that of freedom rights, the Constitutional Court examines not only the criteria for infringement on fundamental rights mentioned earlier (in 1.d/aa/aaa) – public interest, proportionality, and the core guarantee – but also whether the intervention is based on a sufficient legal basis. In cases of serious infringements of fundamental rights, the level of scrutiny is higher; i.e. the Constitutional Court requires a clear legal basis.[1224]

The risk of an appeal-like review of court decisions primarily arises in the context of the proportionality assessment. Therefore, it is crucial for the Constitutional Court to perform this differentiated review only selectively within the substantive scope of individual fundamental rights. Otherwise, only the subsidiary prohibition of arbitrariness applies.[1225] Instead of the proportionality assessment, a mere review of reasonableness is conducted.[1226]

1220 This is mainly because the maximum period for deferring the effectiveness of a norm repeal was extended from six to twelve months with the new StGHG of 2003, thereby also extending the legislature's ability to react in a timely manner. See also the explanations at note 59.

1221 See StGH 2022/015, para. 2.5.3; StGH 2021/006, para. 3.5; StGH 2020/059a, para. 3.5; StGH 2020/046, para. 4.4; StGH 2014/088, para. 4.2; StGH 2013/118, para. 3.4.3; StGH 2008/060, para. 5 (all www.gerichtsentscheide.li).

1222 As mentioned in section 1.a) above this includes last instance decisions in civil, criminal and administrative matters.

1223 Cf. Hoch, Staatsgerichtshof (note 35), 417 ff.

1224 See Hoch, Kriterien (note 18), 641.

1225 See on the subsidiarity of the prohibition of arbitrariness Hugo Vogt, Willkürverbot, in: Andreas Kley/Klaus Vallender (eds.), Grundrechtspraxis in Liechtenstein, LPS Vol. 52, Schaan 2012, 303 (327 ff, para. 43 ff.).

1226 The detailed arbitrariness formula of the Constitutional Court is as follows: "A violation of the prohibition of arbitrariness only exists if a decision cannot be substantiated, is not justifiable, or is offensive. Accordingly, a violation of the prohibition of arbitrariness is not assumed merely because a decision can be classified as incorrect. In its function as a residual fundamental right, the prohibition of arbitrariness is meant to be the last line of defense of the law against such obvious injustice that it is not tolerable in a modern constitutional state." See StGH 2022/080, para. 3.4.2;

However, there is a risk with certain fundamental rights that they might have too broad a substantive scope.[1227] For instance, according to Article 34 LV, the right to property covers not only movable and immovable property but also claims and other financial interests. In order to avoid having to scrutinize every dispute involving financial claims in light of this fundamental right, the Constitutional Court also requires an infringement of the state on an established property position; otherwise, it only performs an arbitrariness review.[1228] Similarly, the guarantee of a legal court according to Article 33(1) LV also encompasses procedural errors according to the case law of the Constitutional Court. However, the court only subjects complaints about such procedural errors to a differentiated review when the infringement of the fundamental right is serious; for instance, in the case of refusal to take up a case where no reasonable alternative legal procedure is available.[1229] Finally, the fundamental right to personal freedom according to Article 32(1) LV could also lead to an excessive review of court decisions. The German Federal Constitutional Court handles this fundamental right very broadly as a general right to act. In contrast, the Constitutional Court subsumes within the scope of personal freedom – similar to the Swiss Federal Court and in accordance with Article 8 of the European Convention on Human Rights (ECHR) – only elementary forms of personal development alongside physical and mental integrity.[1230]

Furthermore the Constitutional Court only conducts an arbitrariness review for discretionary decisions ("Ermessensentscheidungen")[1231] and partially for the interpretation of indeterminate legal terms („unbestimmte Rechtsbegriffe") by the courts.[1232]

StGH 2021/044, para. 2.1; StGH 2020/029, para. 6.1; StGH 2017/097, para. 2.1 (all www.gerichtsentscheide.li).

1227 See Hoch, Staatsgerichtshof (note 35), 424 ff. The issue of a too broad content is relevant not only for reviewing the application of law by the courts but also for norm review in general. However, the vast majority of norm reviews by the Constitutional Court are conducted in the light of the principle of equality and the prohibition of arbitrariness, which is why the explanations in 1.d/aa/aaa) above on norm review did not address this; but also see below note 95.

1228 Klaus Vallender/Hugo Vogt, Eigentumsgarantie, in: Andreas Kley/Klaus Vallender (eds.), Grundrechtspraxis in Liechtenstein, LPS Vol. 52, Schaan 2012, 689 (711, para. 40).

1229 See StGH 2018/060, para. 3.1; StGH 2010/158, para. 2.2; StGH 2009/096, para. 2 (all www.gerichtsentscheide.li); see also Tobias Michael Wille, Recht auf den ordentlichen Richter, in: Andreas Kley/Klaus Vallender (eds.), Grundrechtspraxis in Liechtenstein, LPS Vol. 52, Schaan 2012, 331 (365 ff., para. 39 ff.).

1230 *StGH 2020/085, para. 2.1; StGH 2013/184, para. 5.1; StGH 2012/035, para. 4.1 (all www.gerichtsentscheide.li); see also Marzell Beck/Andreas Kley, Freiheit der Person, Hausrecht sowie Brief- und Schriftengeheimnis, in: Andreas Kley/Klaus Vallender (eds.), Grundrechtspraxis in Liechtenstein, LPS Vol. 52, Schaan 2012, 131 (134 f., para.* 7) with references.

1231 StGH 2019/074, para. 3.2; StGH 2010/064, para. 2.4.1; StGH 2005/085, para. 4.2 (all www.gerichtsentscheide.li). If, however, the appellate court already has to assess a lower court's exercise of discretion, it is often already limited to a mere arbitrariness review. In this case, the Constitutional Court freely reviews the appellate court's decision (no "arbitrariness squared"). See Hilmar Hoch, Schiedsgerichtsbarkeit und Grundrechte, in: Hubertus Schumacher/Wigbert Zimmermann (eds.), Festschrift 100 Jahre Fürstlicher Oberster Gerichtshof, Der Einfluss der höchstgerichtlichen Rechtsprechung auf Finanz und Wirtschaft, Vienna 2022, 269 (286 f.).

1232 StGH 2008/129, para. 2.2; StGH 2008/161, para. 2.1.2 (www.gerichtsentscheide.li); StGH 1988/009, LES 1989, 59 (61); also see Kley, Verwaltungsrecht (note 25), 183.

Another form of restraint towards court decisions applies to encroachments on the right to be heard and the obligation to give reasons where the Constitutional Court exceptionally refrains from finding a fundamental rights violation or at least from overturning the challenged decision – even though the Court justifies this practice rather with the avoidance of procedural inefficiencies than with the sparing of courts.

In cases of violations of the right to be heard (derived from the general equality principle of Article 31(1) LV),[1233] under certain conditions, the Constitutional Court "cures" the committed violation of fundamental rights. In such cases it abstains from finding a fundamental rights violation. Such a remedy is "possible in cases where the violation of the right to be heard could not have had an impact on the challenged decision and the party rights of the complaining party were not significantly restricted in the outcome. By the latter, the Constitutional Court means that an additional instance was available, which had at least the same scope of examination as the court of first instance, and the party could make its case before this additional instance."[1234]

The Constitutional Court practices a similar approach in connection with the constitutional obligation to provide reasons according to Article 43 LV.[1235] If a decision, despite violating said provision, is substantively constitutional in its outcome, the Constitutional Court does not overturn the decision in order to avoid procedural inefficiencies. However, in this case, the fundamental rights violation is asserted, and the constitutional complaint is granted to that extent.[1236]

bbb) Restraint towards Arbitration Decisions

Finally, the Constitutional Court exercises restraint when reviewing decisions of arbitration tribunals. However, this restraint does not go beyond the legal restriction already applicable for review by the civil courts.[1237] The civil courts may primarily review compliance with procedural fundamental rights

1233 *See Hugo Vogt, Anspruch auf rechtliches Gehör, in: Kley/Vallender [eds.], Grundrechtspraxis in Liechtenstein, LPS Vol. 52, Schaan 2012, 573, para.* 11 with references to case law.

1234 StGH 2022/016, para. 2.2.5; StGH 2021/069, para. 2.3; StGH 2021/006, para. *5.1 (all www.gerichtsentscheide.li); see also Peter Bussjäger, Aktuelles aus der Rechtsprechung des Staatsgerichtshofes 2016 – 2019, LJZ 2020, 104 106 f.).* The Constitutional Court has recently admonished the appellate courts to restrain the application of this remedy, so that the Constitutional Court would have to intervene so often. Otherwise, the Constitutional Court has indicated that it would tighten this practice in general; see StGH 2022/016, para. 2.3.7 (www.gerichtsentscheide.li).

1235 See the explanations on this fundamental right later in note 13.

1236 See StGH 2022/015, para. 4.5; StGH 2020/008, para. 4.4; StGH 2018/038, para. 3.12.1; StGH 2022/015, para. 3.1; StGH 2013/156, para. 3.8; StGH 2009/096, para. 3; StGH 2001/022, para. 2.5 (all www.gerichtsentscheide.li). However, an exception applies again if there is more than one materially constitutional solution. In that case, the Constitutional Court does not intervene in advance of the final instance court, but rather annuls the decision and refers it back for re-decision; see StGH 2010/040, para. 3.5 (www.gerichtsentscheide.li). The same applies if, due to the lack of reasoning, neither the constitutionality nor the unconstitutionality of the decision is obvious to the Constitutional Court from the outset; see StGH 2007/015, para. 7.5 (www.gerichtsentscheide.li).

1237 As decisions of private arbitration tribunals are neither acts of "public authority" nor final instances, they are not directly contestable before the Constitution-

in arbitration proceedings, especially the right to be heard.[1238] However, the review of an arbitration decision on the merits can only be conducted with regard to compliance with public policy – which is even narrower than the arbitrariness review.[1239] As the Constitutional Court cannot apply a stricter review than the civil courts this is the only case where the constitutional review drops even below the arbitrariness level.[1240]

[a] Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (e.g. questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

a. For the first question, reference can be made to the previous explanations regarding the Constitutional Court's gradual restraint in norm review (1.d/aa) and in reviewing court decisions (1.d/bb).

a. Regarding "no-go" areas, the Constitutional Court, based on Art. 29 (2) LVG, generally excludes the field of foreign policy from constitutional judicial review (see 1.b above). Only within this narrow framework, it normally refers to judicial self-restraint/political question.

As for the question of justiciability, the Constitutional Court understands this to mean not just whether it should at all deal with a legal matter or an individual case,[1241] but primarily whether it can do so in practical terms. Lack of justiciability in this sense first of all results in the already mentioned restraint of the Constitutional Court in complex and dynamic circumstances. Because in such matters, "the courts are not able to carry out a close examination" of corresponding administrative regulations and measures with the instruments available to them.[1242] Furthermore, cases concerning the judicial review of norms may not be justiciable because the Constitutional Court, as a so-called "negative legislator,"[1243] may only repeal a norm. However, through mere repeal of a norm in a specific case, a constitutionally compliant state might not be established;[1244] or without simultaneous action by the legislature, an impractical "torso"[1245] would emerge in the relevant regulatory area. The Constitutional Court, like the Austrian Constitutional Court, has the competence to suspend the legal effect of a norm repeal, giving the legislature time to react. However, even the corresponding deadline of up to

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al Court according to Art. 15 para. 1 StGHG. See StGH 2008/046, para. 2.3.1 ff. (www.gerichtsentscheide.li) as well as Hoch, Schiedsgerichtsbarkeit (note 44), 285 f.

1238 See for the grounds of appeal § 628 of the Civil Procedure Code (ZPO; as of LGBl. 2010 No. 182) as well as Hoch, Schiedsgerichtsbarkeit (note 44), 276 f.

1239 See StGH 2010/074, para. 5.2 f. (www.gerichtsentscheide.li) as well as Hoch, Schiedsgerichtsbarkeit (note 44), 283 ff.

1240 However, this applies only with regard to the arbitration decision itself; the civil court review decision is reviewed freely by the Constitutional Court. See above note 44.

1241 In this respect, there are also largely clear statutory provisions. See the explanations above in 1.b).

1242 StGH 2021/082, para. 3.1 (www.gerichtsentscheide.li).

1243 Hans Kelsen, Wesen und Entwicklung der Staatsgerichtsbarkeit, VVDStRL 5 (1928), 56; see also StGH 2002/084, para. 2.2.5 (www.gerichtsentscheide.li); StGH 1995/020, LES 1997, 30 (37, para. 4.1) as well as Wille, Probleme (note 15), 452 f.

1244 In this context, as in StGH 1991/146, LES 1993, 73, where the mere annulment of the gender-discriminatory sole maintenance claim of the wife would not have benefitted the complainant (see there 74, para. 3.2).

1245 As stated in StGH 1995/020, LES 1997, 30 (38, para. 4.4).

one year (one and a half years in Austria)[1246] can be too short depending on the extent of the regulatory need caused by a norm repeal. In such cases, the Constitutional Court may resort to an appeal to the legislature (see explanations in 1.d/aa/ddd).

Finally, the question of justiciability plays a role in connection with the Constitutional Court's practice of recognizing constitutional provisions outside the catalog of fundamental rights in the IVth Chapter of the Constitution as such rights (i.e. tax-free subsistence level, municipal autonomy) or even of recognizing unwritten fundamental rights (i.e the prohibition of arbitrariness, the right to subsistence, the principle of legality in tax law).[1247] The prerequisite here is in particular that the new fundamental right can actually be enforced judicially.[1248]

Are there factors to determine when and how your Court should defer (e.g. the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

Of the factors mentioned in relation to this question, only the last three are relevant for the self-restraint of the Constitutional Court:

As to the nature of fundamental rights it can be referred to 1.d/aa/aaa). Accordingly, the judicial review of norms in light of the prohibition of arbitrariness or the principle of equality requires greater restraint than when other fundamental rights are concerned. As explained in 1.d/bb/aaa), such greater restraint applies also to the review of court decisions if only the prohibition of arbitrariness is at issue.

Regarding the subject matter of the procedure as a factor for self-restraint, reference should be made in particular to 1.b) and c), according to which primarily foreign policy and EEA law are exempt from judicial review.

As to change of society and societal views, such change should not be a primary reason for the Constitutional Court's restraint. It can, on the contrary, be a reason for the Constitutional Court's intervention. Fundamental rights, in particular, must be able to provide appropriate contemporary answers to new problems and needs.[1249] Like the ECHR according to the ECtHR, the domestic catalog of fundamental rights can also be described as a "Living Instrument" due to the dynamic case law of the Constitutional Court.[1250] Furthermore, the Constitutional Court has recognized several unwritten fundamental rights and reserves the right to do so for further "fundamental protection needs of

1246 Art. 19 para. 3 StGHG. Previously, according to Art. StGHG as of LGBl. 1979 No. 34, there was a maximum period of only six months. Due to this extension of the deadline, the government also argued that there was no longer any reason for such appeals to the legislature (Report and Proposal of the Government to the Parliament of November 4, 2003, 2003 No. 95, 43; see also StGH 2011/023, para. 9.2 [www.gerichtsentscheide.li]).

1247 See Hoch, Kriterien (note 18), 640 with references to case law.

1248 See StGH 2004/048, para. 2.1 ff.; StGH 2009/090, para. 2.2 (both www.gerichtsentscheide.li).

1249 See StGH 1984/014, LES 1987, 36 (38, para. 1) and refer to Wille, Auslegung (note 26), 165 f. with numerous further references.

1250 See Peter Bussjäger, Werte und Spielregeln. Die Verfassung und ihre Funktionen, in Hilmar Hoch/Christina Neier/Patricia M. Schiess Rütimann (eds.), 100 Jahre liechtensteinische Verfassung. Funktion, Entwicklungen und Verhältnis zu Europa, LPS Bd. 62, Gamprin-Bendern 2021, 25 (35).

the individual which are not mentioned in the constitutional text."[1251] However, if such a question is (still) controversial, the Constitutional Court, similar to the ECtHR at the European level, refrains from preempting the socio-political discourse.[1252] As mentioned, the Constitutional Court has also advised the legislature in an appeal to the legislature on potential fundamental issues, but denied unconstitutionality.[1253]

Are there situations when your Court deferred because it had no institutional competence or expertise?

For the self-restraint of the Constitutional Court due to lack of institutional jurisdiction, reference can be made to 1.b) (foreign policy), 1.c) (primacy of EEA law over national law), 1.d/aa) (special democratic legitimacy of the legislature); for self-restraint due to lack of expertise, reference can be made to 1.d/aa/bbb) (scope for assessment and prognosis in complex matters within the framework of judicial review of norms). The Constitutional Court's self-restraint in relation to the other courts (see 1.d/bb) can be attributed both to self-restraint due to lack of institutional jurisdiction and due to lack of expertise.

Are there cases where your Court deferred because there was a risk of judicial error?

Certainly even the highest courts can make mistakes.[1254] However, a judicial error or a miscarriage of justice is primarily referred to in the context of faulty evidence gathering and assessment in criminal proceedings. Such miscarriages of justice by the Constitutional Court are hardly conceivable, as it typically does not function as a fact-finding instance.[1255] Therefore, the question of constitutional self-restraint to avoid such errors does not arise in practice. However, if "judicial error" is understood to encompass any mistakes in constitutional court decisions, reference can be made to previous explanations. Accordingly, the Constitutional Court exercises self-restraint due to its limited expertise in two main aspects: when reviewing court decisions (1.d/bb) and when conducting norm control in complex matters (1.d/aa/bbb).

Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

Regarding the self-restraint of the Constitutional Court due to a lack of institutional jurisdiction, reference can be made again to 1.b) (foreign policy) and 1.c) (primacy of EEA law over national law); and with regard to both criteria (institutional and democratic legitimacy of the decision-maker) reference can be made to the explanations on self-restraint towards the legislature (1.d/aa).

1251 StGH 1998/045, LES 2000, 1 (6, para. 4.4); see for this Herbert Wille, Verfassungsgerichtsbarkeit (note 13), 52.

1252 See StGH 2018/154, para. 4.5 (www.gerichtsentscheide.li) as well as the reference to the corresponding practice of the ECtHR in para. 3.1 of that decision.

1253 See also what is outlined above in note 28.

1254 Explicitly StGH 1997/003, LES 2000, 57 (62 para. 4.6): "According to a bon mot by the American Supreme Court Justice Robert Jackson, supreme courts do not decide as the final instance because they are infallible, but they are practically infallible because they are the final instance." The relevant decision is Brown v Allen, 344 U.S. 443, 540 (1953) (concurring opinion). See Anna Gamper, Das Argument der letzten Instanz, Vienna 2023, 1, with reference to both decisions.

1255 See StGH 2020/074, para. 2.1; StGH 2018/041, para. 2.1; StGH 2014/046, para. 4.2 (all www.gerichtsentscheide.li). This is different only in the – here not relevant – case of its jurisdiction in ministerial complaint and disciplinary proceedings pursuant to Art. 28 ff. and Art. 35 ff. StGHG.

"The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

In response to the second question, reference can again be made to the explanations in 1.d/aa) regarding the general restraint towards the democratically legitimized legislature.

Specifically, with regard to legislation on "general social policy," it primarily concerns the administration of benefits, which is only limitedly justiciable by the Constitutional Court.[1256] In StGH 2004/048, the Constitutional Court recognized an unwritten fundamental right to a minimum subsistence level, albeit "within the narrow framework of what is indispensable for a dignified existence," and only in the case of legislative inaction, as "it is primarily the responsibility of the competent community to determine the nature and scope of the benefits required in each specific case based on its legislation."[1257] If no fundamental rights or other justiciable constitutional contents are affected, there is no basis for the Constitutional Court to intervene, even in cases of legislative inaction. However, if such a basis for intervention exists, the duration of legislative inaction does play a role (see the explanations below in 10).

Does your Court accept a general principle of deference in judging penal philosophy and policies?

There is no specific self-restraint of the Constitutional Court in the field of criminal policy that goes beyond the general restraint towards the legislature (see above 1.d/aa). This is particularly the case because criminal policy is not a socially controversial topic in Liechtenstein.[1258]

There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

Liechtenstein does not have an army or intelligence agency; thus, this question has not arisen in practice. However, if such questions were to arise in the future (for example, in connection with information conveyed by foreign intelligence services to Liechtenstein authorities), it would be reasonable to assume that the Constitutional Court would apply its practice of judicial self-restraint/political question (see explanations regarding 1.b) to such cases as well.

Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

As explained in 7 above, the Constitutional Court does not have a basis for intervention outside the scope of fundamental rights or other justiciable constitutional contents, even in cases of legislative inaction. However, when there is a basis for intervention, the Constitutional Court does intervene in cases of clear legislative tardiness. And if the repeal of an unconstitutional provision is not feasible, an appeal to the legislature might be made.[1259] On the other hand, in 1990, the Constitutional Court did not repeal a provision on gender equality in spouse taxation primarily because a legislative revi-

1256 See StGH 2004/048, para. 2.2 (www.gerichtsentscheide.li).

1257 StGH 2004/048, para. 2.2 f. (www.gerichtsentscheide.li) with reference to the decision of the Swiss Federal Court BGE 121 I 367 (373, para. 3c).

1258 However, the Constitutional Court exercises significant restraint in reviewing the sentencing decisions of the criminal courts; see StGH 2018/017, para. 4.2 ff.; StGH 2005/085, para. 4.2 ff. (both www.gerichtsentscheide.li).

1259 As in the aforementioned decision StGH 1995/020, LES 1997, 30 (39, para. 4.6).

sion was already underway, and it did not want to pre-empt the legislature.[1260] However, when the unconstitutional situation was still not rectified four years later, the Constitutional Court repealed the relevant provision of the tax law.[1261] In this decision, the Constitutional Court was able to rely on the 1992 addition of a specific gender equality provision (Art. 31 para. 2 LV) to the general constitutional equality clause (Art. 31 para. 1 LV). The transitional provision for this constitutional amendment also mandated the legislature to make the corresponding legal adjustments.[1262] Nonetheless, the Constitutional Court assumed an immediately enforceable fundamental right claim shortly after this constitutional change, without waiting for the legislative adjustments.[1263] This reasoning was also used in a decision of 1996 concerning a gender-discriminatory provision in the Citizenship Act. The government's reference to an ongoing legislative revision was not accepted this time, and the government was criticized for applying a clearly unconstitutional provision instead of submitting it to the Constitutional Court for review.[1264] In all three of these cases of repeal, the maximum delay in the repeal was six months,[1265] allowing the legislature to create a new legal regulation in a timely manner.

The decision maker

Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

Reference is made to the general restraint towards the democratically legitimized legislature (see explanations regarding 1.d/aa).

What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

If the intent of the legislature is apparent from the legislative materials, it is considered in the context of historical interpretation.[1266] If both the wording of the law and the manifest intent of the legislature support a particular unconstitutional interpretation, this cannot be corrected through a constitutionally compliant interpretation, as explained in 1.d/aa/ccc. Instead, for the sake of legal certainty, the unconstitutional provision must be repealed. An exception exists for unconstitutional so-called "qualified silence" ("qualifiziertes Schweigen") of the legislature. In such cases, where no norm can be repealed, the Constitutional Court performs a constitutionally compliant gap-filling contrary to

1260 StGH 1989/015, LES 1990, 135 (141, para. 4.3.2 ff.); also StGH 1993/003, LES 1994, 37 (39, para. 2.5); see Höfling, Verfassungsbeschwerde (note 31), 195.

1261 StGH 1994/006, LES 1995, 16 (23, para. 5.6); also see StGH 1995/020, LES 1997, 30 (38 para. 4.3).

1262 Article II of the relevant constitutional law LGBl. 1992 No. 81 read as follows: "The laws shall determine the adaptation of existing law to the equality of men and women."

1263 As in StGH 1991/014, LES 1993, 73 (75 ff., para. 4.2 ff.). Critical of this claim "to assume the role of a substitute legislator," Wille, Verfassungsgerichtsbarkeit (note 13), 51 f.

1264 StGH 1996/036, LES 1997, 211 (214 ff., para. 4 ff.). The Constitutional Court emphasized that it must be "reserved solely for it to decide whether an unconstitutional provision should exceptionally not be repealed for weighty reasons" (ibid., 216, para. 9).

1265 See note 59 above.

1266 See explanations on interpretation by the Constitutional Court below in section 19.

the intent of the legislature.[1267] Furthermore the manifest intent of the legislature is not considered if it is in an obvious error. In such cases the Constitutional Court does not assume a clear intent of the legislature which could oppose a constitutionally compliant interpretation.[1268] A similar result is likely when the legislature has clearly overlooked an important issue or has not considered it at all. But the Constitutional Court does not further question the clearly manifest intent of the legislature, regardless of the quality of the legislative materials and of the parliamentary debate. The legislature is not subject to the obligation to provide reasons. This fundamental right according to Article 43 LV only pertains to the application of the law, not to legislation.[1269]

Does your Court verify [a] whether the decision maker has justified the decision or [b] whether the decision is one that the Court would have reached, had it itself been the decision maker?

a) Regarding one of the two political decision-makers, the legislature, it has been explained in 12 above that although the legislature has no actual duty to state reasons, the legislative materials and the parliamentary debate allow conclusions to be drawn about the legislature's intentions relevant to the interpretation of the law. In principle, the ordinance maker does not have a duty to give reasons either. Although the latter's will is also relevant for the interpretation of ordinances, there is no equivalent to the legislative materials and the parliamentary debate. However, the government can join any individual complaint procedure and any norm review procedure and submit an opinion.[1270] Thus, it can take this opportunity to provide reasons for any government regulation to be applied or reviewed in an individual complaint or regulation review procedure.

Insofar as the government also issues individual decrees and decisions, it is nonetheless bound by the standards set by the fundamental right to state reasons pursuant to Art. 43 LV, which the Constitutional Court reviews in response to corresponding party pleadings in individual complaints proceedings.[1271]

1267 See detailed discussion in StGH 2020/046, para. 3.2 (www.gerichtsentscheide.li), with references to StGH 2016/005, LES 2017, 45 (48), and to Wille, Auslegung (note 26), 176 f., and Matthias Schmidle, Das rechtliche Gehör des Verdächtigen hinsichtlich der Akteneinsicht des Privatbeteiligten, LJZ 2017, 99 [103]). Contrary to the criticism of Anton A. Eberle (Die Hausdurchsuchung sowie die Herausgabe und Beschlagnahme von Unterlagen im liechtensteinischen Strafverfahren, Bern 2016, 367 note 1485), arguing that such gap-filling creates new law and violates the separation of powers, the Constitutional Court counters that every court creates new law through gap-filling without violating the separation of powers.

1268 StGH 2018/033, para. 1.3.3 (www.gerichtsentscheide.li).

1269 Article 43 last sentence LV, where the fundamental right to justification is anchored, obliges the authority rejecting an appeal to "communicate the reasons for their decision to the appellant." The Constitutional Court views the essential purpose of the obligation to provide reasons accordingly, "that the person affected by an official act or decision can review its validity and defend against a flawed justification" (see, among others, StGH 2022/099, para. 3.1; StGH 2020/013, LES 2020, 190 [192, para. 2.1]; StGH 2018/039, para. 5.1; StGH 2017/197, para. 2.1 [all www.gerichtsentscheide.li]). Both the constitutional provision and the case law of the Constitutional Court regarding the obligation to provide reasons therefore refer solely to acts and decisions, not to legislation.

1270 See Article 13 StGHG (individual complaint procedure); Article 18 para. 3 StGHG (review of laws); Article 20 para. 3 StGHG (review of ordinances); Article 22 para. 2 StGHG (review of treaties).

1271 According to consistent case law, the essential purpose of the obligation

b) The second part of question 13 can generally be answered in the negative. As far as the legislature is concerned, the Constitutional Court expressly refuses to substitute itself for the legislature on the grounds of its special democratic legitimacy and for reasons of separation of powers (see 1.d/aa above). For reasons of separation of powers, the Constitutional Court also applies a - albeit less far-reaching - restraint towards the Government regarding ordinances (see above, in particular 1.d/aa/aaa-ccc). Finally, as far as individual governmental acts are concerned, the constitutional restraint described above under 1.d/bb) applies to (indirect) review of such acts by the Constitutional Court after their passing through the administrative appeals procedure.

Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

For these questions, reference can be made to the explanations in 12 and 13.a).

Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

Again, for these questions, reference can primarily be made to the explanations in 12, where it is outlined that the Constitutional Court relies on parliamentary debate and legislative materials to determine the intent of the legislature. However, the legislature is not required to provide reasons. As mentioned in 13.a), the government can submit opinions in individual complaint proceedings and norm review proceedings. In this context, it can also provide further information in addition to the legislative materials. However, such additional information does not reflect the intent of the legislature but is considered by the Constitutional Court within the framework of other elements of interpretation, i.e mainly of the teleological interpretation.

Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

As explained in 1.d/aa, the Constitutional Court generally exercises significant restraint towards the legislature due to its special democratic legitimacy. This restraint is not dependent on the quality of the parliamentary debate, as the legislature is not bound by an obligation to provide reasons (see the explanations in section 12). This holds even more true in the case of a popular referendum.[1272] As previously discussed in section 12 as well, however, evident deficiencies in legislative materials, parliamentary debates, or voting documents in the context of popular referendums must be taken into account when determining the historical intent of the legislature.

to provide reasons under Article 43 LV is that the party affected by an official act or decision can verify its validity and defend against a flawed justification. However, the scope of the fundamental right to justification is limited by considerations of appropriateness and procedural economy. There is no general right to detailed reasoning (StGH 2020/013, LES 2020, 190 [192, para. 2.1]; StGH 2018/039, para. 5.1; StGH 2017/197, para. 2.1 [all www.gerichtsentscheide.li]; see also Tobias Michael Wille, Begründungspflicht, in: Kley/Vallender (eds.), Grundrechtspraxis in Liechtenstein, LPS Vol. 52, Schaan 2012, 541 (554 ff., para. 16).

1272 The Liechtenstein Constitution provides for extensively developed direct-democratic rights, in particular the right of initiative and referendum at the constitutional and legislative levels according to Articles 64 and 66 LV. See Bernhard Ehrenzeller/Rafael Brägger, Politische Rechte, in: Andreas Kley/Klaus A. Vallender (eds.), Grundrechtspraxis in Liechtenstein, LPS Vol. 52, Schaan 2012, 637 (650 ff.).

Rights' scope, legality and proportionality

Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

As explained in section 1.b) the Constitutional Court exercises maximum restraint when applying the judicial self-restraint-/political question-doctrine. This means that in this area, the Constitutional Court does not further question the interpretation or application of a legal provision by government.

Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

For these questions, reference can primarily be made to the explanations in 1.d/aa/aaa), 1.d/bb/aaa), and 2.a). Generally, a distinction is made between the subsidiary prohibition of arbitrariness and other fundamental rights regarding the intensity of review. As to the review of court decisions, the requirements for the legal basis vary depending on the significance of the encroachment on the fundamental right. Additionally, as to some fundamental rights with a broad scope of application a mere arbitrariness review is applied.

The Constitutional Court's case law does not further differentiate in the intensity of review among individual fundamental rights while the Court acknowledges the exceptional significance of the right to freedom of expression according to Article 40 LV. "In a certain sense, it is the foundation of any freedom at all."[1273] The freedom of expression and the freedom of association and assembly according to Article 41 LV serve "essential purposes of communication freedom and (political) opinion formation. Therefore, they have a dual function: they are not only individual civil liberties but also an indispensable foundation for a functioning democracy."[1274] Accordingly, the Constitutional Court also emphasizes the important role of political rights. These include, in addition to the right to cast an unimpeded vote, the right to express one's political will without distortion.[1275] However, even though the Constitutional Court highlights the special significance of fundamental rights directly relevant to the functioning of democracy, this has no specific implications for the degree of scrutiny. The level of scrutiny equals the one of other fundamental rights.

Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the In claris non fit interpretatio *canon?*

The Constitutional Court explicitly does not recognize the principle "In claris non fit interpretatio" be-

1273 StGH 1994/008, LES 1995, 23 (27, para. 4) (= EuGRZ 1994, 607 ff.) with reference to BVerfGE 7, 208; also see Wolfram Höfling, Die Meinungsfreiheit als Demokratievoraussetzung - Zur Wirkgeschichte eines Grundrechts im Fürstentum Liechtenstein, in: Liechtenstein-Institut (ed.), 25 Jahre Liechtenstein-Institut (1986-2011), LPS Vol. 50, Schaan 2011, 219 (226).

1274 *StGH 2018/074, para. 2.1; StGH 2010/088, para. 3.4.1 (both www.gerichtsentscheide.li); also see Hilmar Hoch/Robin Schädler, Art. 40 LV, para. 5, in: Liechtenstein-Institut (ed.), Kommentar zur liechtensteinischen Verfassung.* Online Commentary, Bendern 2016, verfassung.li (last edited: January 26, 2021).

1275 Political opinion formation, especially in the run-up to referendums, must not be impaired by unsound or even false voting materials (StGH 1990/006, LES 1991, 133 [135 para. 2.1]; StGH 1993/008, LES 1993, 91 [96 f. para. 2.1]; also see StGH 2003/071, para. 2.2 [www.gerichtsentscheide.li]; see Ehrenzeller/Brägger, Rechte [note 85], 671 ff.). In this regard, there is also an overlap with freedom of expression; see Hoch/Schädler, Art. 40 LV (note 87), para. 15.

cause during the process of interpretation, the grammatical element cannot be separated from other elements of interpretation. According to the consistent jurisprudence of the Constitutional Court, there is "no universally valid hierarchy of methods of interpretation today." The grammatical analysis only represents the necessary starting point of an interpretative activity. The decision about whether a clear meaning results from the wording of a provision for a specific case "generally emerges from the context, i.e., taking into account one or more other methods of interpretation."[1276]

What is the intensity review of your Court in case of the legitimate aim test?

This examination is usually not particularly deep, as identifying the public or private interest serving as a legitimate aim in the specific case is often unproblematic. In many cases, recourse to the aims inscribed in the Constitution ("Staatszielbestimmungen") suffices. For example, the Constitutional Court has recognized the most general constitutional goal of promoting the general welfare according to Article 14 as a "heightened public interest."[1277] However, a legitimate aim or interest can be more or less weighty. But the corresponding balancing exercise is best carried out within the criterion of proportionality, which is examined separately according to the jurisprudence of the Constitutional Court.[1278]

What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (i.e. suitability, necessity, and proportionality in the narrower sense)?

The examination is carried out depending on the problem areas of a case based on the relevant, if necessary all, sub-criteria of proportionality.[1279]

Does your Court go through every applicable limb of the proportionality test?

Reference can be made to the explanations in 21.

Are there cases where your Court accepts that the impugned measure satisfies one or more stages

1276 StGH 2018/100, para. 2.4.1; StGH 2017/080, para. 2.2 (both www.gerichtsentscheide.li); also see Wille, Auslegung (note 26), 162 f.). In extreme cases, a "textual interpretation may even prove to be arbitrary" (StGH 2014/072, para. 3.2; StGH 2014/064, para. 3.4; StGH 2011/181, para. 2.2 [all www.gerichtsentscheide.li]). See the constitutional interpretation in the context of reviewing the constitutionality of laws (and ordinances) in section 1.d/aa/ccc) above.

1277 *See StGH 2003/048, para. 5.2.3 (www.gerichtsentscheide.li), as well as Patricia M. Schiess Rütimann, Einführende Bemerkungen zum III. Hauptstück: Von den Staatsaufgaben, Liechtenstein-Institut (ed.), Kommentar zur liechtensteinischen Verfassung.* Online Commentary, Bendern 2016, verfassung.li (last edited: September 30, 2016). The police protection of property ("Polizeigüterschutz") is also regularly invoked as a justification for public interest; see, for example, StGH 2011/203, para. *5.2; StGH 2008/129, para. 2.2 (www.gerichtsentscheide.li); also see Herbert Wille, Liechtensteinisches Verwaltungsrecht.* Ausgewählte Gebiete, LPS Vol. 38, Schaan 2004, 539 ff.

1278 See the criteria for fundamental rights infringements in section 1.d/aa/aaa). In literature and case law, the term "overriding public interest" is sometimes used. However, this formulation blends the two criteria of public interest and proportionality and is therefore not helpful. See on this StGH 2020/076, para. 2.4.7 (www.gerichtsentscheide.li).

1279 See StGH 2021/082 as an example of a particularly detailed proportionality review, para. 5.3 ff.; also see StGH 2013/036, para. 3.2.2 (www.gerichtsentscheide.li), as well as Höfling, Schranken (note 25), 103 ff., para. 41 ff.

of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

In the examination of individual complaints, the requirements of complaint (designation of relevant fundamental right) and substantiation (reasons for its violation) according to Article 16 in conjunction with Article 40(1) StGHG apply. Accordingly what is not pleaded is generally not examined. However, this is different in the context of the judicial review of norms according to Article 18 et seq. StGHG, where an examination takes place ex officio. The Constitutional Court does not carry out its own examination of facts; however, the respective official statements, assumptions, and forecasts can be contested before the Constitutional Court. As mentioned in 1.d/aa/bbb), the legislature and the government are granted an assessment and forecasting prerogative in judicial review proceedings. Accordingly, in case of doubt, the Constitutional Court will follow the official argumentation. Yet even in judicial review proceedings, the Constitutional Court does not have the authority to assume without further examination that a contested norm fulfills one or more steps of the proportionality test.

Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

This question can be answered affirmatively. After first engaging with proportionality in the context of the right of property in the 1970s, the Constitutional Court began a more differentiated proportionality test in the second half of the 1980s, primarily concerning interferences with the freedom of trade. By the mid-1990s, such a proportionality test was applied to all fundamental liberties, both in judicial review and individual proceedings.[1280] In both areas, the Constitutional Court concurrently developed various instruments of judicial restraint to delimit this new proportionality test to a greater or lesser extent.

In relation to judicial review proceedings, the Constitutional Court emphasized in the leading decision on the freedom of trade, StGH 1985/011, the legislature's commitment to the differentiated principle of proportionality, while at the same time granting the legislature "considerable leeway for political design freedom."[1281] This subsequently became the consistent jurisprudence of the Constitutional Court regarding the restrained application of the proportionality principle to the legislature. Subsequent decisions also primarily concerned the freedom of trade.[1282] The Constitutional Court relied on this jurisprudence also as supplementary in the much more frequent judicial review proceedings in the light of the equal treatment principle and the prohibition of arbitrariness, even though no proportionality test is conducted there and thus even greater restraint towards the legislature is indicated from the outset.[1283] Overall, the Constitutional Court related the introduction of the proportionality test in the area of judicial review proceedings directly to a corresponding judicial self-restraint.

The same correlation can also be shown in relation to the review of court decisions. As mentioned,

1280 See Hoch, Schwerpunkte (note 5), 71 f. with references to case law.

1281 StGH 1985/011, LES 1988, 94 (99, para. 16); see regarding this decision also in section 1.d/aa/bbb). However, the Constitutional Court had expressed restraint towards the legislature already a few years earlier – albeit in a much more general sense; see StGH 1982/65/V (LES 1984, 3 [4, para. 2.a]).

1282 As in StGH 2004/014, para. 4; StGH 2006/005, para. 3a; StGH 2008/038, para. 6; StGH 2014/025, para. 5.2.2; see, however, regarding the right to property StGH 2011/203, para. 5.3 ff.; StGH 2007/118, para. 3; and regarding secrecy and privacy StGH 2013/036, para. 3.2.2 (all www.gerichtsentscheide.li).

1283 See, among others, StGH 2018/017, para. 2.1; StGH 2016/024, para. 2.2; StGH 2013/118, para. 3.5.1; StGH 2011/017, para. 2.2; StGH 2010/032, para. 4.1 (all www.gerichtsentscheide.li).

from the mid-1990s onwards, the Constitutional Court also recognized the proportionality requirement as a fundamental rights infringement criterion for the review of court decisions. However, alongside the principle of prohibition of arbitrariness, with certain fundamental rights potentially having a broad substantive scope, there is a risk of excessive review of court decisions and thus of blurring the boundary between the spheres of the Constitutional Court and the other courts. Accordingly, largely simultaneously with the introduction of the proportionality test for fundamental rights infringements, the limitation of this review was introduced for fundamental rights with a potentially broad substantive scope, i.e. right of property, the guarantee of the lawful judge, and the protection of personal freedom (see also 1.d/bb/aaa above).[1284]

Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

According to the "ECtHR-friendly jurisprudence of the Constitutional Court, Liechtenstein's fundamental rights are interpreted in the light of comparable provisions of the ECHR."[1285] Accordingly, the contents of domestic and ECHR fundamental rights strongly overlap.[1286] So far the "margin of appreciation" granted by the ECtHR to the member states of the ECHR has not been restricted by the Constitutional Court in relation to domestic authorities and courts.

Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

In cases against Liechtenstein before the ECtHR, judicial restraint only played a role in one case. In Steck-Risch et al. v. Liechtenstein, the Constitutional Court deemed a violation of the right to be heard as cured,[1287] considering it had no effect on the decision of the contested decision.[1288] The ECtHR, on the other hand, argued that the actual effect of the violation of the right to be heard on the decision in such a situation was of minor importance and applied stricter criteria for remedying a violation of this fundamental right.[1289]

1284 Regarding the right to property, see StGH 1996/008, LES 1997, 153 (157, para. 2.2.2); StGH 1996/20, LES 1998, 68 (72, para. 2); StGH 1996/47, LES 1998, 195 (200, para. 4); similarly StGH 1988/19, LES 1989, 122 (124, para. 2); concerning the guarantee of the lawful judge, see StGH 1997/27, LES 1999, 11 (15, para. 5.1); StGH 1998/45, LES 2000, 1 (4 f., para. 2); regarding the protection of personal freedom, see StGH 1996/4, LES 1997, 203 (206, para. 4.1); similarly StGH 1987/12, LES 1988, 4 (6, para. 6); detailed discussion on this in Hoch, Schwerpunkte (note 5), 79 ff.

1285 Peter Bussjäger, Der Staatsgerichtshof und die Europäische Menschenrechtskonvention – Bemerkungen zur Europäisierung des Grundrechtsschutzes in Liechtenstein, in: Liechtenstein-Institut (ed.), Beiträge zum liechtensteinischen Recht aus nationaler und internationaler Perspektive, Festschrift zum 70. Geburtstag von Herbert Wille, LPS 54, Schaan 2014, 49 (61).

1286 See Bussjäger, Staatsgerichtshof (note 98), 55 ff.

1287 See this version of restraint towards court decisions in 1.d/bb/aaa) above.

1288 ECHR judgment of May 19, 2005, No. 63151/00, LES 2006, 53 (54, para. 24); see Hugo Vogt, Innerstaatliche Durchsetzung der Entscheidungen des Europäischen Gerichtshofs für Menschenrechte, in: Liechtenstein-Institut (ed.): Beiträge zum liechtensteinischen Recht aus nationaler und internationaler Perspektive. Festschrift zum 70. Geburtstag von Herbert Wille. LPS Vol. 54, Schaan 2014, 69, (74).

1289 ECHR judgment No. 63151/00, ibid., 57, para. 57.

Conversely, in a recent case, the Constitutional Court waived restraint towards the democratically legitimized legislature—in this case directly towards the electorate, as a referendum had taken place—because relevant ECtHR jurisprudence was available. The Constitutional Court considered that—even despite the electorate's decision—it had an important "filtering function" to avoid unnecessary condemnations of Liechtenstein by the ECtHR.[1290]

Other peculiarities

How often does the issue of deference arise in human rights cases adjudicated by your Court?

The answer to this question depends on how broadly the concept of judicial self-restraint is understood (see the introductory remarks to 1. regarding the range of practiced forms of self-restraint or limitation of review by the Constitutional Court). If any form of limitation of review is included, then the Constitutional Court very frequently exercises such restraint. However, in the sense of the Constitutional Court's narrow understanding of judicial self-restraint/political question (see the explanations to 1.b), this is only rarely the case.

Has your Court have grown more deferential over time?

As mentioned in the explanations to 24 above, the Constitutional Court gradually increased the level of scrutiny until the 1990s. Since then, the jurisprudence in this regard has remained largely constant.[1291]

Does the deferential attitude depend on the case load of your Court?

Such a correlation is not apparent from the Constitutional Court's justifications for its various forms of judicial restraint or limitation of review.[1292] Such a way of "coping" with a heavy workload would hardly be conceivable without explicit legal basis. In fact, the Constitutional Court emphasized the lack of a legal basis "not to engage with obviously unfounded constitutional complaints without further reasoning."[1293]

[a] Can your Court base its decisions on reasons that are not advanced by the parties? [b] Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

a) Regarding the first question, reference can be made to the application of the principles of complaint and substantiation in the constitutional complaint procedure on the one hand and to the ex officio nature of the norm control procedure on the other hand (see 23. above).

1290 StGH 2020/097, LES 2021, 182 (186, para. 2.6) with reference to Hilmar Hoch, Die EMRK in der Rechtsprechung des Staatsgerichtshofes, LJZ 2018, 111 (113).
1291 See Hilmar Hoch, Staatsgerichtshof (note 35), 426 at note 61. Nevertheless, the initially very strict practice concerning remedying violations of the right to be heard has become somewhat more generous in the last decade. But this may change again: see note 47 with reference to StGH 2022/016, para. 2.3.7 (www.gerichtsentscheide.li); see also the explanations in 1.bb/aaa) above, penultimate paragraph.
1292 This is despite a significant increase in case numbers until 2011, which have since fallen again; see Hoch, Verfassungsgerichtsbarkeit (note 1), 1304.
1293 StGH 1995/28, LES 1998, 6 (11, para. 2.2); see also Hoch, Staatsgerichtshof (note 35), 429 at note 71.

a) The Constitutional Court does not strictly adhere to the requirement of complaint. Specific constitutional articles do not necessarily have to be designated; it suffices if objections are made implicitly or in substance.[1294] Accordingly, it also does not harm if the wrong fundamental right is invoked or if reference is made to the wrong constitutional article, as long as the complaint is sufficiently clear and can be subsumed under the correct fundamental right.[1295]

Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

The Constitutional Court can examine the constitutionality of any statutory or regulatory provision to be applied by it in an individual complaint procedure without request from the parties.[1296] In the case of judicial review proceedings requested by a court or other authorized parties,[1297] the Constitutional Court is bound by the respective request. However, an exception exists when, alongside the law or regulation covered by the request, further directly related provisions prove to be unconstitutional for the same reasons. In this case, these additional provisions not covered by the request can also be repealed.[1298] However, there is no corresponding regulation for the examination of treaties according to Article 22 et seq. StGHG.

1294 StGH 2016/078, para. 2.1; StGH 2016/064, para. 2.5; StGH 2015/008, para. 1.3 (all www.gerichtsentscheide.li); see also Tobias Michael Wille, Liechtensteinisches Verfassungsprozessrecht, LPS Vol. 43, Schaan 2007, 489.

1295 See, for example, StGH 2014/055, para. 2.2; StGH 2011/002, para. 4.2; StGH 1995/006, para. 3.1 (all gerichtsentscheide.li).

1296 Art. 18 para. 1 letter c StGHG (laws); Article 20 para. 1 letter b StGHG (ordinances); Article 22 para. 1 letter b StGHG (treaties).

1297 Article 18 para. 1 letter a and b StGHG (laws); Article 20 para. 1 letter a StGHG (ordinances); Article 22 para. 1 letter b StGHG (treaties). In addition to the courts, the government and municipalities have standing to make applications with regard to laws, certain municipal authorities also with regard to ordinances, and administrative authorities also with regard to treaties. An unusual provision can also be found in Article 20 para. 1 letter c StGHG, according to which 100 eligible voters can request an abstract constitutional review of an ordinance; see on this Wille, Verfassungsprozessrecht (note 107), 192 ff.

1298 Article 19 para. 1, 2nd sentence StGHG (laws) and Article 21 para. 1, 2nd sentence StGHG (ordinances). See on this StGH 2023/025, para. 3 ff. with comparative law references (www.gerichtsentscheide.li). The Constitutional Court applies this exception even when a provision without the unconstitutional provision would represent a "torso" without normative force (StGH 2023/025, para. 3.6.5; StGH 2006/094, para. 3; similar to StGH 2020/097, para. 4.1 [all www.gerichtsentscheide.li]).

Staatsgerichtshof des Fürstentums Liechtenstein

Formen und Grenzen richterlicher Selbstbeschränkung in der Verfassungsgerichtsbarkeit

Es gibt unterschiedliche Verfassungskulturen, und die Wahrnehmung der Rolle der Verfassungsgerichte in einer rechtsstaatlichen Demokratie wirkt sich auf die Intensität ihrer Analyse in Fällen aus, in denen es um Grundrechte geht. Viele Gerichte üben richterliche Selbstbeschränkung.

Richterliche Selbstbeschränkung ist ein juristisches Instrument, das von den Richtern erfunden wurde, um die Gewaltenteilung zu wahren und sich nicht in Angelegenheiten einzumischen, die ihrer Meinung nach ausserhalb ihres Fachwissens oder ihrer Legitimität liegen. Das Instrument wurde hauptsächlich in Fällen eingesetzt, in denen es um Grundrechte ging. Und zwar wegen ihrer transzendenten Qualität, ihrer Fähigkeit, alle materiellen Bereiche staatlichen Handelns zu durchdringen.

Es heisst, dass ein Zuviel an richterlicher Selbstbeschränkung den Vorrang des Rechts und die Gewaltenteilung ebenso gefährdet wie ein übermässiger richterlicher Aktivismus. Die Art und Weise, in der sich Richter in Zurückhaltung üben, ist daher eine grundlegende Frage des Verfassungsprinzips, die die angemessene Rolle der einzelnen Staatsfunktionen in Bezug auf wichtige Fragen der öffentlichen Ordnung betrifft.

Die folgenden Fragen zielen darauf ab, die Unterschiede in der Art und Weise zu ermitteln, in der die europäischen Verfassungsgerichte ihre Kontrollfunktion ausüben.

Fragebogen

Für nationale Berichte

I. Nicht justiziable Angelegenheiten und Intensität richterlicher Selbstbeschränkung

1. Was versteht man in Ihrem Land unter „richterlicher Selbstbeschränkung"?

Es erscheint sinnvoll, zu dieser einleitenden Frage vor dem Hintergrund der weitreichenden Kompetenzen des Staatsgerichtshofes einen Überblick über die verschiedenen Varianten der vom liechtensteinischen Verfassungsgericht, dem Staatsgerichtshof (StGH), geübten Selbstbeschränkung zu geben. Damit werden auch zahlreiche weitere Fragen ganz oder teilweise beantwortet, so dass dort auf diese Ausführungen verwiesen werden kann. Diese einleitenden Ausführungen gliedern sich wie folgt:

Umfassende Kompetenzen des Staatsgerichtshofes

Eingeschränkter judicial self-restraint

Selbstbeschränkung gegenüber EWR-Recht

Varianten gradueller verfassungsgerichtlicher Zurückhaltung

aa) Zurückhaltung bei der Normenkontrolle

aaa) Nach Art des Grundrechts abgestufte Zurückhaltung

bbb) Einschätzungs- und Prognosespielraum von Gesetz- und Verordnungsgeber

ccc) Verfassungskonforme Auslegung

ddd) Appellentscheidungen

bb) Zurückhaltung gegenüber fachgerichtlichen Entscheidungen

aaa) Nach Art des Grundrechts abgestufte Zurückhaltung

bbb) Bei Schiedsentscheiden

Umfassende Kompetenzen des Staatsgerichtshofes

Der Staatsgerichtshof wurde durch Art. 104 der Verfassung von 1921 (LV; LGBl. 2021 Nr. 15) – ähnlich wie das deutsche Bundesverfassungsgericht, aber schon Jahrzehnte vorher – mit umfassenden Kompetenzen sowohl zur Normprüfung als auch zur Kontrolle der Fachgerichtsbarkeit ausgestattet.[1299]

Gemäss Art. 15 Abs. 1 des Staatsgerichtshofgesetzes (StGHG; LGBl. 2004 Nr. 32) kann jede ein Zivil-, Straf- oder Verwaltungsverfahren definitiv beendende („enderledigende") Entscheidung mit Verfassungsbeschwerde („Individualbeschwerde") beim Staatsgerichtshof angefochtenen werden. Dem Staatsgerichtshof kommt gemäss Art. 18 ff. StGHG auch eine umfassende abstrakte und konkrete Normenkontrollfunktion hinsichtlich Gesetzen und Verordnungen sowie eine konkrete Normenkontrollfunktion hinsichtlich Staatsverträgen zu.[1300]

Entsprechend hat die Frage der verfassungsgerichtlichen Selbstbeschränkung beim Staatsgerichtshof ebenso wie beim Bundesverfassungsgericht besondere Relevanz. Gemäss Bundesverfassungsgericht bedeutet der Grundsatz der Selbstbeschränkung des Verfassungsgerichts (judicial self-restraint) „nicht eine Verkürzung oder Abschwächung seiner [...] Kompetenz, sondern den Verzicht, Politik zu treiben'…".[1301] Demgegenüber betont der Staatsgerichtshof, dass „die Grenze zwischen Recht und Politik gerade im Bereich des öffentlichen Rechts fliessend" sei. So habe etwa das bei Grundrechtseingriffen zu berücksichtigende öffentliche Interesse „häufig auch eine politische Dimension".[1302] Entsprechend ist ein Verfassungsgericht permanent dem zumindest latenten Vorwurf ausgesetzt, „Politik zu betreiben", sodass dem Grundsatz der Selbstbeschränkung des Verfassungsgerichts bzw. des judicial self-restraint mit diesem Kriterium kaum klare Konturen gegeben werden können.

Eingeschränkter judicial self-restraint

1299 Siehe Hilmar Hoch, Verfassungsgerichtsbarkeit im Kleinstaat, ZöR 2021, 1289 (1297 ff.).

1300 Siehe Hoch, Verfassungsgerichtsbarkeit (Fn. 1), 1293 f.

1301 BVerfGE 36, 1 (14 f.).

1302 StGH 2009/117, Erw. 2.5 (www.gerichtsentscheide.li); dies mit Verweis auf Jutta Limbach, Standort der Verfassungsgerichtsbarkeit in der Demokratie, LJZ 1997, 1 (4 f.) sowie Karl-Georg Zierlein, Das Bundesverfassungsgericht an der Schnittstelle von Recht und Politik, LJZ 1997, 72 [passim]) Für einen aktuellen Überblick über diese – nach wie vor kontroverse – Diskussion siehe Dieter Grimm, Verfassungsrechtsprechung - juristisch oder politisch? in: Verfassungsgerichtshof (Hrsg.), „100 Jahre Verfassungsgerichtshof 1920-2020", Wien 1921, 19 ff.; für ausführlichere Nachweise siehe auch Dieter Grimm, Recht oder Politik?, Berlin 2020, 29 ff.

Der Staatsgerichtshof verwendet den Ausdruck judicial self-restraint jedenfalls eingeschränkt primär dort, wo der politische Charakter der Entscheidungsmaterie besonders offensichtlich ist, konkret im Bereich der Aussenpolitik. Der Staatsgerichtshof stützt sich dabei auch auf Art. 29 Abs. 2 des Landesverwaltungspflegegesetzes (LVG, LGBl. 1922 Nr. 24), wonach ein „Geschäft der auswärtigen Verwaltung" nicht justiziabel ist.

Faktisch wurde der Staatsgerichtshof in diesem Zusammenhang bisher nur mit – aufgrund des hohen Ausländeranteils in Liechtenstein politisch heiklen – ausländerrechtlichen Fragen im Rahmen des Europäischen Wirtschaftsraums (EWR) und weiterer staatsvertraglicher Vereinbarungen befasst. In strikter Umsetzung von Art. 29 Abs. 2 LVG erachtet der Staatsgerichtshof diese Thematik als Anwendungsfall eines umfassenden judicial self-restraint. So lehnte er es ab, eine von der Regierung für Liechtenstein ausgehandelte Verlängerung der Ausnahmefrist betreffend die Personenfreizügigkeit im EWR einer verfassungsgerichtlichen Überprüfung zu unterziehen.[1303] Der Staatsgerichtshof erachtete auch die Zustimmung der Regierung zur Zulassung ausländischer Beamter bei einer Rechtshilfemassnahme als nicht gerichtlich überprüfbaren (aussen-)politisch bzw. durch die Staatsräson begründeten Akt.[1304] In einer kürzlichen Entscheidung hielt der Staatsgerichtshof – ebenfalls unter Bezugnahme auf Art. 29 Abs. 2 LVG – fest, dass die „verfassungsgerichtliche Durchsetzung einer konsequenten Gleichbehandlung von ausländischen mit liechtensteinischen Staatsangehörigen, aber auch von Angehörigen verschiedener Nationalitäten untereinander" nicht zulässig sei. „Wenn dem anders wäre, würde der Staatsgerichtshof in Verletzung der Gewaltenteilung in die Kompetenzen von Exekutive und Legislative zur Gestaltung der Beziehungen Liechtensteins zu anderen Staaten eingreifen.".[1305]

Sein auf politisch besonders heikle Fragen eingeschränktes Verständnis des judicial self-restraint betont der Staatsgerichtshof auch dadurch, dass er diesen Ausdruck praktisch synonym mit der vom amerikanischen Supreme Court entwickelten, aber auch etwa vom deutschen Bundesverfassungsgericht aufgegriffenen sogenannten political question-Doktrin verwendet.[1306]

Schliesslich sind gewisse Hoheitsakte ebenfalls nicht justiziabel. So sind etwa fürstliche Gnadenakte gemäss Art. 12 LV einer (verfassungs-)gerichtlichen Beurteilung entzogen.[1307]

Selbstbeschränkung gegenüber EWR-Recht

Der Staatsgerichtshof hat zudem im Zusammenhang mit dem EWR-Beitritt im Sinne von Art. 7 des

1303 StGH 1998/056, Erw. 2.6, LES 2000, 107 (110 f., Erw. 2.6); siehe hierzu Hilmar Hoch, Schwerpunkte in der Entwicklung der Grundrechtsprechung des Staatsgerichtshofes, in: Herbert Wille (Hrsg.), Verfassungsgerichtsbarkeit im Fürstentum Liechtenstein, LPS Bd. 32, Vaduz 2001, 65 (83).

1304 StGH 2002/029, Erw. 2.1; vgl. StGH 2009/168, Erw. 2.3.1 in fine (beide www.gerichtsentscheide.li).

1305 StGH 2021/024, 2.5 mit Verweis auf StGH 2011/103, Erw. 6.2 (beide www.gerichtsentscheide.li).

1306 StGH 2021/024, 2.5; StGH 2011/103, Erw. 6.2 (*www.gerichtsentscheide.li*); StGH 1998/56, Erw. 2.6, LES 2000, 107 (110 f., Erw. 2.6).

1307 *Dies gilt nicht nur für den fürstlichen Gnadenakt selbst, sondern auch* für hierzu dem Fürsten erstattete gerichtliche Gutachten; siehe StGH 2012/051, Erw. 1.5 (*www.gerichtsentscheide.li*). Ohne explizit Bezug auf seine judicial self-restraint/political question-Rechtsprechung zu nehmen, zählt der Staatsgerichtshof in Erw. 1.4 das Gnadenrecht zu den typischen (und somit der verfassungsgerichtlichen Überprüfung entzogenen) Prärogativen eines Staatsoberhaupts. Zu weiteren solchen gerichtsfreien Hoheitsakten, wie Ernennungen, Gesetzesinitiativen des Landtags oder der Regierung, gibt es keine einschlägige Rechtsprechung; siehe dazu aber Bericht und Antrag der Regierung an den Landtag vom 12. August 2003, 2003 Nr. 45, 40 f.

EWR-Abkommens[1308] generell den Vorrang des EWR-Rechts gegenüber dem Landesrecht anerkannt. Er hat diese Zurückhaltung hinsichtlich der verfassungsgerichtlichen Überprüfung des EWR-Rechts aber – ähnlich der Solange-Rechtsprechung des Bundesverfassungsgerichts im Verhältnis zum EU-Recht – mit dem Vorbehalt verbunden, dass er (nur) im unwahrscheinlichen Fall einschreiten würde, dass durch das EWR-Recht „Grundprinzipien und Kerngehalte der Grundrechte der Landesverfassung" verletzt würden.[1309]

Der Staatsgerichtshof hat diese weitreichende Variante der verfassungsgerichtlichen Selbstbeschränkung jedoch nicht in Zusammenhang mit seiner sonstigen Rechtsprechung zu judicial self-restraint/political question gebracht. Vielmehr berief er sich in seiner Leitentscheidung StGH 1998/061 primär auf eine analoge Argumentation im Hinblick auf den – dann allerdings in einer Volksabstimmung abgelehnten – schweizerischen EWR-Beitritt.[1310]

Varianten gradueller verfassungsgerichtlicher Zurückhaltung

Verschiedene weitere Varianten einer zwar nicht vollständigen Selbstbeschränkung, aber einer doch mehr oder weniger weitreichenden verfassungsgerichtlichen Zurückhaltung ergeben sich zum einen bei der Normenkontrolle, zum anderen bei der Überprüfung fachgerichtlicher Entscheidungen. Auch hierbei nimmt der Staatsgerichtshof zumeist keinen Bezug auf die judicial self-restraint/political question-Doktrin.[1311] Diese graduelle Zurückhaltung des Verfassungsgerichts soll generell verhindern, dass das eigentliche Anliegen des Grundrechtsschutzes, nämlich die Sicherung elementarer Aspekte der Menschenwürde und des demokratischen Rechtsstaates, im Endeffekt verwässert wird.[1312] Hierzu im Einzelnen:

aa) Zurückhaltung bei der Normenkontrolle

Eine solche graduelle Zurückhaltung pflegt der Staatsgerichtshof im Rahmen seiner Normenkon-

1308 Abkommen vom 2. Mai 1992 über den Europäischen Wirtschaftsraum, LGBl. 1995 Nr. 68.

1309 Siehe StGH 1998/061, LES 2001, 126 ff., sowie Hilmar Hoch, „Grundprinzipien und Kerngehalte der Grundrechte der Landesverfassung". Der EWR-Vorbehalt des Staatsgerichtshofes als materielle Verfassungsänderungsschranke, in: Hilmar Hoch/Christina Neier/Patricia M. Schiess Rütimann (Hrsg.), 100 Jahre liechtensteinische Verfassung. Funktion, Entwicklungen und Verhältnis zu Europa, LPS Bd. 62, Gamprin-Bendern 2021, 51 (53 ff.) u.a. mit Verweis auf BVerfGE 73, 339 (Solange II) und 15 BVerfGE 123, 267 (Lissabon).

1310 StGH 1998/061, LES 2001, 126 (130, Erw. 3.1) mit Verweis auf Botschaft des schweizerischen Bundesrates zum EWRA, BBl 1992 IV 92, sowie auf Daniel Thürer, Liechtenstein und die Völkerrechtsordnung, Archiv für Völkerrecht (AVR) 36 (1998), 98 (120 f.). Ein – naheliegender – Bezug auf die Solange-Rechtsprechung des Bundesverfassungsgerichts ergibt sich aber weder aus den Entscheidungserwägungen noch aus den beiden Verweisen. Siehe hierzu auch Hoch, Grundprinzipien (Fn 11.), 54 f.

1311 Siehe aber immerhin StGH 1994/19, LES 1997, 73 (76, Erw. 7), wo der Staatsgerichtshof auch im Zusammenhang mit der bei der „Anerkennung von grundrechtlichen Ansprüchen mit besonders schwerwiegenden und für das Gericht gar nicht überschaubaren finanziellen Belastungen der öffentlichen Hand" angebrachten richterlichen Zurückhaltung von judicial self-restraint spricht. Siehe dazu Herbert Wille, Verfassungsgerichtsbarkeit im Fürstentum Liechtenstein – Entstehung, Ausgestaltung, Bedeutung und Grenzen, in: Herbert Wille (Hrsg.), Verfassungsgerichtsbarkeit im Fürstentum Liechtenstein, 75 Jahre Staatsgerichtshof, LPS Bd. 32, Vaduz 2001, 9 (50).

1312 Siehe StGH 2007/061, Erw. 2.1; StGH 2000/060, Erw. 2.1; Hoch, Schwerpunkte (Fn. 5), 79.

trollfunktion generell aus Gründen der Gewaltenteilung; insbesondere aber hinsichtlich Gesetzen (Art. 18 ff. StGHG) aufgrund der besonderen demokratischen Legitimation des Gesetzgebers. Es obliege nicht dem (Verfassungs-)Gericht, sondern dem vom Volk gewählten Gesetzgeber, „Grundentscheidungen und Zielsetzungen der Verfassung umzusetzen. Da ihm die‚Entscheidungsprärogative' zukommt, ist es ihm anvertraut, Grundrechtskonflikte nach eigenen Zielvorgaben auszugleichen.[1313] Wenn es um gesellschaftlich und politisch sensible Regelungen geht, soll über solche Fragen erst recht der demokratisch legitimierte Gesetzgeber entscheiden. Entsprechend verlangt der Staatsgerichtshof auch, dass Fragen von „rechtspolitischer Brisanz" nicht vom Verordnungsgeber entschieden werden dürfen, sondern im Wesentlichen im Gesetz geregelt werden müssen.[1314] Andererseits: Je enger der Inhalt einer Verordnung durch den Gesetzgeber vorgegeben ist, umso mehr partizipiert der Verordnungsgeber auch an der erhöhten demokratischen Legitimation des Gesetzgebers.[1315]

aaa) Nach Art des Grundrechts abgestufte Zurückhaltung

Die geringste Zurückhaltung zeigt der Staatsgerichtshof bei der Normenkontrolle, wenn dabei ein Grundrechtseingriff unter Anwendung der etablierten Eingriffskriterien geprüft wird. Er prüft dann, ob sich der Gesetzgeber (oder auch der Verordnungsgeber) an die klassischen Grundrechtseingriffskriterien des (legitimen) öffentlichen Interesses und der Verhältnismässigkeit gehalten und den Kerngehalt des betreffenden Grundrechts respektiert hat.[1316]
Dies ist primär der Fall bei den klassischen, als grundrechtliche Abwehrrechte gegen den Staat konzipierten Freiheitsrechten (wie etwa der Meinungsfreiheit, der Religionsfreiheit oder der Eigentumsgarantie). Eine solche differenzierte Eingriffsprüfung nimmt der Staatsgerichtshof aber auch bei einzelnen Verfahrensgrundrechten vor, soweit diese wie die Freiheitsrechte über einen genügend klar umgrenzten sachlichen Geltungsbereich haben, so ist beim Beschwerderecht und beim Akteneinsichtsrecht als Teilgehalt des Gehörsanspruchs.[1317] Doch auch wenn der Staatsgerichtshof eine Verhältnismässigkeitsprüfung vornimmt, so hat der Gesetzgeber „gleichzeitig allerdings einen erheblichen Spielraum politischer Gestaltungsfreiheit. Der Gesetzgebung liegen notwendigerweise Beurteilungen, Prognosen und Wertungen zugrunde, zu denen in erster Linie der Gesetzgeber selbst aufgerufen ist. Der Staatsgerichtshof als kontrollierendes Organ darf nur einschreiten, wenn der Gesetzgeber den ihm zustehenden Gestaltungsspielraum überschreitet."[1318]

1313 StGH 2012/166, Erw. 9.9; StGH 2010/32, Erw. 4.1; StGH 2007/118, Erw. 3 (alle www.gerichtsentscheide.li). Wenn der Staatsgerichtshof die besondere demokratische Legitimation des Gesetzgebers betont, abstrahiert er allerdings davon, dass der Fürst nach Art. 9 und 65 Abs. 1 LV jedes Gesetz sanktionieren muss. Siehe Herbert Wille, Probleme des gesetzgeberischen Unterlassens in der Verfassungsrechtswissenschaft (Landesbericht Liechtenstein), EuGRZ 2009, 441 (453 Fn. 139).
1314 StGH 2018/133, Erw. 3.1 (*www.gerichtsentscheide.li*); mit zahlreichen Literatur- und Rechtsprechungsnachweisen.
1315 Vgl. StGH 2021/082, Erw. 3.3 (www.gerichtsentscheide.li).
1316 Siehe Hilmar Hoch, Kriterien der Einschränkung von Grundrechten in der Praxis der Verfassungsgerichtsbarkeit (Landesbericht Liechtenstein), EuGRZ 2006, 640 (641 f.).
1317 Siehe Hilmar Hoch, Einheitliche Eingriffskriterien für alle Grundrechte? in: Liechtenstein-Institut (Hrsg.), Beiträge zum liechtensteinischen Recht aus nationaler und internationaler Perspektive, Festschrift zum 70. Geburtstag von Herbert Wille, Schaan 2014, 183 (193 ff.).
1318 StGH 1985/011, LES 1988, 94 (99, Erw. 16); siehe auch StGH 2014/025, Erw. 5.2.2; StGH 2004/76, Erw. 8d (beide www.gerichtsentscheide.li) sowie Wolfram Höfling, Die liechtensteinische Grundrechtsordnung, LPS Bd. 20, Vaduz 1994, 200 f. und hinten die Ausführungen zu 24.

Weniger weit als bei den anderen Grundrechten geht die Normenkontrolle im Lichte des Willkürverbots bzw. des Gleichheitssatzes. Hier ist der gesetzgeberische Spielraum „besonders gross".[1319] Im Lichte des Willkürverbots erfolgt nur eine Vertretbarkeitsprüfung. Auch der Gleichheitssatz bietet bei der Normprüfung keinen weitergehenden Schutz als das Willkürverbot. Denn nach ständiger Rechtsprechung des Staatsgerichtshofes ist die Normprüfung im Lichte des Gleichheitsgebotes in der Regel darauf zu beschränken, ob durch die entsprechende Norm gleich zu behandelnde Sachverhalte bzw. Personengruppen ohne einen vertretbaren Grund – und somit willkürlich – ungleich behandelt werden.[1320] Eine differenzierte Gleichheitsprüfung nimmt der Staatsgerichtshof jedoch vor, wenn eine die Menschenwürde tangierende Diskriminierung u.a. nach Geschlecht, Religion, ethnischer Zugehörigkeit oder Sprache im Raum steht.[1321]

Unabhängig vom tangierten Grundrecht ist für den Staatsgerichtshof jedenfalls nicht relevant, „ob eine gesetzliche Regelung besonders zweckmässig ist oder ob eine andere Regelung rechtspolitisch wünschbar wäre. Die Entscheidung hierüber ist Sache des Gesetzgebers, und der Staatsgerichtshof hat sich nicht an dessen Stelle zu setzen."[1322]

bbb) Einschätzungs- und Prognosespielraum von Gesetz- und Verordnungsgeber

Zudem anerkennt der Staatsgerichtshof bei komplexen Sachverhalten – wie kürzlich bei der Corona-Thematik – eine „Einschätzungsprärogative" des Gesetzgebers bzw. einen „Einschätzungs- und Prognosespielraum" des Verordnungsgebers. in solchen dynamischen sowie von aktuellen wissenschaftlichen Erkenntnissen und statistischen Daten abhängigen Regelungs- und Entscheidungsbereichen „ist es den Gerichten nicht möglich, mit dem ihnen zur Verfügung stehenden Instrumentarium eine engmaschige Überprüfung" vorzunehmen.[1323]

ccc) Verfassungskonforme *Auslegung*

Als Ausfluss der Gewaltenteilung versucht der Staatsgerichtshof auch, die Aufhebung einer Geset-

1319 StGH 2009/113a, Erw. 3.2 (www.gerichtsentscheide.li).

1320 StGH 2020/008, LES 2020, 188 (189, Erw. 4.1); StGH 2017/087, Erw. 4.1.2; StGH 2016/024, Erw. 2.2 (alle www.gerichtsentscheide.li); siehe auch Hugo Vogt, Das Willkürverbot und der Gleichheitsgrundsatz in der Rechtsprechung des liechtensteinischen Staatsgerichtshofes, LPS Bd. 44, Schaan 2008, 75 ff.

1321 StGH 2021/082 4.6.1; StGH 2016/024, Erw. 2.2; StGH 2014/027, Erw. 2.3.1; StGH 2013/009, Erw. 4.1 (alle *www.gerichtsentscheide.li*); siehe auch Jasmin Beck, Was es bedeutet, gleich zu sein. Die Rechtsprechung des Staatsgerichtshofs, menschenrechtliche Verpflichtungen und rechtspolitische Handlungsfelder für ein Liechtenstein der Gleichberechtigung und Nichtdiskriminierung, in: Hilmar Hoch/Christina Neier/Patricia M. Schiess Rütimann (Hrsg.), 100 Jahre liechtensteinische Verfassung. Funktion, Entwicklungen und Verhältnis zu Europa, LPS Bd. 62, Gamprin-Bendern 2021, 215 (221 f.).

1322 StGH 2017/148, Erw. 3; StGH 2016/024, Erw. 2.3 (*www.gerichtsentscheide.li*); siehe auch schon StGH 1998/002, LES 1999, 158 (163 f., Erw. 4.3) mit Verweis auf StGH 1982/065/V, LES 1984, 3 (4) und StGH 1988/016, LES 1989, 115 ff. sowie auf Jutta Limbach (Fn. 4), 9.

1323 StGH 2021/082, Erw. 3.1 (www.gerichtsentscheide.li) mit Hinweisen auf die einschlägige Rechtsprechung der Nachbarstaaten. So auch schon StGH 1985/011, LES 1988, 94 (100): „Der Gesetzgebung liegen notwendigerweise Beurteilungen, Prognosen und Wertungen zugrunde, zu denen in erster Linie der Gesetzgeber selbst aufgerufen ist"; siehe hierzu Andreas Kley, Grundriss des liechtensteinischen Verwaltungsrechts, LPS Bd. 23, Vaduz 1998, 227 und Wolfram Höfling, Schranken der Grundrechte, in: Andreas Kley/Klaus Vallender (Hrsg.), Grundrechtspraxis in Liechtenstein, LPS Bd. 52, Schaan 2012, 83 (106, Rz. 46).

zes- oder Verordnungsbestimmung nach Möglichkeit durch eine verfassungskonforme Auslegung zu vermeiden. Beim Gesetzgeber rechtfertigt sich dieses Vorgehen zusätzlich wegen dessen demokratischer Legitimation. Eine solche Auslegung ergibt sich auch aus Überordnung der Verfassung und der Einheit der Rechtsordnung. Eine verfassungskonforme Auslegung ist aber dann nicht zulässig, wenn sowohl der Wortlaut der Norm als auch der Wille des Gesetz- oder Verordnungsgebers gegen eine solche Auslegung sprechen. In diesem Fall muss die Norm als verfassungswidrig aufgehoben werden.[1324]

ddd) Appellentscheidungen

Der Schonung des Gesetzgebers – seltener auch des Verordnungsgebers[1325] – können zudem sogenannte Appellentscheidungen dienen. Der Staatsgerichtshof subsumiert unter diesen Begriff sowohl Fälle, in denen die Rechtslage zwar problematisch, aber noch verfassungsmässig ist,[1326] als auch schon verfassungswidrige Rechtslagen, bei denen er trotzdem auf die Normaufhebung verzichtet.[1327] Dieser zweite Fall entspricht der Verfassungswidrig- bzw. Unvereinbarkeitserklärung des deutschen Bundesverfassungsgerichts.[1328]

Das Staatsgerichtshofgesetz sieht solche Appellentscheidungen nicht vor. Der Staatsgerichtshof nimmt hier eine Lückenfüllung vor. Nach seiner Meinung „stellen Appellentscheidungen eine pragmatische Mittellösung dar, welche dem Verfassungsgericht erlaubt, unzweideutig seine verfassungsrechtliche Leitfunktion wahrzunehmen und verfassungswidrige Rechtsnormen selbst dann als solche zu benennen, wenn eine Kassation aus gewichtigen praktischen oder verfassungspolitischen Gründen ausnahmsweise nicht realisierbar ist."[1329] *Von einer verfassungsgerichtlichen Zurückhaltung bzw. von einer Schonung des Gesetz-*

1324 Siehe StGH 2022/029, Erw. 4.5; StGH 2020/008, Erw. 4.4; StGH 2018/038, Erw. 3.12.1; StGH 2014/061, Erw. 6.2 (alle www.gerichtsentscheide.li); siehe auch Tobias Michael Wille, Verfassungs- und Grundrechtsauslegung in der Rechtsprechung des Staatsgerichtshofes, in: Liechtenstein-Institut (Hrsg.), Beiträge zum liechtensteinischen Recht aus nationaler und internationaler Perspektive: Festschrift zum 70. Geburtstag von Herbert Wille, LPS Bd. 54, Schaan 2014, 131 (170 ff. m. w. N.). Zur Ausnahme des verfassungswidrigen sogenannten „qualifizierten Schweigens" des Gesetzgebers siehe unten Fn. 80.

1325 So kürzlich immerhin StGH 2020/075, Erw. 2.6 (www.gerichtsentscheide.li).

1326 So StGH 1985/001, LES 1986, 108 (112): StGH 1993/003, LES 1994, 37 (38 f., Erw. 2.2 ff.).

1327 So StGH 1995/020, LES 1997, 30 (38, Erw. 4.5); StGH 1989/015, LES 1990, 135 (141, Erw. 4.3.2 ff.). Siehe zu diesen beiden Varianten von Appellentscheidungen auch die Ausführungen hinten zu 10. *Eine noch einmal andere Variante von* Appellentscheidung *lag der StGH-Entscheidung 2003/065 (www.gerichtsentscheide.li) zugrunde: Der Staatsgerichtshof erachtete eine für das liechtensteinische Stiftungsrecht folgenschwere Praxisänderung zwar als verfassungskonform, nicht aber deren Anwendung auf bestehende Stiftungen, deren Grossteil in ihrer Existenz bedroht gewesen wären. Er verlangte deshalb dringend die Schaffung einer gesetzlichen Regelung mit einer Übergangsfrist zur Sanierung bestehender Stiftungen (siehe dort Erw. 2.7).*

1328 Siehe Wille, Probleme (Fn. 15), 449 ff. Kritik an dieser Variante der Appellentscheidung findet sich im Bericht und Antrag der Regierung an den Landtag vom 4. November 2003, 2003 Nr. 95, 43; Generell ablehnend gegenüber jeglicher Form von Appellentscheidungen Wille, Probleme (Fn. 15), 453 f.; derselbe, Die liechtensteinische Staatsordnung – Verfassungsgeschichtliche Grundlagen und oberste Organe, LPS Bd. 57, Schaan 2015, 673.

1329 StGH 1995/020, LES 1997, 30 (38, Erw. 4.5); Der Staatsgerichtshof stellte schon in dieser Entscheidung von 1996 eine „durchaus gefestigte Praxis sogenannter Appellentscheidungen" fest (Verweis auf StGH 1981/018, LES 1983, 39; StGH 1984/012, LES

gebers kann genau genommen allerdings nur bei einem Aufhebungsverzicht aus „verfassungspolitischen Gründen" gesprochen werden – nicht aber dann, wenn eine solche Aufhebung praktisch gar nicht möglich ist.[1330]

In den letzten zwei Jahrzehnten haben sich allerdings keine Fälle mehr ergeben, bei denen der Staatsgerichtshof die Verfassungswidrigkeit einer Norm zwar feststellte, auf deren Aufhebung aber verzichtete.[1331] *Auch kam es zu keinen Ermahnungen an den Gesetzgeber, problematische, aber noch verfassungsmässige Regelungen baldmöglichst zu sanieren. Allerdings hat der Staatsgerichtshof mehrmals gesetzliche Regelungen zwar als – im Lichte des groben Willkürrasters – verfassungskonform erachtet, für die daran geäusserte Kritik aber durchaus Verständnis gezeigt. Doch sei eine solche Kritik eben politischer Natur und somit nur – aber immerhin –„de lege ferenda", also für den Gesetzgeber relevant.*[1332]

bb) Zurückhaltung *gegenüber fachgerichtlichen Entscheidungen*

Schliesslich übt der Staatsgerichtshof Zurückhaltung bei der Überprüfung fachgerichtlicher[1333] Entscheidungen. Damit will er – ebenso wie andere Verfassungsgerichte mit entsprechender Prüfungskompetenz – vermeiden, dass er faktisch zur weiteren Revisionsinstanz wird.[1334]

aaa) *Nach* Art des Grundrechts abgestufte Zurückhaltung

Wenn fachgerichtliche Entscheidungen in den sachlichen Geltungsbereich insbesondere der Freiheitsrechte eingreifen, prüft der Staatsgerichtshof neben den (zu 1.d/aa/aaa schon erwähnten) Grundrechtseingriffskriterien des öffentlichen Interesses, der Verhältnismässigkeit und der Kerngehaltsgarantie zudem, ob der Eingriff auf einer genügenden gesetzlichen Grundlage beruht. Bei schweren Grundrechtseingriffen ist die Prüfungsdichte höher; der Staatsgerichtshof verlangt eine klare gesetzliche Grundlage.[1335]

Die Gefahr einer revisionsartigen Überprüfung fachgerichtlicher Entscheidungen ergibt sich primär bei der Verhältnismässigkeitsprüfung. *Umso wichtiger ist deshalb, dass der Staatsgerichtshof diese* dif-

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1986, 70; StGH 1989/015, LES 1990, 135; StGH 1993/003, LES 1994, 39); ausführlich hierzu Wolfram Höfling, Die Verfassungsbeschwerde zum Staatsgerichtshof, LPS Bd. 36, Schaan 2003, 194 ff.; siehe auch Andreas Kley, Die Beziehungen zwischen dem Liechtensteinischen Staatsgerichtshof und den übrigen einzelstaatlichen Rechtsprechungsorganen, einschliesslich der diesbezüglichen Interferenz des Handelns der europäischen Rechtsprechungsorgane (Landesbericht Liechtenstein), EuGRZ 2004, 43 (53).

1330 Siehe hierzu die nachfolgenden Ausführungen zu 2.b) betreffend Justiziabilität.

1331 *Dies hat damit zu tun, dass die maximale Frist für den Aufschub der Wirksamkeit einer Normaufhebung mit dem neuen Staatsgerichtshofgesetz von 2003 von sechs auf zwölf Monaten und damit auch die Möglichkeit des Gesetzgebers, rechtzeitig zu reagieren, verlängert wurde. Siehe hierzu auch die Ausführungen bei Fn. 59.*

1332 Siehe StGH *2022/015, Erw. 2.5.3;* StGH *2021/006, Erw. 3.5;* StGH *2020/059a, Erw. 3.5;* StGH *2020/046, Erw. 4.4;* StGH *2014/088, Erw. 4.2; StGH 2013/118, Erw. 3.4.3; StGH 2008/060, Erw. 5 (alle www.gerichtsentscheide.li)*.

1333 Der auch in Liechtenstein gebräuchliche deutsche Begriff „Fachgerichtsbarkeit" umfasst anders als der in Österreich übliche Begriff „ordentliche Gerichtsbarkeit" auch die Verwaltungsgerichtsbarkeit; siehe Hilmar Hoch, Staatsgerichtshof und Oberster Gerichtshof in Liechtenstein. Zum Verhältnis zwischen Verfassungs- und Fachgerichtsbarkeit, in: Hubertus Schumacher/Wigbert Zimmermann (Hrsg.), Festschrift für Gert Delle Karth – 90 Jahre Fürstlicher Oberster Gerichtshof, Wien 2013, 415 (418 f.) mit Nachweisen.

1334 Vgl. Hoch, Staatsgerichtshof (Fn. 35), 417 ff.

1335 Siehe Hoch, Kriterien (Fn. 18) 641.

ferenzierte Prüfung nur punktuell innerhalb des sachlichen Geltungsbereichs der einzelnen Grundrechte vornimmt. Ansonsten kommt nur das subsidiäre Willkürverbot zur Anwendung.[1336] Anstelle der Verhältnismässigkeitsprüfung erfolgt eine blosse Vertretbarkeitsprüfung.[1337]

Nun besteht aber bei bestimmten Grundrechten die Gefahr, dass ihnen ein zu weiter sachlicher Geltungsbereich eingeräumt wird.[1338] So schützt die Eigentumsgarantie gemäss Art. 34 LV neben dem Eigentum an beweglichen Sachen und Grundstücken auch Forderungen und andere geldwerte Interessen. Damit der Staatsgerichtshof nicht jede Auseinandersetzung um finanzielle Ansprüche differenziert im Lichte dieses Grundrechts zu prüfen hat, verlangt er zusätzlich einen staatlichen Eingriff in eine gefestigte Eigentümerposition, ansonsten nimmt er nur eine Willkürprüfung vor.[1339] Und die Garantie des ordentlichen Richters gemäss Art. 33 Abs. 1 LV umfasst nach der Rechtsprechung des Staatsgerichtshofes auch gerichtliche Verfahrensfehler. Rügen solcher Verfahrensfehler unterzieht der Staatsgerichtshof nur dann einer differenzierten Überprüfung, wenn der Grundrechtseingriff schwerwiegend ist; so bei Nichteintretensentscheiden, wenn kein zumutbarer alternativer Rechtschutzweg offensteht.[1340] Schliesslich könnte das Grundrecht auf persönliche Freiheit gemäss Art. 32 Abs. 1 LV zu einer zu weitgehenden Überprüfung fachgerichtlicher Entscheidungen verleiten. So handhabt das deutsche Bundesverfassungsgericht dieses Grundrecht sehr weit im Sinne einer allgemeinen Handlungsfreiheit. Demgegenüber subsumiert der Staatsgerichtshof von vornherein unter den Schutzbereich der persönlichen Freiheit – analog derjenigen des schweizerischen Bundesgerichts und auch im Einklang mit Art. 8 EMRK – neben der körperlichen und seelischen Integrität nur elementare Erscheinungsformen der Persönlichkeitsentfaltung.[1341]

1336 Siehe zur Subsidiarität des Willkürverbots Hugo Vogt, Willkürverbot, in: Andreas Kley/Klaus Vallender (Hrsg.), Grundrechtspraxis in Liechtenstein, LPS Bd. 52, Schaan 2012, 303 (327 ff, Rz. 43 ff.).

1337 Die ausführliche Willkürformel des Staatsgerichtshofes für den Bereich der Rechtsanwendung lautet wie folgt: „Ein Verstoss gegen das Willkürverbot liegt nur dann vor, wenn eine Entscheidung sachlich nicht zu begründen, nicht vertretbar bzw. stossend ist. Dementsprechend wird ein Verstoss gegen das Willkürverbot nicht schon dann angenommen, wenn eine Entscheidung als unrichtig zu qualifizieren ist. In seiner Funktion als Auffanggrundrecht soll das Willkürverbot gewissermassen die letzte Verteidigungslinie des Rechts gegenüber derart offensichtlichem Unrecht sein, dass es in einem modernen Rechtsstaat nicht zu tolerieren ist." Siehe StGH 2022/080, Erw. 3.4.2; StGH 2021/044, Erw. 2.1; StGH 2020/029, Erw. 6.1; StGH 2017/097, Erw. 2.1 (alle www.gerichtsentscheide.li).

1338 Siehe Hoch, Staatsgerichtshof (Fn. 35), 424 ff. Die Problematik zu umfassender Grundrechtsgehalte ist nicht nur bei der Überprüfung der fachgerichtlichen Rechtsanwendung, sondern an sich auch für die Normprüfung relevant. Allerdings erfolgt der allergrösste Teil der Normprüfungen des Staatsgerichtshofes im Lichte des Gleichheitssatzes und des Willkürverbots, weshalb bei den Ausführungen zur Normprüfung nicht darauf eingegangen wurde; siehe aber auch hinten Fn. 95.

1339 Klaus Vallender/Hugo Vogt, Eigentumsgarantie, in: Andreas Kley/Klaus Vallender (Hrsg.), Grundrechtspraxis in Liechtenstein, LPS Bd. 52, Schaan 2012, 689 (711, Rz. 40).

1340 Siehe StGH 2018/060, Erw. 3.1; StGH 2010/158, Erw. 2.2; StGH 2009/096, Erw. 2 (alle www.gerichtsentscheide.li); siehe auch Tobias Michael Wille, Recht auf den ordentlichen Richter, in: Andreas Kley/Klaus Vallender (Hrsg.), Grundrechtspraxis in Liechtenstein, LPS Bd. 52, Schaan 2012, 331 (365 ff., Rz. 39 ff.).

1341 StGH 2020/085, Erw. 2.1; StGH 2013/184, Erw. 5.1; StGH 2012/035, Erw. 4.1 (alle www.gerichtsentscheide.li); siehe hierzu auch Marzell Beck/Andreas Kley, Freiheit der Person, Hausrecht sowie Brief- und Schriftengeheimnis, in: Andreas Kley/Klaus Vallender (Hrsg.), Grundrechtspraxis in Liechtenstein, LPS Bd. 52, Schaan 2012, 131 (134 f., Rz. 7) mit Nachweisen.

Eine blosse Willkürprüfung nimmt der Staatsgerichtshof schliesslich bei der Ermessensausübung[1342] *und teilweise hinsichtlich der Auslegung von unbestimmten Rechtsbegriffen durch die Fachgerichte*[1343] *vor.*

Eine weitere Art der Zurückhaltung gegenüber der Fachgerichtsbarkeit übt der Staatsgerichtshof, wenn er bei einem Teil der Verstösse gegen den Gehörsanspruch und die Begründungspflicht ausnahmsweise auf die Feststellung einer Grundrechtsverletzung oder jedenfalls auf die Aufhebung der angefochtenen Entscheidung verzichtet – auch wenn der Staatsgerichtshof diese Praxis mit der Vermeidung von verfahrensökonomischen Leerläufen und nicht mit der Schonung der Fachgerichte begründet.

Bei Verletzungen des (aus dem allgemeinen Gleichheitssatz von Art. 31 Abs. 1 LV abgeleiteten)[1344] *Anspruchs auf rechtliches Gehör nimmt der Staatsgerichtshof unter bestimmten Voraussetzungen eine sogenannte „Heilung" der erfolgten Grundrechtsverletzung an. Er stellt an von vornherein keine Grundrechtsverletzung fest. Eine Heilung von Gehörsverletzungen ist „für jene Fälle möglich, in denen die Gehörsverletzung keinen Einfluss auf die angefochtene Entscheidung haben konnte und im Ergebnis die Parteirechte einer beschwerdeführenden Partei nicht in erheblicher Weise eingeschränkt wurden. Unter Letzterem versteht der Staatsgerichtshof, dass eine weitere Instanz zur Verfügung stand, welche zumindest die gleiche Kognition wie die Vorinstanz besitzt, und die beschwerdeführende Partei vor dieser weiteren Instanz Stellung nehmen konnte."*[1345]

Eine ähnliche Praxis übt der Staatsgerichtshof im Zusammenhang mit der grundrechtlichen Begründungspflicht gemäss Art. 43 LV.[1346] Wenn sich eine Entscheidung trotz Verletzung der Begründungspflicht im Ergebnis als materiell verfassungskonform erweist, hebt der Staatsgerichtshof die Entscheidung ebenfalls mit dem Argument der Vermeidung eines verfahrensökonomischen Leerlaufs nicht auf. Hier wird aber die Grundrechtsverletzung *festgestellt* und der Verfassungsbeschwerde insoweit Folge gegeben.[1347]

1342 *StGH 2019/074, Erw. 3.2; StGH 2010/064, Erw. 2.4.1; StGH 2005/085, Erw. 4.2 (alle www.gerichtsentscheide.li). Wenn allerdings die Rechtsmittelinstanz schon eine unterinstanzliche Ermessensausübung zu beurteilen hat, ist auch sie häufig auf eine blosse Willkürprüfung beschränkt. In diesem Fall prüft der Staatsgerichtshof die bei ihm angefochtene Rechtsmittelentscheidung frei (keine „Willkür im Quadrat"). Siehe* Hilmar Hoch, Schiedsgerichtsbarkeit und Grundrechte, in: Hubertus Schumacher/Wigbert Zimmermann (Hrsg.), Festschrift 100 Jahre Fürstlicher Oberster Gerichtshof, Der Einfluss der höchstgerichtlichen Rechtsprechung auf Finanz und Wirtschaft, Wien 2022, 269 (286 f.).

1343 *StGH 2008/129, Erw. 2.2; StGH 2008/161, Erw. 2.1.2 (www.gerichtsentscheide.li)*; StGH 1988/009, LES 1989, 59 (61); siehe auch Kley, Verwaltungsrecht (Fn. 25), 183.

1344 Siehe Hugo Vogt, Anspruch auf rechtliches Gehör, in: Kley/Vallender [Hrsg.], Grundrechtspraxis in Liechtenstein, LPS Bd. 52, Schaan 2012, 573, Rz. 11 mit Rechtsprechungsnachweisen.

1345 StGH 2022/016, Erw. 2.2.5; StGH 2021/069, Erw. 2.3; StGH 2021/006, Erw. 5.1 (alle www.gerichtsentscheide.li); siehe auch Peter Bussjäger, Aktuelles aus der Rechtsprechung des Staatsgerichtshofes 2016 – 2019, LJZ 2020, 104 106 f.). Der Staatsgerichtshof hat die ordentlichen Gerichtsinstanzen kürzlich ermahnt, diese Heilungspraxis relativ streng anzuwenden, damit der Staatsgerichtshof weniger intervenieren müsse. Andernfalls hat der Staatsgerichtshof eine Verschärfung dieser Heilungspraxis in Aussicht gestellt; siehe StGH 2022/016, Erw. 2.3.7 (www.gerichtsentscheide.li).

1346 Siehe zu diesem Grundrecht die Ausführungen hinten zu 13.

1347 StGH 2022/015, Erw. 3.1; StGH 2013/156, Erw. 3.8; StGH 2009/143, Erw. 3; StGH 2001/022, Erw. 2.5 (alle www.gerichtsentscheide.li). Eine Ausnahme besteht aber wiederum dann, wenn es mehr als eine materiell verfassungskonforme Lösung gibt. Dann greift der Staatsgerichtshof der ordentlichen Letztinstanz nicht vor, sondern hebt die Entscheidung auf und verweist sie zur Neuentscheidung zurück; siehe StGH

bbb) Bei Schiedsentscheiden

Schliesslich übt der Staatsgerichtshof Zurückhaltung bei der Überprüfung von Entscheidungen privater Schiedsgerichte. Diese Zurückhaltung geht allerdings nicht weiter als diejenige, welche von Gesetzes wegen auch schon für die Prüfung durch die Zivilgerichte gilt.[1348] Danach haben die staatlichen Gerichte primär die Einhaltung von Verfahrensgrundrechten im Schiedsgerichtsverfahren, insbesondere des Gehörsanspruchs zu prüfen.[1349] Die materielle Überprüfung einer Schiedsentscheidung kann dagegen nur hinsichtlich der Einhaltung des – enger als das Willkürverbot gefassten – ordre public erfolgen.[1350] Da der Staatsgerichtshof keine strengere Prüfung als die Zivilgerichte vornehmen kann, ist dies der einzige Fall, wo die verfassungsgerichtliche Überprüfung nicht zumindest mit einer Willkürkognition erfolgt.[1351]

2. [a] Kennt Ihr Gerichtshof verschiedene Stufen der Kontrolldichte? [b] Gibt es „unantastbare" Bereiche oder Bereiche, in denen keine rechtliche Verantwortlichkeit besteht, oder Fragen, die als nicht justiziabel gelten (z.B. kontroverse moralische Fragen, politische Empfindlichkeiten, Kontroversen in der Gesellschaft, Verteilung knapper Mittel, erhebliche finanzielle Auswirkungen für den öffentlichen Haushalt usw.)?

Zur ersten Frage kann auf die vorherigen Ausführungen zur graduellen Zurückhaltung des Staatsgerichtshofes bei der Normprüfung (1.d/aa) und bei der Prüfung der fachgerichtlichen Rechtsanwendung (1.d/bb) verwiesen werden.

Was „unantastbare" Bereiche angeht, so nimmt der Staatsgerichtshof gestützt auf Art. 29 Abs. 2 LVG einzig den Bereich der Aussenpolitik generell von der verfassungsgerichtlichen Kontrolle aus (siehe oben 1.b). Primär in diesem engen Rahmen spricht er von judicial self-restraint/political question.

Was die Frage der Justiziabilität angeht, so versteht der Staatsgerichtshof darunter weniger, ob sich das Verfassungsgericht mit einer Rechtsmaterie bzw. einem Beschwerdefall befassen soll,[1352] sondern primär, ob er dies überhaupt kann; d.h. ob eine solche Befassung praktikabel ist. Aus dem Mangel an in diesem Sinne verstandener Justiziabilität resultiert zunächst die schon zu 1.d/aa/bbb) erwähnte Zurückhaltung des Staatsgerichtshofes bei komplexen und dynamischen Sachverhalten. Denn bei solchen Materien „ist es den Gerichten nicht möglich, mit dem ihnen zur Verfügung stehenden Instrumentarium eine engmaschige Überprüfung" entsprechender behördlichen Regelungen und Massnahmen vorzunehmen.[1353] Weiter sind Normenkontrollfälle mitunter deshalb nicht justiziabel, 2010/040, Erw. 3.5 (www.gerichtsentscheide.li). Gleiches gilt, wenn für den Staatsgerichtshof wegen der fehlenden Begründung von vornherein weder die Verfassungsmässigkeit noch die Verfassungswidrigkeit der Entscheidung offensichtlich ist; siehe StGH 2007/015, Erw. 7.5 (www.gerichtsentscheide.li).

1348 *Da Entscheidungen privater Schiedsgerichte weder Akte einer „öffentliche Gewalt" noch letztinstanzlich sind, sind sie gemäss Art. 15 Abs. 1 StGHG nicht direkt beim Staatsgerichtshof anfechtbar. Siehe StGH 2008/046, Erw. 2.3.1 ff.* (www.gerichtsentscheide.li) sowie Hoch, *Schiedsgerichtsbarkeit (Fn. 44), 285 f.*

1349 Siehe zu den Anfechtungsgründen § 628 der Zivilprozessordnung (ZPO; i.d.F. LGBl. 2010 Nr. 182) sowie Hoch, *Schiedsgerichtsbarkeit (Fn. 44), 276 f.*

1350 Siehe StGH 2010/074, Erw. 5.2 f. (www.gerichtsentscheide.li) sowie Hoch, *Schiedsgerichtsbarkeit (Fn. 44), 283 ff.*

1351 *Dies gilt allerdings nur mit Blick auf die Schiedsentscheidung selbst, die beim* Staatsgerichtshof *angefochtene zivilgerichtliche Überprüfungsentscheidung prüft dieser frei (siehe oben Fn. 44).*

1352 Insoweit gibt es auch weitgehend klare gesetzliche Vorgaben. Siehe vorne die Ausführungen zu 1.b).

1353 StGH 2021/082, Erw. 3.1 (www.gerichtsentscheide.li).

weil der Staatsgerichtshof als sogenannter „negativer Gesetzgeber“[1354] eine Norm nur aufheben kann. Allenfalls kann aber durch eine blosse Normaufhebung im konkreten Fall ein verfassungskonformer Zustand gar nicht hergestellt werden;[1355] oder aber es würde ohne gleichzeitiges Tätigwerden des Gesetzgebers ein unpraktikabler „Torso“[1356] im betreffenden Regelungsbereich entstehen. Nun hat der Staatsgerichtshof wie der österreichische Verfassungsgerichtshof die gesetzliche Kompetenz, die Rechtswirkung einer Normaufhebung aufzuschieben, damit der Gesetzgeber Zeit hat zu reagieren. Doch selbst die entsprechende Frist von maximal einem Jahr (in Österreich sind es eineinhalb Jahre)[1357] kann je nach Umfang des durch eine Normaufhebung verursachten Regelungsbedarfs zu kurz sein. In solchen Fällen behilft sich der Staatsgerichtshof allenfalls mit einer Appellentscheidung (siehe dazu die Ausführungen zu 1.d/aa/ddd).
Schliesslich spielt die Frage der Justiziabilität eine Rolle im Zusammenhang mit der Praxis des Staatsgerichtshofes, auch Verfassungsbestimmungen ausserhalb des Grundrechtekatalogs des IV. Hauptstücks der Verfassung bei Bedarf Grundrechtscharakter zuzusprechen (steuerfreies Existenzminimum, Gemeindeautonomie) oder sogar ungeschriebene Grundrechte anzuerkennen (Willkürverbot, Recht auf Existenzsicherung, Legalitätsprinzip im Abgabenrecht)[1358] Voraussetzung ist dabei insbesondere, dass das neue Grundrecht überhaupt als gerichtlich durchsetzbarer Anspruch gehandhabt werden kann.[1359]

3. Gibt es Faktoren, die ausschlaggebend dafür sind, wie und wann Ihr Gerichtshof Selbstbeschränkung übt (z. B. die Kultur und die Eigenheiten Ihres Landes; die historischen Erfahrungen Ihres Landes; der absolute oder besondere Charakter der fraglichen Grundrechte; der Gegenstand des Verfahrens; der Umstand, dass es um Fragen geht, die sich aus dem Wandel der Gesellschaft und der Anschauungen ergeben)?

Von den zu dieser Frage angeführten Faktoren sind für die Selbstbeschränkung des Staatsgerichtshofes nur die letzten drei relevant:
Zum absoluten oder besonderen Grundrechtscharakter kann zunächst auf die Ausführungen zu 1.d/aa/aaa) verwiesen werden. Danach ist bei der Normenkontrolle im Lichte des Willkürverbots bzw. des Gleichheitssatzes eine grössere Zurückhaltung angebracht, als wenn andere Grundrechte betroffen sind. Entsprechende Zurückhaltung ist gemäss den Ausführungen zu 1.d/bb/aaa) zudem bei der Prüfung der Rechtsanwendung durch die Fachgerichte geboten, wenn nur das Willkürverbot betroffen ist.
Zum Gegenstand des Verfahrens als Faktor für die Selbstbeschränkung ist insbesondere auf die Ausführungen zu 1.b) und c) zu verweisen, wonach primär die Aussenpolitik und das EWR-Recht generell von der verfassungsgerichtlichen Überprüfung ausgenommen sind.

1354 Hans Kelsen, Wesen und Entwicklung der Staatsgerichtsbarkeit, VVDStRL 5 (1928), 56; vgl. auch StGH 2002/084, Erw. 2.2.5 (www.gerichtsentscheide.li); StGH 1995/020, LES 1997, 30 (37, Erw. 4.1) sowie Wille, Probleme (Fn. 15), 452 f.

1355 So in StGH 1991/146, LES 1993, 73, wo die blosse Aufhebung des geschlechtergleichheitswidrigen alleinigen Unterhaltsanspruchs der Ehegattin dem Beschwerdeführer nichts genützt hätte (siehe dort 74, Erw. 3.2).]

1356 So die Formulierung in StGH 1995/020, LES 1997, 30 (38, Erw. 4.4).

1357 Art. 19 Abs. 3 StGHG. Vorher galt gemäss Art. StGHG i.d.F. LGBl. 1979 Nr. 34 eine Maximalfrist von nur sechs Monaten. Aufgrund dieser Fristverlängerung argumentierte die Regierung auch, dass es nunmehr keinen Anlass mehr für solche Appellentscheidungen gebe (Bericht und Antrag der Regierung an den Landtag vom 4. November 2003, 2003 Nr. 95, 43; siehe hierzu auch StGH 2011/023, Erw. 9.2 [www.gerichtsentscheide.li]).

1358 Siehe Hoch, Kriterien (Fn. 18) 640 mit Rechtsprechungsnachweisen.

1359 Siehe StGH 2004/048, Erw. 2.1 ff.; StGH 2009/090, Erw. 2.2 (beide www.gerichtsentscheide.li).

Was den Wandel der Gesellschaft und der Anschauungen angeht, so muss dieser Wandel nicht primär Anlass zur Zurückhaltung des Verfassungsgerichts sein. Er kann im Gegenteil Grund zu dessen Einschreiten sein. Gerade Grundrechte müssen bei neuen Problemlagen und Bedürfnissen adäquate zeitgemässe Antworten geben können.[1360] Wie die EMRK gemäss EGMR kann auch der innerstaatliche Grundrechtskatalog aufgrund der dynamischen Rechtsprechung des Staatsgerichtshofes als „Living Instrument" bezeichnet werden.[1361] Zudem hat der Staatsgerichtshof mehrere ungeschriebene Grundrechte anerkannt und behält sich vor, dies erforderlichenfalls für weitere für den Einzelnen „fundamentale, im Verfassungstext nicht erwähnte Rechtsschutzbedürfnisse" zu tun.[1362] Wenn eine solche Frage allerdings (noch) kontrovers ist, hält sich der Staatsgerichtshof – ähnlich wie der EGMR auf europäischer Ebene – zurück und greift dem gesellschaftspolitischen Diskurs nicht vor.[1363] Wie erwähnt hat der Staatsgerichtshof auch schon den Gesetzgeber in einer Appellentscheidung auf potenzielle grundrechtliche Problemfelder nur hingewiesen, eine Verfassungswidrigkeit aber noch verneint.[1364]

2. Gibt es Situationen, in denen Ihr Gerichtshof aufgrund mangelnder institutioneller Zuständigkeit oder mangelnden Fachwissens Zurückhaltung geübt hat?

Zur Zurückhaltung des Staatsgerichtshofes wegen mangelnder institutioneller Zuständigkeit auf 1.b) (Aussenpolitik), 1.c) (Vorrang des EWR-Rechts gegenüber dem Landesrecht), 1.d/aa) (besondere demokratische Legitimation des Gesetzgebers); zur Zurückhaltung wegen mangelnden Fachwissens auf 1.d/aa/bbb) (Einschätzungs- und Prognosespielraum bei komplexen Sachverhalten im Rahmen der Normenkontrolle). Die verfassungsgerichtliche Zurückhaltung gegenüber den Fachgerichten (siehe dazu 1.d/bb) kann sowohl der Zurückhaltung wegen mangelnder institutioneller Zuständigkeit als auch wegen mangelndem Fachwissen zugeordnet werden.

3. Gibt es Fälle, in denen Ihr Gerichtshof Zurückhaltung geübt hat, weil die Gefahr eines Justizirrtums bestand?

Selbstverständlich kann sich auch ein Höchstgericht irren.[1365] Aber von einem Justizirrtum oder Fehlurteil spricht man primär im Zusammenhang mit einer fehlerhaften Beweiserhebung und -würdigung in Strafverfahren. Solche Fehlurteile des Staatsgerichtshofes sind aber kaum denkbar, da er in seiner Funktion als Verfassungsgericht in der Regel keine Tatsacheninstanz ist.[1366] Entsprechend stellt

1360 Siehe StGH 1984/014, LES 1987, 36 (38, Erw. 1) und hierzu Wille, Auslegung (Fn. 26), 165 f. mit zahlreichen weiteren Nachweisen.

1361 So Peter Bussjäger, Werte und Spielregeln. Die Verfassung und ihre Funktionen, in Hilmar Hoch/Christina Neier/Patricia M. Schiess Rütimann (Hrsg.), 100 Jahre liechtensteinische Verfassung. Funktion, Entwicklungen und Verhältnis zu Europa, LPS Bd. 62, Gamprin-Bendern 2021, 25 (35).

1362 StGH 1998/045, LES 2000, 1 (6, Erw. 4.4); siehe dazu Herbert Wille, Verfassungsgerichtsbarkeit (Fn. 13), 52.

1363 Siehe StGH 2018/154, Erw. 4.5 (www.gerichtsentscheide.li) sowie den Verweis auf die entsprechende Praxis des EGMR in der dortigen Erw. 3.1.

1364 Siehe dazu vorne Fn. 28.

1365 So explizit StGH 1997/003, LES 2000, 57 (62 Erw 4.6): „Nach einem Bonmot des amerikanischen Supreme Court-Richters Robert Jackson entscheiden Höchstgerichte nämlich nicht deshalb letztinstanzlich, weil sie unfehlbar sind, sondern sie sind faktisch unfehlbar, weil sie letztinstanzlich sind." Die betreffende Entscheidung ist Brown v Allen, 344 U.S. 443, 540 (1953) (concurring opinion). Siehe Anna Gamper, Das Argument der letzten Instanz, Wien 2023, 1, mit Verweis auf beide Entscheidungen.

1366 Siehe StGH 2020/074, Erw. 2.1; StGH 2018/041, Erw. 2.1; StGH 2014/046, Erw.

sich die Frage der verfassungsgerichtlichen Zurückhaltung zur Vermeidung solcher eigener Fehlurteile nicht. Wenn aber unter „Justizirrtum" jegliche Fehler bei verfassungsgerichtlichen Entscheidungen verstanden werden, so kann auf die bisherigen Ausführungen verwiesen werden. Danach auferlegt sich der Staatsgerichtshof wegen seinem beschränkten Fachwissen in zweifacher Hinsicht Zurückhaltung: so bei der Überprüfung fachgerichtlicher Entscheidungen (1.d/bb) und bei der Normenkontrolle bei komplexen Sachverhalten (1.d/aa/bbb).

4. *Gibt es Fälle, in denen Ihr Gerichtshof unter Hinweis auf die institutionelle oder demokratische Legitimation des Entscheidungsträgers Zurückhaltung geübt hat?*

Zur Zurückhaltung des Staatsgerichtshofes wegen mangelnder institutioneller Zuständigkeit kann wiederum auf 1.b) (Aussenpolitik) und 1.c) (Vorrang des EWR-Rechts gegenüber dem Landesrecht) verwiesen werden; und hinsichtlich beider Kriterien (institutionelle und demokratische Legitimation des Entscheidungsträgers) auf die Ausführungen zur Zurückhaltung gegenüber dem Gesetzgeber (1. d/aa).

5. *„Je mehr die Gesetzgebung die allgemeine Sozialpolitik gestaltet, desto weniger wird das Gericht bereit sein, einzugreifen". Ist dies ein gültiger Massstab für Ihren Gerichtshof? Teilt Ihr Gerichtshof die Auffassung, dass politische Fragen durch demokratische Verfahren entschieden werden sollten, da die Gerichte nicht gewählt sind und nicht über das demokratische Mandat verfügen, über Angelegenheiten der Politik zu entscheiden?*

In Beantwortung der zweiten Frage kann erneut auf die Ausführungen zu 1. d/aa) zur generellen Zurückhaltung gegenüber dem demokratisch legitimierten Gesetzgeber verwiesen werden.
Was speziell die Gesetzgebung zur „allgemeine Sozialpolitik" betrifft, so geht es dabei primär um Leistungsverwaltung, welche für das Verfassungsgericht nur beschränkt justiziabel ist.[1367] In StGH 2004/048 hat der Staatsgerichtshof immerhin ein ungeschriebenes Grundrecht auf ein Existenzminimum anerkannt; wenn auch nur „im engen Rahmen dessen, was für ein menschenwürdiges Dasein unabdingbar" ist; und auch dies nur im Falle der Untätigkeit des Gesetzgebers, da „es in erster Linie Sache des zuständigen Gemeinwesens ist, auf Grundlage seiner Gesetzgebung über Art und Umfang der im konkreten Fall gebotenen Leistungen zu bestimmen."[1368] Soweit jedoch keine Grundrechte oder sonstige justiziable Verfassungsgehalte betroffen sind, besteht für das Verfassungsgericht auch bei Untätigkeit des Gesetzgebers kein Anknüpfungspunkt zum Einschreiten. Wenn aber ein solcher Anknüpfungspunkt besteht, spielt die Dauer einer gesetzgeberischen Untätigkeit durchaus eine Rolle (siehe die Ausführungen hinten zu 10).

6. *Akzeptiert Ihr Gerichtshof einen allgemeinen Grundsatz der Selbstbeschränkung in Angelegenheiten der Strafrechtspolitik?*

Eine besondere Selbstbeschränkung des Staatsgerichtshofes im Bereich des Strafrechtspolitik, welche über die allgemeine Zurückhaltung gegenüber dem Gesetzgeber (siehe oben 1.d/aa) hinausginge, ist nicht ersichtlich; zumal die Strafrechtspolitik in Liechtenstein auch kein gesellschaftspolitisch kontroverses Thema ist.[1369]

4.2 (alle www.gerichtsentscheide.li). Anders ist dies nur bei dessen – hier nicht relevanter – Zuständigkeit in Ministeranklage- und Disziplinarverfahren gemäss Art. 28 ff. und Art. 35 ff. StGHG.

1367 Siehe StGH 2004/048, Erw. 2.2 (www.gerichtsentscheide.li).

1368 StGH 2004/048, Erw. 2.2 f. (www.gerichtsentscheide.li) mit Verweis auf die Entscheidung des schweizerischen Bundesgerichts BGE 121 I 367 (373, E. 3c).

1369 Hingegen übt der Staatsgerichtshof bei der Prüfung der Strafbemessung durch die Strafinstanzen grosse Zurückhaltung; siehe StGH 2018/017, Erw. 4.2 ff. StGH

7. In engen Grenzen kann sich die Regierung veranlasst sehen, Informationen vor dem Gerichtshof geheim zu halten, insbesondere solche aus nachrichtendienstlichen Quellen. Hat Ihr Gerichtshof jemals aus Gründen der nationalen Sicherheit Selbstbeschränkung geübt?

Liechtenstein hat weder Armee noch Geheimdienst; insoweit hat sich diese Frage in der Praxis noch nicht gestellt. Wenn sich solche Fragen aber in Zukunft stellen sollten (etwa im Zusammenhang mit den liechtensteinischen Behörden von ausländischen Geheimdiensten übermittelten Informationen), wäre es naheliegend, dass der Staatsgerichtshof seine judicial self-restraint/political question-Praxis (siehe Ausführungen zu 1.b) auch auf solche Fälle anwenden würde.

8. Sollten Verfassungsgerichte – als Hüter der Verfassung – einen strengeren Massstab anlegen, wenn die Gesetzgebung bei der Umsetzung von Reformen zum Schutz der Grundrechte säumig ist?

Wie zu 7. ausgeführt, besteht für das Verfassungsgericht ausserhalb des Geltungsbereichs der Grundrechte bzw. ohne sonstige justiziable Verfassungsgehalte auch bei Untätigkeit des Gesetzgebers von vornherein kein Anknüpfungspunkt zum Einschreiten. Bei Vorliegen eines solchen Anknüpfungspunktes interveniert der Staatsgerichtshof bei offensichtlicher Säumigkeit des Gesetzgebers sehr wohl – sofern die Aufhebung einer verfassungswidrigen Regelung nicht möglich erscheint, wie erwähnt, zumindest mit einem Appell an den Gesetzgeber.[1370] Andererseits hob der Staatsgerichtshof im Jahre 1990 eine gegen die Geschlechtergleichheit verstossende Regelung der Ehegattenbesteuerung primär deshalb nicht auf, weil schon eine Gesetzesrevision im Gang war und er dem Gesetzgeber nicht vorgreifen wollte.[1371] Als die verfassungswidrige Rechtslage aber vier Jahre später immer noch nicht behoben war, hob der Staatsgerichtshof die betreffende Regelung des Steuergesetzes auf.[1372] Der Staatsgerichtshof konnte sich in dieser Entscheidung nunmehr auch auf die 1992 erfolgte Ergänzung des allgemeinen Gleichheitssatzes von Art. 31 Abs. 1 LV durch eine spezifische Geschlechtergleichheitsbestimmung (Art. 31 Abs. 2 LV) stützen. Die Übergangsbestimmung für diese Verfassungsänderung enthielt allerdings einen Auftrag an den Gesetzgeber zur Vornahme der entsprechenden Gesetzesanpassungen.[1373] Der Staatsgerichtshof ging in einer kurz nach dieser Verfassungsänderung ergangenen Entscheidung trotzdem von einem sogleich durchsetzbaren grundrechtlichen Anspruch aus, ohne die entsprechenden Gesetzesanpassungen abzuwarten.[1374] Hierauf stützte sich der Staatsgerichtshof auch in einer Entscheidung von 1996 betreffend eine geschlechterdiskriminierende Regelung im Bürgerrechtsgesetz. Er liess den Hinweis der Regierung auf eine laufende Gesetzesrevision nun nicht mehr gelten und rügte die Regierung dafür, dass sie eine klar verfassungswidrige Gesetzesbestimmung angewendet hatte, anstatt diese dem Staatsgerichtshof zur Prüfung vorzulegen.[1375] Bei allen drei hier erwähnten Normaufhebungen wurde allerdings

2005/085, Erw. 4.2 ff. (beide www.gerichtsentscheide.li).

1370 So in der schon mehrfach erwähnten StGH-Entscheidung 1995/020, LES 1997, 30 (39, Erw. 4.6).

1371 StGH 1989/015, LES 1990, 135 (141, Erw. 4.3.2 ff.); ebenso StGH 1993/003, LES 1994, 37 (39, Erw. 2.5); siehe hierzu Höfling, Verfassungsbeschwerde (Fn. 31), 195.

1372 StGH 1994/006, LES 1995, 16 (23, Erw. 5.6); siehe hierzu auch StGH 1995/020, LES 1997, 30 (38 Erw. 4.3).

1373 Art. II. des betreffenden Verfassungsgesetzes LGBl. 1992 Nr. 81 lautete wie folgt: „Über die Anpassung des geltenden Rechts an die Gleichberechtigung von Mann und Frau bestimmen die Gesetze."

1374 So StGH 1991/014, LES 1993, 73 (75 ff., Erw. 4.2 ff.). Kritisch gegenüber dieser Beanspruchung „der Rolle eines Ersatzgesetzgebers" Wille, Verfassungsgerichtsbarkeit (Fn. 13), 51 f.

1375 StGH 1996/036, LES 1997, 211 (214 ff., Erw. 4 ff.). Der Staatsgerichtshof be-

der damals mögliche maximale Aufhebungsaufschub von sechs Monaten verfügt,[1376] damit der Gesetzgeber rechtzeitig eine neue gesetzliche Regelung schaffen konnte.

II. Der Entscheidungsträger

11. Prüft Ihr Gerichtshof einen Akt der parlamentarischen Gesetzgebung mit grösserer Zurückhaltung als einen Akt der Verwaltung? Stellt Ihr Gerichtshof bei der Prüfung von Rechtsakten darauf ab, welche demokratische Legitimation der Entscheidungsträger hat?

Zur generellen Zurückhaltung gegenüber dem demokratisch legitimierten Gesetzgeber kann auch hier auf die Ausführungen zu 1. d/aa) verwiesen werden.

9. Welche Bedeutung misst Ihr Gerichtshof der Entstehung eines Rechtsaktes bei? Welche rechtliche Bedeutung kann die parlamentarische Erörterung eines Rechtsaktes für dessen Prüfung am Massstab der Grundrechte haben?

Wenn der Wille des Gesetzgebers aus den Gesetzesmaterialien ersichtlich ist, wird dieser beim historischen Auslegungselement[1377] berücksichtigt. Wenn sowohl der Gesetzeswortlaut als auch der manifestierte Wille des Gesetzgebers für eine bestimmte verfassungswidrige Auslegung sprechen, kann dies, wie oben zu 1.d/aa/ccc) ausgeführt, nicht durch eine verfassungskonforme Auslegung korrigiert werden. Die verfassungswidrige Regelung ist vielmehr aus Rechtssicherheitsgründen aufzuheben. Eine Ausnahme besteht allerdings bei einem verfassungswidrigen sogenannten „qualifizierten Schweigen" des Gesetzgebers. Mangels aufhebbarer Norm nimmt hier der Staatsgerichtshof entgegen dem Willen des Gesetzgebers eine verfassungskonforme Lückenfüllung vor[1378]. Keine Beachtung findet der manifestierte Wille des Gesetzgebers zudem, sofern sich dieser in einen offensichtlichen Irrtum befindet. Der Staatsgerichtshof geht dann nicht von einem einer verfassungskonformen Auslegung entgegenstehenden klaren Willen des Gesetzgebers aus.[1379] Im Resultat einem solchen Irrtum nahe kommt wohl auch, wenn der Gesetzgeber eine wichtige Frage offensichtlich übersehen oder diese jedenfalls überhaupt nicht berücksichtigt hat. Darüber hinaus hinterfragt der Staatsgerichtshof den klar manifestierten Willen des Gesetzgebers nicht weiter, unabhängig von der Qualität der Gesetzesmaterialien und der parlamentarische Debatte. Eine eigentliche Begründungspflicht trifft den Gesetzgeber nicht. Der grundrechtliche Begründungsanspruch gemäss Art. 43 LV betrifft nur die Rechtsanwendung, nicht die Rechtssetzung.[1380]

tonte, es müsse allein ihm „vorbehalten sein, darüber zu entscheiden, ob eine verfassungswidrige Norm aus gewichtigen Gründen ausnahmsweise nicht aufgehoben werden soll." (a.a.O., 216, Erw. 9).

1376 Siehe hierzu vorne Fn. 59.

1377 Siehe zur Auslegung durch den Staatsgerichtshof auch unten die Ausführungen zu 19.

1378 Ausführlich hierzu StGH 2020/046, Erw. 3.2 (www.gerichtsentscheide.li), mit Verweisen auf StGH 2016/005, LES 2017, 45 (48) sowie auf Wille, Auslegung (Fn. 26), 176 f. und Matthias Schmidle, Das rechtliche Gehör des Verdächtigen hinsichtlich der Akteneinsicht des Privatbeteiligten, LJZ 2017, 99 [103]). Der Kritik von Anton A. Eberle (Die Hausdurchsuchung sowie die Herausgabe und Beschlagnahme von Unterlagen im liechtensteinischen Strafverfahren, Bern 2016, 367 Fn. 1485), wonach eine solche Lückenfüllung neues Recht schaffe und gegen die Gewaltenteilung verstosse, hält der Staatsgerichtshof entgegen, jedes Gericht schaffe mit Lückenfüllung neues Recht, ohne dadurch gegen die Gewaltenteilung zu verstossen.

1379 StGH 2018/033, Erw. 1.3.3 (www.gerichtsentscheide.li).

1380 *Art. 43 letzter Satz LV, wo der grundrechtliche Begründungsanspruch verankert ist, verpflichtet die ein Rechtsmittel* ablehnende Behörde, „dem Beschwerdeführer die Grün-

10. Prüft Ihr Gerichtshof, [a] ob der politische Entscheidungsträger seine Entscheidung begründet hat oder [b] ob die Entscheidung so gefallen ist, wie sie das Gericht selbst getroffen hätte, wenn es selbst politischer Entscheidungsträger wäre?

a) Zum einen der beiden politischen Entscheidungsträger, dem Gesetzgeber, ist zu 12. ausgeführt worden, dass diesen zwar keine eigentliche Begründungspflicht trifft; dass aber die Gesetzesmaterialien und die parlamentarische Debatte Rückschlüsse auf den für die Gesetzesauslegung relevanten Willen des Gesetzgebers ermöglichen. Auch den Verordnungsgeber trifft grundsätzlich keine Begründungspflicht. Zwar ist auch dessen Wille zur Auslegung von Verordnungen relevant, doch fehlt hier ein Äquivalent zu den Gesetzesmaterialien und der parlamentarischen Debatte. Immerhin kann die Regierung jedem Individualbeschwerdeverfahren und jedem Normprüfungsverfahren beitreten und eine Stellungnahme abgeben.[1381] Damit kann die Regierung die Gründe für den Erlass einer in einem Individualbeschwerde- oder Verordnungsprüfungsverfahren anzuwendenden bzw. zu prüfenden Verordnung gewissermassen „nachschieben".

Soweit die Regierung auch individuell-konkrete Verfügungen und Entscheidungen erlässt, ist sie im Übrigen an die durch das Grundrecht auf Begründung gemäss Art. 43 LV vorgegebenen Massstäbe gebunden, welche der Staatsgerichtshof auf entsprechende Parteirüge im Individualbeschwerdeverfahren überprüft.[1382]

b) Der zweite Teil von Frage 13 kann generell verneint werden. Was den Gesetzgeber betrifft, so versagt sich der Staatsgerichtshof aufgrund von dessen besonderer demokratischer Legitimation und aus Gewaltenteilungsgründen ausdrücklich, sich an dessen Stelle zu setzen (siehe oben 1.d/aa). Eine – wenn auch weniger weitgehende – Zurückhaltung auferlegt sich der Staatsgerichtshof aus Gewaltenteilungsgründen auch gegenüber dem Verordnungsgeber (siehe oben insbesondere 1.d/aa/aaa-ccc). Was schliesslich individuell-konkrete Akte der Regierung angeht, so gilt für deren (indirekte) Überprüfung durch den Staatsgerichtshof im Anschluss an den verwaltungsgerichtlichen Instanzenzug die vorne zu 1.d/bb) umschriebene verfassungsgerichtliche Zurückhaltung gegenüber der Fachgerichtsbarkeit.

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de ihrer Entscheidung zu eröffnen." Der Staatsgerichtshof sieht den wesentlichen Zweck der Begründungspflicht entsprechend darin, dass „der von einer Verfügung oder Entscheidung Betroffene deren Stichhaltigkeit überprüfen und sich gegen eine fehlerhafte Be- gründung wehren kann (siehe anstatt vieler StGH 2022/099, Erw. 3.1; StGH 2020/013, LES 2020, 190 [192, Erw. 2.1]; StGH 2018/039, Erw. 5.1; StGH 2017/197, Erw. 2.1 [alle www.gerichtsentscheide.li]). Sowohl die Verfassungsbestimmung als auch die Rechtsprechung des Staatsgerichtshofes zur Begründungspflicht beziehen sich somit allein auf die Rechtsanwendung, nicht auf die Rechtssetzung.

1381 Siehe Art. 13 StGHG (Individualbeschwerdeverfahren); Art. 18 Abs. 3 StGHG (Gesetzesprüfung); Art. 20 Abs. 3 StGHG (Verordnungsprüfung); Art. 22 Abs. 2 StGHG (Staatsvertragsprüfung).

1382 Gemäss ständiger Rechtsprechung ist wesentlicher Zweck der Begründungspflicht gemäss Art. 43 LV, dass die von einer Verfügung oder Entscheidung betroffene Partei deren Stichhaltigkeit überprüfen und sich gegen eine fehlerhafte Begründung wehren kann. Allerdings wird der Umfang des grundrechtlichen Begründungsanspruchs durch die Aspekte der Angemessenheit und Verfahrensökonomie begrenzt. Ein genereller Anspruch auf ausführliche Begründung existiert nicht (StGH 2020/013, LES 2020, 190 [192, Erw. 2.1]; StGH 2018/039, Erw. 5.1; StGH 2017/197, Erw. 2.1 [alle www.gerichtsentscheide.li]; siehe auch Tobias Michael Wille, Begründungspflicht, in: Kley/Vallender (Hrsg.), Grundrechtspraxis in Liechtenstein, LPS Bd. 52, Schaan 2012, 541 (554 ff., Rz. 16).

14. Achtet Ihr Gerichtshof darauf, inwieweit der Entscheidung oder Massnahme eine umfassende Prüfung der Kompatibilität mit den Grundrechten vorausgegangen ist?

Wie gründlich muss zum Beispiel die Analyse des Gesetzgebers sein, damit Ihr Gerichtshof ihr Bedeutung beimisst?
Zu dieser Frage kann auf die Ausführungen zu 12. und 13.a) verwiesen werden.

11. Achtet Ihr Gerichtshof darauf, ob vor der Verabschiedung einer Massnahme die gegensätzlichen Standpunkte in der parlamentarischen Debatte umfassend zum Ausdruck gekommen sind? Reicht es aus, dass eine breite Debatte über den allgemeinen Inhalt der Rechtsvorschriften stattgefunden hat, oder muss den Auswirkungen auf die Rechte besondere Aufmerksamkeit geschenkt werden?

Auch zu dieser Frage kann primär auf die Ausführungen zu 12. verwiesen werden, wonach der Staatsgerichtshof auf die parlamentarische Debatte und generell die Gesetzesmaterialien zur Eruierung des Willens des Gesetzgebers zurückgreift; und dass den Gesetzgeber aber keine eigentliche Begründungspflicht trifft. Wie zudem zu 13.a) geführt wurde, kann die Regierung sowohl in Individualbeschwerdeverfahren als auch Normprüfungsverfahren Stellungnahmen abgeben. Dabei kann sie auch in Ergänzung zu den Gesetzesmaterialien weitere Ausführungen machen. Solche weiteren Ausführungen belegen dann allerdings nicht den Willen des Gesetzgebers, werden aber vom Staatsgerichtshof im Rahmen der anderen Auslegungselemente, insbesondere der teleologischen Auslegung, berücksichtigt.

12. Ist die Tatsache, dass die Entscheidung vom Gesetzgeber oder unter Beteiligung der Öffentlichkeit getroffen wurde, ein schlüssiger Nachweis für die demokratische Legitimität der Entscheidung?

Wie zu 1.d/aa) ausgeführt, auferlegt sich der Staatsgerichtshof generell gegenüber Gesetzgeber aufgrund von dessen besonderer demokratischer Legitimation grosse Zurückhaltung. Diese Zurückhaltung hängt nicht von der Qualität der parlamentarischen Debatte ab, zumal den Gesetzgeber keine Begründungspflicht trifft (siehe die Ausführungen zu 12.). Umso mehr muss all dies bei einem Volksentscheid gelten.[1383] Wie ebenfalls schon zu 12. ausgeführt wurde, sind allerdings offensichtliche Mängel der Gesetzesmaterialien und der parlamentarischen Debatte – bzw. der Abstimmungsunterlagen bei Volksentscheiden – bei der Ermittlung des historischen Willens des Gesetzgebers zu berücksichtigen.

III. Schutzbereich der Rechte, Gesetzmässigkeit und Verhältnismässigkeit

17. Hat Ihr Gerichtshof jemals bei der Bestimmung des Inhalts eines Rechts Zurückhaltung geübt, indem er sich die Auslegung oder Anwendung des Rechts durch die Regierung zu eigen gemacht hat?

Wie zu 1.b) ausgeführt, übt der Staatsgerichtshof im Anwendungsbereich der Judicial self-restraint-/Political question-Doktrin grösste Zurückhaltung. Dies bedeutet, dass in diesem Bereich die Auslegung oder Anwendung des Rechts durch die Regierung von vornherein nicht weiter hinterfragt wird.

13. Ist die Kontrolldichte von der Eigenart des Grundrechts abhängig? Ist Ihr Gerichtshof der Ansicht,

1383 Die liechtensteinische Verfassung kennt stark ausgebaute direkt-demokratische Rechte, gemäss Art. 64 und 66 LV insbesondere das Initiativ- und Referendumsrecht auf Verfassungs- und Gesetzesstufe. Siehe Bernhard Ehrenzeller/Rafael Brägger, Politische Rechte, in: Andreas Kley/Klaus A. Vallender (Hrsg.), Grundrechtspraxis in Liechtenstein, LPS Bd. 52, Schaan 2012, 637 (650 ff.).

dass einige Rechte oder Aspekte von Rechten wichtiger sind und dass Eingriffe in ihre Ausübung daher strenger geprüft werden müssen als andere? Nach welchen Kriterien wird diese Einteilung vorgenommen?

Zu diesen Fragen kann primär auf die Ausführungen zu 1.d/aa/aaa), 1.d/bb/aaa) und 2.a) verwiesen werden. Danach wird hinsichtlich der Kontrolldichte generell zwischen dem subsidiären Willkürverbot und anderen Grundrechten differenziert. Bei der Rechtsanwendung wird zudem einerseits hinsichtlich den Anforderungen an die gesetzliche Grundlage zwischen leichten und schweren Eingriffen unterschieden. Andererseits erfolgt wie beim Willkürverbot auch bei einzelnen anderen Grundrechten mit einem tendenziell grossen sachlichen Geltungsbereich teilweise eine blosse Vertretbarkeitsprüfung.
Hinsichtlich der Kontrolldichte gibt es nach der Rechtsprechung des Staatsgerichtshofes keine eindeutigen weiteren Differenzierungen zwischen den einzelnen Grundrechten. Der Staatsgerichtshof anerkennt zwar insbesondere die überragende Bedeutung der Meinungsfreiheit gemäss Art. 40 LV. Sie „ist in gewissem Sinne die Grundlage jeder Freiheit überhaupt".[1384] Die Meinungsfreiheit und die Vereins- und Versammlungsfreiheit gemäss Art. 41 LV dienen „wesentlich der Freiheit der Kommunikation und der (politischen) Meinungsbildung. Sie haben deshalb eine Doppelfunktion: Sie sind nicht nur individuelle Freiheitsrechte, sondern sind auch unabdingbare Grundlage für eine funktionierende Demokratie.[1385] Entsprechend betont der Staatsgerichtshof auch die wichtige Rolle der politischen Rechte. Diese beinhalten neben dem Recht auf ungehinderte Stimmabgabe auch das Recht auf unverfälschte politische Willenskundgabe.[1386] Aber auch wenn der Staatsgerichtshof die besondere Bedeutung der für das Funktionieren der Demokratie direkt relevanten Grundrechte hervorhebt, hat dies keine konkreten Auswirkungen auf die Prüfungsdichte. Sie ist gleich wie bei anderen Grundrechten.

14. Haben Sie einen Massstab für die Klarheit bei der Prüfung der Verfassungsmässigkeit eines Gesetzes? Wie entscheiden Sie, wie klar ein Gesetz ist? Wann wenden Sie die Regel In claris non fit interpretatio *an?*

Der Staatsgerichtshof anerkennt den Grundsatz *In claris non fit interpretatio* ausdrücklich nicht, weil beim Auslegungsvorgang das grammatikalische nicht von den andern Auslegungselementen getrennt werden kann. Gemäss ständiger Rechtsprechung des Staatsgerichtshofes besteht „heute anerkanntermassen keine allgemein gültige Hierarchie der Auslegungsmethoden mehr". Die Wortauslegung stellt nur den zwangsläufigen Ausgangspunkt der Auslegungstätigkeit dar. Auch die Entscheidung, ob aus dem Wortlaut einer Bestimmung für den jeweiligen Anwendungsfall ein klarer Sinn resultiert, „ergibt sich grundsätzlich erst aus dem Kontext, das heisst unter Berücksichtigung

1384 StGH 1994/008, LES 1995, 23 (27, Erw. 4) (= EuGRZ 1994, S. 607 ff.) mit Verweis auf BVerfGE 7, 208; vgl. auch Wolfram Höfling, Die Meinungsfreiheit als Demokratievoraussetzung - Zur Wirkgeschichte eines Grundrechts im Fürstentum Liechtenstein, in: Liechtenstein-Institut (Hrsg.): 25 Jahre Liechtenstein-Institut (1986-2011), LPS Bd. 50, Schaan 2011, 219 (226).

1385 StGH 2018/074, Erw. 2.1; StGH 2010/088, Erw. 3.4.1 (beide www.gerichtsentscheide.li); siehe auch Hilmar Hoch/Robin Schädler, Art. 40 LV, Rz. 5, in: Liechtenstein-Institut (Hrsg.), Kommentar zur liechtensteinischen Verfassung. Online-Kommentar, Bendern 2016, verfassung.li (zuletzt bearbeitet: 26. Januar 2021).

1386 Die politische Meinungsbildung gerade auch im Vorfeld von Abstimmungen darf nicht durch unsachliche oder gar falsche Abstimmungsunterlagen beeinträchtigt werden (StGH 1990/006, LES 1991, 133 [135 Erw. 2.1]; StGH 1993/008, LES 1993, 91 (96 f. Erw. 2.1); vgl. auch StGH 2003/071, Erw. 2.2 [www.gerichtsentscheide.li]; siehe Ehrenzeller/Brägger, Rechte [Fn. 85], 671 ff.). Insoweit ergibt sich auch eine Überschneidung mit der Meinungsfreiheit; siehe Hoch/Schädler, Art. 40 LV (Fn. 87), Rz. 15.

einer oder mehrerer weiterer Auslegungsmethoden".[1387]

15. Wie intensiv prüft Ihr Gerichtshof, ob eine Massnahme einem legitimen Ziel dient?

Diese Prüfung erfolgt in der Regel nicht intensiv, da die Identifizierung des im konkreten Fall als legitimes Ziel dienenden öffentlichen oder privaten Interesses meist unproblematisch ist. Häufig genügt schon ein Rückgriff auf die Staatszielbestimmungen der Verfassung. So hat der Staatsgerichtshof u.a. das allgemeine Staatsziel der Förderung der gesamten Volkswohlfahrt gemäss Art. 14 LV ohne Weiteres als „gesteigertes öffentliches Interesse" anerkannt.[1388] Allerdings kann ein legitimes Ziel oder Interesse mehr oder weniger gewichtig sein. Die entsprechende Gewichtung des Ziels erfolgt aber sinnvollerweise bei dem in ständiger Rechtsprechung gesondert geprüften Grundrechtseingriffskriterium der Verhältnismässigkeitsprüfung.[1389]

16. Welche Verhältnismässigkeitsprüfung wendet Ihr Gerichtshof an? Wendet Ihr Gericht alle Schritte der klassischen Verhältnismässigkeitsprüfung an (d. h. Angemessenheit, Erforderlichkeit und Verhältnismässigkeit im engeren Sinne)?

Die Prüfung erfolgt je nach den Problemfeldern eines Falles anhand der jeweils betroffenen – erforderlichenfalls auch aller – Teilkriterien der Verhältnismässigkeit.[1390]

17. Prüft Ihr Gerichtshof alle Elemente der Verhältnismässigkeitsprüfung?

Siehe die Ausführungen zu 21.

18. Gibt es Fälle, in denen Ihr Gerichtshof annimmt, dass die angefochtene Massnahme einen oder mehrere Schritte der Verhältnismässigkeitsprüfung erfüllt, auch wenn es offensichtlich keine aus-

1387 StGH 2018/100, Erw. 2.4.1; StGH 2017/080, Erw. 2.2 (beide www.gerichtsentscheide.li); siehe auch Wille, Auslegung (Fn. 26), 162 f. Im Extremfall kann sich „sogar eine wortlautkonforme Auslegung als geradezu willkürlich erweisen" (StGH 2014/072, Erw. 3.2; StGH 2014/064, Erw. 3.4; StGH 2011/181, Erw. 2.2 [alle www.gerichtsentscheide.li]). Siehe zu der für die Prüfung der Verfassungsmässigkeit von Gesetzen (und Verordnungen) besonders wichtigen verfassungskonformen Auslegung vorne 1. d/aa/ccc)

1388 Siehe StGH 2003/048, Erw. 5.2.3 (www.gerichtsentscheide.li) sowie Patricia M. Schiess Rütimann, Einführende Bemerkungen zum III. Hauptstück: Von den Staatsaufgaben, Liechtenstein-Institut (Hrsg.), Kommentar zur liechtensteinischen Verfassung. Online-Kommentar, Bendern 2016, verfassung.li (zuletzt bearbeitet: 30. September 2016). Regelmässig wird auch auf den Polizeigüterschutz zur Begründung eines öffentlichen Interesses zurückgegriffen; siehe etwa StGH 2011/203, Erw. 5.2; StGH 2008/129, Erw. 2.2 (www.gerichtsentscheide.li); siehe auch Herbert Wille, Liechtensteinisches Verwaltungsrecht. Ausgewählte Gebiete, LPS Bd. 38, Schaan 2004, 539 ff.

1389 Siehe zu den Grundrechtseingriffskriterien vorne 1.d/aa/aaa). In Literatur und Rechtsprechung wird teilweise auch vom „überwiegenden öffentlichen Interesse" gesprochen. Diese Formulierung vermischt aber die beiden Grundrechtseingriffskriterien des öffentlichen Interesses und der Verhältnismässigkeit und ist deshalb nicht hilfreich. Siehe hierzu StGH 2020/076, Erw. 2.4.7 (www.gerichtsentscheide.li).

1390 Siehe als Bespiel einer besonders ausführlichen Verhältnismässigkeitsprüfung StGH 2021/082, Erw. 5.3 ff.; siehe auch StGH 2013/036, Erw. 3.2.2 (www.gerichtsentscheide.li) sowie Höfling, Schranken (Fn. 25), 103 ff., Rz. 41 ff.

reichenden Beweise gibt, um dies zu belegen?

Bei der Prüfung von
Individualbeschwerden gilt das Rügeprinzip (Bezeichnung des betroffenen Grundrechts) und das Substantiierungsprinzip (Begründung der jeweiligen Grundrechtsverletzung) gemäss Art. 16 i. V. m. Art. 40 Abs. 1 StGHG. Was nicht vorgebracht wird, wird entsprechend auch nicht geprüft. Anders ist dies bei der Normenkontrolle gemäss Art. 18 ff. StGHG, wo eine amtswegige Prüfung erfolgt. Indessen nimmt der Staatsgerichtshof keine eigenen Sachverhaltsabklärungen vor. Die jeweiligen behördlichen Angaben, Annahmen und Prognosen können aber gegenüber dem Staatsgerichtshof im konkreten Verfahren bekämpft werden. Wie zu 1.d/aa/bbb) ausgeführt, wird jedoch dem Gesetz- und dem Verordnungsgeber bei der Normenkontrolle eine Einschätzungs- und Prognoseprärogative eingeräumt. Entsprechend wird der Staatsgerichtshof im Zweifel der behördlichen Argumentation folgen. Der Staatsgerichtshof hat aber auch im Normprüfungsverfahren keine Kompetenz, ohne nähere Prüfung anzunehmen, dass eine angefochtene Norm einen oder mehrere Schritte der Verhältnismässigkeitsprüfung erfüllt.

19. Fällt die Einführung der Verhältnismässigkeitsprüfung in der Rechtsprechung Ihres Gerichtshofs mit der Entfaltung des Grundsatzes der richterlichen Selbstbeschränkung zusammen?

Diese Frage kann bejaht werden. Nach ersten Ansätzen einer Verhältnismässigkeitsprüfung bei der Eigentumsgarantie in den 1970er Jahren nahm der Staatsgerichtshof in der zweiten Hälfte der 1980er Jahre zuerst bei Eingriffen in die Handels- und Gewerbefreiheit eine differenziertere Verhältnismässigkeitsprüfung vor. Bis Mitte der 1990er Jahre erfolgte eine solche Verhältnismässigkeitsprüfung dann bei allen grundrechtlichen Abwehrrechten sowohl bei der Normenkontrolle als auch bei der Überprüfung der Rechtsanwendung.[1391] Und in beiden Bereichen entwickelte der Staatsgerichtshof mehr oder weniger gleichzeitig verschiedene, diese neue Verhältnismässigkeitsprüfung eingrenzenden Instrumente der richterlichen Zurückhaltung.
In Bezug auf die Normprüfung betonte der Staatsgerichtshof in der Leitentscheidung zur Handels- und Gewerbefreiheit StGH 1985/011 von 1986 die Bindung des Gesetzgebers an den differenzierten Verhältnismässigkeitsgrundsatz, gestand ihm aber gleichzeitig „einen erheblichen Spielraum politischer Gestaltungsfreiheit" zu.[1392] In der Folge wurde dies die ständige Rechtsprechung des Staatsgerichtshofes zur zurückhaltenden Anwendung des Verhältnismässigkeitsgrundsatzes gegenüber dem Gesetzgeber. Die späteren Entscheidungen betrafen ebenfalls primär die Handels- und Gewerbefreiheit.[1393] Der Staatsgerichtshof stützte sich auf diese Rechtsprechung auch ergänzend bei den – weit häufigeren – Normprüfungen im Lichte des Gleichheitssatzes bzw. des Willkürverbots, obwohl dort keine Verhältnismässigkeitsprüfung erfolgt und somit von vornherein eine noch grössere Zurückhaltung gegenüber dem Gesetzgeber angezeigt ist.[1394] Insgesamt kann somit festgehalten werden, dass der Staatsgerichtshof die Einführung der Verhältnismässigkeitsprüfung im Bereich der Normprüfung direkt mit dem Vorbehalt einer entsprechenden richterlichen Selbstbeschränkung verband. Aber auch in Bezug auf die Überprüfung der fachgerichtlichen Rechtsanwendung lässt sich eine

1391 Siehe Hoch, Schwerpunkte (Fn. 5), 71 f. mit Rechtsprechungsnachweisen.
1392 StGH 1985/011, LES 1988, 94 (99, Erw. 16); siehe zu dieser Entscheidung auch vorne 1.d/aa/bbb). Allerdings hatte sich der Staatsgerichtshof schon ein paar Jahre vorher – wenn auch wesentlich allgemeiner – für Zurückhaltung gegenüber dem Gesetzgeber ausgesprochen; siehe StGH 1982/65/V (LES 1984, 3 [4, Erw. 2.a]).
1393 So StGH 2004/014, Erw. 4; StGH 2006/005, Erw. 3a; StGH 2008/038, Erw. 6; StGH 2014/025, Erw. 5.2.2; siehe aber zur Eigentumsgarantie StGH 2011/203, Erw. 5.3 ff.; StGH 2007/118, Erw. 3; und zur Geheim- und Privatsphäre StGH 2013/036, Erw. 3.2.2 (alle www.gerichtsentscheide.li).
1394 Siehe anstatt vieler StGH 2021/017, Erw. 2.1; StGH 2018/039, Erw. 6.3; StGH 2016/024, Erw. 2.2; StGH 2013/118, Erw. 3.5.1; StGH 2011/017, Erw. 2.2; StGH 2010/032, Erw. 4.1 (alle www.gerichtsentscheide.li).

solche Korrelation aufzeigen. Wie erwähnt, hat der Staatsgerichtshof das Verhältnismässigkeitserfordernis als Grundrechtseingriffskriterium ab Mitte der 1990er Jahre auch für die Rechtsanwendung anerkannt. Wie vorne zu 1.d/bb/aaa) ausgeführt wurde, besteht aber neben dem Willkürverbot auch bei einzelnen dieser Grundrechte mit einem potenziell weiten sachlichen Geltungsbereich die Gefahr einer ausufernden Überprüfung fachgerichtlicher Entscheidungen und damit der Verwischung der Grenze zwischen Verfassungs- und Fachgerichtsbarkeit. Entsprechend erfolgte weitgehend gleichzeitig mit der Einführung der Verhältnismässigkeitsprüfung bei Grundrechtseingriffen auch die Einschränkung dieser Prüfung bei den insoweit problematischen Grundrechten Eigentumsgarantie, Garantie des ordentlichen Richters und Schutz der persönlichen Freiheit.[1395]

20. Hat die Rechtsprechung des EGMR die Haltung Ihres Gerichtshofs in Bezug auf die Frage richterlicher Selbstbeschränkung beeinflusst? Entspricht der vom EGMR anerkannte „margin of appreciation" der Konventionsstaaten im innerstaatlichen Bereich dem Beurteilungsspielraum, den Ihr Gerichtshof dem politischen Entscheidungsträger einräumt? Wenn nicht, wie oft überschneiden sich die Erwägungen des EGMR zum Ermessensspielraum der Konventionsstaaten mit den Erwägungen Ihres Gerichtshofs zum rechtspolitischen Gestaltungsspielraum des Gesetzgebers?

Gemäss der „EMRK-freundlichen Judikatur des Staatsgerichtshofes werden die liechtensteinischen Grundrechte im Lichte der vergleichbaren Regelungen der EMRK interpretiert."[1396] Entsprechend überschneidet sich der Gehalt der inländischen und der EMRK-Grundrechte stark.[1397] Soweit ersichtlich, engt der Staatsgerichtshof auch den vom EGMR den EMRK-Mitgliedstaaten eingeräumten „margin of appreciation" im Verhältnis zu den inländischen Behörden und Gerichten nicht ein.

21. Ist Ihr Staat jemals vom EGMR verurteilt worden, weil Ihr Gerichtshof in einem bestimmten Fall richterliche Zurückhaltung geübt hat und das Rechtsmittel an Ihren Gerichtshof dadurch unwirksam geworden ist?

Bei den bisherigen Verurteilungen Liechtensteins durch den EGMR hat eine besondere gerichtliche Zurückhaltung soweit ersichtlich nur in einem Fall eine Rolle gespielt. In der EGMR-Entscheidung Steck-Risch u. a. gegen Liechtenstein hatte der Staatsgerichtshof eine Gehörsverletzung als geheilt erachtet,[1398] weil sie keine Auswirkungen auf die Entscheidung der angefochtenen Entscheidung gehabt habe.[1399] Der EGMR erwog dagegen u.a., dass die tatsächliche Wirkung der Gehörsverlet-

1395 Siehe zur Eigentumsgarantie StGH 1996/008, LES 1997, 153 (157, Erw. 2.2.2); StGH 1996/20, LES 1998, 68 (72, Erw. 2); StGH 1996/47, LES 1998, 195 (200, Erw. 4); ähnlich auch schon StGH 1988/19, LES 1989, 122 (124, Erw. 2); zur Garantie des ordentlichen Richters StGH 1997/27, LES 1999, 11 (15, Erw. 5.1); StGH 1998/45, LES 2000, 1 (4 f., Erw. 2); zum Schutz der persönlichen Freiheit StGH 1996/4, LES 1997, 203 (206 Erw. 4.1); ähnlich auch schon StGH 1987/12, LES 1988, 4 (6 Erw. 6); ausführlich zum Ganzen Hoch, Schwerpunkte (Fn. 5), 79 ff.

1396 Peter Bussjäger, Der Staatsgerichtshof und die Europäische Menschenrechtskonvention – Bemerkungen zur Europäisierung des Grundrechtsschutzes in Liechtenstein, in: Liechtenstein-Institut (Hrsg.), Beiträge zum liechtensteinischen Recht aus nationaler und internationaler Perspektive, Festschrift zum 70. Geburtstag von Herbert Wille, LPS 54, Schaan 2014, 49 (61).

1397 Siehe Bussjäger, Staatsgerichtshof (Fn. 98), 55 ff.

1398 Siehe zu dieser Variante der Zurückhaltung gegenüber der Fachgerichtsbarkeit vorne 1.d/bb/aaa).

1399 EGMR-Urteil vom 19. Mai 2005, Nr. 63151/00, LES 2006, 53 (54, Rz. 24); siehe hierzu Hugo Vogt, Vogt, Hugo, Innerstaatliche Durchsetzung der Entscheidungen des Europäischen Gerichtshofs für Menschenrechte, in: Liechtenstein-Institut (Hrsg.): Bei-

zung auf die Entscheidung in einer solchen Situation von geringer Bedeutung sei und wandte einen strengeren Massstab für die Heilung einer Verletzung dieses Grundrechts an.[1400]
Gerade umgekehrt hat der Staatsgerichtshof im Übrigen in einem kürzlichen Fall auf die Zurückhaltung gegenüber dem demokratisch legitimierten Gesetzgeber – in diesem Fall sogar direkt gegenüber dem Volk, da es zu einer Volksabstimmung gekommen war – verzichtet, weil eine einschlägige EGMR-Rechtsprechung vorlag. Der Staatsgerichtshof erwog, dass ihm trotz des Volksentscheids eine wichtige „Filterfunktion" zukomme, um unnötige Verurteilungen Liechtensteins durch den EGMR zu vermeiden.[1401]

IV. Andere Gesichtspunkte

27. Wie oft stellt sich in Ihrem Gerichtshof die Frage richterlicher Selbstbeschränkung bei der Entscheidung über Menschenrechtsverletzungen?

Die Beantwortung dieser Frage hängt davon ab, wie weit der Begriff der richterlichen Selbstbeschränkung gefasst wird (siehe zur Palette der vom Staatsgerichtshof praktizierten Selbstbeschränkungs- bzw. Kognitionsbeschränkungsvarianten vorne die einleitenden Ausführungen zu 1.). Wenn darunter jegliche verfassungsgerichtliche Kognitionsbeschränkung verstanden wird, dann übt der Staatsgerichtshof sehr häufig eine solche Selbstbeschränkung. Im Sinne des engen Verständnisses des Staatsgerichtshofes von judicial self restraint/political question (siehe hierzu vorne die Ausführungen zu 1.b) ist dies dagegen nur selten der Fall.

22. Hat Ihr Gerichtshof seine Kontrolldichte im Lauf der Zeit zurückgenommen?

Wie in den Ausführungen zu 24. erwähnt, hat der Staatsgerichtshof die Kontrolldichte bis in die 1990er Jahre sukzessive erhöht. Seither ist die Rechtsprechung in dieser Hinsicht im Wesentlichen konstant.[1402]

23. Hängt die gerichtliche Selbstbeschränkung von der Anzahl der beim Gerichtshof anhängigen Rechtssachen ab?

Ein solcher Zusammenhang ist aus den Begründungen des Staatsgerichtshofes für seine verschiedenen Varianten der richterlichen Zurückhaltung bzw. Kognitionsbeschränkung nicht ersichtlich.[1403] Eine solche Art der „Bewältigung" eines zu grossen Geschäftsanfalles wäre ohne explizite gesetzliche Grundlage kaum denkbar. So hat der Staatsgerichtshof gerade die fehlende gesetzliche Möglichkeit betont, „offensichtlich unbegründeten Verfassungsbeschwerden ohne nähere Begründung keine

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träge zum liechtensteinischen Recht aus nationaler und internationaler Perspektive. Festschrift zum 70. Geburtstag von Herbert Wille. LPS Bd. 54, Schaan 2014, 69, (74).

1400 EGMR-Urteil Nr. 63151/00, a.a.O., 57, Rz. 57.

1401 StGH 2020/097, LES 2021, 182 (186, Erw. 2.6) mit Verweis auf Hilmar Hoch, Die EMRK in der Rechtsprechung des Staatsgerichtshofes, LJZ 2018, 111 (113).

1402 Siehe Hilmar Hoch, Staatsgerichtshof (Fn. 35), 426 bei Fn. 61. Immerhin ergab sich nach einer anfänglichen Verschärfung bei der Praxis zur Heilung von Verletzungen des rechtlichen Gehörs in letzter Zeit teilweise wieder eine grosszügigere, allerdings recht kasuistische Praxis. Siehe für einen Überblick über die Entwicklung dieser Rechtsprechung StGH 2022/016, Erw. 2.2. ff. (www.gerichtsentscheide.li); siehe auch vorne die Ausführungen zu 1.bb/aaa) zweitletzter Absatz.

1403 Dies trotz bis 2011 massiv angestiegenen Fallzahlen, die inzwischen aber wieder gefallen sind; siehe Hoch, Verfassungsgerichtsbarkeit (Fn 1), 1304.

Folge zu geben". [1404]

24. [a] Kann Ihr Gerichtshof seine Entscheidungen auf Gründe stützen, die von den Parteien nicht vorgebracht wurden? [b] Kann Ihr Gerichtshof die geltend gemachten Gründe auf eine andere als die vom Antragsteller angegebene Verfassungsbestimmung stützen?

a) Zu dieser Frage kann auf die Ausführungen zur Geltung des Rüge- und das Substantiierungsprinzips im Verfassungsbeschwerdeverfahren einerseits und zur Amtswegigkeit des Normenkontrollverfahrens andererseits verwiesen werden (siehe vorne 23.).

b) Der Staatsgerichtshof handhabt das Rügeprinzip nicht streng. Es müssen nicht zwingend einzelne Verfassungsartikel bezeichnet werden; es genügt, wenn eine bestimmte Grundrechtsrüge sinngemäss bzw. implizit geltend gemacht wird.[1405] Entsprechend schadet es auch nicht, wenn das falsche Grundrecht geltend gemacht bzw. auf dem falschen Verfassungsartikel Bezug genommen wird, sofern das Beschwerdevorbringen genügend klar unter dem richtigen Grundrecht subsumiert werden kann.[1406]

31. Kann Ihr Gerichtshof die Prüfung der Verfassungsmässigkeit eines Gesetzes auf ein anderes Gesetz ausdehnen, das vom Antragsteller nicht angefochten wurde, das aber für die Situation des Antragstellers relevant ist?

Der Staatsgerichtshof kann jede von ihm in einem Individualbeschwerdeverfahren anzuwendende Gesetzes- oder Verordnungsbestimmung auch ohne Parteiantrag von Amtes wegen auf ihre Verfassungsmässigkeit überprüfen.[1407] Bei einer von einem Gericht oder von anderen dazu Berechtigten beantragten Normprüfung[1408] ist der Staatsgerichtshof an den jeweiligen Antrag gebunden. Eine Ausnahme besteht aber dann, wenn sich neben der vom Antrag umfassten Gesetzes- oder Verordnungsbestimmung noch weitere, unmittelbar damit zusammenhängende Bestimmungen aus denselben Gründen als verfassungswidrig erweisen. In diesem Falle können auch diese weiteren, vom Antrag nicht umfassten Bestimmungen aufgehoben werden.[1409] Für die Staatsvertragsprüfung

1404 StGH 1995/28, LES 1998, 6 (11, Erw. 2.2); siehe hierzu Hoch, Staatsgerichtshof (Fn. 35), 429 Fn. 71.

1405 StGH 2016/078, Erw. 2.1; StGH 2016/064, Erw. 2.5; StGH 2015/008, Erw. 1.3 (alle www.gerichtsentscheide.li); siehe auch Tobias Michael Wille, Liechtensteinisches Verfassungsprozessrecht, LPS Bd. 43, Schaan 2007, 489.

1406 Siehe etwa StGH 2014/055, Erw. 2.2; StGH 2011/002, Erw. 4.2; StGH 1995/006, Erw. 3.1 (alle gerichtsentscheide.li).

1407 Art. 18 Abs. 1 Bst. c StGHG (Gesetze); Art. 20 Abs. 1 Bst. b StGHG (Verordnungen); Art. 22 Abs. 1 Bst. b StGHG (Staatsverträge).

1408 Art. 18 Abs. 1 Bst. a und b StGHG (Gesetze); Art. 20 Abs. 1 Bst. a StGHG (Verordnungen); Art. 22 Abs. 1 Bst. b StGHG (Staatsverträge). Neben den Gerichten sind hinsichtlich Gesetzen die Regierung und die Gemeinden, hinsichtlich Verordnungen auch einzelne Gemeindebehörden und hinsichtlich Staatsverträgen auch Verwaltungsbehörden antragslegitimiert. Eine ungewöhnliche Regelung findet sich zudem in Art. 20 Abs. 1 Bst. c StGHG, wonach 100 Stimmberechtigte eine abstrakte Verordnungsprüfung beantragen können; siehe hierzu Wille, Verfassungsprozessrecht (Fn. 107), 192 ff.

1409 Art. 19 Abs. 1, 2. Satz StGHG (Gesetze) und 21 Abs. 1, 2. Satz StGHG (Verordnungen). Siehe hierzu StGH 2023/025, Erw. 3 ff. mit rechtsvergleichenden Hinweisen (www.gerichtsentscheide.li). Der Staatsgerichtshof wendet diese Ausnahmeregelung auch dann an, wenn eine Bestimmung ohne die verfassungswidrige Bestimmung einen „Torso" ohne eigene Normierungskraft dargestellt würde (StGH 2023/025, Erw.

gemäss Art. 22 f. StGHG gibt es allerdings keine entsprechende Regelung.

3.6.5; StGH 2006/094, Erw. 3; ähnlich StGH 2020/097, Erw. 4.1 [alle www.gerichtsentscheide.li]).

The Constitutional Court of the Republic of Lithuania

Forms and Limits of Judicial Deference:

The Case of the Constitutional Court of the Republic of Lithuania

Non-justiciable questions and deference intensities

1. In your jurisdictions, what is meant by "judicial deference"?

The role played by the Constitutional Court in the state and society is of crucial importance. The Constitutional Court is the guardian of the supremacy of the Constitution; it draws the boundaries and preserves the limits of the activity of state power institutions, guarantees the separation of power and ensures the protection of human rights and freedoms. Therefore, the activism of the Constitutional Court, as well as its restraint, influences the development of the national legal system.

The concept of "judicial deference" has not yet been much discussed either in academic debate in Lithuania or in the practice of the Constitutional Court of the Republic of Lithuania. In view of various stages of the activity of the Constitutional Court, such terms as "judicial restraint", "judicial activism"[1410] or "positive legislature"[1411] have been used more often.

However, if the concept of "judicial deference" can be understood as a judicial tool used mostly in human rights cases and invented to uphold the separation of powers and to imply refrainment by the judiciary from intervening in matters perceived to be beyond their expertise or legitimacy to decide, it is possible to trace some elements of this concept in the Lithuanian official constitutional doctrine. The examples of judicial deference in the Lithuanian constitutional jurisprudence are not numerous; nevertheless, some cases could be attributed to this phenomenon.

First, it is possible to identify some elements of judicial deference to the Government based on the notion of expertise in the context of constitutional human rights in two stages of the Court's activity: 1) before the pandemics caused by the Covid-19 disease and 2) in relation to the measures concerning the Covid-19 disease.

Before the COVID-19 crisis, the Constitutional Court held that, according to the Constitution, a legal regulation related to defining the content of human rights and freedoms and consolidating the guarantees of their implementation may be established only by means of a law (i.e. the confirmation of human rights and freedoms, the determination of their content, the legal guarantees of their protection and defence, their permissible limitation, etc.) (the ruling of 26 October 1995[1412]). However, in cases where the Constitution does not require that

certain relationships related to human rights and their implementation (*inter alia*, procedural relationships of the implementation of human rights, etc.) be regulated by means of a law, such relationships may also be regulated by means of substatutory legal acts. In its ruling of 5 May 2007, in the context

1410 See, for example, Šileikis, E., "Aktyvistinė konstitucinė justicija kaip subtili diskrecija inspiruoti teisinius modelius" ["Active Constitutional Jurisprudence as a Method to Influence Legal Issues"], *Jurisprudencija*, 2006, vol. 12(90), https://ojs.mruni.eu/ojs/jurisprudence/article/download/2785/2589.

1411 See, for example, Kūris, E., "Konstitucinės justicijos proceso teisės klausimu", *Teisė*, 2011, vol. 78, https://www.journals.vu.lt/teise/article/download/192/154. The author argues that the role of the Constitutional Court in the legislation is more wide while exercising its judicial control, although this Court is not established to implement the legislative function (for example, in the process of the interpretation of the constitutional principle of a state under the rule of law, this Court developed a number of constitutional requirements for the legislature and other legislative bodies and, therefore, this Court is called a "positive legislator").

1412 The rulings of the Constitutional Court (in English) are available on its website at https://lrkt.lt/en/courtacts/rulings-conclusions-decisions/171/y2023.

of the legal regulation of social security and social assistance relationships, the Constitutional Court explained that, for example, in certain cases, "the need to provide more details about and particularise a legal regulation in substatutory legal acts is objectively determined by the necessity in the law-making process to rely on special knowledge and special (professional) competence" (the ruling of 7 February 2005). However (as held by the Constitutional Court in its rulings more than once), under no circumstances, it is allowed to establish any conditions of the emergence of a person's right or to limit the scope of such a right by means of substatutory legal acts; under no circumstances, substatutory acts may establish any such a legal regulation of the relationships connected with the rights of a person and their exercise that would compete with the one established in the law.

The jurisprudential provision that the need to provide more details about and particularise a legal regulation in substatutory legal acts may be determined by the necessity in the lawmaking process to rely on special knowledge and special (professional) competence was repeated in the Constitutional Court's ruling of 7 December 2020 on the procedure for the allocation of state budget funds for research, experimental development and artistic activities carried out by institutions of science and studies.

In addition, a certain deferential position towards safety measures that lawfully limit fundamental rights (freedom of economic activity) could be seen in the evolving constitutional jurisprudence on the review of the governmental measures applied in the case of the Covid-19 disease. See further details about this jurisprudence in the answer to Question No 27.

Second, we can trace some elements of judicial deference to the legislature, reflected in the constitutional justice cases where the constitutional argumentation is constructed about the recognition of the competence (broad discretion) of the legislature in certain matters. For details, see the answer to Question No 2.

Notwithstanding that the Constitutional Court demonstrates respect for the decision-making actors – the Government and the legislature and this could be called as "judicial deference", the concept of constitutional powers of the Constitutional Court in implementing its mission of ensuring the supremacy of the Constitution, law and other constitutional values, including the protection of the constitutional principle of the separation of powers, and rejecting questions that are regarded as non-justiciable by this Court, is more precise.

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (e.g. questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government, etc.)?

As it was mentioned before, the concept of "judicial deference" in Lithuanian constitutional order cannot be said to be as usual and developed so that it would include the whole spectrum of deference for the Constitutional Court. However, the official constitutional doctrine suggests that the Constitutional Court refuses to engage in constitutional control and to exercise its interpretive activity if a disputed issue falls within the scope of non-justiciable questions. It should be noted as well that even in those areas there are the exceptions where the Constitutional Court might decide to intervene.

The Constitutional Court, while defining its powers enshrined in the Constitution, has identified what issues it does not usually deal with and why petitions are refused or returned to the petitioners.

For example, as noted in the jurisprudence of the Constitutional Court on more than one occasion, the Constitutional Court **does not have jurisdiction to assess** the content, instruments and methods of an **economic policy** (e.g. on tax exemptions and preferences, the priorities of municipal funding and its ways and forms, aid to specific industries, the establishment of the amount of late payment interest, etc.).[1413]

1413 Žalimas, D., "The Constitution of the Republic of Lithuania as the Jurisprudential Constitution" in *Lithuanian Constitutionalism. The Past and the Present*, Vilnius, 2017, p. 305, https://lrkt.lt/data/public/uploads/2017/12/lithuanian-constitutionalism.pdf.

In its ruling of 31 May 2006, the Constitutional Court held: "the assessment of the content, measures and methods of the state economic policy … (no matter who assesses them), also with regard to their reasonableness and expediency, even if it turns out later that there were better alternatives for choosing its economic policies … **in itself cannot be the reason to question the compliance of the legal regulation** of the economic activity conforming to the economic policy … with the legislation of higher legal force … with the Constitution … **unless the said legal regulation is clearly in conflict** with the general welfare of the Nation and with the interests of society and the State of Lithuania, or unless it denies the values consolidated, defended and protected by the Constitution"[1414] (see also the ruling of 22 September 2015 on taxation by the immovable property tax).

The particular application of this constitutional doctrine can be found in the ruling of 13 May 2021, where the petitioner challenged, among others, the constitutionality of the new additional corporate income tax for credit institutions (including banks). After having emphasised that the legal situation of the banks and credit unions subject to the additional corporate income tax is essentially different from that of other economic entities that have no obligation to pay the said tax, the Constitutional Court, nevertheless, underlined that "the reasonableness and expediency of the establishment of the additional income tax for credit institutions … **is not a matter of constitutional review**, since there is no ground for stating that such a legal regulation would clearly deny the values consolidated, defended and protected by the Constitution."

In its ruling of 21 December 2006 on the powers of the Minister of Finance to establish the amount of late payment interest, the Constitutional Court also noted that the choice for a model of financing the national public broadcaster is a matter of social, political and economic expediency, which **is within the competence of the legislature**; under the Constitution, the legislature has the discretion to choose the model of financing the national public broadcaster by taking account of the resources and the material and financial capacities of the state and society and by paying regard to other important factors, *inter alia*, expediency.

In its ruling of 3 November 2020 on the laws providing for the financing of certain programmes, funds or institutions, the Constitutional Court also noted that the establishment of tax exceptions and tax concessions is a matter of social and economic expediency that **is within the competence of the legislature**; under the Constitution, the legislature enjoys the discretion to establish by law tax exceptions or tax concessions by taking account of the resources and the material and financial capacities of the state and society, as well as the priorities of the state economic and social policy, and by heeding other important factors.

In its ruling of 5 February 2013 on the adoption of the law on the 2009 state budget and related laws, the Constitutional Court recognised that "**the petitioner raises the question of social and economic expediency** in relation to the collection of funds to a respective budget and their distribution" and refused to deal with the petition by holding that: "The question whether certain needs (objectives) are allocated sufficient or insufficient funds from the state budget is not about the compliance of the state budget with the Constitution, but rather about budget planning, the evaluation of the needs of society and the state, their balance with the possibilities of society and the state and, consequently, about social and economic expediency" (the rulings of 14 January 2002 and 21 December 2006). **The Constitutional Court does not decide these questions save the cases** where the law on the state budget establishes a legal regulation making it clear from the start that it provides for insufficient finance or no finance for certain needs (objectives) while, at the same time, not providing for any other (alternative) sources of finance, which, under the Constitution, may be allocated for the respective needs, and this is clearly in conflict with the welfare of the Nation and with the interests of society and the State of Lithuania, as well as clearly denies the values consolidated, defended and protected by the Constitution (the ruling of 21 December 2006).

1414 By now, there have been no such situations in the constitutional jurisprudence in which the contested legal regulation would be recognised to be clearly in conflict with the general welfare of the Nation and with the interests of society and the State of Lithuania, or would be declared to deny the values consolidated, defended and protected by the Constitution.

In its ruling of 14 January 2002 on the indicators of the state and municipal budgets, it was held that "The assumption that sufficient funds for financing higher education were not provided for in the state budget cannot be an argument in judging whether the law on the state budget for the particular year is in compliance with paragraph 3 of Article 41 of the Constitution. **The question whether certain needs (objectives) are allocated sufficient or insufficient funds from the state budget is not about the compliance of the state budget with the Constitution**, **but** rather about budget planning, the evaluation of the needs of society and the state, their balance with the possibilities of society and the state and, consequently, **about social and economic expediency**. **Therefore**, **there are no legal grounds for stating that the legal regulation** established by the Law on the Approval of Financial Indicators of the 2001 State Budget and Municipal Budgets (wording of 19 December 2000) **denied the rights** enshrined in paragraph 3 of Article 41 of the Constitution and that the implementation of these rights is not ensured".

It is clear from the examples provided above that the Constitutional Court would rather defer to the legislature in matters related to social, political and economic expediency, the allocation of funds from the state budget, the particular needs of society and the state and their balance. However, this rule is not of absolute nature. The Constitutional Court will engage in constitutional review even where the issue concerns the areas regarded as non-justiciable on two occasions: (i) if the legal regulation in question is clearly in conflict with the general welfare of the Nation and with the interests of society and the State of Lithuania, or (ii) where the legal regulation in question denies the values consolidated, defended and protected by the Constitution.

3. Are there factors to determine when and how your Court should defer (e.g. the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

As it can be seen from the answers provided above, there are limits of constitutional control or investigation in the implementation of constitutional jurisdiction. These limits are observed in all constitutional justice cases and their observance cannot vary according to some kind of factors.

Thus, in the enumerated cases, the Constitutional Court determines the limits of constitutional control or investigation in the implementation of its constitutional jurisdiction, rather than exercises "judicial deference".

Some form of judicial deference can be seen in the cases related to the constitutionality of social allocations. Where the Constitutional Court delt with the right to receive the old-age pension, the state pension, the allocations of social care and social assistance, the conditions for receiving them, the moment of time of the beginning of payment and so on, it usually deferred to the legislature with regard to the amount of the allocation/pension. The Court has given some general rules as to the amount of such pensions or the criteria to determine them (minimum level of living), but it emphasised in all cases that, while determining the particular amount of the allocation, the Court has to take into consideration the financial obligation of the state and state budget expenditure (e.g. the ruling of 6 February 2012).

The Constitutional Court of the Republic of Lithuania ensures the supremacy of the Constitution in the legal system, as well as constitutional justice, by deciding whether laws and other legal acts adopted by the Parliament are in conformity with the Constitution and whether legal acts adopted by the President of the Republic or the Government are in compliance with the Constitution and laws. Thus, the Constitutional Court carries out the verification of the constitutionality of only those legal acts that are passed by the highest legislative and executive institutions.

Therefore, it can be also noted that the Constitutional Court has no power to consider and determine the constitutionality of legal acts adopted by other bodies, for example, issued by institutions of local municipalities (e.g. the decision of 5 November 1994) or adopted by ministries or other governance institutions (e.g. the rulings of 18 December 1997, 2 September 2009 and 24 September 2009), or adopted by a prosecutor (the decision of 29 September 1999) or other courts of Lithuania (the Con-

stitutional Court is not competent to decide on requests to determine whether court decisions are in line with the Constitution and/or the law, and it has no power to review cases heard by courts or to overturn/reverse court decisions (*inter alia*, the decision (No KT27-A-S16/2019) of 9 October 2019, the decision (No KT136-A-S123/2022) of 16 November 2022 and the decision (No KT19-A-S17/2023) of 1 March 2023); the said issues fall within the jurisdiction of other courts of Lithuania, which decide specific administrative and civil disputes)).

Under the Constitution, the Constitutional Court also gives conclusions on four issues ((1) whether election laws were violated during the elections of the President of the Republic or elections of members of the Seimas; (2) whether the state of health of the President of the Republic allows him or her to continue to hold office; (3) whether international treaties of the Republic of Lithuania are not in conflict with the Constitution; (4) whether concrete actions of members of the Seimas and state officials against whom an impeachment case has been instituted are in conflict with the Constitution) (paragraph 3 of Article 105 of the Constitution). The Seimas, conforming to these four kinds of conclusions of the Constitutional Court, adopts the final decision (paragraph 4 of Article 107 of the Constitution).

Under the Constitution, the Constitutional Court also adopts decisions on the interpretation of the provisions formulated in its previous rulings.

In its decision of 13 March 2013, the Constitutional Court emphasised that it, as a legal, but not a political institution, which decides the legal questions assigned under the Constitution to its competence only by invoking legal arguments, may not interpret its final acts by following, *inter alia*, arguments of political expediency, documents of political parties or different public organisations, opinions and assessments by politicians, political science or sociological research, or results of public opinion polls. Otherwise, preconditions could appear for doubting the impartiality of the Constitutional Court and a threat could arise to its independence and the stability of the Constitution itself, *inter alia*, the official constitutional doctrine.

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

There have been no explicitly determined situations of deference due to the absence of institutional competence or expertise in the case law of the Constitutional Court. According to the Law on the Constitutional Court, while preparing a case for the hearing, the justice rapporteur can make a proposal to conduct an expert examination or to summon a specialist that can provide information relevant to the examination of the case.[1415] Namely, the opinion of experts can be used as an argumentation to defer to the legislature.

However, some distinct examples where the Constitutional Court demonstrated confidence in governmental choices can be attributed to the cases of judicial deference. It concerns the socalled technical cases, mostly related to the protection of the environment.

In the ruling of 16 December 2015 on the research and use of the subsurface by applying hydraulic fracturing, the Constitutional Court found in line with the Constitution the legal regulation providing that the mining waste resulting from subsurface exploration and/or the exploitation of subsurface resources by means of hydraulic fracturing may be left in artificial subsurface voids. The Court argued that the application of hydraulic rock fracturing for exploring the subsurface and exploiting subsurface resources, including unconventional hydrocarbons, is allowed only under the procedure laid down by the Government or an institution authorised by it. In the Court's opinion, the responsibility of the Government is to ensure the reliability of this procedure. The Court noted, among others, that the laws laid down the measures for protecting human health and the environment, *inter alia*, in the process of exploring the subsurface and/or exploiting subsurface resources, including unconventional hydrocarbons. The Court concluded that, by means of such measures, the preconditions were created for avoiding harm on human health and the environment (including the subsurface,

1415 Article 27 of the Law on the Constitutional Court. See at https://lrkt.lt/en/about-the-court/legalinformation/the-law-on-the-constitutional-court/193.

groundwater and surface water, as well as drinking water) during subsurface exploration and/or the exploitation of subsurface resources, including unconventional hydrocarbons, by means of hydraulic fracturing and by leaving the waste generated during such fracturing in artificial subsurface voids; there were no grounds for stating that these measures were not sufficiently effective. Alongside with that, the Court also emphasised the duty of the legislature to set up additional means if needed or to prohibit conducting certain activity related to the subsurface if the existing means appeared insufficient.

Are there cases where your Court deferred because there was a risk of judicial error?

There have been no such situations of deference due to a risk of judicial error in the case law of the Constitutional Court.

Are there cases when your Court deferred invoking the institutional or democratic legitimacy of the decision-maker?

Given some elements of the so-called judicial deference to the Government and the Parliament as enumerated in the answers to Questions No 1 and No 2, there have been no other cases significant in the context of explaining the concept of "judicial deference" exercised by invoking the institutional or democratic legitimacy of the decision-maker. Nevertheless, in certain cases, the Lithuanian Constitutional Court uses the argument of the "prerogative of the legislature" in order to justify the constitutionality of the challenged legal regulation.

In the most recent ruling of 5 July 2023, the Constitutional Court found no violation of the Constitution while assessing the legal regulation allowing, in the cases determined by law, the use of the Latin characters absent in the Lithuanian alphabet (x, w, q) in the documents certifying the identity of a person. Still, following its previous doctrine regarding respect for the national language, the Constitutional Court softened its previously rigorous position forbidding the use of the above-mentioned characters in the passports and ID cards. The Constitutional Court emphasised that, since the State Commission of the Lithuanian Language stated in its conclusion that, in general, the possibility of using those characters will not pose a threat to the preservation of the Lithuanian language (to have such a conclusion before amending the law is required under the Constitution), it is the prerogative of the legislature to define in which particular cases (or for what particular groups of persons) Latin characters (without diacritic marks) could be kept in personal ID documents. The Constitutional Court decided that the challenged legal regulation was in line with the Constitution even after the legislature had opted for the groups of persons eligible for this possibility other than those proposed by the State Commission of the Lithuanian Language. If, as the petitioner argued, the Constitution were interpreted differently, i.e. as not allowing the legislature to define the cases when Latin characters can be used in personal ID documents, because the legislature were obliged to follow specifically all proposals of the Commission, the preconditions would be created for denying **the exclusive competence of the Seimas as the legislative authority** to establish the legal regulation governing the writing of the name and surname of a person in documents certifying the identity of a citizen of the Republic of Lithuania.

In the ruling of 24 September 2009 on the constitutionality of the legal acts related to the reorganisation of the armed forces, the Constitutional Court decided that the legal regulation reforming mandatory initial military service was not in conflict with the Constitution. The impugned legal regulation provided for the possibility of determining that the margin number of soldiers of mandatory initial military service of a given year is 0, which meant that regular mandatory initial military service is postponed. The Constitutional Court noted that such a legal regulation does not abolish the constitutional institution of mandatory military service in general; it proposes that the preparation of citizens for the defence of this country be also organised by means that are alternative and different from mandatory initial military service. The Court also emphasised that **the Constitution lays down the prerogative of the legislature** to establish the regulation of the national defence system, *inter alia*, military service. Therefore, as the legal regulation of military service, which is one of the foundations of the national defence system, is a constitutional prerogative of the legislature, **the legislature**,

while regulating the relationships linked to the organisation of national defence, *inter alia*, the armed forces, **has a rather broad discretion**. It may choose various models of the armed forces and forms of military service, for instance, a model under which the armed forces are organised on the grounds of professional and voluntary military service.

In addition, in this context it must be added that objects of constitutional control are also such issues as constitutional amendments (the rulings of 24 January 2014 and 11 July 2014), also acts adopted by referendum (*inter alia*, the rulings of 28 March 2006, 2 September 2011 and 28 June 2016), and legislative omissions (i.e. such loopholes of law that are prohibited by the Constitution; the foundations of the doctrine on these omissions were laid down in the decisions of 6 May 2003 and 13 May 2003) (see the answer to Question No 10 on legislative omissions). The examination of such constitutional control objects as constitutional amendments and legislative omissions in constitutional justice cases illustrates the role of the Constitutional Court as the "positive legislator" (while investigating the constitutionality of laws adopted by the Seimas on amending the Constitution, the Constitutional Court revealed the substantive and procedural limitations on the alteration of the Constitution; while stating the existence of legislative omissions, the Constitutional Court defines the guidelines for such a legal regulation that must be enshrined according to the Constitution).[1416] As in other situations, in these cases, if a legal regulation is recognised to be in conflict with the Constitution, it must be removed from the legal system (however, the Constitutional Court may not correct any anticonstitutional legal act, change faulty provisions, or repeal such an act).

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

The answer to this question should be rather yes, as it is a more or less standard use by the Lithuanian Constitutional Court. The policy implemented by the Seimas, the President of the Republic and the Government constitutes overall activities of these institutions of power within the competence assigned to them under the Constitution and laws. Competent decisions and actions of these institutions of power are an integral part of the policy implemented by them (the Constitutional Court's rulings of 10 March 1998 and 13 May 2010).

As concluded in the answer to Question No 2, the Constitutional Court does not have jurisdiction to assess the content, instruments and methods of an economic policy, which also affects decisions taken in the field of social security and social care. Under the Constitution, this is within the competence of the legislature (**unless a legal regulation is clearly in conflict** with the general welfare of the Nation and with the interests of society and the State of Lithuania, or unless it denies the values consolidated, defended and protected by the Constitution).

In addition, there are jurisprudential provisions in the case law of the Constitutional Court based on its previous precedents adopted while explaining the constitutional provisions (Article 52 of the Constitution) that guarantee the right to social maintenance. Usually, the broad discretion of the legislature linked to the management of state resources is emphasised, especially where it concerns state pensions allocated in cases determined by law.

For example, in its rulings of 2 September 2009 and 14 December 2010, the Constitutional Court held that the content of **the legal regulation of the relationships of social security and social assistance** is affected by various factors, *inter alia*, the resources and the material and financial capacities of the state and society. "**The legislature**, taking account of these factors and respectively regulat-

1416 Žalimas, D., "Teisėtumo patikra Konstitucinio Teismo sprendimuose: patikros principai ir kriterijai" ["Legality (Lawfulness) Assessment in the Judgments of the Constitutional Court: Principles and Criteria of Assessment"] in *Likumu Kvalitātes Izvērtēšana Konstitucionālās Tiesas Nolēmumos: Vērtēšanas Kritēriji Un Principi. Įstatymų kokybės vertinimas Konstitucinio Teismo sprendimuose: vertinimo kriterijai ir principai*, the Constitutional Court of the Republic of Latvia, Riga, 2019, p. 23.

ing the said relationships, **enjoys broad discretion**. The law-making bodies that issue substatutory legal acts also have certain discretion in this area; this discretion must be based on the powers of the respective institutions (officials) established in laws and it may not deny the legal regulation established in laws".

In the ruling of 2 September 2009, the Court held that the legislature has the broad discretion to choose and consolidate in laws a model of the provision of social support, *inter alia*, various forms thereof (state, private, mixed, etc.), as well as the discretion to choose a system of pensions. However, the legislature, when adopting laws on pensionary maintenance is bound by the rules and principles of the Constitution; according to the Constitution, the grounds of pensionary maintenance, the persons who are granted and paid pensions, the conditions for granting and paying pensions, as well as the amounts of pensions, are established only by means of a law.

Under the Constitution, the legislature also has the right to reorganise the established system of pensionary maintenance by changing the grounds of pensionary maintenance, the persons who are granted and paid a pension, as well as the conditions for granting and paying a pension, provided that the requirements arising from Article 52 of the Constitution and the constitutional principle of a state under the rule of law are followed (*inter alia*, the constitutional principles of the protection of legitimate expectations, legal certainty and legal security). These doctrinal provisions have more than once provided the grounds to find in line with the Constitution a legal regulation changing certain elements of the pensionary system (for example, the ruling of 29 June 2012 on the reduction of the amounts of cumulative contributions accumulated in pension funds).

It the above-mentioned ruling of 14 December 2010, it was also recognised that substatutory legal acts (thus, also **government** resolutions) may establish only the procedure for the implementation of laws regulating the relationships of social security and social assistance. The substatutory legal regulation of the relationships of social security and social assistance may comprise the establishment of respective procedures, as well as the establishment of such a legal regulation based on laws where the need to provide more details about and particularise in substatutory legal acts a legal regulation established by laws is objectively determined by the necessity in the law-making process to rely on special knowledge or special (professional) competence in a certain area. However, as the Constitutional Court has held in its rulings more than once, a substatutory legal regulation of the relationships specified in Article 52 of the Constitution may not establish conditions for the emergence of the right of a person to social assistance, nor may it limit the scope of this right.

On more than one occasion, the Constitutional Court also emphasised that the discretion of the legislature, while establishing the granting of state pensions, is broader than that in regulating other pensions, *inter alia*, old-age pensions or disability pensions. The conditions for granting state pensions may be very different and depend on the particularities of state service, economic resources of the state, etc.; the legislature, while enjoying its discretion, is allowed to choose whether or not to stipulate that the state pension of officials and servicemen would be granted to the officials who held certain office, as well as under what conditions this pension is granted (among others, the ruling of 24 December 2008). In addition, the Constitutional Court stresses that this discretion of the legislature is not absolute; the legislature is bound by the imperatives stemming from the Constitution, *inter alia*, the constitutional imperative of social harmony, the principles of justice, reasonableness, proportionality and legal clarity.

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

The Constitutional Court does not base its rulings or other decisions on a general principle of deference while assessing the constitutionality of a legal regulation establishing penal sanctions or other kinds of legal responsibility, but rather, as stated before, the Constitutional Court underlines the broad discretion of the legislature in the matter.

In cases of this kind, the Constitutional Court expresses its regular position that, in a democratic state under the rule of law, the legislature has the right and duty to prohibit by means of laws such deeds that can essentially harm people, society or interests of the state or deeds due to which there can

be a threat of such harm (the ruling of 8 May 2000 on operational activities; the ruling of 10 June 2003 on criminal responsibility for smuggling; the ruling of 29 December 2004 on the prevention of organised crime; the ruling of 16 January 2006 on private accusations and on the right of the person against whom the institution of a criminal case is refused to lodge a complaint against the decision of the prosecutor; the ruling of 8 June 2009 on the provisions of the Criminal Code regulating criminal responsibility of legal persons; the ruling of 18 March 2020 on suspending the execution of a custodial sentence imposed for a grave crime; the ruling of 19 May 2022 on the right of a court to individualise penalty charges for unlawfully reduced social insurance contributions).

The Constitutional Court has also pointed out that, **when establishing in laws the kinds of deeds that are contrary to law**, **as well as when establishing legal responsibility for deeds that are contrary to law**, **the legislature has broad discretion** (the ruling of 10 November 2005 on the compliance of the Code of Administrative Violations of Law with the Constitution; the ruling of 15 March 2008 on the application of the sanction of the deletion of the address of a place of purchase of scrap and waste metals from the licence; the ruling of 18 March 2020 on suspending the execution of a custodial sentence imposed for a grave crime; the ruling of 19 May 2022 on the right of a court to individualise penalty charges for unlawfully reduced social insurance contributions).

For example, at the beginning of the Constitutional Court's activity, the applicants requested an investigation into the constitutionality of the provisions of the Republic of Lithuania's Law on Operational Activities regulating the application of the mode of conduct simulating a criminal act (the mode comprises lawful actions exhibiting elements of crime; these actions are aimed at protecting the key interests of the state, the public or an individual; the person to whom the mode is applied is neither incited nor provoked to commit a crime; the covert participants carrying it out may not be brought to criminal responsibility). On that basis, the Constitutional Court adopted the ruling of 8 May 2000 on operational activities and recognised the examined legal regulation to be in compliance with the Constitution to the extent that conduct simulating a criminal act is authorised by the Prosecutor General or the Deputy Prosecutor General designated by the Prosecutor General, as well as to the extent that it is permitted to apply that mode to Seimas members; meanwhile, the examined legal regulation to the extent that it permitted to apply the said mode to the President of the Republic, due to his or her special status, was ruled to be in conflict with the Constitution.

However, the later cases decided by the Constitutional Court show that, in this kind of cases, the Constitutional Court also applies the classical test to verify whether the constitutional conditions for the limitation of human rights and freedoms are respected, i.e. whether the following conditions are met: 1) the limitations are established by means of a law; 2) the limitations are necessary in a democratic society in order to protect the rights and freedoms of other persons, the values consolidated in the Constitution, as well as the constitutionally important objectives; 3) the limitations do not deny the nature and essence of rights and freedoms; and 4) the constitutional principle of proportionality is observed (*inter alia*, the rulings of 26 January 2004 and 18 April 2019).

For example, in its ruling of 19 May 2022 on the right of a court to individualise penalty charges for unlawfully reduced social insurance contributions, the Constitutional Court repeated its position concerning the requirement of the individualisation of punishment and the requirement of proportionality. In that case, the disputed provisions of the Law on State Social Insurance, insofar as, after establishing the severe sanction (50 per cent of the underpaid amount of social insurance contributions) applicable to the violators of law for unlawfully reduced social insurance contributions, the said law did not allow the court to individualise that sanction by taking into account the nature of the violation of law and the mitigating and other circumstances, were recognised to be in conflict with the Constitution and the constitutional principle of a state under the rule of law. The Constitutional Court emphasised that, under the Constitution, the legislature must establish such a legal regulation that would create the possibility for a court to individualise the strict sanction for unlawful activities.

9. There may be narrow circumstances where the government cannot reveal information to the

Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

The right to information and safeguarding national security were an object of some constitutional justice cases, but it could not be stated that the Constitutional Court deferred on national security grounds in these cases.

The classification of legal acts as "top secret", "secret" or "confidential" or any other designation of security classification, if such legal acts fall under the judicial control of the Constitutional Court, does not preclude this Court from exercising its powers to carry out the constitutionality review of the said legal acts. By its ruling of 5 April 2000, the Constitutional Court declared unconstitutional a government resolution classified as "top secret", since despite the requirement to publish it in the official gazette *Valstybės* žinios, this had not been done.

The petition was submitted to the Constitutional Court by the Higher Administrative Court, requesting an investigation into whether the provision of the Regulations for Operational Activities of the Interior System of the Republic of Lithuania as approved by the Resolution of the Government of the Republic of Lithuania of 1993 was in compliance with the Constitution. The Constitutional Court received the said government resolution together with the petition of the Higher Administrative Court.

The Constitutional Court examined the case in closed session, but the ruling was pronounced publicly in the courtroom. The ruling was officially published in the official gazette *Valstybės* žinios, as the official publication of all final acts of the Constitutional Court is imperatively required by the Constitution.[1417]

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

The Constitutional Court revealed many constitutional imperatives arising from the Constitution, especially the constitutional principle of a state under the rule of law, as well as imperatives applicable to various state institutions, including the imperative that freedom of state power is limited by law, which must be observed by all subjects of legal relationships, including law-making bodies; the discretion of all law-making bodies is limited by supreme law – the Constitution; all legal acts and decisions of all state and municipal institutions and officials must be in compliance with and may not contradict the Constitution (*inter alia*, the rulings of 6 December 2000 and 13 December 2004).

In this context, attention should also be paid to the official doctrine stating that the under the Constitution Constitutional Court investigates only whether precisely legal acts, but not the non-adoption of law-making decisions by state institutions (the Seimas, the President of the Republic, the Government), i.e. avoidance or delay to adopt such decisions, as well as failure to act, which is determined by other motives, even though in the legal system there occur gaps or other indeterminacies due to such failure to act, is not in conflict with legal acts of higher power, *inter alia* (and, first of all), with the Constitution (*inter alia*, the decision of 8 August 2006 and the ruling of 13 May 2010). In cases of non-action or abusive avoidance to adopt legislation, the Constitutional Court has no competence to interfere, even when the restraint of the legislature to act concerns reforms linked to the protection of human rights, because, if there is no legal act adopted and officially published, there is no object for investigation by the Constitutional Court.

Thus, the bodies and persons that are stipulated in the Constitution to have the right to impugn the compliance of legal acts adopted by the Seimas, the President of the Republic or the Government, or the compliance of legal acts adopted by referendum, with legal acts of higher legal force, *inter alia*,

1417 Žalimas, D., "The Constitution of the Republic of Lithuania as the Jurisprudential Constitution" in *Lithuanian Constitutionalism. The Past and the Present*, Vilnius, 2017, p. 299, https://lrkt.lt/data/public/uploads/2017/12/lithuanian-constitutionalism.pdf.

the Constitution, cannot impugn avoidance or delay to adopt such lawmaking decisions or failure to act, which is determined by other motives and due to which certain legal acts have not been passed, including those legal acts that are required to be passed by taking account of the acts of the Constitutional Court so that such a legal regulation is established that is in compliance with the Constitution or other legal acts of higher legal force (the decisions of 8 August 2006 and 13 May 2010).

However, it should also be pointed out in this context that, in the jurisprudence of the Constitutional Court, it is held that the Constitutional Court has the constitutional powers to rule a legal act to be in conflict with the Constitution (or another act of higher legal force) if such an act contains a legal omission, i.e. a legal gap as a result of which a legal regulation is not established, although it must be established precisely in that legal act (or another act of higher legal force) under the Constitution. As concluded by the Constitutional Court in its decision of 8 August 2006, a legislative omission differs from other legal gaps, *inter alia*, in that it is always the consequence of action by the law-making body that has issued a respective legal act, but not the consequence of its failure to act; moreover, it is not the consequence of action (especially, lawful action) or failure to act by any other body; for instance, such a legal gap where certain social relationships have not even begun to be regulated by certain legal acts, although there exists a need for their legal regulation, is not regarded as a legislative omission.

Thus, if there is a legal omission, i.e. incomplete legislation that misses some elements of human rights protection, a constitutional justice case may be initiated. The Constitutional Court could interfere only upon receiving a petition asking to assess whether legislation missing to introduce the legal reform is in compliance with the Constitution, as, under the Constitution, the Constitutional Court has no right to initiate a case *proprio motu*. If no bodies and persons with the right to address the Constitutional Court file a petition with the Constitutional Court, the Court cannot intervene.

As an example of non-action by state institutions in Lithuania can be the long-lasting postponement to adopt the legislation regulating the formation of the family on grounds other than marriage (i.e. partnership). The Constitutional Court held that the Constitution protects all families – those composed on the basis of marriage and also other forms of families; however, under Lithuanian law, the provisions regulating family relationships apply to those who have been married, as there is no other legal form to register a family.

The decision-maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

The Constitutional Court does not pay greater deference to an act of the Parliament than to a decision of the executive. There is no difference in scrutinising the constitutionality of a legal act that has the legal force of a law or the constitutionality of a substatutory legal act. The Constitutional Court applies the same intensity of examination to any act challenged before the Court, without making difference of the body that have adopted that legal act or the legal force of the act.

However, there is some exception regarding the order of hearing cases when the petitioner is the whole Parliament or the President of the Republic – such petitions have the priority to be examined out of sequence, but this does not affect in any way the Court's position towards the challenged act.

The Constitutional Court examines a case only when the bodies and persons (including the Parliament or its members or the Government) specified by the Constitution address the Constitutional Court with a petition requesting an examination into the compliance of a law or another legal act with the Constitution. Although the practice of the Constitutional Court (which is also presented in its annual reports[1418]) shows that the members of the Parliament are more active compared to the

1418 They are available in English on the website of the Constitutional Court: https://lrkt.lt/en/about-thecourt/activity/annual-reports/183.

Government in addressing the Constitutional Court, it is the subject matter of the case that ultimately determines the issues considered in the case, i.e. whether the Court deals with constitutional provisions concerning the Parliament or the Government, or both of them.

It can also be noted that, in its case law, the Constitutional Court has also revealed the content of the constitutional principle of the separation of powers, which is consolidated, among others, in Article 5 of the Constitution, as a legal basis for disputes between state authorities. As the Constitutional Court has repeatedly pointed out, this principle is the main principle of the democratic organisation and functioning of a state under the rule of law (*inter alia*, the rulings of 10 January 1998, 29 September 2015 and 7 December 2020).

The Constitutional Court has held in its rulings more than once that the constitutional principle of the separation of powers implies, among others, the requirement that the legislative, executive and judicial powers must be separated and must be sufficiently independent; however, there must be a balance between them. The competence of every state institution is established according to its purpose; the particular content of this competence depends on the place of the branch of power in question in the entire system of the branches of state power, as well as on its relationship with the other branches of state power. Upon the direct establishment of the powers of a particular state institution in the Constitution, a state institution may not take over such powers from another state institution, nor may it transfer or waive them. Such powers may not be changed or limited by law (e.g. the ruling of 24 December 2002).

Based on the interpretation of the constitutional principle of the separation of powers in the official constitutional doctrine, the Constitutional Court has a strong responsibility, in the process of examining the constitutionality of legal acts, to act as a prudent arbitrator in disputes between public authorities before it, with a view, on the one hand, to ensuring the constitutional balance and harmonious functioning of the system of public authorities as a whole and, on the other hand, to creating the preconditions for the proper exercise by those authorities of the competence enjoyed by them under the Constitution. The protection of the constitutional principle of the separation of powers and the related constitutional imperatives, as well as the proper operation of the mechanisms established by the Constitution to ensure the smooth

functioning of the state authorities and cooperation between them, is important to the Constitutional Court in the course of administering constitutional justice entrusted to it.[1419]

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

An analysis of legislative history (including *travaux préparatoires*) can be and is part of examination carried out in order to find the solution whether the disputed legal act (or its part) in certain constitutional justice cases is in compliance with the Constitution. Revealing intentions of the legislature can also help to find this solution, especially in the case of the legitimate aim test while applying the "classic" proportionality test in situations concerning human rights limitations (for details, see especially Part III "Rights' scope, legality and proportionality" of this Questionnaire).

The Constitutional Court also discloses, where it is pertinent to the subject matter of a case, the history of legislation and the amendments to the challenged provision made before establishing the challenged legal regulation. The "historical part" of the legal regulation under consideration allows the Court to observe the development of certain legal institutions before adopting the final decision.

There are some constitutional justice cases decided after having analysed in detail the formation of a particular legal institution. For example, in the ruling of 13 May 2005 regarding the constitutionality of the provisions of the Law on Hunting, the Constitutional Court began its analysis of the legal regu-

1419 Jočienė, D., "Konstitucinio Teismo patirtis ir iššūkiai sprendžiant valstybės valdžios institucijų ginčus" ["Experience Gained by the Constitutional Court and Its Challenges in Resolving Constitutional Disputes between State Authorities"], *Jurisprudencija*, 2021, vol. 28(2), p. 341 or https://ojs.mruni.eu/ojs/jurisprudence/article/download/6997/5553.

lation by recalling the origins of the regulation governing hunting relationships and looked through the history of the legal regulation of hunting by emphasising its importance.

Lately, the Constitutional Court pays particular attention not only to the legislative history, but also to the legislation procedure itself. Most often, the Court verifies whether a legal act was adopted by observing the constitutional rules in cases when the petitioner challenges not the content, but the decision-making procedure.

An obvious example can be the ruling of 16 April 2019 on amending the Law on Forestry and the legislative procedure. In that ruling, when assessing the legal regulation adopted under urgency procedure, the Constitutional Court emphasised the importance of observing the constitutional requirements for the legislation process, stressing that failure to comply with them can lead to the unconstitutionality of the act. The publicity and transparency of the legislation procedure, regarded as creating the precondition "for ensuring the quality of laws and other acts", were given particular attention. The Constitutional Court recalled that, when the Parliament and each member of the Parliament pass laws and other legal acts, they are bound by the Constitution, constitutional laws and laws; it is not allowed to ignore any stage of the legislative process or any rule of the adoption of laws consolidated in the Constitution and laws.

However, while interpreting the Constitution, it is necessary to apply various methods of interpretation of law: to apply not only the linguistic (verbal) method and the method of the examination of intentions of the legislature, but also other methods, such as the one of general principles of law and that of precedents, also systemic, logical, teleological, historical, comparative methods, etc. (*inter alia*, the rulings of 25 May 2004 and 28 March 2006).

In addition, the Constitutional Court has also held that it is impossible to interpret constitutional norms and principles on the basis of the legal acts adopted by the legislature and other lawmaking bodies, because then the supremacy of the Constitution in the legal system is denied (*inter alia*, the decisions of 12 July 2001, 10 February 2005 and 28 March 2006).

Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

It could be noted that the Constitutional Court verifies the justification of the decision made by the decision maker possibly only in the case of the "positive" legitimate aim test while applying the "classic" proportionality test (for more, see the answers to Questions No 20 and 21). The justification of the decision adopted is sought in the *travaux preparatoires* of the legislation or in the provisions defining the aim of the legislation. The Constitutional Court often assesses a challenged legal regulation in the background and context of its adoption, in order to find out what was the aim and purpose of the legislator while adopting it. The most recent examples can be the COVID cases (for instance, the ruling of 23 January 2023), where the Constitutional Court paid attention to the fact that, in adopting restrictive measures, the legislator sought to protect the health of the whole society. The justification of the decision adopted can be the criteria to seek the balance of constitutional values when the Constitutional Court is requested to decide whether the restrictions of human rights were proportionate or not.

The Constitutional Court does not verify whether the decision is one that this Court would have reached, had it itself been the decision maker. As mentioned before (in the answer to Question No 10), the Constitutional Court reveals only constitutional imperatives significant for the status of all subjects of legal relationships, including various state institutions.

Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative

inquiry be, for example, before your Court will, eventually, give weight to it?

The Constitutional Court does not defer to the legislature or the Government (or its bodies) depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights. For example, the Constitutional Court does not give legally significant weight to the preliminary inquiries made by the Legal Department of the Seimas or the Committee on Legal Affairs of the Seimas when they assess a draft legislative act submitted to the Seimas and conclude that such a draft is contrary to the Constitution or does not comply with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, or that such a draft is inconsistent with the legislative acts of the European Union (including legislative acts or their provisions regulating human rights and freedoms).

However, where the Constitutional Court finds that the legislature, before adopting a particular law, conducted the research of international human rights regulation and aligned the challenged legal regulation with it, this can contribute to the Court's argumentation as the positive background of the case. It depends on the legislature to provide the Court with information on how the challenged legal regulation was adopted, but there are no guarantees that the Court will build its own argumentation based on it.

Does your Court analyse whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

In constitutional justice cases, the Constitutional Court does not analyse whether the opposing views were fully represented in the parliamentary debate when adopting a measure.

However, such a question about representation could arise in examining the constitutionality of a disputed legal act where the Constitutional Court has to find whether the legislature or other law-making bodies complied with the constitutional requirements binding on them in the legislative process, especially, where the petitioner challenges a legal act in terms of the procedure for its adoption. For example, in its ruling of 6 February 2020 on the regulation governing trade in milk and the procedure for its adoption, while assessing whether the disputed law governing trade in milk, in terms of the procedure for its adoption, was in conflict with the Constitution, the Constitutional Court held that, by adopting this law under special urgency procedure, the legislature had not followed the requirements of the publicity and transparency of the legislative process and the quality requirements that stem from the Constitution with respect to laws and other acts of the Seimas, including the constitutional principles of a state under the rule of law and responsible governance. Therefore, the disputed law was recognised, in terms of the procedure for its adoption, in conflict with the provisions of the Constitution, including the said constitutional principles.

Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

If there is a need to identify a decision's democratic legitimacy in constitutional justice cases, this legitimacy can be assessed according to the compliance of this decision with the Constitution and constitutional requirements, which stem from the Constitution and are formulated in the constitutional jurisprudence.

The importance to have consultation with the public before adopting legislation was emphasised in the above-mentioned ruling of 16 April 2019, where the Constitutional Court ruled that lawmaking under urgency and special urgency procedures is permissible only in exceptional reasonable cases, because the stage of public consultations is skipped when a law is adopted under urgency or special urgency procedure. Public consultations also constitute one of the ways to implement the citizen's right to participate in the governance of their state. Therefore, the Constitutional Court held that, "in order to ensure the publicity and transparency of the legislative process, as well as the rights of citizens to participate in the governance of their state and to criticise the work of state institutions or their officials … this [legislation] process … must be regulated so that a possibility would be created

for society to participate in the deliberation of draft laws. In order to reach this objective, such a legal regulation of the legislative process must be established under which draft laws submitted to the Seimas would be made public so that the groups of society and the parties concerned would have enough time to access them and to express their opinion, comments and proposals concerning these draft laws, which would be assessed in a responsible and reasoned manner."

Moreover, there is the obligation to analyse and take into consideration public opinions. The Constitutional Court held that, with regard to the requirements of publicity and transparency of the legislative process and the quality requirements for adopted laws, structural units of the Seimas (*inter alia*, committees and commissions of the Seimas) must be set up to consider and assess the received comments and proposals concerning draft laws under deliberation, as well as internal preventive legal instruments of the Seimas must be established in order that laws and other legal acts adopted by the Seimas would not be in conflict with the Constitution and would meet the quality requirements, stemming from the Constitution, for laws and other acts of the Seimas.

In view of the fact that the deliberation of laws under urgency procedure implies shortened stages of the legislative process, especially the stage of deliberation, thus, limited possibilities to ensure that the requirements of publicity and transparency of the legislative process, as well as the quality requirements for laws, which stem from the Constitution, would be observed, the Constitutional Court noted that the Seimas may establish such a legal regulation governing the deliberation of draft laws under urgency procedure according to which this procedure would be applied in exceptional cases, where, given the political, social, economic or other circumstances, it is necessary to urgently establish a new legal regulation or amend an effective legal regulation in order to ensure important interests of society and the state and to protect other constitutional values.

When interpreting the Constitution, the Constitutional Court has disclosed the content of the presumption of the constitutionality of legal acts and of the constitutionality of the consequences as a result of the application of such legal acts: as long as the Constitutional Court has not adopted a decision that a certain legal act (part thereof) is in conflict with the Constitution, it is presumed that such a legal act (part thereof) is in compliance with the Constitution and that the legal consequences that have appeared on the basis of the act in question are legitimate (*inter alia*, the rulings of 30 December 2003 and 27 April 2016 and the decision (No KT10-S7/2019) of 21 March 2019, etc.).

Rights' scope, legality and proportionality

Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

There are only few examples of situations when the Constitutional Court confirmed the doubts of the Government regarding the unconstitutionality of the disputed legal act relating to human rights. For example, in its ruling of 6 June 2018 on the priority to enter state service granted to citizens who have fulfilled their military obligation, after considering the case following the petition of the Government, the Constitutional Court, *inter alia*, declared unconstitutional the provisions of the Law on State Service and the Law on National Conscription under which, if several applicants taking part in a competition for the position of a state servant receive the same assessment, the priority to be appointed to this position was given to the applicant who had fulfilled his or her military obligation.

According to the Constitutional Court, the impugned legal regulation created less favourable conditions for being appointed to the position of a career state servant or the head of an establishment in state service for those citizens who were exempted from the military obligation due to objective circumstances such as their state of health (among others, disability), age or gender on the grounds established by law, as well as for those citizens whose mandatory military service or alternative national defence service had been deferred or who had been released from it earlier due to their state of health or other important personal, family or social circumstances, compared to citizens who had

performed mandatory initial military service or alternative national defence service. By means of such a legal regulation, citizens who were in the same situation in terms of entry to state service were treated differently on the constitutionally unjustifiable grounds.

Almost the same arguments were raised by the Government, the petitioner in that constitutional justice case. It argued that the disputed legal regulation did not take into account the fact that some persons, for reasons beyond their control, were not able to carry out regular mandatory initial military service or to complete basic military training or to carry out alternative national defence service and were, therefore, in a different situation from those who were able to carry out such military service. In addition, the Government argued that this legal regulation limited entry to state service on equal terms for persons with disabilities and other persons who were unable to perform this service because of their physical (or medical) condition.

Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

Under the constitutional concept of human rights, civil and political rights, as well as economic, social and cultural rights, are not differentiated according to their importance in the constitutional practice.

Over the past thirty years, the Constitutional Court has interpreted the imperative of the equal protection of human rights and freedoms, which derives from the Constitution, as meaning that the system of human rights and freedoms is harmonious. It was held that "The human rights and freedoms entrenched in the Constitution comprise a single and harmonious system. The Constitution consolidates the concept of human rights and freedoms where the rights and freedoms of one person cohabitate with the rights and freedoms of other persons" (the ruling of 26 December 2004).

Other constitutional imperatives formulated in the case law of the Constitutional Court are related to the grounds and conditions for the limitation of the exercise of human rights and freedoms, as well as the legal guarantees of their defence as laid down by the Constitution (for details on these limitations, see the answer to Question No 20).

The above-mentioned statement on the equal importance of all fundamental rights can also be affirmed by the position expressed in the ruling of 28 March 2006, in which the Constitutional Court bound itself by not permitting the reinterpretation of the official constitutional doctrine so that the official constitutional doctrine would be corrected if, by doing so, among others, the guarantees of rights and freedoms of the person (i.e. the whole catalogue of them) entrenched in the Constitution are reduced.

Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *in claris non fit interpretatio* canon?

The constitutional requirements related to the quality of laws and other acts of the Seimas include the requirement that a law must be clear. One of the basic elements of the principle of a state under the rule of law, which is consolidated in the Constitution, is legal certainty and clarity. These interrelated imperatives of legal certainty and clarity presuppose certain obligatory requirements for a legal regulation. First, a legal regulation must "be clear and harmonious; legal norms must be formulated precisely and may not contain any ambiguities" (the ruling of 30 May 2003). Second, a legal regulation must be easily understandable and consistent; wording in the legal acts must be explicit; the consistency and internal harmony of the legal system must be ensured; legal acts may not contain any provisions that at the same time regulate the same social relationships in a different manner (the ruling of 13 December 2004). Otherwise, possibilities for subjects of law to learn what is demanded by law would be worsened (the ruling of 29 September 2005). Third, it is required that one legal norm or provision does not deny another (the ruling of 9 May 2006). Fourth, a wording of a legal text is considered to be deficient and to deviate from the said requirements of the principle of a state under the rule of law if it does not specify the articles (paragraphs thereof) with respect to which the date

of the beginning of the application (as a rule, referred to in laws as the "date of coming into force") is delayed (i.e. a later date of coming into force is established than with respect to other articles (paragraphs thereof) of the law) (the ruling of 21 December 2006). Fifth, the notions (formulations) that are linked to the implementation of constitutional human rights and to their restriction must be clear, defined and understandable (the ruling of 24 December 2008).

In more detail, for example, in its ruling of 29 December 2004, the Constitutional Court, *inter alia*, held that "The legal regulation consolidating the procedure for the implementation of the right of a person to judicial defence of his or her rights and freedoms must be in compliance with the requirement of clarity, which arises from the constitutional principle of a state under the rule of law. In order to provide the possibility for a person to implement in reality his or her right to apply to a court regarding a violation of his or her rights and freedoms, the legislature must clearly establish in laws in what way and to which court the person may apply".

The Constitutional Court applies the *in claris non fit interpretatio* canon in such situations in which facts or statements are obvious. For example, in its ruling of 7 January 2008 on mandatory membership in the Bailiffs Chamber of Lithuania, the Constitutional Court, considering the constitutionality of the impugned provision of the Republic of Lithuania's Law on Bailiffs (i.e. "activities of the Bailiffs Chamber of Lithuania shall be financed from the dues paid by bailiffs") to the extent that, according to the petitioner, the mandatory membership of all bailiffs in the association – the Bailiffs Chamber of Lithuania and the corresponding duties to this association are established, *inter alia*, held that it is universally recognised that such state-controlled professions as a bailiff etc. imply the self-regulation of the profession and the corresponding system of self-governance. It was held that, it goes without saying, that "persons engaged in a state-controlled profession must have certain duties related to ensuring the functioning of the said system of self-governance". In view of these and other arguments, the disputed legal regulation was recognised to be not in conflict with the Constitution.

What is the intensity review of your Court in case of the legitimate aim test?

Under the Constitution, it is permitted to limit the rights and freedoms of individuals if the following conditions are met: the limitations are established by means of a law; the limitations are necessary in a democratic society in order to protect the rights and freedoms of other persons, the values consolidated in the Constitution, as well as the constitutionally important objectives; the limitations do not deny the nature and essence of rights and freedoms; and the constitutional principle of proportionality is observed (*inter alia*, the ruling of 14 March 2002, etc.). Thus, among others, there is the requirement in the constitutional jurisprudence that limitations of the rights and freedoms of individuals must be necessary in a democratic society in order to protect the rights and freedoms of other persons, the values consolidated in the Constitution, as well as the constitutionally important objectives. As the constitutional principle of a state under the rule of law is such a constitutional principle against which the compliance of a disputed legal regulation is examined most frequently in constitutional justice cases (and sufficiently often a violation of this principle is found),[1420] the legitimate aim test is also applied quite intensively, basically in every case concerning the restrictions of human rights.

In its practice, the Constitutional Court examines whether a measure that interferes with a human right has an objective of sufficient importance. Such an objective is consolidated in general terms by the Constitution, guaranteeing the particular human right. According to the Constitution, such objectives that can generally be named as "public interest" are, for example: necessary to guarantee public order (paragraph 2 of Article 24, paragraph 4 of Article 26 and paragraph 2 of Article 36); nec-

1420 In the rulings adopted in 2022, the Constitutional Court assessed the compliance of legal acts with 22 articles of the Constitution (or constitutional principles); in most cases, as in the previous year, the legal acts were examined in terms of their compliance with the constitutional principle of a state under the rule of law – it was invoked in fourteen rulings; nine legal acts (parts thereof) were ruled in conflict with this principle. See *Annual Report 2022*, the Constitutional Court of the Republic of Lithuania, 2023, p. 45, https://lrkt.lt/data/public/uploads/2023/03/metinis-2022-web.pdf.

essary to protect the security of the State or society (paragraph 4 of Article 26, paragraph 2 of Article 32 and paragraph 2 of Article 36); necessary to protect the health or morals of people (paragraph 2 of Article 24, paragraph 3 of Article 25, paragraph 2 of Article 32 and paragraph 2 of Article 36).

As mentioned above in the answer to Question No 12, seeking to understand the aim of a measure that interferes with a human right, the Constitutional Court may analyse the legislative history (including *travaux préparatoires*) of the measure (for revealing intentions of the legislature).

The ruling of 27 April 2022 makes it clear what legitimate objectives are important in the sphere of electoral law, including the ensuring of passive electoral rights.

By that ruling, the Constitutional Court found the provisions of three electoral laws to be contrary to constitutional electoral law and the constitutional principle of a state under the rule of law to the extent that they established the uniform presentation of information about the fact that candidates for the Seimas of the Republic of Lithuania, the European Parliament and the

municipal councils of the Republic of Lithuania have been found guilty of committing a criminal act.

The petitioner applied to the Constitutional Court after the Central Electoral Commission of the Republic of Lithuania had rejected his complaint on the grounds that the entry "Has been found guilty of a criminal act by a court judgment" had been presented in the uniform manner beside the name of a candidate on the election poster of the candidate to the Seimas and on the poster with the list of candidates. No account had been taken of the nature of the criminal act (its type and the degree of dangerousness or the form of guilt) of which the candidates concerned had been found guilty, and no account had been taken of the sentence imposed on them or the criminal record.

The Constitutional Court noted that, under the Constitution, the legislature has the duty to establish such a legal regulation that would ensure the transparency of the electoral process and the publicity of information important to the electorate about the facts of the life of subjects exercising their passive electoral right. When implementing this duty, in regulating the manner in which information about the recognition of a candidate guilty of a criminal act is to be presented on posters published by the electoral commission, so that voters can freely and unrestrictedly decide on the suitability of the candidate, the legislature must take into account the fact that the criminal act committed by a person may be varied in nature. It was also stressed that the significance and importance of such information in terms of representing the interests of the electorate and managing public affairs may change over time. Under the Constitution, the preconditions must be created for individualising sufficiently the provision of relevant information about candidates for the above-mentioned institutions to voters, so that they can properly decide on whether these candidates are suitable for them.

The Constitutional Court also noted that the manner, established by the legislature, of how information is presented about the fact that a candidate for the Seimas has been found guilty of a criminal act, as well as the essentially analogous manner, not impugned by the petitioner, of how information is presented about the fact that a candidate for members of the European Parliament or municipal councils has been found guilty of a criminal act, equally negatively describes persons seeking to be elected members of the above-mentioned three institutions. Such a presentation of information does not allow voters to distinguish whether a person has been convicted of a crime or a criminal offence, or to know about the gravity of the committed act, whether the act was committed intentionally or negligently, when the criminal offence was committed, or whether the candidate's conviction has expired.

Thus, the established legal regulation did not make it possible to properly present information important to voters, without misleading them, about the particularly important facts of the candidate's life. Therefore, the transparency of the electoral process and the publicity of information important to voters, as guaranteed by the Constitution, were not ensured. At the same time, such a legal regulation did not create preconditions for sufficiently individualising the presentation of information about the recognition of a candidate for members of the Seimas, the European Parliament, or the municipal councils to have been guilty of committing a criminal act and, more than necessary for

the constitutionally justified purpose, limited the possibilities of persons implementing their passive electoral right to seek election.

See for the application of the legitimate aim test in the case when there is a need to protect the health of people in the answer to Question No 27.

What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (i.e. suitability, necessity and proportionality in the narrower sense)?

As mentioned before (in the answer to Question No 20), under the Constitution, it is permitted to limit the rights and freedoms of individuals if, among others, the constitutional principle of proportionality is observed (the ruling of 14 March 2002 etc.).

The Constitutional Court has also held in its acts on more than one occasion that the constitutional principle of proportionality is one of the elements of the constitutional principle of a state under the rule of law, which means that the measures provided for by law must be in line with legitimate objectives important to society, that these measures must be necessary in order to reach the said objectives and that these measures must not limit the rights and freedoms of a person clearly more than necessary in order to reach the said objectives (*inter alia*, the rulings of 11 December 2009, 15 February 2013 and 14 April 2014). The Constitutional Court usually applies all these stages of the "classic" proportionality test. This can also be affirmed by the answer to Question No 27.

Does your Court go through every applicable limb of the proportionality test?

The Constitutional Court usually goes through every applicable limb of the proportionality test.

Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

The Constitutional Court concludes that the impugned measure satisfies the proportionality test only when it has sufficient evidence to do so, usually after verifying every element pertinent to the test of proportionality. On the other hand, if the Court finds a violation in one of the steps of the case, it will not proceed any further in verifying the remaining elements.

Has the inception of proportionality review in your Court's case law been concomitant with the rise of the judicial deference doctrine?

As mentioned before, only some elements of the concept of "judicial deference" to the Government or to the legislature can be identified in the Lithuanian official constitutional doctrine. Instead of the concept of "judicial deference", it is more accurate to state that, when assessing the constitutionality of a legal regulation, the Constitutional Court exercises all its constitutional powers assigned to it in implementing its mission of ensuring the supremacy of the Constitution, law and other constitutional values, and it refuses to deal with non-justiciable questions.

The doctrine concerning proportionality review has been formulated and used by the Constitutional Court on case-by-case basis starting from the first decade of its activity. Thus, it is not possible to affirm that the inception of proportionality review in the Constitutional Court's case law has been concomitant with the rise of the judicial deference doctrine. **25.** Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the

margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

The significance of the jurisprudence of the European Court of Human Rights (hereinafter referred to as the ECtHR) as a source of the interpretation of law, which is also important for the interpretation and application of Lithuanian law, was recognised by the Constitutional Court already in the above-mentioned ruling of 8 May 2000 on operational activities. The preceding and subsequent

case law of the Constitutional Court confirms that, when interpreting the provisions of the Constitution and formulating the official constitutional doctrine, the Constitutional Court takes into account the international context of the case at issue and directly refers to and applies the provisions of international law, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention). Moreover, this Convention remains the most frequently used regional international instrument protecting human rights in the practice of the Constitutional Court.

The Convention and the ECtHR's jurisprudence influence the jurisprudence of the Constitutional Court. This influence is particularly seen, for example, in the ruling of the Constitutional Court of 28 September 2011. In that case, the Constitutional Court examined the compatibility with the Constitution of the concept of the family based solely on marriage, which was consolidated in the State Concept of the Family Policy approved by the Seimas resolution of 3 June 2008. In the course of considering that case, the Constitutional Court reviewed the international obligations of the State of Lithuania arising from Article 8 of the Convention, which guarantees the right to respect for family life, as well as the relevant case law of the ECtHR. This was done in order to strengthen the constitutional argumentation as to why the "family" must be treated in a broader sense than just a union formed on the basis of marriage and why, in the light of social changes, societal developments, etc., it is necessary to treat the family more broadly, including new groups of persons and relationships built on other grounds than marriage. Thus, the provisions of the jurisprudence of the ECtHR are also used as reinforcing arguments to support the decisions of the Constitutional Court.

To some extent, it can be affirmed that the ECtHR's doctrine of the margin of appreciation is the domestic equivalent of the margin of discretion the Constitutional Court affords to the legislator in certain issues discussed above. As mentioned in the above answers to this Questionnaire, the Constitutional Court reveals constitutional requirements consolidated by the Constitution for the legislature and other law-making bodies (including their discretion in implementing the Constitution). The Constitutional Court is bound by the Constitution and precedents that it itself has created in its previous constitutional justice cases and by the official constitutional doctrine that it itself has formed, which substantiates those precedents (e.g. the ruling of 22 December 2011). However, it would be more accurate to state (as mentioned in the answer to Question No 24) that, when assessing the constitutionality of a legal regulation, the Constitutional Court exercises all its constitutional powers assigned to it in implementing its mission of ensuring the supremacy of the Constitution, law and other constitutional values (rather than affords the margin of discretion).

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

There have been no cases where the ECtHR would have condemned Lithuania due to the jurisprudence of the Constitutional Court making it an ineffective remedy of human rights protection because of the deference given to the legislature.

One specific case of the difference of opinions and positions between the ECtHR and the Constitutional Court concerned the different weight given to constitutional values. The Constitutional Court found the challenged legal regulation concerning the consequences of impeachment procedure in conflict with the Constitution insofar as it permitted the impeached person to be re-elected to the position that requires the oath to be taken, while the ECtHR decided that the life-long ban to participate in parliamentarian elections violates the Constitution. However, this case was not about judicial deference, rather quite to the contrary, the position of the Constitutional Court was that the legislature had failed to pay sufficient attention to the constitutional institution of the oath to the state and the loyalty of state officials.

Other peculiarities

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

As noted above in the answer to Question No 2, some deferential position towards safety measures that lawfully limit fundamental rights can be seen from the evolving constitutional jurisprudence on the assessment of the constitutionality of the governmental measures to manage the COVID-19 disease.

In its ruling of 24 January 2023, the Constitutional Court expressed its position on the limitation imposed on freedom of economic activity following the declaration of quarantine. When giving that ruling, the Constitutional Court referred to its previous case law (i.e. the ruling of 21 June 2022 on the right of the National Public Health Centre to impose on employees mandatory measures for the control of communicable diseases in humans).

In the ruling of 24 January 2023, the Constitutional Court declared the respective resolution of the Government of the Republic of Lithuania to be not in conflict with the Constitution and the Law on the Prevention and Control of Communicable Diseases in Humans insofar as the said resolution laid down the legal regulation imposing limitations on the provision of beauty and dental services during the quarantine declared in the spring of 2020. That constitutional justice case was instituted following a petition of the Supreme Administrative Court of Lithuania, which was considering an administrative case concerning compensation for property damage. The petitioner applied to the Constitutional Court by raising the issue as to whether the Government, having imposed the said limitations through a substatutory legal act, had exceeded the powers conferred on it.

In that ruling, the Constitutional Court noted that the impugned legal regulation temporarily limited freedom of economic activity of persons engaged in the provision of beauty or dental services. However, the Constitutional Court recalled that, under the Constitution, it is possible to limit freedom of economic activity if several conditions are met: the limitations are established by means of a law; the limitations are necessary in a democratic society in order to protect the rights and freedoms of other persons, the values consolidated in the Constitution, as well as the constitutionally important objectives; the limitations do not deny the nature and essence of rights and freedoms; and the constitutional principle of proportionality is observed.

According to the Constitutional Court, when assessing the conformity of the impugned legal regulation with the Constitution and the law, two aspects should be taken into account. First, the general context in which this regulation was adopted, i.e. the fact that the impugned provisions of the government resolution were adopted following the declaration of a state-level emergency across the country as a result of the threat of the spread of a new COVID-19 disease and the emergence of the adverse epidemic situation due to the COVID-19 disease. Second, it should be taken into account that the impugned legal regulation was aimed at achieving the constitutionally important objective and the public interest – the protection of human and public health.

The Constitutional Court confirmed that the measures taken during the quarantine and established in the impugned provisions of the government resolution, temporarily limiting freedom of economic activity of persons engaged in the provision of beauty or dental services, were laid down by means of a law, among others, the Law on the Prevention and Control of Communicable Diseases in Humans.

Taking into account the fact that the quarantine regime measures laid down in the impugned provisions of the government resolution were to be applied only for a limited period of time, in other words, for about two months, and the fact that the Government provided for compensation for the losses incurred as a consequence of the imposition of the quarantine and the quarantine measures, the Constitutional Court decided that there were no grounds for stating that the impugned legal regulation denied the very essence of the principle of freedom of economic activity. Moreover, according to the assessment of the Constitutional Court, the impugned legal regulation was proportionate to the important objective, arising from the Constitution, since it was aimed at the general well-being of the nation. This regulation was introduced by taking into account the specific information available at the time on the spread of the communicable COVID-19 disease and it was applied

on a temporary basis. The quarantine measures were reviewed and adjusted as appropriate in the light of the evolving situation, by assessing whether they were still necessary to prevent threats to human health and life and other constitutional values; the measures imposed were repealed when it was decided that they were no longer necessary.

In this context, it is also affirmed in the ruling that, at the time of the adoption of the impugned provisions of the government resolution, the available information on the pathogens of the communicable COVID-19 disease and its other characteristics was limited and rapidly changing, the situation was new and unforeseeable, while the consequences of the COVID-19 disease were unexplored and only predictable. Therefore, the Government, when adopting the impugned legal regulation, had no reason to believe that the protection of human and public health, among others, by ensuring the provision of health care services not only to those suffering from COVID-19, but also to other persons who might need such services, could be achieved at the time by less restrictive measures.

It is apparent from the said case in which the constitutionality of the measures for the management of the COVID-19 disease was assessed that, even in such a complex and particular situation, the impugned legal regulation that is aimed at the protection of human and public health is still subject to the requirement that the general conditions for the lawfulness of limitations on the exercise of human rights must not be undermined, not to mention the fact that limitations must not deny the nature and essence of these rights. This approach is also consistent with the case law of the constitutional justice institutions of most other states, which was developed in similar cases.

An assessment of the constitutionality of the legal regulation restricting close contacts in closed spaces during quarantine was examined in the ruling of 31 May 2023. Among others, based on the above-mentioned case, the Constitutional Court expressed its position, *inter alia*, that, in the event of an emergency situation that arises in the state from the spread of human communicable diseases in society and threatens human health and life, the legislature may, in the exercise of its duty under the Constitution, including paragraph 1 of Article 53 thereof, to protect persons from threats to health (to reduce risks to health and, where possible, in certain cases to prevent them), provide for the right of a person to decide in which place of the territory of the Republic of Lithuania to stay, when to leave this place and move to another place, also the right to freely decide as to which permanent or temporary place of residence to choose and to decide whether to stay in Lithuania or leave, as well as the right to choose the measures limiting the time of departure, which are aimed at preventing the spread of human communicable diseases in society, as well as at managing the spread of these diseases. However, the main reason why the legal regulation impugned in that case was not held to be contrary to the Constitution and Article 32 thereof, which, *inter alia*, enshrines freedom of movement of persons, was that, under the impugned legal regulation at issue, the prohibition of close contacts in closed spaces was regarded as a quarantine regime measure related not to the conditions of movement within the country, but to the conditions of gathering of persons, close contacts and the organisation of personal celebrations, which are not governed by Article 32 of the Constitution.

28. Has your Court have grown more deferential over time?

The crisis caused by the Covid-19 disease was preceded by the global economic and financial crisis of 2008 in many European countries, which faced the necessity to apply the so-called austerity measures aimed to manage and overcome this crisis, involving the reduction of salaries, pensions and other social benefits paid by the state. Lithuania was no exception.[1421] The Constitutional Court of the Republic of Lithuania developed the official constitutional doctrine concerning these measures.

1421 "New Challenges to the Rule of Law", the keynote speech by Dainius Žalimas at the 4th Congress "The Rule of Law and Constitutional Justice in the Modern World" of the World Conference on Constitutional Justice, Vilnius, the Republic of Lithuania, 11–14 September 2017, https://www.venice.coe.int/WCCJ/04_Vilnius/Presentations/WCCJ-4thCongress-session2-key-note-Zalimase.pdf.

Although this crisis could not be equated with that caused by the COVID-19 disease, in the constitutional justice cases related to austerity measures, the Constitutional Court examined the criteria of the constitutionality of these measures. However, these criteria are based on the general criteria of the legality of restrictions of human rights, as provided for by international law, as well as they are in essence identical to the criteria formulated by other European constitutional courts in relation to the constitutionality of austerity measures.[1422] These criteria include objectivity, non-discrimination, an exceptional and temporary character of the measures in question, the observance of other relevant constitutional principles, such as social solidarity, and the broad discretion of the political branch of power to decide the issues of economic policy.[1423]

This leads to the conclusion that the Constitutional Court has not grown more deferential over time.

Does the deferential attitude depend on the case load of your Court?

The position of the Constitutional Court in constitutional justice cases does not depend on the case load of this Court.

The Constitutional Court exercises the powers, granted to it under the Constitution, to officially interpret the Constitution and to form the official constitutional doctrine (in particular, the rulings of 30 May 2003 and 28 March 2006). The constitutional principle of a sate under the rule of law, enshrined in the Constitution, implies, *inter alia*, the continuity of the constitutional jurisprudence (see, among others, the rulings of 21 July 2001 and 13 December 2004). These interpretative activities of the Constitutional Court can be defined as a constant and systemic process enabling the Constitutional Court to interpret the existing, already formed official constitutional doctrine more widely, by adding new elements, where there is a constitutional objective need and/or there are legal arguments for such an evolutive interpretation of one or another constitutional provisions.

Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

The Constitutional Court, while implementing its mission of ensuring the supremacy of the Constitution, law and other constitutional values and while exercising its constitutional powers, can base its decisions on reasons that are not provided by the parties in constitutional justice cases. The Constitutional Court, while adjudicating a case and administering constitutional justice, can go beyond the questions raised by the petitioner and assess a legal regulation that is not challenged by the petitioner, but is closely linked to the challenged one.

Regarding the reasons given by the Constitutional Court, it must be noted, as the Court has itself held more than once, that it is impossible to interpret the norms set out in the articles of the Constitution that are indicated by the petitioner by keeping those articles separate from other norms of the Constitution. The Constitutional Court, after it finds that the impugned legal act is in conflict with the articles of the Constitution that have not been indicated by the petitioner, is empowered to state so.

1422 Žalimas, D., "Taupymo priemonių konstitucingumo kriterijai Lietuvos Respublikos oficialiojoje konstitucinėje doktrinoje" ["Criteria of the Constitutionality of Austerity Measures in the Official Constitutional Doctrine of the Republic of Lithuania"], *Teisė*, 2005, vol. 94, https://www.zurnalai.vu.lt/teise/article/view/7349/5347.

1423 "New Challenges to the Rule of Law", the keynote speech by Dainius Žalimas at the 4th Congress "The Rule of Law and Constitutional Justice in the Modern World" of the World Conference on Constitutional Justice, Vilnius, the Republic of Lithuania, 11–14 September 2017, https://www.venice.coe.int/WCCJ/04_Vilnius/Presentations/WCCJ-4thCongress-session2-key-note-Zalimase.pdf.

Therefore, when the Constitutional Court examines following the petition of the petitioner whether the impugned legal act is in conflict with the articles of the Constitution indicated by the petitioner, it alongside investigates whether the said legal act is in conflict with the Constitution as an indivisible and harmonious system.

There are examples where the Constitutional Court, seeking to ensure the supremacy of the Constitution, recognised that not only the impugned legal regulation was in conflict with the Constitution, but it also investigated the legal regulation interrelated with the challenged one, as well as the legal regulation adopted after the challenged regulation was abolished. There are also examples where the Constitutional Court found that the challenged legal regulation contradicted the Constitution due to other reasons than those provided by the petitioner or contradicted different constitutional provisions than those indicated by the petitioner. The Constitutional Court considers that it has the power to do so within its mission to ensure the supremacy of the Constitution. One of such examples can be the ruling of 11 July 2014 on organising and calling referendums. This case was initiated upon two petitions:

the petition of the Supreme Administrative Court of Lithuania, requesting an investigation into **whether the Republic of Lithuania's Law on Referendums**, insofar as it provides neither for the powers of the Central Electoral Commission of the Republic of Lithuania to assess the compliance of a draft law (amending the Constitution of the Republic of Lithuania) with the Constitution of the Republic of Lithuania in the cases where such a draft law is proposed by the citizens of the Republic of Lithuania to be adopted by referendum, nor for the powers of this commission to adopt, on the grounds of the said assessment, decisions precluding the initiative to adopt by referendum such provisions of a draft law (amending the Constitution of the Republic of Lithuania) that would violate the Constitution of the Republic of Lithuania itself, is **in conflict with paragraph 1 of Article 6 of the Constitution of the Republic of Lithuania and the constitutional principle of a state under the rule of law**;

the petition of the Seimas of the Republic of Lithuania, requesting an investigation into **whether Article 14 of the Republic of Lithuania's Law on Referendums**, insofar as it does not provide for the right of the Seimas to decide on calling a referendum where it receives the conclusion from a group of experts that the text of the decision submitted in the citizens' petition to call a referendum may not be in line with the Constitution of the Republic of Lithuania, is **in conflict with paragraph 1 of Article 6 and paragraph 1 of Article 7 of the Constitution of the Republic of Lithuania and the constitutional principle of a state under the rule of law**.

Thus, the first petitioner asked to investigate one aspect of unconstitutionality and indicated one provision and one constitutional principle, while the second petitioner asked to investigate one provision of the law and indicated two constitutional provisions and one constitutional principle.

After examining the case, the Constitutional Court, having not found a violation, following the petition of the first petitioner, also recognised that:

Article 6 of the Republic of Lithuania's Law on Referendums, insofar as it does not establish the requirement that several issues unrelated by their content and nature, or several unrelated amendments to the Constitution of the Republic of Lithuania, or several unrelated provisions of laws may not be submitted as a single issue in a decision proposed to be put to a referendum, is in conflict with paragraphs 1 and 3 of Article 9 of the Constitution of the Republic of Lithuania, which was not challenged at all by any of the petitioners;

Article 14 of the Republic of Lithuania's Law on Referendums, insofar as it provides that the Seimas of the Republic of Lithuania is obliged to adopt a resolution on calling a referendum where the decision proposed to be put to the referendum may not be in line with the requirements stemming from the Constitution of the Republic of Lithuania, is in conflict with paragraph 1 of Article 6 and paragraph 1 of Article 7 of the Constitution of the Republic of Lithuania and the constitutional principle of a state under the rule of law; thus, the Court reformulated the arguments given by the petitioner.

More similar examples can be found in the case law of the Constitutional Court.

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

The Constitutional Court can extend its constitutionality review in constitutional justice cases, as it is shown by the example presented above (and others).

If this Court finds the unconstitutionality of provisions whose compliance with the Constitution is not impugned by the petitioner, but which are consolidated **in the same legal act** whose other provisions are impugned by the petitioner in terms of their constitutionality, it must state that **the** said **provisions that are not impugned by the petitioner are unconstitutional**. The same applies to provisions that are not impugned by the petitioner, but regulate the essentially identical relationships and **are consolidated in another legal act**. The implementation of constitutional justice implies that a legal act (part thereof) that is in conflict with the Constitution must be removed from the legal system.

For example, the Constitutional Court based its position on these jurisprudential statements in its above-mentioned ruling of 27 April 2022 on information indicated in electoral posters that candidates for political representative institutions have been found guilty of a criminal act. By that ruling, the Constitutional Court declared to be contrary to the Constitution not only the relevant provisions of the Law on Elections to the Seimas of the Republic of Lithuania, which were challenged by the petitioner, but also the essentially analogous provisions laid down in the other two electoral laws (the Law on Elections to the European Parliament and the Law on Elections to Municipal Councils).

The Constitutional Court investigates the compliance of disputed legal acts with the Constitution as a harmonious system: when the Constitutional Court examines whether the impugned legal act (part thereof) is in conflict with the articles (paragraphs thereof) of the Constitution indicated by the petitioner, it alongside investigates whether the said legal act (part thereof) is in conflict with the Constitution as an indivisible and harmonious system (*inter alia*, the rulings of 24 December 2002 and 30 May 2003).

Thus, in its case law, the Constitutional Court also decides on the compliance of the impugned legal act with the articles of the Constitution that have not been indicated by the petitioner. In its rulings of 13 June 2000 and 30 May 2003, the Constitutional Court held that it is impossible to interpret the norms set out in the articles (paragraphs thereof) of the Constitution that are indicated by the petitioner by keeping them separate from other norms of the Constitution, also that, **after the Constitutional Court has found that the impugned legal act (part thereof) is in conflict with the articles (paragraphs thereof) of the Constitution that have not been indicated by the petitioner**, **it is empowered to state that the impugned legal act (part thereof) is in conflict with the articles (paragraphs thereof) of the Constitution that have not been indicated by the petitioner**.

The Constitutional Court of the Grand Duchy of Luxembourg

Formes et limites de la déférence judiciaire : le cas des cours constitutionnelles

Les cultures constitutionnelles varient et la perception des cours constitutionnelles de leur propre rôle dans une démocratie constitutionnelle affecte l'intensité de leur analyse dans les affaires qui impliquent les droits fondamentaux. De nombreux tribunaux font preuve de déférence judiciaire.

La déférence judiciaire représente un outil juridique inventé par les juges pour maintenir la séparation des pouvoirs et pour s'abstenir d'intervenir dans des litiges qu'ils considèrent aller au-delà de leur expertise ou de leur légitimité à trancher. L'instrument a surtout été utilisé dans des affaires qui impliquent les droits fondamentaux, et ce, en raison de leur qualité transcendante, de leur capacité à traverser tous les domaines substantiels du processus décisionnel public.

Une attitude de déférence systématique est susceptible de mettre en danger la prééminence du droit et la séparation des pouvoirs autant qu'un activisme judiciaire excessif. La manière dont les juges exercent leur déférence est donc une question fondamentale de droit constitutionnel, qui concerne le rôle approprié de chaque branche du gouvernement par rapport à des questions importantes de politique publique.

Les questions suivantes cherchent à découvrir les différences entre les manières dont les cours constitutionnelles européennes exercent la déférence judiciaire.

Questionnaire

Pour les rapports nationaux

I. Matières non justiciables et intensités de déférence

1. Qu'entend-on par « déférence judiciaire » dans vos juridictions?

Le droit luxembourgeois ne connaît pas explicitement la notion de déférence judiciaire. Reprenant la définition donnée dans l'introduction du questionnaire – « *La déférence judiciaire représente un outil juridique inventé par les juges pour maintenir la séparation des pouvoirs et pour s'abstenir d'intervenir dans des litiges qu'ils considèrent aller au-delà de leur expertise ou de leur légitimité à trancher* ») – on observe que cet argument a été invoqué à plusieurs reprises devant les juridictions administratives sur le fondement de la doctrine de « l'acte du gouvernement »[1424] ou « de la compétence liée ». Pour ce qui concerne la doctrine de l'acte du gouvernement, le débat a été relancé en 2020 par le Tribunal administratif, lequel s'est déclaré incompétent *ratione materiae* pour examiner un litige concernant la demande d'un député d'accéder aux accords conclus par le gouvernement avec le principal opérateur de médias, incluant des clauses de confidentialité[1425]. Pour le Tribunal il s'agissait d'un acte de gouvernement. Cependant, la Cour administrative a refusé de l'appliquer sur le fondement même du principe de la séparation des pouvoirs[1426]. La position des juges administratifs sur l'argument de la compétence liée est bien distincte: ils n'examinent pas la proportionnalité d'une mesure lorsque le décideur se trouve en situation de compétence liée[1427].

1424 R. ERGEC, *Le contentieux administratif en droit luxembourgeois, Supplément au Bulletin de jurisprudence administrative*, Pasicrisie luxembourgeoise, 2023, p. 41, paras 48 et 49.

1425 Trib. admin., 12 août 2020, n°43866, https://ja.public.lu/40001-45000/43866.pdf, cité in ERGEC op. cit.

1426 Cour admin., 26 janvier 2021, n°44997C, https://ja.public.lu/40001-45000/44997C.pdf, cité in ERGEC op. cit.

1427 Cour admin., 16 octobre 2018, n°41110C, https://ja.public.lu/40001-45000/41110C.pdf, cité in A. KLETHI, « Le principe de proportionnalité à la lumière de la jurisprudence de la Cour constitutionnelle et des juridictions administratives luxembourgeoises », in Actes du séminaire des Conseils d'Etat français et luxembourgeois et de la Cour administrative luxembourgeoise du 16 novembre 2021, Luxembourg, Revue luxembourgeoise de droit public, 2023, n°15, p.145, spéc. p. 24.

La Cour de cassation refuse d'accueillir ce type d'argumentation, considérant que les juges peuvent statuer (en l'espèce en matière de responsabilité de l'Etat) « *sans qu'il y ait lieu de distinguer a priori entre actes d'autorité et actes de gestion, ni même entre exercice d'un pouvoir discrétionnaire et exercice d'une compétence liée* »[1428].

La Cour constitutionnelle n'a pas eu l'occasion de se prononcer explicitement sur la question de la déférence judicaire. Au contraire, étant donné les missions qui lui sont confiées par la Constitution[1429], la Cour doit régulièrement examiner l'intention du législateur lors de l'élaboration des lois[1430] pour déterminer si celles-ci sont conformes au principe de l'égalité devant la loi.

La doctrine[1431] relève néanmoins, que la Cour exerce une forme de *judicial restraint* (au sens de la doctrine américaine[1432]) lorsqu'elle a recours à la notion de « marge d'interprétation » du législateur (théorie empruntée à la pratique de la Cour Constitutionnelle belge)[1433]. Les auteurs considèrent que ce *restraint* est moins présent lors de l'examen des questions relevant du droit de la famille[1434] que dans le domaine économique ou social[1435]. D'autre part, la Cour considère qu'en matière de la légalité de la peine le législateur a un « *très large pouvoir d'appréciation* »[1436] et « *est seul compétent pour déterminer les impératifs de l'ordre public et les moyens les plus aptes à atteindre leur réalisation* »[1437].

Cependant, même dans les cas de figure où la doctrine y voit une *retenue*, en toute circonstance, la Cour garde toujours son pouvoir d'apprécier si les choix du législateur sont proportionnés au regard du but poursuivi[1438].

2. Votre Cour envisage-t-elle un éventail de déférence ? Existe-t-il des zones „interdites", ou des zones prédéterminées de non-responsabilité, ou des questions non justiciables pour

1428 Cour cass., 29 janvier 1981, arrêts n°6/81 à 10/81, *ETAT c/MAJERUS et consorts*, cités in R. ERGEC *op. cit* . et G. RAVARANI, *La responsabilité civile des personnes privées et publiques*, Pasicrisie luxembourgeoise, 3e édition, 2014, p.277, n°242.

1429 Cf. Question 2, *infra*.

1430 Cf. Question 12, *infra*.

1431 P. KINSCH, « L'égalité devant la loi », in *La jurisprudence de la Cour constitutionnelle du Luxembourg 19972007*, Luxembourg, Pasicrisie Luxembourgeoise, 2008, p. 85-103, spéc. p. 95.

1432 *Ibid*.

1433 *Ibid*.

1434 Pour un exemple récent, cf. Cour constit., 7 juillet 2017, n°129, Mémorial A, n°638 du 14 juillet 2017, https://legilux.public.lu/eli/etat/leg/acc/2017/07/07/a638/jo.

1435 « *Ce n'est, on le voit, pas à la Cour Constitutionnelle qu'il appartient de définir la politique économique et sociale de la nation* », KINSCH, préc., p. 99.

1436 Il s'agit d'une jurisprudence constante, cf. entre autres Cour constit., 19 mars 2010, n° 54/10, Mémorial A, n°49 du 1er avril 2010, https://legilux.public.lu/eli/etat/leg/acc/2010/03/19/n1/jo: « *le législateur est seul compétent pour déterminer les impératifs de l'ordre public et les moyens les plus aptes à atteindre leur réalisation; qu'il lui appartient d'apprécier s'il est souhaitable d'instaurer des peines plus sévères quand une infraction nuit particulièrement à l'intérêt général; que la Cour constitutionnelle ne pourrait censurer pareil choix que si celuici aboutit à une différence de traitement manifestement déraisonnable d'infractions comparables.* » (cont.)

(cont.) « Considérant qu'au regard de l'objectif poursuivi par le législateur et de son très large pouvoir d'appréciation ainsi que du fait que le juge pénal est appelé à adapter la sanction à la gravité des négligences commises et l'importance des suites, l'aggravation de la sanction de l'article 422 du Code pénal se trouve dans un rapport raisonnable de proportionnalité avec le but poursuivi ».

1437 Cour constit., 9 mars 2012, n° 71/12, Mémorial A, n°54 du 23 mars 2012, https://legilux.public.lu/eli/etat/leg/acc/2010/03/09/n1/jo :« la loi répond à ces critères [de proportionnalité] et n'a pas dépassé sa marge d'appréciation »

1438 P. KINSCH, préc., p. 21, citant Cour constit., du 7 avril 2006, n°29/06 à 33/06, Mémorial A n° 69 du 21 avril 2006, p. 1334 à 1342, https://legilux.public.lu/filestore/eli/etat/leg/memorial/2006/a69/fr/pdf/eli-etat-legmemorial-2006-a69-fr-pdf.pdf.

votre Cour (par exemple, des questions morales controversées, des sensibilités politiques, des controverses sociétales, l'allocation de ressources limitées, des implications financières importantes pour le gouvernement,

La Constitution (article 112)[1439] ainsi que la loi modifiée du 27 juillet 1997 portant organisation de la Cour Constitutionnelle (article 2)[1440] disposent que la Cour statue sur la conformité des lois à la Constitution[1441]. A contrario, une des "zones interdites" pour la Cour est la compétence pour vérifier la constitutionnalité des actes règlementaires[1442]. Ces questions relèvent des juridictions administratives.

Une autre limitation réside dans le fait que la Cour ne peut pas statuer sur les lois qui portent sur l'approbation des traités (article 112(2) de la Constitution et article 2(1) de la loi modifiée du 27 juillet 1997).

A titre d'information, la Cour peut statuer sur les recours formés contre les décisions de la Chambre des Députés portant sur la perte de qualité de député (article 67(3) de la Constitution[1443] et article 2(2) alinéa 2 de la loi du 27 juillet 1997). Depuis la réforme de la Constitution de 2023[1444], la Cour a également la compétence pour statuer sur les conflits d'attribution (article 2(2) de la loi modifiée du 27 juillet 1997, article 112(3) de la Constitution mis en œuvre par la loi du 23 janvier 2023 portant règlement des conflits d'attribution[1445]).

En matière de contrôle de constitutionnalité, la saisine de la Cour ne se fait que par voie préjudi-

1439 La version consolidée au 1er juillet 2023 de la Constitution est disponible ici : https://legilux.public.lu/eli/etat/leg/constitution/1868/10/17/n1/consolide/20230701

1440 Loi du 27 juillet 1997 portant organisation de la Cour constitutionnelle, Mémorial A n°58 du 13 août 1997, la version consolidée au 3 juillet 2023 est disponible ici : https://legilux.public.lu/eli/etat/leg/loi/1997/07/27/n6/consolide/20230703.

1441 La Cour ne contrôle pas la conformité d'une loi qui n'est plus en vigueur, cf. Cour constit., 20 décembre 2013, n°107/13, Mémorial A, n°2 du 3 janvier 2014, https://legilux.public.lu/eli/etat/leg/acc/2013/12/20/n2/jo. La question de savoir si la Cour est exclusivement compétente pour statuer sur des dispositions législatives qui deviennent caduques du fait de l'entrée en vigueur de nouvelles dispositions constitutionnelles et si le juridictions inférieures ont également cette compétence n'a pas été clairement arrêtée par la jurisprudence de la Cour, cf. P. KINSCH, « Que reste-t-il de la compétence de la Cour constitutionnelle après l'entrée en vigueur de la révision constitutionnelle? », *Journal des Tribunaux Luxembourg (JTL),* 2023, p. 111, spéc. point B. et Conclusion p.114.

1442 Cour constit., 19 mai 2023, n°00179, Mémorial A, n°251 du 24 mai 2023, https://legilux.public.lu/eli/etat/leg/acc/2023/05/19/a251/jo; Cour constit., 3 juin 2011, n°65/11, Mémorial A, n°127 du 22 juin 2011, https://legilux.public.lu/eli/etat/leg/acc/2011/06/03/n1/jo; Cour constit., 6 mars 2009, n°48/09, https://legilux.public.lu/eli/etat/leg/acc/2009/03/06/n1/jo.

1443 Compétence auparavant attribuée par l'ancien article 116 de la Constitution à la Cour supérieure de justice.

1444 Compétence auparavant attribuée par l'ancien article 95 de la Constitution à la Cour supérieure de justice, mais uniquement pour l'ordre judiciaire. A. STEICHEN, La constitution luxembourgeoise commentée, Chapitre VII. La justice, Legitech, 2024, p. 423, spéc. p. 428, para 453. N'était pas visée la question des conflits d'attribution entre l'ordre judiciaire et l'ordre administratif, cf. travaux préparatoires de la loi du 23 janvier 2023 portant règlement des conflits d'attribution, Doc. Parl. 7960, spéc. Projet de loi du27 janvier 2022, Exposé des motifs, p. 4, https://wdocs-pub.chd.lu/docs/exped/0127/139/255397.pdf. (Code de champ modifié)

1445 Loi du 23 janvier 2023 portant règlement des conflits d'attribution et portant modification de la loi modifiée du 27 juillet 1997 portant organisation de la Cour Constitutionnelle, Mémorial A, n° 43 du 25 janvier 2023, https://legilux.public.lu/eli/etat/leg/loi/2023/01/23/a43/jo.

cielle[1446]; ce mécanisme agissant ainsi comme un filtre qui restreint le champ des affaires examinées et constitue une limitation procédurale supplémentaire au pouvoir de la Cour. Les juges du Grand-Duché sont, en principe, tenus de saisir la Cour quand une des parties soulève une question portant sur la conformité d'une loi à la Constitution[1447]; cependant la loi précise que la saisine n'est pas obligatoire quand « *a) une décision sur la question soulevée n'est pas nécessaire pour rendre son jugement;* [ou] *b) la question de constitutionnalité est dénuée de tout fondement;* [ou] *c) la Cour Constitutionnelle a déjà statué sur une question ayant le même objet* »[1448].

3. Existe-t-il des facteurs qui déterminent comment et quand votre Cour doit faire preuve de déférence (par exemple, la culture et les conditions de votre pays; les expériences historiques de votre pays; le caractère absolu ou restreint des droits fondamentaux en question; la question débattue devant la Cour; si les circonstances de l'affaire impliquent un changement des conditions sociales et des attitudes)?

Contrairement à d'autres pays, les juges qui composent la Cour constitutionnelle du GrandDuché ne sont pas issus du monde politique. Ce sont des juges de carrière, qui continuent à exercer leurs missions dans leur juridiction d'origine même après la nomination à la Cour constitutionnelle (Article 3(6) de loi modifiée du 27 juillet 1997 portant organisation de la Cour Constitutionnelle[1449]). Ils sont certes nommés par le pouvoir exécutif, cependant la loi prévoit qu'en font partie automatiquement : le Président de la Cour supérieure de justice, le Président de la Cour administrative et les deux conseillers à la Cour de cassation les plus anciens en rang (Article 3(3) de loi modifiée du 27 juillet 1997). En outre, les autres conseillers (ainsi que leurs suppléants) sont nommés sur l'avis conjoint de la Cour supérieure de justice et de la Cour administrative (article 3(4) de loi modifiée du 27 juillet 1997).

La doctrine considère que cette façon de composer la Cour « *implique que pour le pouvoir constituant l'interprétation de la constitution est exclusivement une opération juridique, dépouillée de toute considération politique* »[1450].

Cette autonomie, ainsi que le fait que ses missions soient essentiellement cantonnées au contrôle de la conformité de la loi à la Constitution[1451], font qu'on peut affirmer l'absence de déférence de la Cour.

Existe-t-il des situations dans lesquelles votre Cour a fait preuve de déférence parce qu'elle ne disposait pas de la compétence ou de l'expertise institutionnelle nécessaire?

La Cour vérifie soigneusement sa propre compétence. Les seuls cas de figure dans lesquels la Cour décline de statuer sur une question qui lui est posée sont si la Cour considère qu'elle n'a pas la

1446 En matière de décision de la Chambre des députes, il s'agit d'un recours (article 67(3) de la Constitution et article 2(2) alinéa 2 de la loi du 27 juillet 1997, la procédure à suivre est prévue par la loi du 29 juin 2023 portant modification : 1°de la loi électorale modifiée du 18 février 2003; 2°de la loi modifiée du 27 juillet 1997 portant organisation de la Cour Constitutionnelle, Mémorial A, n°340 du 29 juin 2023, https://legilux.public.lu/eli/etat/leg/loi/2023/06/29/a340/jo). En matière de conflit d'attribution, la juridiction saisie renvoie l'affaire devant la Cour constitutionnelle par une décision motivée (articles 1 et 2 de la loi du 23 janvier 2023 portant règlement des conflits d'attribution et portant modification de la loi modifiée du 27 juillet 1997 portant organisation de la Cour Constitutionnelle, Mémorial A, n°43 du 25 janvier 2023, https://legilux.public.lu/eli/etat/leg/loi/2023/01/23/a43/jo).

1447 Article 6, premier alinéa, de la loi modifiée du 27 juillet 1997, préc. Pour étude plus approfondie de la question, cf. N. EDON, « Les questions non posées », in J. GERKRATH (dir), *Les 20 ans de la Cour Constitutionnelle : Trop jeune pour mourir ?Actes du colloque du 31 mars 2017*, Luxembourg, Pasicrisie Luxembourgeoise, 2018, p. 22.

1448 Article 6, deuxième alinéa, de la loi modifiée du 27 juillet 1997, préc.

1449 Loi citée supra.

1450 A. STEICHEN, *op. cit.*, p. 423, spéc. p. 428, n°452 *in fine*.

1451 Pour un résumé des autres compétences de la cour, cf. Question 2, *supra*.

compétence *rationae materiae* pour statuer ou si elle considère la question irrecevable[1452]. Les juges constitutionnels doivent juger à partir des conclusions et documentations qui leur sont soumises par les parties et les représentants du gouvernement[1453].

Avez-vous des cas où votre Cour a fait preuve de déférence parce qu'il y avait un risque d'erreur judiciaire?

Non.

Y a-t-il des cas où votre Cour a fait preuve de déférence en invoquant la légitimité institutionnelle ou démocratique du décideur?

Cf. réponse à la question 1, *supra*, sur la « mage d'appréciation » accordée au législateur. Cependant, la Cour ne se réfère pas explicitement aux notions de légitimité institutionnelle ou démocratique du législateur.

„Plus la législation concerne une question de politique sociale publique au sens large, moins le tribunal sera disposé à intervenir." Est-ce une norme valide pour votre Cour? Votre Cour partage-t-elle le point de vue selon lequel les questions d'ordre public devraient être tranchées par des processus démocratiques parce que les tribunaux ne sont pas élus et n'ont pas le mandat démocratique de trancher les questions d'ordre public?

Non applicable; cf. réponse à la question 1, *supra*.

Votre Cour accepte-t-elle un principe général de déférence dans le jugement des politiques et de la philosophie criminelles?

La jurisprudence accorde au législateur une large marge d'appréciation en matière de détermination des peines. Cependant, même dans ce cas de figure, la Cour contrôle la proportionnalité de la norme et son adéquation au but poursuivi.

Cf. réponse à la question 1, *supra*.

Il peut y avoir des circonstances plus strictes dans lesquelles le gouvernement ne peut pas divulguer des informations à la Cour, en particulier dans le contexte d'affaires de sécurité nationale impliquant des informations classifiées. Votre Cour a-t-elle déjà fait preuve de déférence pour des raisons de sécurité nationale?

Non, ce cas de figure ne s'est pas encore présenté.

Compte tenu du rôle des cours constitutionnelles en tant que gardiennes de la Constitution, devraient-elles interférer avec des politiques publiques prétendument inconstitutionnelles lorsque les gouvernements sont passifs dans la mise en œuvre des réformes des droits fondamentaux?

Les cours constitutionnelles devraient être des juridictions, et non pas des instances politiques. A ce titre, elles ne devraient traiter que des questions qui leur sont expressément soumises, sans s'immiscer dans le débat politique. Les situations d'immobilisme ou d'inactivité des instances politiques devraient se résoudre dans les urnes, ou par le biais d'actions en responsabilité civile.

II. Décideur

Votre Cour témoigne-t-elle plus de déférence à une loi du Parlement qu'à une décision de l'exécutif? Votre Cour fait-elle preuve de déférence en fonction du niveau de responsabilité démocratique du décideur initial?

La Cour ne peut connaître que des questions préjudicielles portant sur la conformité d'une loi à la

1452 Cf. à titre d'exemple Cour constit., 19 mai 2023, n°00179, préc.

1453 Article 10 de la loi du 27 juillet 1997 portant organisation de la Cour Constitutionnelle, préc.

Constitution et ne contrôle pas les actes réglementaires. Cette dernière mission est confiée aux juridictions administratives.

Cf. réponse à la question 2, *supra*.

Quel poids votre Cour accorde-t-elle au processus législatif? Quelle pertinence juridique, le cas échéant, l'analyse parlementaire devrait-elle avoir pour l'analyse par les juges de la compatibilité avec les droits fondamentaux?

La Cour analyse quasi systématiquement les travaux préparatoires des lois – notamment dans les recours fondés sur le principe d'égalité devant la loi, lorsqu'il s'agit de vérifier la raison pour laquelle deux catégories de personnes sont traitées différemment par la loi[1454]. D'après une jurisprudence classique, « *en cas d'inégalité créée par la loi entre des catégories de personnes,* ***il appartient au juge*** *constitutionnel* ***de rechercher l'objectif de la loi incriminée*** *; qu'il lui incombe,* à défaut de justification suffisamment exprimée dans les travaux préparatoires*, de* ***reconstituer le but expliquant la démarche du législateur*** *pour, une fois l'objectif ainsi circonscrit, examiner s'il justifie la différence législative instituée au regard des exigences de rationalité, d'adéquation et de proportionnalité* »[1455]. L'analyse des travaux préparatoires est également opérée pour le contrôle de proportionnalité des mesures adoptées par les lois par rapport aux objectifs poursuivis (cf. réponse à la question 21, *supra*).

La doctrine considère que la Cour a ainsi « défini une règle hiérarchisant les procédés de découverte du but poursuivi au moyen d'une distinction opérée par une disposition normative. Dans ce domaine, ce n'est qu'« à défaut de justification suffisamment exprimée dans les travaux préparatoires[1456] » qu'il incombe au juge constitutionnel « de reconstituer le but expliquant la démarche du législateur[34] »»[1457]. Il s'agirait « *d'une manière stricte de procéder, en passant d'abord par l'examen des travaux préparatoires* »[1458].

Outre les travaux préparatoires, sont également régulièrement pris en compte dans ce travail de reconstitution les arguments des représentants de la partie étatique ou par le ministère public[1459].

Votre Cour vérifie-t-elle si le décideur a justifié sa décision ou s'il s'agit d'une décision que la Cour elle-même aurait rendue si elle avait été le décideur?

Cf. réponse la question 12, *supra*.

Votre Cour fait-elle preuve de déférence quant à la mesure dans laquelle la décision ou la mesure a été précédée d'une analyse approfondie de la compatibilité avec les droits fondamentaux? Quelle doit être, par exemple, la profondeur de l'analyse du législateur pour que votre Cour lui donne du poids?

Cf. réponse la question 12, *supra*.

Votre Cour examine-t-elle si les points de vue opposés ont été pleinement représentés dans

1454 P. KINSCH, « L'égalité devant la loi », préc., p. 85-103, spéc. p. 95, spéc. p.109.
1455 Cour constit., 5 mai 2000, n°09/00, Mémorial A, n°40 du 30 mai 2000, https://legilux.public.lu/eli/etat/leg/acc/2000/05/05/n1/jo; Cour constit., 4 mai 2011, n°64/11, Mémorial A, n°94 du 13 mai 2011, https://legilux.public.lu/eli/etat/leg/acc/2011/05/04/n1/jo. Pour un arrêt plus récent reprenant les mêmes considérants, cf. Cour. constit., 27 janvier 2012, n°69/12, Mémorial A, n°20 du 6 février 2012, https://legilux.public.lu/eli/etat/leg/acc/2012/01/27/n1/jo.
1456 En italique dans le texte cité. [34] En italique dans le texte cité.
1457 P. KINSCH, « Les usages des travaux préparatoires des lois au Luxembourg (le bon, le mauvais et l'indicible) », *Pas. Lux.* 2020, t. 39/4, p. 763, spéc. p. 768; article en libre accès ici : https://hdl.handle.net/10993/46792; également publié in *Etudes en l'honneur de Pascal Ancel*, Bruxelles, Larcier, 2021, p. 157, spéc p. 169; L'auteur cite deux arrêts : Cour constit., 5 mai 2000, n°9/00 préc. et Cour constit., 4 mai 2011, n°64/11, préc.
1458 P. KINSCH, « Les usages des travaux préparatoires des lois au Luxembourg (le bon, le mauvais et l'indicible) », *Pas. Lux.*, préc., spéc. p.766, *infra* note 15.
1459 Cour constit., du 30 septembre 2022, n°00170, Mémorial A, n°509 du 6 octobre 2022, https://legilux.public.lu/eli/etat/leg/acc/2022/09/30/a509/jo.

le débat parlementaire lors de l'adoption d'une mesure? Suffit-il qu'il y ait eu un débat approfondi sur le contenu général de la législation, ou faut-il qu'il y ait eu une considération spéciale des implications sur les droits?

Non. Cf. réponse la question 12, *supra*.

Le fait que la décision appartienne au pouvoir législatif ou qu'elle ait été prise après des consultations publiques ou des débats publics est-il une preuve concluante de la légitimité démocratique de la décision?

Non. Cf. réponse la question 12, *supra*.

III. Le champ d'application des droits, légalité et proportionnalité

Votre Cour a-t-elle déjà fait preuve de déférence à l'étape de la définition des droits, en donnant du poids à la définition des droits du gouvernement ou à son application aux faits en cause?

Non. Cf. réponse la question 12, *supra*.

Des droits applicables affectent-ils l'intensité de la déférence? Votre Cour considèret-elle que certains droits ou aspects de droits sont plus importants et que, par conséquent, les ingérences dans leur exercice méritent un examen plus rigoureux que d'autres?

Non. Cf. réponse à la question 12, *supra*.

Disposez-vous d'une échelle de clarté lors du contrôle de constitutionnalité d'une loi? Comment décidez-vous de la clarté d'une loi? Quand appliquez-vous la règle d'interprétation *In claris non fit interpretatio*?

La règle « *in claris non fit interpretatio* » est classique en droit luxembourgeois et a été jadis appliqué par les juridictions administratives[1460], de même que par les juridictions judiciaires[1461]. Elle conduit les juges à ne pas appliquer la méthode d'interprétation téléologique dans les cas de figure où le texte de la loi est considéré comme étant clair. Cependant, depuis un arrêt du 14 juillet 2009, la Cour administrative déclare que « [m]ême *l'application du texte légal le plus clair en apparence peut nécessiter une démarche d'interprétation lorsqu'une application littérale conduirait à un résultat absurde, humainement ou scientifiquement*.»[1462].

Cependant, le manque de clarté d'une loi peut constituer une raison pour laquelle cette loi se voit l'objet d'un recours préjudiciel devant la Cour.

A plusieurs occasions, les juges constitutionnels ont eu l'occasion de sanctionner des lois qui n'étaient pas suffisamment précises à l'égard des dispositions constitutionnelles visées. La sanction est particulièrement fréquente dans le domaine de la légalité de la peine[1463]. La cour sanctionne le manque

1460 P. HURT, « Attendu que la loi est claire...Propos irrévérencieux sur l'utilisation de l'argument du sens clair en jurisprudence luxembourgeoise », *JTL*, 2010, p. 193, spéc. p. 194, partie 1; cité par, et dans le même sens P. KINSCH, « Les usages des travaux préparatoires des lois au Luxembourg (le bon, le mauvais et l'indicible) », préc., p. 763, spéc. p. 768.

1461 *Ibid.*

1462 Cour admin., 14 juillet 2009, n°23857C et n°23871C, cité in R. ERGEC, *op cit*., p. 191, para 288, https://ja.public.lu/20001-25000/23857C.pdf; cf. également Trib. admin., 31 juillet 2013, n°30544, https://ja.public.lu/30001-35000/30544.pdf, p. 8, qui considère que « [l]*'application textuelle du texte clair et précis par le juge ne peut trouver exception que dans la mesure où il a aboutirait à une situation absurde, contraire à toute logique, bref au bon sens même* », cité par P. KINSCH, « Les usages des travaux préparatoires des lois au Luxembourg (le bon, le mauvais et l'indicible) », préc., p. 763, spéc. p. 768.

1463 Cf. entre autres : Cour constit., 6 juin 2018, n°00138, Mémorial A, n°459 du 8 juin 2018, http://legilux.public.lu/eli/etat/leg/acc/2018/06/06/a459/jo

de précision au regard de l'ancien article 14 de la Constitution, actuel article 19.

La Cour dessine néanmoins les contours de cette sanction, en laissant néanmoins la place à l'interprétation jurisprudentielle et considère qu'« [i]*l n'en découle pas que toute règle législative, qui de par sa nature est générale et abstraite, doit couvrir dès une première lecture toutes les hypothèses et cas de figure. Elle est nécessairement soumise à l'application jurisprudentielle concrète au cas par cas, ces applications devant en dégager la portée concrète* »[1464].

Quelle est l'intensité du contrôle de votre Cour au stade de l'établissement du but légitime ?

Cf. réponse à la question 21, *infra*.

Quel test de proportionnalité votre Cour applique-t-elle ? Votre Cour applique-t-elle toutes les étapes du test classique de proportionnalité (c'est-à-dire satisfaire à une triple exigence d'adéquation, de nécessité et de proportionnalité au sens strict) ?

Avant la réforme constitutionnelle de 2023, le test de proportionnalité ne figurait qu'à l'ancien article 32 (2) alinéa 2 de la Constitution[1465] (actuel article 48 alinéa 2) portant sur les conditions que doivent respecter les mesures prises par le Grand-Duc en cas d'état d'urgence. La Constitution disposait que ces mesures « *doivent être nécessaires, adéquates et proportionnées au but poursuivi et être conformes à la Constitution et aux traités internationaux* ». La Cour n'a jamais été saisie d'une question préjudicielle portant sur cette disposition constitutionnelle.

Depuis 2023, inspiré de la pratique de la CEDH[1466], ce principe a été généralisé pour toutes les limitations aux libertés publiques. Il a été inscrit dans la Constitution à l'article 37 qui dispose que « [t]*oute limitation de l'exercice des libertés publiques doit être prévue par la loi et respecter leur contenu essentiel. Dans le respect du principe de proportionnalité, des limitations ne peuvent être apportées que si elles sont nécessaires dans une société démocratique et répondent effectivement à des objectifs d'intérêt général ou au besoin de protection des droits et libertés d'autrui* ».

En outre, le principe est prévu à l'actuel article 15 de la Constitution. Son premier alinéa reprend les dispositions de l'ancien article 10bis de la Constitution et dispose que « [l]*es Luxembourgeois sont égaux devant la loi* »; alors que son deuxième alinéa ajoute désormais que « [l]*a loi peut prévoir une différence de traitement qui procède d'une disparité objective et qui est rationnellement justifiée, adéquate et proportionnée à son but* ». Il s'agit ici de la codification d'une jurisprudence constante de notre Cour[1467], suivant laquelle « *le législateur peut, sans violer le principe constitutionnel de l'égalité, soumettre certaines catégories de personnes à des régimes légaux différents à la condition* ***que la différence instituée procède de disparités objectives, qu'elle soit rationnellement justifiée, adéquate et proportionnée à son but*** »[1468].

Bien qu'elle en fît régulièrement l'usage pour analyser le respect du principe d'égalité devant la loi[1469], cette jurisprudence ne consacrait pas expressément le principe de proportionnalité comme « *prin-*

1464 Cour constit., 23 décembre 2022, n°00176, Mémorial A, n° 19 du 13 janvier 2023, https://legilux.public.lu/eli/etat/leg/acc/2022/12/23/a19/jo, cf. note de P. KINSCH, *JTL*, 2023, p. 172.

1465 Ce texte a été lui-même introduit assez récemment, par la loi du du 13 octobre 2017 portant révision de l'article
32, paragraphe 4 de la Constitution, Mémorial A, n°908 du 16 octobre 2017, https://legilux.public.lu/eli/etat/leg/loi/2017/10/13/a908/jo. Pour un historique de la genèse de cette disposition, cf. M. THEWES, « Le Conseil d'État Luxembourgeois et le principe de proportionnalité », in *Actes du séminaires des Conseils d'Etat français et luxembourgeois et de la Cour administrative luxembourgeoise du 16 novembre 2021*, préc, p. 138.

1466 M. THEWES, préc.

1467 P. KINSCH, « L'égalité devant la loi », préc., spéc. p. 95, note de bas de page 3.

1468 Nous soulignons, Cour constit. 26 mars 1999, n° 77/99, Mémorial A, n°41 du 20 avril 1999, https://legilux.public.lu/eli/etat/leg/acc/1999/03/26/n1/jo.

1469 M. THEWES, préc., spéc. p. 139.

cipe constitutionnel autonome »[1470]. Cette consécration a été opérée par une série de trois arrêts rendus en 2021.

Le premier de ces arrêts, rendu le 22 janvier 2021[1471], considère que le principe de proportionnalité est un « *principe général de droit* ». La Cour y fait référence dans un *obiter* qui précède un attendu de principe important qui consacre « *le principe de sécurité juridique comme principe général inhérent à leurs ordres juridiques respectifs ainsi que les principes de confiance légitime et de non-rétroactivité des lois comme principes généraux ou fondamentaux, en tant qu'expressions de la sécurité juridique* ». Cet obiter rappelle « *que la Cour constitutionnelle a d'ores et déjà recours à un autre* ***principe général de droit****, à savoir celui de la proportionnalité, lorsqu'elle examine, dans le cadre de l'analyse de la conformité d'une loi au texte de l'article 10bis de la Constitution qui consacre le principe de l'égalité devant la loi, la question de savoir si la différence de traitement opérée par la loi répond à une différence objective des situations à régler en vue de décider si la loi mise en cause respecte le texte constitutionnel* »[1472].

Dans l'arrêt du 19 mars 2021[1473] la Cour précise expressément (et en faisant référence à l'arrêt du 22 janvier 2021 précité) que « *le principe de proportionnalité* [est] *un principe à valeur constitutionnelle* ». Cependant, la doctrine relève que, malgré le fait que la Cour indique qu'il s'agit d'une « mise en balance » entre les objectifs de la loi et le respect des droits des contribuables visés « la Cour ne décline aucunement les critères ou les étapes de cette « mise en balance » »[1474].

Le 12 mai 2021[1475], saisie d'une question préjudicielle portant sur la conformité au principe d'égalité devant la loi des critères utilisés par la loi électorale pour fixer le nombre des élus par circonscription, la Cour a rappelé que « [q]*uels que soient les critères à la base de la fixation du nombre des députés à élire par circonscription, le principe constitutionnel de proportionnalité s'impose de toute manière au législateur* ».

Plus récemment, dans un arrêt du 30 septembre 2022, à l'occasion de l'examen de la proportionnalité des mesures de lutte contre la pandémie Covid-19, notre Cour a eu l'occasion d'énoncer le sens qu'elle entend donner au principe de proportionnalité et a précisé qu'elle « *ne sera amenée à conclure à une violation de la Constitution que s'il apparaît une rupture* ***du juste équilibre****, devant être préservé* ***entre les risques existants*** *et les* ***moyens nécessaires*** *pour y pallier par la mise en place d'une mesure inadéquate au regard de la situation, par nature évolutive à laquelle le législateur avait à faire face* »[1476].

22. Votre Cour passe-t-elle par chaque étape applicable du test de proportionnalité ?

Non, la Cour ne suit pas systématiquement chaque étape du test de proportionnalité.

Deux approches principales se démarquent dans sa pratique. La première concerne l'application du principe de proportionnalité en tant que principe constitutionnel. Dans ce contexte, le test effectué par la Cour consiste en une « mise en balance » des droits et des objectifs de la loi (comme l'illustre

1470 Formule de M. THEWES, préc.
1471 Cour constit., 22 janvier 2021, n°00152, Mémorial A n° 72 du 28 janvier 2021, https://legilux.public.lu/eli/etat/leg/acc/2021/01/22/a72/jo, note de P. KINSCH, *JTL*, 2021, p. 105.
1472 Nous soulignons.
1473 Cour constit., 19 mars 2021, n°00146, Mémorial A, n°232 du 23 mars 2021, https://legilux.public.lu/eli/etat/leg/acc/2021/03/19/a232/jo.
1474 M. THEWES, « Le Conseil d'Etat Luxembourgeois et le principe de proportionnalité », préc., n°15, p.138, spéc. p. 140.
1475 Cour constit., 12 mai 2021, n°00165, Mémorial A, n°372 du 17 mai 2021, https://legilux.public.lu/eli/etat/leg/acc/2021/05/12/a372/jo.
1476 Cour constit., 30 septembre 2022, n°00170, préc.; Cf. dans le même sens, Cour constitut., 25 novembre 2022, n°00172, Mémorial A, n°605 du 7 décembre 2022, https://legilux.public.lu/eli/etat/leg/acc/2022/11/25/a605/jo et Cour constit., 3 mars 2023, n°00178, Mémorial A, n° du https://legilux.public.lu/eli/etat/leg/acc/2023/03/03/a114/jo.

l'arrêt du 19 mars 2021 précité) ou, plus récemment, la vérification du « juste équilibre » entre les droits protégés et les droits mis en cause par la loi (comme illustré dans l'arrêt du 30 septembre 2022 précité).

La seconde approche est appliquée dans le cadre des recours qui concernent le principe d'égalité devant la loi. Dans ces cas, le juge constitutionnel s'assure que la différence de traitement est basée sur des disparités objectives et est rationnellement justifiée, adéquate, et proportionnée à son but. Cependant, dans ce deuxième contexte, la Cour n'analyse pas toujours de manière exhaustive chaque étape du test de proportionnalité; elle peut se concentrer sur certains aspects selon les cas, sans nécessairement distinguer les trois étapes de manière explicite[1477].

Existe-t-il des affaires dans lesquelles votre Cour admet que la mesure litigieuse satisfait à une ou plusieurs étapes du test de proportionnalité, même s'il n'y a manifestement pas suffisamment de preuves pour démontrer ce fait ?

Comme énoncé plus haut, la Cour n'analyse pas systématiquement de manière exhaustive chaque étape du test de proportionnalité, cependant il serait démesuré de considérer que la Cour l'ait fait en absence de preuves suffisantes.

L'apparition du contrôle de la proportionnalité dans la jurisprudence de votre Cour a-t-elle coïncidé avec l'essor de la théorie de la déférence judiciaire ?

Non.

La jurisprudence de la Cour européenne des droits de l'homme a-t-elle façonné l'approche de votre Cour en matière de déférence ? La doctrine de la Cour européenne des droits de l'homme sur la marge d'appréciation est-elle l'équivalent national de la marge d'appréciation que votre Cour accorde ? Si non, à quelle fréquence les considérations relatives à la marge d'appréciation de la Cour européenne des droits de l'homme recoupent-elles les considérations relatives à la déférence de votre Cour dans des affaires similaires ?

La Cour s'est référée expressément à la jurisprudence de la CEDH dans ses arrêts du 22 janvier 2021 et 19 mars 2021[56]. Cependant la référence ne portait pas sur le concept de déférence, ni sur celui de marge d'appréciation. Au contraire, elle a servi à appuyer la consécration du principe de proportionnalité en tant que principe constitutionnel[1478].

La Cour européenne des droits de l'homme avait-elle condamné votre Etat en raison de la déférence dont votre Cour a fait preuve dans une affaire précise, déférence qui en a fait un recours inefficace?

Non, pas expressément. Cependant, il convient de mentionner l'arrêt de la CEDH rendu dans l'affaire Wagner et J.M.W.L. c. Luxembourg[1479], qui concernait le refus du Luxembourg d'accorder l'exéquatur à un jugement péruvien d'adoption plénière accordée à une mère adoptive célibataire de nationalité luxembourgeoise.

1477 Cf. à titre d'exemple Cour constit. 9 décembre 2022, n°00174, Mémorial A, n° 632 du 16 décembre 2022, https://legilux.public.lu/eli/etat/leg/acc/2022/12/09/a632/jo; Cour constit. 23 décembre 2022, n°00176, préc. Ces deux arrêts sont aussi des exemples où les deux types de test sont appliqués dans le même recours, c'est-à-dire une application du prince de proportionnalité en tant que principe constitutionnel une analyse de proportionnalité dans le cadre d'un recours portant sur le principe d'égalité devant la loi. [56] Préc., cf. note 49 et 51 *supra*.

1478 P. KINSCH, « Les principes généraux du droit comme éléments de l'ordre juridique luxembourgeois », *JTL*, 2022, p. 69, spéc conclusion p.75 : « *Dans les deux cas de la jurisprudence administrative et de la jurisprudence constitutionnelle, les influences des juridictions européennes (Cour de justice de l'Union européenne ou Cour*

(cont.)

1479 CEDH, 28 juin 2007, Wagner et J.M.W.L. c. Luxembourg, n°76240/01, https://hudoc.echr.coe.int/eng?i=0032049896-2174101.

Dans cette affaire, la question préjudicielle posée à notre Cour était de savoir si la loi luxembourgeoise qui ne permettait qu'aux couples mariés d'adopter plénièrement un enfant, à l'exclusion des personnes célibataires était conforme au principe de l'égalité devant la loi. Pour notre Cour[1480] « *la spécificité se justifie si la différence de condition est effective et objective, si elle poursuit un intérêt public et si elle revêt une ampleur raisonnable;* […] *elle est légitime en l'espèce comme s'appuyant sur une* ***distinction réelle découlant de l'état civil des personnes****, sur une* ***garantie accrue au profit de l'adopté par la pluralité des détenteurs de l'autorité parentale dans le chef des gens mariés*** *et sur une* ***proportionnalité raisonnable du fait que l'adoption simple reste ouverte au célibataire*** *dans le respect des exigences de forme et de fond prévues par la loi* ». Sur le fondement de cette décision, les tribunaux luxembourgeois ont refusé l'exéquatur de la décision d'adoption[1481].

Si la CEDH ne sanctionne pas expressément notre Cour pour (excès de) déférence, elle retient une position tout-à-fait opposée sur la question de l'adoption par des célibataires. Elle a constaté, entre autres, que « *d'une part, les liens de l'enfant sont rompus avec sa famille d'origine, mais que, d'autre part, aucun lien de substitution plein et entier n'existe avec sa mère adoptive. L'intéressée se retrouve dès lors dans un vide juridique, qui n'a d'ailleurs pas été comblé par le fait qu'une adoption simple a été accordée entre-temps* »[1482] et a considéré qu'« *en l'espèce, aucun motif de nature à justifier pareille discrimination. Cette conclusion s'impose d'autant plus qu'avant les faits litigieux d'autres enfants péruviens adoptés par des mères célibataires ont obtenu un jugement d'adoption plénière de plein droit au Luxembourg* »[62].

Pour la doctrine « [c]*et incident ne reflète pas une divergence de vues entre la Cour Constitutionnelle et la Cour européenne des droits de l'homme. Les deux juridictions n'avaient, tout simplement, pas à répondre à la même question* »[1483]. Ceci serait dû au fait que *européenne des droits de l'homme) ainsi que de la jurisprudence et de la doctrine étrangère sont évidentes – y compris, dans les derniers arrêts de la Cour constitutionnelle, l'influence de la jurisprudence du tribunal constitutionnel fédéral allemand et de la doctrine allemande* ».

la Cour constitutionnelle opère un contrôle abstrait des questions préjudicielles qui lui sont posées alors que la CEDH a pu prendre en compte d'autres faits litigieux.

IV. Autres particularités

À quelle fréquence la question de la déférence se pose-t-elle dans les affaires relatives aux droits de l›homme jugées par votre Cour?

Non applicable. Cf. réponse à la question 1, *supra*.

Votre Cour est-elle devenue plus déférente avec le temps?

Non. Cf. réponse à la question 1, *supra*.

L'attitude déférente dépend-elle du nombre d'affaires inscrites au rôle de la Cour?

Non. Cf. réponse à la question 1, *supra*.

Votre Cour peut-elle fonder ses décisions sur des motifs non avancés par les parties? Votre Cour peut-elle recadrer les motifs avancés en vertu d'une disposition constitutionnelle différente de celle invoquée par le demandeur?

1480 Cour constit., 13 novembre 1998, n°2/98, Mémorial A, n°102 du 8 décembre 1998, https://legilux.public.lu/eli/etat/leg/acc/1998/11/13/n1/jo.

1481 Les procédures administratives ont également échoué : cf. CEDH, 28 juin 2007, préc, cons. 35 et s.

1482 Cons. 155. [62] Cons. 157.

1483 P. KINSCH, « L'égalité devant la loi », préc, p. 112 : « *Cet incident ne reflète pas une divergence de vues entre la Cour Constitutionnelle et la Cour européenne des droits de l'homme. Les deux juridictions n'avaient, tout simplement, pas à répondre à la même question, si bien qu'il n'est pas trop étonnant que leurs réponses aient été divergentes. Mais il est clair que la réponse de la Cour européenne des droits de l'homme, plus proche des faits*

(cont.)

L'article 8 de la loi du 27 juillet 1997 précitée dispose que « [l]*a question préjudicielle qui figure au dispositif du jugement ne doit répondre à aucune condition particulière de forme. Elle indique avec précision les dispositions législatives et constitutionnelles sur lesquelles elle porte ».* La Cour a considéré que cet article ne l'habilitait pas « à substituer une autre règle constitutionnelle à celle précisée par la juridiction de renvoi »[1484]. La doctrine indique que dans des arrêts subséquents, la Cour a pu « *ajouter, à l'article de la Constitution cité par la juridiction de renvoi, un autre article, non cité mais intrinsèquement lié au premier* »[1485].

La Cour a précisé sa position sur la question pour statuer qu'il est « *indifférent* […] *que la juridiction de renvoi s'abstienne de désigner l'article de la Constitution susceptible d'être violé par une norme légale, dès lors qu'elle indique clairement la règle juridique contenue dans une ou plusieurs dispositions de la Constitution* »[1486].

et moins abstraite, était objectivement préférable. Au Luxembourg, c'est aux juridictions de fond qu'il appartenait de prendre en considération les éléments concrets de la situation internationale dont il s'agissait ».

Dans les arrêts cités sous la question 12, la Cour a recadré les questions posées en les rattachant aux principes de proportionnalité et en se référant la jurisprudence de la CEDH et de la CJUE.

31. Votre Cour peut-elle étendre son contrôle de constitutionnalité à une autre loi non contestée devant elle mais liée à la situation du requérant?

Non.

1484 Cour constit. 17 novembre 2006, n°37/06, Mémorial A, n°220 du 20 décembre 2006, https://legilux.public.lu/eli/etat/leg/acc/2006/11/17/n1/jo.

1485 Cf. arrêts cités in L. HEUSCHLING, « Pourquoi la Cour constitutionnelle devrait s'intéresser à l'histoire, ou audaces apparentes et réelles de l'arrêt no 146 (2019) relatif à « l'État de droit » », *JTL,* 2019, p. 97, spec. p. 108, supra section B, note 95. Selon l'auteur cité, « [c]*e type de raisonnement n'est* […] *pas à considérer comme une prise de distance par rapport à la lecture très restrictive posée dans l'arrêt no 37* ».

1486 Cour constit., 1er octobre 2010, n°57/10, Mémorial A, n°180 du 11 octobre 2010, https://legilux.public.lu/eli/etat/leg/acc/2010/10/01/n1/jo; Cour constit., 28 mai 2019, n°00146, Mémorial A, n°383 du 4 juin 2019, https://legilux.public.lu/eli/etat/leg/acc/2019/05/28/a383/jo, note de L. HEUSCHLING, préc.

The Constitutional Court of the Republic of North Macedonia

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Non-justiciable questions and deference intensities

In your jurisdictions, what is meant by "judicial deference"?

The term "judicial deference" has not been closely defined in the practice of the Constitutional Court of the Republic of North Macedonia, nor the constitutional and legal theory, as well as in the academic works of the constitutional and legal specialists in the Republic of North Macedonia. As the starting point for the preparation of the answers to this questionnaire served the definition provided in the introduction of this questionnaire, which states that judicial deference is a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters that are perceived to be beyond their expertise or legitimacy to decide, which is especially applicable in cases involving human rights.

Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

The most frequent areas where the Constitutional Court exercises judicial deference are those in matters of foreign policy and national security, as well as criminal law, including amnesty.

Foreign policy is thought to belong exclusively to the executive power and cannot be a subject under control by the Constitutional Court. One of the earliest decisions of the Constitutional Court in which such an attitude was set out is **Resolution U.No.111/1993** from November 10, 1993, where the Constitutional Court rejected an initiative for a review of the constitutionality and legality of the membership of the Republic of Macedonia in the UN under the temporary reference „*former Yugoslav Republic of Macedonia*". The fact that there is no regulation or other general act expressing approval for the admission of the Republic of Macedonia to the UN under a temporary and provisional name *"former Republic of Macedonia"*, led the Court to the conclusion that there are no procedural presumptions for initiating constitutional proceeding, and that: *"particular political and diplomatic actions and activities of the Government of the Republic of Macedonia, which were carried out throughout the process of the international recognition of the Republic of Macedonia, in capacity of executive power in the area of international relations, as negotiations and planning for a final and competent decision by the competent state body, are not and cannot be subject to a constitutional review"*, and that *"for potential negative outcomes associated with the admission of Republic of Macedonia to the UN under the terms outlined in the draft-resolution of the Security Council, it addresses the issue of political accountability, and in accordance to Article 110 of the Constitution, the Court has no jurisdiction to make decisions."*

The Court took a similar stance with regard to the recognition of foreign states and governments, which is solely within the competence of the Government of the Republic of North Macedonia as per Article 91 Indent 8 of the Constitution. The Court cited the doctrine of a political issue once again, in the case **U.No.140/1999** from 14.06.2000, where the Court rejected the initiative to initiate a proceeding for a constitutional review of the Decision on the establishment of diplomatic relations between the Republic of Macedonia and the Republic of China ("Official Gazette of RM" No. 7/99). The petitioner believed that this Decision violated the Constitution because it was made by a Government that did not have the authority to enter into international agreements and that it was in violation of the obligations of the state that had previously established diplomatic relations with the People's Republic of China, committing to consider Taiwan as an integral part of the People's Republic of China. The Court noted that: "*In accordance with Article 91 Indents 8 and 9 of the Constitution, it is undeniable that the Government of the Republic of Macedonia has direct constitutional competence to recognize states and governments and to establish diplomatic and consular relations with foreign states.*" According to the assessment of the Court, *the acts used by the Government to exercise these powers have a distinct character as actions used to carry out a specific international policy at a specific period and have political underground, regardless of their form. According to Article 2 of the Vienna Convention on*

Diplomatic Relations, the consequences of those acts on the international relations of the state unquestionably have a legal character, but they do not constitute a part of the internal legal order, either as sources of law (regulations) or as acts whose content is limited by law, except in terms of the competence for their adoption. The contested decision... according to the Court, obviously falls inside the Government's defined political power under Article 91, Indents 8 and 9 of the Constitution, and it represents „*a declaration of a state's political intent, or that of its authorised bodies, to establish diplomatic relations with a foreign state, without becoming a regulation of its own internal legal system. As a result, only mechanisms of parliamentary democracy of political control can be used to control that act.* "

In another case, the Constitutional Court rejected to review a constitutionality on the Law on the Ratification of the Agreement between the States Parties to the North Atlantic Treaty and other States participating in the Partnership for Peace on the Status of their Forces and the Additional Protocol, on the grounds that the Constitution does not expressly grant the Constitutional Court the competence to decide whether international agreements are constitutional (**Resolution U.No.178/200** from 31 January 2001).

A few years later, a different petitioner, citing the Resolution U.No.178/2000 that was previously mentioned, demanded the Constitutional Court to review the constitutionality of the Basic Agreement between the Republic of Macedonia and NATO on the operation of NATO missions in Macedonia from 24 December 1998 and the Agreement for a NATO headquarters based in Skopje from 11 May 1999. The petitioner was of the opinion that the Constitutional Court could not invoke the doctrine of a political issue and decline jurisdiction over the contested agreements because they had the nature of regulations, with which the Government interfered with the legislative activities of the Assembly and violated the Constitution.

Once again, the Constitutional Court declared that it „*absolutely does not have competence to repeal or annul international treaties as acts of international law*" adding that „*the competence of the Constitutional Court to repeal or annul an act can only be established with respect to the instruments for the entry of a particular agreement into the Republic of Macedonia's legal system, such as the law on ratification of such an agreement*" and that "*by annulling a ratification law or other unlawful instrument, the Constitutional Court can prevent an international agreement from becoming a part of domestic law, but it cannot interfere with the international agreement as such.*"

According to the Court, the fact that those agreements entered into force in the international legal system as soon as they were signed, does not affect their concurrent incorporation and entry into force in the domestic legal system. The Court did not contest the fact that the contested agreements were not ratified or published, but it determined that what is requested by the initiative is outside of its jurisdiction, because the Court does not have the authority to make conclusive and declarative decisions about whether or not an international agreement is a part of the domestic legal system (**Resolution U.No.77/2009** from 21 April 2010).

With the Resolution **U.No.250/2009** from 23 December 2009, the Constitutional Court did not initiate a review of the constitutionality of the Law on ratification of the Agreement on the Physical Demarcation of the Border between the Republic of Macedonia and the Republic of Kosovo („Official Gazette of the Republic of Macedonia" no. 127/2009"). The petitioner of the initiative (a political party) believed that the agreement altered the borders of the Republic of North Macedonia, and insisted that it should have been approved by a two-thirds majority rather than a simple majority. According to the court, „*The Constitutional Court does not have the constitutional competence to review the Agreement on the physical demarcation of the border between the Republic of Macedonia and the Republic of Kosovo, whose agreement with the Constitution was evaluated by the Assembly of the Republic of Macedonia in the ratification procedure, and in which the contested law is properly adopted in accordance with Point 1 of Amendment X of the Constitution of the Republic of Macedonia*".

The cases **U.No.9/2021** and **U.No.25/2021** (Resolution from 20.04.2023) from the most recent constitutional case law could be regarded as an example of judicial deference in the area relating to energy and the exploitation of natural resources. The Constitutional Court rejected the initiatives to

initiate a proceeding for the review of the Law on the Resolution of the Dispute between the Government of the Republic of North Macedonia and Makpetrol AD Skopje, adopted in 2020, on the grounds that the legal disputes between the Government and a private company that performs the activity of supplying natural gas in connection with the ownership of the gas pipeline system of the Republic. The petitioners of the initiatives claimed that this law violates the principle of the rule of law and the principle of separation of powers because the Parliament has taken under its jurisdiction an issue that belongs to legal obligations and that should be resolved by a judicial or extrajudicial settlement or a judgment. The Constitutional Court did not accept the allegations in the initiatives and rejected them. The fact that the disagreements were settled through an agreement and the proceedings in connection with the ownership dispute for the gas pipeline system were terminated due to the law, despite the fact that the constitutional judges did not contest its separate and specific nature, was a key factor in the decision-making process. This allowed the state to maintain ownership of the natural gas transmission system and ensure further development of gasification in the Republic of North Macedonia. The Constitutional Court did not conduct a substantive legal review and rejected the initiatives due to the conclusion that the goals of the law have been met and its application has been exhausted.

Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

There are no predetermined criteria that dictate when and how the Court should refrain (exercise self-restraint); rather, it depends on the particulars of the case at hand, especially the subject matter of the issue that is brought before the Court.

Are there situations when your Court deferred because it had no institutional competence or expertise?

The Constitutional Court of the Republic of North Macedonia assesses and analyses the contested laws and regulations in their entirety, that is, in both a substantive and formal sense, when reviewing their constitutionality and legality. The Court reviews both the substance, as well as the adoption process. However, when it comes to urban planning, this rule is occasionally deviated. The Constitutional Court of the Republic of North Macedonia is one of the few constitutional courts in the region and, more broadly, in Europe that decides on the constitutionality and legality of urban planning. The jurisdiction of the Constitutional Court in relation to these acts derives from the constitutional provision of Article 110 Indent 2, which states that in addition to deciding whether or not laws passed by the Assembly are constitutional, the Constitutional Court also has the authority to decide on whether or not other regulations are in compliance with both the Constitution and the laws. The regulations approved by the bodies of the local self-government units, such as urban plans and planning, are also included in the category of other regulations. The Constitutional Court developed a position that the urban plans adopted by the councils of the local self-government units represent general acts with a normative character, i.e., regulate relationships in the field of urban planning generally, and that as regulations, they are subject to constitutional-judicial control. In terms of the scope of control over urban planning, the predominant[1487] view in earlier constitutional case law was that the jurisdiction of the Constitutional Court only pertains to the process of adopting an urban planning, not its content, and that its jurisdiction over urban plans is restricted. However, through the control of the legality and constitutionality of the legal aspects of the procedure of their adoption, the Con-

1487 In the recent constitutional case law, the Court has abandoned this position so that it can review the content of urban planning (**Resolution U.No.23/2022** from 5 April 2023 by which the Constitutional Court determined that the Detailed Urban Planning is not in accordance with the General Urban Planning because the Detailed Urban Planning provided for the construction of buildings with other purposes than those planned by the General Urban Planning for the City of Skopje); Similarly with Resolution U.No.**81/2022 from 12 July 2023**).

stitutional Court provides effective protection of the constitutional principle - the arrangement and humanization of space and the protection and improvement of the environment and nature, which according to Article 8 Paragraph 1 Indent are fundamental values of the constitutional order. As a result, in line with this stance of the Constitutional Court, when the party with the initiative submitted to the Constitutional Court requested that the Constitutional Court review the planning-urban decisions in the urban planning (for example, the type and purpose of buildings, the number of floors of buildings, planned infrastructure, etc.), the Constitutional Court rejected the initiatives as being non-competent on the grounds that the issues presented by the initiative went beyond its jurisdiction: "*From the established case law of the Constitutional Court of the Republic of Macedonia, and in relation to by-laws in the field of spatial and urban planning (urban plans, programs for the installation of urban equipment, etc.), it follows that the Constitutional Court is competent to review the procedure for their adoption, but not their content, which as a professional-technical matter falls under the competence of the Ministry of Transport and Communications in the phase of giving consent to these by-laws*" (**Resolution U.No.58/2017** from 13.12.2017, similarly in **Resolution U.No.6/2012** from 7 March, 2012).

Similar reasoning applies to the Rulebook on Standards for Urban Planning, which often appears as the subject in initiatives submitted to the Constitutional Court. In relation to this act, the Court took the position that: "*The Rulebook on Standards and Norms for Urban Planning is a technical norm that is based on certain scientific and expert opinions and experiences in the field of urban planning and which is adopted by the competent minister following a legally implemented procedure*" (**Resolution U.No.12/2013** from 3 April 2013). Consequently, the Court refrains from reviewing this act and the request for its control "*it cannot serve as a basis for assessing the constitutionality and legality of this by-law because the references are to professional rather than legal matters, and this is made more apparent by the fact that they represent the exercise of legally recognized powers*" (**Resolution U.No. 19/2008** from 18 June 2008).

Are there cases where your Court deferred because there was a risk of judicial error?

As an answer to this question, it is possible to cite those few instances in which the Constitutional Court, after expressing doubts about the constitutionality of law or regulation and initiating a procedure for a review, does not continue to the second stage of the procedure, which includes annulment or repeal of the law or regulation, but instead stops the procedure.

This possibility is foreseen in Article 47 of the Rules of the Procedure of the Constitutional Court, which states that the Court will halt the proceeding if it is found that the inception of the procedure was founded on an incorrect factual scenario; or if the reasons for questioning the constitutionality and legality vanish when the factual and legal circumstances of the public hearing are established. (This includes instances where the author of the act, in response to the Court's decision to initiate a procedure for review of the constitutionality of a law (or other regulation), will point to specific facts or circumstances that the Court did not take into consideration when making the decision and which cast a different light on the matter, that is, which are of sufficient influence to cause the grounds for doubting the constitutionality of the contested law. The Court invokes the potential of Article 47 of the Rules of Procedure and halts the proceedings if it is evident that repealing or annulling a law in such circumstances would carry the risk of judicial error.

Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

As an illustration, **Resolution U.No.40/2020** from 15 April 2020, by which the Constitutional Court did not initiate a procedure for reviewing the constitutionality of the Decision to the dissolution of the Assembly of the Republic of North Macedonia, number 08-1421/1 from 16 February 2020 („Official Gazette of the Republic of North Macedonia" number 43/2020). The petitioner of the initiative urged that this decision be annulled because it was impossible to hold early elections for deputies under the circumstances of the state of emergency that had been established owing to the COVID-19 crisis. The Constitutional Court did not accept the allegations of the petitioner of the initiative. In particular, the Court declared that the contested decision has its basis in the Constitution from

both the perspective of its author and the perspective of the subject matter it addresses. The Court especially emphasizes that: "*The majority of Members of the Parliament proclaimed that the Assembly should be dissolved, and according to the Constitutional Court, the expressed will of the majority of MPs out of the total number of MPs are not in contradiction with the provisions of the Constitution*" and that "*with the contested decision, the Assembly of the Republic of North Macedonia realized its constitutional right to dissolution as indicated in Article 63, paragraph 6 of the Constitution*" which explains why the issue of its compliance with the provisions of the Constitution was not raised before the Court.

Additionally, in its earlier constitutional case law, the Constitutional Court has never problematized the territorial division of the state, that is the changes to the borders of the municipalities. The territorial division is carried out by a law passed by the Assembly of the Republic of North Macedonia and which, after its adoption, very often comes before the Constitutional Court. We use **Resolution U.No. 195/2004** from 29 December 2004, as a case in point, in which the Court decided not to initiate the proceeding for review whether the Law on the Territorial Organisation of Local Self-Government in the Republic of Macedonia („Official Gazette of the Republic of Macedonia" no. 55/ 2004) was constitutional. The petitioners believed that this Law did not follow the Constitution because it was not approved by the required number of votes in the Assembly and because the results of local referenda in which residents supported the permanence of municipal borders were not taken into consideration when it was approved. In reference to the constitutional provisions that regulate local self-government, the Constitutional Court stated that the contested Law has a constitutional basis because Article 116 of the Constitution provides for the territorial division of the Republic and the areas of the municipalities are determined by law and leaves the regulation of all matters from these areas to be in the sole jurisdiction of the Assembly of the Republic of Macedonia as the representative body of all citizens and the holder of the legislative power of the Republic. Regarding the allegations from the initiative, specifically, if the legislator had in mind the outcomes of the citizens' statements in the referenda in the local self-government units during the process of adopting the contested laws, the court noted that it is a factual question that the Constitutional Court does not have the competence to decide.

"The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

Examples that bolster the point made in the question can be found in constitutional case law. The choice of the electoral system of the state serves as the best illustration for the argument that political matters should be decided by democratically elected authorities. The Electoral Code was specifically the focus of constitutional case law in the case of **U.No. 2/2012**. The petitioner contested the Electoral Code as a whole as being in violation of the Constitution because, in his view, it did not guarantee the equality and equality of the right to vote of the citizens. In order to allow for the adoption of a new law that would alter the election model, the petitioner with the idea urged the Constitutional Court to completely repeal the Electoral Law. In the Resolution by which the Court did not initiate a proceeding for a review of the constitutionality, it stated the following: "*The fact that the petitioner, starting from the negative effects of the mathematical calculation of the established electoral model in the Republic of Macedonia, perceives a violation of the constitutional provisions and proposes a change of the established model, cannot constitute grounds for expressing doubt from a constitutional point of view that the contested Electoral Code as a whole is in accordance with the Constitution. In addition, the number of political parties, coalitions of political parties, and voter turnout all play a role in whether a certain electoral model has more or less negative consequences on the mathematical calculations after elections are held in a given election period, and that is not a matter for the Constitutional Court to be involved with, rather, it is a matter of the legislative power up to the limits as long as such effects do not violate the constitutional guarantees in the sphere of civil and political rights established by the Constitution. Therefore, according to the Court, the legislator has the authority to choose the electoral model while abiding by the constitutional guarantees for the right to vote, the principles of equality, political pluralism, and free and democratic elections, as well as taking into account the recognised electoral models in the*

states." (**Resolution U.No. 2/2012** from 11 April 2012).

Other than choosing the electoral system and other related matters, the Constitutional Court has no jurisdiction over acts passed by the Parliament in connection with elections, such as the Resolution for early parliamentary elections. Referencing previously established constitutional case law that decisions on election announcements do not have the character of a regulation that is eligible for a constitutional review, the Constitutional Court emphasised the following in **Resolution U. No.168/2020** from 3 June 2020: "*The contested Resolution does not contain general norms of conduct, that is, it does not regulate relationships in a general way. Based on its form and legislator, it belongs to the category of legal acts that have an individual character, meaning that choices are taken with regard to particular legal situations in which the use of a general rule has been exhausted. The contested resolution does not generally regulate legal relations, according to the content. The contested resolution does not change or add to the system of general election regulations because it does not specify the requirements for electing Members of the Assembly, the election process, or the timing, i.e., the deadlines by which the elections must be conducted, and its role should only be completed by applying the general regulations governing the election deadlines to the particular instance of the election of Members of the Assembly for the Republic of North Macedonia, which will be completed by carrying out the electoral acts.*" Therefore, the initiative was rejected by the Constitutional Court.

Does your Court accept a general principle of deference in judging penal philosophy and policies?

Yes, the Constitutional Court of the Republic of North Macedonia does, in fact, adopt the general principle of deference in judging penal philosophy. According to the Constitutional Court, the Criminal Code, which specifies criminal acts and associated sanctions, is an instrument through which the legislator establishes the penal policy. The Constitutional Court has thus far reviewed this Code numerous times. The Constitutional Court bases its decisions in these matters on the fundamental concepts of the rule of law and the necessity of precise and clear legal standards. The court stated that criminal law norms should be explicit and unambiguous since they have the potential to impair very significant human rights (such as the right to freedom and security of the person, the right to a fair trial, the presumption of innocence, etc.). The Constitutional Court reviewed the constitutionality of the Criminal Code clause that defined the crime of *Malpractice in the Service* in Resolution **U.No. 10/2008** from 27 February 2008. In reviewing the constitutionality of this provision, the Court took into account: "*It is significant whether it clearly and precisely contains all the elements on the basis of which the criminal liability of the perpetrator for his illegal behaviour can be determined. This specifically relates to the execution action, which must be specified in the legal description in accordance with the legality principle. This ensures that only conduct that fits the legal description can be brought under that provision and considered a crime. The legislator, and not the Constitutional Court, determines the legislative-legal method to be used to determine the description of the enforcement action.*" The Court found that the contested section of Article 353-v (335-в) of the Criminal Code contains all the essential components of the crime of malpractice in the service (the perpetrator, the act of commission, the consequence, and the punishment) and did not raise the issue of whether it complies with the provisions of the Constitution.

The Constitutional Court typically exercises judicial deference in cases when the petitioner of the initiative contests the criminal law provisions simply on the basis of the penalty, or whether it is high or not: "*regarding the allegations from the initiative that the prescribed punishments were disproportionate and excessively strict, The Court determined that the prescribing of punishments and the scope of punishments is a matter of the state's legislative penal policy, which is not a matter for which the Constitutional Court is in competence*" (**U. number. 273/2009** from 15 September 2010).

Therefore, the decision about the nature and scope of the punishment for the Court is a matter of penal policy, which falls under the sole competence of the legislative power.

When penal-legal standards are questioned purely on the basis of how they are applied in particular situations, the Constitutional Court also defers from reviewing those standards. In case **U.**

No. 87/2015 (Resolution from 25 May 2016), the Constitutional Court emphasized the right and obligation of regular courts to apply those norms in the specific cases that will come before them, affirming the legislative right of the authority to transform the penal policy into legal norms, stating the following: "*the application of the principle of the lenient law (lex mitior) is a matter for the court that applies the law in specific cases and is not a matter for the legislator, nor for the Constitutional Court. The constitutional provision of Article 52 Paragraph 4 forbids laws from having a retroactive effect (with the anticipated exception for the more favourable law), but it does not impose the obligation to the legislator in the laws from the criminal law field to provide retroactive application of the more lenient law in the transitional and final provisions because it is a matter that is decided by the court that determines the criminal responsibility of a person. Therefore, the question of whether to apply a more lenient law to those who commit crimes is a specific one that is assessed case by case by the criminal court. It is not a matter that would be generally decided by the legislator, nor is it a question that would be evaluated in an abstract manner by the Constitutional Court during the process for reviewing constitutionality.*"

Amnesty is also regarded as a matter of state criminal policy, outside the jurisdiction of the Constitutional Court. After the nation's independence, amnesty was applied multiple times, and almost always, amnesty laws were challenged before the Constitutional Court, which either rejected the initiatives or found no violation of the Constitution. One of the latest examples is the one from 2020 when the Constitutional Court, with **Resolution U.No.1/2019** and **U.No.6/2019** from 22 January 2020, did not initiate a proceeding for reviewing the constitutionality of the Amnesty Law („Official Gazette of Republic of Macedonia" No. 233/2018), in general. The Court emphasized that the legislator determined the type of amnesty in the Amnesty Law, and the Constitution does not consider whether the Constitutional Court or someone else thinks it is necessary or not for individuals covered by the Law to be amnestied, not amnestied, or others to be amnestied, (The Constitutional Court cannot take on the responsibilities of the Parliament in its place), however, regardless of whether the Parliament was authorised by the Constitution to act as it did. The Court emphasized that: "*the constitutional right of the Parliament to grant amnesty, means its right to choose the category of individuals who will be included in the amnesty as well as the degree, i.e., to whom the amnesty applies and to whom it does not in the context of what is required by law, the question of the compatibility of the contested provisions of the Amnesty Law with the provisions of the Constitution cannot be raised before the Court.*"

There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

The provision of the Law on the National Security Agency that stated that a candidate for director, deputy director, or employee in the Agency must not have the citizenship of another country was not found to be inconsistent with the constitutional principle of equal access of citizens to employment in state bodies (Resolution in the case **U.No.112/2019** from 24 June 2019). For the Court, the decisive criterion in the review of the constitutionality of this provision was "*the competences and specificities of the Directorate for Security and Counterintelligence as a special body that carries out the tasks of the state security system that relate to protection against espionage, terrorism or other activities aimed at threatening or destroying the democratic institutions established by the Constitution of the Republic of North Macedonia with violent means, as well as protection from more serious forms of organized crime*". The Court also pointed out the sensitivity of the subject of regulation of this law, as well as the seriousness of the field of action, i.e. the competence of the National Security Agency, so that the contested legal framework provides the impartial and objective performance of work responsibilities at workplaces and is a requirement for the effective operation of the Agency in its role of defending the security of the state. The power of the legislator to establish more stringent hiring standards for the National Security Agency was affirmed by the Court "*in order to establish the circumstances for the Agency to work more effectively and with greater accountability and at the same time, it would be excluded that any elements of suspicion would surface that would render the personnel unfit to carry out tasks relating to the identification and mitigation of security threats and risks to the national security of the state.*"

With Resolution **U.No.122/2019** from 23 September 2020, for the same grounds and using the same justification, the Constitutional Court later rejected the initiative of a person employed by the Agency who lost his employment in the Agency and was transferred to another position in the Ministry of Internal Affairs as a result of the application of the contested restriction.

In a case from earlier constitutional case law (**Resolution U.No.84/2001** from 14 November 2001), the Court reviewed the constitutionality of the provisions of the Law on Procurement, Possession and Carrying of Weapons, which regulated the circumstances under which the competent authority could refuse to issue a permit for the purchase and carrying of weapons. The court considered that: "*the issue of carrying and possessing weapons is one that requires the existence of a certain level of discretionary power on the part of the authority, depending on the specifics of each request, and from that aspect, the legal restrictions on the possession of weapons are at the same time legally limited to the discretion of the competent authority which affects the provision of legality in decision-making in general*" and that defining the conditions under which a request for a possession of a weapon is denied "*are legitimate grounds within which the discretion of the competent authority may act, ensuring the legality of its decision on that matter, fulfilling the elementary requirement of the principle of the rule of law. In that situation, the citizen's prior conviction, the ongoing criminal proceeding, and the assessment of the authority for potential weapon misuse cannot be viewed as evidence undermining the presumption of innocence or the credibility of the individual*". The court did not raise the question of the constitutionality of the legal provisions because it considered that taking into account the impact of prior convictions for specific crimes is proportionate to the overall goal of the Law of enabling the possession of weapons when there is a justified need for it and has no implications for public safety.

In the case **U.No.2/2004** (Resolution to reject the initiative of 19.05.2004), The provisions of the National Concept for Security and Defense were not subject to a review of constitutionality and legality by the Constitutional Court („Official Gazette of the Republic of Macedonia" no. 40/2003) which formed the Management Committee, a body headed by the President of the Government and composed of some ministers, for assessment and decision-making in respect to the security of the Republic during times of crisis and crisis situations. The petitioner claimed that this Act was unconstitutional since it only recognised the terms military and state of emergency, not crisis situation or crisis and that the Management Committee, under the direction of the President of the Government, the role between the President of the Republic as supreme commander of the armed forces and president of the Security Council of the Republic of Macedonia (Article 86 of the Constitution), and the President of the Government as the holder of the other executive authority was divided in an inappropriate manner, and that limits the powers of the Supreme Commander and the President of the Security Council of the Republic of Macedonia. "*Commencing with the content of the National Security and Defence Concept, as a fundamental document for the security and defence of the Republic of Macedonia that establishes stances and communicates the viewpoints of the country on its national interests, its environment for security, the strategy of national security as well as the aims, directions, areas and instruments for its realization and perceptions and attitudes towards defence*", the Constitutional Court judged that this document is not a regulation as defined by Articles 51 and 110 of the Constitution and that it is not subject to constitutional review.

Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

Throughout the whole era following the independence of the Republic of North Macedonia, reforms in the judiciary have been ongoing with varied degrees of intensity in order to improve the protection of human freedoms and rights, and strive to bring its legislation and practises closer to and in line with those of the European Union. Throughout the process, numerous judiciary laws were amended such as the Law on Courts, the Law on the Judicial Council, the Law on the Council of Public Prosecutors, the Law on the Academy for Judges and Public Prosecutors, the Law on Salaries of the Judges, and other laws governing court proceedings. However, the Constitutional Court is not a part of the justice system and the judicial authority, nor is it a factor in the process of reforms in the

judiciary. The Court is unable to actively influence that process in terms of initiating the course that the reforms ought to take because it is a matter of politics that the Government of the Republic of North Macedonia is responsible for. Of course, the laws and other regulations adopted by the Parliament, the Government, and other state bodies within the framework of these reforms can be subject to constitutional-judicial control, so the influence of the Constitutional Court is indirect and only becomes apparent after the adoption and entry into force of the laws that are the result of judicial reforms. However, even if the Constitutional Court determines that there are sufficient grounds to interfere in these laws, it does not have the authority to impose on the legislator a timetable by which the contested law must be passed or changed, nor it is authorised to provide guidance to the legislator on how the legal requirements should stand, and in practical terms, the Constitutional Court cannot directly influence the process of amending the legislation in the field of the judiciary. The Constitutional Court also has no role or participation in constitutional reforms and has no authority to evaluate constitutional amendments, neither before nor after their adoption by the Assembly.

The decision-maker

Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

The analysis of constitutional case law does not provide sufficient evidence to draw the conclusion that the Constitutional Court is more deferred when it comes to acts passed by the Parliament than when it comes to acts passed by the executive power. (According to Article 12 of the Rules of Procedure of the Constitutional Court) The process before the Constitutional Court begins with the submission of an initiative, by any individual or a legal entity, to initiate a proceeding for constitutional review of a law, the constitutionality and legality of a regulation, or any other general act. However, according to Article 14 Paragraph 1, the Constitutional Court may start proceedings for constitutional judicial control on its own initiative. Participants in the proceedings before the Constitutional Court include both the petitioner of the initiative and the adopter of the act. The decision of the Constitutional Court to initiate a proceeding for reviewing the constitutionality and/or legality of a particular act is not influenced by the capacity of the adopter of the act, nor does the process differ depending on which state body adopted the act. The fundamental criterion in decision-making is the nature and content of the contested act, or whether it is an individual act or a general act of a normative nature, i.e., a regulation that regulates relations generally. This is a fundamental criterion for determining the Constitutional Court's capability to review the legality and constitutionality of the contested act, whereas the general acts or regulations are subject to constitutional and judicial assessment, while individual acts can only be subject to assessment only in regular courts, and not before the Constitutional Court. The Constitutional Court bases its analysis of the constitutionality of a law, or the legality of a regulation, primarily on its content rather than the fact that it was adopted by a particular state body. The Constitutional Court often works within the parameters of the request established by the initiative, although it is not constrained by the justifications emphasised in the initiative while reviewing the constitutionality and/or legality of the contested act. The provisions of the regulation or other general act that are not subject to review under the initiative may be reviewed by the Court for their constitutionality and legality in accordance with Article 14 Paragraph 2 of the Rules of Procedure of the Constitutional Court. The Court may also review a regulation for other reasons that are not specified by the petitioner.

In constitutional case law, there are instances where an initiative for the Court to review a by-law act adopted by the executive power was made, but during the proceeding, the Court determined that the legal justification for the adoption of the contested by-law act was in violation of the Constitution. As a result, the Court initiated a procedure to review the Law and on its own, and repealed the disputed provisions (**Resolution U.No. 208/2001** from 22 May 2002 and **Decision U.No. 208/2001**).

What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

The Court takes the history of the adoption of the laws into consideration, and every time a peti-

tion contesting a law passed by the Parliament is submitted to the Constitutional Court, the Court requests that the Parliament provide an opinion on the petition (Article 18 of the Rules of Procedure of the Constitutional Court). Article 13 of the Rules of Procedure of the Constitutional Court states that both the petitioner of the initiative and the adopter of the act must participate in the court's proceedings, so that by requesting an opinion, it is possible to hear the opinion of the adopter of the act in the proceedings before the Constitutional Court, that is, of the Parliament as a legislative body. During the analysis of the initiative in the previous procedure, the Constitutional Court established a practice whereby, whenever a contested law is in question, in addition to the opinion of the Parliament, a request for the Draft Law with the Rationale is also necessary, in order to determine the motivations behind the enactment of the legislator of the contested law and the objectives that should be met with the suggested legal solutions. This is crucial when it comes to laws that directly affect how citizens can exercise their freedoms and rights, particularly when those laws impose limitations on how those rights can be exercised. In such a situation, insight into the legislative background aids the Constitutional Court in determining the legitimate purpose of the law as one of the steps in applying the proportionality test. Sometimes, even in the Resolutions or the Decisions made in response to the submitted initiative, the Court states the justifications provided in the Explanatory Memorandum of the Draft Law for which it was adopted.

Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

The assessment of the Court is restricted to the analysis of the justifications for the adoption of the law that the adopter of the act underlined.

Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

The debates that take place in the Assembly of the Republic of North Macedonia throughout the process of passing a law typically have no impact on the procedure and decision-making of the Constitutional Court. In the previous procedure, the Constitutional Court may, if it deems it necessary, request the Assembly to provide it with transcript notes from the sessions of the Assembly where the law being contested before the Constitutional Court was debated, however, this has no influence on the decision-making of the Constitutional Court and the Court does not address this matter in the final decision. The Law on Prevention and Protection from Discrimination, which was adopted in May 2019 after extensive and serious debates in the Parliament and the public broadly, and which expanded the grounds on which citizens can request protection from discrimination, such as sexual orientation and gender identity, was completely repealed by the Constitutional Court in 2020. The Constitutional Court stated that the reason for the repeal was an oversight in the procedure for its adoption, specifically that the Law was not passed with the required majority after the second consideration of the Assembly after the President of the Republic initially exercised his right of veto and refused to sign the decree. (**Decision U.No. 115/2019** from 14 May 2020). The Court stated its opinion that: "*due to the fact it was submitted to the vote a second time following the previous veto of the President of the Republic, ...in that case, the law gets greater legitimacy, and it should be passed by an absolute majority of votes as required by Article 75, Paragraph 3 of the Constitution, a standard that, in the norm of the Court, is an imperative legal standard.*"

This decision of the Constitutional Court drew an extensive amount of public criticism because it created a legal gap in a very important area, which is the protection of citizens from discrimination because they were left without a legal foundation and without a mechanism for protection against discrimination. The decision was made under the particular circumstances of a state of emergency being declared due to the global coronavirus pandemic, with a technical government, and under the conditions of a dissolved Assembly, so owing to these circumstances, new parliamentary elections had to be held, and the law had to be re-adopted with the required majority.

The Law on Administrative Disputes ("Official Gazette of SFRY" No. 4/77 and 36/77), which dates from the time of the former Socialist Federal Republic of Yugoslavia, takes a different approach that could be seen as a type of judicial deference. With **Resolution U.No. 43/1998** from 3 July 2002, the Constitutional Court initiated a proceeding to review the constitutionality of the Law as a whole and determined that it was not in compliance with the newly established Constitution following the independence of the Republic of Macedonia.

However, the Constitutional Court deferred making a final judgement until the new Law on Administrative Disputes was passed in 2007 in order to prevent a legal void from forming and to prevent depriving citizens of a legal remedy in the domain of judicial control of administrative acts and discontinued the constitutional review proceeding. (Resolution to initiate a proceeding U.No. 43/1998 from 3 July 2002) (Resolution to discontinue the proceeding U.No. 32/1998 from 20 May 20, 2007)

Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

The Court does not analyze whether all issues raised by the law or measure were fully covered in the parliamentary debate.

Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

It has been recognised that the democratic legitimacy of legislation or decision is significantly impacted by the fact that it was passed by the Parliament, which holds the legislative authority. However, this does not preclude the Constitutional Court from conducting constitutional-judicial control over such an act or decision, as a result of the role of the Constitutional Court as the keeper of legality and the regulator of the legislative power, it has the authority to either annul or repeal it if it determines that it is against the law.

Rights' scope, legality and proportionality

Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

No.

Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

In general, it cannot be stated that the fundamental right in matter determines the level of deference by the Constitutional Court. However, there are instances in the case law, regarding certain rights during the constitutional and judicial review of the applicable laws regulating these rights, which show that the Constitutional Court acts with extreme caution and strictness, particularly by stressing the need for precise legal standards or specific protection of fundamental rights. For example, custody is the strictest tool to assure the presence of the accused in criminal proceedings because it restricts freedom, a fundamental human right that is intrinsically tied to the human individual. The Constitutional Court repealed the provisions for mandatory custody for offences carrying a mandatory life sentence with **Decision U.No. 34/2005** from 31 May 2006. The judge is prevented, based on his free judicial conviction and thorough and careful assessment of the facts and evidence, from determining whether there are grounds for determining custody established in the Law on Criminal Procedure because the court is required to impose a measure of custody for these crimes only due to the severity of the sentence of life imprisonment. The Court explained its reasoning for its Decision by stating that the requirement of mandatory custody changes the constitutional authority of the Court to determine whether imprisonment is necessary and legal as the strictest measure to guaran-

tee the appearance of the accused in criminal proceedings, and the legislator only explicitly requires the court to make a custody determination by means of this imperative standard. Deciding whether an obligatory custody order must be made by the court only because the Law imperatively mandates it, indicates that the legislator, not the court, decided on the measure of custody for specific crimes, and therefore, the Court found this provision violates the fundamental principles of the rule of law, the separation of powers, and the right to the presumption of innocence.

The right to privacy, the monitoring of communications, and the protection of personal data are other areas where the Constitutional Court exercises relatively stringent control over the validity of laws. The Constitutional Court points out the necessity of clarity and precision in the legal provisions governing the authorization of state authorities to monitor communications in its analysis of those provisions in light of the constitutional provisions protecting personal privacy: "*The regulations controlling the monitoring area must be clear sufficiently precise and predictable, not allowing for improvisations or interpretation in order to avoid endangering the safety of anyone to whom that legislation may apply, and to refrain from interfering in an illegal and unconstitutional way with freedom of association and freedom of correspondence.*" (The Constitutional Court annulled a number of provisions of the Law on Electronic Communications in **Decision U.No. 139/2010**, which was issued on 15 December, 2010)

Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

The Court stated the following in the aforementioned Decision on the Law on Electronic Communications: "*Although covert monitoring techniques and approaches are aimed at disclosing the substance of communications to stop or identify crimes, it would be achievable to conduct criminal preoceedings or if it is necessary for the security and defence of the Republic, according to the Court there are insufficient guarantees against potential abuse by the authorised authority in the contested provisions of the Law, this is due to the requirement that the provisions regulating the monitoring area be sufficiently detailed and predictable, without improvisation or interpretation so as to avoid endangering the privacy of anyone to whom that law may apply, or, to be more specific, the legislation governing the use of communications monitoring measures should include a crystal clear illustration of the situations and conditions under which the public authority is permitted to deploy such a measure, the process used to monitor communications, the circumstances in which it has its own justification, and the body that issues the order to monitor communications. Everything else is opposed to the rule of law and moves in the direction of unlimited power.*" Due to the uncertainty of the expressions employed, the absence of regulations regarding the circumstances and methods by which the constitutionally granted right to privacy may be violated, in that case, the Constitutional Court found that they pose a genuine risk of arbitrary and capricious state interference in private affairs and correspondence of the citizens, which could harm their honour and reputation without any legitimate legal or constitutional justification.

Contrarily, the Constitutional Court found that the legal provisions of the Law on Internal Affairs, regulating the use of firearms by law enforcement officials, are sufficiently definite and clear and do not call into question the protection of the right to life provided by Article 10 of The Constitution. As a result, the Constitutional Court decided not to initiate a proceeding for a review of the constitutionality of the contested provisions in **Resolution U.No. 10/2006** from 22 March 2006, concluding that: "*The constitutional inviolability of the right to life, bodily and moral integrity of an individual cannot be opposed to the use of coercive measures, including the use of weapons, within legally established parameters and properly established out procedures. The analysis of the content of the contested legal provision shows that it does not violate the fundamental freedoms and rights of a citizen or an individual, because it specifies exactly when an authorised authority will use a firearm in each scenario, that is, it clearly states the circumstances under which an authorised official from the Ministry of Internal Affairs may employ the same. In the contested legal provision, the use of weapons by the authorised official is only permitted if it is essential in the circumstances that are listed. Thus, it follows logically that the guaranteed inviolability of human life is not always violated when law enforcement authorities employ firearms, and especially not where it was required to protect societal and citizen interests against criminality.*"

The request for clarity and precision of legal norms is considered by the Constitutional Court as an integral part of the principle of the rule of law, which is a fundamental value of the constitutional order of the Republic of North Macedonia according to Article 8 Indent 3 of the Constitution. In the case **U.No.87/2015** from 25 May 2016, the Constitutional Court reviewed the constitutionality of several provisions of the Law on Offences (see „Official Gazette of the Republic of Macedonia" no. 124/2015) and pointed out the following: "*The principle of the rule of law requires legislators to formulate precise, unequivocal, and explicit legal norms because only as such can serve as a strong foundation for actions of the state authorities, which indicates that the concept of the rule of law cannot exist without clear and defined rules that ensure the legal security of the citizens. The rule of law implies the consistent application of legal regulations, which should be broad, properly defined, and unambiguously formulated. Given the oppressive nature of criminal sanctions and their propensity to intrude* on fundamental *human rights, this is especially important for the area of criminal law.*"

We quote **Decision U.No. 109/2022** from 23 May 2022, as an illustration of modern constitutional case law, in which the Constitutional Court interpreted the principle of the rule of law and the demand for precision and clarity of legal norms as follows: "*The principle of the rule of law in a legal system or order should be realized through the dominance of the legal norm which should be clear, precise and understandable, which won't leave the citizens with the chance of a different interpretation, its different application, or the chance of legal uncertainty. One of the primary criteria of the fundamental value of the constitutional order, the rule of law and the principle of legal certainty as its integral element, is that legal norms be accessible to the addressees. This aims for those whose rights and obligations are determined by the norms, to be familiar with their content and, based on that, to adjust their behaviour. Legislators are required to conceptualise exact, unequivocal, and explicit rules that will ensure citizens' legal security as a component of it, which was not done in this particular case.*"

What is the intensity review of your Court in case of the legitimate aim test?

There is no predetermined procedure, nor predetermined criteria on the basis of which the intensity of the control of the Constitutional Court over the acts of the legislative and executive authorities is determined, considering the characteristics and specifics of each case, as well as certain other criteria, such as for example, the quality of the law that is being reviewed, the arguments offered by the adopter of the act for the content of the contested provisions, the subject of the law, etc. The Constitutional Court applies the test of proportionality in cases where the subject for a review is the restriction of specific citizen rights in order to ascertain whether there is a legitimate reason for the adoption of such provisions and whether they have an objective and reasonable justification, i.e. whether they are proportionate to the goals that the adopter of the act wanted to achieve.

The Constitutional Court specifically utilised the proportionality principle in instances involving the Covid-19 epidemic, which involved the measures and restrictions on freedoms and rights that were imposed during the state of emergency. From a constitutional and legal standpoint, the Constitutional Court did not find it necessary to contest the authority of the government to pass decrees with binding legal effect, but it did note that this power is limited and should not be used, in particular, to refer to rights from which there can be no exceptions under any circumstances (Article 54, Paragraphs 3 and 4 of the Constitution): "*...during the existence of a state of emergency, the Government may regulate differently certain matters that are governed by legitimate laws, it may establish new deadlines, it may change the existing, and it may introduce new solutions. But such powers are not unlimited. There are two constitutional restrictions on the ability of the Government to make decrees with binding legal effect. The first is that the ordinances govern necessary actions that are functionally related to directly or indirectly addressing and resolving the causes and effects of the state of emergency, while also taking into account that the actions must have a legitimate purpose, be socially justifiable, and be reasonable and proportionate in light of the quickest return to normal state (which will essentially meet the requirements of Articles 125 and 126 of the Constitution). The second restriction is regulated by Article 54 of the Constitution, which stipulates that restrictions on freedoms and rights during a state of emergency cannot be made in a way that is discriminatory against anyone based on their gender, race, skin colour, language, religion, national or social origin, property, or social status. The right to life, the prohibition of torture, inhu-*

man and degrading treatment and punishment, the legal certainty of criminal acts and punishments, as well as the freedom of belief, conscience, thought and religion cannot be restricted in a state of emergency."

The Court determined that the Covid-19 pandemic, which has been proclaimed a state of emergency, is closely related to the suspension of election operations, that it is consistent with the purpose of the emergency, and that it will continue until the emergency ends, that the electoral process through which the right to vote is exercised will continue from the day the state of emergency ends, and for this reason, it determined that the measure has a legitimate purpose, social justification is reasonable, and is proportionate to the goal that is to be achieved — returning to a normal state. For the Court: "*As a fundamental value of the constitutional order of the Republic, the protection of the lives and health of the citizens, the basis for which the state of emergency was declared and the measures taken under it, is inviolable and the highest values that are at the top of the civil and political freedoms and rights protected by the Constitution. As a result, the decision to postpone the polls due to the emergency situation is justified by the fact that protecting the lives and health of the people is of the highest priority… In light of the fact that the Parliament has been dissolved, members of the Parliament will have to be chosen by conducting elections, and the Republic of North Macedonia has also declared a state of emergency, according to the conclusion reached by the Court, the Government did not suspend the Parliament, as claimed in the initiative, but rather acted in accordance within its constitutional powers under emergency circumstances, which did not violate the constitutional provisions as cited by the petitioner in the initiative.*" (cited from **Resolution U.No. 42/2020** from 14 May 2020 by which the Constitutional Court did not initiate a proceeding for reviewing the constitutionality of the Decree with legal force on matters related to the electoral process („Official Gazette of the Republic of North Macedonia" no. 72/2020).

As a result, the Constitutional Court, applying the test of the legitimate aim, determined that the measures and restrictions that were directly related to the state of emergency brought on by the pandemic and that were intended to restore normalcy were reasonable, necessary, and proportionate and that they were not a matter in question, in contrast to those that were unrelated to the pandemic.

Therefore, with **Decision U.No.209/2020** of 23 September 2020, the Constitutional Court annulled the Decree with legal force on the application of the Law on Construction during the State of Emergency, which, in addition to other concerns, regulated matters relating to beach lease agreements. The Court held that: "*It is neither essential nor legitimate to regulate the interactions between the tenants of building sites adjacent to beaches. Breaching of rights and obligations of the tenants, as well as their powers and authority, through legal regulation through ordinances with legal force, and under the circumstances of a widespread epidemic in which the citizens on the territory of the Republic of North Macedonia find themselves, could have a basis if the restriction measures are proportionate and connected to the outcome in order to meet the defined health objectives to put an end of spreading the epidemic*", which was not the case with the contested decision, and as a result, the Court annulled it as being violating the Constitution.

What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

The Court uses the traditional proportionality test, aiming to take into account all factors, or phases, in the assessment of proportionality (adequacy, necessity, and proportionality in the more narrow sense of the word). As an illustration, in the case **U.No. 39/2006**, with a Decision from 6 June 2007, the Court repealed some of the provisions of the Law on Protection from Smoking, which forbade the sale of cigarettes in establishments more than 50 metres or less away from preschools and educational institutions. The Court unquestionably found that the prohibition on the sale of cigarettes in the locations covered by the contested legal norm is considered a restriction, i.e., an obstruction to the freedom of the market and entrepreneurship, but that the goal of the restriction is to protect the health of minors as a matter of public interest, which the Court found to be a legitimate objective: "*Moving on to the topic of establishing a balance between personal and societal interests, it is important to determine whether the imposition of this type of measure is actually necessary to such an extent, to protect*

the health of the people, i.e. minors, in a way that would justify the restriction of the market, i.e. the right of freedom in the market and entrepreneurship. According to the Court, the imposition of such a measure, as provided in the contested legal norm, is neither necessary nor actually beneficial in achieving the legitimate goal of protecting children, as it follows from the entirety of the Law on Smoking Protection, with the pronounced general measure in Article 5 of the Law on Prohibiting the sale of cigarettes and tobacco to people under the age of 18 in the retail trade, the legislator has already achieved its constitutional obligation to protect the health of the young population (children). As a result, the general prohibition stated in Article 5 of the Law has achieved the intended effect and purpose of the Law, rendering the additional restriction on the sale of cigarettes contained in the contested legal provision excessive, unnecessary, and only appearing as an economic restriction and obstruction of the right to freedom of the market and entrepreneurship. Therefore, the restriction in the contested provision cannot pass the test of proportionality with the legitimate objective and fails in achieving a fair balance between personal and public interest."

Another instance in which the Constitutional Court applied the proportionality test is the case **U. No.189/2012** (Decision from 25 June 2014) involving the right to leave the country, ensured by Article 27 of the Constitution. The Court repealed the provision in the Law on Travel Documents that allowed for the confiscation of a passport in the scenario that a person was forcibly returned to or expelled from another country for breaking its entry and stay regulations. The Court determined that: "*The measure itself is excessive and a restriction on the person's freedom of movement, or their ability to travel internationally. Given that the individuals to whom the contested measure is imposed have already been deported, i.e. forcibly returned to the Republic of Macedonia, which means that they are already suffering a certain consequence, It would be logical to forbid them from reentering the country, i.e. the countries whose entry and residence regulations they violated, but by those countries, not by their own country. Rather, the contested measure, which also includes the revocation of the passport for a year, fully deprives these individuals of their ability to leave their own country and travel to any other foreign country, and that measure is applied by their home country. Due to the automatic prohibition on individuals travelling to any location outside of the country, this measure raises questions from the perspectives of the principles of proportionality and the rule of law.*"

Does your Court go through every applicable limb of the proportionality test?

Refer to the example in the response to the earlier question.

Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

There are no such examples.

Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

From the analyzed case law, it cannot be drawn such a conclusion.

Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

Yes, the margin used by the ECtHR is equal to the margin of discretion recognized by the Constitutional Court when reviewing the constitutionality and legality of acts by legislative and executive authority that restrict the freedoms and rights of the citizen, notably when it comes to the application of the proportionality test, which is a direct result of the case law of the European Court of Human Rights.

Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

Yes, the European Court of Human Rights later reviewed several cases in which the Constitutional Court of the Republic of North Macedonia had rejected requests for the protection of freedoms and rights. In these cases, the court found that the rights of the Convention had been violated and ruled in favour of the applicants. One of those cases is **U.No. 75/2018,** in which a member of the Roma ethnic group alleged that as a minor, he had experienced racialized police aggression for which the prosecution had not carried out a successful investigation. He invoked protection against racial discrimination in the case before the Constitutional Court and requested the Court to annul the judgements of the regular courts that had rejected his claims that he had filed following the Law on Protection Against Discrimination. Following the request for the protection of freedoms and rights, the Constitutional Court did not apply a decision-making process based on merit, but instead, it rejected the case due to non-competence. In particular, the Constitutional Court determined that the petitioner had essentially asked the Court to act as an instance of a higher court and rule that certain court decisions were irregular and unlawful, and thus to begin reviewing their legality, whether the substantive law has been properly applied, which, according to the constitutional standard, is not within the competence of the Constitutional Court. The Constitutional Court indicated that: "The Constitutional Court of the Republic of Macedonia does not have the authority to serve as an instance higher court, in line with its constitutionally established jurisdictions, that will review the legality of the decisions of other judicial authorities, which led the Court to conclude that the requirements of Article 28 Paragraph 1 of the Rules of Procedure of the Constitutional Court of the Republic of Macedonia for rejecting the petition were properly met."

In contrast to the Constitutional Court, which did not conduct a substantive and legal review of the petition, The European Court of Human Rights accepted the application of the petitioner and determined that the alleged acts of police brutality and the lack of a thorough investigation violated Article 3 of the Convention. ((Application No. 173/17) Case X and Y v. North Macedonia; Decision Date: 5 November 2020)

Other peculiarities

How often does the issue of deference arise in human rights cases adjudicated by your Court?

The analysis of statistical data on the decision-making process of the Constitutional Court, resulting from the submitted petitions for the protection of rights and freedoms over the past few years led to the conclusion that judicial deference is frequently present in the constitutional case law of the Constitutional Court of the Republic of North Macedonia. In particular, the Constitutional Court handled 56 petitions for the protection of freedoms and rights between 2018 and 2022. In most cases, 40 petitions for the protection of freedoms and rights were rejected, 12 requests were denied, just 3 requests were approved, and a violation was found within the freedoms and rights guaranteed in the Constitution.

The Constitutional Court may reject a petition which it calls for the protection of a freedom or right that is outside of its jurisdiction of the rights over which it has immediate authority to decide according to Article 110 Indent 3. In particular, this article states that the Constitutional Court protects the freedoms and rights of the individual and citizen, including the freedom of conviction, conscience, thought and public expression of thought, political association and activity, as well as the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation. As a result, the Constitutional Court is normatively legally prohibited from preceding a review, i.e., the protection of other rights that are not covered by the cited constitutional provision of Article 110 paragraph 3, and this means that it has limited competence for the protection of only some of the constitutionally guaranteed rights, not all of them.

When deciding on petitions for the protection of freedoms and rights, the control of the Constitutional Court of the judgments of the regular courts is limited only to the matter of whether those judgments violated any of the constitutional rights of the citizen listed in Article 110 Indent 3 of the Constitution. The Constitutional Court does not review the legality of the actions of the courts and does not review the factual context the courts have created during the process of adjudication. The-

refore, if the petitioner makes reference in the request to an incorrectly or insufficiently established factual situation or an incorrect application of the substantive law by the regular courts, the Constitutional Court indicates that it is not in competence to act as an instance court and to review how a law has been applied by the courts and such petitions are rejected by the Court. The Constitutional Court rejects petitions where it determines that the party making the petition for the protection of freedoms and rights did so simply because it was dissatisfied with the outcome of the proceedings before the regular courts, that is if the party wants to make use of the intervention of the Constitutional Court to resolve the case in its favour.

Has your Court have grown more deferential over time?

This question cannot be answered with precision because an analysis of the trends in the cases before the Constitutional Court, particularly those involving petitions for the protection of freedoms and rights, reveals that in recent years an increasing number of cases have been decided on the merits by the Constitutional Court, as opposed to earlier times when the Constitutional Court rejected petitions for the protection of freedoms and rights in the largest number of cases for procedural reasons.

Does the deferential attitude depend on the case load of your Court?

Deference is not utilized as a tool for reducing the workload of the Court because it is unrelated to the volume of cases.

Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

Yes, the Rules of Procedure of the Constitutional Court explicitly address this possibility in Article 14 Paragraph 2, according to which during a review of the constitutionality, that is, the legality and constitutionality of a regulation or other general act, the Constitutional Court may review the constitutionality and legality of provisions or other general act that are not contested by the initiative.

Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

Yes (see the response to the previous question).

Уставен Суд на Република Северна Македонија

Форми и граници на судското воздржување: Случај со уставните судови

Несудски прашања и интензитет на воздржување
Во вашата јурисдикција, што се подразбира под поимот „судско воздржување (самоограничување)"

Поимот „судско воздржување" не е поблиску дефиниран во практиката на Уставниот суд на Република Северна Македонија, ниту пак во уставно-правната теорија и научните трудови на експертите од областа на уставното-право во Република Северна Македонија. За потребите на изготвувањето на одговорите на овој прашалник појдовна точка беше дефиницијата во воведниот дел на прашалникот според која судското воздржување е судска алатка (средство) создадено од страна на судиите за да ја подржат поделбата на власта и да се воздржат од интервенирање во работи (прашања) кои се сметаат дека се надвор од доменот на нивната стручност или легитимност да одлучуваат, кое што наоѓа особено своја примена во случаите кои се однесуваат на човековите права.

Дали постои спектар на самоограничување за вашиот Суд? Дали постојат сфери или утврдени зони на правна неодговорност или несудски прашања за вашиот Суд (пр. прашања поврзани со морални контроверзи, политички сензитивни прашања, социјално контроверзни прашања, распределба на ретки ресурси, значителни финансиски импликации за владата и сл.)?

Најчести области во кои Уставниот суд го применува судското самоограничување се надворешните работи и безбедноста на земјата, како и казнената политика, вклучувајќи ја амнестијата.

Надворешната политика се смета дека е во исклучив домен на извршната власт и таа не може да биде предмет на контрола од страна на Уставниот суд. Една од првите одлуки на Уставниот суд во која беше изразен ваков став е Решението У.бр.111/1993 од 10 ноември 1993 година со кое Уставниот суд ја отфрлил иницијативата со која се барала оценка на уставноста и законитоста на зачленувањето на Република Македонија во ООН под привремената референца "бивша југословенска Република Македонија". Судот констатирал дека не постојат процесни претпоставки за водење на уставно-судска постапка бидејќи не постои пропис односно општ акт со кој е изразена согласност за прием на Република Македонија во членство на ООН под привремено и провизорно име "бивша Република Македонија" и дека: „не се и не можат да бидат предмет на уставно-судска оцена одделните политичко-дипломатски дејствија и активности на Владата на Република Македонија, преземени во процесот на меѓународното признавање на Република Македонија, во својство на извршна власт во областа на меѓу народните односи, како преговарање и подготовка за конечна и компетентна одлука на надлежниот орган на државата, и дека „за евентуални негативни последици во врска со зачленувањето на Република Македонија во ООН под условите содржани во предлог-Резолуцијата на Советот за безбедност, се навлегува во прашањето на политичката одговорност, за која, согласно член 110 од Уставот, Судот, исто така, не е надлежен да одлучува".

Сличен став изрази Судот и во поглед на признавањето на други држави и влади што согласно член 91 алинеја 8 од Уставот е во исклучива надлежност на Владата на Република Северна Македонија. Судот повторно се повика на доктрината на политичко прашање во предметот У.бр.140/1999 од 14.06.2000 година со кое Уставниот суд ја отфрли иницијативата за поведување постапка за оценување уставноста на Одлуката за воспоставување на дипломатски односи помеѓу Република Македонија и Република Кина («Службен весник на РМ» бр.7/99). Подносителот сметал дека оваа одлука е спротивна на Уставот бидејќи ја склучила Владата која немала овластување за склучување на меѓународни договори и дека со неа биле повредени меѓународните обврски на државата која претходно имала воспоставени дипломатски односи со Народна Република Кина со што се обврзала да го смета Тајван како неделив дел од Народна Република Кина. При анализата на случајот Уставниот суд тргнал од природата на оспорената одлука како претпоставка за определување на надлежноста на Судот. При тоа,

Судот констатирал дека: „неспорно е дека според член 91 алинеја 8 и 9 од Уставот, Владата на Република Македонија има непосредно уставно овластување да признава држави и влади и да воспоставува дипломатски и конзуларни односи со други држави". Според оценка на Судот, актите со кои Владата ги остварува овие овластувања, имаат изразит карактер на акти со кои се води определена меѓународна политика во определено време и дека имаат политички карактер, независно од нивната форма. Последиците од тие акти во меѓународните односи на државата несомнено имаат и правен карактер, согласно чл. 2 од Виенската конвенција за дипломатски односи, но не претставуваат дел од внатрешниот правен поредок било како извори на правото (прописи), било како акти чија содржина е ограничена со правото, освен во поглед на надлежноста за нивно донесување. Оспорената одлука..... според Судот несоменено потпаѓа под означените политички овластувања на Владата од чл. 91 алинеја 8 и 9 од Уставот и таа претставува „израз на политичка волја на една држава, односно на нејзините овластени органи да воспостави дипломатски односи со друга држава, без притоа да добијат каракатер на пропис во внатрешниот правен поредок. Контролата на тој акт, според тоа, е можна само преку облиците на политичка контрола во парламентарната демократија".

Во друг предмет, Уставниот суд одби да ја оцени уставноста на Законот за ратификација на Договорот меѓу државите-страни во Северноатлантскиот договор и другите држави учесници во Партнерството за мир за статусот на нивните сили и Дополнителниот протокол со образложение дека во Уставот не е предвидена изречно надлежност на Уставниот суд за оценување на меѓународните договори. (Решение У.бр.178/2000 од 31 јануари 2001 година.

Неколку години подоцна друг подносител на иницијатива, повикувајќи се на претходно споменатото решение У.бр.178/2000, побара од Уставниот суд да ја оцени на уставноста на Основниот договор меѓу Република Македонија и НАТО за дејствување на НАТО мисии во Македонија од 24 декември 1998 година и Договорот за НАТО штаб со седиште во Скопје од 11 мај 1999 година. Подоситело сметал дека Уставниот суд не може да се повика на доктрината на политичко прашање и да одбие надлежност за оспорените договори, бидејќи тие имале карактер на прописи со кои Владата извршила упад во легислативната дејност на Собранието и го повредила Уставот.

Уставниот суд повторно укажал дека е „апсолутно ненадлежен да укинува или поништува меѓународни договори како акти на меѓународното право" додавајќи дека *„надлежноста на Уставниот суд да укине или поништи акт може да се воспостави само во однос на инструментите за влегување на одреден договор во правниот поредок на Република Македонија, како што е законот за ратификација на таков договор*, и дека Уставниот суд може со поништување на закон за ратификација или друг невалиден инструмент да спречи еден меѓународен договор да биде дел од внатрешниот правен поредок, но никако не може да интервенира во меѓународниот договор како таков.

Според Судот, фактот што тие договори влегле во сила во меѓународниот правен поредок со потпишувањето, не е фактор на нивно истовремено инкорпорирање и влегување во сила, во внатрешниот правен поредок. За Судот не бил спорен фактот дека оспорените договори не биле ратификувани и ниту објавени, но тој оценил дека она што се бара со иницијативата, излегува надвор од доменот на надлежноста на Уставниот суд бидејќи Судот нема надлежност да донесува утврдувачки и декларативни одлуки за тоа дали еден меѓународен договор е дел или не од внатрешниот правен поредок (Решение У.бр.77/2009 од 21 април 2010).

Уставниот суд со Решение У.бр.250/2009 од 23 декември 2009 година не повел постапка за оценување на уставноста на Законот за ратификација на Договорот за физичка демаркација на границата меѓу Република Македонија и Република Косово („Службен весник на Република Македонија" бр.127/2009). Подносителот на иницијативата (политичка партија) сметала дека со договорот се менувала границата на Република Македонија, поради што истиот требало да биде донесен со двотретиснко мнозинство гласови, а не со просто мнозинство. Судот оценил дека: „Уставниот суд нема уставна надлежност да го цени предметниот Договор за физичка демаркација на границата меѓу Република Македонија и Република Косово, чија согласност

со Уставот, Собранието на Република Македонија ја ценело во спроведената постапка на ратификација, а во која оспориениот закон е правилно донесен во согласност со точката 1 од Амандманот X од Уставот на Република Македонија".

Од најновата уставно-судска практика, како пример на судско воздржување во сфера поврзана со енергетиката и користењето на природните ресурси би можел да се наведе предметот У.бр.9/2021 и У.бр.25/2021 (решение од 20.04.2023). Уставниот суд ги отфрли иницијативите за поведување постапка за оценување на Законот за решавање на спорот помеѓу Владата на Република Северна Македонија и Макпетрол АД Скопје донесен во 2020 година, врз основа на кој беа окончани судските спорови помеѓу Владата и приватна компанија која врши дејност на снабдување со природен гас во врска сопственоста на гасоводниот систем на Републиката. Подносителите на иницијативите тврдеа дека со овој закон е повредено начелото на владеењето на правото и начелото на поделба на власта, бидејќи Собранието презело во своја надлежност прашање што спаѓа во облигационо-правни односи и што треба да се реши со судска или вонсудска спогодба или со пресуда. Уставниот суд не ги прифати наводите во иницијативите и истите ги отфрли. Имено, иако за уставните судии не беше спорно дека се работи за посебен и специфичен закон, решавачка околност при одлучувањето беше тоа што врз основа на законот по пат на спогодба се решиле несогласувањата и се окончаа постапките во врска со сопственичкиот спор за гасоводниот систем, со што се овозможило државата да ја задржи сопственоста врз преносниот систем со природен гас и да обезбеди натамошен развој на гасификацијата на Република Северна Македонија. Уставниот суд не се впушти во материјално правна оценка на законот бидејќи констатираше дека целта на законот е остварена и истиот се исцрпел во својата примена и иницијативите ги отфрли.

Дали постојат фактори што определуваат кога и како вашиот Суд би требало да се самоограничи (пр. културата и условите во вашата земја; историските искуства во вашата земја; апослутниот или квалифицираниот карактер на основното право за кое што станува збор; предметот на прашањето што е поставено пред Судот; дали предметот на случајот вклучува социјални услови и ставови што се менуваат?

Не постојат претходно утврдени фактори што определуваат кога и како Судот треба да се воздржи (самоограничи), туку тоа зависи од околностите во конкретниот случај и особено од предметот на прашањето што е поставено пред Судот.

Дали постојат ситуации во кои вашиот Суд се воздржал (самоограничил) поради тоа што немал институционално знаење и стручност?

При оценката на уставноста и законитоста, Уставниот суд на Република Северна Македонија ги цени и анализира оспорените закони и прописи во нивната севкупност, односно и во формална и во материјална смисла. Судот ја оценува не само нивната содржина, туку и постапката на нивното донесување. Меѓутоа, од ова правило понекогаш се отстапува кога станува збор за урбанистичките планови. Имено, Уставниот суд на Република Северна Македонија е еден од ретките уставни судови во регионот и пошироко во Европа кој одлучува за уставноста и законитоста на урбанистичките планови. Надлежноста на Уставниот суд во однос на овие акти произлегува од уставната одредба на член 110 алинеја 2, според која Уставниот суд одлучува не само за согласноста со Уставот на законите, како акти на Собранието, туку и за согласноста на другите прописи со Уставот и со законите. Во категоријата на други прописи спаѓаат и прописите што ги донесуваат органите на единиците на локалната самоуправа, како што се на пример урбанистичките планови. Во својата уставно-судска практика, Уставниот суд изградил став дека урбанистичките планови што ги донесуваат советите на единиците на локалната самоуправа претставуваат општи акти што имаат нормативен каракатер, односно уредуваат односи во сферата на урабанистичкото планирање на општ начин, и дека како прописи, подлежат на уставно-судска контрола. Во поглед на обемот на контрола на урбанистичките планови, во постарата[1488] уставно-судска практика доминираше ставот дека надлежноста на

1488 Во поновата уставно-судска практика, овој став на Судот се напушта така што Уставниот суд не се воздржува од навлегување во оценка на содржината на

Уставниот суд во поглед на урбанистичките планови е ограничена и се однесува исклучиво на постапката за донесување на урбанистичкиот план, а не и на неговата содржина. Меѓутоа, преку контролата на законитоста и на уставноста на правните аспекти на процедурата на нивното донесување, Уставниот суд обезбедува ефикасна заштита на уставниот принцип – уредувањето и хуманизацијата на просторот и заштитата и унапредувањето на животната средина и природата кои според член 8 став 1 алинеја претставуваат темелни вредности на уставниот поредок. Оттука, согласно ваквиот став на Уставниот суд, кога со иницијативата поднесена до Уставниот суд странката бараше Уставниот суд да ги преиспита планско-урбанистичките решенија во урбанистичките планови (како на пример, видот и намената на објекти, катност на објекти, планирана инфраструктура и сл.) Уставниот суд иницијативите ги отфрлаше поради ненадлежност со образложение дека прашањата покренати со иницијативата ги надминуваат надлежностите на Уставниот суд: „Од воспоставената судска практика на Уставниот суд на Република Македонија, произлегува дека Уставниот суд во однос на подзаконските акти од областа на просторното и урбанистичкото планирање (урбанистички планови, програми за поставување на урбана опрема итн.) е надлежен да ја оценува постапката за нивното донесување, но не и да ја оценува нивната содржина, што како стручно-техничко прашање е во надлежност на Министерството за транспорт и врски во фазата на давање согласност на овие подзаконски акти" (Решение У.бр.58/2017 од 13.12.2017, слично и во Решение У.број. 6/2012 од 7 март 2012).

Слично и во однос на Правилникот за стандарди за урбанистичко планирање кој исто така често пати се јавува како предмет на оценување во иницијативите поднесени пред Уставниот суд. Во однос на овој акт Судот завзел став дека: „Правилникот за стандарди и нормативи за урбанистичкото планирање претставува технички норматив кој се заснова на одредени научни и стручни мислења и искуства од областа на урбанистичкото планирање и кој се носи од страна на надлежниот министер по законски спроведена постапка" (Решение У.бр.12/2013 од 3 април 2013). Оттука Судот не се впушта во оценката на овој акт и барањето за негова контрола „не може да претставува основа за оценување на уставност и законитост на овој подзаконски акт, од причина што истите се однесуваат на стручни, а не на правни прашања, дотолку повеќе што претставуваат операционализација на законско утврдени овластувања" (Решение У.бр.19/2008 од 18 јуни 2008 година).

Дали постојат случаи во кои вашиот суд се воздржал поради тоа што постоел ризик од судска грешка?

Во одговор на ова прашање можат да се наведат оние ретки случаи во кои Уставниот суд, откако ќе изрази сомневање во уставноста на законот или прописот и ќе поведе постапка за оценување на нивната уставност, потоа не пристапува во втората фаза од постапката што опфаќа поништување или укинување на законот или прописот, туку постапката ја запира. Таква можност е предвидена во член 47 од Деловникот на Уставниот суд кој предвидува дека Судот ќе ја запре постапката ако се утврди дека поведувањето на постапката било засновано врз погрешна фактичка состојба; или ако по утврдувањето на фактичката и правната состојба на јавната расправа отпаднат основите за сомневање на уставноста и законитоста. (пр. тука спаѓаат ситуациите кога доносителот на актот во одговор на решението на Судот за поведување на постапка за оценување на уставноста на законот (или друг пропис) ќе укаже на определени факти или околности што Судот не ги имал предвид при одлучувањето, а кои што фрлаат поинаква светлина на предметот, односно кои се од такво влијание што доведуваат до тоа да отпаднат основите за сомневање во уставноста на оспорениот закон (или пропис). Во такви

урбанистичките планови (Одлука У.бр.23/2022 од 5 април 2023 со која Уставниот суд утврди дека деталниот урбанистички план не е во согласност со Генралниот урбанистички план поради тоа што со деталниот урбанистички план предвидел изградба на објекти со други намени од оние планирани со Генералниот урбанистички план за град Скопје); слично и со Решение У.бр.81/2022 од 12 јули 2023).

ситуации, укинувањето или поништувањето на законот очигледно би значело ризик од судска грешка, поради што Судот ја користи можноста од член 47 од Деловникот и ја запира постапката.

Дали постојат случаи кога вашиот суд се воздржал повикувајќи се на институционалниот или демократскиот легитимитет на донесувачот на актот?

Како пример може да се наведе Решението У.бр.40/2020 од 15 април 2020 со кое Уставниот суд не поведе постапка за оценување на уставноста на Одлуката за распуштање на Собранието на Република Северна Македонија, број 08-1421/1 од 16.02.2020 година („Службен весник на Република Северна Македонија" број 43/2020). Подносителот на иницијативата бараше оваа одлука да се поништи, бидејќи во услови на прогласена вонредна состојба поради кризата со КОВИД-19, не било можно да се спроведат предвремени избори за пратеници. Уставниот суд не ги прифати наводите на подносителот на иницијативата. Имено Судот констатирал дека оспорената одлука има основа во Устав, како од аспект на нејзиниот доносител, така и од аспект на содржината опфатена со истата. Судот при тоа посебно потенцира дека:„мнозинството од вкупниот број на пратеници се изјасниле Собранието да се распушти, што според Уставниот суд, вака изразената волја на мнозинството пратеници од вкупниот број на пратеници не е во спротивност со одредбите на Уставот" и дека „со оспорената одлука Собранието на Република Северна Македонија ја реализирало својата уставна можност за распуштање определена во член 63 став 6 од Уставот" поради што пред Судот не се постави прашањето за нејзината согласност со одредбите на Уставот.

Исто така, во досегашната уставно-судска практика, Уставниот суд никогаш не ја проблематизирал територијалната поделба на државата, односно измените на општинските граници. Теритиоријалната поделба се врши со закон што го носи Собрнието на Република Северна Македонија и кој по неговото донесување, многу често доаѓа пред Уставниот суд. Како пример го наведуваме Решението У.бр.195/2004 од 29.12.2004 година со кое Судот не повел постапка за оценување на уставноста на Законот за територијалната организација на локалната самоуправа во Република Македонија («Службен весник на Република Македонија» бр.55/2004). Подносителите сметале дека овој Закон не е во согласност со Уставот бидејќи не бил донесен со потребното мнозинство гласови во Собранието и дека при неговото донесување не биле земени предвид резултатите од локалните референдуми на кои граѓаните се изјасниле за непроменливост на општинските граници. Уставниот суд повикувајќи се на уставните одредби со кои е регулирана локалната самоуправа, укажал дека оспориот закон има уставна основа, бидејќи член 116 од Уставот предвидува територијалната поделба на Републиката и подрачјата на општините се утврдуваат со закон и препуштил регулирањето на сите прашања од овие области да биде во исклучива надлежност на Собранието на Република Македонија како претставнички орган на граѓаните и носител на законодавната власт на Републиката. Во однос на наводите од иницијативата дали во постапката за донесување на оспорените закони, законодавецот ги имал предвид резултатите од изјаснувањето на граѓаните на референдумите во единиците на локалната самоуправа, Судот укажал дека е фактичко прашање за кое Уставниот суд не е надлежен да одлучува.

„Колку повеќе законодавството се однесува на прашање од широко општествена политика, толку помалку судот е спремен да интервенира". Дали ова е стандард за вашиот суд? Дали вашиот суд ја дели концепцијата според која прашањата поврзани со политиката треба да се решаваат преку демократските процеси, бидејќи судовите не се избрани органи и тие немаат демократски мандат да одлучуваат по прашања поврзани со водењето политика?

Во уставно-судската практика можат да се најдат примери кои одат во прилог на тврдењето содржано во прашањето. Имено, најдобар пример во поткрепа на ставот дека прашањата поврзани со политиката треба да ги решаваат демократски избраните органи е прашањето за изборот на изборниот модел на државата. Имено, во предметот У.бр.2/2012 предмет на уставно-судска контрола беше Изборниот законик кој подносителот на иницијативата го оспори во целина како несогласен со Уставот, бидејќи, според негово мислење, тој не ја обезбедувал

рамноправноста и еднаквоста на правото на глас на граѓаните. Поради тоа, подносителот со иницијативата бараше Уставниот суд да го укине Изборниот закон во целина за да може да се донесе нов, со кој ќе се промени изборниот модел. Судот во решението со кое не поведе постапка за оценување на уставноста го наведе следното: „Фактот што подносителот на иницијативата тргнувајќи од негативните ефекти при математичката пресметка на утврдениот изборен модел во Република Македонија согледува повреда на уставните одредби и предлага промена на утврдениот модел, не може да претставуваат основи за изразување на сомнение од уставен аспект дека оспориениот Изборниот законик во целина не е во согласност со Уставот. Притоа, дали одреден изборен модел има повеќе или помалку негативни ефекти при математичката пресметка по спроведени избори во еден изборен период зависи од излезноста на граѓаните, бројот на политичките партии, коалицирање на политичките партии, а тоа не е прашање за кое треба да се произнесе Уставниот суд, туку е прашање на законодавната власт се до границите додека таквите ефекти не ги повредуваат уставните гаранци од сверата на граѓанските и политичките права утврдени во Уставот. Оттука, според Судот право е на законодавецот почитувајќи ги уставните гаранции за избирачкото право, начелото на еднаквост, начелото на политички плурализам и слободни и демократски избори како и имајќи ги предвид прифатените изборни модели во државите да го утврди изборниот модел".(Решение У.број. 2/2012 од 11 април 2012).

Освен изборот на изборниот модел и други прашања, односно акти што ги донесува Собранието во врска со изборите остануваат надвор од опфатот на Уставниот суд, како на пример решението на Собранието за распишување на предвремени парламентарни избори. Во Решението У.бр.168/2020 од 3 јуни 2020 година, Уставниот суд повикувајќи се на претходно воспоставената уставно-судска практика според која решенијата за распишување на изборите немаат карактер на пропис кој е подобен за уставно-судска оценка, нагласил дека: „Оспореното решение не содржи општи норми на однесување, односно не уредува односи на општ начин. Според неговата форма и доносител спаѓа во групата на правни акти што имаат поединечен карактер, односно со кои се одлучува за поединечни правни ситуации во кои примената на некој општ пропис се исцрпува еднократно. Оспореното решение според содржината не уредува правни односи на општ начин. Со оспореното решение не се вршат никакви измени и дополнувања на системот на општи норми кои се однесуваат на изборите, затоа што со него не се утврдуваат ниту условите за избор на пратеници во Собранието, ниту постапката за избор, ниту пак, на општ начин се утврдуваат времето, односно роковите за спроведување на изборите, а неговата функција треба да се исцрпува единствено во тоа тие општи норми што се однесуваат на роковите за изборите да ги примени на еден конкретен случај на избор на пратеници за Собрание на Република Северна Македонија, кој ќе се исцрпи со спроведувањето на изборните дејствија". Поради тоа Уставниот суд ја отфрлил иницијативата.

Дали вашиот суд го прифаќа генералниот принцип на воздржување при оценката на казнената филозофија и политика?

Да, Уставниот суд на Република Северна Македонија го прифаќа генералниот принцип на воздржување при оценката на казнената политика. Имено, Уставниот суд смета дека законодавецот е тој кој ја утврдува казнената политика, а таа се преточува во одребите од Крвичниот законик кој ги пропишува кривичните дела и кривичните санкции. Овој законик досега многу пати бил оценуван од страна на Уставниот суд. Основниот принцип од кој што поаѓа Уставниот суд во овие предмети е принципот на владеењето на правото и барањето за јасност и прецизност на правните норми. Судот укажал дека поради способноста со кривично правните норми да бидат засегнати мошне значајни човекови права, (пр. правото на слобода и безбедност на личноста, правото на фер судење, презумпцијата на невиност и сл.) истите треба да бидат јасни и прецизни. Во Решението У.бр.10/2008 од 27 февруари 2008 година, Уставниот суд ја оценувал уставноста на одредбата од Кривичниот законик со која било пропишано кривичното дело Несовесно работење во службата. Судот оценил дека за оценка на уставноста на оваа одредба: „е значајно дали таа ги содржи јасно и прецизно сите елементи врз основа на кои може да се утврди казнено-правната одговорност на сторителот за неговото противправно

поведение. Ова особено се однесува на дејствието на извршувањето кое, согласно начелото на законитост, мора да биде утврдено во законскиот опис. Со тоа се обезбедува само поведение што е соодветно со законскиот опис да може да се подведе под таа одредба и да се смета за кривично дело. Изборот на законодавно-правната техника при утврдување на описот на дејствието на извршување пак, е прашање за што одлучува законодавецот, а не Уставниот суд". Судот утврди дека оспорената одредба од членот 353-в од Кривичниот законик ги содржи сите основни елементи на кривичното дело несовесно работење во службата (сторителот на делото, дејствието на извршување, последицата и казната) и не го постави прашањето за нејзината согласност со одредбите од Уставот.

Доколку подносителот во иницијативата ги оспорува казнено-правните одредби исклучиво од аспект на висината на казната, во смисла на тоа дали таа е висока или не, во такви случаи вообичаено Уставниот суд го применува судското воздржување: „Во однос на наводите од иницијативата дека пропишаните казни биле несразмерни и претерано строги, Судот оцени дека пропишувањето на казните и висината на казните е прашање на законодавната казнена политика на државата, што не е прашање за кое е надлежен Уставниот суд (У.број. 273/2009 од 15 септември 2010).

Значи прашањето за видот и висината на казната за Судот е прашање на казнената политика што е во исклучив домен на законодавната власт.

Уставниот суд исто така не навлегува во оценка на казнено-правните норми доколку истите се оспоруваат исклучиво од аспект на нивната примена во конкретни случаи. Во предметот У.бр.87/2015 година (решение од 25 мај 2016 година), Уставниот суд го афирмираше правото на законодавниот орган казнената политика да ја преточи во правни норми и го нагласи правото и обврската на редовните судови тие норми да ги применуваат во конкретните случаи што ќе се појават пред нив укажувајќи на следново: „примената на принципот на поблагиот закон (lex mitior) е прашање на судот што го применува законот во конкретни случаи, а не е прашање на законодавецот, ниту пак на Уставниот суд. Уставната одредба од членот 52 став 4 забранува законите да имаат ретроактивно дејство, (со предвидениот исклучок за поповолниот закон), но од неа не произлегува обврска законодавецот во законите од кривично-правната област во преодните и завршните одредби задолжително да предвиди ретроактивна примена на поблагиот закон, од причина што тоа е прашање за коешто решава судот кој одлучува за казнено-правната одговорност и санкцијата на конкретен сторител на казниво дело. Значи прашањето за примената на поблагиот закон за сторителите на казниви дела е конкретно прашање што се оценува од случај до случај од страна на кривичниот суд, а не е прашање кое воопштено би го утврдувал законодавецот, ниту пак прашање кое што апстрактно би го проценувал Уставниот суд во постапката за оценката на уставноста".

Прашањето за амнестијата исто така се смета дека претставува дел од казнената политика на државата кој е надвор од опфат на Уставниот суд. Амнестијата била повеќе пати применувана во земјата по нејзиното осамостојување и речиси секогаш законите за амнестија биле оспорувани пред Уставниот суд, кој иницијативите ги отфрлал или утврдувал дека нема повреда на Уставот. Еден од последните примери е оној од 2020 кога Уставниот суд со Решенија У.бр.1/2019 и У.бр.6/2019 од 22 јануари 2020 година, не поведе постапка за оценување на уставноста на Законот за амнестија („Службен весник на Република Македонија" бр. 233/2018), во целина. Судот укажал дека во Законот за амнестија, законодавецот го детерминирал видот на амнестијата, а прашањето од гледиштето на Уставот не е дали Уставниот суд или некој друг, смета дека треба или не треба, токму лицата опфатени со Законот да бидат амнестирани, да не бидат амнестирани или и други да бидат амнестирани, (Уставниот суд не може да се стави на местото на Собранието и да ја врши неговата улога), туку дали имало уставно овластување Собранието за тоа што го направило или немало. Судот нагласил дека: „уставното овластување Собранието да дава амнестија, кое истовремено подразбира и негово право да го определи степенот односно за кои се однесува и за кои не се однесува амнестијата во контекст на пропишаното во Законот и да ја одреди категоријата на лицата кои ќе бидат опфатени со амнестијата, односно

лицата на кои амнестијата нема да се однесува, пред Судот не може да се постави прашањето за согласноста на оспорените одредби од Законот за амнестија, со одредбите на Уставот.

Можно е да постојат околности во кои владата не може да открие информации на Судот, особено во контекст на националната безбедност вклучувајќи ги и службите за разузнавање. Дали вашиот суд се воздржал повикувајќи се на причини поврзани со националната безбедност.

Уставниот суд не утврдил несогласност со уставното начело за еднаков пристап на граѓаните при вработувањето во државните органи на одредбата од Законот за Агенцијата за национална безбедност со која било предвидено дека кандидатот за директор, заменик-директор или работник во Агенцијата не смее да има државјанство на друга држава (Решение во предметот У.бр.112/2019 од 24 јуни 2019 година). За Судот решавачки критериум при оценката на уставноста на оваа одредба биле „надлежностите и специфичностите на Управата за безбедност и контраразузнавање како посебен орган кој ги извршува работите на системот на државната безбедност кои се однесуваат за заштита од шпионажа, тероризам или други активности насочени кон загрозување или уривање на демократските институции утврдени со Уставот на Република Северна Македонија со насилни средства, како и заштита од потешки форми на организиран криминал". Судот исто така укажал и на сензитивноста на предметот на уредување на овој закон, како и на сериозноста на полето на делување, односно надлежноста на Агенцијата за национална безбедност, така што спорното законско уредување е предуслов за успешно функционирање на Агенцијата во функција на заштитата на безбедноста на државата и обезбедува непристрасно и објективно вршење на работните задачи на работните места. Судот го афирмирал правото на законодавецот да ги утврди поблиските критериуми за вработување во Агенцијата за национална безбедност „со цел да се создадат услови за постигнување на повисок степен на доверба, ефикасно и отчетно функционирање на Агенцијата и истовремено би се исклучиле можностите од појава на елементи на сомнение со што вработените би биле недостојни за вршење на работата којашто е поврзана со откривање и спречување на активности што се поврзани со безбедносни закани и ризици за националната безбедност на државата".

Од истите причини и со истото образложение Уставниот суд подоцна со Решение У.број. 122/2019 од 23 септември 2020 ја отфрлил иницијативата на лице вработено во Управата, кое поради примената на оспореното ограничување го загубило работното место во агенцијата и било прераспределено на друго работно место во Министерството за внатрешни работи.

Во предмет од постарата уставно-судска практика (Решение У.бр.84/2001 од 14 ноември 2001) Судот ја оценувал уставноста на одредбите од Законот за набавување, поседување и носење оружје со кои се уредувале околностите под кои надлежниот орган можел да одбие да издаде дозвола за набавка и носење на оружје. Судот оценил дека: „природата на прашањето за поседување и носење на оружје е таква што го прави нужно постоењето на определено дискреционо овластување на органот во зависност од околностите врзани за секое поединечно барање и од тој аспект законските ограничувања за поседување на оружје истовремено се и законски ограничува на дискрецијата на надлежниот орган, што во целина влијае на обезбедување на законитоста при одлучувањето" и дека пропишувањето на околностите за одбивање на барањето за поседување оружје „се легитимни основи во чии граници може да се движи дискрецијата на надлежниот орган и обезбедуваат законитост во одлучувањето за тоа прашање, со што се исполнува елементарното барање на принципот на владеење на правото. Во тој контекст, поранешната осудуваност на граѓанинот, актуелното водење на казнена постапка и оценката на органот за можна злоупотреба на оружјето, не може да се сметаат како основи со кои се повредуваат презумпцијата на невиност и кредибилитетот на личноста". Судот сметал дека одмерувањето на влијанието на поранешната осудуваност за определени казниви дела е сразмерен на генералната цел на Законот да се овозможи поседување оружје кога за тоа постои оправдана потреба и кога нема импликации врз општата безбедност и не го поставил прашањето за уставноста на законските одредби.

Во предметот У.бр.2/2004 (решение за отфрлање на иницијативата од 19.05.2004 година) Уставниот

суд не се впуштил во оценка на уставноста и законитоста на одредбите од Националната концепција за безбедност и одбрана («Службен весник на Република Македонија» бр.40/2003) со кои бил основан Управувачки комитет како тело за проценка и донесување одлуки во врска со безбедноста на Републиката во случаи на криза и кризни ситуации со кој раководи претседателот на Владата и во кој членуваат определени министри. Подносителот сметал дека овој акт е во спротивност со Уставот бидејќи Уставот не ги познавал термините кризна состојба и криза, туку постоела само воена и вонредна состојба и дека со раководењето на Управувачкиот комитет преку претседателот на Владата се вршела непринципиелна поделба на функцијата меѓу претседателот на Републиката, како врховен командант на вооружените сили и претседател на Советот за безбедност на Република Македонија (член 86 од Уставот) и претседателот на Владата како носител на другата извршна власт, а со самото тоа и до ограничување на ингеренциите на Врховниот командант и претседателот на Советот за безбедност на Република Македонија. Уставниот суд„тргнувајќи од содржината на Националната концепција за безбедност и одбрана, како основен документ на Република Македонија во областа на безбедноста и одбраната со кој се определуваат ставовите и се искажуваат погледите на Република Македонија за нејзините национални интереси, нејзиното безбедносно опкружување, политиката на националната безбедност како и целите, насоките, областите и инструментите за нејзиното остварување и погледите и ставовите во однос на одбраната“ оценил дека овој документ не е пропис во смисла на членовите 51 и 110 од Уставот и дека не подлежи на уставно судска оцена“.

Имајќи ја предвид улогата на судовите како чувари на Уставот, дали тие треба да се мешаат повеќе во политиките (применувајќи по строга контрола) кога владата е пасивна во воведување на реформи поврзани со правата?

Реформите во сферата на судството кои имаат за цел подобрување на заштитата на човековите слободи и права, со различен интензитет, но постојано и континуирано се одвиваат во целиот период по осамостојувањето на Република Северна Македонија и имаат за цел приближување и усогласување на нејзиното законодавство и практика со стандардите на Европската Унија. Во рамките на тој процес, бројни закони од сферата на судството беа менувани и дополнувани, како што се Законот за судовите, Законот за Судскиот совет, Законот за Советот на јавните обвинители, Законот за Академија за судии и јавни обвинители, Законот за платите на судиите, законите со кои се уредуваат постапките пред судовите итн. Меѓутоа, Уставниот суд не е дел од правосудниот систем и од судската власт, ниту пак е фактор во процесот на реформи во судството. Судот не може директно да влијае во тој процес во смисла да иницира во кој правец да се движат реформите, бидејќи тоа претставува прашање на политиката за што е надлежна Владата на Република Северна Македонија. Секако, законите и другите прописи што ги донесува Собранието, Владата и другите државни органи во рамките на овие реформи можат да бидат предмет на уставно-судска контрола, така што влијанието на Уставниот суд е посредно и индиректно и се остварува по донесувањето и влегување во сила на законите што се резултат на судските реформи. Но, и во случај кога Уставниот суд наоѓа основи да интервенира во законите од оваа сфера, тој нема овластување да му постави рок на законодавецот во кој тој би бил должен да го донесе или измени спорниот закон, ниту пак е овластен да му укаже на законодавецот како би требало да гласат законските одредби, со што практично Уставниот суд не може да влијае директно врз процесот на реформи на законодавството од областа на судството. Уставниот суд, исто така, нема никаква улога ни учество во уставните реформи и нема надлежност да ги оценува уставните амандмани, ниту пред, ниту после нивното усвојување од страна на Собранието.

Доносител на одлуките (актите)

Дали вашиот Суд покажува повисок степен на воздржување во однос на актите на Собранието во споредба со актите на извршната власт. Дали вашиот Суд се воздржува во зависност од степенот на демократската одговорност на оригиналниот донесувач на одлуките/законите?

Анализата на уставно-судската практика не дава доволно основи за да може да се заклучи

дека Уставниот суд покажува поголема воздржаност во однос на актите донесени од страна на Собранието, споредено со актите што ги носат органите на извршната власт. Имено, постапката пред Уставниот суд започнува со поднесување на иницијатива за поведување постапка за оценување на уставноста на закон и уставноста и законитоста на пропис или друг општ акт која може да ја поднесе секое физичко или правно лице (член 12 од Деловникот на Уставниот суд). Но, и Уставниот суд може по сопствена иницијатива за поведе постапка за уставно-судска контрола (член 14 став 1). При тоа, подносителот на иницијативата и донесувачот на оспорениот акт се учесници во постапката пред Уставниот суд. Својството на доносителот на актот не игра улога при одлуката на Судот дали во однос на определен акт ќе поведе постапка за оценување на уставноста и/или законитоста или не, ниту пак постапката пред Уставниот суд се разликува во зависност од тоа кој орган е доносител на актот. Основен критериум при одлучувањето е природата и содржината на оспорениот акт, односно фактот дали оспорениот акт претставува општ акт од нормативна природа, односно пропис кој на општ начин ги уредува односите или пак се работи за поединечен акт. Ова претставува основен критериум за определување на надлежноста на Уставниот суд за оценка на уставноста и законитоста на оспорениот акт, при што општите акти односно прописите подлежат на уставно-судска оценка, додека пак поединечните акти можат да бидат оспорени само пред редовните судови, но не и пред Уставниот суд. При одлучувањето за суштината на работата, главен критериум од кој што паѓа Уставниот суд при оценката на уставноста на законот односно прописот претставува неговата содржина, а не фактот кој е доносител на актот. При оценката на уставноста и/или законитоста на оспорениот акт Уставниот суд по правило се движи во рамките на барањето поставено со иницијативата, но тој не е врзан со причините истакнати во иницијативата. Согласно член 14 став 2 од Деловникот на Уставниот суд, судот може да ја оценува уставноста и законитоста и на одредбите од прописот или другиот општ акт што не се оспорени во иницијативата. Судот може да го оценува прописот и од други причини кои не се наведени од страна на подносителот.

Во уставно-судската практика постојат случаи кога пред Судот била поднесена иницијатива за оценување на подзаконски акт донесен од страна на извршната власт, но Судот во текот на постапката, оценувајќи дека и законскиот основ за донесување на оспорениот подзаконски акт е спротивен на Уставот, по сопствена иницијатива повел постапка за оценување и на Законот и ги укинал спорните одредби (Решение У.бр.208/2001 од 22 мај 2002 и Одлука У.бр.208/2001).

Каква тежина и придава вашиот Суд на историјата на донесување на законот. Дали, за судската проценка на согласноста на актот со човековите права, е воопшто релевантно и колку е релевантно, тоа што прашањето било разгледувано од страна на Парламентот?

Судот води сметка за историјата на донесување на законот, и секогаш кога пред него е поднесена иницијатива со која се оспорува некој закон донесен од страна на Собранието, Уставниот суд бара од Собранието тоа да достави мислење по повод поднесената иницијатива (член 18 од Деловникот на Уставниот суд). Ова произлегува и од фактот што член 13 од Деловникот на Уставниот суд, предвидува дека подносителот на иницијативата и донесувачот на оспорениот акт се учесници во постапката пред Уставниот суд, така што со барањето на мислење, се овозможува во постапката пред Уставниот суд да се слушне и мислењето на доносителот на актот, односно на Собранието како законодавен орган. Уставниот суд создаде практика при анализата на иницијативата во претходната постапка, секогаш кога е оспорен закон, освен мислење од Собранието, да се бара и Предлог-законот со образложението со цел да се видат кои биле причините од кои се раководел законодавецот при донесување на оспорениот закон и какви цели треба да се постигнат со предложените законски решенија. Ова е мошне значајно кога се работи за закони кои се однесуваат директно на остварувањето на слободите и правата на граѓаните, особено во случај кога со законите се предвидуваат определени ограничувања на начинот на остварување на правата. Во таков случај, увидот во законодавната историја му помага на Уставниот суд да ја оцени легитимната цел на законот, како еден од чекорите во примената на тестот на пропоционалност. Судот понекогаш и во самата одлука или решение по повод поднесената иницијатива ги цитира причините наведени во Образложението на Предлог законот поради кои истиот бил донесен.

Дали Уставниот суд утврдува дали доносителот на актот го оправдал неговото донесување или дали и Судот би донел таква одлука/акт доколку тој би бил во позиција на доносител на актот?

Оценката на Судот е ограничена на оценка на причините за донесување на законот истакнати од доносителот на актот.

Дали вашиот Суд се воздржува во зависност од обемот во кој одлуката или мерката биле предмет на исцрпна расправа во поглед на нивната согласност со основните права? Колку длабока треба да биде законодавната расправа на пример, за да Уставниот суд и даде евентуално тежина?

Дебатите што се водат во Собранието на Република Северна Македонија во текот на постапката за донесување на законот по правило немаат влијание врз постапката и одлучувањето на Уставниот суд. Уставниот суд може, доколку оцени за потребно, во претходната постапка, по приемот на иницијативата да побара од Собранието да му ги достави стенограмските белешки од седниците на Собранието на кои се расправало за законот што е оспорен пред Уставниот суд, но тоа нема влијание врз одлучувањето на Уставниот суд и Судот не се осврнува на ова прашање во конечната одлука. Во 2020 година, Уставниот суд го укина во целина Законот за спречување и заштита од дискриминација кој беше донесен во мај 2019 година после долги и сериозни дебати во Собранието и во јавноста воопшто и со кој беа проширени основите за кои граѓаните можат да бараат заштита од дискриминација, како на пример сексуалната ориентација и родовиот идентитет. Причина за укинувањето според Уставниот суд беше пропуст во постапката за неговото донесување, односно поради тоа што Законот не бил донесен со потребното мнозинство, по второто разгледување од страна на Собранието откако првобитно претседателот на Републиката го искористи правото на вето и одби да го потпише указот. (Одлука У .бр.115/2019 од 14 мај 2020 година). Судот изрази став дека: „од причина што бил повторно ставен на гласање по претходно даденото вето од претседателот на Републиката, ...во тој случај законот добива поголем легитимитет и истиот треба да се донесе со апсолутно мнозинство гласови како што предвидува член 75 став 3 од Уставот, норма која што според оценката на Судот е императивна правна норма".

Инаку, оваа одлука на Уставниот суд наиде на голем број критики во јавноста од причина што со неа беше создадена правна празнина во една мошне значајна област, а тоа е заштитата на граѓаните од дискриминација бидејќи граѓаните беа оставени без правен основ и без механизам за заштита од дискриминација. Таа одлука беше донесена во специфични услови на прогласена вонредна состојба поради глобалната пандемија од коронавирусот, во услови на постоење на техничка Влада и распуштено Собрание, па поради оваа состојба требаше да се спроведат нови парламентарни избори и законот одново да биде донесен со потребното мнозинство.

Поинаков пристап, кој може да се толкува како форма на судско воздржување е случајот со Законот за управните спорови („Службен лист на СФРЈ" бр. 4/77 и 36/77) кој датираше од времето на поранешната Социјалистичка Федеративна Република Југославија. Уставниот суд со Решение У.бр. 43/1998 од 3 јули 2002 година поведе постапка за оценување на уставноста на Законот во целина наоѓајќи дека истиот не е во согласност со новодонесениот Устав по осамостојувањето на Република Македонија. Но, за да се избегне настанувањето на правна празнина и да не се лишат граѓаните од правен лек во областа на судската контрола на управните акти, Уставниот суд го одложи конечното одлучување по предметот, се до донесувањето на новиот Закон за управни спорови и во 2007 година ја запре постапка за оценување на уставноста на законот. (Решение за поведување постапка У.бр.43/1998 од 3 јули 2002; Решение за запирање на постапката У.бр.32/1998 од 20 мај 2007)

Дали вашиот Суд анализира дали и спротивните ставови биле целосно застапени во собраниската дебата при усвојување на мерката? Дали е доволно да има обемна дебата за генералните прашања на законот или мора да има потаргетиран фокус за тоа какви се импликациите врз правата?

Судот не анализира дали во собраниската дебата биле целосно дискутирани сите гледишта

поврзани со законот/мерката.

Дали фактот што актот/одлуката ја донел законодавецот и после јавни консултации или јавни дебати е решавачки доказ за демократскиот легитимитет на одлуката?

Се разбира дека фактот што некој закон или одлука ги донело Собранието како носител на законодавната власт има големо влијание за демократски легитимитет на законот/одлуката. Но, тоа сепак не го спречува Уставниот суд да врши уставно-судска контрола на таквиот акт/одлука, и доколку најде дека истиот е во спротивност со Уставот, да го поништи или укине, бидејќи тоа произлегува од уставната позиција на Уставниот суд како чувар на уставноста и контролор на законодавната власт.

III. Опсег на правата, законитост и пропорционалност

Дали некогаш вашиот Суд се воздржал во фазата на дефинирање на правото, со тоа што дал тежина на владината дефиниција на правото или примената на таа дефиниција на фактите на случајот?

Не.

Дали природата на основното право влијае врз степенот на судско воздржување? Дали Вашиот Суд ги смета определени права или определени аспекти на правата како поважни и дека поради тоа тие заслужуваат поригорозна контрола од другите?

Генерално не може да се каже дека степенот на воздржување на Уставниот суд зависи од природата на основното право за кое што станува збор. Но, во судската практика може да се сретнат примери кои укажуваат дека Уставниот суд, во однос на определени права, при уставно-судската контрола на релевантните закони во кои тие права се уредени, постапува доста внимателно и строго, особено инсистирајќи на барањето за јасност и прецизност на правните норми или пак на определени гаранции на фундаменталните права. Така на пример, во однос на притворот како најстрога мерка за обезбедување присуство на обвинетиот во кривичната постапка, бидејќи со неа се ограничува слободата како основно човеково право кое што е нераскинливо поврзано со човековата личност . Со Одлуката У.бр.34/2005 од 31 мај 2006 Уставниот суд ги укина одредбите за задолжителен притвор за кривичните дела за кои е пропишана казна доживотен затвор. Судот оцени дека со обврската судот да изрече мерка притвор за овие кривични дела, само поради тежината на казната доживотен затвор, судијата е оневозможен врз основа на своето слободно судиско уверување и сестрана и грижлива оцена на фактите и доказите да оценува дали постојат основите за определување притвор утврдени во Законот за кривичната постапка. Во образложението на Одлуката Судот укажа дека со одредбата за задолжителен притвор се изместува уставната позиција на судот да одлучува за потребата и основаноста на притворот како најстрога мерка за обезбедување присуство на обвинетиот во кривичната постапка, а законодавецот преку оваа императивна норма го обврзува судот само формално да донесе решение за притвор. Утврдувајќи обврска за судот задолжително да определи мерка притвор, само затоа што Законот императивно тоа го наложува, значи дека законодавецот е тој кој за конкретни кривични дела одлучил за мерката притвор, а не судот, поради што Судот утврди дека со оваа одреба се повредува уставното начело на владеењето на правото, поделбата на власта и правото на презумпција на невиност.

Друга област во која Уставниот суд применува доста строга контрола на уставноста на законите е сферата на правото на приватност, следењето на комуникациите и заштитата на личните податоци. Уставниот суд при анализата на законските одредби со кои се уредува материјата на следење на комуникациите во однос на уставните одредби за заштита на приватноста укажува на неопходноста од јасност и прецизност на законските одредби со кои се уредува овластувањето на државните органи за следење на комуникациите: „Одредбите со кои се уредува областа на следење мора да бидат во доволна мера прецизни и предвидливи, не трпат импровизации и толкување за да не преставуваат закана за следење на секого на кого тој закон може да се примени и да не навлезат на неуставен и незаконит начин во почитувањето на

правото на коресподенцијата и слободата на општење на граѓаните." (Одлука У.бр.139/2010 од 15 декември 2010 со која Уставниот суд поништи повеќе одредби од Законот за електронските комуникации).

Дали постои скала (рангирање) на јасност во случаите на оценка на уставноста на законите? Како одлучуваата за тоа дали законот е јасен? Кога ја применувате максимата ***In claris non fit interpretatio*** **canon?**

Во горенаведената Одлука за Законот за електронски комуникациите Судот укажа дека: „Иако методите и техниките за прислушнување се тајни и имаат за цел откривање на содржината на комуникацијата како би се спречиле или откриле кривични дела, би се овозможило водење кривична постапка или кога тоа го бараат интересите на безбедноста и одбраната на Републиката, Судот оцени дека оспорените одредби од Законот не содржат доволно гаранции против евентуална злоупотреба од страна на овластениот орган. Ова од причина што одредбите со кои се уредува областа на следење мора да бидат во доволна мера прецизни и предвидливи, не трпат импровизации и толкување за да не преставуваат закана за следење на секого на кого тој закон може да се примени и да не навлезат на неуставен и незаконит начин во почитувањето на правото на коресподенцијата и слободата на општење на граѓаните. Или поконкретно, законската регулатива која се однесува на примена на мерките за следење на комуникациите треба да содржи кристално јасна престава за околностите и условите под кои јавната власт е овластена да прибегне кон употреба на ваква мерка, начинот на кој се прави следењето, случаите во кои следењето на комуникациите има своја оправданост, органот кој дава наредба за следење на комуникациите. Сето останато оди во правец на неограничена моќ и е во спротивност со принципот на владеењето на правото". Во тој предмет Уставниот суд утврди дека поради непрецизноста на употребените изрази, недоуреденоста по однос на условите и процедурата во која може да дојде до отстапување на загарантираното уставно право на приватност, преставуваат реална закана од самоволно и произволно мешање на државните органи во приватниот живот и преписката на граѓаните кое што може негативно да се одрази на честа и угледот на граѓаните без за тоа да има реална основа во Уставот и законите.

Спротивно на ова, Уставниот суд утврдил дека законските одредби од Законот за внатрешни работи со кои се уредува употребата на огнено оружје од страна на припадниците на полицијата се доволно јасни и прецизни и дека не ја доведуваат во прашање заштитата на правото на живот од член 10 на Уставот. Така со Решението У.бр.10/2006 од 22 март 2006 година, Уставниот суд не повел постапка за оценување на уставноста на оспорените одредби утврдувајќи дека: „употребата на средствата за присилба, вклучувајќи го и огненото оружје, во со закон строго определени граници и конкретно пропишани постапки, не може да се спротивставува на уставната неприкосновеност на правото на живот, физичкиот и моралниот интегритет на човекот. Од анализата на содржината на оспорената законска одредба произлегува дека истата не е во колизија со основните слободи и права на човекот и граѓанинот, од причина што во истата јасно и прецизно се наведени случаите во кои овластеното службено лице ќе употреби огнено оружје, односно децидно се наведени условите под кои може да се употреби истото од страна на овластено службено лице на Министерството за внатрешни работи. Имено, во оспорената законска одредба употребата на огненото оружје од страна на овластеното службено лице е дозволено само ако е нужно во наведените случаи. Оттука, следува логичен заклучок дека не секогаш употребата на огнено оружје од страна на овластените службени лица значи повреда на загарантираната неприкосновеност на животот на човекот, а особено не тогаш кога тоа било нужно да се заштитат интересите на граѓаните и општеството од криминалот".

Барањето за јасност и прецизност на правните норми Уставниот суд го смета како составен дел на начелото на владеењето на правото што е темелна вредност на уставниот поредок на Република Северна Македонија според член 8 алинеја 3 од Уставот. Во предметот У.бр. 87/2015 од 25 мај 2016 година Уставниот суд ја оценувал уставноста на неколку одредби од Законот за прекршоците („Службен весник на Република Македонија" бр.124/2015) и укажал дека: „Принципот на владеењето на правото го обврзува законодавецот да конципира прецизни,

недвосмислени и јасни норми, бидејќи само таквите правни норми можат да претставуваат солидна основа за постапување од страна на државните органи, што значи дека само јасните и прецизните норми ја гарантираат правната сигурност на граѓаните како составен дел на принципот на владеењето на правото. Владеењето на правото, подразбира доследна примена на законските прописи, кои треба да се општи, точно одредени и недвосмислени формулирани правила. Ова особено е значајно за сферата на казненото право со оглед на репресивната природа на казнено-правните санкции и нивниот потенцијал да навлезат во основните човекови права".

Како пример од поновата уставно-судска практика ја наведуваме Одлуката У.бр.109/2022 од 23 мај 2022 во која Уставниот суд на следниот начин го интерпретирал принципот на владеењето на правото и барањето за прецизност и јасност на правните норми: „Принципот на владеењето на правото во еден правен систем или поредок треба да се остварува преку доминација на правната норма која треба да биде јасна, прецизна и разбирлива, која нема да остава можност за различно толкување и нејзина различна примена или можност за правна несигурност на граѓаните. Достапноста на правните норми за адресатите е едно од основните барања на темелната вредност на уставниот поредок - владеењето на правото и принципот на правна сигурност како нејзин составен елемент. Ова има за цел оние чии права и обврски се утврдени со нормите, да бидат запознаени со нивната содржина и врз основа на тоа, да го прилагодат своето однесување. Законодавецот е обврзан да конципира прецизни, недвосмислени и јасни норми коишто ќе ја гарантираат правната сигурност на граѓаните како негов составен дел, што не е сторено во конкретниот случај од страна на законодавецот."

Колкав е интензитетот на контролата на вашиот Суд при примената на тестот за легитимна цел?

Не постои однапред утврдена постапка, ниту однапред утврдени критериуми врз основа на кои се утврдува интензитетот на контролата на Уставниот суд врз актите на законодавната и извршната власт, бидејќи тоа зависи од карактеристиките и специфичностите на секој конкретен случај и од определени фактори како што се на пример, квалитетот на законот што е предмет на оценка, аргументите истакнати од страна на доносителот на актот со кои се оправдува донесувањето на оспорените одредби, предметот на самиот закон и сл. Во случаите кога предмет на оценка се ограничувањата на определени права на граѓаните Уставниот суд го применува тестот на пропорционалност со цел да утврди дали постои легитимна цел за донесување на таквите одредби и дали истите имаат објективно и разумно оправдување, односно дали се пропорционални со целите што доносителот на актот сакал да ги постигне.

Принципот на пропорционалност беше особено применуван од страна на Уставниот суд во предметите поврзани со пандемијата со Ковид – 19 кои се однесуваа на мерките и ограничувањата на слободите и правата што беа преземени во услови на вонредна состојба. За Уставниот суд не беше од уставно-правен аспект спорно овластувањето на Владата да донесува уредби со законска сила, но укажа дека тоа овластување не е неограничено и не смее да се однесува особено на оние права кои не можат да бидат дерогирани во какви и да било околности (член 54 ставови 3 и 4 од Уставот): „....при постоење на вонредна состојба, Владата може да регулира поинаку одредени прашања коишто се уредени со важечки закони, може да одредува нови рокови, може да ги менува постојните и да носи нови решенија. Но ваквите овластувања не се неограничени. Имено, Уставот има две уставни ограничувања на овластувањето на Владата да носи уредби со законска сила. Првото е, уредбите да уредуваат неопходни мерки кои се во функционална врска со директно или индиректно соочување и надминување на причините и последиците од вонредната состојба, со водење сметка мерките да имаат легитимна цел, општествена оправданост, да бидат разумни и пропорционални во светло на што побрзо враќање во редовна состојба (со што во суштина ќе бидат задоволени членовите 125 и 126 од Уставот). Второто ограничување е уредено во членот 54 од Уставот, чие задоволување бара ограничувањето на слободите и правата во вонредна состојба да не може да биде дискриминаторско по основ на пол, раса, боја на кожа, јазик, вера, национално или социјално потекло, имотна или општествена положба. Во вонредна состојба не може да

се ограничат правото на живот, забраната на мачење, нечовечко и понижувачко постапување и казнување, правната одреденост на казнивите дела и казните, како и на слободата на уверувањето, совеста, мислата и вероисповеста".

Судот утврди дека прекинот на изборните дејствија е тесно поврзан со прогласената вонредна состојба – епидемија од Ковид -19, дека е во согласност со причината за вонредната состојба и дека трае до завршувањето на вонредната состојба – односно дека изборниот процес преку кој се остварува избирачкото право продолжува од денот на престанок на вонредната состојба поради што оцени дека мерката има легитимна цел, општествена оправданост, разумна е и пропорционална на целта што се сака да се постигне – враќање во редовна состојба. За Судот: „заштитата на животот и здравјето на граѓаните заради кои е и прогласена вонредната состојба и мерките кои се преземаат во рамките на истата, се неприкосновени и највисоки вредности кои се наоѓаат на врвот на граѓанските и политичките слободи и права заштитени со Уставот, како темелна вредност на уставниот поредок на Републиката. Поради тоа, одложувањето на одржувањето на изборите, заради вонредната состојба, има свое оправдување токму во заштитата на животот и здравјето на луѓето како највисока вредност...Оттука, во услови кога Собранието е распуштено и се распишани избори за пратеници во Собранието, а дополнително е прогласена вонредна состојба на територијата на Република Северна Македонија, Судот оцени дека Владата, со донесувањето на оспорената уредба со законска сила за прашања поврзани со изборниот процес, не го суспендирала Собранието, како што се наведува во иницијативата, туку постапила во согласност со нејзините уставни овластувања во услови на вонредна состојба, со што не ги повредила уставните одредби на кои се повикува подносителот на иницијативата (од Решението У.бр. 42/2020 од 14 мај 2020 со кое Уставниот суд не поведе постапка за оценување на уставноста на Уредбата со законска сила за прашања поврзани со изборниот процес („Службен весник на Република Северна Македонија" бр. 72/2020).

Според тоа, применувајќи го тестот на легитимната цел, мерките и ограничувањата што беа непосредно поврзани со вонредната состојба предизвикана со пандемијата и кои што имаа за цел враќање на општеството во нормала, беа оценети од страна на Уставниот суд како разумни, неопходни и пропорционални и истите не беа проблематизирани, за разлика од оние кои не беа поврзани со пандемијата.

Така на пример со Одлука У.број. 209/2020 од 23 септември 2020 Уставниот суд ја поништи Уредбата со законска сила за примена на Законот за градежно земјиште за време на вонредна состојба со која покрај другите прашања се уредуваа и прашања поврзани со договорите за закуп на плажите. Судот оцени дека: „не може да се оправда како неопходно потребно и легитимно регулирањето на односите на закупците на градежното земјиште во делот на плажите. Задирањето со правна регулатива преку уредби со законска сила во правата и обврските на закупците на градежно земјиште, како и во овластувањата, а во услови на општа пандемија во која се наоѓаат граѓаните и на територијата на Република Северна Македонија, би можело да има основ доколку постои сразмерност и поврзаност на мерките за ограничување со настанатата состојба заради постигнување на поставените здравствени цели за запирање на ширење на епидемијата" што не било случај со оспорената уредба поради што Судот истата ја поништил како спротивна на Уставот

Каков тест на пропорционалност применува вашиот Суд? Дали Судот ги применува сите фази на „класичниот" тест на пропорционалност (односно оценка на соодветноста, неопходноста и пропорционалноста во потесна смисла на зборот)?

Судот го применува класичниот тест на пропорционалност, при што настојува да се осврне на сите елементи односно фази во оценката на пропорционалноста (соодветноста, неопходноста и пропорционалноста во потесна смисла на зборот). Како пример може да се наведе предметот У.бр.39/2006, во кој Судот, со Одлука донесена на 6 јуни 2007 година, укина дел од одредбите од Законот за заштита од пушењето со кои беше забранета продажба на цигари во објектите кои се оддалечени од претшколските и школските воспитно-образовни установи на растојание помало од 50 м. Судот неспорно утврди дека забраната на продажба на цигари во објектите

предвидени во оспорената законска норма претставува ограничување, односно попречување на правото на слобода на пазарот и претприемништвото, но дека целта на тоа ограничување е заштита на здравјето на малолетните лица како јавен интерес, што според Судот беше оценето дека преставува легитимна цел: „Преминувајќи на теренот на балансирање на поединечниот и јавниот интерес, треба да се одговори на прашањето дали изрекувањето на овој вид на мерка е неопходно до тој степен, заради зачувувањето на здравјето на луѓето, односно на малолетниците што би го оправдало ограничувањето на пазарот, односно правото на слобода на пазарот и претприемништвото. Според Судот, изрекувањето на ваквата мерка како што е предвидено во сега оспорената законска норма, не е неопходно ниту вистински служи за постигнување на легитимната цел за заштита на децата, од причина што од целината на Законот за заштита од пушењето произлегува дека законодавецот веќе со изречената генерална мерка во членот 5 од Законот за забрана на продажба на цигари и тутун на лица помлади од 18 години во прометот на мало ја постигнал својата уставна обврска за заштита на здравјето кај младата популација (децата). Со тоа, ефектот и целта на Законот е постигнат со генералната забрана изречена во членот 5 од Законот, поради што дополнителното ограничување на продажбата на цигари како што е содржано во оспорената законска одредба е прекумерно и непотребно и се појавува исклучиво како економско ограничување и попречување на правото на слобода на пазарот и претприемништвото. Оттука, ограничувањето во оспорената одредба не може да го положи тестот на пропорционалност со легитимната цел, при што не е постигнат фер баланс помеѓу индивидуалниот и јавниот интерес".

Друг случај во кој Уставниот суд го примени тестот на пропорционалност е случајот У.бр.189/2012 (Одлука од 25 јуни 2014 година) во врска со правото на напуштање на земјата што е гарантирано со член 27 од Уставот. Судот ја укина одредбата од Законот за патни исправи која што предвидуваше одземање на пасош доколку лицето е присилно вратено или протерано од друга земја поради повреда на правилата за влез и престој во таа земја. Судот утврди дека: самата мерка е непропорционална и претставува прекумерно ограничување на слободата на движењето на лицето, односно на правото на патување во странство. Ова од причина што лицата на кои им се изрекува оспорената мерка биле веќе депортирани, односно присилно вратени во Република Македонија, што значи дека тие веќе трпат определена последица, така што логично би било да им се забрани повторен влез во државата, односно државите чии што правила за влез и престој ги прекршиле, но од страна на тие држави, а не од нивната сопствена држава. Наместо тоа, со оспорената мерка која опфаќа одземање на пасошот во период од една година, на овие лица им е во целост одземено правото да ја напуштат сопствената земја и да патуваат во која и да било друга странска земја, и таа мерка ја применува нивната матична држава. Токму таа автоматска забрана на лицата да патуваат било каде во странство, ја прави оваа мерка спорна од гледна точка на принципот на пропорционалност, како и од гледна точка на принципот на владеењето на правото".

Дали вашиот Суд ги применува сите елементи на тестот на пропорционалност?

Види го примерот во одговорот на претходното прашање)

Дали постојат случаи во кои вашиот Суд прифатил дека оспорената мерка ги задоволува еден или повеќе елементи од тестот на пропорционалност, иако на прв поглед нема доволно докази што го покажуваат тоа?

Не постојат такви примери.

Дали истовремено со воведувањето на тестот на пропорционалност во уставно судската практика на вашиот Суд се забележа истовремен подем на доктрината на судско воздржување (самоограничување)?

Од анализираната судска практика не може да се извлече таков заклучок.

Дали судската практика на Европскиот суд за човекови права влијаеше врз формулирањето на ставот на вашиот Суд кон судското воздржување. Дали доктрината на маргина на проценка на

Европскиот суд за човекови права претставува домашен еквивалент на маргината на дискреција што ја признава вашиот Суд? Доколку не, колку често анализите во поглед на маргината на проценка на ЕСЧП се поклопуваат со воздржувањето на вашиот Суд во слични случаи?

Да, маргината на проценка на ЕСЧП претставува еквивалент на маргината на дискреција што ја признава Уставниот суд при оценката на уставноста и законитоста на актите на законодавната и извршната власт со кои се ограничуваат слободите и правата на граѓанинот, особено кога станува збор за примената на тестот на пропорционалност кој е директна последица на праксата на Европскиот суд за човекови права.

Дали Европскиот суд за човекови права ја има осудено вашата земја поради воздржувањето на вашиот Суд во конкретен случај, поради кое што воздржување постапувањето пред Судот било неефикасно правно средство?

Да, неколку предмети во кои Уставниот суд на Република Северна Македонија ги отфрлил барањата за заштита на слободите и права биле подоцна предмет на анализа и од страна на Европскиот суд за човекови права кој одлучил во полза на апликантите, односно утврдил повреда на правата на Конвенцијата. Еден од тие случаи е предметот У.бр.75/2018 година во кој припадник на ромската етничка група тврдел дека како малолетник бил жртва на расно мотивирано полициско насилство во врска со кое не била спроведена ефикасна истрага од страна на обвинителството. Во предметот пред Уставниот суд тој се повикал на заштита од дискриминација врз основа на расата и барал Уставниот суд да ги поништи пресудите на редовните судови со кои било одбиено неговото тужбено барање поднесено врз основа на Законот за заштита од дискриминација. Уставниот суд воопшто не се впуштил во мериторно одлучување по барањето за заштита на слободите и правата, односно истото го отфрлил поради ненадлежност. Имено, Уставниот суд оценил дека подносителот на барањето всушност барал Уставниот суд да посгапува како инстанциионо повисок суд и да утврди дека конкретните одлуки на судовите биле неправилни и незаконити, а со тоа да се впушти во оцена на нивната законитост дали правилно е применето материјалното право, што во смисла на уставната норма, не е надлежност на Уставниот суд. Уставниот суд укажал дека: „според уставно утврдените надлежности на Уставниот суд на Република Македонија, овој суд нема надлежност да постапува како инстанционо повисок суд кој ќе ја цени законитоста на одлуките на другите правосудни органи, поради што Судот оцени дека се исполнети условите од член 28 алинеја 1 од Деловникот на Уставниот суд на Република Македонија, за отфрлање на барањето".

Но, за разлика од Уставниот суд кој воопшто не се впуштил во матерјално-правно разгледување на барањето, Европскиот суд за човекови права ја прогласил апликацијата на подносителите за допуштена и утврдил повреда на членот 3 од Конвенцијата во врска со наводната полициска бруталност и отсуство на ефективна истрага. (Случај X и Y против Северна Македонија, (Апликација бр. 173/17), пресуда од 5 ноември 2020 година.

IV. Други посебни прашања

Колку често прашањето за судско воздржување се појавува во предметите за заштита на човековите слободи и права за кои што одлучува вашиот Суд?

Од анализата на статистичките податоци за начинот на одлучување на Уставниот суд по поднесените барања за заштита на слободите и правата во последните неколку години, би можело да се заклучи дека прашањето за судското воздржување е често присутно во уставно-судската практика на Уставниот суд на Република Северна Македонија. Имено, во периодот од 2018 заклучно со 2022, Уставниот суд постапувал по 56 барања за заштита на слободите и правата. Во најголем број од предметите – 40 барањата за заштита на слободите и правата биле отфрлани, 12 барања биле одбиени, а само 3 барања биле прифатени и била констатирана повреда на некое од уставно загаранитираните слободи и права.

Една од причините поради кои Уставниот суд може да го отфрли барањето е кога со барањето се бара заштита на слобода или право кое не спаѓа во рамките на правата за кои Уставниот суд

може непосредно да одлучува согласно член 110 алинеја 3. Имено, според овој член Уставниот суд ги штити слободите и правата на човекот и граѓанинот што се однесуваат на слободата на уверувањето, совеста, мислата и јавното изразување на мислата, политичкото здружување и дејствување и забраната на дискриминација на граѓаните по основ на пол, раса, верска, нациоална, социјална и политичка припадност. Ова значи дека Уставниот суд има ограничена надлежност за заштита само на дел од уставно гарантираните права, а не на сите поради што тој е нормативно-правно спречен да се впушти во оценка односно заштита на другите права кои не се опфатени во цитираната уставна одредба од членот 110 алинеја 3.

При одлучувањето по барањата за заштита на слободите и правата контролата на Уставниот суд на пресудите на редовните судови е ограничена исклучиво само во однос на прашањето дали со тие пресуди е повредено некое од уставните права на граѓанинот наведени во член 110 алинеја 3 од Уставот. Уставниот суд не ја оценува законитоста на постапувањето на судовите и не ја преиспитува фактичката состојба што ја утврдиле судовите при одлучувањето. Оттука, доколку во барањето подносителот се повикува на погрешно или нецелосно утврдена фактичка состојба или погрешна примена на материјалното право од страна на редовните судови, Уставниот суд укажува дека не е надлежен да постапува како инстанционен суд и да ја оценува примената на правото од страна на судовите и таквите барања Судот ги отфрла. Уставниот суд исто така ги отфрла барањата и во случај ако оцени дека барањето за заштита на слободите и правата странката го поднела исклучиво поради тоа што не била задоволна од исходот на постапката пред редовните судови, односно доколку целта на странката е преку интервенцијата на Уставниот суд да добие решение на спорот во нејзина корист.

Дали со текот на времето вашиот Суд се воздржува повеќе?

На ова прашање не може да се даде прецизен одговор од причина што анализата на трендовите на предметите пред Уставниот суд, особено оние кои се однесуваат на барања за заштита на слободите и правата покажува дека во последните неколку години се зголемува бројот на предмети во кои Уставниот суд одлучувал мериторно, за разлика од порано кога Уставниот суд барањата за заштита на слободите и правата во најголем број на случаи ги отфрлал од процесни причини.

Дали воздржувањето е поврзано односно зависи од бројот на предмети пред Судот?

Воздржувањето не е поврзано со бројот на предмети, односно истото не се користи како инструмент да се намали оптовареноста на Судот.

Дали вашиот Суд може да ги заснова своите одлуки на причини кои не се истакнати од страна на странките? Дали Судот може да ги прекфалификува причините што се истакнати и да ги подведе под друга уставна одредба од онаа наведена од страна на подносителот?

Да, таквата можност е изрично предвидена во Деловникот на Уставниот суд кој во член 14 став 2 пропишува дека при испитувањето на уставноста на закон, односно уставноста и законитоста на пропис или друг општ акт, Уставниот суд може да ја оценува уставноста и законитоста и на одредбите од прописот или другиот општ акт што не се оспорени во иницијативата.

Дали вашиот Суд може да ја прошири контролата на уставноста на друга одредба што не била оспорена пред него, но која што е во врска со ситуацијата на апликантот.

Да (види го одговорот на претходното прашање).

The Constitutional Court of the Republic of Moldova

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

National Report: Republic of Moldova

Constitutional cultures vary and the courts' perceptions of their own role in a constitutional democracy affect the intensity of their scrutiny in fundamental rights cases. Many courts profess judicial deference.

Judicial deference is a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters which are perceived to be beyond their expertise or legitimacy to decide. The tool has been employed, most prominently, in human rights cases. This is due to their transcendent quality, capable of cutting across all substantive areas of public decision-making.

It is said that over-deferential attitude threatens the rule of law and separation of powers as much as excessive judicial activism does. The way judges exercise judicial deference is, therefore, a fundamental matter of constitutional principle that concerns the proper role of each branch of government in relation to significant questions of public policy.

The following questions aim to discover the differences in exercising judicial deference by European constitutional courts.

Questionnaire

for the national reports

V. Non-justiciable questions and deference intensities

32. In your jurisdictions, what is meant by "judicial deference"?

By "judicial deference" is meant the existence of relevant reasons for all courts to show deference to the legislative power or to the executive power. For the Constitutional Court, judicial deference is seen as a constraint on constitutional judges in making a decision, in favor of the legislature or the executive. This form of deference falls under the concept of discretionary margin (see JCC no. 16 of 4 June 2018, § 66, regarding the prohibition of the transmission of television and radio programs with informative, informative-analytical, military and political content that are not produced in the member states of the European Union, in the United States of America, in Canada or in the states that have ratified the European Convention on cross-border television).

33. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

The Constitutional Court of the Republic of Moldova shows deference in a number of political areas in which it recognized the legislator and the government a wide discretionary margin. For example, the Court mentioned in its jurisprudence that the establishment of state policies in the field of education and the determination of the criteria for the organization and operation of the education system is a prerogative of the legislator (see DCC no. 1 of 5 January 2018, § 29). the State's margin of appreciation and its right to intervene in the education process is thus greater than in other fields and can be achieved through various regulatory instruments. The state has the right and the obligation to establish the ways, content and standards necessary to ensure the optimal realization of the right to education (DCC nr.7 din 4 July 2013, §§ 40-41).

At the same time, in the context of a application lodged by the People's Assembly of Gagauzia (Gagauz-Yeri), which concerned the issue of introducing in schools teaching in Gagauz language the subjects "Romanian language and literature" and "Romanian history", The Court mentioned that the promotion of the state language policy belongs to the competence of the Ministry of Education – the central specialized body in the field of education. Therefore, the Court declared inadmissible the

criticisms of the author who claimed that the introduction of the subjects "Romanian language and literature" and "Romanian history" in schools teaching in Gagauz language is contrary to the right of the Gagauz people to study the state language, - the Moldovan language, and history Moldova (see DCC no. 21 of 10 December 2013, §§ 33-34).

In Judgment no. 29 22of November 2018, at § 55, the Court recognized the legislator a wide discretionary margin regarding the nature and extent of the measures to be taken in the field of social protection. The Court motivated this by the fact that the legislator is better placed than the Constitutional Court to carry out complex evaluations and assessments.

In other fields, *e.g*. conclusion of international treaties and the establishment of duties and taxes, although the Court recognizes a wide discretionary margin for the Parliament and the Government, it specified that this is not absolute. Thus, according to the Court's jurisprudence, the discretionary margin of the authorities when concluding international treaties is limited by national interests (see JCC no. 12 of 7 May 2020, § 96). At the same time, the Court is competent to verify the constitutionality of some rules regarding the imposition of the payment of taxes provided for by law, if the amount of these taxes is so high that the property right would be unjustifiably affected (see DCC no. 45 of 27 April 2023, § 25). Therefore, if the amount of the tax is reasonable, the very issue of its existence is a matter that belongs to the discretionary margin of the legislature, being excluded from the constitutionality control (see DCC no. 9 of 20 January 2022, § 25).

Moreover, in the Court's opinion, the declared insufficiency of budgetary resources does not represent an objective and reasonable consideration for restricting the exercise of constitutional rights (see JCC no. 3 of 24 February 2022, § 49, regarding the amount of compensation for transport services granted to people with severe disabilities depending on the place of residence).

34. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

The Constitutional Court mentioned that, although it represents a jurisdictional body empowered to control the constitutionality of laws and to guarantee fundamental rights and freedoms, when it decides on a problem subject of an application, it does not do so in a vacuum, detached being of social realities (JCC no. 29 of 22 November 2018, § 59, regarding the age and contribution period necessary for the establishment of the disability pension).

For example, being notified by a group of deputies with the control of the constitutionality of Law no. 3465 of September 1, 1989 regarding the functioning of the languages spoken on the territory of the Moldavian Soviet Socialist Republic, the Constitutional Court found the outdated and useless nature of this law. For this, it noted that the community in the Republic of Moldova lives in another state, a new one, governed by the rule of law, democratic and independent, in which the current rationales of the Law regarding the functioning of spoken languages no longer make sense. The Court noted, in the preamble of the Law, another proof of its outdated nature: the obligation to use the Russian language as the language of communication between the nations of the Union of Soviet Socialist Republics. The Union of Soviet Socialist Republics dissolved on 26 December 1991. Moreover, if the force of the law in question were accepted, this obligation would constitute another imposition of a conception in a paternalistic manner, atypical for the contemporary period (see JCC no. 17 of 4 June 2018, § 32 and § 35).

In another case, the Court showed deference for the linguistic rights of citizens belonging to ethnic minorities, declaring unconstitutional a law of the Parliament that gave the Russian language a privileged status in relation to other languages of ethnic minorities in the Republic of Moldova. In order to reach this conclusion, the Court referred, including to the data on the structure of the population by mother tongue obtained at the 2014 Census (see JCC no. 4 of 21 January 2021).

35. Are there situations when your Court deferred because it had no institutional competence or expertise?

In the case-law of the Constitutional Court of the Republic of Moldova, there were situations in which the Court recognized that it did not have the necessary expertise and recognized the contested provisions as constitutional.

For example, in a case concerning the payment of the fixed fee to the administrator/liquidator and the compensation of the related expenses that are jointly and severally the responsibility of the debtor's management bodies, the Court observed that there are several legislative models for remuneration of the insolvency administrator that implies the existence of a liquidation fund. However, the Court noted that it does not possess the necessary expertise to accurately establish whether these practices will achieve the legitimate goals pursued more effectively than the contested measures and whether they will not affect other rights or interests, generating other consequences (see JCC no. 16 of June 2020, §§ 68-69).

In a number of cases that concerned the unconstitutional criticisms regarding the increase of the retirement age and the full contribution period, the Court held that, although the standard retirement age requirement leaves room for discussion as to the best solution, it is not within its competence to decide on this matter (see DCC no. 111 of 6 September 2022, § 24, regarding retirement age, length of service and early retirement for a long career; DCC no. 175 of 23 November 2021, § 25, relating to the contribution period carried out under special working conditions).

36. Are there cases where your Court deferred because there was a risk of judicial error?

When examining the exceptions of unconstitutionality, the Constitutional Court is often called upon to clarify matters related to the interpretation and application of the law in a specific case. In these cases, the Court shows deference to the competence of common law courts which are better positioned to evaluate concrete situations (see DCC no. 104 of 19 July 2022, § 26, which concerned the banning of the parent from seeing his child).

For example, in a case that concerned the amendments made to the Law on Advocacy, the Court was called to verify the constitutionality of the exclusion of the possibility to obtain a lawyer's license based on the scientific title of doctor of law and based on seniority for judges and prosecutors because it represents an interference with the right to private life. Analyzing the relevant jurisprudence of the European Court, the Court mentioned that the finding a violation of the right to respect for private life by excluding the right to access the profession of lawyer based on the scientific title of doctor of law and on the basis of seniority for judges and prosecutors depends on a case-by-case analysis, an analysis that is concrete, not abstract. The Constitutional Court does not analyze concrete cases. It admitted that in some cases there could be applicable and violated the right in question; in others it might just be applicable, but not violated; in others the right would be no applicable and, therefore, not violated. It is up to the common law courts to assess whether, in a particular case, it is possible to talk about the application of the right to private life of an applicant for a license to practice the profession of lawyer and a violation of this right as a result of the refusal to receive him/her in profession, including through the retroactive application of the law (see DCC no. 155 of 22 November 2022, § 40). Thus, in order to avoid the risk of a judicial error, the Court showed deference in favor of a concrete examination by the courts of common law.

37. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

The institutional or democratic legitimacy of the decision-maker did not constitute an express reason for deference for the Constitutional Court.

38. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

This standard is valid for the Constitutional Court of the Republic of Moldova, in so far as the legislator or the government has not clearly exceeded the limits of its discretionary margin. This Court review applies the test of less intrusive measures capable of achieving the aim as effectively, at the same or lower costs. However, there have been situations where the Court has declared a public policy unconstitutional simply because it does not pursue a legitimate goal (see JCC no. 3 of 24 February 2022, regarding the lack of any legitimate purpose of the differentiated amount of compensation for transport services granted to people with severe disabilities (based on the criterion of the place of residence)).

The Constitutional Court of the Republic of Moldova has both jurisprudence in which it has intervened in matters of vast public social policies (*e.g.* by JCC no. 5 of 25 February 2020, The Court declared unconstitutional the condition of the numerical criterion, the requirement of territorial representativeness of political parties in the process of registration as an excessive and disproportionate measure in relation to the legitimate aim pursued), as well as case-law in which it showed deference for the option of the legislator or the government who acted within the limits of their discretionary margin (e.g. DCC no. 7 of 20 January 2022, regarding the Government's prerogative to regulate the transfer to private ownership of land sectors assigned within the limits of the law and occupied by houses, outbuildings and gardens; DCC no. 87 of 25 July 2023, regarding the Parliament's option to replace the basis for adjusting the pension according to changes in the financial rights of those in office with the pension indexation mechanism).

39. Does your Court accept a general principle of deference in judging penal philosophy and policies?

The general principle of deference when judging penal policies and philosophy is a principle accepted by the Constitutional Court of the Republic of Moldova.

In its jurisprudence, the Court emphasized that it cannot carry out a constitutional review regarding a crime from the perspective of the *ultima ratio* principle, analyzing the existence of alternative non-criminal measures. It is not in a position to develop empirical studies in this regard. There may be different opinions from a criminological point of view, but it is not the role of the Court to favor one of them to the detriment of the others. The criminal policy of the state represents a competence reserved to the Parliament (Article 72 para. (3) letter n) of the Constitution). In this regard, the Parliament enjoys a discretionary margin when developing the national criminal policy, in particular when it decides whether a conduct should be criminalized or if some facts should be criminally sanctioned. From the perspective of the principle of ult*ima ratio*, the Constitutional Court can intervene only when it performs, once referred, the test of the proportionality of the punishment limits (see DCC no. 159 of 24 November 2022, § 78-79, regarding the criticisms of unconstitutionality formulated on the crime of illicit enrichment; DCC no. 3 of 19 January 2023, § 22, regarding the regulation of criminal liability for slander).

40. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

Constitutional Court judges have the right of access to state secrets, and the secret nature of relevant information in a pending case cannot constitute a reason for the Government not to present it to the Court. There were no situations in which the Court showed deference for security reasons. On the contrary, the Court mentioned, in its jurisprudence, that the interests based on national security are not absolute and declared unconstitutional the provision that limited the competence of the courts to review the proportionality of individual administrative and normative acts related to the national security of the Republic of Moldova (see JCC no. 27 of 13 November 2020, regarding the foreigner's guarantees in case of expulsion). Moreover, the Court declared unconstitutional the provisions of Law no. 200 of 16 July 2010 on the regime of foreigners, which forbade communication to the foreigner of the reasons underlying the decision to declare him/her as an undesirable person. The Court noted that the need to protect state secrets and the legitimate interest of national security does

not oppose the right of the person to know the summary of the reasons that served as the basis for declaring him/her as an undesirable person, in so far as it is compatible with maintaining the confidentiality of the obtained information (see JCC nr. 27 of 13 November 2020, § 84).

41. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

The Constitutional Court of the Republic of Moldova has the competence to issue Addresses to the Parliament or the Government to draw their attention to the need to liquidate some gaps in the legislation due to the non-implementation of some provisions of the Constitution.

For example, through an Address attached to the Judgment no. 22 of 1 October 2018, The Court pointed out to the Parliament that the notion of "serious consequences" is found in several articles of the Criminal Code and suggested the modification of the criminal provisions in question, in accordance with the principle of the legality of criminalization. Being subsequently referred to verify the constitutionality of the same notion, but in the context of another crime, the Court noted the Parliament's omission to remedy these aspects that perpetuate a state of unconstitutionality, as well as the frequency of applications related to this problem. Finally, the Court declared unconstitutional the notion of "serious consequences", which was found in several articles of the Criminal Code, based on the reasons in Judgment no. 22 of 17 October 2018 and, through an Address, drew Parliament's attention to the need to bring the criminal rules in line with the reasoning set forth in the aforementioned judgment (see JCC nr. 24 din 17 October 2019).

VI. **The decision-maker**

42. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

Whether it is an act of Parliament or the executive, the Court checks whether they have acted within the limits of their margin of appreciation. However, regarding an act of the Government that is adopted to organize the execution of laws, the Court must also check whether the Government has acted *ultra vires* (see JCC no. 6 of 28 February 2023, § 58, which concerned the calculation of the pension of seconded officials).

The degree of democratic accountability of the original decision maker is not a criterion of deference for the Constitutional Court of the Republic of Moldova.

43. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

In Judgment no. 14 of 27 April 2021, § 54, the Court held that its competence in the matter of the control of the constitutionality of the parliamentary procedure is limited, given the sovereign character of the Parliament in the matter of legislation and the judicial deference that must be shown by the Court towards the role of the Parliament as an autonomous legislator. In this matter, the Court can verify the constitutionality of a law from a procedural point of view only if, when adopting it, the Parliament affected any essential element of the legislative process, which expressly results from the Constitution or which can be clearly deduced from a constitutional principle.

The parliamentary level analysis is of relevance for the Constitutional Court's analysis of the compatibility with fundamental rights of the contested law, when the Court analyzes the legitimate purpose of the interference. In its case-law, the Court declared unconstitutional a provision that prohibited non-commercial organizations from operating as private providers of audiovisual media services, as it did not identify any legitimate purpose in the informative note and in the opinions presented by the authorities (see JCC no. 6 of 10 March 2022, § 40).

In another case, regarding the constitutionality of the prohibition of generally known symbols used

in the context of actions of military aggression, war crimes or crimes against humanity, the Constitutional Court identified the legitimate purpose of the measure in question, referring to the informative note of the amendment by which it was introduced. According to this note, the use of such symbols indirectly promotes war, leads to the emergence of social tensions and inter-ethnic hatred. Thus, the Court admitted that the purposes mentioned in the informative note to the amendment by which the measure in question was introduced can serve to ensure national security and public order (see JCC no. 9 of 11 April 2023, §§ 75-76).

44. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

The Constitutional Court of the Republic of Moldova checks whether the Parliament has justified its decision. This obligation of the Parliament results from the general constitutional obligation of the authorities to motivate their own decisions, which can be deduced from Article 54 of the Constitution and from the standards of European constitutionalism, dictated by the culture of justification, in which every exercise of power must be justified (see JCC no. 15 of 28 April 2021, § 42, regarding the control of the constitutionality of the Parliament Decision on the declaration of the state of emergency).

Moreover, the Constitutional Court analyzes whether the legislator objectively motivated its decision, whether there is a rational connection with the legitimate goals it pursues, whether it respected the condition of minimal interference and ensured a fair balance between the competing principles (see JCC no. 9 of 11 April 2023, which concerned the constitutional review of the prohibition of generally known symbols used in the context of actions of military aggression, war crimes or crimes against humanity).

45. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

The Constitutional Court shows deference to the Parliament's role as an autonomous legislator. However, based on Article 54 of the Constitution and the standards of European constitutionalism, dictated by the culture of justification, in which every exercise of power must be justified, Parliament has the constitutional obligation to motivate its own decisions (see JCC no. 15 din 28 April 2021, § 42, regarding the control of the constitutionality of the Parliament Decision on the declaration of the state of emergency).

For example, in its jurisprudence, the Court declared unconstitutional a Decision of the Parliament declaring the state of emergency due to the lack of an objective justification regarding the need to institute the state of emergency. In concrete terms, the Court noted that "in the informative note of the draft decision, which takes up one page ... no arguments are offered to justify including the duration of the state of emergency". At the same time, the Court held that "the informative note does not contain a motivation that reflects the standard of proportionality, for example, regarding the total prohibition of gatherings, public demonstrations and other mass actions (see JCC no. 15 of 28 April 2021, § 44 and § 46). Moreover, considering that on that date there was a referral to the Court regarding the finding of the circumstances justifying the dissolution of the Parliament, the authors of the draft Decision had to argue the greater weight of the purpose of establishing the state of emergency for a period of two months compared to the purpose of a possible dissolution of the Parliament. This argument should also refer to the insufficiency of other legal measures, compared to the measures that the state of emergency requires, to achieve the intended goal (see JCC no. 15 of 28 April 2021, § 48).

In another recent ruling, regarding the ban on running for elections, applied to persons associated with political parties declared unconstitutional – a measure that implied substantial limitations of the constitutional right to run for elections – the Court held that Parliament must provide compelling reasons when setting the duration of a ban, as well as when deciding to extend it. Parliament must

justify to what extent the duration of the established ban is suitable to pursue its legitimate aims. However, the Court observed that the Parliament increased, without any justification, the duration of the ban from three to five years. Thus, the Court found that the legislator increased the duration of the contested ban in the absence of an objective justification (see JCC no. 16 of 3 October 2023, §§ 52- 53).

46. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

In Judgment no. 14 of 27 April 2021, which aimed to exclude several powers of the President of the Republic regarding the Intelligence and Security Service, the Constitutional Court held that, within the legislative procedures, the Parliament must provide MPs with the possibility to examine the content of the draft law through an exchange of opinions. The Court noted that this stage of the legislative process is necessary, because it gives the MPs the opportunity to understand the essence of the draft law proposed for examination and contributes to building the trust of the society that the law was widely discussed before its adoption (§ 57).

In this context, the Constitutional Court declared unconstitutional a number of acts adopted by the Parliament of the Republic of Moldova, as voted on in an accelerated regime, without ensuring the parliamentary opposition the opportunity to ask questions or speak on the subject under examination. The Court held that, even if the parliamentary procedures were accompanied by protests from the parliamentary opposition, this fact cannot justify the adoption of acts in a procedure without debates (see JCC no. 14 of 27 April 2021, § 62, which concerned the exclusion of several competences of the President of the Republic regarding the Intelligence and Security Service; JCC no. 21 of 27 July 2021, § 52, which concerned the procedure for changing the numerical and nominal composition of the Permanent Bureau of the Parliament; JCC no. 22 of 29 July 2021, § 49, which concerned the procedure for adopting a law for the repeal and modification of several normative acts).

In these cases, the Constitutional Court did not examine the content of the parliamentary debates, but the possibility for the parliamentary opposition to formulate questions and take the floor. The Court consulted the transcript of the plenary session of the Parliament and considered that in a very short period between the two readings of the draft laws (i.e. of a minute in JCC no. 14 of 27 April 2021, § 60, and three minutes in JCC no. 22 of 29 July 2021, § 48) the Mps from the parliamentary opposition did not have the opportunity to submit the contested Law to the debate.

47. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

The authority to legislate, the existence of public consultations or public debates does not represent conclusive evidence for the democratic legitimacy of the decision. According to the jurisprudence of the Constitutional Court, the Fundamental Law establishes the procedural requirements of the legislative process applicable both at the stage of verifying the content of draft laws (e.g. the existence of parliamentary debates, the right to submit amendments, the right to ask questions, the right to speak etc.), as well as at the stage of verifying the fulfillment of the preliminary procedural conditions to be able to start the examination of the acts in question. For example, at the stage of verifying compliance with the preliminary procedural conditions to be able to start the examination of draft laws, Parliament must ascertain whether the draft in question was sent by one of the authorities authorized by Article 73 of the Constitution to submit legislative initiatives and whether, in the case of the Government, the decision approving the draft law entered into force, according to Article 102 para. (4) of the Constitution (see JCC no. 17 of 10 June 2021, §§ 53-54).

In this regard, the Court declared unconstitutional a Decision of the Parliament, adopted at the legislative initiative of the Government, because, when it was voted in the first reading, the Government Decision by which the draft in question was approved had not entered into force. Therefore, the Court held that during the examination of the draft law in the first reading, the Parliament voted on

a non-existent act (see JCC no. 17 of 10 June 2021, § 57, regarding the change of the composition of the Superior Council of Magistracy).

VII. Rights' scope, legality and proportionality

48. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

As a rule, the Constitutional Court, as the sole interpreter of the constitution, defines the scope of constitutional rights. As its judgment is a "judgment of laws" in the abstract, but not a "judgment of concrete cases", the Court cannot verify, according to its powers, the proportionality of how the contested provisions is applied, *i.e.* the proportionality of the interference to the concrete way, in the circumstances of a particular case (see JCC no. 3 of 14 January 2021, § 65, regarding access to personal information). For this reason, the government's definition of rights or its application to the facts at issue is not a relevant issue for the Court's analysis.

However, sometimes the Court shows deference to the definition regulated by the legislator through a law. For example, in its Judgment no. 29 of 22 November, 2018, the Court was called to verify whether the limitations imposed on the right to the disability pension by a law do not disproportionately affect Article 47 of the Constitution, which guarantees the right to social assistance and protection. In this sense, the Court mentioned that, at the legislative level, the constitutional provisions of Article 47 are developed by Law no. 156 of 14 October 1998 regarding the public pension system, which contains provisions regarding the categories of pensions and their conditions of exercise. The Court observed that section 3 of this Act regulates the scope of the right to disability pension (§ 53). Analyzing these provisions, the Court accepted that the imposition *per se* by the legislator of a retirement age and a contribution period is not unconstitutional (§ 55).

49. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

Applicable rights do not affect the degree of deference. The Constitutional Court of the Republic of Moldova treats rights in an equally important manner and analyzes the interferences in their exercise just as rigorously. There is no hierarchy of rights in the analysis of the Constitutional Court. If the Court finds the existence of an interference with the applicable fundamental right, it will proceed with the analysis of its proportionality, applying the stages of the proportionality test.

50. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

In its jurisprudence, the Constitutional Court established that the question of the quality of a law does not represent a question of constitutionality as long as a fundamental right is not affected. Thus, the Constitutional Court performs the test of the quality of the law only by reference to a fundamental right (see DCC no. 146 of 17 Decembre 2020, § 22, regarding the appointment of the debtor's representative in the insolvency process and his competence to contest the claims and preferential rights from the claim table; DCC no. 38 of 30 March 2021, § 17, which concerned the subsidiary liability of the members of the debtor's management bodies for the violation of the obligation to submit the application for initiation of the insolvency process).

However, if the Court finds the application of the right, it will continue its analysis regarding the quality of the law, applying the rules of interpretation. If the challenged text is drafted with sufficient precision, the rule *In claris non fit interpretatio* (clear texts must not be interpreted) must be taken into account here (see DCC no. 76 of 2 July 2020, § 28). In other words, the general nature of the formulation of a legal text lead to the general character of its application, without the need for distinctions that the respective text does not contain and does not follow (DCC no. 60 of 9 June 2020, § 31, regarding the incompatibility of the judge to successively judge the same civil case).

In other cases, the Court analyzes whether the meaning of the disputed term can be deduced from its ordinary meaning, *i.e.* by simple application of the rules of linguistic interpretation, starting from the usual meaning of the terms, taking into account the circumstances of the concrete case (see DCC no. 99 of 10 August 2023, § 26, regarding the deprivation of the right to drive means of transport).

51. What is the intensity review of your Court in case of the legitimate aim test?

At this stage of the proportionality test, the Court must verify whether the purpose pursued by the interference can be subsumed under the legitimate purposes provided by Article 54 para. (2) of the Constitution. In order to identify the purpose of the interference, the Court can refer to the informative note of the contested law (see JCC no. 9 din 11 April 2023, § 75, on the constitutional review of the prohibition of generally known symbols used in the context of actions of military aggression, war crimes or crimes against humanity) or may infer this purpose based on the analysis of the contested provision (see JCC no. 14 of 8 August 2023, §§ 75-77, on the guarantees of the refusal to grant the right of access to state secrets). The Court's analysis at this stage is not very rigorous. As a rule, the Court "admits" that the interference aims to achieve a special purpose, which can be subsumed under a general legitimate purpose provided by Article 54 para. (2) of the Constitution (see JCC no. 20 of 3 November 2022, § 50, regarding the condition of typing the appeal request).

However, if the Court, analyzing the informative note to the draft law and opinions presented by the authorities, cannot identify any argument in support of the legitimacy of the interference, it will find the lack of a legitimate purpose and declare the challenged interference unconstitutional (see JCC no. 6 of 10 March 2022, §§ 36-41, which concerned the prohibition applied to non-commercial organizations to operate as private providers of audiovisual media services).

52. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

The Constitutional Court applies the classic test of proportionality when examining the proportionality of interference with a fundamental right.

The Constitutional Court analyzes in all cases the opportunity and proportionality in the narrow sense of the contested interference (see JCC no. 22 of 6 August 2020, regarding the presentation of fiscal information to courts and criminal investigation bodies as evidence; JCC nr. 14 din 8 august 2023 regarding the presentation of fiscal information to courts and criminal investigation bodies as evidence). Often, the Court does not apply the second stage of the classical proportionality test, *i.e.* necessity.

However, there were cases in which the Court analyzed the necessary nature of the means used to achieve the aims pursued (see JCC no. 26 of 30 October 2018, regarding the mandatory vaccination for a child to be able to go to kindergarten or school, §§ 59-67; JCC no. 35 of 9 November 2021, §§ 184-191, in which the Court found that, although there are alternative less intrusive means to ensure the implementation of the Government's program of activity and the unblocking of the activities of the ministries within the Government, they are not able to ensure the achievement of the mentioned legitimate aims with the same efficiency as the measure of abolishing some public functions and creating other functions of public dignity and JCC no. 11 of 20 July 2023, in which the Court identified the existence of a less intrusive measure for employment in private security organizations, *i.e.* lack of criminal record, in relation to the contested measure, *i.e.* lack of a conviction for intentional crimes).

53. Does your Court go through every applicable limb of the proportionality test?

The Constitutional Court does not go through every applicable stage of the proportionality test. If the interference does not pass the opportunity stage (see JCC no. 14 of 21 July 2022, §53, in which the Court considered that the absolute ban on the recalculation of residential, communal and non-communal bills does not ensure a fair balance between the supplier's economic interests and the consumer's property right) or that of necessity (see JCC no. 5 of 14 February 2023, § 83, in which

the Court found that the objective of the legislator to avoid situations of annulment of decisions due to the violation of insignificant rules of procedure can be achieved by limiting the judicial review to the serious procedural errors of the Evaluation Commission in the evaluation procedure, which affects the fairness of the evaluation procedure, without limiting the competence to examine procedural matters), the finding in this regard will be sufficient to declare it unconstitutional.

54. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

There are cases where the Court does not expressly find that the contested measure satisfies one of the stages of the proportionality test, but only admits this possibility in order to move on to the next stage, thus strengthening its analysis. For example, in Judgment no. 6 of 10 April 2018, the Court could not affirm the lack of any rational connection with the legitimate goals pursued by the obligation to take the polygraph test for the position of president of the National Integrity Authority and continued to analyze the necessity and proportionality in the narrow sense of the interference. The Court also proceeds in this way when it finds that the established measure partially satisfies one of the stages of the proportionality test. For example, in Judgment no. 7 of 19 March 2019, the Court held that the contested measure partially fulfills the condition of the rational connection with the legitimate goals and continued to analyze the proportionality in the narrow sense of the interference.

55. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

Control of the proportionality of interference with a fundamental right is imposed by Article 54 of the Constitution. However, the areas in which the authorities have a wider or reduced discretion were later developed in the Court's jurisprudence, considering the jurisprudence of the European Court of Human Rights.

56. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

In its Judgment no. 16 of 4 June, 2018, referring to the case Animal Defenders International v. United Kingdon, 22 April 2013 [*GC*], the Constitutional Court outlined the concept of discretionary margin that it recognizes. Thus, the Court mentioned that the margin of appreciation also includes the relevant reasons for all courts regarding the need to show deference to the legislative power or to the executive power. Considering this form of deference, the Constitutional Court operates with the concept of margin of discretion, seen as a constraint for constitutional judges in making a decision, in favor of the legislature or the executive (§ 66).

For example, in its Decision no. 5 of 14 January 2019, regarding voting abroad based on an identity card or expired identity documents, the Court verified whether the Parliament did not exceed its discretionary power granted by the Constitution in the matter of limiting the exercise of the right to vote of people abroad, exercised on the basis of documents other than a valid passport. In this regard, the Court analyzed whether the interference is provided for by law, whether it pursues one or more legitimate goals and whether it is not disproportionate (see DCC no. 5 of 14 January 2019, §§ 20 – 31).

57. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

On 18 November 2008, the European Court of Human Rights issued its judgment in the case of *Tănase v. Republic of Moldova*, through which it found the violation of the plaintiff's right to be elected to the Parliament of the Republic of Moldova, through the adoption of Law no. 273 of December 7, 2007. The provisions of the law imposed restrictions on the occupation of public positions for per-

sons who also held the citizenship of a state other than the Republic of Moldova. The Government of the Republic of Moldova requested the re-examination of the case by the Grand Chamber, citing the legitimate and democratic nature of the interference. While the proceedings were pending before the Grand Chamber, the Constitutional Court of the Republic of Moldova issued Judgment no. 9 of 26 May 2009, by which he declared unconstitutional the Law establishing the interference with the right of the plaintiff guaranteed by Article 3 Protocol no. 1 to the Convention. The Constitutional Court considered that by adopting the law in question, the legislator acted within the limits of its margin of appreciation, and the interference with the right to be elected was proportional to the aim pursued.

The findings of the Constitutional Court in this judgment were taken into account by the Grand Chamber in its analysis. However, on 27 April 2010, the Grand Chamber of the European Court found a violation of Article 3 Protocol no. 1 to the Convention (see *Tănase v. Republic of Moldov*a [MC], 27 April 2010). Later, on 11 December 2014, at the initiative of some judges of the Constitutional Court, the Constitutional Court revised its Judgment no. 9 of 26 May 2009 and declared unconstitutional the provisions of Law no. 273 of 7 December 2007 (see JCC no. 31 of 11 December 2014).

VIII. **Other peculiarities**

58. How often does the issue of deference arise in human rights cases adjudicated by your Court?

The admissibility conditions for referral to the Constitutional Court quite often raise the question of deference. When analyzing the application of a fundamental right or article of the Constitution, the Court first establishes the state's margin of appreciation in the respective field. If the Court observes that the state acted within the limits of its margin of appreciation, then it will not find the application of the fundamental right or the article invoked by the author of the referral. For example, in its Decision no. 45 of April 27, 2023, which addressed criticisms of unconstitutionality based on property rights formulated regarding the wealth tax, The Court noted that the legislator has a wide margin of appreciation in this area and checked whether by regulating this type of tax, the legislator acted within the limits of his margin of appreciation.

59. Has your Court have grown more deferential over time?

There are areas where the Court has become more differential, such as that of social protection (see DCC no. 108 of 6 September 2022, regarding the retirement age and length of service of judges retiring as of 1 July 2021; DCC no. 21 of 2 March 2023, regarding the recalculation of pensions previously established for military personnel and persons from the command body and from the troops of the internal affairs bodies).

In other areas, such as parliamentary procedures, the Court, on the contrary, has been more active (see answers to questions 13-15 above).

60. Does the deferential attitude depend on the case load of your Court?

The overloaded agenda of the Constitutional Court or the small number of pending applications do not influence its analysis in concrete cases. The Court examines the cases before it with equal attention, without treating them as a deferential *de plano* to reduce its workload.

61. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

According to articles 24 para. (2) of the Law on the Constitutional Court and 39 of the Constitutional Jurisdiction Code, the application submitted to the Constitutional Court must be reasoned. This condition is not fulfilled by simply referring a provision from the Constitution, which cannot be considered a criticism of unconstitutionality. In such situations, the Court rejects the application as inadmissible, specifying that the simple reference to a text from the Constitution, without explain-

ing the alleged non-conformity with it of the contested legal provisions, it does not amount to an argument. If it proceeded to examine the merits of the application formulated in such a manner, the Constitutional Court would substitute itself for the author in invoking the arguments of unconstitutionality, which would be equivalent to an *ex officio* control (se JCC no. 20 of 3 November 2022, § 23, on the condition of typing the appeal request; JCC no. 12 of 6 April 2021, §§ 31 – 32, regarding the minimum wage amount).

However, the Court may classify the reasons advanced under a different constitutional provision from the one invoked by the author of the application. The Court is the master of characterization in matter of constitutionality control. The Court cannot be compelled, when examining the constitutionality of a legal text, to analyze the criticized provisions only through the lens of the constitutional norms invoked by the author, but is free to analyze them also in relation to the relevant constitutional provisions for resolving the referral, the arguments brought in this regard being important (see JCC no. 17 of 23 June 2020, § 58, in which the Court held the application of Article 20 of the Constitution (free access to justice), because its analysis concerned the appeal of the emergency measures ordered by the Executive; JCC no. 27 of 13 November 2020, §§ 18-19, in which the Court considered that the arguments of the author of the application make applicable and articles 19 (*the legal status of foreign citizens and stateless persons*) and 26 (*the right to defence*) of the Constitution; JCC no. 2 of 12 January 2021, § 24, in which the Court considered that articles 28 are also relevant in the case (intimate, family and private life) and 47 (the right to social assistance and protection) of the Constitution).

For example, in Decision no. 190 of 23 December 2022, the Court observed that although the author of the exception of unconstitutionality invoked articles 23 (*the quality of the law*) and 127 (*property*) from the Constitution, in reality, he claims that the contested norm violates his property right. Therefore, the Court analyzed the criticisms of unconstitutionality by referring to articles 23, 46 (the right to private property and its protection) and 127 of the Constitution (DCC no. 190 of 23 December 2022, § 23).

62. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

According to Article 6 paras (2) and (3) of the Code of Constitutional Jurisdiction, the Constitutional Court is sovereign in the matter of constitutionality control and may extend its control to other normative acts whose constitutionality depends in whole or in part on the constitutionality of the disputed act. The Court proceeded in such a way in a number of judgments, namely: JCC no. 37 of 7 December 2021, § 23, in which the Court extended its scope to Article 17 paras (2)-(4) of the Law on the assessment of institutional integrity, because it had, for the most part, a content similar to the norm contested by the author of the referral, *i.e.* Article 343^8 of the Code of Civil Procedure; JCC no. 21 of 4 August 2020; § 35, in which the author challenged only Article 84 para (1) of the Insolvency Law, but the Court extended its scope regarding Article 84 para (2) of the Insolvency Law, which had a similar content to the one contested by the author of the application and which referred to a possible ban on leaving the place of residence without the permission of the insolvency court and regarding Article 84 para. (3) of the same law that had a logical connection with the first two norms subject to constitutionality control; JCC no. 6 of 10 March 2020, § 35, in which the Court extended its control regarding the provisions of point 8 of Annex no. 6 to Government Decision no. 1231 of 12 December 2018, as it coincided in content with the disputed provisions of Article 27 para. (5) from the Law on the unitary salary system in the budgetary sector and because they aim to implement the established norm).

Curtea Constituțională a Republicii Moldova

Formele și limitele deferenței judiciare: cazul curților constituționale

Raportul național: Republica Moldova

Culturile constituționale variază, iar percepțiile tribunalelor constituționale despre rolul lor într-o democrație constituțională afectează intensitatea analizei lor în cazurile care implică drepturi fundamentale. Multe tribunale manifestă deferență judiciară.

Deferența judiciară reprezintă un instrument juridic inventat de judecători pentru a menține separația puterilor și pentru a se abține să intervină în chestiuni despre care consideră că sunt dincolo de experiența sau de legitimitatea lor, pentru a le decide. Instrumentul a fost utilizat, mai ales, în cazurile care implică drepturi fundamentale. Iar asta datorită calității lor transcendente, a capacității lor de a străbate toate zonele substanțiale ale procesului de luare a deciziilor publice.

Se spune că o atitudine exagerat de deferențială periclitează preeminența dreptului și separația puterilor la fel de mult ca activismul judiciar exagerat. Modul în care își exercită judecătorii deferența reprezintă, prin urmare, o chestiune fundamentală de principiu constituțional, care vizează rolul corespunzător al fiecărei ramuri a guvernării în legătură cu chestiunile semnificative de politică publică.

Următoarele întrebări caută să descopere diferențele dintre modurile de exercitare a deferenței judiciare de către curțile constituționale europene.

Chestionar

Pentru rapoartele naționale

I. **Chestiunile non-justițiabile și intensitățile deferenței**

63. În jurisdicția dumneavoastră, ce se înțelege prin „deferență judiciară".

Prin „deferență judiciară" se înțelege existența unor motive relevante pentru toate instanțele de a manifesta deferență față de puterea legislativă sau față de puterea executivă. Pentru Curtea Constituțională, deferența judiciară este privită ca o constrângere pentru judecătorii constituționali în luarea unei decizii, în favoarea legislativului sau a executivului. Această formă de deferență se încadrează în conceptul marjei discreționare (a se vedea HCC nr. 16 din 4 iunie 2018, § 66, referitoare la interzicerea transmiterii programelor de televiziune şi radio cu conținut informativ, informativ-analitic, militar şi politic care nu sunt produse în statele membre ale Uniunii Europene, în Statele Unite ale Americii, în Canada sau în statele care au ratificat Convenția europeană cu privire la televiziunea transfrontalieră).

64. Are în vedere Curtea dumneavoastră un spectru al deferenței? Există arii „de nepătruns", sau zone prestabilite ale lipsei de răspundere juridică, sau chestiuni non-justițiabile pentru Curtea dumneavoastră (*e.g.* chestiunile controversate în materie de morală, sensibilitățile politice, controversele din societate, alocarea resurselor limitate, implicațiile financiare substanțiale pentru guvern etc.)?

Curtea Constituțională a Republicii Moldova manifestă deferență într-un șir de domenii politice în care i-a recunoscut legislatorului și guvernului o marjă discreționară largă. De exemplu, Curtea a menționat în jurisprudența sa, că stabilirea politicilor de stat în sfera învățământului şi determinarea criteriilor de organizare şi funcționare a sistemului de învățământ constituie o prerogativă a legislatorului (a se vedea DCC nr. 1 din 5 ianuarie 2018, § 29). Astfel, marja de apreciere a statului şi dreptul său de intervenție în procesul de învățământ este mai mare decât în alte domenii şi poate fi realizat prin diverse instrumente de reglementare. Statul are dreptul şi obligația de a stabili căile, conținutul şi standardele necesare pentru a asigura realizarea optimă a dreptului la învățătură (DCC nr.7 din 4 iulie 2013, §§ 40-41).

Totodată, în contextul unei sesizări formulate de Adunarea Populară a Găgăuziei (Gagauz-Yeri), care viza chestiunea introducerii în școlile cu instruire în limba găgăuză a disciplinelor „limba şi literatura română" şi „istoria românilor", Curtea a menționat că promovarea politicii lingvistice de stat ține

de competența Ministerului Educației - organul central de specialitate în domeniul învățământului. Așadar, Curtea a declarat inadmisibile criticile autorului care susțineau că introducerii în școlile cu instruire în limba găgăuză a disciplinelor „limba şi literatura română" şi „istoria românilor" este contrară dreptului poporului găgăuz la studierea limbii de stat, - limba moldovenească, şi a istoriei Moldovei (a se vedea DCC nr. 21 din 10 decembrie 2013, §§ 33-34).

În Hotărârea nr. 29 din 22 noiembrie 2018, la § 55, Curtea i-a recunoscut legislatorului o marjă discreționară largă în ceea ce privește natura şi întinderea măsurilor care trebuie întreprinse în domeniul protecției sociale. Curtea a motivat acest lucru prin faptul că legislatorul este mai bine plasat decât Curtea Constituțională pentru a efectua evaluări şi aprecieri complexe.

În alte domenii, *e.g.* încheierea tratatelor internaționale şi stabilirea taxelor şi impozitelor, deşi Curtea îi recunoaşte Parlamentului şi Guvernului o marjă discreționară largă, ea a precizat că aceasta nu este absolută. Astfel, potrivit jurisprudenței Curții, marja discreționară a autorităților la încheierea tratatelor internaționale este limitată de interesele naționale (a se vedea HCC nr. 12 din 7 mai 2020, § 96). Totodată, Curtea este competentă să verifice constituționalitatea unor norme privind impunerea la plata unor impozite prevăzute de lege, dacă cuantumul acestor impozite este atât de mare, încât dreptul de proprietate ar fi afectat în mod nejustificat (a se vedea DCC nr. 45 din 27 aprilie 2023, § 25). Aşadar, în cazul în care cuantumul impozitului este rezonabil, problema în sine a existenței acestuia constituie o chestiune care ține de marja discreționară a legislativului, fiind exclusă de la controlul de constituționalitate (a se vedea DCC nr. 9 din 20 ianuarie 2022, § 25).

Mai mult, în optica Curții, nici insuficiența declarată a resurselor bugetare nu reprezintă un considerent obiectiv şi rezonabil pentru restrângerea exercițiului drepturilor constituționale (a se vedea HCC nr. 3 din 24 februarie 2022, § 49, referitoare la cuantumul compensației pentru serviciile de transport acordate persoanelor cu dizabilități accentuate în funcție de locul de trai).

65. Există factori care stabilesc modul şi cazul în care trebuie să manifeste deferență Curtea dumneavoastră (*e.g.* cultura şi condițiile țării dumneavoastră; experiențele istorice ale țării dumneavoastră; caracterul absolut sau calificat al drepturilor fundamentale în discuție; chestiunea dezbătură în fața Curții; dacă circumstanțele cazului presupun condiții sociale şi atitudini în schimbare)?

Curtea Constituțională a menționat că, deşi ea reprezintă un for jurisdicțional abilitat cu controlul constituționalității legilor şi cu garantarea drepturilor şi a libertăților fundamentale, atunci când decide cu privire la o problemă care face obiectul unei sesizări, ea nu o face într-un vid, desprinsă fiind de realitățile sociale (HCC nr. 29 din 22 noiembrie 2018, § 59, referitoare la vârsta şi stagiul de cotizare necesar pentru stabilirea pensiei de dizabilitate).

De exemplu, fiind sesizată de un grup de deputați cu controlul constituționalității Legii nr. 3465 din 1 septembrie 1989 cu privire la funcționarea limbilor vorbite pe teritoriul Republicii Sovietice Socialiste Moldoveneşti, Curtea Constituțională a constatat caracterul desuet şi inutil al acestei legi. Pentru aceasta, ea a reținut că, comunitatea din Republica Moldova trăieşte într-un alt stat, unul nou, de drept, democratic şi independent, în care rațiunile de moment ale Legii cu privire la funcționarea limbilor vorbite nu-şi mai au rostul. Curtea a remarcat, în preambulul Legii, o altă dovadă a caracterului desuet al acesteia: obligativitatea utilizării limbii ruse ca limbă de comunicare între națiunile din Uniunea Republicilor Sovietice Socialiste. Uniunea Republicilor Sovietice Socialiste s-a destrămat pe 26 decembrie 1991. De altfel, dacă ar fi acceptată vigoarea legii în discuție, această obligație ar constitui o altă impunere a unei concepții de o manieră paternalistă, atipică pentru perioada contemporană (a se vedea HCC nr. 17 din 4 iunie 2018, § 32 şi § 35).

Într-o altă cauză, Curtea a manifestat deferență pentru drepturile lingvistice ale cetățenilor care aparțin minorităților etnice, declarând neconstituțională o lege a Parlamentului care îi conferea limbii ruse un statut privilegiat în raport cu alte limbi ale minorităților etnice în Republica Moldova. Pentru a ajunge la această concluzie, Curtea s-a raportat, inclusiv la datele privind structura populației după limba maternă obținute la Recensământul din 2014 (a se vedea HCC nr. 4 din 21 ianuarie 2021).

66. Există situații în care Curtea dumneavoastră a manifestat deferență pentru că nu avea competență instituțională sau expertiza necesară?

În jurisprudența Curții Constituționale a Republicii Moldova au existat situații în care Curtea a recunoscut că nu are expertiza necesară și recunoscut constituționale prevederile contestate.

De exemplu, într-o cauză care viza achitarea onorariului fix administratorului/lichidatorului și compensarea cheltuielilor aferente care se trec în mod solidar în obligația organelor de conducere ale debitorului, Curtea a observat că există mai multe modele legislative de remunerare a administratorului insolvenței care presupun existența unui fond de lichidare. Totuși, Curtea a menționat că nu posedă expertiza necesară pentru a stabili cu exactitate dacă aceste practici vor realiza scopurile legitime urmărite mai eficient decât măsurile contestate și dacă nu vor afecta și alte drepturi sau interese, generând alte consecințe (a se vedea HCC nr. 16 din iunie 2020, §§ 68-69).

Într-un număr de cauze care vizau criticile de neconstituționale referitoare la majorarea vârstei de pensionare și a stagiului complet de cotizare, Curtea a reținut că, deși cerința vârstei standard de pensionare lasă loc de discuții cu privire la cea mai bună soluție, nu ține de competența sa să decidă în această materie (a se vedea DCC nr. 111 din 6 septembrie 2022, § 24, referitoare la vârsta de pensionare, stagiul de cotizare și pensia anticipată pentru carieră lungă; DCC nr. 175 din 23 noiembrie 2021, § 25, referitoare la stagiul de cotizare realizat în condiții deosebite de muncă).

67. Aveți cazuri în care Curtea dumneavoastră a manifestat deferență pentru că exista riscul unei erori judiciare?

Atunci când examinează excepțiile de neconstituționalitate, Curtea Constituțională este deseori chemată să clarifice chestiuni ce țin de interpretarea și aplicarea legii într-un caz concret. În aceste cazuri, Curtea manifestă deferență pentru competența tribunalelor de drept comun care sunt mai bine poziționate să evalueze situațiile concrete (a se vedea DCC nr. 104 din 19 iulie 2022, § 26, care viza interzicerea întrevederilor părintelui cu copilul său).

De exemplu, într-o cauză care viza modificările aduse Legii cu privire la avocatură, Curtea a fost chemată să verifice constituționalitatea excluderii posibilității de a obține licența de avocat pe baza titlului științific de doctor în drept și pe baza vechimii în muncă pentru judecători și procurori pentru că reprezinta o imixtiune în dreptul la viața privată. Analizând jurisprudența relevantă a Curții Europene, Curtea a menționat că stabilirea unei încălcări a dreptului la respectarea vieții private prin excluderea dreptului de a accede în profesia de avocat pe baza titlului științific de doctor în drept și pe baza vechimii în muncă pentru judecători și procurori depinde de o analiză de la caz la caz, analiză care are un caracter concret, nu abstract. Curtea Constituțională nu analizează cazuri concrete. Ea a admis că în unele cazuri ar putea fi incident și încălcat dreptul în discuție; în altele ar putea fi doar incident, însă nu și încălcat dreptul; în altele nu ar fi incident și, prin urmare, nu ar fi încălcat acest drept. Ține de competența instanțelor de drept comun să evalueze dacă într-un caz particular, se poate vorbi despre incidența dreptului la viața privată al unui solicitant de licență pentru exercitarea profesiei de avocat și de o încălcare a acestui drept ca urmare a refuzului de a-l primi în profesie, inclusiv prin aplicarea retroactivă a legii (a se vedea DCC nr. 155 din 22 noiembrie 2022, § 40). Astfel, pentru a evita riscul unei erori judiciare, Curtea a manifestat deferență în favoare unei examinări concrete de către instanțele de drept comun.

68. Există cazuri în care Curtea dumneavoastră a manifestat deferență, invocând legitimitatea instituțională sau democratică a decidentului?

Legitimitatea instituțională sau democratică a decidentului nu constituit un motiv expres de deferență pentru Curtea Constituțională.

69. „Cu cât mai mult vizează legislația o chestiune de politici public sociale vaste, cu atât mai puțin dispusă va fi curtea să intervină". Este acesta un standard valid pentru Curtea dumneavoastră? Împărtășește Curtea dumneavoastră concepția potrivit căreia chestiunile de politică publică ar trebui decise prin intermediul proceselor democratice, pentru că tribunalele nu sunt alese și le lipsește mandatul democratic pentru a decide chestiuni de politică

publică?

Acest standard este valabil pentru Curtea Constituțională a Republicii Moldova, în măsura în care, legislatorul sau guvernul nu și-a depășit în mod vădit limitele marjei sale discreționare. Acest control al Curții aplică testul măsurilor mai puțin intruzive apte să realizeze scopul la fel de eficient, cu aceleași costuri sau costuri mai mici. Totuși, au existat situații în care Curtea a declarat neconstituțională o politică publică doar pentru că nu urmărește un scop legitim (a se vedea HCC nr. 3 din 24 februarie 2022, referitoare la lipsa vreunui scop legitim al cuantumului diferențiat al compensației pentru serviciile de transport acordat persoanelor cu dizabilități accentuate (bazat pe criteriul locului de trai)).

Curtea Constituțională a Republicii Moldova are atât jurisprudență în care a intervenit în chestiuni de politici public sociale vaste (*e.g.* prin HCC nr. 5 din 25 februarie 2020, Curtea a declarat neconstituțional condiția criteriului numeric, cerința reprezentativității teritoriale a partidelor politice în curs de înregistrare ca fiind o măsură excesivă și disproporționată în raport cu scopul legitim urmărit), cât și jurisprudență în care a manifestat deferență pentru opțiunea legislatorului sau guvernului care au acționat în limitele marjei lor discreționare (*e.g.* DCC nr. 7 din 20 ianuarie 2022, referitoare la prerogativa Guvernului de a reglementa modul de transmitere în proprietate privată a sectoarelor de teren atribuite în limitele legii şi ocupate de case, anexe gospodăreşti şi grădini; DCC nr. 87 din 25 iulie 2023, referitoare la opțiunea Parlamentului de a substitui temeiul de ajustare a pensiei în funcție de modificare drepturilor băneşti ale celor aflați în exercițiul funcției cu mecanismul indexării pensiilor).

70. Acceptă Curtea dumneavoastră un principiu general al deferenței la judecarea politicilor și filosofiei penale?

Principiu general al deferenței la judecarea politicilor și filosofiei penale este un principiul acceptat de Curtea Constituțională a Republicii Moldova.

În jurisprudența sa, Curtea a subliniat că nu poate efectua un control de constituționalitate în privința unei infracțiuni din perspectiva principiului *ultima ratio*, analizând existența unor măsuri alternative non-penale. Ea nu se află în poziția de a elabora studii empirice în această privință. Pot exista opinii diferite sub aspect criminologic, însă nu ține de rolul Curții să o favorizeze pe una dintre ele în detrimentul celorlalte. Politica penală a statului reprezintă o competență rezervată Parlamentului (articolul 72 alin.(3) lit. n) din Constituție). În acest sens, Parlamentul se bucură de o marjă discreționară la elaborarea politicii penale naționale, în particular atunci când decide dacă o conduită trebuie incriminată sau dacă unele fapte trebuie sancționate penal. Din perspectiva principiului *ultima ratio*, Curtea Constituțională poate interveni doar atunci când efectuează, odată sesizată, testul proporționalității limitelor pedepsei (a se vedea DCC nr. 159 din 24 noiembrie 2022, § 78-79, referitoare la criticile de neconstituționalitate formulate în privința infracțiunii de îmbogățire ilicită; DCC nr. 3 din 19 ianuarie 2023, § 22, referitoare la reglementare răspunderii penale pentru calomnie).

71. Pot exista circumstanțe mai stricte în care guvernul nu-i poate dezvălui informații Curții, în special în contextul cazurilor de securitate națională, care presupun informații cu caracter secret. A manifestat vreodată Curtea dumneavoastră deferență din motive de securitate națională?

Judecătorii Curții Constituționale dețin dreptul de acces la secretul de stat, iar caracterul secret al informațiilor relevante într-o cauză pendinte nu poate constitui un motiv pentru Guvern să nu le prezinte Curții. Nu au existat situații în care Curtea să manifeste deferență din motive de securitate. Dimpotrivă, Curtea a menționat, în jurisprudența sa, că interesele bazate pe securitatea națională nu sunt absolute ca pondere și a declarat neconstituțional prevederea care îi limita competența instanțelor de judecată de a efectua controlul proporționalității actelor administrative individuale și normative referitoare la securitatea națională a Republicii Moldova (a se vedea HCC nr. 27 din 13 noiembrie 2020, referitoare la garanțiile străinului în cazul expulzării). Mai mult, Curtea a declarat neconstituționale prevederile Legii nr. 200 din 16 iulie 2010 privind regimul străinilor, care interzicea comunicarea străinului a motivelor care stau la baza deciziei declarării sale ca persoană indezirabilă. Curtea a notat că necesitatea protecției secretului de stat și a interesului legitim al siguranței naționale nu se opune dreptului persoanei de a cunoaşte rezumatul motivelor care au servit drept temei

pentru declararea sa ca persoană indezirabilă, în măsura în care acest lucru este compatibil cu păstrarea confidenţialităţii datelor obţinute (a se vedea HCC nr. 27 din 13 noiembrie 2020, § 84).

72. Dat fiind rolul tribunalelor constituţionale de gardieni ai Constituţiei, ar trebui să interfereze acestea cu presupusele politici publice neconstituţionale atunci când guvernele sunt pasive în materie de implementare a reformelor de conformare cu drepturile fundamentale?

Curtea Constituțională a Republicii Moldova are competența să emită Adrese Parlamentului sau Guvernului prin care să le atragă atenția în privința necesității lichidării unor lacune în legislație ce se datorează nerealizării unor prevederi ale Constituției.

De exemplu, printr-o Adresa anexată la Hotărârea nr. 22 din 1 octombrie 2018, Curtea i-a semnalat Parlamentului că noțiunea de „urmări grave" se regăsește în mai multe articole ale Codului penal şi a sugerat modificarea normelor penale în discuție, în conformitate cu principiul legalității incriminării. Fiind sesizată ulterior cu verificare constituționalității aceiași noțiuni, însă în contextul unei ale infracțiuni, Curtea a notat omisiunea Parlamentului de a remedia aceste aspecte care perpetuează o stare de neconstituționalitate, precum şi frecvența sesizărilor relative la această problemă. În fine, Curtea a declarat neconstituțională noțiunea de „urmări grave", care se regăsea în mai multe articole din Codul penal, pe baza raţiunilor din Hotărârea nr. 22 din 1 octombrie 2018 și, printr-o Adresă, i-a atras atenția Parlamentului în privința necesității aducerii normelor penale în corespundere cu raționamentele expuse în hotărârea menționată (a se vedea HCC nr. 24 din 17 octombrie 2019).

II. **Decidentul**

73. Manifestă Curtea dumneavoastră mai multă deferenţă faţă de un act al Parlamentului, decât faţă de o decizie a executivului? Manifestă Curtea dumneavoastră deferenţă în funcţie de nivelul de răspundere democratică a decidentului originar?

Fie că este vizat un act al Parlamentului sau a executivului, Curtea verifică dacă acestea au acționat în limitele marjei lor discreționare. Totuși, în privința unui act al Guvernului care este adoptat pentru organizarea executării legilor, Curtea trebuie să mai verifice dacă Guvernul a acționat *ultra vires* (a se vedea HCC nr. 6 din 28 februarie 2023, § 58, care viza calcularea pensiei funcționarilor detașați).

Nivelul de răspundere democratică a decidentului originar nu este un criteriu de deferență pentru Curtea Constituțională a Republicii Moldova.

74. Ce pondere oferă Curtea dumneavoastră procesului legislativ? Care este relevanţa juridică, dacă este cazul, pe care ar trebui să o aibă analiza de la nivel parlamentar pentru analiza judecătorilor privind compatibilitatea cu drepturile fundamentale?

În Hotărârea nr.14 din 27 aprilie 2021, § 54, Curtea a reținut că competența sa în materia controlului constituționalității procedurii parlamentare este limitată, dat fiind caracterul suveran al Parlamentului în materia legiferării şi deferența judiciară care trebuie manifestată de Curte față de rolul Parlamentului de legislator autonom. În această materie, Curtea poate verifica constituționalitatea unei legi sub aspect procedural doar dacă la adoptarea ei Parlamentul a afectat vreun element esențial al procesului de legiferare, care rezultă expres din Constituție sau care poate fi dedus clar dintr-un principiu constituțional.

Analiza de nivel parlamentară are relevanță pentru analiza Curții Constituționale privind compatibilitatea cu drepturile fundamentale a legii contestate, atunci când Curtea analizează scopul legitim al ingerinței. În jurisprudența sa, Curtea a declarat neconstituțională o prevedere care le interzicea organizațiilor necomerciale să funcționeze în calitate de furnizori privați de servicii media audiovizuale, pentru că nu a identificat în nota informativă și în opiniile prezentate de autorități niciun un scop legitim (a se vedea HCC nr. 6 din 10 martie 2022, § 40).

Într-o altă cauză, referitoare la constituționalitatea interzicerii simbolurilor general cunoscute utilizate în contextul unor acțiuni de agresiune militară, crime de război sau crime împotriva umanității, Curtea Constituțională a identificat scopul legitim al măsurii în discuție, făcând trimitere la nota informativă

a amendamentului prin care fost introdusă. Potrivit acestei note, utilizarea unor asemenea simboluri promovează indirect războiul, conduce la apariţia unor tensiuni sociale şi a urii interetnice. Astfel, Curtea a admis că scopurile menţionate în nota informativă la amendamentul prin care a fost introdusă măsura în discuţie pot servi la asigurarea securităţii naţionale şi a ordinii publice (a se vedea HCC nr. 9 din 11 aprilie 2023, §§ 75-76).

75. Verifică Curtea dumneavoastră dacă decidentul şi-a justificat decizia sau dacă decizia este una la care Curtea ar fi ajuns ea însăşi dacă ea era decidentul?

Curtea Constituțională a Republicii Moldova verifică dacă Parlamentul și-a justificat decizia. Această obligație a Parlamentului rezultă din obligația constituțională generală a autorităților de a-şi motiva propriile decizii, care poate fi dedusă din articolul 54 din Constituţie şi din standardele constituționalismului european, dictate de cultura justificării, în care fiecare exercițiu al puterii trebuie justificat (a se vedea HCC nr. 15 din 28 aprilie 2021, § 42, referitoare la controlul constituționalității Hotărârii Parlamentului privind declararea stării de urgență).

Mai mult, Curtea Constituțională analizează dacă legislatorul și-a motivat în mod obiectiv decizia, dacă există o legătură rațională cu scopurile legitime pe care le urmărește, dacă a respectat condiția ingerinței minime şi a asigurat unui echilibru corect între principiile concurente (a se vedea HCC nr. 9 din 11 aprilie 2023, care viza controlul constituționalității interzicerii simbolurilor general cunoscute utilizate în contextul unor acțiuni de agresiune militară, crime de război sau crime împotriva umanității).

76. Manifestă Curtea dumneavoastră deferenţă în funcţie de măsura în care decizia sau măsura a fost precedată de o analiză cuprinzătoare privind compatibilitatea cu drepturile fundamentale? Cât de profundă trebuie să fie analiza legislativului, de exemplu, pentru ca Curtea dumneavoastră să-i dea importanţă?

Curtea Constituțională manifestă deferență pentru rolul Parlamentului de legislator autonom. Totuși, pe baza articolului 54 din Constituţie şi din standardele constituționalismului european, dictate de cultura justificării, în care fiecare exercițiu al puterii trebuie justificat, Parlamentul are obligația constituțională de a-şi motiva propriile decizii (a se vedea HCC nr. 15 din 28 aprilie 2021, § 42, referitoare la controlul constituționalității Hotărârii Parlamentului privind declararea stării de urgență).

De exemplu, în jurisprudența sa, Curtea a declarat neconstituțională o Hotărâre a Parlamentului prin care s-a declarat starea de urgență din cauza că lipsei unei motivări obiective privind necesitatea instituirea stării de urgenta. La modul concret, Curtea a reținut că „în nota informativă a proiectului de hotărâre, care ocupă o pagină ... nu sunt oferite argumente care să justifice inclusiv durata stării de urgență". Totodată, Curtea a reținut că „nota informativă nu conține o motivare care să reflecte standardul proporționalității, de exemplu, în privința interdicției totale a desfăşurării adunărilor, a manifestațiilor publice şi a altor acțiuni de masă (a se vedea HCC nr. 15 din 28 aprilie 2021, § 44 și § 46). Mai mult, având în vedere că pe rolul Curții la acea dată se se afla o sesizare referitoare la constatarea circumstanțelor care justifică dizolvarea Parlamentului, autorii proiectului de Hotărâre trebuiau să argumenteze ponderea mai mare a scopului instituirii stării de urgență pe o perioadă de două luni în comparație cu scopul unei eventuale dizolvări a Parlamentului. Această argumentare trebuia să se refere şi la caracterul insuficient al altor măsuri legale, în comparație cu măsurile pe care le presupune starea de urgență, pentru realizarea scopului urmărit (a se vedea HCC nr. 15 din 28 aprilie 2021, § 48).

Într-o altă hotărâre recentă, referitoare la interdicția de a candida la alegeri, aplicată unor persoane asociate partidelor politice declarate neconstituționale – măsură care implica limitări substanțiale ale dreptului constituțional de a candida la alegeri – Curtea a reținut că Parlamentul trebuie să aducă motive convingătoare atunci când stabilește durata unei interdicții, precum și atunci când decide să majoreze durata acesteia. Parlamentul trebuie să justifice în ce măsură durata interdicției stabilite este aptă să urmărească scopurile legitime ale acesteia. Totuși, Curtea a observat că, Parlamentul a majorat, fără vreo motivare, durata de interdicției de la trei la cinci ani. Astfel, Curtea a constatat că legislatorul a majorat durata interdicției contestate în lipsa unei justificări obiective (a se vedea HCC nr. 16 din 3 octombrie 2023, §§ 52- 53).

77. Analizează Curtea dumneavoastră dacă opiniile opuse au fost reprezentate pe deplin în cadrul dezbaterii parlamentare atunci când a fost adoptată o măsură? Este suficient să fi existat o dezbatere extinsă privind fondul general al legislației sau trebuie să fi existat o atenție specială privind implicațiile asupra drepturilor?

În Hotărârea nr. 14 din 27 aprilie 2021, care viza excluderea unor competențe ale Președintelui Republicii referitoare la Serviciul de Informații și Securitate, Curtea Constituțională a reținut că, în cadrul procedurilor de legiferare, Parlamentul trebuie să asigure deputații cu posibilitatea de a examina conținutul proiectului de lege printr-un schimb de opinii. Curtea a notat că această etapă a procesului de legiferare este necesară, deoarece ea le oferă deputaților posibilitatea de a înțelege esența proiectului de lege propus spre examinare și contribuie la edificarea încrederii societății că legea a fost discutată pe larg până la adoptare (§ 57).

În acest context, Curtea Constituțională a declarat neconstituționale un șir de acte adoptate de Parlamentul Republicii Moldova, pentru că au fost votate într-un regim accelerat, fără a-i asigura opoziției parlamentare posibilitatea de a pune întrebări sau de a lua cuvântul asupra subiectului supus examinării. Curtea a reținut că, chiar dacă procedurile parlamentare au fost însoțite de proteste din partea opoziției parlamentare, acest fapt nu poate justifica adoptarea actelor într-o procedură lipsită de dezbateri (a se vedea HCC nr. 14 din 27 aprilie 2021, § 62, care viza excluderea unor competențe ale Președintelui Republicii referitoare la Serviciul de Informații și Securitate; HCC nr. 21 din 27 iulie 2021, § 52, care viza procedura de modificare a componenței numerice și nominale a Biroului permanent al Parlamentului; HCC nr. 22 din 29 iulie 2021, § 49, care viza procedura de adoptare a unei legi pentru abrogarea și modificarea unor acte normative).

În aceste cauze, Curtea Constituțională nu a examinat conținutul dezbaterilor parlamentare, ci posibilitatea ca opoziția parlamentară să formuleze întrebări și luări de cuvânt. Curtea a consultat stenograma ședinței plenare a Parlamentului și a considerat că într-o perioada foarte scurtă între cele două lecturi ale proiectelor de legi (*i.e.* de un minut în HCC nr. 14 din 27 aprilie 2021, § 60, și de trei minute în HCC nr. 22 din 29 iulie 2021, § 48) deputații din opoziția parlamentară nu au avut posibilitatea să supună dezbaterii Legea contestată.

78. Faptul că decizia aparține legislativului sau că s-a ajuns la aceasta după consultări publice sau după dezbateri publice reprezintă o probă concludentă pentru legitimitatea democratică a deciziei?

Autoritatea de a legifera, existența consultări publice sau dezbaterilor publice nu reprezintă o probă concludentă pentru legitimitatea democratică a deciziei. Potrivit jurisprudenței Curții Constituționale, Legea fundamentală stabilește cerințele procedurale ale procesului de legiferare aplicabile atât la etapa verificării conținutului proiectelor de legi (*e.g.* existența dezbaterilor parlamentare, dreptul de a depune amendamente, dreptul de a acorda întrebări, dreptul de a lua cuvântul etc.), cât și la etapa verificării îndeplinirii condițiilor procedurale preliminare pentru a putea demara examinarea actelor în discuție. De exemplu, la etapa verificării respectării condițiilor procedurale preliminare pentru a putea demara examinarea proiectelor de legi, Parlamentul trebuie să constate dacă proiectul în discuție a fost trimis de una din autoritățile autorizate de articolul 73 din Constituție să înainteze inițiative legislative și dacă, în cazul Guvernului, hotărârea de aprobare a proiectului de lege a intrat în vigoare, potrivit articolului 102 alin.(4) din Constituție (a se vedea HCC nr. 17 din 10 iunie 2021, §§ 53-54).

În acest sens, Curtea a declarat neconstituțională o Hotărâre a Parlamentului, adoptată la inițiativa legislativă a Guvernului, pentru că, atunci când aceasta a fost votată în prima lectură, nu intrase în vigoare Hotărârea Guvernului prin care proiectul în discuție a fost aprobat. Prin urmare, Curtea a reținut că în cadrul examinării proiectului de lege în prima lectură Parlamentul a votat un act inexistent (a se vedea HCC nr. 17 din 10 iunie 2021, § 57, referitoare la modificare componenței Consiliului Superior al Magistraturii).

III. **Câmpul de aplicare al drepturilor, legalitate și proporționalitate**

79. A manifestat vreodată Curtea dumneavoastră deferență la etapa definirii drepturilor, dând pondere definiției guvernului date drepturilor sau aplicării acesteia faptelor în discuție?

Ca o regulă, Curtea Constituțională, în calitate de sigurul interpret al constituției, definește câmpul de aplicare a drepturilor constituționale. Pentru că judecata sa este o „judecată a legilor", la modul abstract, dar nu o „judecată a cazurilor concrete", Curtea nu poate verifica, potrivit competențelor sale, caracterul proporțional al modului de aplicare a prevederilor contestate, adică proporționalitatea ingerinței la modul concret, în circumstanțele unei cauze particulare (a se vedea HCC nr. 3 din 14 ianuarie 2021, § 65, referitoare la accesul la informațiile cu caracter personal). Din acest motiv, definiția guvernului oferită drepturilor sau aplicarea acesteia faptelor în discuție nu este o chestiune relevantă pentru analiza Curții.

Totuși, uneori, Curtea manifestă deferență pentru definiția reglementată de legislator printr-o lege. De exemplu, în Hotărârea sa nr. 29 din 22 noiembrie 2018, Curtea a fost chemată să verifice dacă limitările impuse dreptului la pensia de dizabilitatea printr-o lege nu afectează în mod disproporționat articolul 47 din Constituție, care garantează dreptul la asistență și protecție socială. În acest sens, Curtea a menționat că, la nivel legislativ, dispozițiile constituționale ale articolului 47 sunt dezvoltate prin Legea nr. 156 din 14 octombrie 1998 privind sistemul public de pensii, care conține dispoziții referitoare la categoriile de pensii și la condițiile de exercițiu al acestora. Curtea a observat că secțiunea a 3-a din această Lege reglementează câmpul de aplicare al dreptului la pensie de dizabilitate (§ 53). Analizând aceste dispoziții, Curtea a acceptat că impunerea *per se* de către legislator a unei vârste de pensionare și a unui stagiu de cotizare nu este neconstituțională (§ 55).

80. Afectează vreunul dintre drepturile aplicabile intensitatea deferenței? Consideră Curtea dumneavoastră că unele drepturi sau aspecte ale drepturilor sunt mai importante și că, așadar, ingerințele în exercițiul acestora merită o analiză mai riguroasă decât altele? Aveți factori care să stabilească natura dreptului fundamental în discuție?

Drepturile aplicabile nu afectează intensitatea deferenței. Curtea Constituțională a Republicii Moldova tratează drepturile de o manieră la fel de importantă și analizează la fel de riguros ingerințele în exercitarea acestora. Nu există o ierarhie a drepturilor în analiza Curții Constituționale. Dacă Curtea constată existența unei ingerințe în dreptul fundamental aplicabil, ea va purcede cu analiza proporționalității acesteia, aplicând etapele testului de proporționalitate.

81. Aveți o scală a clarității atunci când verificați constituționalitatea unei legi? Cum decideți cât de clară este o lege? Când aplicați regula *In claris non fit interpretatio*?

În jurisprudența sa, Curtea Constituțională a stabilit că problema calității unei legi nu reprezintă o problemă de constituționalitate atât timp cât nu este afectat un drept fundamental. Astfel, Curtea Constituțională efectuează testul calității legii doar prin raportare la un drept fundamental (a se vedea DCC nr. 146 din 17 decembrie 2020, § 22, referitoare la momentul desemnării reprezentantului debitorului în procesul de insolvabilitate și competența acestuia de a contesta creanțele și drepturile de preferință din tabelul de creanțe; DCC nr. 38 din 30 martie 2021, § 17, care viza răspunderea subsidiară a membrilor organelor de conducere ale debitorului pentru încălcarea obligației de depunere a cererii de intentare a procesului de insolvabilitate).

Totuși, dacă Curtea constată incidența dreptului, ea își va continua analiza privind calitatea legii, aplicând regulile de interpretare. Dacă textul contestat este redactat cu suficientă precizie, aici trebuie avută în vedere în special regula *In claris non fit interpretatio* (textele clare nu trebuie interpretate) (a se vedea DCC nr. 76 din 2 iulie 2020, § 28). Cu alte cuvinte, caracterul general al formulării unui text legal conduce la caracterul general al aplicării lui, fără să fie necesare distincții pe care textul respectiv nu le conține și nu le urmărește (DCC nr. 60 din 9 iunie 2020, § 31, referitoare la incompatibilitatea judecătorului la judecarea succesivă a aceleiași cauze civile).

În alte cazuri, Curtea analizează dacă semnificația termenului contestat poate fi dedusă din sensul obișnuit al acestuia, adică prin aplicarea simplă a regulilor de interpretare lingvistică, pornind de la

sensul uzual al termenilor, având în vedere circumstanțele cauzei concrete (a se vedea DCC nr. 99 din 10 august 2023, § 26, referitoare la privarea de dreptul de a conduce mijloace de transport).

82. Cât de intens este controlul Curții dumneavoastră la etapa stabilirii scopului legitim?

La această etapă a testului de proporționalitatea, Curtea trebuie să verifice dacă scopul urmărit de ingerință poate fi subsumat scopurilor legitime prevăzute de articolul 54 alin. (2) din Constituție. Pentru a identifica scopul pe care îl urmărește ingerința, Curtea poate consulta nota informativă a proiectului de lege contestată (a se vedea HCC nr. 9 din 11 aprilie 2023, § 75, care viza controlul constituționalității interzicerii simbolurilor general cunoscute utilizate în contextul unor acțiuni de agresiune militară, crime de război sau crime împotriva umanității) sau poate deduce acest scop pe baza analizei prevederii contestate (a se vedea HCC nr. 14 din 8 august 2023, §§ 75-77, referitoare la garanțiile refuzului de acordare a dreptului de acces la secretul de stat). Analiza Curții la acesta etapă nu este una foarte riguroasă. De regulă, Curtea „admite" că ingerința urmărește realizarea unui scop special, care poate fi subsumat unul scop legitim general prevăzut de articolul 54 alin.(2) din Constituție (a se vedea HCC nr. 20 din 3 noiembrie 2022, § 50, referitoare la condiția dactilografierii cererii de recurs).

Totuși, dacă Curtea, analizând nota informativă la proiectul de lege și opinii prezentate de autorități, nu poate identifica niciun argument în susținerea caracterului legitim al ingerinței, ea va constata lipsa unui scop legitim și va declara neconstituțională ingerința contestată (a se vedea HCC nr. 6 din 10 martie 2022, §§ 36-41, care viza interdicția aplicată organizațiilor necomerciale să funcționeze în calitate de furnizori privați de servicii media audiovizuale).

83. Ce test de proporționalitate aplică Curtea dumneavoastră? Aplică Curtea dumneavoastră toate etapele testului clasic de proporționalitate (*i.e.* oportunitate, necesitate, și proporționalitate în sens strict)?

Curtea Constituțională aplică testul clasic al proporționalității atunci când examinează caracterul proporțional al ingerinței într-un drept fundamental.

Curtea Constituțională analizează în toate cazurile oportunitatea și proporționalitatea în sens restrâns a ingerinței contestate (a se vedea HCC nr. 22 din 6 august 2020, referitoare la prezentarea informației fiscale către instanțele judecătorești și organele de urmărire penală ca mijloc de probă; HCC nr. 14 din 8 august 2023, referitoare la garanțiile refuzului de acordare a dreptului de acces la secretul de stat). De multe ori, Curtea nu aplică cea dea doua etapă a testului clasic de proporționalitate, *i.e.* necesitatea.

Totuși, au existat cauze în care Curtea a analizat caracterul necesar al mijloacelor utilizate pentru realizarea scopurilor urmărite (a se vedea HCC nr. 26 din 30 octombrie 2018, referitoare la obligativitatea vaccinului pentru ca un copil să poată merge la grădiniță sau la școală, §§ 59-67; HCC nr. 35 din 9 noiembrie 2021, §§ 184-191, în care Curtea a constatat că, deși există mijloace alternative mai puțin intruzive pentru a asigura implementarea programului de activitate a Guvernului și deblocarea activității ministerelor din cadrul Guvernului, acestea nu sunt apte să asigure realizarea scopurilor legitime menționate cu aceeași eficiență ca măsura desființării unor funcții publice și creării altor funcții de demnitate publică și HCC nr. 11 din 20 iulie 2023, în care Curtea a identificat existența unei măsuri mai puțin intruzive pentru angajarea în organizațiile de pază particulară, *i.e.* lipsei antecedentelor penale, în raport cu măsura contestată, *i.e.* lipsa unei condamnări pentru infracțiuni intenționate).

84. Parcurge Curtea dumneavoastră fiecare etapă aplicabilă a testului de proporționalitate?

Curtea Constituțională nu parcurge fiecare etapă aplicabilă a testului de proporționalitate. Dacă ingerința nu trece etapă oportunității (a se vedea HCC nr. 14 din 21 iulie 2022, §53, în care Curtea a considerat că interdicția absolută de recalculare a facturilor locative, comunale și necomunale nu asigură un echilibru corect între interesele economice ale furnizorului și dreptul de proprietate a consumatorului) sau cea a necesității (a se vedea HCC nr. 5 din 14 februarie 2023, § 83, în care Curtea a constatat că obiectivul legislatorului de a evita situațiile de anulare a deciziilor din cauza încălcării unor reguli de procedură nesemnificative poate fi realizat prin limitarea controlului judiciar la erorile

procedurale grave ale Comisiei de evaluare în cadrul procedurii de evaluare, care afectează caracterul echitabil al procedurii de evaluare, fără să limiteze *in toto* competența de a examina chestiunile de procedură), constatarea în această privința va fi suficientă pentru a o declara neconstituțională.

85. Există cazuri în care Curtea dumneavoastră acceptă că măsura contestată satisface una sau mai multe etape ale testului de proporționalitate, chiar dacă nu există, în mod vizibil, probe suficiente care să demonstreze acest fapt?

Există cazuri în care Curtea nu constată în mod expres că măsura contestată satisface una din etapele testului de proporționalitate, ci admite doar această posibilitatea pentru a trece la următoare etapă, consolidându-și astfel analiza. De exemplu, în Hotărârea nr. 6 din 10 aprilie 2018, Curtea nu a putut afirma lipsa oricărei legături raționale cu scopurile legitime pe care le urmărește obligativitatea efectuării testului poligraf pentru ocuparea funcției de președinte al Autorității Naționale de Integritate și a continuat să analizeze necesitatea și proporționalitatea în sens restrâns a ingerinței. Curtea procedează astfel și atunci când constată că măsura constată satisface parțial una din etapele testului de proporționalitate. De exemplu, în Hotărârea nr. 7 din 19 martie 2019, Curtea a reținut că măsura contestată îndeplinește parțial condiția legăturii raționale cu scopurile legitime și a continuat să analize proporționalitatea în sens restrâns a ingerinței.

86. A fost apariția controlului proporționalității în jurisprudența Curții dumneavoastră concomitentă cu ascensiunea teoriei deferenței judiciare?

Controlul proporționalității ingerinței într-un drept fundamental este impus de articolul 54 din Constituție. Totuși, domeniile în care autoritățile dispun de o marjă discreționară mai largă sau redusă au fost dezvoltate ulterior în jurisprudența Curții, având în vedere jurisprudența Curții Europene a Drepturilor Omului.

87. A conturat jurisprudența CEDO abordarea Curții dumneavoastră privind deferența? Reprezintă teoria CEDO a marjei de apreciere echivalentul jurisprudențial al marjei discreționare pe care o recunoaște Curtea dumneavoastră? Dacă nu, cât de des se suprapun considerentele CEDO privind marja de apreciere cu considerentele Curții dumneavoastră privind deferența în cazuri similare?

În Hotărârea sa nr. 16 din 4 iunie 2018, făcând referire la cauza *Animal Defenders International v. Regatul Unit*, 22 aprilie 2013 [MC], Curtea Constituțională a conturat conceptul marjei discreționare pe care o recunoaște. Astfel, Curtea a menționat că marja de apreciere include și motivele relevante pentru toate instanțele referitoare la nevoia manifestării deferenței față de puterea legislativă sau față de puterea executivă. Având în vedere această formă de deferență, Curtea Constituțională operează cu conceptul de marjă de discreție, privită ca o constrângere pentru judecătorii constituționali în luarea unei decizii, în favoarea legislativului sau executivului (§ 66).

De exemplu, în Decizia sa nr. 5 din 14 ianuarie 2019, referitoare la votarea în afara țării în baza buletinului de identitate sau a actelor de identitate expirate, Curtea a verificat dacă Parlamentul nu și-a depășit puterea discreționară acordată de Constituție în materie de limitare a exercițiului dreptului la vot al persoanelor peste hotarele țării, exercitat în baza altor acte decât un pașaport valabil. În acest sens, Curtea a analizat dacă ingerința este prevăzută de lege, dacă urmărește unul sau mai multe scopuri legitime și dacă nu este disproporționată (a se vedea DCC nr. 5 din 14 ianuarie 2019, §§ 20 – 31).

88. A condamnat CEDO statul dumneavoastră din cauza deferenței manifestate de Curtea dumneavoastră într-un caz precis, deferență care a făcut ca remediul ei să fie lipsit de efectivitate?

La 18 noiembrie 2008, Curtea Europeană a Drepturilor Omului a pronunțat hotărârea în cauza *Tănase v. Moldova*, prin care a constatat încălcarea dreptului reclamantului de a fi ales în Parlamentul Republicii Moldova, prin adoptarea Legii nr. 273 din 7 decembrie 2007. Dispozițiile legii impuneau restricții la ocuparea unor funcții publice pentru persoanele care dețineau și cetățenia unui alt stat decât a Republicii Moldova. Guvernul Republicii Moldova a solicitat reexaminarea cauzei de către Marea Cameră, invocând caracterul legitim și democratic al ingerinței. În timp ce procedurilor erau pend-

inte în fața Marii Camere, Curtea Constituțională a Republicii Moldova a pronunțat Hotărârea nr. 9 din 26 mai 2009, prin care a declarat constituțională Legea care stabilea ingerința în dreptul reclamantului garantat de articolul 3 Protocolul nr. 1 la Convenție. Curtea Constituțională a considerat că prin adoptarea legii în discuție, legislatorul a acționat în limitele marjei sale sa de apreciere, iar ingerința în dreptul de a fi ales era proporțională scopului urmărit.

Constatările Curții Constituționale din această hotărâre au fost avute în vedere de către Marea Cameră în analiza sa. Totuși, la 27 aprilie 2010, Marea Cameră a Curții Europene a constatat încălcarea articolului 3 Protocolul nr. 1 la Convenție (a se vedea *Tănase v. Moldova* [MC], 27 aprilie 2010). Ulterior, la 11 decembrie 2014, la demersul unor judecători ai Curții Constituționale, Curtea Constituțională și-a revizuit Hotărârea nr. 9 din 26 mai 2009 și a declarat neconstituționale prevederile Legii nr. 273 din 7 decembrie 2007 (a se vedea HCC nr. 31 din 11 decembrie 2014).

IV. **Alte particularități**

89. Cât de des apare chestiunea deferenței în cazurile fundamentale judecate de Curtea dumneavoastră?

Condițiile de admisibilitate pentru sesizarea Curții Constituționale pun în discuție destul de des chestiunea deferenței. Atunci când analizează incidența unui drept fundamental sau articol din Constituției, Curtea stabilește, mai întâi, marjă de apreciere a statului în domeniul respectiv. Dacă Curtea observă că statul a acționat în limitele marjei sale de apreciere, atunci nu va constata incidența dreptului fundamental sau a articolului din Constituție invocat de autorul sesizării. De exemplu, în Decizia sa nr. 45 din 27 aprilie 2023, care viza critici de neconstituționalitatea bazate pe dreptul de proprietate formulate în privința impozitului pe avere, Curtea a notat că legislatorul deține o marjă largă de apreciere în acest domeniu și a verificat dacă prin reglementarea acestui tip de impozit, legislatorul a acționat în limitele marjei sale de apreciere.

90. A devenit Curtea dumneavoastră mai deferențială de-a lungul timpului?

Există domenii în care Curtea a devenit mai diferențială, cum ar fi cel al protecției sociale (a se vedea DCC nr. 108 din 6 septembrie 2022, referitoare la vârsta de pensionare şi vechimea în muncă a judecătorilor care ies la pensie începând cu 1 iulie 2021; DCC nr. 21 din 2 martie 2023, referitoare la recalcularea pensiilor stabilite anterior militarilor şi persoanelor din corpul de comandă şi din trupele organelor afacerilor interne).

În alte domenii, cum ar fi cel al procedurilor parlamentare, Curtea, dimpotrivă, a fost mai activă (a se vedea răspunsurile la întrebările 13-15 de mai sus).

91. Depinde atitudinea deferențială de numărul de cauze de pe rolul Curții?

Agenda supraîncărcată a Curții Constituționale sau numărul mic de sesizări pendinte nu influențează analiza sa în cauze concrete. Curtea examinează cauzele din fața sa cu o atenție egală, fără a le trata *de plano* deferențial pentru a-și reduce volumul de muncă.

92. Își poate baza Curtea dumneavoastră hotărârile pe motive care nu au fost avansate de părți? Poate reîncadra Curtea dumneavoastră motivele avansate sub o prevedere constituțională diferită de cea invocată de reclamant?

Potrivit articolelor 24 alin. (2) din Legea cu privire la Curtea Constituțională şi 39 din Codul jurisdicției constituționale, sesizarea depusă în fața Curții Constituționale trebuie să fie motivată. Această condiție nu este îndeplinită prin simpla trimitere o prevedere din Constituție, care nu poate fi considerată o critică de neconstituționalitate. În asemenea situații, Curtea respinge ca inadmisibilă sesizarea formulată, precizând că simpla trimitere la un text din Constituție, fără explicarea pretinsei neconformități cu acesta a prevederilor legale contestate, nu echivalează cu un argument. Dacă ar proceda la examinarea fondului sesizării formulate de o asemenea manieră, Curtea Constituțională s-ar substitui autorului în invocarea argumentelor de neconstituționalitate, fapt care ar echivala cu un control din oficiu (a se vedea HCC nr. 20 din 3 noiembrie 2022, § 23, referitoare la condiția dactilografierii cererii de recurs; HCC nr. 12 din 6 aprilie 2021, §§ 31 – 32, referitoare la cuantumul salariului minim).

Totuşi, Curtea poate încadra motivele avansate sub o prevedere constituţională diferită de cea invocată de autorul sesizării. În jurisprudenţa sa, Curtea a reţinut că este suverană cu privire la competenţa sa în materia controlului de constituţionalitate. Curtea nu poate fi constrânsă, la examinarea constituţionalităţii unui text de lege, să analizeze dispoziţiile criticate doar prin prisma normelor constituționale invocate de către autor, ci este liberă să le analizeze şi în raport cu prevederile constituţionale relevante pentru soluţionarea sesizării, importante fiind argumentele aduse în acest sens (a se vedea HCC nr. 17 din 23 iunie 2020, § 58, în care Curtea a reţinut incidenţa articolului 20 din Constituţie (accesul liber la justiţiei), pentru că analiza sa viza problema contestării măsurilor de urgenţă dispuse de Executiv; HCC nr. 27 din 13 noiembrie 2020, §§ 18-19, în care Curtea a considerat că argumentele autorului sesizării fac incidente şi articolele 19 (Statutul juridic al cetăţenilor străini şi al apatrizilor) şi 26 (Dreptul la apărare) din Constituţie; HCC nr. 2 din 12 ianuarie 2021, § 24, în care Curtea a considerat că în această cauză sunt incidente şi articolele 28 (viaţa intimă, familială şi privat)] şi 47 (dreptul la asistenţă şi protecţie socială) din Constituţie).

De exemplu, în Decizia nr. 190 din 23 decembrie 2022, Curtea a observat că deși autorul excepției de neconstituționalitate a invocat articolele 23 (calitatea legii) şi 127 (proprietatea) din Constituție, în realitate, acesta susține că norma contestată îi încalcă dreptul de proprietate. Prin urmare, Curtea a analizat criticile de neconstituționalitate prin raportare la articolele 23, 46 (dreptul la proprietate privată și protecția acesteia) și 127 din Constituție (DCC nr. 190 din 23 decembrie 2022, § 23).

93. Își poate extinde Curtea dumneavoastră controlul de constituționalitate asupra altei legi care nu a fost contestată în fața sa, dar care are legătură cu situația reclamantului?

Potrivit articolului 6 alineatele (2) şi (3) din Codul jurisdicţiei constituţionale, Curtea Constituţională este suverană în materia controlului de constituţionalitate şi își poate extinde obiectul de controlul în privința altor acte normative de a căror constituționalitate depinde în întregime sau parțial constituționalitatea actului contestat. Curtea a procedat astfel într-un șir de hotărâri, și anume: HCC nr. 37 din 7 decembrie 2021, § 23, în care Curtea și-a extins obiectul și în privința articolului 17 alineatele (2)-(4) din Legea privind evaluarea integrității instituționale, pentru că avea, în mare parte, un conținut asemănător cu norma contestată de autorul sesizării, *i.e.* articolul 343[8] din Codul de procedură civilă; HCC nr. 21 din 4 august 2020; § 35, în care autorul a contestat doar articolul 84 alin.(1) din Legea insolvabilității, însă Curtea și-a extins obiectul în privința articolului 84 alin.(2) din Legea insolvabilității, care avea un conținut asemănător celui contestat de autorul sesizării şi care se referea la o eventuală interdicție a părăsirii localității de reşedință fără permisiunea instanței de insolvabilitate și în privința articolului 84 alin. (3) din aceiași lege care avea o conexiune logică cu primele două norme supuse controlului de constituționalitate; HCC nr. 6 din 10 martie 2020, § 35, în care Curtea și-a extins controlul în privința prevederile punctului 8 din Anexa nr. 6 la Hotărârea de Guvern nr.1231 din 12 decembrie 2018, pentru că coincidea după conținut cu prevederile contestate ale articolului 27 alin.(5) din Legea privind sistemul unitar de salarizare în sectorul bugetar şi pentru că au ca scop executarea normei contestate).

The Constitutional Court of Montenegro

Subject: Forms and limits of judicial restraint: The case of constitutional courts

NATIONAL REPORT ON THE QUESTIONNAIRE FOR XIX CONGRESS OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS

I. Matters not subject to judicial decision and intensity of restraint

1. *What does the term "judicial restraint" encompass in your jurisdiction?*

The concept of "judicial restraint" in the jurisdiction of the Constitutional Court of Montenegro (hereinafter: the Constitutional Court) is viewed through its position, role and powers in the public system, which are determined, first of all, by the provisions of the Constitution of Montenegro[1489] (hereinafter: the Constitution) and Amendments I to XVI to the Constitution[1490], i.e. the fact that the Constitutional Court acts "only" within the competences stipulated by the provisions of the mentioned regulations.

In this regard, in part six, the Constitution regulates, among other, the competences, the decision-making method and the effect of the decisions of the Constitutional Court, while Amendments no. XV and XVI of the Constitution regulate, among other, the composition, conditions for election, and term of office of the Constitutional Court judges.

In this regard, the Constitutional Court is in charge of the protection of constitutionality and legality, preserving the legality of the functioning of the legal order in Montenegro, and it is the supreme institution ruling on constitutional and political disputes through the application of law, and by acting and fulfilling the role assigned to it by the Constitution, it influences the stability of the entire community. The Constitutional Court decides on disputed issues within its competences by interpreting constitutional norms, materialized through the constitutional court decisions, which are binding and enforceable for everyone. It is this unique, stabilizing role that reflects the special character of the Constitutional Court, as the only body that has the authority to subject the decisions of the legislative, executive and judicial powers to the law, i.e. to assess their acts in relation to the constitutional requirements and values established by the Constitution.

Specifically, in accordance with the provisions of Article 149 of the Constitution, the Constitutional Court:

1) decides on the conformity of laws with the Constitution and confirmed and published international agreements;

2) decides on the conformity of other regulations and general acts with the Constitution and the law;

3) decides on constitutional appeal due to the violation of human rights and freedoms guaranteed by the Constitution, after all other effective legal remedies have been exhausted;

4) decides whether the President of Montenegro has violated the Constitution;

5) decides on conflict of jurisdiction between courts and other state authorities, between state authorities and local self-government authorities and between the authorities of local self-government units;

6) decides on prohibition of work of a political party or a non-governmental organization;

1489 "Official Gazette of Montenegro", number 1/07.

1490 "Official Gazette of Montenegro", number 38/13.

7) decides in electoral disputes and disputes related to the referendum, which are not within the jurisdiction of other courts;

8) decides on conformity with the Constitution of the measures and actions of state authorities taken during the state of war and the state of emergency;

9) performs other tasks stipulated by the Constitution.

When it comes to the jurisdiction of the Constitutional Court regarding the review of the constitutionality and legality of regulations (conformity of laws with the Constitution and confirmed and published international treaties, or conformity of other regulations and general acts with the Constitution and the law), the Constitution stipulates that any person may file an initiative to start the procedure for the review of constitutionality and legality, and that the procedure before the Constitutional Court for the review of constitutionality and legality may be initiated, by way of petition, by an "ordinary" court, another state authority, a local self-government authority, and by five Members of the Parliament, as well as the Constitutional Court itself, and in terms of jurisdiction of the Constitutional Court to decide on constitutional appeals, Amendment XV to the Constitution specifies that the Constitutional Court decides on a constitutional appeal in a panel composed of three judges, which may only decide unanimously and in full composition, and in the event that unanimity is not reached, the constitutional appeal is decided upon by majority vote of all judges.

According to the Law on the Constitutional Court of Montenegro[1491], the Constitutional Court decides on issues within its jurisdiction at a session of all judges, and at a session of a panel composed of three judges when deciding on a constitutional appeal; it holds regular expert meetings on cases within its jurisdiction, which, in addition to judges, may be attended by the Secretary General and Constitutional Court advisers, as well as collegiums of judges where more important issues related to the functioning, administration and international cooperation of the Constitutional Court are discussed.

The Law on the Constitutional Court of Montenegro also stipulates that in the procedure for review of the conformity of laws with the Constitution and confirmed and published international treaties, or of other regulations and general acts with the Constitution and the law, the Constitutional Court is not limited by the petition or initiative. The same Law stipulates that in the constitutional appeal procedure, the Constitutional Court decides on the violation of human rights or freedoms guaranteed by the Constitution stated in the constitutional appeal. The Law on the Constitutional Court of Montenegro specifies that the Constitutional Court itself may initiate the procedure for review of the conformity of laws with the Constitution and confirmed and published international treaties, or of other regulations and general acts with the Constitution and the law, in particular when: the question is raised during the constitutional appeal procedure as to the conformity of the law with the Constitution and confirmed and published international treaties, or the conformity of other regulations and general acts with the Constitution and the law on the basis of which the individual act that is the subject of a constitutional appeal was adopted; or the question is raised in the course of the procedure for review of the conformity of laws with the Constitution and confirmed and published international agreements, or of other regulations and general acts with the Constitution and the law, as to the constitutionality or legality of other provisions or other regulations related to the provisions that are the subject of review.

Given that the decisions of the Constitutional Court, i.e. the positions on certain issues expressed therein, are binding on everyone, including state authorities, state administration bodies, local self-government authorities, i.e. local administrations, legal entities and other entities exercising public authority, the Constitutional Court of Montenegro ensures that its decisions, i.e. constitutional case law, are transparent, principled and well-reasoned, and that any change in case law, if needed, is based on convincing arguments, all with the aim of preserving legal certainty, as one of the fundamental elements of the rule of law. In this regard, in accordance with the Constitution, the Law on the Constitutional Court of Montenegro and the Rules of Procedure of the Constitutional Court

1491 "Official Gazette of Montenegro", number 11/15.

of Montenegro[1492], the Constitutional Court: publishes its decisions and rulings in the Official Gazette of Montenegro, and on the Constitutional Court website (http://www.ustavnisudcg.co.me/); adopts the annual report on the work of the Court, which is published on its website[1493]; allows the presence of representatives of the media at the Constitutional Court sessions and public hearings in the Constitutional Court; publishes constitutional court case law and relevant information on the Constitutional Court website; issues collections of relevant decisions and rulings of the Constitutional Court; issues other publications about the Constitutional Court work and activities and the development of the constitutional judiciary in Montenegro; makes announcements to the media, holds conferences for media representatives; appoints a public relations advisor; hires experts in relevant fields to provide expert opinions; participates in professional conferences to share experiences on constitutional case law, and other forms of cooperation between constitutional courts and other courts that perform the function of constitutional courts; cooperates with international organizations, constitutional courts of European and other countries and with the European Court of Human Rights in Strasbourg; prepares regular reports on constitutional case law for the Bulletin - the official publication of the Council of Europe Commission for Democracy through Law (Venice Commission); etc.

Furthermore, in order to strengthen the independence of judges (and therefore the Constitutional Court itself), to have effective participation in examining cases, providing broader arguments and encouraging dialogue about the positions of the Constitutional Court expressed in its decisions, the Law on the Constitutional Court of Montenegro allows every judge to give a separate opinion (concurring and dissenting) in a case, and such opinion, together with the relevant decision, must be published on the Constitutional Court website, and may also be published in the Official Gazette of Montenegro together with the relevant decision, if so requested by the judge who issued the opinion and if the judges at the session declare so.

2. *Is there a spectrum (range) of restraint for your court? Are there any "forbidden" areas or established zones of legal non-responsibility for your court or issues that are not subject to judicial decision (for example, issues that cause moral controversy, issues that are politically sensitive, cause controversy in society, refer to the allocation of scarce resources, have significant financial implications for the government, etc.).*

See the answer to the first question.

3. *Are there factors that determine when and how your court should exercise restraint (for example, what falls within the domain of culture and conditions in your country; the historical experience of your country; the absolute or qualified character of the fundamental rights in question; the merits of the case that was brought before the court; whether the issue that the case essentially comes down to implies a change in social conditions and attitudes)?*

The Constitutional Court of Montenegro acts in accordance with the relevant provisions

1492 "Official Gazette of Montenegro", no. 7/16 and 95/23.

1493 The annual report includes, among other: an overview of received, resolved and unresolved cases in the reporting period by classification codes; the structure of received cases by jurisdiction; an overview of pending cases at the end of the reporting period by case classification codes and by year; an overview of the Court's decision-making process within its jurisdiction; information on court work in panels; an overview of decisions upholding constitutional appeals; information on violated rights in decisions upholding constitutional appeals; violations of constitutional and convention rights stated by the appellants in constitutional appeals in the cases decided by the court in the reporting year; overview of decisions rejecting constitutional appeals; overview of ongoing cases received in the reporting year and passed on from earlier years, etc.

of the Constitution of Montenegro and the Law on the Constitutional Court, whereby the culture and conditions in our country, historical experiences, the character of fundamental rights and other factors are taken into account depending on the circumstances of the specific case.

4. *Are there situations in which your court exercised restraint because it did not have institutional jurisdiction or appropriate expertise?*

The Constitutional Court of Montenegro has had situations in which it did not have institutional jurisdiction, and it has not had situations where it declared itself without jurisdiction because of a lack of appropriate expertise.

5. *Were there any cases in which your court exercised restraint because there was a risk of judicial error?*

No.

6. *Are there any cases in which your court exercised restraint by referring to the institutional or democratic legitimacy of the decision-making entity?*

The Constitutional Court of Montenegro has never exercised restraint in a case due to the institutional or democratic legitimacy of the decision-making entity.

7. *"The more a specific regulation relates to a broader social policy issue, the less likely the court is to intervene." Is the stated thesis an applicable standard for your court? Does your court agree with the concept that decisions on political issues should be made through democratic processes, because courts are not elected in elections and lack a democratic mandate to decide on political issues?*

The Constitution of Montenegro and the Law on the Constitutional Court of Montenegro stipulate the jurisdiction and procedure of handling cases by the Constitutional Court, and the Constitutional Court acts accordingly.

8. *Does your court accept the general principle of restraint in ruling on matters related to penal philosophy and penal policy?*

No.

9. *There may be limited circumstances where the authorities are not in a position to disclose certain information to the court, particularly in the context of national security, where classified intelligence is involved. Has your court been in position to exercise restraint on the grounds of national security?*

In its work, the Constitutional Court of Montenegro has not had cases where it exercised restraint on the basis of national security, nor were there any circumstances where the authorities withheld information from the aspect of national security.

10. *Given that the constitutional courts have the role of guardians of the constitution, should they interfere more strongly in the domain of politics (apply stricter supervision, i.e. control) when the authorities are passive towards the introduction of reforms that are in line with rights?*

No. The Constitutional Court of Montenegro acts in accordance with its competences, stipulated by the Constitution of Montenegro and the Law on the Constitutional Court.

II. Decision-making entity

11. *Does your court show more restraint towards an act of parliament than towards a decision of the executive power? Does the restraint exercised by your court differ depending on the degree of democratic responsibility of the original decision-making entity?*

It follows from the Constitution that: power in Montenegro is organized according to the principle of division of power into legislative, executive and judicial; the legislative power is exercised by the Parliament of Montenegro, the executive power by the Government of Montenegro,

the judicial power by courts, and constitutionality and legality are protected by the Constitutional Court, i.e. the Constitutional Court was established as a special authority (body), separated from other authorities (it is outside the government structure based on the "tripartition of power" (legislative, executive and judicial)), which protects constitutionality and legality, i.e. the constitutional legal order and human rights and freedoms guaranteed by the Constitution, and the Constitutional Court does not exercise any restraint towards an act depending on whether it was passed by the executive, legislative or judicial authorities.

The number of cases handled by the Constitutional Court depends on the dynamics of their inflow, and statistical reports on the work of the Constitutional Court are prepared for each calendar year. Cases received at the Constitutional Court are distributed to the judge rapporteur and the constitutional court advisor according to the order of receipt and the type of constitutional court proceedings, the type of contested acts and the alphabetical order of the last name of the judge, i.e. the constitutional court advisor, on the day of receipt at the Constitutional Court, in accordance with the provisions of Article 49, paragraphs 1 and 3 of the Rules of Procedure of the Constitutional Court of Montenegro. According to the provisions of Article 53 of the Rules of Procedure of the Constitutional Court of Montenegro, the Constitutional Court examines cases according to the order in which they are received. In exceptional cases, the Constitutional Court examines the following types of cases as priority:

1. cases for which a special time limit is prescribed by law, within which the Constitutional Court must examine and decide on the case;

2. cases related to deciding on issues of special importance for the protection of the rights and freedoms of citizens;

3. cases related to the rights of the child;

4. cases related to violation of personal dignity, deprivation of liberty, detention and respect for person (Articles 28, 29, 30 and 31 of the Constitution), i.e. violation of the right to life, the prohibition of torture, the prohibition of slavery and forced labour, and the right to liberty and security (Articles 2, 3, 4, and 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms);

5. cases in which the conditions for issuing an interim order to suspend the execution of an individual act or action are met, and

6. other cases, as decided by the Constitutional Court.

If a participant in the proceedings submits a petition for priority examination of the case, the Constitutional Court decides on that petition when proposed by the judge-rapporteur.

In connection with the above, for example, in 2020, among other, the Constitutional Court decided in 14 cases requesting review of the constitutionality of the provisions of the law and in 11 cases requesting review of the constitutionality and legality of the provisions of the regulations, where legislators are part of the executive branch.

12. *What weight does your court give to legislative history? What legal significance should a parliamentary debate have for judicial review of conformity from the point of view of human rights, and should there be any significance at all?*

The Constitutional Court looked at the term "parliamentary debate" through the procedure of passing a law in relation to which, in certain stages, the debate is held in the Parliament of Montenegro. In this regard, according to the Constitution of Montenegro, the legislative power in Montenegro is exercised by the Parliament. It is reflected in the adoption of laws regulating:

1) the manner of exercise of human rights and liberties, when this is necessary for their ex-

ercise;

2) the manner of exercise of the special minority rights;

3) the manner of establishment, organization and competences of the authorities and the procedure before those authorities, if so required for their operation;

4) the system of local self-government;

5) other matters of interest for Montenegro.

The Constitution and Amendments I to XVI to the Constitution stipulate that the right to propose laws and other acts belongs to the Government and a Member of the Parliament, and to six thousand voters, through the Member of the Parliament they authorized, and specify the quorum for holding a session of the Parliament and the number of votes of Members of the Parliament needed to pass a law, depending on the matter regulated therein. Detailed procedure for passing laws is regulated by the Rules of Procedure of the Parliament of Montenegro[1494] stipulating, among other: that the procedure for passing laws is initiated by submitting a proposal for the law; that the proposal for the law is submitted in the form in which the law is passed and must be explained and in writing; that the explanation of the proposed law contains: the constitutional basis referred to in Article 16 of the Constitution to regulate the issues that are the subject of the proposed law; the reasons for passing the law; conformity with the European Union *acquis* and confirmed international conventions; explanation of basic legal principles; assessment of financial resources for the enforcement of the law; public interest for which retroactive effect is proposed, if the proposed law contains provisions for which retroactive effect is foreseen and the text of the provisions of the law to be changed, if a law on amendments is proposed; that the proposal for the law is considered first in the Parliamentary committees (first reading), and then it is considered and debated at the sessions of the Parliament, in the procedure of general debate on the proposal for the law (second reading), the procedure of detailed debate on the proposal for the law (third reading) and after the detailed debate is completed, the voting is done on the amendments that are not an integral part of the proposal for the law (if any), and then on the proposal for the law as a whole.

In this regard, we should note that the Constitutional Court was established as a special authority, separated from other powers (legislative, executive and judicial), which protects constitutionality and legality, i.e. the constitutional legal order and human rights and freedoms guaranteed by the Constitution, and in accordance with the provisions of Article 149 paragraph 1 item 1 of the Constitution it has the exclusive role and powers of the so-called "negative legislator", i.e. it has jurisdiction only for the review of the conformity of the specific legal solution with the relevant provisions of the Constitution and confirmed and published international treaties.

Furthermore, in relation to the review of the constitutionality of certain provisions of laws that have retroactive effect, i.e. provisions of laws introducing certain restrictions on human rights and freedoms, in addition to other elements, the Constitutional Court takes into account whether the provisions with retroactive effect, i.e. provisions restricting certain human rights and freedoms, strive for a legitimate goal, i.e. are "in the service" of public interest. Also, the question of the formal constitutionality of a law, i.e. the procedure for its enactment, may be raised before the Constitutional Court, in which case the Constitutional Court, in the process of formal legal assessment of such a law, determines whether the conditions regarding the required number of Members of the Parliament have been met in the process of passing that law for quorum and decision-making, in accordance with the provisions of the Constitution and Amendments I to XVI to the Constitution. The Constitutional Court dealt with this issue in the following cases: U-I br. 31/10, of 26 January 2011, U-I br. 37/15, of 24 February 2017, U-I br. 14/17 and 18/17, of 30 October 2018, U-I br. 13/22, 14/22 and 16/22 of 28 July 2022, etc.

1494 "Official Gazette of the Republic of Montenegro", no. 51/06 and 66/06, and "Official Gazette of Montenegro", no. 88/09, 80/10, 39/11, 25/12, 49/13, 42/15, 52/17, 17/18 and 47/19.

13. *Does your court check whether the decision-making entity justified and explained its decision or whether this decision is identical to the one that your court would have made if it itself, by any chance, was the decision-making entity?*

The actions of the Constitutional Court of Montenegro are not comparable to the actions of any other state decision-making authority, nor does it act as a court of last (third or fourth) instance. The Constitutional Court, in constitutional appeal proceedings, examines whether human rights guaranteed by the Constitution of Montenegro and the European Convention for the Protection of Human Rights and Fundamental Freedoms in proceedings before courts of general and special jurisdiction have been violated, examining, among other, the reasoning of the court decision in those proceedings, as part of the right to a fair trial – the right to a reasoned court decision, in accordance with the standards of the right to a fair trial.

14. *Does your court exercise restraint depending on the extent to which a given decision or measure was preceded by a thorough examination of compliance with fundamental rights? How deep should the legislator's analysis be for your court to ultimately give that analysis certain weight?*

The Constitutional Court of Montenegro acts in accordance with the competences and procedures regulated by the Constitution of Montenegro and the Law on the Constitutional Court, regardless of the depth and breadth of the preliminary examination of compliance with fundamental rights.

15. *Does your court analyse whether opposing views were fully represented in the parliamentary debate when a measure was adopted? Is it enough to conduct an extensive debate on the general features of a particular regulation or must the focus be clearly indicated and placed on the implications of the regulation?*

As stated in previous answers, in the area of abstract control of constitutionality and legality, the Constitutional Court is authorized to review the conformity of laws with the Constitution and confirmed and published international treaties, i.e. the conformity of other regulations and general acts with the Constitution and the law, and this is the framework of its actions in the sense of the provisions of Article 149, items 1 and 2 of the Constitution.

16. *Does the fact that a certain decision was made by the legislator or, on the other hand, that the decision itself resulted from the process of public consultation or public discussion, have evidentiary weight on the basis of which it is possible to determine the democratic legitimacy of the decision?*

The provision of Article 149, item 2 of the Constitution defines the jurisdiction of the Constitutional Court to decide on the conformity of other regulations and general acts (by-laws) with the Constitution and the law. The principle of conformity of legal regulations (Article 145 of the Constitution) implies that by-laws are enacted on the basis of normatively established authority of the entity passing the act. According to the Constitution, the Government has the general authority to enact regulations (for the implementation of laws), and administrative bodies, local self-governments or other legal entities have such authority when, on certain issues, they are authorized to do so by law. In other words, the law must be the basis for the adoption of by-laws and it includes only what

follows from the legal norm and is not expressly regulated therein. In the process of reviewing the conformity of such a regulation with the Constitution and the law, the Constitutional Court examines whether the contested act was passed by an authorized body, whether the body passing the act had the legal authority to do so (legal basis) and whether the regulation corresponds in its content, purpose and scope to the framework set by the law.

In accordance with the above, the Constitutional Court may examine whether the procedure for the adoption of a by-law was followed, i.e. whether a public hearing was conducted for the act, if it is prescribed as mandatory in the adoption procedure. The Constitutional Court dealt with this issue in the following cases: U-II br. 2/14, of 30 June 2015, U-II br. 42/14, of 18 November 2015, U-II br. 33/14, of 28 December 2015, U-II br. 17/14, of 4 October 2016, U-II br. 25/15, of 4 October 2016, U-II br. 10/16, of 4 October 2016, etc.

III. Scope of rights, legality and proportionality

17. *Has your court ever refrained from making a decision at the stage of defining a right, giving importance to the government's definition of the right or applying that definition to the facts?*

The Constitutional Court of Montenegro does not have the jurisdiction to carry out preventive control of constitutionality, which would allow it to eliminate possible unconstitutionality in the process of adopting regulations or defining rights. Therefore, the Constitutional Court of Montenegro can react only upon the submitted petition for the review of the conformity of the adopted law with the Constitution and confirmed and published international treaties and the petition for the review of the conformity of other adopted regulation and general act with the Constitution and the law. Also, proceedings before the Constitutional Court may be initiated by an initiative to start proceedings for the review of conformity of laws with the Constitution and confirmed and published international treaties, and by an initiative to start proceedings for the review of conformity of other regulations and general acts with the Constitution and the law, as well as by an initiative to start proceedings for the review of conformity with the Constitution of measures and actions of state authorities undertaken during wartime and state of emergency. When it comes to individual cases, brought on the basis of a defined right on the basis of the adopted law, such issues are resolved in the constitutional appeal procedure due to the violation of human rights and freedoms guaranteed by the Constitution. Therefore, both within the abstract jurisdiction and the jurisdiction upon constitutional appeal, the Constitutional Court of Montenegro decides on the basis of the Constitution of Montenegro, its own case law and the case law of the European Court of Human Rights.

18. *Does the nature of applicable rights affect the extent of restraint? Does your court consider that some rights or some aspects of rights are more important than others and therefore deserve more rigorous scrutiny?*

The only "division" that could be made based on the case law of the Constitutional Court of Montenegro is the "division" into absolute rights and rights that can be limited by law only when this is necessary in a democratic society. Namely, as already stated, in the case law of the Constitutional Court of Montenegro, there is generally no "policy" of refraining from decision-making, and we cannot speak of refraining from decision-making when basic human rights are in question either. The Rules of Procedure of the Constitutional Court of Montenegro define consideration of cases in the order in which they are received, as well as exceptions to such treatment, when certain types of cases are considered as priority. Pursuant to Article 53 of the Rules of Procedure of the Constitutional Court of Montenegro*:*

(1) The Constitutional Court considers cases according to the order in which they are received.

(2) In exceptional cases, the Constitutional Court considers the following types of cases as priority:

1. cases for which a special time limit is prescribed by law, within which the Constitutional Court must consider and decide on the case;

2. cases related to deciding on issues of special importance for the protection of the rights and freedoms of citizens;

3. cases related to the rights of the child;

4. cases related to violation of personal dignity, deprivation of liberty, detention and respect for person (Articles 28, 29, 30, 31 of the Constitution), i.e. violation of the right to life, the prohibition of torture, prohibition of slavery and forced labour and the right to liberty and security (Articles 2, 3, 4, and 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms);

5. cases in which the conditions for issuing an interim order to suspend the execution of an individual act or action are met, and

6. other cases, as decided by the Constitutional Court.

(3) If a participant in the procedure submits a petition for priority consideration of the case, the Constitutional Court decides on that petition when proposed by the judge rapporteur.

19. *Do you have a certain scale of clarity when examining the constitutionality of a law? How do you decide how clear a law is? When do you apply the principle In claris non fit interpretatio ("Where everyone understands equally, there is no need for interpreter")?*

The clarity of a law or any other regulation, where the Constitutional Court is responsible for reviewing the constitutionality, i.e. constitutionality and legality, is an integral part of the principle of the rule of law (Article 1, paragraph 2 of the Constitution), as the highest value of the constitutional order of Montenegro. A regulation must be clear and precise in accordance with the particularity of the matter that it normatively regulates, thus preventing any arbitrariness in the interpretation and application of the regulation, i.e. eliminating any uncertainty of the addressees of the legal norm regarding the final effect of the provisions that are directly applied to them. The requirements of legal certainty and the rule of law, referred to in the provisions of Article 1, paragraph 2 of the Constitution, require that the legal norm be available to the addressees and predictable for them, i.e. be such that they can actually and specifically know their rights and obligations in order to act accordingly. The addressees of the legal norm cannot actually and specifically know their rights and duties, and predict the consequences of their behaviour if the legal norm is not sufficiently specific and precise.

In order to determine whether a certain provision of a law or other regulation meets the requirements for specificity and precision of a legal norm, the Constitutional Court starts from its linguistic, systematic, objective or teleological interpretation, and from the criteria of the European Court of Human Rights for the fulfilment of the "standard of legality", established in its extensive case law[1495].

20. *What is the intensity of your court's review when the legitimate aim test is applied?*

There are not many decisions the case law of the Constitutional Court of Montenegro where the Constitutional Court found that there was no legitimate aim that is in the public interest for the type

1495 *Sunday Times (No.1) v. United Kingdom,* Judgment of 26 April 1979, Application No. 6538/74, *Malone v. United Kingdom,* Judgment of 2 August 1984, Application No. 8691/79, *Centro Europa 7 S.R.L. and Di Stefano v. Italy,* judgment of 7 June 2012, application number 38433/09, etc.

of imposed restriction. The final assessment of the Constitutional Court is given mainly in the phase of proportionality examination.

21. *What proportionality test does your court apply? Does your court apply all phases of the "classic" proportionality test (i.e., suitability, necessity, and proportionality in the strict sense)?*

The Constitutional Court of Montenegro applies the proportionality test, referring to the criteria established in the case law of the European Court of Human Rights.

22. *Does your court go through each applicable segment of the proportionality test?*

The Constitutional Court of Montenegro, in principle, goes through each applicable segment of the proportionality test.

23. *Are there cases where your court accepts that the measure in question satisfies one or more phases of the proportionality test even when there appears to be insufficient evidence to support this?*

We cannot say that there were cases in the previous case law of the Constitutional Court of Montenegro in which the Constitutional Court accepted that the measure in question satisfies one or more phases of the proportionality test even when, apparently, there is insufficient evidence to support this.

24. *Was the introduction of proportionality test into the jurisprudence of your court accompanied by the strengthening of the doctrine of judicial restraint?*

We do not see a connection between the introduction of the proportionality test in the jurisprudence of the Constitutional Court of Montenegro and possible strengthening of the doctrine of judicial restraint.

25. *Does the case law of the European Court of Human Rights (ECtHR) shape your court's approach to refraining from decision-making/intervention? Is the ECtHR's margin of appreciation doctrine the domestic equivalent of the discretion awarded by your court? If not, how often do issues related to the ECtHR's margin of appreciation overlap with issues of your court's restraint in similar cases?*

The case law of the European Court of Human Rights is of great importance for the decision-making of the Constitutional Court. However, this does not prevent the Constitutional Court from providing a wider scope of protection than that provided by the standards established by the case law of the European Court. In the constitutional appeal procedure, the Constitutional Court allows the enjoyment of the right to a fair trial and property right guaranteed by the Constitution of Montenegro, which is not the guarantee of the right to a fair trial and the right to property from the European Convention.

The jurisprudence of the European Court of Human Rights regarding the margin of appreciation available to countries on certain issues is essentially similar, if not equivalent, to the assessment of the Constitutional Court, when it comes to discretionary powers.

26. *Has the ECtHR condemned your country for your court's refraining from ruling or intervening in a case, judicial restraint from ruling, rendering it an ineffective remedy?*

The European Court of Human Rights has not condemned our country because the Constitutional Court of Montenegro refrained from making decisions in a case. We point out the position of the ECtHR that a constitutional appeal may in principle be considered an effective legal remedy of 20 March 2015, taken in the case of *Siništaj v. Montenegro* (judgment of 24 November 2015).

IV. Other specifics

27. *How often is the question of exercising restraint in making a decision in cases concerning human rights raised in cases decided by your court?*

In proceedings related to human rights and freedoms, the Constitutional Court acts in accordance with the Constitution of Montenegro, the Law on the Constitutional Court of Montenegro and the Rules of Procedure of the Constitutional Court of Montenegro.

28. *Has your court increasingly exercised restraint in making decisions or in intervening over time?*

The Constitutional Court of Montenegro has not exercised restraint in making decisions or in intervening at all.

29. *Does restraint as an attitude also depend on the workload of your court?*

The number of cases affects the length of proceedings before the Constitutional Court of Montenegro, but the Court makes efforts to act in accordance with the Law on the Constitutional Court of Montenegro and the Rules of Procedure of the Constitutional Court of Montenegro in all competences.

The burden of the Constitutional Court of Montenegro because of a large number of unresolved cases from earlier years may refer to the question of whether the Constitutional Court fulfils its role as a protector of constitutionality and legality and human rights and fundamental freedoms. This would require taking certain measures in order to make the Constitutional Court more efficient (the number of employees working on cases).

Therefore, despite a certain number of pending cases, the fulfilment of the role of the Constitutional Court is not called into question, since the Court has significantly reduced the backlog in the number of pending cases in the last two years.

30. *Can your court base its decisions on arguments that the parties in the dispute did not present? Can your court requalify the presented arguments by classifying them under a different constitutional provision from the one invoked by the applicant (party)?*

The issue of dealing with arguments presented by the parties in a particular dispute before

the Constitutional Court is regulated by the Law on the Constitutional Court of Montenegro. In that regard:

- in the procedure for reviewing the conformity of laws with the Constitution and confirmed and published international treaties, or of other regulations and general acts with the Constitution and the law, the Constitutional Court is not limited by the petition, or initiative (Article 59);

- in the procedure of deciding whether the President of Montenegro has violated the Constitution, the Constitutional Court is limited by the reasons from the petition (Article 82);

- a petition for deciding on a conflict of jurisdiction (between courts and other state authorities, between state authorities and authorities of local self-government units and between authorities of local self-government units) contains information about the petitioner, the name of the authorities between which there is a conflict of jurisdiction, the subject of the procedure, a detailed explanation of the facts and the circumstances of the case that led to a conflict of jurisdiction and the reasons why the authority is considered to have jurisdiction, or not to have jurisdiction to decide on the case. The petition is accompanied by documentation relevant for decision-making;

- the petition to ban the work of a political party or non-governmental organization must state the prohibited activity, i.e. the facts and circumstances of unconstitutional activity, which may be the reason for banning the work of a political party or non-governmental organization (Article 92);

- the appeal initiating an electoral dispute (election of councillors and Members of the Parliament and the election of the President of Montenegro) and a dispute related to the referendum must contain reasons and evidence of the violation of voting rights during the election, i.e. the referendum (Article 98, paragraph 2, Article 104 paragraph 2, and Article 105 paragraph 2);

- the appeal initiating the procedure for deciding on the conformity with the Constitution of the measures and actions of state authorities undertaken during the state of war and state of emergency must be explained and must contain reasons and evidence of the unconstitutional restriction of the exercise of certain human rights and freedoms (Article 108, paragraph 5).

In accordance with the provision of Article 75 of the Law on the Constitutional Court of Montenegro, the Constitutional Court decides on the violation of human rights or freedoms guaranteed by the Constitution indicated in the constitutional appeal. This has been interpreted in the case law of the Constitutional Court so that the court is bound by the facts presented in the constitutional appeal, but not by their legal qualifications. Therefore, the Court may base its legal assessment of a constitutional appeal on a different provision of the Constitution and/or the Convention than the one referred to by the appellant. This approach is in conformity with the well-established case law of the ECtHR (*Akdeniz v. Turkey*, No. 25165/94, paragraph 88, 31 May 2005).

In addition to the above, the provisions of Article 60 of the Rules of Procedure of the Constitutional Court of Montenegro prescribe that, depending on the type of case, the proposal for a decision or ruling of the Constitutional Court should, as a rule, contain:

(...);

4. the content of the filing;

5. the content of the response, or opinion;

(...);

8. the established factual and legal circumstances in the matter;

9. provisions of the Constitution and laws on which the constitutional-legal solutions in the case are based;

10. the provisions of the international act regulating certain legal issues;

11. constitutional assessment of the contested act;

12. expert and other opinions, if they were obtained during the proceedings;

13. relevant case law of the Constitutional Court, comparative case law of constitutional courts in other countries and case law of the European Court of Human Rights;

14. a proposal to hold a public hearing, if the judge rapporteur believes that it should be held;

(...);

21. other proposals of the judge rapporteur considered to be relevant to the case;

22. proposal of the judge rapporteur on the manner in which the case should be decided.

31. *Can your court expand the review of constitutionality so that it includes other legal provisions that have not been contested before it, but are related to the position of the appellant or petitioner?*

As stated in the previous answers – in the procedure for review of the conformity of laws with the Constitution and confirmed and published international treaties, or of other regulations and general acts with the Constitution and the law, the Constitutional Court is not limited by the petition, or the initiative, i.e. it can "extend the review" of the constitutionality, or the constitutionality and legality of a legal provision or a provision of another document that is not covered by the submitted petition or initiative.

The Law on the Constitutional Court of Montenegro specifies that the Constitutional Court itself may initiate proceedings for the review of the conformity of laws with the Constitution and confirmed and published international treaties, or of other regulations and general acts with the Constitution and the law, in particular when: the question is raised in the course of the constitutional appeal procedure as to the conformity of the law with the Constitution and confirmed and published international treaties[1496] or the conformity of other regulations and general acts with the Constitution and the law, on the basis of which the individual act that is the subject of a constitutional appeal was adopted; or the question is raised during the procedure for review of the conformity of laws with the Constitution and confirmed and published international agreements, or of other regulations and general acts with the Constitution and the law as to the constitutionality, i.e. the legality of other provisions or other regulations that are related to the provisions that are the subject of the review[1497].

1496 This issue was dealt with by the Constitutional Court in the case designated as U-I br. 34/18, U-III br. 1970/18 and U-III br. 1987/18, of 12 December 2018 and 27 September 2019.

1497 The Constitutional Court dealt with this issue in the cases designated as U-II br. 71/18, of 28 February 2019, U-II br. 67/21 and 14/22, of 12 May 2022, etc.

Ustavni sud Crne Gore

Predmet: Oblici i granice sudske uzdržanosti: Slučaj ustavnih sudova

NACIONALNI IZVJEŠTAJ U ODNOSU NA UPITNIK ZA XIX KONGRES KONFERENCIJE EVROPSKIH USTAVNIH SUDOVA

I. Pitanja koja ne podliježu sudskom odlučivanju i intenzitet uzdržanosti

1. *Šta u vašoj jurisdikciji obuhvata pojam „sudske uzdržanosti"?*

Pojam „sudske uzdržanosti" u juridskiciji Ustavnog suda Crne Gore (u daljem tekstu: Ustavni sud) posmatra se kroz njegov položaj, ulogu i ovlašćenja koja ima u državnom sistemu, koji su određeni, prije svega, odredbama Ustava Crne Gore[1498] (u daljem tekstu: Ustav) i Amandmana I do XVI na Ustav[1499], odnosno da Ustavni sud djeluje „samo" u okviru nadležnosti koje su utvrđene odredbama navedenih propisa.

S tim u vezi, Ustav, u šestom dijelu, uređuje, pored ostalog, nadležnosti, način odlučivanja i dejstvo odluka Ustavnog suda, dok se Amandmanima br. XV i XVI na Ustav, pored ostalog, uređuju sastav, uslovi za izbor i trajanje mandata sudija Ustavnog suda.

S tim u vezi, Ustavni sud nadležan je za zaštitu ustavnosti i zakonitosti, očuvanje legalnosti funkcionisanja pravnog poretka u Crnoj Gori i predstavlja vrhovnu instituciju za rješavanje ustavnih i političkih sporova putem primjene prava i svojim djelovanjem i ispunjavanjem uloge koja mu je Ustavom dodijeljenja, utiče na stabilnost cjelokupne društvene zajednice. O spornim pitanjima iz svojih nadležnosti Ustavni sud odlučuje tumačenjem ustavnih normi, koja svoju materijalizaciju dobijaju donošenjem ustavnosudskih odluka, koje su obavezujuće i izvršne za sve. U toj jedinstvenoj, stabilizujućoj ulozi, upravo se i ogleda posebnost Ustavnog suda, kao jedinog tijela koje raspolaže ovlašćenjima da odluke zakonodavne, izvršne i sudske vlasti potčinjava pravu, odnosno njihove akte cijeni u odnosu na ustavnopravne zahtjeve i vrijednosti utvrđene Ustavom.

Konkretno, Ustavni sud, saglasno odredbama člana 149. Ustava:

1) odlučuje o saglasnosti zakona sa Ustavom i potvrđenim i objavljenim međunarodnim ugovorima;

2) odlučuje o saglasnosti drugih propisa i opštih akata sa Ustavom i zakonom;

3) odlučuje o ustavnoj žalbi zbog povrede ljudskih prava i sloboda zajamčenih Ustavom, nakon iscrpljivanja svih djelotvornih pravnih sredstava;

4) odlučuje da li je predsjednik Crne Gore povrijedio Ustav;

5) odlučuje o sukobu nadležnosti između sudova i drugih državnih organa, između državnih organa i organa jedinica lokalne samouprave i između organa jedinica lokalne samouprave;

6) odlučuje o zabrani rada političke partije ili nevladine organizacije;

7) odlučuje u izbornim sporovima i sporovima u vezi sa referendumom koji nijesu u nadležnosti drugih sudova;

8) odlučuje o saglasnosti sa Ustavom mjera i radnji državnih organa preduzetih za vrijeme ratnog i vanrednog stanja;

1498 „Službeni list Crne Gore", broj 1/07.
1499 „Službeni list Crne Gore", broj 38/13.

9) vrši i druge poslove utvrđene Ustavom.

Kada je u pitanju nadležnost Ustavnog suda u pogledu ocjene ustavnosti i zakonitosti propisa (saglasnosti zakona sa Ustavom i potvrđenim i objavljenim međunarodnim ugovorima, odnosno saglasnosti drugih propisa i opštih akata sa Ustavom i zakonom), Ustavom je utvrđeno da svako može dati inicijativu za pokretanje postupka za ocjenu ustavnosti i zakonitosti, a da postupak pred Ustavnim sudom za ocjenu ustavnosti i zakonitosti, predlogom, može da pokrene „redovni" sud, drugi državni organ, organ lokalne samouprave i pet poslanika, kao i sâm Ustavni sud, dok je u pogledu nadležnosti Ustavnog suda koja se odnosi na odlučivanje o ustavnim žalbama, Amandmanom XV na Ustav utvrđeno da o ustavnoj žalbi Ustavni sud odlučuje u vijeću sastavljenom od troje sudija, koje može odlučivati samo jednoglasno i u punom sastavu, a u slučaju da se ne postigne jednoglasnost o ustavnoj žalbi se odlučuje većinom glasova svih sudija.

Prema Zakonu o Ustavnom sudu Crne Gore[1500], Ustavni sud odlučuje o pitanjima iz svoje nadležnosti na sjednici svih sudija, kao i na sjednici vijeća sastavljenog od troje sudija kada odlučuje o ustavnoj žalbi; održava redovne stručne sastanke o predmetima iz svoje nadležnosti kojim sastancima, pored sudija, mogu prisustvovati generalni sekretar i ustavnosudski savjetnici, kao i kolegijume sudija na kojima se razmatraju važnija pitanja u vezi sa funkcionisanjem, upravljenjem i međunarodnom saradnjom Ustavnog suda.

Zakonom o Ustavnom sudu Crne Gore propisano je i da u postupku za ocjenu saglasnosti zakona sa Ustavom i potvrđenim i objavljenim međunarodnim ugovorima, odnosno drugog propisa i opšteg akta sa Ustavom i zakonom, Ustavni sud nije ograničen predlogom, odnosno inicijativom. Istim Zakonom je utvrđeno je da u postupku po ustavnoj žalbi, Ustavni sud odlučuje o onoj povredi ljudskog prava ili slobode zajemčene Ustavom na koju se ukazuje ustavnom žalbom. Zakon o Ustavnom sudu Crne Gore precizirano je da Ustavni sud može sâm da pokrene postupak za ocjenu saglasnosti zakona sa Ustavom i potvrđenim i objavljenim međunarodnim ugovorima, odnosno drugog propisa i opšteg akta sa Ustavom i zakonom, naročito kad se: u toku postupka po ustavnoj žalbi postavi pitanje saglasnosti zakona sa Ustavom i potvrđenim i objavljenim međunarodnim ugovorima ili saglasnosti drugog propisa i opšteg akta sa Ustavom i zakonom, na osnovu kojeg je donijet pojedinačni akt koji je predmet ustavne žalbe; ili u toku postupka za ocjenu saglasnosti zakona sa Ustavom i potvrđenim i objavljenim međunarodnim ugovorima ili drugog propisa i opšteg akta sa Ustavom i zakonom postavi pitanje ustavnosti, odnosno zakonitosti drugih odredaba ili drugih propisa koje su u vezi sa odredbama koje su predmet ocjene.

S obzirom na to da su odluke Ustavnog suda, odnosno stavovi o određenim pitanjima izraženi u njima, obavezujući za sve, pa i za državne organe, organe državne uprave, organe lokalne samouprave, odnosno lokalne uprave, pravna lica i druge subjekta koji vrše javna ovlašćenja, Ustavni sud Crne Gore vodi računa da njegove odluke, tj. ustavnosudska praksa, bude transparentna, principijelna i kvalitetno obrazložena, a da eventualne promjena sudske prakse, ukoliko se ukaže potreba za njom, bude zasnovana na ubjedljivim argumentima, a sve u cilju očuvanja pravne sigurnosti, kao jednog od temeljnih elemenata vladavine prava. U tom smislu, Ustavni sud, saglasno Ustavu, Zakonu o Ustavnom sudu Crne Gore i Poslovniku Ustavnog suda Crne Gore[1501]: objavljuje svoje odluke i rješenja u „Službenom listu Crne Gore", kao i na internet stranici Ustavnog suda (http://www.ustavnisudcg.co.me/); usvaja godišnji izvještaj o radu Suda koji objavljuje na svojoj internet stranici[1502]; omogućava

1500 „Službeni list Crne Gore", broj 11/15.

1501 „Službeni list Crne Gore", br. 7/16. i 95/23.

1502 Izvještaj o radu, pored ostalog, sadrži: pregled primljenih, riješenih i neriješenih predmeta u izvještajnom periodu po klasifikacionim oznakama; strukturu primljenih predmeta po nadležnostima; pregled neriješenih predmeta na kraju izvještajnog perioda po klasifikacionim oznakama predmeta i po godinama; pregled načina odlučivanja Suda u okviru nadležnosti; podatke o radu suda u vijećima; pregled odluka o usvajanju ustavne žalbe; podatke o povrijeđenim pravima u odlukama o usvajanju ustavne žalbe; povrede ustavnih i konvencijskih prava na koje su podnosioci

prisustvo predstavnika sredstava javnog informisanja na sjednici Ustavnog suda i javne rasprave u Ustavnom sudu; objavljuje ustavnosudsku praksu i važnije podataka na internet stranici Ustavnog suda; izdaje zbirke značajnijih odluka i rješenja Ustavnog suda; izdaje druge publikacije o radu i aktivnostima Ustavnog suda i razvoju ustavnog sudstva u Crnoj Gori; daje saopštenja sredstvima javnog informisanja, održavana konferencije za predstavnike sredstava javnog informisanja; imenuje savjetnika za odnose sa javnošću; angažuje stručnjaka iz odgovarajuće oblasti radi davanja stručnog mišljenja; učestvuje na stručnim konferencijama u cilju razmjene iskustava o ustavno-sudskoj praksi, kao i drugim oblicima saradnje između ustavnih sudova i drugih sudova koji obavljaju funkciju ustavnih sudova; sarađuje sa međunarodnim organizacijama, ustavnim sudovima evropskih i drugih država i s Evropskim sudom za ljudska prava u Strazburu; priprema redovne izvještaje o ustavno-sudskoj praksi za Bilten - službenu publikaciju Komisije za demokratiju putem prava Savjeta Evrope (Venecijanska komisija); i dr.

Pored navedenog, u cilju jačanja nezavisnosti sudija (a samim tim i samog Ustavnog suda), efektivnog učešća u ispitivanju predmeta, davanja šire argumentacije i podsticanja dijaloga o stavovima Ustavnog suda izraženim u njegovim odlukama, Zakon o Ustavnom sudu Crne Gore omogućava svakom sudiji da u predmetu da izdvojeno mišljenje (saglasna i nesaglasna), koje mišljenje se, zajedno sa odlukom na koju se odnosi, obavezno objavljuje na internet stranici Ustavnog suda, a može se objaviti i u „Službenom listu Crne Gore" zajedno sa odlukom na koju se odnosi, ukoliko to zahtijeva sudija koji je izdvojio mišljenje i ukoliko se o tome izjasne sudije na sjednici.

2. *Da li za vaš sud postoji spektar (dijapazon) uzdržanosti? Da li za vaš sud postoje „zabranjene" oblasti ili utvrđene zone pravne neodgovornosti ili pitanja koja ne podliježu sudskom odlučivanju (na primjer, pitanja koja izazivaju moralne kontroverze, pitanja koja su politički osjetljiva, izazivaju kontroverze u društvu, odnose se na opredeljivanje oskudnih resursa, imaju značajne finansijske implikacije za vlast i td.).*

Vidjeti odgovor na prvo pitanje.

3. *Da li postoje činioci koji odlučuju kada i kako vaš sud treba da ispolji uzdržanost (na primjer, ono što spada u domen kulture i uslova u vašoj državi; istorijska iskustva vaše države; apsolutni ili kvalifikovani karakter osnovnih prava o kojima je riječ; meritum predmeta koji je iznijet pred sud; da li pitanje na koje se taj predmet suštinski svodi podrazumijeva promjenu društvenih uslova i stavova)?*

Ustavni sud Crne Gore postupa saglasno mjerodavnim odredbama Ustava Crne Gore i Zakona o Ustavnom sudu, pri čemu su kultura i uslovi u našoj zemlji, istorijska iskustva, karakter osnovnih prava i drugi činioci koji se imaju u vidu i uzimaju u obzir u zavisnosti od okolnosti konkretnog slučaja.

4. *Da li postoje situacije u kojima je vaš sud ispoljio uzdržanost zato što nije imao institucionalnu nadležnost niti odgovarajuću stručnost?*

Ustavni sud Crne Gore je imao situacija u kojima je ispoljio institucionalnu nenadležnost, dok nije imao situacija u kojima se oglasio nenadležnim zbog nedostatka odgovarajuće stručnosti.

5. *Da li je bilo predmeta u kojima je vaš sud ispoljio uzdržanost zato što je postojala opasnost od sudske greške?*

Nije.

6. *Da li postoje predmeti u kojima je vaš sud ispoljio uzdržanost pozivajući se na institucionalni ili demokratski legitimitet subjekta odlučivanja?*

Ustavni sud Crne Gore nije nikada ispoljio uzdržanost u predmetu zbog institucionalnog ili demokratskog legitimiteta subjekta odlučivanja.

ustavnih žalbi ukazivali u predmetima u kojima je sud odlučio u izvještajnoj godini; pregled rješenja o odbacivanju ustavne žalbe; prikaz predmeta u radu koji su primljeni u izvještajnoj godini i preneseni iz ranijih godina, i dr.

7. „Što se više određeni propis odnosi na pitanje iz domena šire društvene politike, to je sud manje spreman da interveniše". Da li navedena teza predstavlja važeći standard za vaš sud? Da li je vaš sud saglasan sa koncepcijom po kojoj odluke o političkim pitanjima treba donositi kroz demokratske procese, zato što sudovi nijesu birani na izborima i nedostaje im demokratski mandat da odlučuju o pilitičkim pitanjima?

Ustavom Crne Gore i Zakonom o Ustavnom sudu Crne Gore je utvrđena nadležnost i procedura u postupanju Ustavnog suda u predmetima i u skladu sa tim Ustavni sud postupa.

8. *Da li vaš sud prihvata opšte načelo uzdržanosti u prosuđivanju pitanja koja se odnose na kaznenu filozofiju i kaznenu politiku?*

Ne.

9. *Mogu postojati ograničene okolnosti u kojima vlasti nijesu u poziciji da obelodane određene informacije sudu, naročito u kontekstu nacionalne bezbjednosti, kada se radi o tajnim obavještajnim podacima. Da li je vaš sud bio u prilici da ispolji uzdržanost po osnovu nacionalne bezbjednosti?*

Ustavni sud Crne Gore nije u svom radu imao predmete, u kojima je ispoljio uzdržanost po osnovu nacionalne bezbjednosti, niti je bilo okolnosti u kojima su vlasti uskratile informacije sa aspekta nacionalne bezbjednosti.

10. *S obzirom na to da ustavni sudovi imaju ulogu čuvara ustava, da li oni treba jače da se miješaju u domen politike (da primjenjuju stroži nadzor, odnosno kontrolu) onda kada su vlasti pasivne prema uvođenju reformi koje su u skladu sa pravima?*

Ne. Ustavni sud Crne Gore postupa u skladu sa svojim nadležnostima, propisanim Ustavom Crne Gore i Zakonom o Ustavnom sudu.

II. Subjekt odlučivanja

11. *Da li vaš sud ispoljava veću uzdržanost prema nekom aktu parlamenta nego prema odluci izvršne vlasti? Da li se uzdržanost koju ispoljava vaš sud razlikuje u zavisnosti od stepena demokratske odgovornosti izvornog subjekta odlučivanja?*

Iz Ustava proizilazi: da se vlast u Crnoj Gori uređuje po načelu podjele vlasti na zakonodavnu, izvršnu i sudsku; da zakonodoavnu vlast vrši Skupština Crne Gore, izvršnu Vlada Crne Gore, sudsku sudovi, a da ustavnost i zakonitost štiti Ustavni sud, tj. da je Ustavni sud ustanovljen kao poseban organ (tijelo), izdvojen od ostalih vlasti (izvan je strukture vlasti utemeljene na „trodiobi vlasti" (zakonodavne, izvršne i sudske)), koji štiti ustavnost i zakonitost, odnosno ustavnopravni poredak i ljudska prava i slobode zajemčene Ustavom i Ustavni sud ne ispoljava bilo kakvu uzdržanost prema aktu u zavisnosti od toga da li je donijet od strane izvršne, zakonodavne ili, pak, sudske vlasti.

Broj predmeta u radu Ustavnog suda zavisi od dinamike njihovog priliva i statistički izvještaji o radu Ustavnog suda se sačinjavaju za svaku kalendarsku godinu. Predmeti koji pristignu u Ustavni sud raspoređuju se sudiji izvestiocu i ustavnosudskom savjetniku prema redosljedu prijema i vrsti ustavnosudskog postupka, vrsti osporenih akata i abecednom redu prezimena sudije, odnosno ustavnosudskog savjetnika, danom prispijeća u Ustavni sud, saglasno odredbama člana 49. st. 1. i 3. Poslovnika Ustavnog suda Crne Gore. Prema odredbama člana 53. Poslovnika Ustavnog suda Crne Gore, Ustavni sud razmatra predmete prema redosljedu njihovog prijema. Izuzetno, Ustavni sud razmatra sljedeće vrste predmeta kao prioritetne:

1. predmete za koje je zakonom propisan poseban vremenski rok u okviru kojeg Ustavni sud mora razmatrati i odlučivati u predmetu;

2. predmete koji se odnose na odlučivanje o pitanju od posebnog značaja za zaštitu prava i sloboda građana;

3. predmete koji se odnose na prava djeteta;

4. predmete koji se odnose na povredu dostojanstva ličnosti, lišenje slobode, pritvor i poštovanje ličnosti (čl. 28, 29, 30. i 31. Ustava), odnosno povredu prava na život, zabranu mučenja, zabranu ropstva i prinudnog rada i prava na slobodu i sigurnost (čl. 2, 3, 4, i 5. Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda);

5. predmete u kojima su ispunjeni uslovi za izdavanje privremene naredbe za obustavu izvršenja pojedinačnog akta ili radnje, i

6. drugi predmete, za koje Ustavni sud odluči.

Ukoliko učesnik u postupim podnese prijedlog za prioritetno razmatranje predmeta, Ustavni sud odlučuje o tom prijedlogu kada to predloži sudija izvjestilac.

U vezi se navedenim, Ustavni sud je, na primjer, u 2020. godini, pored ostalog, odlučio u 14 predmeta u kojima sa zahtijevala ocjena ustavnosti odredaba zakona i u 11 predmeta u kojima se tražila ocjena ustavnosti i zakonitosti odredaba propisa čiji donosioci predstavljaju dio izvršne vlasti.

12. *Koju težinu vaš sud pridaje zakonodavnoj istoriji? Kakav pravni značaj treba da ima parlamentarna rasprava za sudsku procjenu usklađenosti sa stanovišta ljudskih prava i da li taj značaj uopšte treba da postoji?*

Ustavni sud je pojam „parlamentarna rasprava" sagledao kroz postupak donošenja zakona u odnosu na koji se, u određenim fazama, vodi rasprava Skupštini Crne Gore. U tom smislu, prema Ustavu Crne Gore zakonodavnu vlast u Crnoj Gori vrši Skupština. Ona se ogleda u donošenju zakona kojima se uređuju:

1) način ostvarivanja ljudskih prava i sloboda, kada je to neophodno za njihovo ostvarivanje;

2) način ostvarivanja posebnih manjinskih prava;

3) način osnivanja, organizacija i nadležnost organa vlasti i postupak pred tim organima, ako je to neophodno za njihovo funkcionisanje;

4) sistem lokalne samouprave;

5) druga pitanja od interesa za Crnu Goru.

Ustavom i Amandmanima I do XVI na Ustav propisano je da pravo predlaganja zakona i drugih akata imaju Vlada i poslanik, kao i šest hiljada birača, preko poslanika koga ovlaste i utvrđen je kvorum za održavanje sjednice Skupštine i broj glasova poslanika koji su potrebni da bi se neki zakon donio, u zavisnosti od materije koju uređuje. Bliži postupak donošenja zakona uređen je Poslovnikom Skupštine Crne Gore[1503] i njime je, pored ostalog, propisano: da se postupak za donošenje zakona pokreće podnošenjem predloga zakona; da se predlog zakona podnosi u obliku u kome se donosi zakon i mora biti obrazložen i to u pisanoj formi; da obrazloženje predloga zakona sadrži: ustavni osnov iz člana 16. Ustava za uređivanje pitanja koja su predmet predloga zakona; razloge za donošenje zakona; usaglašenost sa pravnom tekovinom Evropske unije i potvrđenim međunarodnim konvencijama; objašnjenje osnovnih pravnih instituta; procjenu finansijskih sredstava za sprovođenje zakona; javni interes zbog kojeg je predloženo povratno dejstvo, ako predlog zakona sadrži odredbe za koje se predviđa povratno dejstvo i tekst odredaba zakona koje se mijenjaju, ako se predlaže zakon o izmjenama; da se predlog zakona razmatra najprije u Skupštinskim odborima (prvo čitanje), a nakon toga se razmatra i o njemu vodi rasprava na sjednicama Skupštine i to u postupku načelnog pretresa o predlogu zakona (drugo čitanje), postupku pretresa predloga zakona u pojedinostima (treće čitanje) i po završenom pretresu u pojedinostima pristupa se glasanju o amandmanima koji nijesu

1503 „Službeni list Republike Crne Gore", br. 51/06. i 66/06. i „Službeni list Crne Gore", br. 88/09, 80/10, 39/11, 25/12, 49/13, 42/15, 52/17, 17/18. i 47/19.

sastavni dio predloga zakona (ukoliko ih ima), a zatim o predlogu zakona u cjelini.

S tim u vezi, za ukazati je da je Ustavni sud ustanovljen kao poseban organ, izdvojen od ostalih vlasti (zakonodavne, izvršne i sudske), koji štiti ustavnost i zakonitost, odnosno ustavnopravni poredak i ljudska prava i slobode zajemčene Ustavom i saglasno odredbi člana 149. stav 1. tačka 1. Ustava isključivo ima ulogu i ovlašćenja tzv. „negativnog zakonodavca", odnosno nadležan je samo za ocjenu saglasnosti konkretnog zakonskog rješenja sa mjerodavnim odredbama Ustava i potvrđenim i objavljenim međunarodnim ugovorima.

Pored toga, u odnosu na ocjenu ustavnosti pojedinih odredaba zakona koje imaju povratno dejstvo, odnosno odredaba zakona koje uvode određena ograničenja ljudskih prava i sloboda, Ustavni sud, pored ostalih elemenata, uzima u obzir da li je propisivanje odredaba sa povratnim dejstvom, odnosno odredaba kojima se ograničavaju određena ljudska prava i slobode, težilo legitimnom cilju, tj. bilo „u službi" javnog interesa. Takođe, pred Ustavnim sudom može se postaviti i pitanje formalne ustavnosti nekog zakona, odnosno postupka njegovog donošenja, u kojem slučaju Ustavni sud, u postuku formalno-pravne ocjene takvog zakona, utvrđuje da li su u postupku donošenja tog zakonan ispunjeni uslovi o potrebnom broju poslanika za kvorum i odlučivanje, saglasno odredbama Ustava i Amandmana I do XVI na Ustav. Ovim pitanjem Ustavni sud se bavio u predmetima poslovnih oznaka: U-I br. 31/10, od 26. januara 2011. godine, U-I br. 37/15, od 24. februara 2017. godine, U-I br. 14/17 i 18/17, od 30. oktobra 2018. godine, U-I br.13/22, 14/22 i 16/22 od 28. jula 2022. godine i dr.

13. *Provjerava li vaš sud to da li je subjekt odlučivanja opravdao i obrazložio svoju odluku ili da li je ta odluka istovjetna sa onom koju bi sam vaš sud donio da je on sam, kojim slučajem, bio subjekt odlučivanja?*

Postupanje Ustavnog suda Crne Gore nije uporedivo sa postupanjem bilo kojeg drugog državnog organa odlučivanja, niti djeluje kao sud poslednje (treće ili četvrte) instance. Ustavni sud u postupcima po ustavnim žalbama cijeni da li su povrijeđena ljudska prava garantovana Ustavom Crne Gore i Evropskom konvencijom za zaštitu ljudskih prava i osnovnih sloboda u postupcima pred sudovima opšte i posebne nadležnosti, cijeneći, pored ostalog, i obrazloženost sudske odluke u tim postupcima, kao dio prava na pravično suđenje-pravo na obrazloženu sudsku odluku, u skladu sa standarima prava na pravično suđenje.

14. *Da li vaš sud ispoljava uzdržanost u zavisnoti od razmjera u kojima je datoj odluci ili mjeri prethodilo temeljno ispitivanje usklađenosti sa osnovnim pravima? Koliko duboko u svojoj analizi treba da ide zakonodavac da bi vaš sud na kraju toj analizi pridao određenu težinu?*

Ustavni sud Crne Gore postupa u skladu sa nadležnostima i procedurom koji su uređeni Ustavom Crne Gore i Zakonom o Ustavnom sudu, bez obzira na dubinu i širinu prethodnog ispitivanja usklađenosti sa osnovnim pravima.

15. *Analizira li vaš sud to da li su suprotni stavovi bili u cjelosti zastupljeni u parlamentarnoj debati prilikom donošenja neke mjere? Da li je dovoljno da se vodi opsežna debata o opštim odlikama određenog propisa ili težište mora biti jasno naznačeno i stavljeno na implikacije koje taj propis ima.*

Kao što je navedeno u ranijim odgovorima, Ustavni sud je, u području apstraktne kontrole ustavnosti i zakonitosti, ovlašćen da ocjenjuje saglasnost zakona sa Ustavom i potvrđenim i objavl-

jenim međunarodnim ugovorima, odnosno saglasnost drugih propisa i opštih akata sa Ustavom i zakonom i to prestavlja okvir njegovog djelovanja u smislu odredaba člana 149. tač. 1. i 2. Ustava.

16. *Da li činjenica da je određenu odluku donio zakonodavac ili je, pak, sama odluka proistekla iz procesa javnih konsultacija ili javne rasprave, ima dokaznu težinu na osnovu koje je moguće utvrditi demokratski legitimitet odluke?*

Odredbom člana 149. tačka 2. Ustava utvrđena je nadležnost Ustavnog suda da odlučuje o saglasnosti drugih propisa i opštih akata (podzakonski akti) sa Ustavom i zakonom. Načelo saglasnosti pravnih propisa (član 145. Ustava) podrazumijeva da se podzakonski propisi donose na osnovu normativno utvrđenog ovlašćenja za donosioca akta. Prema Ustavu, generalno ovlašćenje za donošenje propisa (za izvršavanje zakona) ima Vlada, a organi uprave, lokalna samouprava ili drugo pravno lice kada su na to, po određenim pitanjima, ovlašćeni zakonom. Drugim riječima, zakon mora biti osnov za donošenje podzakonskih akata i obuhvata samo ono što proizilazi iz zakonske norme, a njom nije izričito uređeno. U postupku ocjene saglasnosti takvog propisa s Ustavom i zakonom, Ustavni sud ispituje da li je osporeni akt donio ovlašćeni organ, da li je donosilac imao zakonsko ovlašćenje za njegovo donošenje (pravni osnov) i da li propis po svojoj sadržini, cilju i obimu odgovara onim okvirima koje mu je odredio zakon.

Saglasno navedenom, Ustavni sud može da ispituje da li je ispoštovana procedura za donošenje podzakonskog akta, odnosno da li je sprovedena javna rasprava o tom aktu, ukoliko je ona propisana kao obavezna u postupku njegovog donošenja. Ovim pitanjem Ustavni sud se bavio u predmetima poslovnih oznaka: U-II br. 2/14, od 30. juna 2015. godine ,U-II br. 42/14, od 18. novembra 2015. godine, U-II br. 33/14, od 28. decembra 2015. godine, U-II br. 17/14, od 4. oktobra 2016. godine, U-II br. 25/15, od 4. oktobra 2016 godine, U-II br. 10/16, od 4. oktobra 2016. godine, i dr.

III. Obim prava, zakonitost i srazmjernost

17. *Da li se vaš sud ikada suzdržao od donošenja odluke u fazi definisanja prava, dajući značaj vladinoj definiciji prava ili primjeni te definicije na činjenice?*

Ustavni sud Crne Gore nema nadležnosti da vrši preventivnu kontrolu ustavnosti, koja bi mu omogućila da se u postupku donošenja propisa ili definisanja prava otklone eventualne neustavnosti. Dakle, Ustavni sud Crne Gore može reagovati tek po podnijetom predlogu za ocjenu saglasnosti usvojenog zakona sa Ustavom i potvrđenim i objavljenim međunarodnim ugovorima i predlogu za ocjenu saglasnosti usvojenog drugog propisa i opšteg akta sa Ustavom i zakonom. Takođe, postupak pred Ustavnim sudom može se inicirati inicijativom za pokretanje postupka za ocjenu saglasnosti zakona sa Ustavom i potvrđenim i objavljenim međunarodnim ugovorima i inicijativom za pokretanje postupka za ocjenu saglasnosti drugih propisa i opštih akata sa Ustavom i zakonom, kao i inicijativom za pokretanje postupka za ocjenu saglasnosti sa Ustavom mjera i radnji državnih organa preduzetih za vrijeme ratnog i vanrednog stanja. Kada je riječ o pojedinačnim slučajevima, donijetim na osnovu definisanog prava na osnovu donijetog zakona, takva pitanja će se rješevati u postupku po ustavnoj žalbi zbog povrede ljudskih prava i sloboda zajemčenih Ustavom. Dakle, i kroz apstraktnu i kroz nadležnost po ustavnoj žalbi Ustavni sud Crne Gore, odlučuje na osnovu Ustava Crne Gore, vlastite i prakse Evropskog suda za ljudska prava.

18. *Da li priroda primjenjivih prava utiče na stepen uzdržanosti? Da li vaš sud smatra da su neka prava ili neki aspekti prava važniji od drugih pa samim tim zavrjeđuju i rigorozniju kontrolu?*

Jedina „podjela" o kojoj bi se iz prakse Ustavnog suda Crne Gore moglo govoriti je „podjela" na apsolutna prava i prava koja se mogu ograničiti zakonom samo onda kada je to neophodno u demokratskom društvu. Naime, kako je već prethodno rečeno u praksi Ustavnog suda Gore generalno ne postoji „politika" suzdržavanja od donošenja odluka, pa se ne može govoriti o suzdržavanju od donošenja odluka ni kada su osnovna ljudska prava u pitanju. Poslovnikom Ustavnog suda Crne Gore definisano je razmatranje predmeta po redosledu njihovog prijema, kao i izuzeci od takvog postupanja, kada se određene vrste predmeta razmatraju kao preioritretne. Saglasno odredbi člana 53. Poslovnika Ustavnog suda Crne Gore*:*

(1) Ustavni sud razmatra predmete prema redosljedu njihovog prijema.

(2) Izuzetno, Ustavni sud razmatra sljedeće vrste predmeta kao prioritetne:

1. predmete za koje je zakonom propisan poseban vremenski rok u okviru kojeg Ustavni sud mora razmatrati i odlučivati u predmetu;

2. predmete koji se odnose na odlučivanje o pitanju od posebnog značaja za zaštitu prava i sloboda građana;

3. predmete koji se odnose na prava djeteta;

4. predmete koji se odnose na povredu dostojanstva ličnosti, lišenje slobode, pritvor i poštovanje ličnosti (čl. 28., 29., 30., 31. Ustava), odnosno povredu prava na život, zabranu mučenja, zabranu ropstva i prinudnog rada i prava na slobodu i sigurnost (čl. 2, 3, 4, i 5. Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda);

5. predmeti u kojima su ispunjeni uslovi za izdavanje privremene naredbe za obustavu izvršenja pojedinačnog akta ili radnje, i

6. drugi predmete, za koje Ustavni sud odluči.

(3) Ukoliko učesnik u postupku podnese prijedlog za prioritetno razmatranje predmeta, Ustavni sud odlučuje o tom prijedlogu kada to predloži sudija izvjestilac.

19. *Da li imate određenu skalu jasnoće kada ispitujete ustavnost nekog zakona? Kako odlučujete koliko je neki zakon jasan? Kada primjenjujete princip* ***In claris non fit interpretario*** *(„Što svak jednako razumije, tome tumača ne treba")?*

Jasnoća zakona ili bilo kojeg drugog propisa, za čiju ocjenu ustavnosti, odnosno ustavnosti i zakonitosti je nadležan Ustavni sud, sastavni je dio načela vladavine prava (član 1. stav 2. Ustava), kao najviše vrijednosti ustavnog poretka Crne Gore. Propis mora biti jasan i precizan u skladu sa posebnošću materije koju normativno uređuje, čime se sprječava svaka arbitrarnost i proizvoljnost u tumačenju i primjeni propisa, odnosno uklanjanju neizvjesnosti adresata pravne norme u pogledu krajnjeg efekta odredaba koje se na njih neposredno primjenjuju. Zahtjevi pravne sigurnosti i vladavine prava, iz odredbe člana 1. stav 2. Ustava, traže da pravna norma bude dostupna adresatima i za njih predvidljiva, tj. takva da oni mogu stvarno i konkretno znati svoja prava i obaveze kako bi se prema njoj mogli ponašati. Adresati pravne norme ne mogu stvarno i konkretno znati svoja prava i dužnosti, te predvidjeti posljedice svog ponašanja ako pravna norma nije dovoljno određena i precizna.

U cilju utvrđivanja da li određena odredba zakona ili drugog propisa ispunjava zahtjeve za određenošću i preciznošću pravne norme, Ustavni sud polazi od njenog jezičkog, sistematskog, ciljnog ili teleološkog tumačenja, kao i od kriterijuma Evropskog suda za ljudska prava za ostvarivanje „standarda zakonitosti", ustanvoljenih u njegovoj bogatoj sudskoj praksi[1504].

1504 *Sunday Times (No.1) protiv Ujedinjenog Kraljevstva*, presuda od 26. aprila 1979, zahtjev broj 6538/74, *Malone protiv Ujedinjenog Kraljevstva*, presuda od 2. avgusta 1984. godine, predstavka broj 8691/79, *Centro Europa 7 S.R.L. i Di Stefano protiv Italije*,

20. *Koliki je intenzitet preispitivanja vašeg suda onda kada se primjenjuje test legitimnosti cilja?*

U praksi Ustavnog suda Crne Gore ne postoji mnogo odluka u kojima je Ustavni sud utvrdio da ne postoji legitiman cilj koji je u javnom interesu za neku vrstu nametnutog ograničenja. Konačna ocjena Ustavnog suda sprovede se uglavnom u fazi ispitivanja proporcionalnosti.

21. *Koji test proporcionalnosti primjenjuje vaš sud? Da li vaš sud primjenjuje sve faze "klasičnog" testa proporcionalnosti (tj. prikladnost, neophodnost, te proporcionalnost u užem smislu)?*

Ustavni sud Crne Gore primjenjuje test proporcionalnosti, pozivajući se na kriterijume utvrđene u praksi Evropskog suda za ljudska prava.

22. *Da li vaš sud prolazi kroz svaki primjenjivi segment testa proporcionalanosti?*

Ustavni sud Crne Gore, u principu, prolazi kroz svaki primjenjivi segment testa proporcionalnosti.

23. *Postoje li slučajevi u kojima vaš sud prihvata da predmetna mjera zadovoljava jednu ili više faza testa proporcionalnosti čak i onda kada, po svemu sudeći, nema dovoljno dokaza koji bi to potkrijepili?*

Ne bi se moglo reći da je u dosadašnjoj praksi Ustavnog suda Crne Gore bilo slučajeva u kojima je Ustavni sud prihvatio da predmetna mjera zadovoljava jednu ili više faza testa proporcionalnosti čak i onda kada, po svemu sudeći, nema dovoljno dokaza koji bi to potkrijepili.

24. *Da li je uvođenje preispitivanja sa stanovišta proporcionalnosti u sudsku praksu vašeg suda bilo praćeno jačanjem doktrine sudske uzdržanosti?*

Ne uočavamo vezu između uvođenja preispitivanja stanovišta proporcionalnosti u sudsku praksu Ustavnog suda Crne Gore i eventualnog jačanja doktrine sudske uzdržanosti.

25. *Da li praksa Evropskog suda za ljudska prava (ESLjP) oblikuje pristup vašeg suda suzdržavanju od donošenja odluka/intervencije? Da li je doktrina polja slobodne procjene ESLjP domaći ekvivalent slobodnoj ocjeni koju dodjeljuje vaš sud? Ako nije, koliko često se preklapaju pitanja koja se odnose na slobodne procjene ESLjP s pitanjima suzdržavanja vašeg suda u sličnim predmetima?*

Praksa Evropskog suda za ljudska prava je od velikog značaja za donošenje odluka Ustavnog suda. Međutim, to ne sprječava Ustavni sud da pruži širi obim zaštite od onog koji pružaju standardi ustanovljeni praksom Evropskog suda. Ustavni sud u postupku po ustavnoj žalbi omogućava uživanje prava na pravično suđenje i prava svojine zajemčenih Ustavom Crne Gore, a što ne predstavlja garanciju prava na pravično suđenje i prava na imovinu iz Evropske konvencije.

Sudska praksa Evropskog suda za ljudska prava u pogledu polja slobodne procjene koje je na raspolaganju državama po određenim pitanjima je bitno slična, ako ne i ekvivalentna, ocjeni Ustavnog

presuda od 7. juna 2012, predstavka broj 38433/09, i dr.

suda, kada se radi o diskrecionim ovlašćenjima.

26. *Da li je ESLjP osudio vašu državu zbog suzdržavanja vašeg suda od donošenja odluka ili intervencije u nekom predmetu, sudskog suzdržavanja od odnošenja odluke, što ga je učinilo nedjelotvornim pravnim lijekom?*

Evropski sud za ljudska prava nije osudio našu državu zbog suzdržavanja Ustavnog suda Crne Gore od donošenja odluka u nekom predmetu. Ukazujemo na stav ESLjP da se ustavna žalba može u principu smatrati djelotvornim pravnim lijekom od 20. marta 2015. godine, zauzet u predmetu *Siništaj protiv Crne Gore* (presuda od 24. novembra 2015. godine).

IV. Ostale specifičnosti

27. *Koliko se često postavlja pitanje suzdržavanja od donošenja odluke u predmetima koji se tiču ljudskih prava u slučajevima u kojima odlučuje vaš sud?*

Ustavni sud u postupcima koji se odnose na ljudska prava i sloboda postupa u skladu sa Ustavom Crne Gore, Zakonom o Ustavnom sudu Crne Gore i Poslovnikom Ustavnog suda Crne Gore.

28. *Da li je vaš sud s vremenom sve više suzdržavao od donošenja odluka ili od intervencije?*

Ustavni sud Crne Gore se uopšte nije uzdržavao od donošenja odluka ili od intervencije.

29. *Da li uzdržanost kao stav zavisi i od opterećenosti vašeg suda predmetima?*

Broj predmeta utiče na dužinu trajanja postupka pred Ustavnim sudom Crne Gore, ali Sud ulaže napore da po svim nadležnostima postupa u skladu sa Zakonom o Ustavnom sudu Crne Gore i Poslovnikom Ustavnog suda Crne Gore.

Opterećenost Ustavnog suda Crne Gore velikim brojem neriješenih predmeta iz ranijih godina, može biti usmjerena na pitanje da li Ustavni sud ostvaruje svoju ulogu kao zaštitnik ustavnosti i zakonitosti i ljudskih prava i osnovnih sloboda. Navedeno zahtijeva preduzimanje određenih mjera u cilju efikasnijeg postupanja Ustavnog suda (broja zaposlenih na obradi predmeta).

Dakle, uprkos određenom broju neriješenih predmeta, ne dovodi se u pitanje ostvarivanje uloge Ustavnog suda, budući da je Sud u poslednjih dvije godine značajno smanjio zaostatak u broju neriješenih predmeta.

30. *Da li vaš sud može da zasniva svoje odluke na argumentaciji koju stranke u sporu nijesu iznijele? Da li vaš sud može da izvrši prekvalifikaciju iznijetih argumenata tako što će ih svrstati pod različitu ustavnu odredbu od one na koju se pozvao podnosilac (stranka)?*

Pitanje postupanja sa argumentacijom koju su iznijele stranke u određenom sporu pred Ustavnim sudom uređeno je Zakonom o Ustavnom sudu Crne Gore. U tom smislu:

- u postupku za ocjenu saglasnosti zakona sa Ustavom i potvrđenim i objavljenim međunarodnim ugovorima, odnosno drugog propisa i opšteg akta sa Ustavom i zakonom, Ustavni sud nije ograničen predlogom, odnosno inicijativom (član 59);

- u postupku odlučivanja da li je Predsjednik Crne Gore povrijedio Ustav, Ustavni sud je ograničen razlozima iz predloga (član 82);

- predlog za odlučivanje o sukobu nadležnosti (između sudova i drugih državnih organa, između državnih organa i organa jedinica lokalne samouprave i između organa jedinica lokalne samouprave) sadrži podatke o podnosiocu predloga, naziv organa između kojih postoji sukob nadležnosti, predmet postupka, detaljno obrazloženje činjenica i okolnosti predmeta zbog kojih je došlo do sukoba nadležnosti i razloge zbog kojih se organ smatra nenadležnim, odnosno nadležnim za odlučivanje u predmetu. Uz predlog se podnosi dokumentacija od značaja za odlučivanje;

- u predlogu o zabrani rada političke partije ili nevladine organizacije mora biti navedeno zabranjeno djelovanje, odnosno činjenice i okolnosti neustavnog djelovanja, koje mogu biti razlog za zabranu rada političke partije ili nevladine organizacije (član 92);

- žalba kojom se pokreće izborni spor (izbor odbornika i poslanika i izbor Predsjendika Crne Gore) i spor u vezi sa referendumom mora da sadrži razloge i dokaze o povredi biračkog prava u toku izbora, odnosno referednuma (član 98. stav 2, član 104. stav 2. i član 105. stav 2);

- žalba kojom se pokreće postupak za odlučivanje o saglasnosti sa Ustavom mjera i radnji državnih organa preduzetih za vrijeme ratnog i vanrednog stanja, mora biti obrazložena i sadržati razloge i dokaze o neustavnom ograničenju ostvarivanja pojedinih ljudskih prava i sloboda (član 108. stav 5).

U skladu sa odredbom člana 75 Zakona o Ustavnom sudu Crne Gore, Ustavni sud odlučuje o povredi ljudskog prava ili slobode zajemčene Ustavom na koju se ukazuje u ustavnoj žalbi. Ovo je tumačeno u praksi Ustavnog suda tako da je sud vezan činjenicama iznijetim u ustavnoj žalbi, ali ne i njihovim pravnim kvalifikacijama. Stoga, svoju pravnu ocjenu ustavne žalbe Sud može zasnivati na drugoj odredbi Ustava i/ili Konvencije od one na koju se poziva podnosilac žalbe. Ovaj pristup je u skladu sa dobro utvrđenom sudskom praksom ESLJP *(Akdeniz protiv Turske,* broj 25165/94, stav 88, 31. maj 2005. godine).

Pored navedenog, odredbama člana 60. Poslovnika Ustavnog suda Crne Gore propisano je da Predlog odluke ili rješenja Ustavnog suda, u zavisnosti od vrste predmeta, po pravilu, treba da sadrži:

(...);

4. sadržinu podneska;

5. sadržinu odgovora, odnosno mišljenja;

(...);

8. utvrđeno činjenično i pravno stanje u predmetu;

9. odredbe Ustava i zakona na kojima se zasnivaju ustavno-pravna rješenja u predmetu;

10. odredbe međunarodnog akta koji uređuje određena pravna pitanja;

11. ustavnopravnu ocjenu osporenog akta;

12. stručna i druga mišljenja, ukoliko su u toku postupka pribavljena;

13. relevantnu praksu Ustavnog suda, uporednu praksu ustavnih sudova u drugim zemljama i praksu Evropskog suda za ljudska prava; .

14. predlog za održavanje javne rasprave, ako sudija izvjestilac smatra da je treba održati;

(...);

21. ostale predloge sudije izvjestioca za koje on smatra da su relevantni za predmet;

22. predlog sudije izvjestioca o načinu na koji treba odlučiti u predmetu.

31. *Da li vaš sud može da proširi presipitivanje ustavnosti tako da njima obuhvati i ostale zakonske odredbe koje pred njim nisu osporene, ali jesu u vezi sa položajem podnosioca žalbe odnosno predstavke?*

Kao što je navedeno prethodnim odgovorima - u postupku za ocjenu saglasnosti zakona sa Ustavom i potvrđenim i objavljenim međunarodnim ugovorima, odnosno drugog propisa i opšteg akta sa Ustavom i zakonom, Ustavni sud nije ograničen predlogom, odnosno inicijativom, tj. može da „proširi preispitivanje" ustavnosti, odnosno ustavnosti i zakonitosti zakonske odredbe ili odredbe nekog drugog porpisa koje nijesu obuhvaćene podnijetim predlogom ili inicijativom.

Zakonom o Ustavnom sudu Crne Gore precizirano je da Ustavni sud može sâm da pokrene postupak za ocjenu saglasnosti zakona sa Ustavom i potvrđenim i objavljenim međunarodnim ugovorima, odnosno drugog propisa i opšteg akta sa Ustavom i zakonom, naročito kad se: u toku postupka po ustavnoj žalbi postavi pitanje saglasnosti zakona sa Ustavom i potvrđenim i objavljenim međunarodnim ugovorima[1505] ili saglasnosti drugog propisa i opšteg akta sa Ustavom i zakonom, na osnovu kojeg je donijet pojedinačni akt koji je predmet ustavne žalbe; ili u toku postupka za ocjenu saglasnosti zakona sa Ustavom i potvrđenim i objavljenim međunarodnim ugovorima ili drugog propisa i opšteg akta sa Ustavom i zakonom postavi pitanje ustavnosti, odnosno zakonitosti drugih odredaba ili drugih propisa koje su u vezi sa odredbama koje su predmet ocjene[1506].

1505 Ovim pitanjem Ustavni sud se bavio u predmetu poslovne oznake U-I br. 34/18, U-III br.1970/18 i U-III br. 1987/18, od 12. decembra 2018. godine i 27. septembra 2019. godine.

1506 Ovim pitanjem Ustavni sud se bavio u predmetima poslovnih oznaka U-II br. 71/18, od 28. februara 2019. godine, U-II br. 67/21 i 14/22, od 12. maja 2022. godine, i dr.

The Supreme Court of the Netherlands

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Constitutional cultures vary and the courts' perceptions of their own role in a constitutional democracy affect the intensity of their scrutiny in fundamental rights cases. Many courts profess judicial deference.

Judicial deference is a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters which are perceived to be beyond their expertise or legitimacy to decide. The tool has been employed, most prominently, in human rights cases. This is due to their transcendent quality, capable of cutting across all substantive areas of public decision-making.

It is said that over-deferential attitude threatens the rule of law and separation of powers as much as excessive judicial activism does. The way judges exercise judicial deference is, therefore, a fundamental matter of constitutional principle that concerns the proper role of each branch of government in relation to significant questions of public policy.

The following questions aim to discover the differences in exercising judicial deference by European constitutional courts.

Questionnaire

for the national reports

I. Non-justiciable questions and deference intensities

1. In your jurisdictions, what is meant by "judicial deference"?

The *Hoge Raad* is a Supreme Court with, amongst others, constitutional tasks. The Dutch Constitution charges the *Hoge Raad* with cassation of judgments for breaches of law, in the cases and within the limits provided by law. Also violation of international treaties which are valid in the Netherlands, government policies, and laws and policies from provinces and municipalities could lead to an appeal in cassation. Furthermore, the *Hoge Raad* reviews whether the previous court followed the right procedures and whether the disputed judgment is sufficiently substantiated.

The *Hoge Raad* may examine, in a case which is brought before it, whether a legal provision is in conformity with law of a higher order. A concept of "judicial deference" has no autonomous meaning within the law of the Netherlands. The case-law of the *Hoge Raad* includes various judgments in cases in which the duty to provide effective legal protection to the people encounters the primacy of the legislator to weigh up general interests. In 2021, the Venice Commission implicitly told Dutch courts that a general deferential attitude of a court towards Parliament should not be an end in itself, in so far as this is potentially detrimental to the courts' (constitutional) review functions (European Commission for

Democracy through Law (Venice Commission), The Netherlands, Opinion on the legal protection of citizens, adopted 15-16 October 2021 (Childcare Allowance Case), paragraph 101).

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

Please refer to our answer on question 1.

3. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute

or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

Please refer to our answer on question 1.

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

In several judgments the *Hoge Raad* ruled that it was up to the legislator to choose between different options for the further development of the law or to choose the way in which legal protection should be provided. We will provide two examples.

In a tax case, the *Hoge Raad* ruled (judgment of 14 June 2019, ECLI:NL:HR:2019:816) that the taxation of a so-called fixed return on savings and investment – which could deviate from the actual return on such assets – violated Article 1 Protocol 1 ECHR and Article 14 ECHR. Since several solutions for providing legal protection were conceivable, the *Hoge Raad* left the choice to the legislator.

In a social security case (judgment of 8 December 2017, ECLI:NL:HR:2017:3081), the applicant alleged to need medical care as a consequence of her physical disability. When she started living together with a person who also took charge of her medical care, Dutch authorities decided, on the basis of a certain legal provision, that they were a joint household, as a consequence of which the welfare benefit which the applicant received was terminated. The court of appeal ruled that this decision violated the prohibition of discrimination of Article 14 ECHR, since, in short, in the event the care was provided by a relative of the applicant and the relative and the applicant would live together, the welfare benefit would have been continued. The *Hoge Raad* ruled that the applicable legal provision violated the prohibition of discrimination and that it was up to the legislator to decide in which way the existing justice deficit should be remedied.

5. Are there cases where your Court deferred because there was a risk of judicial error?

Not applicable.

6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

Please refer to our answer on question 4.

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

Please refer to our answers regarding questions 1 and 4.

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

Not applicable.

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

Procedural rules in the Netherlands enable Dutch courts to oblige a party to reveal information and to decide whether a refusal of a party to do so, is (wholly or partly) justified. These rules also concern cases in which information of national security services is involved.

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing

rights-compliant reforms?

Not applicable.

II. The decision-maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

Not applicable.

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

In the Netherlands, legal provisions are interpreted by courts on the basis of, in the essence, their wording, parliamentary documents during the drafting of the law, jurisprudence and academic research results.

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

Not applicable.

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

Not applicable.

15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

Not applicable.

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

Not applicable.

III. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

Not applicable.

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

Not applicable.

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

Not applicable.

20. What is the intensity review of your Court in case of the legitimate aim test?

In the Netherlands, the ECHR is directly applicable law and is also constitutional law. The case-law of the ECtHR is applied.

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

Please refer to our answer on question 20.

22. Does your Court go through every applicable limb of the proportionality test?

Please refer to our answer on question 20.

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

Please refer to our answer on question 20.

24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

Please refer to our answer on question 20.

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

Please refer to our answer on question 20.

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

Not applicable, as there is no autonomous concept of deference in the Netherlands.

IV. **Other peculiarities**

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

Not applicable.

28. Has your Court have grown more deferential over time?

Not applicable.

29. Does the deferential attitude depend on the case load of your Court?

Not applicable.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

The Dutch Constitution, more specific article 121 (and also Dutch procedural laws), obliges the

court to give reasons for its decision. The Constitution does not provide further provisions on this topic. The procedural laws in civil, criminal and tax law also provide rules for the reasoning of a judgment. As far as the possibilities to use arguments inside or outside the scope of the allegations of the parties are concerned, these fields of law distinguish between questions of fact and questions of law. The nature of the jurisdiction also makes a difference. Therefore, this question cannot be answered in general terms, other than that, in general, judgments must be verifiable for the parties involved in a case, as well as for third parties.

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

Not applicable.

The Portuguese Constitutional Court

Forms and Limits of Judicial Deference:

The Case of Constitutional Courts

National report: Constitutional Court of Portugal

João Carlos Loureiro[1507]

Raquel Barradas de Freitas[1508]

Questionnaire

I. Non-justiciable questions and deference intensities

1. In your jurisdiction, what is meant by "judicial deference"?

We take the term 'judicial deference' to refer to the practice, by a court, of choosing to give significant weight to judgments of other public authorities (the legislature, administrative bodies, or the executive) on a particular matter. Strong deference amounts to a court declining to render an independent judgment on the issue at hand when it would otherwise be competent to do so.

The term 'deference', in the relevant sense, is not used in the jurisprudence of the Portuguese Constitutional Court (PCC). It is also absent from judgments of ordinary courts (including the Supreme Court of Justice and the Supreme Administrative Court) and from Portuguese language scholarly writing in the domains of constitutional theory and public law[1509].

There are five main reasons for this absence:

(i) There is no doctrine of deference in Portuguese public law;

(ii) The PCC is a specialized court (it scrutinizes normative provisions only – there is no constitutional review of administrative acts, no mechanism akin to a 'constitutional complaint' (*Verfassungsbeschwerde* [Germany], *Amparo* [Spain]), no direct access to the Court by individuals;

(iii) The dominant view is that the Constitution (PC) does not empower the PCC to refrain from exercising its powers of constitutional scrutiny on the basis of self-denying limits;

(iv) The PCC has a duty to resolve every case legitimately brought before it[1510];

(v) The PCC is competent to render judgments on constitutional limits to its own de-

1507 Justice of the Portuguese Constitutional Court.

1508 Advisor to the President of the Portuguese Constitutional Court.

1509 With very few exceptions: Judge Almeida Ribeiro's dissenting opinion in Judgment nº 225/2018, paras. 7/8, and Sampaio, Jorge Silva, *Ponderação e Proporcionalidade: A Operação da Ponderação, a Proporcionalidade como Norma Reguladora e as Condições para a Deferência Judicial*, vol. II (Almedina, 2023), 933-979; Canas, Vitalino, *O Princípio da Proibição do Excesso* (Almedina, 2023), 151, 195, 879/880. In addition to these, there is some literature on issues connected to judicial deference, in the relevant sense. See, for instance, Gonçalves, Pedro Costa, *Manual de Direito Administrativo* (Almedina, 2019); Caupers, João, 'Actos Políticos: contributo para a sua delimitação', Cadernos de Justiça Administrativa. 98 (2013), NA, p. 3-13; Lopes, Dulce, *Eficácia, Reconhecimento e Execução de Atos Administrativos Estrangeiros* (Almedina, 2018), 272, 497, 498, 662; Novais, Jorge Reis, *Direitos Fundamentais nas Relações entre Particulares* (Almedina, 2018), 324, 265, 312, 322.

1510 Article 20, nº 1, PC, and Judgment nº 147/2022, X.

cisionmaking power. It is also competent to render a judgment on constitutional limits to the decision-making power of both the legislature and the executive (when the latter issues normative provisions). The exercise of this competence is regarded, not as a matter of deference but as a matter of deciding the law of the Constitution[1511].

The conspicuous absence of the term 'deference' from both judicial and doctrinal discourse in Portugal should not, however, lead us to conclude that questions related to judicial self-restraint are not a relevant theme for the PCC. Self-restraint is one of the judicial virtues meant to guide the way in which the Court exercises its power of constitutional review, and a relevant one at that. The virtue of self-restraint may manifest itself in different ways, many of which have very little to do with deference. Deferring to another constitutional actor may not be an expression of selfrestraint on the part of the Court – the Court may have a conclusive reason not to do something that it is competent to do. If the Court has a conclusive reason to act and acts on such a reason, it is not showing self-restraint. In such instances, the Court's reason for acting is not self-restraint but a different kind of reason which conclusively determines what it is to do.

Three conceptual distinctions are relevant here:

(i) To be competent to do something v. to have a reason to do what one is competent to do

There is a distinction with a difference between being competent to do something and having a reason to do it. On the one hand, when a court acts on a conclusive reason (e.g. a legal duty) and refrains from passing judgment on an issue, it is not exercising self-restraint but acting on the basis of a particularly weighty, or even exclusionary, reason not pass judgment. In other words, if a court does what it is legally bound to do, it is neither exercising self-restraint nor deferring.

On the other hand, a court may be competent to assess whether a particular legislative measure, which restricts the exercise of a protected right, goes beyond what is necessary in achieving the particular (legitimate) aim pursued. Yet it may have reasons not to declare a measure unnecessary in a particular case, e.g. if it has no access to all relevant information about possible alternative measures and/or the technical/scientific knowledge needed to render a negative judgment on the lawful (not proper) use of discretionary power by the legislator.

Talk of deference makes sense only when a court has no conclusive legal reason to refrain from rendering its own judgment on an issue.

(ii) Deference v. justiciability

An issue is justiciable if it is suitable for a court to decide. An issue is suitable for a court to decide if it can be decided on the basis of legal reasons. This statement is true across jurisdictions.

If a court is competent and equipped to decide a matter presented to it on the basis of legal reasons, then the matter or issue before it is justiciable. To say that an issue is not justiciable is not to say that a court ought to defer. Deference, in the relevant sense, comes into play only when an issue is justiciable. When a court declares a matter non-justiciable (i.e. not suitable for the court to decide) it is not deferring. Rather, it is affirming the constitutional limits of its role, a role which is constituted both by powers and duties.

The PCC is constitutionally bound to decide what it is competent to decide. It is also constitutionally required not to overstep the limits of its powers. Deference has a place within the exercise of discretionary power by a court. Neither the scholarly literature on constitutional scrutiny, nor the PCC itself rely on the idea that the Court has discretionary power in the domain of constitutional

1511 For a similar view, see Lord Hoffmann's remarks in *R. (on the application of ProLife Alliance) v. BBC* [2002] EWCA Civ 297; [2002] 2 All ER 756 (CA); and Lester, Anthony & Pannick, David (eds), *Human Rights Law and Practice*, 3rd edn. (Buttwerworths, London, 2009), para 3.19, n.3.

scrutiny. When a court has a legal duty to reach a certain decision, it has no discretion. When there are legal reasons for the court to decide one way or another, the Court must support (and justify) its decision with those reasons it identifies as relevant. In the presence of legal standards guiding the decision-making process, there is no space for discretion. In the absence of talk of discretionary power, there is no logical room for deference.

(iii) Deference v. comity

In some anglophone literature, comity is presented as a reason for deference. Jointly considered, the constitutional principles of separation and interdependence of powers and of judicial independence[1512] are at the root of comity as a constitutional principle. Judicial 'comity' is defined as respect that a court 'ought to show for the way another pubic authority exercises its power'[1513]. As a constitutional principle, entailed by the separation of powers, comity demands that courts, the PCC among them, 'respect the constitutional functions of other public authorities'. When considered in the context of the exercise of discretionary powers, comity can be seen as a reason for deference. In the Portuguese constitutional culture, however, there is little conceptual space for talk of judges exercising discretionary power when they engage in constitutional review of legislation. They consider themselves bound by constitutional legal standards even when they clarify the boundaries of their own role in the domain of constitutional scrutiny.

In the Portuguese constitutional system, the separation and independence of judicial power are constitutionally entrenched. Both the PCC and academic commentators use terms such as 'selfrestraint' (*autocontenção)*, 'light scrutiny' (*controlo de evidência*), or 'comity'[1514], rather than 'deference'. Such terms are used to refer to the way in which the Court interprets the principles which regulate the allocation and distribution of power among public authorities in the Portuguese constitutional setting, including the democratic principle and the principle of separation of powers[1515]. This is seen, not as a matter of discretion but of interpretation.

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the governmentetc.)?

There are no abstract criteria in place for determining whether and to what extent the Court ought to pass judgment on an issue. The object of constitutional review is clearly defined by the Constitution[1516], by statute[1517], and by the jurisprudence of the PCC. The Court is competent to assess the compatibility with the Constitution of normative provisions issued by Parliament

1512 Articles 2, 111, nº 1, 203, and 221 of the PC.

1513 Endicott, Timothy, *Administrative Law*, 4th edn. (OUP, 2018), 19.

1514 Equivalent terms used (for 'comity') in the relevant Portuguese literarature are *cortesia institucional* and *cortesia constitucional*. For a sample of views on this issue, see Miranda, Jorge, *Atos Legislativos* (Almedina, 2019), 143, 230, 255; Miranda, Jorge, *Direito Parlamentar* (Almedina, 2022), 24, 36; Morais, Carlos Blanco de, *O Sistema Político – Em tempo de erosão da democracia representativa* (Almedina, 2017).

1515 For an overview of the historic evolution and current shape of judicial review of legislation in Portugal, see Ribeiro, Gonçalo Almeida, ´Judicial Review of Legislation in Portugal: A Brief Genealogy', in Francesco Biagi, Justin O. Frosini & Jason Mazzone (eds.), *Constitutional History: Comparative Perspectives* (Brill, 2019). For an examination of the doctrine of constitutionally conforming interpretation in Portugal, see Ribeiro, Gonçalo Almeida, ´The Conundrum of Constitutionally Conforming Interpretation', in Mathias Klatt (ed.),
Constitutionally Conforming Interpretation - Comparative Perspectives, vol. 1 (Hart, 2023).

1516 Articles 223, nº 1, 277, 280, and 281, nº 1, PC.

1517 Articles 6, 3, nº 1, a), 51, and 54, of Lei nº 28/82, 15 November – 'Lei do Tribunal Constitucional' (LTC).

or by the executive (which, in the Portuguese system, is authorized to legislate). It is also competent to scrutinize any general and abstract provisions issued by other public bodies, regardless of their form. The object of constitutional scrutiny are legislated rules or normative provisions, not decisions or other types of act (e.g. decisions) performed by other public authorities.

Procedural requirements having to do with standing to lodge an application for constitutional review are also clearly established both by the Constitution and by statute[1518] for each of the available forms of scrutiny, as are other requirements of admissibility.

The dominant understanding is that the PCC does not have the constitutional power to craft legal standards aimed at restricting the discretion of the legislator (be it Parliament or the executive). The point of reference for the PCC is the Constitution, which the Court has ultimate authority to interpret.

3. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

No. There are procedural requirements which a request for constitutional review must meet in order to be assessed by the PCC. Such requirements will vary according to the type of constitutional scrutiny at stake. Once such threshold requirements have been met, the Court will assess and decide each case on its merits, by reference to the constitutional standards included in the request or any other constitutional standards the Court considers germane to the question at hand.

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

No, though there are examples of self-restraint. In one anticipatory review case[1519], for instance, the Court refrained from declaring the challenged normative provisions unconstitutional in part due to the 'epistemically limited context' in which it was required to deliberate[1520]. This is not, as noted above, an instance of deference, in the relevant sense: the Court did not (could not) substitute its own judgment on the substantive question at hand for the judgment of the legislator, i.e. the Court is neither adopting nor endorsing the judgment of the decision-maker on the substance of the measure. It is simply saying that it is not in a sufficiently epistemically informed position to conclude for itself that the relevant provision is unconstitutional. Such a reason for not declaring a normative provision unconstitutional is a prudential reason to refrain from acting in such a way as to infringe the principle of separation of powers.

5. Are there cases where your Court deferred because there was a risk of judicial error?

Please see response to question 4.

6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

There are numerous examples of judgments by the PCC in which the Court affirms that an issue before it is within the sphere of discretion (*liberdade de conformação*) of the democrat-

1518 Articles 224 and 281, nº 2, PC, and Article 72, LTC.

1519 Judgment nº 421/2009.

1520 For a comprehensive analysis of the epistemic limitations the PCC faces in anticipatory review proceedings, see Amaral, Maria Lúcia, and Ravi Afonso Pereira, 'The Portuguese Constitutional Court', in Armin von Bogdandy, Peter Huber, and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (Oxford, 2020; online edn, Oxford Academic, 20 Aug. 2020), https://doi.org/10.1093/oso/9780198726418.003.0013.

ically elected legislator, and, by implication, that a particular normative provision it is called to scrutinize is not to be declared unconstitutional. This happens when, having assessed the compatibility of a particular legislative measure with the Constitution, the Court concludes that there are no other constitutional limits to the legislator's power to decide how to regulate the particular area of social life it aimed to regulate by issuing a particular normative provision. Beyond its core power of constitutional scrutiny, the PCC is also competent to decide disputes on electoral matters and the registration and finances of political parties. Below are recent examples of judgments in which the Court expresses an expansive understanding of the scope of the powers of both the democratically elected legislator and the ordinary courts (looking at the limits if its own role in light of the separation of powers as a constitutional principle):

- Judgment nº 325/2023 (no violation of article 29, PC, by a provision in a criminal statute which used a vague term in defining an offence. The criminal legislator acted within the limits of its competence to create new criminal offences formulated in a sufficiently clear, precise way);

- Judgments nº 470/2022 and 279/2023 (in the domain of litigation concerning disputes within political parties - to which the PCC has had a minimalist approach - the Court is required to act with self-restraint and exercise only a 'mitigated form of control' – the associative and self-regulatory autonomy of political parties, too, is constitutionally protected);

- Judgment nº 134/2019 (citing Judgment nº 580/1999, the Court stresses the broad scope of decision-making power that the Constitution gives to the democratic legislator. It does, however, conclude that the legislative provision under scrutiny is unconstitutional because it relies on an arbitrary distinction between categories of people, in violation of Articles 2 and 13 of the PC).

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

Yes, this is, generally speaking, the conception adopted by the PCC. While the Court (along with some scholarly literature on the topic) has rejected the idea of a general presumption of compatibility of legislation with the Constitution (*presunção de não inconstitucionalidade*)[1521], it has consistently stressed the need to respect and preserve the space within which the democratically elected legislator (including the executive, within certain domains) exercises its constitutionally attributed powers. On the Court's view, the tasks of constitutional scrutiny and policy making are fundamentally distinct. The Court sees itself as having the specialized, technical role of authoritatively interpreting the Constitution.

1521 See, for example, Judgment nº 102/2016 (point 9), in which the Court states that such a presumption would be incompatible with the duty - imposed on courts by article 204, PC - not to apply, in cases brought before them, any normative provision which infringes the Constitution. However, there are specific instances in which a presumption of comparibility with the constitution exists. In incidental review proceedings, for instance, the Public Prosecutor *(Ministério Público)* is constitutionally required (Article 280, nº 3, PC) to lodge an application for constitutional review of any normative provisions disapplied by ordinary courts when the source of such provisions is an international treaty, a 'legislative act' or a 'regulatory decree'. Some commentators sustain that, read correctly, this constitutional provision entails that there is a presumption of compatibility of legislative acts with the Constitution (applications for constitutional review of such normative provisions enacted in such a way are compulsory only if the relevant provision has been disapplied by an ordinary court on the basis of a judgment of unconstitutionality).

The Court's view of its own role is rather narrow: identifying, clarifying, and articulating existing constitutional limits to the exercise of legislative power. Even in the domain of incidental scrutiny, the Court's task is one of review (of discrete normative provisions by reference to parameters set out in the Constitution), not appeal (whose object is the substance and merit of a decision by an ordinary court).

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

The PCC is duty-bound, when faced with a constitutional review request, to assess whether a penal normative provision is compatible with the Constitution. A dominant concern is whether the legislator's decision to criminalize a particular type of conduct is compatible with the requirements of the *ultima ratio* principle[1522] and of the rule-of-law (*Estado de Direito/ Rechtsstaat*) requirement of clear definition of criminal offences (art. 29, nº 1, PC). The Court makes caseby-case judgments on this matter, but tends to give considerable weight to its own jurisprudence in relevantly similar cases. Four recent examples are noteworthy (with different outcomes):

- Judgment nº 218/23 (on the constitutional admissibility of pimping as a criminal offence - the Court concluded that the statutory provision which criminalizes pimping is unconstitutional);

- Judgments nº 867/2021 and nº843/2022 (on the constitutional admissibility of pet abuse as a criminal offence – the Court concluded (though not unanimously), in several instances of incidental review proceedings, that the provision which defines pet abuse as a criminal offence is unconstitutional. More recently, sitting *en banc* in abstract review proceedings, the Court has reversed its judgment and refrained from judging the provision unconstitutional[17];

- Judgment nº 20/2019 (on the constitutional admissibility of the use of vague and opentextured terms in the definition of the offence of aggravated murder – the Court concluded that the provision under scrutiny, which defined the offence of aggravated murder, as formulated, is not unconstitutional). Only 'manifestly arbitrary or excessive measures' should be declared unconstitutional by the Court. The Court adopts a light-touch approach when it assesses the proportionality of penal legislative provisions and criminal sanctions.

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

The kernel of the Court's task is to clarify the constitutional role of different public bodies which have the power to make decisions on national security grounds.

- Judgment nº 458/1993 (the Court states that, in their task of densifying the constitutional concept of secret intelligence (*segredo de Estado*), public bodies are bound by the Constitution and by the doctrine of rights, freedoms and guarantees[1523]. However, judgments on the implications of releasing information or making documents available are political judgments which do not have to (though they may) be subjected to judicial scrutiny).

10. Given the courts' role as guardians of the Constitution, should they interfere with

1522 Article 18, nº 2 and 3, PC. [17] Judgment nº 70/2024.

1523 See Title II, PC, English version available here: https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf

policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

The PCC has (under article 283, PC) the power to declare that the legislator has breached the Constitution by failing to legislate when it ought to have done so (legislative omission). Despite its merely declaratory character, a judgment of unconstitutionality by omission plays an important role in the constitutional dialogue between the PCC and the legislator[1524]. The Court has, however, been parsimonious in its use of this mechanism of review - it has been used only 16 times in forty years.

Even in such instances, however, the Court is constitutionally required not to 'interfere' with the way in which the legislator uses its power to legislate. A declaration of unconstitutionality by omission is limited to the question whether the absence of a legislative measure on a particular issue (independently of its substance) is a breach of the Constitution. The PCC is neither constitutionally authorised to craft standards for the legislator to follow in producing the necessary legislation, nor to condition the legislator by means of a specific time frame for the issuing of new legislative measures[20].

In matters concerning state duties of fundamental rights protection, there is a minimum threshold which must be met - a 'prohibition of deficient protection' of fundamental rights[1525] by the various public authorities, including the legislator.

II. The decision-maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

The degree of democratic accountability of the author of a normative provision under constitutional scrutiny is not a criterion for the PCC to give more or less weight to their judgment on a particular matter. While the Court must take into account the constitutionally established hierarchy of legislative sources, it does not render a judgment on whether or not to *defer* on the basis of the democratic credentials of a public authority.

The Court sees this as a matter of hierarchy of sources, not of deference or intensity of scrutiny.

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

In abstract review proceedings - including in anticipatory (*a priori/preventive*) review cases -, the Court officially invites the public body who issued the relevant provision to respond in writing to the application for review[1526]. Typically, the body's response includes a document

1524 For an overview of the Portuguese system of constitutional review, and for examples of legislative omission judgments, see Ribeiro, Joaquim de Sousa & Mealha, Esperança, ´Constitutional Courts as ´Positive Legislators" (2010): https://www.tribunalconstitucional.pt/tc/content/files/relatorios/relatorio_004_confwashington.pdf [20] Idem, 13.

1525 Two landmark decisions on this matter are Judgments nº 298/98 and nº 75/2010, on abortion rights. In the latter judgment, the Court states (points 11.4. 17 and 11.4.18) that judges are not equiped to offer an exact measure of the degree of protection the state has the duty to afford individuals. The PCC stresses that, in this domain, a judgment of unconstitutionality is justifiable only in cases of manifest error by the legislator.

1526 Articles 54 and 64-A, LTC.

with a summary of the parliamentary stages and readings/debates on the relevant bill. The Court will take such elements into account in its analysis of the aims of the relevant piece of legislation, the different iterations of the provision(s) under scrutiny, and the place of such provision(s) in a wider context of legal regulation and social change. Access to such information often informs the Court's analysis of the scope of the scrutinized provision(s)[1527].

Access to relevant documents and sources of information, including the legislative history of the particular provision(s) under scrutiny, is not a matter of deference.

The fact of parliamentary consideration is not legally relevant to the assessment, by the Court, of the compatibility of a normative provision with constitutionally protected rights.

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

At times, the Court does look into the justification(s) offered by the relevant public body for the adoption of the measures under scrutiny. It typically does so, however, in a very cautious/parsimonious/conservative way[1528].

As formulated, the second part of the question assumes that the Court is entitled to engage in such an inquiry. This is, however, the wrong assumption to make in the Portuguese case. The PCC is not authorised to put itself in the shoes of the legislator (be it Parliament or the executive) and ask itself what measures it would have taken in their place. The Court cannot substitute its own judgment for that of the issuer of the scrutinised normative provision. The PCC is neither empowered nor equipped to formulate and/or answer such a question.

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

The PCC does not pass judgment on the quality, depth, or reach of the preparatory stages of a relevant bill. By implication, the Court is not competent to decide how much weight to give to legislative inquiry materials on the basis of a judgment on their quality, depth or reach.

15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

The PCC does not scrutinise parliamentary debates. As noted in response to question 14 (above), while the Court typically has access to a summary of the substance of relevant parliamentary debates in abstract review proceedings, such materials are simply used by the Court as a source of information. At no point are they (can they be) an object of scrutiny or assessment by the Court.

According to Article 229, nº 2, PC, Parliament is required to consult the regional governments of Madeira and the Azores during the legislative process, when legislating on matters concerning those regions. A similar requirement exists for consultation of trade unions in the domain of employment and labour legislation[1529]. The PCC may, thus, scrutinise and de-

1527 For instance, Judgments nº 172/2014 (point 6) and nº 324/2013 (point 2).

1528 See, for example, Judgments nº 468/2022 (point 19), nº 464/2022, and nº 465/2022 (2nd Chamber).

1529 Article 54, nº 5, d), PC ('workers' committees') establishes the right of participation of such committees in the process of 'drawing up labour legislation and economic and social plans that address their sector'. Article 56, nº 2, a), PC ('Trade unions and collective agreements') extends the right of particiption in the legislative process

clare particular provisions unconstitutional in cases in which Parliament fails to meet such constitutionally established consultation requirements.

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

There is no record of a statement by the Court to this effect. The Court implicitly recognises the democratic credentials of the legislator (including the executive, in certain domains) and does not set out to seek evidence of the democratic (procedural) legitimacy of discrete measures.

III. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right [or its application of that definition to the facts]?

It is not entirely clear what is meant by 'rights-definition stage' here. On the one hand, the Court steers clear of pure policy and 'political opportunity' judgments (in abstract review proceedings). On the other hand, as noted in our response to question 7, the object of constitutional scrutiny, in both abstract and incidental review proceedings, is not a judicial decision which applies legal standards to facts. The object of scrutiny is always a normative provision (a legal standard), not a set of facts or another public authority's application of a certain definition of a right to a set of facts[1530].

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights as more important, and hence more deserving of rigorous scrutiny, than others?

The Portuguese Constitution has a vast catalogue of fundamental rights, including - quite uniquely in the European context[1531] - a long list of social and economic rights. It also establishes (as noted in response to question 10) a mechanism of constitutional review which is particularly relevant in the domain of social rights: unconstitutionality by omission[1532] (*inconstitucionalidade por omissão*).

The Constitution puts in place a legal regime for 'rights, freedoms, and guarantees' (*direitos, liberdades e garantias*)[1533], which is also applicable to so-called 'analogous rights' (*direitos análogos*)[1534] – e.g. the right to private property (Article 62, PC). This constitutional regime includes the following legal limits to the powers of various public authorities when fundamental rights are at stake: (i) exclusive parliamentary power to legislate (Article 165, nº 1, b))[1535]; (ii) a stricter standard in case of restrictions to or suspension of such rights (Articles 18 and 19); (iii) special access to justice guarantees (Article 20, nº 5).

Restrictions to such rights are[1536] subject to closer scrutiny by the PCC, in the sense that the

to trade unions.

1530 As recently reiterated in Judgments nº 318/2023 and nº 325/2023.

1531 See, for instance, Ben-Bassat, Avi, and Dahan, Momi, 'Social Rights in the Constitution and in Practice', 36 *J. Comp. Econ.* 107, 103–119 (2008); and Vieira, Mónica Brito, and Silva, Filipe Carreira da, 'Getting rights right: explaining social rights constitutionalization in revolutionary Portugal', I•CON (2013), Vol. 11 No. 4, 898–922.

1532 Article 283, PC.

1533 Article 17º and Title II, PC.

1534 Also Articles 59 (workers' rights), 61 (private enterprise, cooperatives and worker management), 63, nº4 (social security and solidarity), and 268 (citizen's rights and guarantees), PC.

1535 Though Parliament may authorise the executive to issue legislation (*decretos-leis)* in this domain (Article 198º, nº 1, b), PC).

1536 Via Article 18, nº 2 and 3, CP, according to which "2. The law may only restrict

Court is constitutionally required to declare unconstitutional any restriction of a fundamental right which is not a strictly necessary means of protection of another constitutionally protected right or interest.

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

No such canon or scale of clarity is applied[1537]. Please see responses to questions 8 and 18 (above).

20. What is the intensity review of your Court in case of the legitimate aim test?

As noted, both the PCC and the relevant scholarship in the field tend to cast issues commonly discussed under the heading of 'deference' as problems of burden of proof rather than stringency or intensity of review. In light of the discipline imposed by Article 18, nº 2, PC, on the ability of the legislature to restrict the exercise of fundamental rights, the constitutional legitimacy of the aim pursued by the adoption of a particular measure is presupposed[34]. Such a presupposition (which is a kind of presumption) is, however, capable of being rebutted.

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

The PCC applies a three-stage proportionality test. At the first stage, the Court assesses the *adequacy* of the measure as a means for the pursuit of the relevant aim. At the second stage, the Court moves on to a judgment of *necessity*, through which the Court establishes whether the means chosen is less restrictive or burdensome than other similarly adequate available means. Finally, at the final stage of the test (proportionality *stricto sensu*), the Court determines whether there is, in a particular case, a balance between the need to pursue a particular (legitimate) aim and the constitutional protection of individuals against acts of public bodies which limit the exercise of their fundamental rights[1538].

The Court has been increasingly cautious in its use of the third limb of the proportionality test, stressing due respect for the democratically elected legislator's exercise of its constitutionally attributed powers (particularly in abstract review proceedings). Grounds for such caution, however, have not yet been clearly and systematically articulated in the jurisprudence of the PCC.

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rights, freedoms and guarantees in cases expressly provided for in the Constitution, and such restrictions must be limited to those needed to safeguard other constitutionally protected rights and interests. 3. Laws that restrict rights, freedoms and guarantees must have a general and abstract nature and may not have a retroactive effect or reduce the extent or scope of the essential content of the constitutional precepts." [Excerpt taken from official English version of the PC published by the Portuguese Parliament– link in note 17]

1537 The PCC has been openly dismissive of the *in claris non fit interpretatio* maxim. See, for instance, Judgment nº 92/1987, in which the Court states that, since all legal texts call for interpretation, the maxim is 'entirely devoid of rigour'. As for considerations about how clear a provision must be, there are many possible examples. See, for instance, Judgments nº 500/2021 and nº 843/2022 (in particular, Judge Teles Pereira's dissenting opinion). [34] As noted by Machete, Pedro, and Violante, Teresa, 'O Princípio da Proporcionalidade e da Razoabilidade na Jurisprudência Constitucional, também em relação com a Jurisprudência dos Tribunais Europeus', National Report submitted for the XV Trilateral Conference of the Constitutional Courts of Spain, Italy, and Portugal (Rome, October 2013), 18-19.

1538 See, as a point of reference, Judgment nº 107/2001.

22. Does your Court go through every applicable limb of the proportionality test?

Yes[1539], except when proceeding to the following limb is logically precluded by the conclusion reached when passing judgment at the previous stage[1540].

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

N/A

24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

N/A

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

N/A. Please see response to questions 1, 2, and 3[1541].

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

There have been instances in which the ECtHR declared that the PCC had breached Article 6(1) ECHR (access to justice) by being too strict in its assessment of incidental review admissibility requirements[1542]. However, for the reasons briefly outlined at the outset (responses to questions listed in Part I) , it is doubtful that the Court's more or less strict reading of the admissibility requirements of constitutional review applications are instances of deferential behaviour.

The *Dos Santos Calado and Others v. Portugal* (application nos. 55997/14, 68143/16, 78841/16 and 3706/17) case is a case in point.

IV. Other peculiarities

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

N/A

28. Has your Court have grown more deferential over time?

N/A

29. Does the deferential attitude depend on the case load of your Court?

N/A

1539 Among many examples, see Judgments nº 318/2021 and nº 800/2023.
1540 There are examples of judgments in which the PCC does go through every limb of the test, despite having rendered a negative judgment along the way. See, for instance, Judgment nº 486/2018 (point 7, para 4), recently mentioned in Judgment nº 578/2023 (point 11.2, para 13).
1541 See Martins, Ana Maria Guerra, and Roque, Miguel Prata, 'Judicial Dialogue in a Multilevel Constitutional Network: The Role of the Portuguese Constitutional Court', in Andenas, Mads, and Fairfrieve, Duncan (eds.), *Courts and Comparative Law* (OUP, 2015), 300- 328.
1542 See Lanceiro, Rui Tavares, ´The Impact of the ECHR and of Pan-European General Principles of Good Administration on the Administrative Law of Portugal', Ulrich Sterlkens and Agné Andrijauskaité (eds.) *Good Administration and the Council of Europe: Law, Principles, and Effetiveness* (OUP, 2020), 390-391.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

The PCC is required to restrict its assessment to the normative provision(s) identified by the applicant in their official request of constitutional review. However, the Court's scrutiny is not restricted to the constitutional provisions invoked in the application. There is a clear, stable line of case law on this point[1543].

31. Can your Court extend its constitutionality review to other legal provisions that has not been contested before it, but has a connection with the applicant's situation?

No. The PCC is not authorized to extend its scrutiny to normative provisions not identified in the request submitted by the applicant, though it may mention (*obiter*) other provisions in a judgment. See response to question 30.

A related question is whether the Court may extend a judgment of unconstitutionality to normative provisions which, despite not having been directly contested before it, would be repristinated in the event of a declaration of unconstitutionality[1544]. In point 5 of Judgment nº 452/1995 (in abstract review proceedings), the Court refers to, but does not fully address, this question. In this case, the cumulative, subsidiary scrutiny of normative provisions not directly contested in the application was expressly requested by the applicant, with the purpose of precluding the repristination of provisions rendered invalid.

1543 Judgments nº 266/87, 96/2015, and 221/2019.

1544 On this issue, see Canotilho, J.J. Gomes, and Moreira, Vital, *Constituição da República Portuguesa Anotada,* 4.ª ed. (Coimbra Editora, 2010), 976; and Medeiros, Rui, *A Decisão de Inconstitucionalidade: os autores, o conteúdo e os efeitos da decisão de inconstitucionalidade da Lei* (UCP, 1999), 667-669.

The Constitutional Court of Romania

National Report

V. Non-justiciable questions and deference intensities

Laura-Iuliana Scântei, judge

Benke Károly, first-assistant-magistrate

32. In your jurisdictions, what is meant by "judicial deference"?

The Constitutional Court is the guarantor for the supremacy of the Constitution and the sole authority of constitutional jurisdiction in Romania. During its more than 30 years of institutional existence, it has developed a complex case-law both in terms of identifying, enshrining and developing the values, principles and requirements established in the Constitution, as well as in terms of establishing the limits of its competence. Considering that the question refers to the meaning of the concept of judicial deference, it is first necessary to recall the legal mechanism used to establish the competence of the Constitutional Court of Romania. Thus, according to Article 3 (2) of Law No 47/1992 on the organization and operation of the Constitutional Court, in the exercise of its powers, the Constitutional Court is the only authority entitled to decide upon its competence. Moreover, according to Article 3 (3) of the same law, the competence of the Constitutional Court thus established may not be challenged by any public authority. It follows that it pertains exclusively to the Constitutional Court to make the final assessment as to the concrete determination of the institutional implications of the principle of separation of State powers, as well as to the interpretation of the value content of fundamental rights and freedoms. It can be noted that, in this context, it is also for the Constitutional Court to assess the intensity of the review on the observance of fundamental rights and freedoms, depending on the field under review. Thus, it is found that, in the exercise of its powers, the Constitutional Court of Romania has shaped its competence according to the evolution of Romanian society, the tendency being that of combining Bickelian virtues with that of capitalizing on a coherent alternation of living law and interpretative originalism, which has led, organically, to a jurisprudential development connected to the evolution of the core values underlying the Constitution (Decision No 766/2011[1545]).

Although the case-law of the Constitutional Court rarely uses the term "deference", it can be noted instead that it attaches great importance to concepts that are closely related to judicial deference. Thus, the use of phrases such as "the legislator's margin of appreciation", "the legislator's option" or "legislative expediency" leads to the idea of a certain degree of judicial deference intervening in certain fields or questions of law. In this regard, we mention that, when examining a legal provision regarding the granting of material rights to the heroes-martyrs and fighters who contributed to the victory of the Romanian Revolution of December 1989, as well as to those who sacrificed their lives or suffered following the anti-communist workers' revolt in Brasov in November 1987, the constitutional court pointed out that:

"While the obligation of gratitude or respect due to certain persons for their particular contribution to the development of society is of a moral nature and rests with society as a whole, the legislator, whether original or delegated, enjoys, as regards the specific content of the regulation, including that of the norm impugned in this case, a relatively wide margin of appreciation, and, correlatively, the Constitutional Court shall analyse the constitutionality of the impugned regulation in a deferential manner. Consequently, the criteria that the authors of the exception of unconstitutionality consider to be discriminatory may be deemed contrary to Article 16 of the Constitution, insofar as they manifestly lack objectivity and rationality." (Decision No 430/2018[1546], para. 27)

1545 Published in the Official Gazette of Romania, Part I, No 549 of 3 August 2011.

1546 Published in the Official Gazette of Romania, Part I, No 818 of 24 September 2018.

As such, judicial deference is directly proportional to the margin of appreciation granted to the legislator. Thus, whenever this margin is wider, the Constitutional Court's analysis is more deferential, the Court proving a self-restraint attitude and giving priority to the appreciation of the legislative authority. Therefore, judicial deference is related to the approach that the Constitutional Court has depending on the legislative fields subject to review; thus, it is competent to rule on them, but chooses to diminish the intensity of the review, considering that the authority best placed for assessing the measure is the legislative authority itself.
However, it should be noted that the legislator's margin of appreciation cannot be absolute, but is benchmarked/limited by the assessment of the objective and rational nature of the legislative measures examined.

33. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government, etc.)?

The Constitutional Court of Romania is willing to intervene most energetically in the "hard core" of constitutional jurisdictions' powers, namely the observance of fundamental rights. It should be noted that the intensity of the review varies according to the fundamental right under consideration or to certain of its components. Thus, with regard to economic rights, the Constitutional Court is more permissive, often referring to the fact that these are exercised under the law, and, as such, it tends to grant a wide margin of appreciation to the legislator, while, regarding civil and political rights, the legislator's margin of appreciation is lower, so the intensity of the review is much higher.

The following decisions of the Constitutional Court of Romania are examples in which the legislator's wide margin of appreciation was called into question, grouped according to the fields in which they were delivered:

a) The Constitutional Court of Romania does not examine purely political aspects.

"The fact that the presentation of the Government Program did not meet the expectations of the authors of the referral or that the hearings of the candidates for the position of minister and the parliamentary procedure in general suffered from the perspective of the same expectations are subjective statements, of a political nature, whose regime, including with regard to the effects that they produce, pertains exclusively to the political register. The Constitutional Court is not competent to rule on the value of the content of the Government Program or on the appropriateness of the measures that it contains. Moreover, the Constitutional Court is not competent to assess the time allocated for hearing the candidates for the position of minister either. Consequently, the pleas thus formulated are irrelevant from the perspective of a constitutional review, exceeding the competence of the Constitutional Court." (Decision No 57/2021[1547], para. 40)

"No minister can be held responsible for the political opinions or actions exercised when drafting or adopting a normative act that has the regime of law. [...] the exemption from liability for the law-making activity guarantees the exercise of the mandate against any potential pressure or abuse that might be committed against the persons holding the offices of MP or minister; such an immunity ensures their independence, freedom and security in exercising their rights and obligations under the Constitution and laws." (Decision No 68/2017[1548], para. 81, Decision No 26/2020[1549], para. 99*) "The statements of the Minister of Justice were of a political nature, falling within the limits of her freedom of expression. They did not produce any legal effects capable of leading to an institutional deadlock or hindering the exercise of the constitutional prerogatives of any public authority (requiring the intervention of the Constitutional Court of Romania – a/n)."* (Decision No 26/2020, para. 100)

"The review conducted by the Constitutional Court may concern only the constitutionality of Parliament's

1547 Published in the Official Gazette of Romania, Part I, No 254 of 12 March 2021.
1548 Published in the Official Gazette of Romania, Part I, No 181 of 14 March 2017.
1549 Published in the Official Gazette of Romania, Part I, No 168 of 2 March 2020.

decisions, not the content of any political agreement that led to their adoption." (Decision No 12/2014[1550], para. 53)

"The establishment of parliamentary procedures is a matter of parliamentary regulation, representing a regulatory option, which cannot be censured by the Court as long as it does not contravene in itself to any express or implicit constitutional provision." (Decision No 137/2018[1551], para. 56)

b) Furthermore, the Constitutional Court does not examine matters of economic appreciation with major financial implications on the banking system. Thus, with regard to the acceptance in lieu of payment of the buildings purchased by bank loan in CHF, the Court was called upon to rule on whether or not a certain value of the exchange rate fluctuation and its maintenance over a certain period of time, predetermined by the legislator, could result in the termination of the credit agreement at the debtor's initiative, leading to the acceptance of the immovable property in lieu of payment and to the debtor's remaining balance being written off.

"It is not the role of the Constitutional Court to classify loan agreements into short, medium or long-term agreements depending on which to establish a certain legal regime in terms of retention of hardship and, thus, to impose, by itself, certain thresholds for the value consistency of the difference in the exchange rate [necessary to be met for hardship to intervene – a/n].

With regard to the temporal consistency of the difference in the exchange rate, the Court notes that the fact of maintaining, over a period of 6 months, a difference of 52.6% between the current exchange rate and the one existing at the time when the loan agreement was signed reveals the constant, permanent, irreversible nature of the fluctuation, which, therefore, is not temporary/circumstantial/particular. It is not the Court's role to determine whether or not this period should have been longer, but only to ensure that it is a rational period that prevents arbitrariness." (Decision No 431/2021[1552], para. 57 and 58)

c) The Constitutional Court does not examine matters of social appreciation, such as raising the retirement age for women.

"In ruling on the constitutionality of the legislative solution enshrining a different treatment between the sexes [in matters of retirement – a/n], the Court, by Decision No 107/1995, referred to the social conditions existing in 1995, considering that the impugned legal texts reflect these conditions, thus being constitutional. Furthermore, the Court, however, noted the changing trend in social conditions at European level and did not rule out a possible reconsideration of its views in the future.

This solution has been consistently maintained until 2008, when the Court, by Decision No 191/2008, noted that European institutions and the case-law of the European Court of Human Rights, through its judgment of 22 August 2006 in the case of Walker v. the United Kingdom, emphasised the possibility and even the need to equalise the legal treatment between men and women. However, it was left to the States to assess when and for how long it was necessary to make such changes. In this context, noting the change in the social conditions, at least at the level of the other European countries, which called for an equal treatment, the Court considered that the legislator was the only authority in a position to concretely assess when such a change shall take place.

By adopting the [new – a/n] Law on the unitary public pension system, the legislator considered that it was time to initiate a regulation that would gradually lead to the establishment of an equal treatment between men and women in terms of retirement age.

Indeed, the Court finds that the cultural traditions and social realities are still evolving towards ensuring a real factual equality between the sexes and, so, it cannot be concluded that, at present, the social conditions in Romania can be considered as supporting an absolute equality between men and women. [...]

1550 Published in the Official Gazette of Romania, Part I, No 144 of 27 February 2014.

1551 Published in the Official Gazette of Romania, Part I, No 404 of 11 May 2018.

1552 Published in the Official Gazette of Romania, Part I, No 1027 of 27 October 2021.

Beyond the natural changes that occur in society in terms of mentalities, culture, education and traditions, the provision of an equal treatment between the sexes appears increasingly necessary in the context of the European trend that requires States to align to the standards of equal, non-discriminatory treatment between men and women.

The Court considers that it is necessary to change its views on the issue of equalising the retirement age between men and women. However, without being able to sharply rule on its expediency, opposition to this solution would equal, at present, to an actual opposition to a social trend of an international scale, to whose standards Romania is called to rise. Indeed, the discrepancies still existing between the current social conditions in Romania and these standards cannot be denied. Therefore, the Court considers that the solution adopted by the legislator through the Law on the unitary public pension system in the sense of a gradual increase of the retirement age of women over a period of 15 years is the only one able to ensure the adequacy of this measure to the social reality and to give a constitutional nature to this legal provision. For these reasons, the Court considers that the provisions of the Law on the unitary public pension system establishing an equal treatment in terms of retirement age between men and women are not contrary to the provisions of the Constitution." (Decision No 1237/2010[1553])

d) The Constitutional Court does not examine the expediency of measures related to the wage policy of the legislator.

"It is up to the legislator to take charge of the wage policy regarding the personnel paid from public funds, meaning both the establishment of the salary system and of the additional salary rights. The Court has neither the role nor the competence to establish, by itself, the elements of this policy, but only to verify compliance with the constitutional requirements inherent in the normative acts adopted by the legislator in this field, and not the expediency of a wage policy measure." (Decision No 667/2016[1554], para. 23, Decision No 139/2020[1555], para. 15, Decision No 756/2021[1556], para. 20, Decision No 294/2022[1557], para. 67, Decision No 429/2022[1558], para. 63, Decision No 223/2022[1559], para. 31, Decision No 581/2022[1560], para. 33, Decision No 102/2023[1561], para. 17, Decision No 316/2023[1562], para. 50 or Decision No 482/2023[1563], para. 44)

"It is the right of the legislative authority to develop legislative policy measures in the field of wages in accordance with the economic and social conditions existing at a given moment. At the same time, the national legislator enjoys a wide margin of appreciation to determine the appropriateness and intensity of its policies in this field." (Decision No 575/2011[1564])

e) The Constitutional Court does not examine the sufficiency of the financial resources to commit budgetary expenditure or generate an excessive deficit.

"The assessment of the sufficiency of financial resources is a matter of exclusive political expediency, which

1553 Published in the Official Gazette of Romania, Part I, No 785 of 24 November 2010.
1554 Published in the Official Gazette of Romania, Part I, No 57 of 19 January 2017.
1555 Published in the Official Gazette of Romania, Part I, No 468 of 3 June 2020.
1556 Published in the Official Gazette of Romania, Part I, No 164 of 18 February 2022.
1557 Published in the Official Gazette of Romania, Part I, No 616 of 23 June 2022.
1558 Published in the Official Gazette of Romania, Part I, No 169 of 28 February 2022.
1559 Published in the Official Gazette of Romania, Part I, No 851 of 30 August 2022.
1560 Published in the Official Gazette of Romania, Part I, No 181 of 3 March 2022.
1561 Published in the Official Gazette of Romania, Part I, No 758 of 22 August 2023.
1562 Published in the Official Gazette of Romania, Part I, No 707 of 2 August 2023.
1563 Published in the Official Gazette of Romania, Part I, No 1161 of 21 December 2022.
1564 Published in the Official Gazette of Romania, Part I, No 368 of 26 May 2011.

essentially concerns the relations between Parliament and the Government. If the Government does not have sufficient financial resources, it may propose the necessary amendments to ensure them, by virtue of its right of legislative initiative. [...] The Court cannot determine whether or not the budget allocation is exceeded because it is not competent to do so; instead, the Court is competent to ensure the observance of the constitutional requirements regarding budgetary certainty and predictability, so that both the Government and Parliament have a real representation of the budgetary impact of the measures that they promote and adopt, as the case may be." (Decision No 22/2016[1565], para. 56 and 60)

"It is not a matter related to the role and powers of the Constitutional Court, by way of constitutional review [...], to consider that one or several laws brought before it is/are capable of leading to an excessive budget deficit within the meaning of Article 126 of the Treaty on the Functioning of the European Union and Protocol No 12 on the excessive deficit procedure to this Treaty. The latter regulations establish their own specific procedure under European law in order to establish the existence of an excessive budget deficit and to remedy such a potential situation." (Decision No 593/2020[1566], para. 58)

f) The Constitutional Court does not rule on the economic and social policy of the State.

"When implementing its policies, especially social and economic policies, the legislator must enjoy a margin of appreciation when ruling both on the existence of a problem of public interest, which requires a normative act, and on the choice of methods for its application." (Decision No 488/2023[1567], para. 34)

g) The Constitutional Court does not rule on the monetary policy of the State.

"The State, through its representative bodies, safeguards the national interests implied by the economic, financial and foreign exchange activity, context in which the National Bank of Romania is responsible for carrying out the policy related to the management of the foreign exchange reserves, including with regard to the international reserves but, as concerns the conditions of actual storage of the gold reserves, respectively custody costs or transport costs for relocation or insurance of the gold held in the treasure reserve and stored either in the country or abroad, these are matters of expediency that fall within the competence of the legislator, by virtue of its capacity as [...] owner, being the expression of national sovereignty, according to Article 1 (2) and Article 2 of the Basic Law, aspects which, in fact, do not, in principle, fall within the scope of constitutional review.

Or, taking into account the institutional dialogue between the National Bank of Romania, Parliament and the Government, [...]by virtue of its role granted by the Constitution, the legislator may, at any time, legislate in the sense of storing abroad the gold held in the treasure reserve, if this is required, including in the event of Romania's accession to the euro area, or, on the contrary, as it is the case with the law submitted for constitutional review, to relocate the gold already stored abroad in the country." (Decision No 414/2019[1568], para. 142 and 143)

h) The Constitutional Court does not rule on matters related to the fiscal policy of the legislator.

"The difference in legal treatment [between the State and the citizen, as subjects of the fiscal law relation – a/n] resides precisely in the specificity of the fiscal relations, in which the State enjoys a wide margin of appreciation, in the aim pursued by the legal suspension of forced execution (namely, the staggering of the payments resulting from court decisions) and in the urgent need for instant balancing of the State budget." (Decision No 1533/2011[1569])

"Following the assessment of the context in which this normative act was adopted and of the purpose

1565 Published in the Official Gazette of Romania, Part I, No 160 of 2 March 2016.
1566 Published in the Official Gazette of Romania, Part I, No 645 of 22 July 2020.
1567 Published in the Official Gazette of Romania, Part I, No 101 of 2 February 2024.
1568 Published in the Official Gazette of Romania, Part I, No 922 of 15 November 2019.
1569 Published in the Official Gazette of Romania, Part I, No 905 of 20 December 2011.

pursued by the legislator, the Court finds that the impugned text of law establishes the beneficiaries of this 'leniency act' [of a fiscal nature – a/n], the legislator being the only one able to establish both the possibility of exemption from payment of tax obligations by certain categories of taxpayers, as well as the conditions under which this fiscal measure is carried out." (Decision No 5/2018[1570], para. 20)

i) The Constitutional Court does not rule on the criminal policy of the legislator.

"In the field of criminal policy, the legislator enjoys a rather wide margin of appreciation, given that it is in a position that allows it to assess, according to a series of criteria, the need for a certain criminal policy." (Decision No 101/2021[1571], para. 79)

34. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

3.1. The jurisprudential hypotheses set out in point 2 refer to the fields in which the constitutional court grants a wide margin of appreciation to the legislator in terms of dosing and grading its intervention. Admittedly, there are objectively quantifiable situations in which the Court retains a wider margin of appreciation in favour of the legislator, but when these situations are overcome, the Court restricts the margin of appreciation of the legislator.

Thus, Article 53 of the Constitution refers to the restriction of the exercise of certain rights or freedoms for the protection of national security, public order, health or morals, citizens' rights and freedoms; when conducting criminal investigations; for preventing the consequences of a natural calamity, disaster or particularly severe catastrophe. This constitutional text allows for a fairly wide margin of appreciation on the part of the legislator when deciding to limit or restrict the exercise of a fundamental right/freedom in the situations mentioned above. It can be noted that the enforcement of this constitutional text is determined by a factual and legal situation that deviates from the usual course of State life, so that the reaction of the legislator must be consistent with the exceptional situation that has arisen. As such, in times of social, economic or sanitary unrest, the Constitutional Court grants a wide margin of appreciation to the legislator, which is not, however, absolute. As an example, we note two decisions of the Constitutional Court of Romania, in which it stated that:

"[...] this threat to economic stability persists [the global economic crisis of 2009 – a/n], so the Government is entitled to adopt appropriate measures to fight it. One of these measures is to reduce budget expenditures, a measure materialized, among others, in the reduction of the amounts of salaries/allowances/payments by 25%. [...] Article 53, in its component on national security, is applicable and, at the same time, represents the basis for justifying the measures envisaged." (Decision No 872/2010[1572])

or

"The measure of wearing a protective mask is one of the measures regulated by Law No 55/2020 aimed at preventing and combating the effects of the COVID-19 pandemic. As stated in the explanatory memorandum to the above-mentioned law, given the situation of exceptional gravity generated by the spread of the SARS-CoV-2 coronavirus and its negative consequences on public health, the national legislator considered that its legislative intervention was necessary, in compliance with the constitutional provisions of Article 53, in order to regulate measures aimed at combating the effects of the COVID-19 pandemic." (Decision No 381/2021[1573], para. 57)

1570 Published in the Official Gazette of Romania, Part I, No 401 of 10 May 2018.
1571 Published in the Official Gazette of Romania, Part I, No 295 of 24 March 2021.
1572 Published in the Official Gazette of Romania, Part I, No 433 of 28 June 2010.
1573 Published in the Official Gazette of Romania, Part I, No 836 of 1 September 2021.

3.2. On the other hand, with regard to legal rights, the Court noted that their structuring was carried out in accordance with the legislator's option in that field and so, the assessment of its margin of appreciation is greatly diminished:

"What is specific to all these citizens' rights and correlative obligations of the State is the fact that, to the extent that they are not expressly listed by the Constitution, the legislator is free to choose, depending on the State policy, financial resources, priority of the objectives pursued and need to fulfil other obligations of the State, enshrined at constitutional level, what measures shall ensure citizens a decent standard of living, and to establish the conditions and limits for granting them. It may also order the modification or even termination of the social protection measures taken, without having to comply with the conditions of Article 53 of the Constitution, since this constitutional text refers only to the rights enshrined in the Basic Law, and not to those established by laws." (Decision No 1576/2011[1574])

3.3. Another situation that calls into question the granting of a wide margin of appreciation in favour of the legislator also arises when its reaction is determined by the questionable way in which litigants use the procedural means regulated by law. Thus, the Court ruled that, since litigants raise exceptions of unconstitutionality and request the referral of the Constitutional Court only in order to obtain the staying of the proceedings before the courts of law, the legislator has a wide margin of appreciation in identifying the solutions necessary to cease such a practice. Hence:

"The legislator's option to repeal the measure of the de jure staying is based on the fact that the parties often lodge exceptions of unconstitutionality as a way to delay the adjudication of the cases. The extremely high number of cases pending before the Constitutional Court as a result of the frequent filing of exceptions of unconstitutionality makes their settlement extremely lengthy, to the detriment of the rapid adjudication of the cases. However, given that the purpose of this measure, i.e., the de jure staying of the settlement of cases before the courts of first instance, was to provide the parties with a procedural guarantee in exercising the right to a fair trial and the right to defence, by removing the possibility of settling a case based on a legal provision deemed unconstitutional, reality showed a transformation of this measure, in most cases, into an instrument designed to delay the settlement of the cases pending before the courts of law. The regulation encouraged abusive use of procedural rights and arbitrariness in a form that cannot be sanctioned, as long as the staying of the proceedings is regarded as an immediate and necessary consequence of exercising free access to justice. Thus, the primary purpose of the constitutional review – the general interest of society to remove from the legislation in force those provisions affected by flaws of unconstitutionality – was perverted into a prominently personal purpose of certain litigants, who used the exceptions of unconstitutionality as a pretext for postponing the delivery of the solution by the court of law before which the dispute was brought. However, the Court finds that, by adopting the [impugned – a/n] law, the will of the legislator is to eliminate exceptions of unconstitutionality from being raised for purposes other than that provided for by the Constitution and the law, thus preventing, for the future, the abusive exercise by the parties of this procedural right." (Decision No 1106/2010[1575])

3.4. The legislator also has a wide margin of appreciation in choosing the means to implement pilot judgments issued by the European Court of Human Rights.

Thus, in order to implement the ECtHR judgment of 12 October 2010 in the case of *Maria Atanasiu and Others v. Romania*, the legislator opted not to update with the inflation index the compensation owed by the State for the immovable property seized during the communist regime (1945-1989), given that such compensation was calculated according to a scale of real estate price indices from 2013, while the payment was made at a later date. On this point, the Constitutional Court ruled:

"The legislator implemented a measure equivalent to a capping of the amount of the compensation established under Law No 165/2013. This is an application consistent with the considerations of principle

1574 Published in the Official Gazette of Romania, Part I, No 32 of 16 January 2022.
1575 Published in the Official Gazette of Romania, Part I, No 672 of 4 October 2010.

resulting [...] from the judgment of the European Court of Human Rights of 12 October 2010, delivered in the case of Maria Atanasiu and Others v. Romania, which granted a wide margin of appreciation as to the configuration and enforcement of State claims related to the restitution of buildings. In this respect, by the same judgment, it was held that the State 'must have a considerable margin of appreciation in selecting the measures to secure respect for property rights or to regulate ownership relations within the country and in their implementation' (para. 233), and that 'Setting a cap on compensation awards and paying them in instalments over a longer period might also help to strike a fair balance between the interests of former owners and the general interest of the community' (para. 235). [...]

Therefore, by taking into account, on the one hand, the particularly complex and burdensome patrimonial obligations on the State, with an encumbering effect on the actual State budget over a long period of time, correlated with the existing economic context, and, on the other hand, the fact that the above-mentioned obligations, related to present time, have a reparative nature with a prominent historical component, the Court finds that, by the impugned measure, the Romanian legislator clearly placed itself within that margin, thus fulfilling the requirements established by the judgment of the European Court of Human Rights." (Decision No 686/2014[1576], para. 31 and 32)

In another case which also concerned the enforcement of several ECtHR judgments on prison conditions [*Iacov Stanciu v. Romania* and *Rezmiveș v. Romania*], the Constitutional Court of Romania granted a wide margin of appreciation to the legislator in choosing the optimal solutions and measures to meet the requirements of the Strasbourg court judgments. The Constitutional Court of Romania noted that:

"By the judgment of 24 July 2012, delivered in the case of Iacov Stanciu v. Romania, although having found a violation of the provisions of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the ECtHR held that 'it is not for the Court to determine what measures of redress may be appropriate for a respondent State to take in accordance with its obligations under Article 46 of the Convention. However, the Court's concern is to facilitate the rapid and effective suppression of a shortcoming found in the national system of protection of human rights' (para. 194)." (Decision No 243/2023[1577], para. 55)

"[Initially, the Romanian legislator had passed a law] establishing a compensation procedure for persons serving prison sentences in inappropriate conditions (compensatory appeal). Thus, when calculating the sentence actually served, regardless of the regime of execution of the sentence, as a compensatory measure, the execution of the sentence in inappropriate conditions was also taken into account, meaning that, for each period of 30 days of imprisonment served in inappropriate conditions, even if these were not consecutive, 6 additional days were considered served of the punishment applied [compensation in days considered served]." (Decision No 243/2023, para. 49)

"The determination of the number of days considered actually served, as a compensatory measure for each period of 30 days of imprisonment served in inappropriate conditions, is an element to be decided exclusively by the legislator, which is free to regulate in this regard based on considerations of expediency, assessed depending on the purpose of the law and the period in which this purpose is estimated to be achieved. The same arguments also support the option referring to the period for which days considered served are granted in compensation for accommodation in inappropriate conditions, which are calculated as of 24 July 2012, the date of delivery, by the European Court of Human Rights, of the judgment in the case of Iacov Stanciu v. Romania." (Decision No 181/2022[1578], para. 17)

"[Subsequently], the legislator indicated its intention to amend the law [on the compensatory appeal] and to adopt the legislative solution of compensation [in cash] in case of accommodation in inappropriate conditions in a certain legal and social context. Thus, the Court considered that the solution to repeal [compensation in days considered served] fell within the exclusive competence of Parliament, as the sole

1576 Published in the Official Gazette of Romania, Part I, No 68 of 27 January 2015.
1577 Published in the Official Gazette of Romania, Part I, No 987 of 31 October 2023.
1578 Published in the Official Gazette of Romania, Part I, No 785 of 8 August 2022.

legislative authority, to identify and edict normative solutions, in compliance with the constitutional requirements, in accordance with the present realities of society. Full competence to establish such solutions lies with the legislator." (Decision No 243/2023, para. 56)

3.5. According to the Romanian Constitution, under certain conditions, the Government is the delegated legislator, meaning that it can issue emergency and simple ordinances (primary regulatory acts having the force of law) under the conditions provided for by Article 115 of the Constitution. The Government may adopt emergency ordinances only in extraordinary situations whose regulation cannot be postponed, having the obligation to motivate the urgency therein. Under the specific conditions of the national constitutional regime, the constitutional court has the power to verify whether or not the Government has issued emergency ordinances in extraordinary situations. The existence of an extraordinary situation is a condition for the constitutionality of emergency ordinances, and its assessment by the Constitutional Court, most of the times, confirms the existence of such a situation having led to the issuance of an emergency ordinance, which justifies the conclusion that the Government enjoys a margin of appreciation in assessing the conditions for issuing emergency ordinances, especially in the economic and social fields:

"Having regard to the role of the Government in ensuring the balanced functioning of the economic and social system, the Government's assessment of the extraordinary nature of the situation having led it to adopt Government Emergency Ordinance No 8/2021, in order to reconcile the legislative policy aimed at protecting students with the existing budgetary resources, shall be taken into consideration, as well as that of the urgency to regulate this situation, as follows from the preamble of this normative act and its substantiation note." (Decision No 500/2023[1579], para. 36)

3.6. The legislator's option to grant a wide margin of appreciation to the authorities called upon to apply the law is accepted in the case-law of the Constitutional Court of Romania with regard to the field in which it intervenes.

"The requirements of the rule of law do not imply the absence of any margin of appreciation of public authorities. Moreover, not every area of social life must or can be standardized down to the smallest details, so that, depending on the field concerned, the margin of appreciation of public authorities may be greater or narrower. As to awarding and withdrawing decorations/medals, given the nature of the field, this margin is wider, which does not imply any prejudice to the principle of the rule of law." (Decision No 479/2021[1580], para. 39)

In certain specific situations faced by society, the Court grants the legislator a margin of appreciation in managing the respective field concerned, but the intensity of the review may vary, by introducing constitutional requirements, which limit the margin of appreciation.

"The adoption of concrete measures to control the phenomenon of stray dogs falls within the State's margin of appreciation; thus, the legislator is called to establish the concrete normative conditions under which the phenomenon of stray dogs must be managed. In this respect, the legislator is bound, as a constitutional requirement, to involve and make responsible the local public authorities, including through summary or criminal sanctions, in order to avoid resorting to euthanasia." (Decision No 1/2012[1581])

"The Constitutional Court is not competent to assess the expediency of the solution adopted by the Romanian legislator [for controlling the phenomenon of stray dogs – a/n] nor that of the legislative solution promoted by the authors of the referral." (Decision No 383/2013[1582])

35. Are there situations when your Court deferred because it had no institutional competence

1579 Published in the Official Gazette of Romania, Part I, No 7 of 4 January 2024.
1580 Published in the Official Gazette of Romania, Part I, No 1023 of 27 October 2021.
1581 Published in the Official Gazette of Romania, Part I, No 53 of 23 January 2014.
1582 Published in the Official Gazette of Romania, Part I, No 644 of 21 October 2013.

or expertise?

Usually, granting a fairly wide margin of appreciation in relation to "institutional competence or expertise" occurs if the Constitutional Court is put in a position to assess compliance with the conditions provided for by Article 115 (4) of the Constitution for issuing emergency ordinances in a field with economic and financial implications. The issuance of such ordinances shall be carried out by the Government only in extraordinary situations whose regulation cannot be postponed, it having the obligation to motivate the urgency therein. As such, it is up to the Constitutional Court to assess whether or not the situation invoked by the Government is an extraordinary one so as to justify the issuance of the respective emergency ordinance.

"From the corroborated analysis of the substantiation note and the preamble to Government Emergency Ordinance No 174/2022, the Court notes that [...] the economic benchmarks, invoked by the Government in the preamble to the ordinance – among which some indicate the current state of the economy and others confirm its previous evolution, while some anticipate the future evolution of the economy –, are particularly important in assessing the extraordinary nature of the situation, but also the urgency of the regulation. Such extremely volatile events, with significant impact on the economy, such as those invoked by the Government in the preamble to the ordinance, require a prompt reaction from the delegated legislator in adopting legislative measures. Therefore, the Court notes that, in such circumstances, the Government's margin of appreciation regarding the extraordinary nature of a situation, which led it to adopt an emergency ordinance, may be wider" (Decision No 187/2023[1583], para. 56)

"The Constitutional Court must take into account the specific matter in which the Government has adopted the emergency ordinance under review as regards compliance with this article of the Basic Law and, in particular situations, such as those related to fiscal-budgetary matters, grant the Government a wider margin of appreciation. The extraordinary situation and urgency of the regulation are not invariable notions, especially in a context characterized by a very strong dynamics, such as the fiscal-budgetary one, in which a multitude of constantly evolving factors must be taken into account, but notions that, from case to case, shall acquire different valences." (Decision No 200/2021[1584], para. 36)

"The analysis of the preamble to Government Emergency Ordinance No 93/2012 and of its substantiation note led the Court to infer the factual/objective elements of the extraordinary situation. This situation is the result of a series of dysfunctions of the financial system, which, amid the tensions generated by the economic crisis, would lead to a loss of public confidence in the services provided by the entire financial system. Even if the dysfunctions of the financial system, viewed alone, are not of such a gravity as to damage public interest, combined with the tensions generated by the economic crisis, they may damage public interest; moreover, in assessing the latter situations, the Government enjoys a certain margin of appreciation." (Decision No 175/2014[1585], para. I.4, and Decision No 309/2018[1586], para. 20)

36. Are there cases where your Court deferred because there was a risk of judicial error?

No.

37. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

The institutional and democratic legitimacy of the original or delegated legislator, as the case may be, confers on it, in certain situations, a margin of appreciation in adopting normative acts. By way of example, the following recitals from the Constitutional Court of Romania's case-law can be noted:

"Taking into account [...] the fact that, through its constitutional powers and all the institutional charac-

1583 Published in the Official Gazette of Romania, Part I, No 318 of 13 April 2023.
1584 Published in the Official Gazette of Romania, Part I, No 653 of 1 July 2021.
1585 Published in the Official Gazette of Romania, Part I, No 361 of 16 May 2014.
1586 Published in the Official Gazette of Romania, Part I, No 1064 of 17 December 2018.

teristics that it possesses, [...] the Government is best placed to guide and define the budgetary policy of the State and, as such, it shall give weight to the Government's assessment of the extraordinary nature of the situation having led it to adopt Government Emergency Ordinance No 99/2016 and, in particular, to maintain, in 2017, the measure of staggering salary payments due under court decisions" (Decision No 769/2020[1587], para. 19)

"The distinct criticism formulated in relation to Article 101 (5) of the law ['If the number of students enrolled in the admission exam, for each specialization, is lower than the number of places available, the respective unit shall not have the right to organize an admission exam for the specialization in question for the following school year'] cannot be examined by the Constitutional Court in the light of the reasons invoked. Thus, Parliament is the public authority best placed to determine the conditions under which a school unit can organize an admission contest in the ninth grade, as well as the situations in which this right is withdrawn." (Decision No 340/2023[1588], para. 155)

"The democratic legitimacy enjoyed by Parliament represents the exclusive constitutional basis that gives it the prerogative to configure the system of rights granted to its members so that they can fulfil the representative mandate acquired. It is therefore up to Parliament to assess the establishment of these rights, the criteria for granting them, their content, amount, method of calculation. Therefore, by opting for the old-age allowance, Parliament exercised its margin of appreciation in determining the rights attached to the status of Deputies and Senators. The repeal of the legal provisions establishing this right was done under the same margin of appreciation, considering that the other standardised rights represented a sufficient protection granted to the parliamentary mandate. The Court is not competent to substitute itself for this margin of appreciation and cannot establish that the removal of one or the other of the legal protection measures affects the constitutional level of protection of the representative mandate." (Decision No 678/2023[1589], para. 40 and 42)

However, in its case-law, the Court noted that:

"The different political legitimacy of a public authority in relation to another cannot justify a breach of the duties/powers of the other public authority by such duties/powers being shifted and taken over by another public authority elected by vote." (Decision No 358/2018[1590], para. 100)

The democratic legitimacy of Parliament, although not specifically stated, is transposed in the recitals of the decisions by reference to the fact that the measure adopted/criticised is based and forms part of the legislator's policy in that area.

"The legislator used precisely that discretion [in deciding whether and to what extent the differences between different similar situations justify different legal treatment] and laid down special conditions for obtaining compensatory payments in the defence industry system. [...] Such a stance has been supported by the legislative policy on economic and social issues. The choice of one criterion or another for the grant of social benefits pertains to the legislator's free assessment, provided that that criterion is not random and does not infringe the constitutional rights and principles." (Decision No 1648/2010[1591])

"As regards the economic, financial and foreign currency policy of the State, [...] the State must ensure that national interests are protected in economic, financial and foreign currency activities. It is therefore the State that is developing a general economic policy, and it is the economic, financial and foreign/monetary policy that must facilitate social and economic development, and it is the obligation of the State, through its representative bodies, to carry out this constitutional task. Thus, pursuant to Article 61 (1) of the Constitution, according to which the Parliament is the supreme representative body of the Romanian people

1587 Published in the Official Gazette of Romania, Part I, No 145 of 12 February 2020.
1588 Published in the Official Gazette of Romania, Part I, No 595 of 29 June 2023.
1589 Published in the Official Gazette of Romania, Part I, No 1119 of 12 December 2023.
1590 Published in the Official Gazette of Romania, Part I, No 473 of 7 June 2018.
1591 Published in the Official Gazette of Romania, Part I, No 44 of 18 January 2011.

and the sole legislative authority of the country, the legislative authority may and must adopt any solution it deems necessary and appropriate, of course, within the limits of the Basic Law, by which legal provisions circumscribed to the constitutional provisions on economic, financial and foreign exchange activity are transposed at infra-constitutional level in the aforementioned areas." (Decision No 414/2019[1592], para. 139)

38. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

As indicated in point 2, criminal, economic, social, financial, monetary or budgetary policy issues call into question a wide margin of discretion on the part of the legislator. The Constitutional Court of Romania carries out a constitutional review of the concrete measures taken, without interfering with the policies pursued in these areas.

"The Court emphasised that it is not competent to assume itself the criminal policy of the State, and thus it is the legislator that has a wide margin of discretion in this area." (Decision No 101/2021, para. 82)

"It is the right of the legislator to develop legislative policy measures in the area of salaries in accordance with the economic and social conditions prevailing at some point in time." (Decision No 575/2011)

"It is for the legislator to assess not only the appropriateness of the remedies but also their scope." (Decision No 504/2011[1593])

In the context of social policies to encourage family relationships based on marriage, the Constitutional Court grants the legislator a wide margin of discretion to adopt specific measures in this regard:

"As regards the grant of the pension only to the surviving spouse and not to the persons who have actually lived with the deceased, the legislator intended to protect and encourage stable and continuous relationships based on marriage. In that regard, the Court notes that the legislator has made the grant of a survivor's pension subject to a period of at least 10 years of marriage, which reflects not only an objective determination, which falls within the financial resources of the State which influence the determination of the criteria and limitations for the grant of social security rights, but also the intention to protect family life based on marriage. However, [...] the national legislator is free to lay down rules to support family relationships based on marriage and conferring rights specific to spouses. The Court considers that, in so far as it would encourage the assimilation of cohabitation relationships to relationships between spouses for the purposes of determining entitlement to a survivor's pension, the legislator would render relative the importance of the requirement relating to the duration of the marriage, weakening the protection afforded to that institution. [...]. The Court considers that, if it acknowledges that the number of years of marriage provided for by law in order to obtain a survivor's pension can be complemented by adding the period spent together out of wedlock, the Constitutional Court would replace, in breach of the principle of separation of powers in the State, the legislator, which […] enjoys exclusive competence to regulate the conditions governing the grant of social security rights taking into account both the protected social values and the available financial resources." (Decision No 699/2020[1594], para. 33-35)

The legal transposition of constitutional concepts expressing a certain orientation of the State's social policy also falls within the legislator's wide discretion:

"The social State requires a certain degree of State intervention in addressing the various areas of social character existing in the social policy of the State. Establishing the degree of State intervention in the

1592 Published in the Official Gazette of Romania, Part I, No 922 of 15 November 2019.

1593 Published in the Official Gazette of Romania, Part I, No 506 of 18 July 2011.

1594 Published in the Official Gazette of Romania, Part I, No 49 of 15 January 2021.

sphere of social rights and the concrete forms of intervention suitable for each stage of its development is an exclusive prerogative of Parliament, which can opt either for a massive unconditional State intervention in the social field (social democratic model) or for subsidiary intervention thereof, with the primary place resting with family, community, churches or trade unions (conservative-corporate model), or for minimal intervention where economic development is encouraged to address social problems (liberal model). By choosing one of the three models set out above, the State has a duty to create the conditions necessary to achieve optimal social security for its citizens, but it does not mean that it must create and maintain the whole system alone. The resources of the State alone are not enough in order to cope with these tasks, especially in situations of deep economic crisis, so awareness must be raised on the fact that not only the State but also the community and individuals have mutual responsibilities, which are related obligations in this area.

[...] the State, in the course of its existence, may opt for different social security models, ranging from minimal intervention to maximum intervention; what's important is that the State does not give up its social function. The constitutional obligation imposed by Article 1 (3) is to intervene in favour of the citizen, so this constitutional text requires a positive attitude and action by the State. However, the degree of intensity of these interventionist measures may differ depending on the political vision and economic conditions of the State at a given time. Denying the possibility for the State or its legislative body to change its conception in that regard would amount to denying the evolution or denying the adaptation of the society to the existing factual situation.

Imposing the conservative-corporate model under the criticised law amounts to enshrining the principle of subsidiarity in the field of social security, namely, the State doubles the action of the community, the family and, ultimately, the citizen. But State intervention is still strong since it provides social assistance benefits to prevent and combat poverty and the risk of social exclusion, to support the child and the family, to support people with special needs or for special situations (Article 9 (1) of the Law), as well as services of a social nature (e.g. support and support services to ensure the basic needs of the person, personal care, rehabilitation, social integration/reintegration services – see in this regard Article 30 (1) of the contested law). Moreover, the existence of an institutional construction of the national social assistance system at both central and local level, coupled with precise and detailed procedures for obtaining social assistance benefits or services, demonstrates the interest of the State in the field of social assistance. Social welfare as an integral part of the social policy of the State is therefore an integral part of the concept of social welfare, and the State in this area can vary the intensity of its intervention without affecting Article 1 (3) of the Constitution. Only the very sharp reduction or abandonment of that intervention would lead to a breach of that constitutional concept, which, as has been pointed out, is not the case of the impugned law." (Decision No 1594/2011[1595])

39. Does your Court accept a general principle of deference in judging penal philosophy and policies?

The Constitutional Court, in criminal matters, held that:

"Parliament is free to decide on the criminal policy of the State, in accordance with Article 61 (1) of the Constitution, as the sole legislative authority of the country. The Court also held that it did not have the power to engage in the legislative and criminal policy of the State, any contrary attitude constituting an interference with the competence of that constitutional authority." (Decision No 629/2014[1596], para. 23)

"The Court has acknowledged that, in this area, the legislature enjoys a fairly wide margin of discretion, given that it is in a position which enables it to assess, on the basis of a number of criteria, the need for a particular criminal policy. However, although, in principle, Parliament enjoys exclusive competence to regulate measures relating to the criminal policy of the State, that power is not absolute in the sense of

1595 Published in the Official Gazette of Romania, Part I, No 909 of 21 December 2011.

1596 Published in the Official Gazette of Romania, Part I, No 932 of 21 December 2014.

excluding the exercise of constitutional review over the measures adopted. The criminalisation/decriminalisation of acts or the reconfiguration of the constituent elements of an offence falls within the legislator's discretion, which is not absolute and is limited by constitutional principles, values and requirements." (Decision No 405/2016[1597], para. 66)

"The legislator must weigh the use of criminal law according to the protected social value, since the Constitutional Court may censure that the legislator's choice only if it is contrary to constitutional principles and requirements." (Decision No 824/2015[1598], para. 25)

"Parliament may only exercise its power to criminalise and decriminalise antisocial acts in compliance with the rules and principles enshrined in the Constitution." (Decision No 2/2014)

"In the exercise of its constitutional power to legislate in the context of criminal policy, the legislator has the right, but also the obligation to defend certain social values, some of which identify themselves with the values protected by the Constitution (right to life and physical and psychological integrity – Article 22; right to protection of health – Article 34, right to vote – Article 36, etc.), by criminalising the acts adversely affecting them." (Decision No 62/2007[1599], Decision No 2/2014, Decision No 405/2016, para. 67, Decision No 221/2023[1600], para. 35 or Decision No 364/2023[1601], para. 45)

"In so far as a criminal rule is contrary to the criminal policy of the State, it is possible to find an infringement of those fundamental rights and freedoms in respect of which the constitutional standard of protection has been disregarded. However, in so far as a legislative solution, which conflicts with the criminal policy of the State, affects all those fundamental rights or freedoms, in that it undermines the system of their protection as a whole, Article 1 (3) of the Constitution should be laid down as a reference provision, in its component relating to the rule of law. Such a measure not only affects certain social relations, but has the capacity/capability to undermine the entire system of guarantees associated with fundamental rights and freedoms. The Court will carry out a two-fold analysis, namely it will establish the clear relationship of conflict between the criminal rule adopted and the criminal policy of the State and then it will determine whether that relationship of conflict is such as to infringe specific fundamental rights/freedoms [of the defendant or other persons], or even the entire spectrum thereof." (Decision No 650/2018[1602], para. 297 and 298)

"The criminal policy of the State, which is reflected primarily and mainly in the Criminal Code, has focused on the idea of reducing the special penalty limits and punishing more severely the plurality of offences [imposition of the highest penalty, to which an increase by one third of all the other penalties fixed is added]. However, the new legislative wording is an obvious relaxation of the system of penalties for concurrent offences, as compared with that in force; if the legislator has, in principle, the constitutional power to establish such an orientation of criminal policy, it must link the two axes which it took into account when drawing up the Criminal Code. Thus, if concurrent offences are to be punished more leniently, the legislator is under a constitutional obligation to increase the special penalty limits in order to make a correlation between them. Otherwise, the offender would be encouraged to commit several offences, because he knows that he is mainly punished for a single offence committed and the increase applied in these circumstances becomes insignificant. In those circumstances, the criminal policy of the State becomes contradictory: if this Criminal Code was initially given a preventive function, the envisaged form has the effect of encouraging the commission of as many concurrent offences as possible, because most of them would remain unpunished. Such a conception affects the basis of the rule of law as it is undeniable that criminal perseverance must be discouraged and punished harsher. This measure alters the State's criminal policy, as promoted

1597 Published in the Official Gazette of Romania, Part I, No 517 of 8 July 2016.
1598 Published in the Official Gazette of Romania, Part I, No 122 of 17 February 2016.
1599 Published in the Official Gazette of Romania, Part I, No 104 of 12 February 2007.
1600 Published in the Official Gazette of Romania, Part I, No 505 of 9 June 2023.
1601 Published in the Official Gazette of Romania, Part I, No 661of 19 July 2023.
1602 Published in the Official Gazette of Romania, Part I, No 97 of 7 February 2019.

and regulated by the Criminal Code in force. There is nothing to prevent the legislator from amending/changing the State's criminal policy, but this must be linked to the overall conception of the Criminal Code and in line with the requirements of the Constitution; this means that the State must strike a fair balance between the protection of the individual liberty of the offender and the fundamental rights and freedoms of other persons." (Decision No 650/2018, para. 303-306)

40. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

The case-law of the Constitutional Court of Romania does not provide examples of the legislature's broad discretion in matters of national security. On the contrary, the Constitutional Court of Romania found that certain legal provisions concerning the use of classified information in criminal proceedings were unconstitutional.

"The impugned legislative solution breaks the fair balance between the public interests and individual interests, in that it attributes the decision to refuse access to classified information of probative value in criminal proceedings to an administrative authority, which amounts to an obstacle to the defendant's right to information, with direct consequences for his right to a fair trial, an obstacle which is not subject to any form of judicial review. In such a situation, access to classified information is subject not only to the procedural steps necessary in order to obtain an authorisation provided for by law, but, once the legal procedure has been completed and the necessary authorisations have been obtained, the defendant's defence counsel may be faced with a refusal by the issuing authority, which has the effect of effectively and absolutely blocking access to classified information. The legal consequences are all the more serious because the request for access to that information is not a matter for the defendant/defence counsel, but for the court hearing the case, which has previously found that that information is essential for the resolution of the criminal proceedings, by attributing probative value to it. However, in so far as evidence unknown to the defendant and his lawyer is used in criminal proceedings, even if, ultimately, it cannot be used to rule on a conviction, to waive the imposition of the sentence or to postpone the imposition of the sentence in question, but was taken into account in the document instituting the proceedings, on which the criminal charge is based, it is clear that equality of arms and, therefore, a fair trial, can no longer be guaranteed." (Decision No 21/2018[1603], para. 63)

"The Court cannot overlook the situation of a category of officials, who perform their duties almost exclusively in relation to classified documents/information (as is the case of the defendants in the case in which the present exception of unconstitutionality was raised, who are employed by an intelligence service). In such a situation, by excluding the classified evidence solely as a result of the will of the employing institution (since Article 352 (12) of the Code of Criminal Procedure provides that 'if the issuing authority does not allow the defendant's defence counsel to have access to the classified information, that information cannot be used to rule on a conviction, to waive the imposition of the sentence or to postpone the imposition of the sentence in question' - a/n), which is not subject to judicial review, may result in a genuine 'immunity' before the criminal law for that professional category, as regards offences committed in connection with the service, a conclusion which the Court holds to be inadmissible in a democratic society governed by the principles of the rule of law. The distinct, privileged legal status from the point of view of criminal liability contravenes the principle of equal rights of citizens." (Decision No 21/2018, para. 69)

"It is necessary for the defendant's lawyer, in order to ensure the effectiveness of his rights of defence, to initiate and follow the procedure in order to obtain the authorisations provided for by law, that is to say, be subject to the verification and control measures required by law in order to ensure the protection of classified information, in accordance with the constitutional provisions aimed at safeguarding national security. Therefore, the strict regulation of access to information classified as State secrets, including with

1603 Published in the Official Gazette of Romania, Part I, No 175 of 23 February 2018.

regard to the establishment of conditions to be met by the persons who will have access to such information, does not have the effect of effectively and absolutely blocking access to information essential to the outcome of the case, but creates precisely the legislative framework within which two conflicting interests – the individual interest of the defendant, based on the fundamental right of defence, and the general interest of society, based on the need to safeguard national security – coexist in a fair balance, which gives satisfaction to both legitimate interests, with the result that none of them is affected in its substance.

[Acceptance of access to] classified information constituting, respectively, State secrets and professional secrecy for [all] lawyers would create a gap in the national system for the protection of classified information, that is to say, a professional category who would have access to such information in excess of the needs arising from each criminal case in which lawyers carry out assistance and representation activities. [...] for reasons of expediency, not all the employees of an institution have to obtain clearance certificates and that, otherwise, there is a risk of creating a gap in the national system for the protection of classified information which, unlike the activity inherent in the act of justice, cannot be covered by reliance on grounds of incompatibility or recusal. Consequently, [...] restrictions on access to classified information are a procedural remedy for situations in which the presumption of honesty or professionalism of the individual dealing with classified information is questioned." (Decision No 199/2021[1604], para. 24 and 25)

"The Parliament cannot subrogate itself to the original competence of the executive power to declassify secret State information, as it has only the constitutional power to create the legislative framework necessary for declassification, and not the power to decide, by law, on that legal operation. The application of the law, its implementation in this matter, is a matter for the executive." (Decision No 74/2019[1605], para. 136)

41. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

As has been pointed out, the Parliament has no absolute discretion in any field. The margin of discretion is narrower or broader, so that exceeding it may be penalised by the Constitutional Court. The variability of the margin of discretion requires the intervention of the Constitutional Court in order to protect both the constitutive and the attributive dimensions of the Constitution and the fundamental rights and freedoms. The intensity of the review of constitutionality is directly proportional to the nature of the area concerned and to the margin of discretion enjoyed by the legislator. In other words, in areas where the legislator's discretion is wide, the intensity of the Constitutional Court's assessment of the legislative policy in that area is lower and may even take the form of observations.

"The Court wishes to point out that, although the legislator has the right, under the Basic Law, to regulate the remuneration of teaching and auxiliary teaching staff, the fact remains that, in the relevant legislative activity, the legislator must take account of the fact that education is a national priority and that the remuneration of teaching and auxiliary teaching staff must be consistent with the role and importance of the activity carried out." (Decision No 212/2015[1606], para. 35)

"The intensity of the review (level of scrutiny) which it carries out in the context of that power [resolution of legal disputes of a constitutional nature – a/n] in order to ensure the supremacy of the Constitution is lower in terms of attainment of the purpose of the law, but it is high in terms of the result/purpose laid down by law to be achieved." (Decision No 417/2019[1607], para. 160)

1604 Published in the Official Gazette of Romania, Part I, No 640 of 30 June 2021.
1605 Published in the Official Gazette of Romania, Part I, No 200 of 13 March 2019.
1606 Published in the Official Gazette of Romania, Part I, No 323 of 13 May 2015.
1607 Published in the Official Gazette of Romania, Part I, No 825 of 10 October 2019.

VI. The decision-maker

Laura-Iuliana Scântei, judge

Benke Károly, first-assistant-magistrate

42. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

According to Article 146 of the Constitution, the Constitutional Court carries out the constitutional review of laws and ordinances or emergency ordinances adopted by the Government. The latter acts adopted by the Government are delegated legislative acts which have the legal force of laws but are subject to approval by Parliament.

In carrying out the review of constitutionality, the Court does not draw any distinction based on any different level of democratic accountability of the Parliament or the Government. The Court examines the act subject to review on the basis of its legislative nature, without the level of its review varying according to the author of the act, that is to say, an aspect which is external to its normative content.

43. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

In its decisions, the Court rarely observes how, in the legislative procedure, the parliamentary committees referred to the fundamental rights and freedoms in question. Even though the Court mentions reports of parliamentary committees in its decision, in the context of the legislative procedure conducted, their conclusions are not analysed and, as such, are not decisive in the assessment of the constitutionality of the law. Where appropriate, the opinions of the stakeholders (Legislative Council – specialised body of the Parliament) are relied on in support of the possible constitutionality or unconstitutionality of the law, after the primary analysis was carried out by the Constitutional Court of Romania, practically to legitimise the solution reached by the Constitutional Court (Decision No 198/2021[1608], para. 59).

44. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

In the Romanian constitutional system, the draft law or legislative proposal must be accompanied by an explanatory memorandum. That explanatory memorandum is taken into account in the process of assessing the constitutionality of the law only as part of the methods for interpreting the provisions subject to review (Decision No 238/2020[1609]). The justification for the decision to legislate usually takes into account the element of legislative expediency and cannot be subject to constitutional review. The only case in which the justification for the decision to legislate is analysed arises where the legal provisions found to be unconstitutional are brought into line with the decisions of the Constitutional Court of Romania (Decision No 466/2019[1610], Decision No 467/2019[1611]). However, there have been situations where the Court analysed how the Parliament justified the substance of the legislative solution promoted and the lack of such justification led to a declaration of unconstitu-

1608 Published in the Official Gazette of Romania, Part I, No 421 of 21 April 2021.
1609 Published in the Official Gazette of Romania, Part I, No 666 of 28 July 2020.
1610 Published in the Official Gazette of Romania, Part I, No 862 of 25 October 2019.
1611 Published in the Official Gazette of Romania, Part I, No 765 of 20 September 2019.

tionality of that law (Decision No 153/2020[1612]).

On the other hand, with regard to the legislative acts of the Government, which must be accompanied by a substantiation note, the Court examines whether the Government has justified its decision to legislate, since those legislative acts are adopted under the strict conditions laid down in Article 115 of the Constitution.

As to the merits of the legislation, the Court assesses the legislative solution from its own primary perspective, without substituting itself to the political decision-maker. In the case of interim decisions delivered by the Constitutional Court, it can be observed that the Constitutional Court attaches meanings or interpretations or additive/complement solutions to the law which indicate quite clearly that, had it been the decision-maker, that legislation, in terms of its constitutionality, should have included other requirements/assumptions and that the Court would thus have reached another decision. In this regard, an illustrative decision is Decision No 136/2021[1613], in which the Court, in essence, held that compensation for deprivation of liberty in the course of criminal proceedings cannot be limited solely to the situation in which that measure was taken unlawfully, but must also include the situation in which such a measure was unfair in view of the purpose of the judicial proceedings (the person was ultimately acquitted).

It is precisely those interim decisions which show that the paradigm in which the Constitutional Court operates is that of carrying out a separate assessment, as in the case of a primary decision-maker.

45. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

As stated in the reply to question 12, the Court does not show deference on the manner in which the assessment of the conformity of the law with fundamental rights and freedoms was carried out during the parliamentary procedure. The Court carries out its own assessment of the constitutionality of the law, regardless of the depth of the parliamentary debate on the compatibility of the law with fundamental rights.

46. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

In the case-law of the Constitutional Court, it was held that "*regulatory autonomy confers on the Chambers of Parliament the right to decide on their own organisation and on the procedures for the conduct of parliamentary activity, but that right may not be exercised in a discretionary, abusive manner, in breach of Parliament's constitutional powers or of the mandatory rules relating to parliamentary procedure; the regulatory rules are the legal instruments enabling parliamentary activities to be carried out for the performance of the constitutional functions of the legislative forum and must be interpreted and applied in good faith and in a spirit of loyalty to the Basic Law.*" (Decision No 209/2012[1614])

"*The Constitutional Court does not also have jurisdiction to rule on the arrangements for the application of parliamentary regulations.*" (Decision No 44/1993[1615], Decision No 68/1993[1616], Decision No

1612 Published in the Official Gazette of Romania, Part I, No 489 of 10 June 2020.
1613 Published in the Official Gazette of Romania, Part I, No 494 of 12 May 2021.
1614 Published in the Official Gazette of Romania, Part I, No 188 of 22 March 2012.
1615 Published in the Official Gazette of Romania, Part I, No 190 of 10 August 1993.
1616 Published in the Official Gazette of Romania, Part I, No 12 of 19 January 1993.

22/1995[1617], Decision No 98/1995[1618], Decision No 710/2009[1619], Decision No 786/2009[1620], Decision No 1466/2009[1621], Decision No 209/2012, Decision No 738/2012[1622], No 260/2015[1623], para. 18, or Decision No 223/2016[1624], para. 33 and 34)

"Regulatory autonomy cannot be exercised in a discretionary manner, in breach of Parliament's constitutional powers." (Decision No 209/2012)

"[With regard to the complaint that – a/n] the report of the Joint Special Committee drawn up in the course of the proceedings before the Chamber of Deputies was circulated to Deputies on the very day of the vote, that is to say, in breach of the deadline of at least 5 days before the date set for the discussion of the draft law or the legislative proposal in the plenary session of the Chamber of Deputies, [the Court found that - a/n] failure to comply with the deadline for submitting the report constitutes an issue of application of the regulations of the two Chambers. In other words, the subject-matter of the complaint of unconstitutionality is, in fact, the manner in which, subsequent to the submission of the report by the Joint Special Committee of the Chamber of Deputies and the Senate for systematisation, unification and guarantee of legislative stability in the field of justice, the parliamentary rules and procedures for the adoption of the law were complied with. However, in so far as the regulatory provisions relied on in support of the complaints are of no constitutional relevance, since they are not expressly or implicitly enshrined in a constitutional provision, the questions raised by the authors of the referral do not constitute questions of constitutionality, but of the application of the regulatory rules." (Decision No 650/2018, para. 214 and 216)

"In all constitutional rules, the provisions containing incidental procedural rules relating to law-making are linked and subsumed to the principle of legality enshrined in Article 1 (5) of the Constitution, a principle which in turn underpins the rule of law, expressly enshrined in the provisions of Article 1 (3) of the Constitution. Moreover, the Venice Commission, in its report entitled Rule of Law Checklist, adopted at its 106th Plenary Session (Venice, 11-12 March 2016), also states that the procedure for the adoption of laws is a criterion for assessing legality, which is the first of the reference values of the rule of law (Section IIA5). In that regard, according to the same document, the following, inter alia, are also relevant: the existence of clear constitutional rules concerning the legislative procedure, public debates on draft laws, their adequate justification and the existence of impact assessments before the laws are adopted. As regards the role of these procedures, the Commission notes that the rule of law is linked to democracy in that it promotes accountability and access to rights that limit the powers of the majority.

The establishment of clear rules concerning the legislative procedure, including at the level of the Basic Law, and compliance with the rules thus established are a safeguard against the misuse of powers by parliamentary majority, thus a guarantee of democracy. In so far as the rules on legislative procedure are enshrined at constitutional level, the Constitutional Court has jurisdiction to rule on the way in which the laws adopted by Parliament comply with them and to adequately sanction their infringement." (Decision No 128/2019[1625], para. 32 and 33)

"This means that accelerated legislation, without the urgency procedure having been approved beforehand, cannot be carried out as part of the general procedure for the adoption of laws, since it goes beyond the constitutional reference framework and is contrary to Articles 75 and 76 (3) of the Constitution, which are the basis for democratic debates in Parliament and which, by virtue of their value, presuppose

1617 Published in the Official Gazette of Romania, Part I, No 64 of 7 April 1995.
1618 Published in the Official Gazette of Romania, Part I, No 248 of 31 October 1995.
1619 Published in the Official Gazette of Romania, Part I, No 358 of 28 May 2009.
1620 Published in the Official Gazette of Romania, Part I, No 400 of 12 June 2009.
1621 Published in the Official Gazette of Romania, Part I, No 893 of 21 December 2009.
1622 Published in the Official Gazette of Romania, Part I, No 690 of 8 October 2012.
1623 Published in the Official Gazette of Romania, Part I, No 318 of 11 May 2015.
1624 Published in the Official Gazette of Romania, Part I, No 349 of 6 May 2016.
1625 Published in the Official Gazette of Romania, Part I, No 189 of 8 March 2019.

an exchange of ideas between those exercising national sovereignty. The avoidance or limitation of parliamentary debates by unduly shortening time limits, without complying with the express constitutional provisions to that effect, denotes an infringement of a fundamental value of the State, namely its democratic nature. From an axiological point of view, parliamentary debates in their common/general form are intrinsically linked to democracy, so that any deviation from it must be carried out only under the conditions and limits laid down by the Constitution. Disregarding that highest value places the addressee of the legal rule in a situation of perpetuating legal uncertainty. Thus, although, prima facie, it appears that the Parliament has failed to comply with just one procedural aspect, in fact, the consequences that that irregularity entails might be serious from a formal point of view, affecting the idea of democracy and legal certainty in their substance." (Decision No 261/2022[1626], para. 75)

It may therefore be stated that, in some cases, few in number, the Court reviews the conduct of the parliamentary procedure, as a question of formal/extrinsic constitutionality, observance of which is the prerequisite for the representation of all opinions in parliamentary debate. In other words, for the Court, the guarantee of compliance with the procedure also represents, by default, respect for the essential content of parliamentary debate.

47. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

Article 2 of the Romanian Constitution provides that national sovereignty belongs to the Romanian people, who shall exercise it through their representative bodies, resulting from free, periodic and fair elections, as well as by means of a referendum.

Article 90 of the Constitution provides that the President of Romania may, after consultation with Parliament, ask the people of Romania to express, by referendum, their will on matters of national interest.

At the same time, Article 74 (1) of the Romanian Constitution provides that the legislative initiative shall lie, as the case may be, with the Government, Deputies, Senators, or a number of at least 100,000 citizens entitled to vote. The citizens who exercise their right to legislative initiative must belong to at least one quarter of the country's counties, while, in each of those counties or the Municipality of Bucharest, at least 5,000 signatures should be registered in support of such initiative. In accordance with Article 150 (1) of the Constitution, revision of the Constitution may be initiated by the President of Romania at the proposal of the Government, by at least one quarter of the number of Deputies or Senators, as well as by at least 500,000 citizens with the right to vote.

Whether a law is adopted following a governmental, parliamentary or citizens' initiative, or the results of an advisory referendum, it will enjoy the same democratic legitimacy. Consultations and public debates define the shape of the legislative initiative and attach a certain content thereto, without, however, the assessment of the constitutionality of the law being deferent in relation to the ideas, thesis or conceptions debated and promoted.

A valid advisory referendum or a citizens' initiative does not always have the expected effect, i.e. the adoption of a law in accordance with the outcome of the referendum or the citizens' initiative.

Thus, an advisory referendum was held on 22 November 2009, the validated outcome of which was the switching to a unicameral Parliament composed of 300 members, but the initiative to revise the Constitution in accordance with the outcome of the referendum was not adopted and was rejected by Parliament. (2012)

Also, on 26 May 2019, an advisory referendum was held, the validated result of which was to prohibit amnesty and pardon in respect of persons convicted of corruption offences, but, prior to any action of the Parliament on the initiative to revise the Constitution, in line with the outcome of the referendum, the initiative was declared unconstitutional. The Constitutional Court found that:

1626 Published in the Official Gazette of Romania, Part I, No 570 of 10 June 2022.

"The general prohibition on granting amnesty or pardon in respect of 'acts' of corruption has the effect of denying persons who have committed acts of corruption the right to benefit from the act of amnesty or pardon. Such legal treatment, regardless of its regulatory level, disregards the human existence of the individual, placing human beings who committed "acts" of corruption in a situation of inferiority, thus limiting their human dignity. The legislative proposal for the revision of the Romanian Constitution excessively restricts the State's power and discretion, which unjustifiably affects the exercise of public power in favour/benefit of citizens. Thus, as a result of the limitation of public power, a category of citizens is deprived of a right on grounds of a circumstantial nature, contrary to human dignity. The Court thus finds that the envisaged measure constitutes a disrespect of the subjective principles characterising the human being, which constitutes, in the light of Article 152 (2) of the Constitution, an infringement of human dignity." (Decision No 464/2019[1627], para. 54)

Similarly, a citizens' initiative to revise the Constitution for the purposes of defining marriage as a freely consented union between a man and a woman – and not between spouses – was adopted in Parliament, but it could not be approved by the referendum held on 6-7 October 2018, due to the absence of a legal quorum for participation, for which reason the referendum was invalidated by the Constitutional Court. (Ruling No 2/2018[1628])

III. Rights' scope, legality and proportionality

Gheorghe Stan, judge

Cristina Titirișcă, assistant-magistrate

48. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

The principle of separation and balance of powers presupposes the existence of reciprocal control between the powers of the State with regard to the exercise of their specific powers in accordance with the law, which is a mechanism specific to the rule of law and democracy in order to avoid abuse by one or other of the powers of the State[1629]. To that effect, the Constitutional Court analysed the concept of constitutional loyalty and, therefore, the principle of sincere cooperation between State institutions, which is not constitutionally enshrined, but the importance of which in the context of the mechanisms inherent in the rule of law was revealed in the settled case-law of the Constitutional Court, which it attached to the normative content of Article 1 (5) of the Constitution[1630]. Thus, the Court held[1631] that a first component of the rule of law is the implementation of the explicit and

1627 Published in the Official Gazette of Romania, Part I, No 646 of 5 August 2019.

1628 Published in the Official Gazette of Romania, Part I, No 1012 of 29 November 2018.

1629 Decision No 1109 of 8 September 2011 of the Constitutional Court, published in the Official Gazette of Romania, Part I, No 773 of 2 November 2011.

1630 Article 1 of the Constitution – The Romanian State: "(1) Romania is a sovereign, independent, unitary and indivisible National State. (2) The form of government of the Romanian State is the Republic. (3) Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed. (4) The State shall be organized based on the principle of the separation and balance of powers – legislative, executive, and judicial – within the framework of constitutional democracy. (5) In Romania, the observance of the Constitution, of its supremacy and that of the laws shall be mandatory".

1631 Decision No 611 of 3 October 2017 of the Constitutional Court, published in

formal provisions of the law and of the Constitution. In other words, in terms of sincere cooperation between State institutions/authorities, an initial meaning of the concept is compliance with the rules of positive law, in force for a given period of time, expressly or implicitly governing powers, prerogatives, tasks, obligations or duties of State institutions/authorities.

The Court found that respect for the rule of law is not limited to this component, but involves, on the part of the public authorities, constitutional behaviour and practices, which have their origin in the constitutional normative order, regarded as a set of principles that underpin the social, political and legal relations of a society. In other words, this constitutional normative order has a broader meaning than the positive norms enacted by the legislator, constituting the constitutional culture specific to a national community. Therefore, sincere cooperation implies, beyond respect for the law, mutual respect of state authorities/institutions, as an expression of constitutional values assimilated, assumed and promoted, in order to ensure balance between state powers. Constitutional loyalty can therefore be characterised as a value-principle intrinsic to the Basic Law, while sincere cooperation between state authorities/institutions plays a defining role in the implementation of the Constitution. As the Venice Commission pointed out, "respect for the Constitution cannot be limited to the literal execution of its operational provisions. The Constitution by its very nature, in addition to guaranteeing human rights, provides a framework for state institutions, establishes their duties and obligations. The purpose of these provisions is to enable the proper functioning of the institutions on the basis of sincere cooperation between them. The head of state, the Parliament, the Government, the judiciary, all serve the common purpose of promoting the interests of the country as a whole, not the narrow interests of a single institution or of a political party that has appointed the holder of the office. Even if an institution is in a situation of power, when it is able to influence other state institutions, it must do so in view of the interest of the state as a whole, including, as a consequence, the interests of the other institutions and those of the parliamentary minority" (Venice Commission on the compatibility with constitutional principles and the rule of law of the actions of the Romanian Government on other state institutions and the Government Emergency Ordinance amending Law No 47/1992 on the organisation and functioning of the Constitutional Court and the Government Emergency Ordinance amending and supplementing Law No 3/2000 on the organisation and conduct of the referendum in Romania, opinion adopted at the 93rd Plenary Session/Venice, 14-15 December 2012, par. 87). The institutional conduct that falls within the scope of sincere cooperation has, therefore, an *extra legem* component, based on constitutional practices, which have as their primary purpose the proper functioning of the state authorities, the good administration of public interests and respect for the fundamental rights and freedoms of citizens. The secondary purpose is to avoid interinstitutional conflicts and remove blockages in the exercise of their legal prerogatives. The instruments that compete in achieving these goals and demonstrate loyal behaviour towards constitutional values are institutional dialogue and the establishment of mutually accepted practices. These instruments must form the basis for resolving "together", "by the parties' agreement", and not "against", "to the detriment" of one or another, of any disputes arising in the relations between authorities, caused by confusing, equivocal factual or legal situations. By virtue of the principle of sincere cooperation between authorities, it is therefore necessary for each of them to exercise reasonable and increased due diligence in the framework of the legal institutional dialogue in order to avoid as far as possible the generation of legal conflicts of a constitutional nature. Indisputably, sincere cooperation involves only solutions in accordance with the constitutional normative order, since their basis may be *extra legem*, not at all *contra legem*. Thus, the conduct of the parties who, in order to avoid a conflict, adopt a solution contrary to the legal or constitutional norms in force cannot be classified as sincere cooperation. It is obvious that a clear, rigorous, predictable and exhaustive legislative framework is such as to remove potential interinstitutional conflicts, but the legislator, even the constitutional one, cannot be criticised for the fact that the adopted legislative solutions do not include in their normative hypotheses all the possible situations which the reality (social, political, legal), mutable in its essence, can generate. In that light, the concept of sincere cooperation cannot have a stable, concrete, quantifiable content, but, on the contrary, it is a dynamic one, variable from one case to another,

depending on the actors involved, but also from one era to another, depending on the evolution of the legislative framework governing inter-institutional relations or the existence of good practices/equities governing those relationships. However, what can be established on a permanent basis is that the loyalty of state institutions/authorities must always be manifested towards constitutional principles and values, while inter-institutional relations must be governed by dialogue, balance and mutual respect.

In the light of these considerations, the Court noted that the role of contributing to the shaping of the principle of sincere collaboration and mutual respect lies mainly with the institutions/authorities in a position to cooperate. It is for them to shape/structure the possible forms that a loyal conduct can adopt, in relation to the legal powers of each of the institutions/authorities in collaboration and in relation to the constitutional values and principles relevant to the respective cooperation. Cooperation must be done in the forms provided by the law, and where the law is silent, public authorities must identify and establish, in good faith, those forms of cooperation which value the constitutional normative order and do not prejudice the constitutional principles under which they operate and relate, nor the fundamental rights or freedoms of the citizens in whose service they carry out their activity. Good faith must therefore be manifested in order to find solutions that overcome the possible institutional blockages and that ensure the efficient functioning of each authority, in accordance with the powers conferred by law. In the event that the identification of these good practices is difficult to achieve and the resolution of inter-institutional disputes fails, public authorities have the possibility to appeal to constitutional instruments of mediation, namely to the procedure of resolving conflicts of a constitutional nature, provided for in Article 146 e) of the Constitution, which aims precisely to restore the constitutional normative order, by interpreting the norms of the relevant Basic Law and establishing concrete benchmarks of loyal conduct towards constitutional values and principles.

In the light of these jurisprudential references, it follows that the Romanian Constitutional Court acts as mediator between the powers of the State and does not give precedence to the rights/competences of one institution over another. The Court shall judge in the light of the observance of the powers conferred by the Constitution.

49. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

No. As regards human rights, according to Article 20 of the Constitution, "(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to." (2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions." Romania has become party to the Convention for the protection of human rights and fundamental freedoms following its ratification by Law No 30/1994, published in the Official Gazette of Romania, Part I, No 135 of 31 May 1994, assuming the obligation to comply with the provisions of this Convention, as well as the interpretation given by the European Court of Human Rights to this Convention, within the limits laid down in that Convention, in accordance with the provisions of Article 46, according to which "the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties"[1632].

50. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

The Constitutional Court of Romania has a rich jurisprudence on the quality of the law, which are the principle considerations by reference to which, in the case before the court, the criticism of uncon-

1632 See, in this respect, Decision No 233 of the Constitutional Court of 15 February 2011, published in the Official Gazette of Romania, Part I, No 340 of 17 May 2011.

stitutionality regarding the violation of the principle of legality is analysed in its component on the quality of the law/regulation. The Court, in its case-law, established that the essential feature of the rule of law is the supremacy of the Constitution and the obligation to respect the law[1633] and that "the rule of law ensures the supremacy of the Constitution, the correlation of all laws and all regulatory acts with it"[1634], which means that it "involves, as a priority, compliance with the law, and the democratic state is, par excellence, a state where the rule of law prevails"[1635]. The Court also noted that "the principle of legality is one of constitutional rank",[1636]so that "the violation of the law immediately results in disregarding Article 1 paragraph (5) of the Constitution, which provides that compliance with laws is mandatory. The violation of this constitutional obligation implicitly entails the application of the principle of the rule of law, enshrined in Article 1 paragraph (3) of the Constitution"[1637]. According to the Court's case-law regarding the violation of the constitutional provisions of Article 1 (5) in its component on the quality of the law, one of the requirements of the principle of compliance with laws concerns the quality of regulatory acts[1638]. In order to be complied with by its addressees, the law must meet certain requirements of precision, clarity and predictability so that those addressees can adapt their conduct accordingly. In this respect, the Constitutional Court has held in its case-law that, as a matter of principle, any regulatory act must satisfy certain qualitative conditions, including predictability, which presupposes that it must be sufficiently precise and clear to be applied; thus, the wording of the regulatory act with sufficient precision allows the persons concerned – who may, if necessary, seek the advice of a specialist – to foresee to a reasonable extent, in the circumstances of the case, the consequences that may result from a particular act. Of course, it may be difficult to draft laws of complete precision and a certain suppleness may even prove desirable, suppleness which must not, however, affect the predictability of the law[1639]. At the same time, the Constitutional Court referred to the case-law of the European Court of Human Rights, which found that the meaning of the concept of predictability depends to a large extent on the context of the text in question, the scope it covers and the number and quality of its addressees[1640]. The predictability of the law does not preclude the person concerned from being required to seek a good advice in order to assess, at a reasonable level in the circumstances of the case, the consequences that might arise from a partic-

1633 Decision of the Constitutional Court No 232 of 5 July 2001, published in the Official Gazette of Romania, Part I, No 727 of 15 November 2001, Decision of the Constitutional Court No 234 of 5 July 2001, published in the Official Gazette of Romania, Part I, No 558 of 7 September 2001, or Decision of the Constitutional Court No 53 of 25 January 2011, published in the Official Gazette of Romania, Part I, No 90 of 3 February 2011.

1634 Decision of the Constitutional Court No 22 of 27 January 2004, published in the Official Gazette of Romania, Part I, No 233 of 17 March 2004.

1635 Decision of the Constitutional Court No 13 of 9 February 1999, published in the Official Gazette of Romania, Part I, No 178 of 26 April 1999.

1636 Decision of the Constitutional Court No 901 of 17 June 2009, published in the Official Gazette of Romania, Part I, No 503 of 21 July 2009.

1637 Decision of the Constitutional Court No 783 of 26 September 2012, published in the Official Gazette of Romania, Part I, No 684 of 3 October 2012.

1638 Decision of the Constitutional Court No 1 of 10 January 2014, published in the Official Gazette of Romania, Part I, No 123 of 19 February 2014, paragraph 225.

1639 Decision of the Constitutional Court No 743 of 2 June 2011, published in the Official Gazette of Romania, Part I, No 579 of 16 August 2011, Decision of the Constitutional Court No 1 of 11 January 2012, published in the Official Gazette of Romania, Part I, No 53 of 23 January 2012 or Decision of the Constitutional Court No 447 of 29 October 2013, published in the Official Gazette of Romania, Part I, No 674 of 1 November 2013

1640 Decision of the Constitutional Court No 772 of 15 December 2016, published in the Official Gazette of Romania, Part I, No 315 of 3 May 2017, para. 22 and 23.

ular action[1641]. In the light of the principle of general applicability of laws, the Strasbourg Court held that their wording could not be absolutely precise. One of the standard regulatory techniques consists of resorting mor to general categories rather than exhaustive lists. Thus, many laws use, by force of things, more or less vague formulas, the interpretation and application of which depend on practice. However clearly a legal rule may be drafted, in any legal system, there is an inevitable element of judicial interpretation. The need to elucidate unclear points and adapt to changing circumstances will always exist. Again, while certainty is highly desirable, it could lead to excessive rigidity, but the law must be able to adapt to changes in the situation. The decision-making role conferred on the courts is precisely aimed at removing the doubts which persist when interpreting the rules, since the progressive development of law through case-law as a source of law is a necessary and well-rooted component in the legal tradition of the Member States.

As such, according to the settled case-law of the Constitutional Court, the law must meet the three quality requirements resulting from Article 1 (5) of the Constitution – clarity, precision and predictability. The Court has held that compliance with laws is mandatory, but a legal subject cannot be required to comply with a law which is not clear, precise and predictable, since they cannot adapt their conduct according to the normative hypothesis of the law. That is why one of the requirements of the principle of compliance with laws concerns the quality of regulatory acts. Therefore, any regulatory act must satisfy certain qualitative conditions, i.e. be clear, precise and predictable.[1642] It is therefore incumbent upon the legislator, in the regulatory act, irrespective of the area in which it exercises that constitutional power, to show increased attention in the compliance with the principle of clarity and predictability of the law. The Court has held that the requirement of clarity of the law concerns the unequivocal nature of the subject matter of the regulation, that of precision refers to the accuracy of the chosen legislative solution and the language used, whereas the predictability of the law concerns the purpose and consequences it entails[1643]. The Court also held that the legislator must refer to regulations which are a benchmark of clarity, precision and predictability, and that errors of assessment in the drafting of regulatory acts must not be perpetuated in the sense of themselves becoming a precedent in the legislative activity; on the contrary, these errors must be corrected in order for the regulatory acts to contribute to achieving greater security of legal relations[1644].

As regards the rule of interpretation *In claris non fit interpretatio*, it can be applied in the analysis of the incidence of binding acts of the European Union in the context of the constitutionality review, respectively if the author of the referral of unconstitutionality invokes non-compliance with the provisions of Article 148 of the Constitution[1645]. In this regard, the Court held that "the use of a rule of

1641 Judgment of 24 May 2007 in Dragotoniu and Militaru-Pidhorni v. Romania, par. 35, and Judgment of 20 January 2009 in Sud Fondi – S.R.L. and Others v. Italy, par. 109.

1642 For example, Decision No 1 of the Constitutional Court of 10 January 2014, published in the Official Gazette of Romania, Part I, No 123 of 19 February 2014, para. 223-225, Decision of the Constitutional Court No 363 of 7 May 2015, published in the Official Gazette of Romania, Part I, No 495 of 6 July 2015, para. 16-20, Decision of the Constitutional Court No 603 of 6 October 2015, published in the Official Gazette of Romania, Part I, No 845 of 13 November 2015, para. 20-23, or Decision of the Constitutional Court No 405 of 15 June 2016, published in the Official Gazette of Romania, Part I, No 517 of 8 July 2016, para. 45, 46, 55.

1643 Decision of the Constitutional Court No 183 of 2 April 2014, published in the Official Gazette of Romania, Part I, No 381 of 22 May 2014, par. 23.

1644 Decision of the Constitutional Court No 390 of 2 July 2014, published in the Official Gazette of Romania, Part I, No 532 of 17 July 2014, par. 32.

1645 Article 148 – Integration into the European Union – "(1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means

European law in the context of the constitutional review as a rule interposed to the reference one entails, pursuant to Article 148 (2) and (4) of the Constitution of Romania, cumulative conditionality: on the one hand, that rule must be sufficiently clear, precise and unequivocal in itself, or its meaning must have been clearly, precisely and unequivocally established by the Court of Justice of the European Union, and, second, the rule must be confined to a certain level of constitutional relevance, so that its normative content supports the possible breach by national law of the Constitution – the only direct reference rule in the context of constitutional review.[1646]"

51. What is the intensity review of your Court in case of the legitimate aim test?

In order to carry out the proportionality test, the Constitutional Court of Romania determines, first, the aim pursued by the legislator through the measure criticised and whether it is a legitimate one, since the proportionality test will be able to relate only to a legitimate aim. It is an empirical analysis, as the Court analyses, for example, the economic context or the explanatory memorandum of the legislative measure promoted by the primary or delegated legislator. The first text of proportionality was drafted by the Court by Decision No 266 of 21 May 2013 on the exception of unconstitutionality of the provisions of Article 82 of Audiovisual Law No 504/2002, published in the Official Gazette of Romania, Part I, No 443 of 19 July 2013.

52. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

The text of Article 53 of the Constitution lays down the conditions and limits of the restriction of the exercise of certain rights or freedoms[1647]. It takes into account the fundamental rights and freedoms enshrined in Chapter II of Title II of the Constitution of Romania. According to the principle of pro-

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of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators. (2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act. (3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union. (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented. (5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval."

1646 Decision of the Constitutional Court No 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, No 286 of 28 April 2015, or Decision of the Constitutional Court No 668 of 18 May 2011, published in the Official Gazette of Romania, Part I, No 487 of 8 July 2011.

1647 Article 53. – Restriction on the exercise of certain rights or freedoms – (1) The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe.

(2) Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom."

portionality, any measure taken must be appropriate – objectively capable of achieving the goal, necessary – indispensable for the achievement of the aim and proportionate – the right balance between the specific interests in order to be fit for the purpose pursued. Thus, in order to carry out the proportionality test, the Court must, first of all, determine the aim pursued by the legislator by the criticised measure and whether that measure is legitimate, since the proportionality test may relate only to a legitimate aim[1648].

53. Does your Court go through every applicable limb of the proportionality test?

Yes.

54. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

No. The Constitutional Court of Romania assesses regulatory acts by reference to constitutional norms and principles, and the framework in which it judges is determined by the law and by the referral that is the subject of the Court's analysis.

55. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

No. The proportionality test is applicable in cases where non-compliance with Article 53 of the Constitution is invoked.

56. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of appreciation your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

No. The requirements arising from the case-law of the European Court of Human Rights regarding the application of the principle of proportionality have been accepted in the case-law of the Constitutional Court of Romania, and the standard of protection of fundamental rights governed by the Constitution of Romania is not lower than that established by the Convention for the protection of human rights.

57. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

No.

IV. Other peculiarities

Gheorghe Stan, judge

Cristina Titirișcă, assistant-magistrate

58. How often does the issue of deference arise in human rights cases adjudicated by your Court?

The powers of the Constitutional Court of Romania are expressly and exhaustively provided by Article 146 of the Constitution and, correlatively, by Law No 47/1992 on the organisation and func-

1648 Decision of the Constitutional Court No 462 of 17 September 2014, published in the Official Gazette of Romania, Part I, No 775 of 24 October 2014.

tioning of the Constitutional Court, republished[1649], as subsequently amended and supplemented. The same regulatory acts also establish the legal subjects entitled to bring the matter before the Constitutional Court of Romania. As such, the Constitutional Court is subject only to the Constitution and its organic law of organisation and functioning, and, as the sole authority of independent constitutional jurisdiction, the Court alone has the right to decide, in the exercise of its duties, on its competence, which cannot be challenged by any other public authority[1650].

At the same time, the Constitutional Court judges within the limits of its referral, and the possibility of extending its analysis to other legal provisions than those mentioned in the referral by its author is regulated separately in the case of *a priori* constitutionality review, subject to the Court's assessment that the legal provisions on which it extends its analysis "necessarily and obviously cannot be dissociated" from those in respect of which it has already been invested[1651], as well as in the case of the *a posteriori* constitutionality review, subject to the admission of the exception of unconstitutionality, in which case "the Court will also rule on the constitutionality of other provisions of the contested act, from which, necessarily and obviously, the provisions mentioned in the referral cannot be dissociated"[1652].

Therefore, in the light of the foregoing, the judicial reference is not a ground of unconstitutionality to be relied upon by the parties, so that statistics can be drawn up in this respect of the number of cases in which it is invoked. The judicial reference, understood as a margin of appreciation/opportunity of law-making, is invoked by the Constitutional Court of Romania on a case-by-case basis, depending on the reasoning leading to a solution or another of the Court, being one of the arguments on the basis of which that solution is based. Moreover, in the light of the Constitution and of Law No 47/1992, judicial deference is not an element in respect of which there is an obligation to invoke or analyse it in the recitals of the Court's decision.

59. Has your Court have grown more deferential over time?

Judicial deference, i.e. the margin of appreciation of the primary or delegated legislator, is assessed on a case-by-case basis in the case-law of the Constitutional Court, depending on the specific elements of the case brought before the court.

60. Does the deferential attitude depend on the case load of your Court?

No. Judicial deference is one of the arguments used by the Court to demonstrate the logical-legal reasoning upon which it pronounces its decision in a given case.

61. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

The Constitutional Court cannot base its decision on reasons other than those advanced by the author of the referral, as the document instituting proceedings sets out the procedural framework before the Constitutional Court.

As concerns the exception of unconstitutionality (the *a posteriori* constitutional review), the Court held that the direct submission of an exception of unconstitutionality to it is inadmissible[1653]. Sim-

1649 Official Gazette of Romania, Part I, No 807 of 3 December 2010.

1650 Decision of the Constitutional Court No 713 of 9 November 2017, published in the Official Gazette of Romania, Part I, No 345 of 19 April 2018.

1651 Article 18 (1) of Law No 47/1992, republished, as subsequently amended and supplemented.

1652 Article 31 (2) of Law No 47/1992, republished, as subsequently amended and supplemented.

1653 Decision of the Constitutional Court No 3 of 6 January 1994, published in the Official Gazette of Romania, Part I, No 145 of 8 June 1994.

ilarly, the procedural framework established by the referral cannot be extended by submitting an application to intervene in the its own interest or in the interest of a party, in which sense, in its case-law, the Court has held that, having regard to the provisions of Law No 47/1992, the provisions of the Civil Procedure Code relating to applications to intervene are applicable only to civil proceedings and not in front of the Constitutional Court, which exercises its powers under an independent judicial proceedings[1654].

There are two situations in which the Constitutional Court of Romania rules ex officio, both under the procedure of the Constitution revision (constitutional laws): The Court shall rule ex officio on the initiatives to revise the Constitution [Article 146 a) second thesis] and on the revision law after its adoption by the Parliament [Article 23 of Law No 47/1992].

As a first step[1655], the object of the constitutional review carried out by the Court ex officio is the initiative to revise the Constitution. As regards the limits of this first review, Article 19 of Law No 47/1992 stipulates the obligation of the Court to rule "on the observance of constitutional provisions in regard of such revision". Regardless of the author of the review initiative, in the sense that its initiator is either the President of Romania, at the proposal of the Government, or at least a quarter of the number of deputies or senators, or at least 500.000 citizens with the right to vote – legal subjects expressly and exhaustively referred to in Article 150 (1) of the Constitution –, it shall be submitted to the Constitutional Court for verification by the constitutional court of the requirements for revision[1656]. The

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1654 Decision of the Constitutional Court No 82 of 15 January 2009, published in the Official Gazette of Romania, Part I, No 33 of 16 January 2009.

1655 Decision of the Constitutional Court No 539 of 17 September 2018, published in the Official Gazette of Romania, Part I, No 798 of 18 September 2018, par. 23.

1656 Article 150 of the Constitution – Initiative of revision: "(1) Revision of the Constitution may be initiated by the President of Romania on the proposal of the Government, by at least one quarter of the number of Deputies or Senators, as well as by at least 500,000 citizens with the right to vote. (2) The citizens who initiate the revision of the Constitution must belong to at least half the number of the counties in the country, and in each of the respective counties or in the Municipality of Bucharest, at least 20,000 signatures must be recorded in support of this initiative."

Article 152 of the Constitution – Limits of revision: "(1) The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language shall not be subject to revision. (2) Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof. (3) The Constitution shall not be revised during a state of siege or emergency, or in wartime."

- If the initiative of revision belongs to citizens, together with the rules of the organic law of the Constitutional Court governing its competence to verify the constitutionality of citizens' initiatives for the revision of the Constitution, the provisions of Article 7 of Law No 189/1999 on the exercise of legislative initiative by citizens, republished in the Official Gazette of Romania, Part I, No 516 of 8 June 2004, as subsequently amended, are applicable. These provisions determine the subject of the review conducted by the Court regarding the fulfilment of the condition laid down in Article 150 of the Constitution. According to Article 7 (1) of Law No 189/1999, republished: The Constitutional Court, ex officio or on the basis of the notice from the President of the Chamber of Parliament with which the initiative was registered, shall verify: a) the constitutional nature of the legislative proposal which is the subject of the initiative; b) the fulfilment of the conditions relating to the publication of this proposal and whether the lists of supporters submitted are attested in accordance with Article 5; c) meeting the minimum number of supporters to promote the initiative, provided for in Article 74 and,

decision of the Court shall be communicated to the initiator(s), and the revision initiative shall be submitted to the Parliament, in the form of a draft law or a legislative proposal, as the case may be, only together with the decision of the Constitutional Court.

The second review[1657] carried out ex officio by the Constitutional Court during the procedure for the revision of the Constitution shall take place, pursuant to Article 146 point l) of the Constitution and Article 23 of Law No 47/1992, immediately after the draft law or, as the case may be, the legislative proposal for the revision of the Constitution was adopted by the Parliament and became a law for the revision of the Constitution, i.e. after the completion of the parliamentary legislative procedure for the revision of the Constitution. The object of the constitutional review carried out by the Constitutional Court is, this time, the law on the revision of the Constitution. Regarding the limits of this type of constitutionality review, the ordinary legislator did not regulate benchmarks different from those fixed for the exercise of the first type of control, regarding the draft law or legislative proposal for the revision of the Constitution. In this regard, Article 23 (2) of Law No 47/1992 provides that "The decision which ascertains that constitutional provisions concerning revision have not been complied with shall be sent to (...)", which is also found in Article 19 final sentence of the same law. From the scheme of the provisions of Articles 19-23 of Law No 47/1992, in relation to the succession of the stages characterising the procedure for the revision of the Constitution, it follows that, when carrying out the second type of review, exercised over the law for the revision of the Constitution, the Court will not re-examine the same aspects that were the object of the review exercised over the draft law or of the legislative proposal on the revision of the Constitution, insofar as, during the parliamentary legislative procedure for the adoption of the respective legislative proposal or draft law, its content has not undergone substantive changes. In the event that no specific normative difference in content is found, the Court will report its review – within the scope of all the "constitutional provisions on revision" and which, in particular, are found in Title VII – Revision of the Constitution, Articles 150-152 of the Constitution – only to those not considered by the Court when the previous decision on the constitutionality of the revision initiative was delivered. If, on the contrary, in exercising its role as a sovereign legislative authority, the Parliament, within the parliamentary procedure for the revision of the Constitution, has made changes to the legislative proposal/draft law for the revision of the Constitution and there is a specific difference in substantial normative content at the level of the constitutional law, then it is for the Court to reassess the new content of the revision law in relation to the provisions of Article 152 of the Constitution, on the limits of revision.

Therefore, even in the event of an ex officio referral, the Constitutional Court is bound by the analysis within the limits laid down by the Basic Law and cannot base its judgments on grounds which have not been raised by the parties.

As regards the possibility for the Constitutional Court of Romania to reclassify the grounds invoked by the author of the referral of unconstitutionality on the basis of a constitutional provision other than that invoked by this one, namely as regards the determination of the subject of the exception of unconstitutionality, the Court has held in its case-law that, in the exercise of the constitutional review, the constitutional court must take into account the real intention of the party who raised the exception of unconstitutionality, since otherwise the Court would be bound by a strictly formal procedural criterion, namely the formal indication by the author of the exception of the legal text criticised[1658].

Therefore, considering the real will of the author of the exception of unconstitutionality, as it emerg-

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as the case may be, Article 150 of the Constitution, republished, as well as compliance with territorial dispersion in counties and Bucharest, provided for in the same articles"

1657 Decision of the Constitutional Court No 539 of 17 September 2018, par. 31 et seq.

1658 Decision of the Constitutional Court No 775 of 7 November 2006, published in the Official Gazette of Romania, Part I, No 1006 of 18 December 2006; Decision of the Constitutional Court No 297 of 27 March 2012, published in the Official Gazette of Romania, Part I, No 309 of 9 May 2012; Decision of the Constitutional Court No 244 of 6 April 2017, published in the Official Gazette of Romania, Part I, No 529 of 6 July 2017.

es from the grounds of the exception[1659], from the analysis of the criticisms of unconstitutionality, the Constitutional Court may consider as having been invoked another constitutional ground other than the one mentioned by the author in those grounds/the one retained in the summary judgment instituting the proceedings, which establishes the procedural framework before the Constitutional Court.

62. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

No, the Constitutional Court rules within the limits of its referral, on the regulatory act the constitutionality of which is disputed. As regards the *a posteriori* constitutional review, the content elements of the act of referral to the Court are strictly determined by the law and establish the procedural framework in which the Constitutional Court will resolve the exception of unconstitutionality[1660]. This procedural framework cannot be amended before the Constitutional Court by requesting the extension of the constitutionality review with regard to normative texts other than those retained in the document instituting the proceedings or by adding other constitutional provisions in support of the formulated exception of unconstitutionality. According to the settled case-law of the Court[1661], the constitutional dispute takes place only within the limits determined by the summary judgment instituting the proceedings, without being possible of being altered by either of the parties. Therefore, the direct invocation before the Court of constitutional grounds other than those indicated at the time of raising the exception of unconstitutionality before the court or extending the constitutional review to other provisions which have not been discussed by the parties is inadmissible. Thus, there have been situations in which the author of the exception of unconstitutionality, in the oral conclusions before the Constitutional Court, has invoked another constitutional basis, in addition to or instead of what was shown by raising the exception of unconstitutionality before the court. In such a situation, the Court held[1662] that the parties must state, in writing or orally, their exception of unconstitutionality at the time of its invocation, i.e. must indicate the provisions and/or principles of the Constitution allegedly violated by the criticised provisions of law. The exception thus invoked is discussed by the parties and the court must formulate its opinion on its merits, all of which aspects following to be mentioned in the document instituting the proceedings before the Constitutional Court.

1659 According to Article 10 (2) of Law No 47/1992, "The institutions of proceedings shall be made in writing and they shall be motivated.".

1660 See Benke Károly, Mihaela Senia Costinescu, *Constitutionality Control in Romania. Exception of Unconstitutionality*, Hamangiu Publishing House, Bucharest, 2020, p. 137 et seq.

1661 Decision of the Constitutional Court No 1.069 of 14 July 2011, published in the Official Gazette of Romania, Part I, No 638 of 7 September 2011; Decision of the Constitutional Court No 528 of 15 May 2012, published in the Official Gazette of Romania, Part I, No 401 of 15 June 2012; Decision of the Constitutional Court No 272 of 23 May 2013, published in the Official Gazette of Romania, Part I, No 564 of 4 September 2013; Decision of the Constitutional Court No 572 of 12 July 2016, published in the Official Gazette of Romania, Part I, No 885 of 4 November 2016, or Decision of the Constitutional Court No 548 of 13 July 2017, published in the Official Gazette of Romania, Part I, No 897 of 15 November 2017.

1662 Decision of the Constitutional Court No 256 of 25 April 2017, published in the Official Gazette of Romania, Part I, No 571 of 18 July 2017.

Curtea Constituțională a României

Forme și limite ale deferenței judiciare: cazul curților constituționale

Raport Național

I. Chestiuni nejudecabile și intensități ale deferenței

Laura-Iuliana Scântei, judecător

Benke Károly, prim-magistrat-asistent

1. Ce se înțelege prin „deferență judiciară" în jurisdicțiile dvs.?

Curtea Constituțională este garantul supremației Constituției și unica autoritate de jurisdicție constituțională din România. În decursul celor peste 30 de ani de existență instituțională a dezvoltat o jurisprudență complexă atât în ceea ce privește identificarea, consacrarea și dezvoltarea valorilor, principiilor și exigențelor înscrise în Constituție, cât și în privința stabilirii limitelor sale de competență. Întrucât întrebarea pusă se referă la înțelegerea conceptului de deferență judiciară, este necesar ca mai întâi să evocăm mecanismul legal care stă la baza determinării competenței CCR. Astfel, conform art.3 alin.(2) din Legea nr.47/1992 privind organizarea și funcționarea Curții Constituționale, în exercitarea atribuțiilor care îi revin Curtea Constituțională este singura în drept să hotărască asupra competenței sale. Totodată, potrivit art.3 alin.(3) din aceeași lege, competența Curții Constituționale astfel stabilită, nu poate fi contestată de nicio autoritate publică. Rezultă că ține de aprecierea exclusivă și de ultimă instanță a Curții Constituționale determinarea în concret a implicațiilor instituționale a principiului separației puterilor în stat, precum și interpretarea conținutului de valoare a drepturilor și libertăților fundamentale. Se poate observa faptul că, în acest cadru, revine, de asemenea, Curții Constituționale să evalueze intensitatea controlului respectării drepturilor și libertăților fundamentale în funcție de domeniul analizat. Astfel, se constată că, în exercitarea atribuțiilor sale, CCR și-a modelat competența în funcție de evoluția societății românești, tendința fiind aceea a îmbinării virtuților bickeliene cu cea a valorificării unei alternanțe coerente a dreptului viu și a originalismului interpretativ, ceea ce a condus, în mod organic, la o dezvoltare jurisprudențială racordată la evoluția valorilor fundamentale care stau la baza Constituției (Decizia nr.766/2011[1663]).

Deși jurisprudența CCR nu folosește termenul de deferență decât arareori, se poate observa, în schimb, faptul că aceasta acordă o importanță majoră unor concepte care sunt în strânsă legătură conceptuală cu deferența judiciară. Astfel, folosirea unor sintagme precum „marja de apreciere a legiuitorului", „opțiunea legiuitorului" sau „oportunitatea legislativă" conduc ele însele la ideea unui anume grad de deferență judiciară ce intervine în anumite domenii sau probleme de drept. În acest sens, menționăm că instanța constituțională, examinând o dispoziție legală referitoare la acordarea unor drepturi materiale eroilor-martiri și luptătorilor care au contribuit la victoria Revoluției române din decembrie 1989, precum și persoanelor care și-au jertfit viața sau au avut de suferit în urma revoltei muncitorești anticomuniste de la Brașov din noiembrie 1987, a subliniat că:

„În condițiile în care obligația având ca obiect recunoștința ori respectul ce se cuvin anumitor persoane, pentru aportul lor deosebit la dezvoltarea societății este de natură morală și îi revine societății, în întregul ei, legiuitorul, originar sau delegat, se bucură, în ceea ce privește conținutul determinat al reglementării, inclusiv al celei criticate în prezenta cauză, de o marjă de apreciere relativ întinsă, iar, în mod corelativ, Curtea Constituțională va analiza constituționalitatea reglementării criticate într-o manieră deferențială. În consecință, criteriile pe care autorii excepției de neconstituționalitate le apreciază ca fiind discriminatorii vor putea fi considerate ca fiind contrare art.16 din Constituție, în măsura în care sunt, în mod vădit, lipsite de obiectivitate și raționalitate" [Decizia nr.430/2018[1664], par.27].

Ca atare, deferența judiciară se află într-un raport direct proporțional cu marja de apreciere acordată legiuitorului. Astfel, ori de câte ori această marjă este mai întinsă/ largă, analiza CCR este mai deferentă, Curtea manifestând a o atitudine de self-restraint și dând prioritate aprecierii autorității

1663 Publicată în Monitorul Oficial al României, Partea I, nr.549 din 3 august 2011.

1664 Publicată în Monitorul Oficial al României, Partea I, nr.818 din 24 septembrie 2018.

legislative. Prin urmare, deferența judiciară ține de abordarea pe care Curtea Constituțională o are în raport cu domeniile legislative analizate, ea având competența de a se pronunța cu privire la acestea, dar alege ca intensitatea controlului să fie mai diminuată apreciind că autoritatea cea mai bine plasată în evaluarea măsurii este însăși autoritatea legislativă.

Totuși, trebuie observat faptul că marja de apreciere a legiuitorului nu poate fi una absolută, ci este jalonată/ limitată prin evaluarea caracterului obiectiv și rațional al măsurilor legislative analizate.

2. Există un evantai al deferenței pe care Curtea dumneavoastră îl are în vedere? Există domenii „interzise" sau domenii predeterminate fără răspundere sau chestiuni nejudecabile de instanța dumneavoastră (de exemplu, chestiuni morale controversate, sensibilități politice, controverse sociale, alocarea de resurse limitate, implicații financiare semnificative pentru guvern etc.)?

CCR este dispusă să intervină cel mai energic în „nucleul dur" al atribuțiilor jurisdicțiilor constituționale, și anume respectarea drepturilor fundamentale. Trebuie observat faptul că intensitatea controlului variază în funcție de dreptul fundamental analizat sau de anumite elemente componente ale sale. Astfel, în privința drepturilor economice, CCR este mai permisivă, de multe ori făcând trimitere la faptul că acestea se exercită în condițiile legii, ca atare tinde să acorde o marjă largă de apreciere legiuitorului, pe când în privința drepturilor civile și politice marja de apreciere a legiuitorului este mai redusă, astfel că intensitatea controlului este mult mai mare.

În continuare, prezentăm decizii ale CCR care au adus în discuție marja largă de apreciere a legiuitorului grupate în funcție de domeniile în care au fost pronunțate:

a) CCR nu examinează chestiunile pur politice.

„Faptul că prezentarea Programului de guvernare nu s-ar fi ridicat la exigențele autorilor sesizării sau că audierile candidaților la funcția de ministru și procedura parlamentară în general au suferit prin prisma acelorași exigențe sunt afirmații subiective, de natură politică, având un regim, inclusiv în privința efectelor pe care le produc, circumscris exclusiv registrului politic. Curtea Constituțională nu este competentă să se pronunțe asupra valorii conținutului Programului de guvernare sau oportunității măsurilor pe care acesta le cuprinde. De asemenea, nu intră în competența Curții Constituționale evaluarea timpilor alocați audierii candidaților la funcția de ministru. Ca urmare, criticile astfel formulate sunt fără relevanță în planul controlului de constituționalitate, excedând competenței Curții Constituționale" (Decizia nr.57/2021[1665], par.40).

„Niciun ministru nu poate fi tras la răspundere pentru opiniile politice sau acțiunile exercitate în vederea elaborării ori adoptării unui act normativ cu regim de lege. [...] exonerarea de răspundere pentru activitatea de legiferare este o garanție a exercitării mandatului față de eventuale presiuni sau abuzuri ce s-ar comite împotriva persoanei care ocupă funcția de parlamentar sau de ministru, imunitatea asigurându-i acesteia independența, libertatea și siguranța în exercitarea drepturilor și a obligațiilor ce îi revin potrivit Constituției și legilor" (Decizia nr.68/2017[1666], par.81, Decizia nr.26/2020[1667], par.99*). Declarațiile ministrului justiției au fost unele de natură politică, care se subsumează limitelor libertății sale de exprimare. Acestea nu au produs efecte juridice de natură să conducă la un blocaj instituțional ori să împiedice exercitarea prerogativelor constituționale ale vreunei autorități publice (care să necesite intervenția CCR-sn)* - (Decizia nr.26/2020, par.100).

„Controlul exercitat de Curtea Constituțională poate avea ca obiect doar constituționalitatea hotărârilor Parlamentului, nu și conținutul eventualelor acorduri politice care au condus la adoptarea acestora" (Decizia nr.12/2014[1668], par.53)

1665 Publicată în Monitorul Oficial al României, Partea I, nr.254 din 12 martie 2021.
1666 Publicată în Monitorul Oficial al României, Partea I, nr.181 din 14 martie 2017
1667 Publicată în Monitorul Oficial al României, Partea I, nr.168 din 2 martie 2020.
1668 Publicată în Monitorul Oficial al României, Partea I, nr.144 din 27 februarie 2014.

„Stabilirea procedurilor parlamentare ține de sfera regulamentului parlamentar, reprezentând o opțiune regulamentară, ce nu poate fi cenzurată de Curte dacă ea în sine nu contravine vreunei dispoziții constituționale exprese sau implicite" (Decizia nr.137/2018[1669], par.56).

b) De asemenea, CCR nu examinează chestiuni ce comportă o apreciere de natură economică cu implicații financiare majore asupra sistemului bancar. Astfel, în materia dării în plată a imobilelor cumpărate prin credit bancar în CHF, Curtea a fost chemată să se pronunțe dacă o anumită valoare a fluctuației de curs valutar și menținerea ei pe o anumită perioadă de timp prestabilită de legiuitor poate conduce la încetarea contractului de credit la inițiativa debitorului, cu consecința dării în plată a bunului imobil și a eliberării debitorului de restul rămas de plată.

„Nu este rolul Curții Constituționale să clasifice contractele de credit în contracte pe durată scurtă, medie sau lungă în funcție de care să stabilească un anumit regim juridic sub aspectul reținerii impreviziunii şi, astfel, să impună ea însăși anumite praguri pentru consistența valorică a diferenței de curs valutar [necesară a fi întrunită pentru intervenirea impreviziunii – sn].

Cu privire la consistența temporală a diferenței de curs valutar, Curtea reține că menținerea pe o durată de 6 luni a diferenței de 52,6% dintre cursul actual şi cel existent la data încheierii contractului de credit relevă un caracter constant, continuu, ireversibil al fluctuației, care, așadar, nu este una temporară/circumstanțială/particulară. Nu este rolul Curții să stabilească dacă această perioadă trebuia să fie mai mare, ci doar de a se asigura că este o perioadă rațională şi care previne arbitrarul" (Decizia nr.431/2021[1670], par.57, 58).

c) CCR nu examinează chestiuni ce comportă o apreciere de natură socială, precum creșterea vârstei de pensionare a femeilor.

„Pronunțându-se asupra constituționalității soluției legislative care consacra tratamentul diferit dintre sexe [în materie de pensionare – sn], Curtea, prin 107/1995, a pus în balanță condițiile sociale existente la momentul anului 1995, apreciind că textele de lege criticate reflectă aceste condiții, fiind astfel constituționale. În același timp însă, Curtea observa tendința de schimbare a condițiilor sociale la nivel european şi nu excludea, pe viitor, o eventuală reconsiderare a opticii sale.

Această soluție a fost păstrată în mod constant până în anul 2008, când Curtea, prin Decizia nr.191/2008, observa că instituțiile europene şi jurisprudența Curții Europene a Drepturilor Omului, prin Hotărârea din 22 august 2006, pronunțată în Cauza Walker împotriva Regatului Unit, subliniau posibilitatea şi chiar necesitatea egalizării tratamentului juridic dintre bărbați şi femei. Cu toate acestea, era lăsată la latitudinea statelor aprecierea momentului şi a intervalului de timp necesar operării acestor modificări. În acest context, Curtea, observând schimbarea condițiilor sociale, cel puțin la nivelul celorlalte țări europene, care reclama instituirea egalității de tratament, a apreciat totuși că doar legiuitorul este în măsură să aprecieze în mod concret momentul în care această schimbare va avea loc.

Adoptând [noua – sn] Legea privind sistemul unitar de pensii publice, legiuitorul a considerat că este momentul să inițieze o reglementare care să conducă, gradual, la instituirea unui tratament egal între bărbați şi femei sub aspectul vârstei de pensionare.

Desigur, Curtea constată că tradițiile culturale şi realitățile sociale sunt încă în stadiu de evoluție către asigurarea unei egalități faptice reale între sexe, astfel încât nu se poate ajunge la concluzia că, în prezent, condițiile sociale din România pot fi considerate ca susținând o egalitate absolută între bărbați şi femei. [...].

Dincolo de modificările firești ce apar în societate sub aspectul mentalităților, al culturii, educației şi cu privire la tradiții, prevederea unui tratament egal între sexe apare tot mai necesară în contextul curentului european care impune statelor alinierea la standardele unui tratament egal, nediscriminatoriu între bărbați şi femei.

1669 Publicată în Monitorul Oficial al României, Partea I, nr.404 din 11 mai 2018.
1670 Publicată în Monitorul Oficial al României, Partea I, nr.1027 din 27 octombrie 2021.

Curtea consideră că se impune o schimbare a opticii sale în ceea ce privește problema egalizării vârstei de pensionare între bărbați și femei. Fără a putea să se pronunțe tranșant asupra oportunității sale, totuși, opoziția față de această soluție ar semnifica, în prezent, însăși opunerea unui curent social care are o amploare internațională, la ale cărui standarde România este chemată să se ridice. Desigur, nu pot fi negate discrepanțele existente încă între condițiile sociale actuale din România și aceste standarde. De aceea, Curtea consideră că soluția adoptată de legiuitor prin Legea privind sistemul unitar de pensii publice în sensul unei creșteri treptate a vârstei de pensionare a femeii pe parcursul a 15 ani este singura în măsură să asigure adecvarea acestei măsuri la realitatea socială și să dea un caracter constituțional normei de lege. Pentru aceste motive, Curtea consideră că dispozițiile Legii privind sistemul unitar de pensii publice prin care se instituie egalitatea de tratament sub aspectul vârstei de pensionare între bărbați și femei nu este contrară prevederilor Constituției". (Decizia nr.1237/2010[1671])

d) CCR nu examinează oportunitatea unor măsuri ce țin de politica salarială a legislativului.

„Legiuitorul este cel care își asumă politica salarială cu privire la personalul plătit din fonduri publice, prin aceasta înțelegându-se atât stabilirea sistemului de salarizare, cât și a drepturilor salariale suplimentare. Curtea nu are nici rolul și nici competența de a stabili ea însăși elementele acestei politici, ci doar de a verifica respectarea exigențelor constituționale inerente actelor normative adoptate de legiuitor în acest domeniu, și nu oportunitatea unei măsuri de politică salarială" [Decizia nr.667/2016[1672], par.23, Decizia nr.139/2020[1673], par.15, Decizia nr.756/2021[1674], par.20, Decizia nr.294/2022[1675], par.67, Decizia nr.429/2022[1676], par.63, Decizia nr.223/2022[1677], par.31, Decizia nr.581/2022[1678], par.33, Decizia nr.102/2023[1679], par.17, Decizia nr.316/2023[1680], par.50, sau Decizia nr.482/2023[1681], par.44].

„Este dreptul autorității legiuitoare de a elabora măsuri de politică legislativă în domeniul salarizării în concordanță cu condițiile economice și sociale existente la un moment dat. Totodată, legiuitorul național se bucură de o largă marjă de apreciere pentru a determina oportunitatea și intensitatea politicilor sale în acest domeniu" [Decizia nr.575/2011[1682]].

e) CCR nu examinează suficiența resurselor financiare pentru angajarea unei cheltuieli bugetare sau la generarea unui deficit excesiv

„Aprecierea caracterului suficient al resurselor financiare este o problemă exclusiv de oportunitate politică, ce privește, în esență, relațiile dintre Parlament și Guvern. Dacă Guvernul nu are resurse financiare suficiente, poate să propună modificările necesare pentru asigurarea lor, în virtutea dreptului sau de inițiativă legislativă. [...] Curtea nu poate stabili dacă se depășește sau nu alocarea bugetară pentru că acest aspect nu este de competența sa; în schimb, este de competența Curții să garanteze asigurarea exigențelor constituționale referitoare la certitudinea și previzibilitatea bugetară pentru ca atât Guvernul, cât și Parla-

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1671 Publicată în Monitorul Oficial al României, Partea I, nr.785 din 24 noiembrie 2010.
1672 Publicată în Monitorul Oficial al României, Partea I, nr.57 din 19 ianuarie 2017.
1673 Publicată în Monitorul Oficial al României, Partea I, nr.468 din 3 iunie 2020.
1674 Publicată în Monitorul Oficial al României, Partea I, nr.164 din 18 februarie 2022.
1675 Publicată în Monitorul Oficial al României, Partea I, nr.616 din 23 iunie 2022.
1676 Publicată în Monitorul Oficial al României, Partea I, nr.169 din 28 februarie 2022.
1677 Publicată în Monitorul Oficial al României, Partea I, nr.851 din 30 august 2022.
1678 Publicată în Monitorul Oficial al României, Partea I, nr.181 din 3 martie 2022.
1679 Publicată în Monitorul Oficial al României, Partea I, nr.758 din 22 august 2023.
1680 Publicată în Monitorul Oficial al României, Partea I, nr.707 din 2 august 2023.
1681 Publicată în Monitorul Oficial al României, Partea I, nr.1161 din 21 decembrie 2023.
1682 Publicată în Monitorul Oficial al României, Partea I, nr.368 din 26 mai 2011.

mentul să aibă reprezentarea reală a impactului bugetar al măsurilor pe care le promovează şi le adoptă, după caz" [Decizia nr.22/2016[1683], par.56 și 60].

„Nu ţine de rolul şi atribuţiile Curţii Constituţionale ca, pe calea controlului de constituționalitate [...], să aprecieze că una sau mai multe legi cu care este sesizată este aptă/sunt apte să ducă la deficit bugetar excesiv în sensul art.126 din Tratatul privind funcționarea Uniunii Europene şi al Protocolului nr.12 privind procedura aplicabilă deficitelor excesive la acest tratat. Aceste din urmă reglementări stabilesc o procedură proprie specifică ce ține de dreptul european pentru a se constata existența unui deficit bugetar excesiv şi a se remedia o eventuală astfel de situație" [Decizia nr.593/2020[1684], par.58].

f) CCR nu se pronunță cu privire la politica economică și socială a statului

„Legiuitorul trebuie să dispună, la punerea în aplicare a politicilor sale, mai ales a celor sociale şi economice, de o marjă de apreciere, pentru a se pronunța atât asupra existenței unei probleme de interes public, care necesită un act normativ, cât şi asupra alegerii modalităților de aplicare a acestuia" [Decizia nr.488/2023[1685], par.34].

g) CCR nu se pronunță cu privire la politica monetară a statului

„Statul, prin organele sale reprezentative, asigură protejarea intereselor naționale în activitatea economică, financiară şi valutară, context în care este lăsată Băncii Naționale a României posibilitatea să înfăptuiască politica de administrare a rezervelor valutare, inclusiv cu privire la rezervele internaționale, însă, în ceea ce privește condițiile de depozitare efectivă a aurului, respectiv costurile de custodie sau cheltuielile de transport pentru relocare sau asigurarea aurului deținut în tezaur şi depozitat fie în țară, fie în străinătate, acestea sunt aspecte de oportunitate ce țin de competența legiuitorului, în virtutea calității [...] de proprietar, fiind expresia suveranității naționale, potrivit art.1 alin.(2) şi art.2 din Legea fundamentală, aspecte ce nu intră de altfel, de principiu, nici în sfera controlului de constituționalitate.

Or, având în vedere dialogul instituțional între Banca Națională a României, Parlament şi Guvern, [...] legiuitorul, în virtutea rolului său acordat de Constituție, poate oricând să legifereze în sensul de a depozita în străinătate aurul deținut în tezaur, dacă acest aspect se impune, inclusiv în situația aderării României la zona euro, sau dimpotrivă, astfel cum este în cazul legii deduse controlului de constituționalitate, de a-l reloca în țară pe cel depozitat deja în străinătate" [Decizia nr.414/2019[1686], par.142 și 143].

h) CCR nu se pronunță cu privire la politica fiscală a legislativului.

„Diferența de tratament juridic [dintre stat şi cetățean, ca subiecte ale raportului de drept fiscal – sn.] rezidă tocmai din specificitatea raporturilor de drept fiscal, în care statul are o largă marjă de apreciere, din finalitatea urmărită prin suspendarea de drept a executării silite (şi anume, eşalonarea plății sumelor de bani rezultate din hotărâri judecătorești) şi din nevoia urgentă pe moment a echilibrării bugetului de stat" [Decizia nr.1533/2011[1687]].

„Ca urmare a evaluării contextului în care a fost adoptat acest act normativ şi a scopului urmărit de legiuitor, Curtea constată că textul de lege criticat stabilește beneficiarii «actului de clemență» [de natură fiscală – sn], legiuitorul fiind singurul în măsură să stabilească atât posibilitatea de exonerare de la plată a unor obligații fiscale de către anumite categorii de contribuabili, cât şi condițiile în care se realizează această măsură fiscală". [Decizia nr.5/2018[1688], par.20].

i) CCR nu se pronunță cu privire la politica penală a legislativului.

„În domeniul politicii penale, legiuitorul se bucură de o marjă de apreciere destul de întinsă, având

1683 Publicată în Monitorul Oficial al României, Partea I, nr.160 din 2 martie 2016.
1684 Publicată în Monitorul Oficial al României, Partea I, nr.645 din 22 iulie 2020.
1685 Publicată în Monitorul Oficial al României, Partea I, nr.101 din 2 februarie 2024.
1686 Publicată în Monitorul Oficial al României, Partea I, nr.922 din 15 noiembrie 2019.
1687 Publicată în Monitorul Oficial al României, Partea I, nr.905 din 20 decembrie 2011.
1688 Publicată în Monitorul Oficial al României, Partea I, nr.401 din 10 mai 2018.

în vedere că acesta se află într-o poziție care îi permite să aprecieze, în funcție de o serie de criterii, necesitatea unei anumite politici penale" [Decizia nr.101/2021[1689], par.79].

3. Există factori care determină modul și momentul în care instanța dumneavoastră ar trebui să dea dovadă de deferență (de exemplu, cultura și condițiile țării dumneavoastră; experiențele istorice ale țării dumneavoastră; natura absolută sau limitată a drepturilor fundamentale în cauză; chestiunea dezbătută în fața Curții; dacă circumstanțele cauzei implică o schimbare a atitudinilor și condițiilor sociale)?

3.1. Ipotezele jurisprudențiale enunțate la pct.2 au în vedere domeniile în care instanța constituțională acordă o marjă largă de apreciere legiuitorului în dozarea și gradarea intervenției sale. Desigur, există situații obiectiv cuantificabile în care Curtea reține o marjă mai largă de apreciere în favoarea legiuitorului, însă, în momentul că care aceste situații sunt depășite, Curtea restrânge această marjă de apreciere a legislativului.

Astfel, art.53 din Constituție se referă la restrângerea exercițiului unor drepturi sau libertăți pentru apărarea securității naționale, a ordinii, a sănătății ori a moralei publice, a drepturilor și a libertăților cetățenilor; desfășurarea instrucției penale; prevenirea consecințelor unei calamități naturale, ale unui dezastru ori ale unui sinistru deosebit de grav. Acest text constituțional permite o marjă destul de întinsă de apreciere din partea legiuitorului atunci când decide să limiteze sau să restrângă exercițiul unui drept/ libertăți fundamentale în ipotezele menționate. Se poate observa că aplicarea acestui text constituțional este determinată de o situație de fapt și de drept ce se abate de la desfășurarea firească a vieții de stat, astfel că reacția legislativului trebuie să fie concordantă cu situația excepțională ivită. Ca atare, în situații de convulsii sociale, economice sau sanitare, CCR acordă o largă marjă de apreciere legiuitorului, dar nu absolută. Exemplificativ reținem 2 decizii ale CCR, prin care s-a statuat că:

„ (...) această amenințare la adresa stabilității economice continuă să se mențină [criza economică globală din 2009], astfel încât Guvernul este îndrituit să adopte măsuri corespunzătoare pentru combaterea acesteia. Una dintre aceste măsuri este reducerea cheltuielilor bugetare, măsură concretizată, printre altele, în diminuarea cuantumului salariilor/indemnizațiilor/soldelor cu 25%. (...) art.53 teza referitoare la securitatea națională este aplicabil și, în același timp, se constituie într-un temei pentru justificarea măsurilor preconizate" [Decizia nr.872/2010[1690]].

sau

„Măsura purtării măștii de protecție face parte din ansamblul măsurilor reglementate de Legea nr.55/2020 în vederea prevenirii și combaterii efectelor pandemiei de COVID-19. Așa cum a arătat și în expunerea de motive la legea mai sus menționată, legiuitorul național, având în vedere situația de o gravitate excepțională generată de răspândirea coronavirusului SARSCoV-2 și consecințele negative asupra sănătății publice, a considerat că este necesară intervenția sa legislativă, în condițiile prevederilor constituționale ale art.53, în vederea reglementării unor măsuri menite să combată efectele pandemiei de COVID-19 [Decizia nr.381/2021[1691], par.57].

3.2. În schimb, în privința drepturilor de natură legală, Curtea a observat că structurarea lor se realizează în funcție de opțiunea legiuitorului în respectivul domeniu, astfel că evaluarea marjei sale de apreciere este mult diminuată:

„Caracteristic tuturor acestor drepturi ale cetățenilor și obligații corelative ale statului este faptul că, în măsura în care nu sunt nominalizate expres de Constituție, legiuitorul este liber să aleagă, în funcție de politica statului, de resursele financiare, de prioritatea obiectivelor urmărite și de necesitatea îndeplinirii și a altor obligații ale statului consacrate deopotrivă la nivel constituțional, care sunt măsurile prin care va asigura cetățenilor un nivel de trai decent și să stabilească condițiile și limitele acordării lor. De asemenea,

1689 Publicată în Monitorul Oficial al României, Partea I, nr.295 din 24 martie 2021.
1690 Publicată în Monitorul Oficial al României, Partea I, nr.433 din 28 iunie 2010.
1691 Publicată în Monitorul Oficial al României, Partea I, nr.836 din 1 septembrie 2021.

va putea dispune modificarea sau chiar încetarea acordării măsurilor de protecție socială luate, fără a fi necesar să se supună condițiilor art.53 din Constituție, întrucât acest text constituțional privește numai drepturile consacrate de Legea fundamentală, iar nu și cele stabilite prin legi". [Decizia nr.1576/2011[1692]].

3.3. O altă situație care aduce în discuție acordarea unei largi marje de apreciere în favoarea legiuitorului apare și atunci când reacția acestuia este determinată de modul discutabil în care justițiabilii folosesc mijloacele procesuale pe care legea le reglementează. Astfel, Curtea a decis că din moment ce justițiabilii ridică excepția de neconstituționalitate și solicită sesizarea CCR doar pentru a obține suspendarea de drept cauzei din fața instanței *a quo*, legiuitorul are o largă marjă de apreciere în identificarea soluțiilor necesare încetării unei astfel de practici. Prin urmare:

„Opțiunea legiuitorului în sensul abrogării măsurii suspendării de drept se întemeiază pe faptul că invocarea excepțiilor de neconstituționalitate de către părți este folosită de multe ori ca modalitate de a întârzia judecarea cauzelor. Numărul extrem de ridicat al dosarelor aflate pe rolul Curții Constituționale ca urmare a invocării frecvente a excepțiilor de neconstituționalitate determină ca soluționarea acestora să dureze extrem de mult, în detrimentul celerității judecății cauzelor. Or, în condițiile în care scopul măsurii suspendării de drept a judecății cauzelor la instanțele de fond a fost acela de a asigura părților o garanție procesuală în exercitarea dreptului la un proces echitabil și dreptului la apărare, prin eliminarea posibilității judecării cauzei în temeiul unei dispoziții legale considerate a fi neconstituționale, realitatea a dovedit că această măsură s-a transformat, în majoritatea cazurilor, într-un instrument menit să tergiverseze soluționarea cauzelor aflate pe rolul instanțelor judecătorești. Reglementarea a încurajat abuzul de drept procesual și arbitrariul într-o formă care nu poate fi sancționată, atâta vreme cât suspendarea procesului este privită ca o consecință imediată și necesară a exercitării liberului acces la justiție. Astfel, scopul primordial al controlului de constituționalitate - interesul general al societății de a asana legislația în vigoare de prevederile afectate de vicii de neconstituționalitate - a fost pervertit într-un scop eminamente personal, al unor părți litigante, care au folosit excepția de neconstituționalitate drept pretext pentru amânarea soluției pronunțate de instanța în fața căreia a fost dedus litigiul. Or, Curtea constată că, prin adoptarea legii [criticate – sn], voința legiuitorului este aceea de a elimina invocarea excepției de neconstituționalitate în alt scop decât cel prevăzut de Constituție și lege, preîntâmpinând, pentru viitor, exercitarea abuzivă de către părți a acestui drept procesual" [Decizia nr.1106/2010[1693]].

3.4. Legislativul dispune de o largă marjă de apreciere și în privința alegerii mijloacelor pentru punerea în executare a unei hotărâri-pilot pronunțate de Curtea Europeană a Drepturilor Omului.

Astfel, pentru punerea în aplicare a hotărârii CEDO din 12 octombrie 2010, pronunțate în cauza *Maria Atanasiu și alții împotriva României*, legiuitorul a optat pentru neactualizarea cu indicele inflației a despăgubirilor datorate de stat pentru bunurile imobile confiscate în timpul regimului comunist (1945-1989), în condițiile în care aceste despăgubiri erau calculate în raport cu o grilă a indicilor prețurilor imobiliare din anul 2013, însă plata lor era efectuată la o dată ulterioară anului 2013. Cu privire la acest aspect, Curtea Constituțională a statuat:

Legiuitorul a implementat o măsură echivalentă unei plafonări a valorii despăgubirilor stabilite în condiții Legii nr.165/2013. Este o aplicare fidelă a considerentelor de principiu rezultate [...] din Hotărârea Curții Europene a Drepturilor Omului din 12 octombrie 2010, pronunțată în Cauza Maria Atanasiu și alții împotriva României, prin care a fost acordată o largă marjă de apreciere în privința modului de configurare și executare a creanțelor statului în materia restituirii imobilelor. În acest sens, prin aceeași hotărâre, s-a statuat că statului «trebuie să i se lase o marjă largă de apreciere pentru a alege măsurile destinate să garanteze respectarea drepturilor patrimoniale sau să reglementeze raporturile de proprietate din țară și pentru punerea lor în aplicare» (paragraful 233), iar «Plafonarea despăgubirilor și eșalonarea lor pe o perioadă mai lungă ar putea să reprezinte, de asemenea, măsuri capabile să păstreze un just echilibru între interesele foștilor proprietari și interesul general al colectivității» (paragraful 235). [...]

Așadar, având în vedere, pe de o parte, obligațiile de natură patrimonială deosebit de complexe

1692 Publicată în Monitorul Oficial al României, Partea I, nr.32 din 16 ianuarie 2022.
1693 Publicată în Monitorul Oficial al României, Partea I, nr.672 din 4 octombrie 2010.

şi împovărătoare asupra statului, cu efect grevant chiar asupra bugetului de stat pe o lungă perioadă de timp, corelate cu contextul economic existent, şi, pe de altă parte, faptul că obligaţiile menţionate, raportate la momentul de faţă, au un caracter reparatoriu cu o componentă istorică pronunţată, Curtea constată că, prin măsura criticată, legiuitorul român s-a plasat, în mod evident, în interiorul acestei marje, îndeplinindu-se, astfel, exigenţele stabilite prin hotărârea Curţii Europene a Drepturilor Omului" [Decizia nr.686/2014[1694], par.31 şi 32].

Într-un alt caz care, de asemenea, viza punerea în executare a unor hotărâri a CEDO referitoare la condiţiile de detenţie din penitenciare [*Iacov Stanciu împotriva României* şi *Rezmiveş împotriva României*], CCR a acordat o largă marjă de apreciere legiuitorului în alegerea soluţiilor şi măsurilor optime pentru a răspunde exigenţelor hotărârilor Curţii de la Strasbourg. CCR a reţinut că:

„prin Hotărârea din 24 iulie 2012, pronunţată în Cauza Iacov Stanciu împotriva României, CEDO, deşi a constatat o încălcare a prevederilor art.3 din Convenţia pentru apărarea drepturilor omului şi a libertăţilor fundamentale, a reţinut că «nu este sarcina Curţii să stabilească ce măsuri reparatorii ar fi indicat de luat de către un stat pârât în conformitate cu obligaţiile acestuia prevăzute la art.46 din Convenţie. Cu toate acestea, preocuparea Curţii este de a facilita eliminarea rapidă şi eficace a unei nereguli constatate în cadrul sistemului naţional pentru apărarea drepturilor omului» (paragraful 194)". [Decizia nr.243/2023[1695], par.55]

„[Iniţial, legislativul român a adoptat o lege] care instituia o procedură de compensare pentru persoanele care executau pedeapsa cu închisoarea în condiţii necorespunzătoare (recursul compensatoriu). Astfel, la calcularea pedepsei executate efectiv se avea în vedere, indiferent de regimul de executare a pedepsei, ca măsură compensatorie, şi executarea pedepsei în condiţii necorespunzătoare, caz în care, pentru fiecare perioadă de 30 de zile executate în condiţii necorespunzătoare, chiar dacă acestea nu erau consecutive, se considerau executate, suplimentar, 6 zile din pedeapsa aplicată [compensare în zile considerate executate]" - [Decizia nr.243/2023, par.49].

„Stabilirea numărului de zile considerate efectiv executate, ca măsură compensatorie pentru fiecare perioadă de 30 de zile executate în condiţii necorespunzătoare, este un element care ţine în exclusivitate de opţiunea legiuitorului, existând libertatea de a dispune sub acest aspect pe baza unor considerente de oportunitate, apreciate în funcţie de scopul legii şi de perioada în care se estimează a fi atins acest scop. Aceleaşi argumente susţin şi opţiunea pentru perioada pentru care se acordă zile considerate ca executate în compensarea cazării în condiţii necorespunzătoare, care se calculează începând cu 24 iulie 2012, data pronunţării de către Curtea Europeană a Drepturilor Omului a hotărârii în Cauza Iacov Stanciu împotriva României". [Decizia nr.181/2022[1696], par.17].

„[Ulterior], legiuitorul şi-a manifestat intenţia de modificare a legii [recursului compensatoriu] şi de adoptare a soluţiei legislative a compensării [în bani] în cazul cazării în condiţii necorespunzătoare într-un anumit context juridic şi social. Astfel, Curtea a apreciat că soluţia de abrogare a [compensării în zile considerate executate] se încadrează în competenţa exclusivă a Parlamentului, ca unică autoritate legiuitoare, de a identifica şi edicta soluţii normative, cu respectarea exigenţelor constituţionale, în acord cu realităţile prezente ale societăţii. Deplina competenţă în ceea ce priveşte stabilirea acestor soluţii revine legiuitorului" [Decizia nr.243/2023, par.56].

3.5. Potrivit Constituţiei României, Guvernul, în anumite condiţii, este legiuitor delegat, în sensul că poate emite ordonanţe şi ordonanţe de urgenţă (acte de reglementare primară având forţa legii) în condiţiile prevăzute de art.115 din Constituţie. Guvernul poate adopta ordonanţe de urgenţă numai în situaţii extraordinare a căror reglementare nu poate fi amânată, având obligaţia de a motiva urgenţa în cuprinsul acestora. CCR, în condiţiile specifice ale regimului constituţional naţional, are competenţa de a verifica dacă Guvernul a emis ordonanţe de urgenţă în situaţii extraordinare. Existenţa situaţiei extraordinare este o condiţie de constituţionalitate a ordonanţei de urgenţă, iar

1694 Publicată în Monitorul Oficial al României, Partea I, nr.68 din 27 ianuarie 2015.
1695 Publicată în Monitorul Oficial al României, Partea I, nr.987 din 31 octombrie 2023.
1696 Publicată în Monitorul Oficial al României, Partea I, nr.785 din 8 august 2022.

evaluarea ei de către CCR, de cele mai multe ori, confirmă existența acestei situații care a condus la emiterea ordonanței de urgență, ceea ce îndreptățește concluzia potrivit căreia Guvernul are o marjă de apreciere în evaluarea condițiilor de emitere a ordonanțelor de urgență mai ales în domeniile economico-sociale:

„Ținând de rolul Guvernului de a asigura funcționarea echilibrată a sistemului economic și social, se va ține seama de aprecierea Guvernului cu privire la caracterul extraordinar al situației care l-a determinat să adopte Ordonanța de urgență a Guvernului nr.8/2021, cu scopul de a concilia politica legislativă de protecție pentru studenți cu resursele bugetare existente, precum și cu privire la urgența în reglementarea acestei situații, astfel cum rezultă din preambulul acestui act normativ și din nota sa de fundamentare" [Decizia nr.500/2023[1697], par.36].

3.6. Opțiunea legiuitorului de a acorda o largă marjă de apreciere autorităților chemate să aplice legea este acceptată în jurisprudența CCR cu referire la domeniul în care aceasta intervine.

„Exigențele statului de drept nu impun lipsa oricărei marje de apreciere a autorităților publice. De altfel, nu orice domeniu al vieții sociale trebuie sau poate fi normat în cele mai mici amănunte, astfel că, în funcție de domeniul vizat, marja de apreciere a autorităților publice poate fi mai mare sau mai restrânsă. În domeniul acordării și retragerii decorațiilor/medaliilor această marjă, având în vedere natura domeniului, este una mai largă, aspect care nu indică nicio atingere adusă principiului statului de drept" [Decizia nr.479/2021[1698], par.39].

În anumite situații specifice cu care se confruntă societatea, Curtea recunoaște legiuitorului o marjă de apreciere în gestionarea domeniului respectiv, însă intensitatea controlului poate varia, prin introducerea unor cerințe constituționale, care limitează marja de apreciere.

„Adoptarea măsurilor concrete care să țină sub control fenomenul câinilor fără stăpân ține de marja de apreciere a statului, astfel încât legiuitorul este cel chemat să stabilească condițiile normative concrete în care fenomenul câinilor fără stăpân trebuie gestionat. În acest sens legiuitorul este obligat, ca și cerință constituțională, să implice și să responsabilizeze autoritățile publice locale, inclusiv prin sancțiuni de natură contravențională sau penală, pentru a se evita recurgerea la măsura eutanasierii" [Decizia nr.1/2012[1699]].

„Aprecierea asupra oportunității soluției adoptate de legiuitorul român [pentru ținerea sub control a fenomenului câinilor fără stăpân – sn], ca și asupra oportunității soluției legislative pe care autorii sesizării o promovează, nu intră în competența Curții Constituționale" [Decizia nr.383/2013[1700]]

4. Există situații în care Curtea dumneavoastră a dat dovadă de deferență deoarece nu avea competența sau expertiza instituțională necesară?

De obicei, acordarea unei marje destul de largi de apreciere raportat la „competența sau expertiza instituțională" apare în ipoteza în care CCR este pusă în situația de a evalua respectarea condițiilor prevăzute de art.115 alin.(4) din Constituție pentru emiterea unei ordonanțe de urgențe într-un domeniu cu implicații economico-financiare. Emiterea unei astfel de ordonanțe se realizează de Guvern numai în situații extraordinare a căror reglementare nu poate fi amânată, având obligația de a motiva urgența în cuprinsul acestora. Ca atare, revine CCR competența de a evalua dacă situația invocată de Guvern este una extraordinară pentru a se justifica emiterea ordonanței de urgență.

„Din analiza coroborată a notei de fundamentare și a preambulului Ordonanței de urgență a Guvernului nr.174/2022, Curtea reține că [...] indicatorii economici, invocați de Guvern în preambulul ordonanței - între care unii indică starea actuală a economiei, iar alții confirmă evoluția acesteia în perioada anterioară, în timp ce o parte anticipează evoluția viitoare a economiei -, sunt deosebit de importanți

1697 Publicată în Monitorul Oficial al României, Partea I, nr.7 din 4 ianuarie 2024.
1698 Publicată în Monitorul Oficial al României, Partea I, nr.1023 din 27 octombrie 2021.
1699 Publicată în Monitorul Oficial al României, Partea I, nr.53 din 23 ianuarie 2014.
1700 Publicată în Monitorul Oficial al României, Partea I, nr.644 din 21 octombrie 2013.

în evaluarea caracterului de situație extraordinară, dar şi a urgenței reglementării. Astfel de evenimente extrem de volatile, cu impact semnificativ asupra economiei, cum sunt cele invocate de Guvern în preambulul ordonanței, impun o reacție promptă din partea legiuitorului delegat în adoptarea unor măsuri de ordin legislativ. Aşa încât, Curtea reține că în astfel de împrejurări marja de apreciere a Guvernului cu privire la caracterul extraordinar al situației, care l-a determinat să adopte ordonanța de urgență, poate fi mai largă" [Decizia nr.187/2023[1701], par.56].

„Curtea Constituțională trebuie să țină seama de materia specifică în care Guvernul a adoptat ordonanța de urgență supusă examinării în ceea ce privește conformitatea cu acest articol al Legii fundamentale, iar, în situații particulare, precum în materie fiscal-bugetară, să acorde Guvernului o marjă de apreciere mai largă. Situația extraordinară şi urgența reglementării nu reprezintă noțiuni invariabile, mai ales într-un context caracterizat de o dinamică foarte accentuată, aşa cum este cel fiscal-bugetar, în care trebuie să se țină seama de o multitudine de factori într-o continuă evoluție, ci noțiuni care, de la caz la caz, vor căpăta valențe diferite" [Decizia nr.200/2021[1702], par. 36].

*„Din analiza preambulului Ordonanței de urgență a Guvernului nr.93/2012 şi a Notei de fundamentare, Curtea poate deduce elementele de fapt/obiective ale situației extraordinare. Situația indicată este rezultatul existenței unor disfuncționalități ale sistemului financiar, care, pe fondul tensiunilor generate de criza economică, ar conduce la pierderea încrederii populației în serviciile oferite de întregul sistem financiar. Chiar dacă disfuncționalitățile sistemului financiar, privite în mod singular, nu sunt de o atare gravitate încât să afecteze interesul public, coroborate însă cu tensiunile generate de criza economică pot conduce la lezarea interesului public; de altfel, în aprecierea acestor din urmă situații Guvernul dispune de o anumită marjă de apreciere" [*Decizia nr.175/2014[1703], punctul I.4, şi Decizia nr.309/2018[1704], par.20].

5. Aveți cazuri în care Curtea dumneavoastră a dat dovadă de deferență deoarece exista riscul unei erori judiciare?

Nu.

6. Există situații în care Curtea dumneavoastră a dat dovadă de deferență invocând legitimitatea instituțională sau democratică a factorului de decizie?

Legitimitatea instituțională şi democratică a legiuitorului originar sau delegat, după caz, conferă acestuia în anumite situații o marjă de apreciere în adoptarea unor actelor normative. Cu titlu exemplificativ, se reține următoarele considerente din jurisprudența CCR:

„Ținând seama de [...] faptul că, prin atribuțiile constituționale şi toate caracteristicile instituționale pe care le posedă, [...] Guvernul este cel mai în măsură pentru a orienta şi defini politica bugetară a statului şi, ca atare, va acorda greutate aprecierii Guvernului cu privire la caracterul extraordinar al situației care l-a determinat să adopte Ordonanța de urgență nr.99/2016 şi, în particular, să mențină şi în 2017 măsura de eşalonare a plăților salariale cuvenite în temeiul unor hotărâri judecătoreşti" [Decizia nr.769/2020[1705], par.19].

„Critica distinctă formulată în raport cu alin.(5) al art.101 din lege [„În situația în care la concursul de admitere, pentru fiecare specializare, se înscrie un număr de elevi mai mic decât numărul locurilor scoase la concurs, unitatea respectivă nu are dreptul de a organiza concurs de admitere pentru specializarea respectivă în anul şcolar următor"] nu poate fi analizată de Curtea Constituțională prin prisma motivelor invocate. Astfel, Parlamentul este autoritatea publică cea mai bine plasată să determine condițiile în care o unitate şcolară poate organiza concurs de admitere în clasa a IX-a, precum şi situațiile în care acest drept

1701 Publicată în Monitorul Oficial al României, Partea I, nr.318 din 13 aprilie 2023.
1702 Publicată în Monitorul Oficial al României, Partea I, nr.653 din 1 iulie 2021.
1703 Publicată în Monitorul Oficial al României, Partea I, nr.361 din 16 mai 2014.
1704 Publicată în Monitorul Oficial al României, Partea I, nr.1064 din 17 decembrie 2018.
1705 Publicată în Monitorul Oficial al României, Partea I, nr.145 din 12 februarie 2020.

se retrage" [Decizia nr.340/2023[1706], par.155].

„Legitimitatea democratică de care se bucură Parlamentul constituie temeiul constituțional exclusiv care îi dă prerogativa de a configura sistemul de drepturi acordate membrilor săi pentru ca aceștia să își poată îndeplini mandatul reprezentativ pe care l-au dobândit. Așadar, revine Parlamentului să aprecieze stabilirea acestor drepturi, criteriile după care se acordă, conținutul, cuantumul, modul de calcul al acestora. Prin urmare, Parlamentul, optând pentru acordarea indemnizației pentru limită de vârstă, și-a exercitat marja de apreciere în privința stabilirii drepturilor aferente statutului deputaților și al senatorilor. Abrogarea dispozițiilor legale care instituiau acest drept s-a realizat în baza aceleiași marje de apreciere, considerându-se că celelalte drepturi normativizate reprezintă o protecție suficientă acordată mandatului parlamentar. Curtea nu are competența de a se substitui acestei marje de apreciere și nu poate să stabilească faptul că eliminarea uneia sau a alteia dintre măsurile de protecție de natură legală afectează nivelul constituțional de protecție a mandatului reprezentativ" [Decizia nr.678/2023[1707], par.40 și 42].

Însă, Curtea a subliniat, în jurisprudența sa, că:

„legitimitatea politică diferită a unei autorități publice în raport cu alta nu poate justifica o încălcare a atribuțiilor/competențelor celeilalte autorități publice, prin deplasarea și preluarea acestora de către o altă autoritate publică aleasă prin vot" [Decizia nr.358/2018[1708], par.100].

Legitimitatea democratică a Parlamentului, deși neinvocată expres, ea transpare in considerentele deciziilor prin trimiterea făcută la faptul că măsura adoptată/ criticată se întemeiază și face parte din politica legiuitorului din respectivul domeniu.

„Legiuitorul a folosit tocmai această marjă de apreciere [în a decide dacă și în ce măsură diferențele dintre diversele situații similare justifică un tratament juridic diferit] și a instituit condiții speciale pentru obținerea plăților compensatorii în sistemul industriei de apărare. [...] O atare orientare a fost susținută de politica legislativă în materie economico-socială. Alegerea unui criteriu sau altul pentru acordarea unor prestații sociale este la libera apreciere a legiuitorului, cu condiția ca acest criteriu să nu fie unul aleatoriu și să nu încalce drepturile și principiile consacrate constituțional" [Decizia nr.1648/2010[1709]].

„În ceea ce privește politica economică, financiară și valutară a statului, [...]statul trebuie să asigure protejarea intereselor naționale în activitatea economică, financiară și valutară. Prin urmare, statul este cel care își elaborează o politică economică generală, iar politicile economice, financiare și valutare/ monetare sunt cele care trebuie să faciliteze dezvoltarea social-economică, fiind obligația statului, prin organele sale reprezentative, să ducă la îndeplinire această misiune constituțională. Astfel, în virtutea art.61 alin.(1) din Constituție, potrivit căruia Parlamentul este organul reprezentativ suprem al poporului român și unica autoritate legiuitoare a țării, autoritatea legiuitoare poate și trebuie să adopte orice soluție pe care o consideră necesară și oportună, desigur, în limitele Legii fundamentale, prin care să transpună la nivel infraconstituțional în domeniile menționate prevederi legale care să se circumscrie prevederilor constituționale cu privire la activitatea economică, financiară și valutară" [Decizia nr.414/2019[1710], par.139].

7. „Cu cât legislația se referă mai mult la o chestiune mai largă de politică socială publică, cu atât instanța va fi mai puțin dispusă să intervină". Este acesta un standard valabil pentru instanța dumneavoastră? Împărtășește Curtea dumneavoastră opinia potrivit căreia chestiunile de ordine publică ar trebui decise prin procese democratice, deoarece instanțele nu sunt alese și nu au un mandat democratic de a decide în chestiuni de ordine publică?

Astfel cum s-a arătat la pct.2, aspectele ce țin de politica penală, economică, socială, financiară, monetară sau bugetară aduc în discuție o largă marjă de apreciere din partea legiuitorului.

1706 Publicată în Monitorul Oficial al României, Partea I, nr.595 din 29 iunie 2023.
1707 Publicată în Monitorul Oficial al României, Partea I, nr.1119 din 12 decembrie 2023.
1708 Publicată în Monitorul Oficial al României, Partea I, nr.473 din 7 iunie 2018.
1709 Publicată în Monitorul Oficial al României, Partea I, nr.44 din 18 ianuarie 2011.
1710 Publicată în Monitorul Oficial al României, Partea I, nr.922 din 15 noiembrie 2019.

CCR realizează un control de constituționalitate al măsurilor concrete adoptate, fără a interfera cu politicile promovate în aceste domenii.

„Curtea a subliniat faptul că nu are competența să își asume ea însăși politica penală a statului, drept care legiuitorul are o largă marjă de apreciere în acest domeniu" [Decizia nr.101/2021, par.82].

„Este dreptul autorității legiuitoare de a elabora măsuri de politică legislativă în domeniul salarizării în concordanță cu condițiile economice și sociale existente la un moment dat" [Decizia nr.575/2011].

„Este dreptul legiuitorului să aprecieze nu numai cu privire la oportunitatea măsurilor reparatorii, ci și asupra întinderii lor" [Decizia nr.504/2011[1711]].

În contextul politicilor sociale de încurajare a relațiilor de familie întemeiate pe căsătorie, instanța constituțională acordă o largă marjă de apreciere legiuitorului pentru adoptarea unor măsuri punctuale în acest sens:

„Cât privește acordarea pensiei doar soțului supraviețuitor și nu persoanelor care au trăit în fapt cu cel decedat, legiuitorul a avut în vedere protejarea și încurajarea relațiilor stabile și continue întemeiate pe căsătorie. În acest sens, Curtea observă faptul că legiuitorul a condiționat acordarea pensiei de urmaș de o durată de cel puțin 10 ani a căsătoriei, fapt ce exprimă nu doar o determinare obiectivă, ce ține de resursele financiare ale statului care influențează stabilirea criteriilor și limitelor de acordare a drepturilor de asigurări sociale, dar și intenția de a proteja viața de familie întemeiată pe căsătorie. Or, [...] legiuitorul național se bucură de libertatea de a stabili reglementări prin care să susțină relațiile de familie întemeiate pe căsătorie și care conferă drepturi specifice soților. Curtea apreciază că, în măsura în care ar încuraja asimilarea relațiilor de concubinaj relațiilor dintre soți în vederea stabilirii dreptului la pensie de urmaș, legiuitorul ar relativiza importanța cerinței referitoare la durata căsătoriei, fragilizând protecția acordată acestei instituții. [...]. Curtea consideră că, dacă ar admite că numărul de ani de căsătorie prevăzut de lege pentru a obține pensia de urmaș poate fi complinit prin adăugarea perioadei trăite împreună în afara căsătoriei, instanța de contencios constituțional s-ar substitui, cu încălcarea principiului separației puterilor în stat, legiuitorului, care [...] se bucură de competența exclusivă de a reglementa condițiile de acordare a drepturilor de asigurări sociale ținând cont atât de valorile sociale protejate, cât și de resursele financiare disponibile" [Decizia nr.699/2020[1712], par.33-35].

Modul de transpunere la nivel legal a unor concepte constituționale care exprimă o anumită orientare a politicii statului în domeniul social ține de asemenea de marja largă de apreciere a legiuitorului:

„Statul social presupune un anumit grad de intervenție etatică în abordarea diferitelor domenii cu caracter social existente la nivelul politicii sociale a statului. Stabilirea gradului de intervenție a statului în sfera drepturilor cu caracter social, precum și a formelor concrete de intervenție, adecvate fiecărei etape de dezvoltare a acestuia, este o prerogativă exclusivă a Parlamentului, care poate opta fie pentru o intervenție masivă necondiționată a statului în domeniul social (model social-democrat), fie pentru intervenția subsidiară a acestuia, locul primordial revenind familiei, comunității, bisericii sau sindicatelor (model conservator-corporatist), fie pentru o intervenție minimă, situație în care este încurajată dezvoltarea economică în scopul rezolvării problemelor sociale (model liberal). Alegând unul dintre cele trei modele mai sus enunțate, statul are îndatorirea să creeze condițiile necesare pentru realizarea unei securități sociale optime pentru cetățenii săi, dar nu înseamnă că acesta trebuie să creeze și să întrețină singur tot sistemul. Resursele statului singure nu ajung să facă față acestor sarcini, mai ales în situații de criză economică profundă, astfel încât trebuie conștientizat faptul că nu numai statul, ci și comunitatea și indivizii au răspunderi reciproce, obligații corelative în acest domeniu.

[...] statul, în cursul existenței sale, poate opta pentru diverse modele de securitate socială, de la o intervenție minimală la una maximală; important este ca statul să nu renunțe la funcția sa socială. Obligația constituțională impusă prin art.1 alin.(3) este aceea de a interveni în favoarea cetățeanului, deci acest text constituțional obligă la o atitudine pozitivă, la o acțiune din partea statului. Însă gradul de inten-

1711 Publicată în Monitorul Oficial al României, Partea I, nr.506 din 18 iulie 2011.

1712 Publicată în Monitorul Oficial al României, Partea I, nr.49 din 15 ianuarie 2021.

sitate a acestor măsuri cu caracter intervenționist poate diferi în funcție de viziunea politică și de condițiile economice ale statului de la un anumit moment dat. A nega posibilitatea statului, respectiv a organului său legislativ de a-și modifica în această privință concepția ar însemna negarea evoluției sau negarea adaptării societății la situația de fapt existentă.

Impunerea modelului conservator-corporatist prin legea criticată echivalează cu consacrarea principiului subsidiarității în domeniul asistenței sociale, respectiv statul dublează acțiunea comunității, familiei și, în ultimă instanță, a cetățeanului. Dar intervenția statului este încă puternică din moment ce asigură beneficii de asistență socială pentru prevenirea și combaterea sărăciei și riscului de excluziune socială, pentru susținerea copilului și familiei, pentru sprijinirea persoanelor cu nevoi speciale sau pentru situații deosebite [art.9 alin.(1) din lege], precum și servicii de natură socială [spre exemplu, servicii de asistență și suport pentru asigurarea nevoilor de bază ale persoanei, servicii de îngrijire personală, de recuperare/reabilitare, de inserție/reinserție socială - a se vedea în acest sens art.30 alin.(1) din legea criticată]. Mai mult, existența unei construcții instituționale a sistemului național de asistență social atât la nivel central, cât și la cel local, dublată de existența unor proceduri precise și detaliate pentru obținerea beneficiilor sau serviciilor de asistență socială, denotă interesul statului în domeniul asistenței sociale. Prin urmare, asistența socială fiind un palier al politicii sociale a statului este parte integrantă a conceptului de stat social, iar statul în acest domeniu își poate varia intensitatea intervenției fără a afecta art.1 alin.(3) din Constituție. Doar diminuarea foarte puternică a acestei intervenții sau renunțarea la aceasta ar duce la încălcarea conceptului constituțional menționat, ceea ce, astfel cum s-a arătat, nu este cazul în raport cu legea criticată" [Decizia nr.1594/2011[1713]].

8. Curtea dumneavoastră acceptă un principiu general al deferenței în judecarea politicilor și filosofiilor penale?

Instanța de contencios constituțional, în materie penală, a statuat că:

„Parlamentul este liber să decidă cu privire la politica penală a statului, în virtutea prevederilor art.61 alin.(1) din Constituție, în calitate de unică autoritate legiuitoare a țării. De asemenea, Curtea a reținut că nu are competența de a se implica în domeniul legiferării și al politicii penale a statului, orice atitudine contrară constituind o imixtiune în competența [acestei] autorități constituționale" [Decizia nr.629/2014[1714], par.23].

„Curtea a recunoscut că, în acest domeniu, legiuitorul se bucură de o marjă de apreciere destul de întinsă, având în vedere că acesta se află într-o poziție care îi permite să aprecieze, în funcție de o serie de criterii, necesitatea unei anumite politici penale. Cu toate acestea, deși, în principiu, Parlamentul se bucură de o competență exclusivă în reglementarea măsurilor ce țin de politica penală a statului, această competență nu este absolută în sensul excluderii exercitării controlului de constituționalitate asupra măsurilor adoptate. Incriminarea/dezincriminarea unor fapte ori reconfigurarea elementelor constitutive ale unei infracțiuni țin de marja de apreciere a legiuitorului, marjă care nu este absolută, ea fiind limitată de principiile, valorile și exigențele constituționale" [Decizia nr.405/2016[1715], par.66].

„Legiuitorul trebuie să dozeze folosirea mijloacelor penale în funcție de valoarea socială ocrotită, instanța de control constituțional putând cenzura opțiunea legiuitorului numai dacă aceasta contravine principiilor și exigențelor constituționale" [Decizia nr.824/2015[1716], par.25].

„Parlamentul nu își poate exercita competența de incriminare și de dezincriminare a unor fapte antisociale decât cu respectarea normelor și principiilor consacrate prin Constituție" [Decizia nr.2/2014].

„În exercitarea competenței sale constituționale de a legifera în cadrul politicii penale, legiuitorul

1713 Publicată în Monitorul Oficial al României, Partea I, nr.909 din 21 decembrie 2011.

1714 Publicată în Monitorul Oficial al României, Partea I, nr.932 din 21 decembrie 2014.

1715 Publicată în Monitorul Oficial al României, Partea I, nr.517 din 8 iulie 2016.

1716 Publicată în Monitorul Oficial al României, Partea I, nr.122 din 17 februarie 2016.

are dreptul, dar şi obligaţia de a apăra anumite valori sociale, unele dintre acestea identificându-se cu valorile protejate de Constituţie (dreptul la viaţă şi la integritate fizică şi psihică - art.22; dreptul la ocrotirea sănătăţii - art.34, dreptul de vot - art.36 etc.), prin incriminarea faptelor care aduc atingere acestora" [Decizia nr.62/2007[1717], Decizia nr.2/2014, Decizia nr.405/2016, par.67, Decizia nr.221/2023[1718], par.35 sau Decizia nr.364/2023[1719], par.45].

„În măsura în care o normă penală contravine politicii penale a statului, se poate reţine încălcarea acelor drepturi şi libertăţi fundamentale faţă de care standardul constituţional de protecţie a fost nesocotit. Însă, în măsura în care o soluţie legislativă, în disonanţă cu politica penală a statului, afectează totalitatea acestor drepturi sau libertăţi fundamentale, în sensul că fragilizează întregul sistem de protecţie a acestora, urmează a se stabili drept standard de referinţă art.1 alin.(3) din Constituţie, în componenta sa referitoare la statul de drept. O asemenea măsură nu afectează doar anumite relaţii sociale, ci are capacitatea/aptitudinea să submineze întregul sistem de garanţii asociat drepturilor şi libertăţilor fundamentale. Analiza Curţii va fi una în două trepte, respectiv stabilirea relaţiei de vădită contrarietate între norma penală adoptată şi politica penală a statului şi dacă această relaţie de contrarietate este de natură a încălca drepturi/libertăţi fundamentale specifice [ale inculpatului sau ale celorlalte persoane] sau chiar întregul spectru al acestora" [Decizia nr.650/2018[1720], par.297 şi 298].

„Politica penală a statului, reflectată în mod primar şi primordial în Codul penal, s-a axat pe ideea reducerii limitelor speciale de pedeapsă şi pe pedepsirea mai aspră a pluralităţii de infracţiuni [aplicarea pedepsei celei mai grele, la care se adaugă un spor de o treime din totalul celorlalte pedepse stabilite]. Or, noua formulă legislativă constituie o evidentă relaxare a regimului sancţionator al concursului de infracţiuni, faţă de cel aflat în vigoare; deşi legiuitorul, în principiu, are competenţa constituţională să stabilească o asemenea orientare a politicii penale, acesta trebuie să coreleze cele două axe pe care le-a avut în vedere la elaborarea Codului penal. Astfel, dacă se doreşte pedepsirea mai blândă a concursului de infracţiuni, corelativ, legiuitorul are obligaţia constituţională de a spori limitele speciale de pedeapsă, pentru a se realiza o corelare între acestea. În caz contrar, infractorul ar fi încurajat să comită mai multe infracţiuni, pentru că ştie că în principal este pedepsit pentru o singură infracţiune comisă, iar sporul aplicat în aceste condiţii devine nesemnificativ. Or, în aceste condiţii, politica penală a statului devine contradictorie: dacă iniţial s-a dorit ca acest Cod penal să aibă mai degrabă o funcţie preventivă, în forma preconizată se ajunge la încurajarea săvârşirii a cât mai multor infracţiuni în concurs, pentru că cele mai multe dintre ele rămân nepedepsite. O asemenea concepţie afectează fundamentul statului de drept, fiind de netăgăduit faptul că perseverenţa infracţională trebuie descurajată şi mai aspru pedepsită. Această măsură alterează politica penală a statului, astfel cum a fost promovată şi normativizată prin Codul penal în vigoare. Nimic nu împiedică legiuitorul să modifice/să schimbe politica penală a statului, însă aceasta trebuie să fie corelată cu concepţia de ansamblu a Codului penal şi în conformitate cu exigenţele Constituţiei; aceasta înseamnă ca statul să asigure un just echilibru între protecţia libertăţii individuale a infractorului şi drepturile şi libertăţile fundamentale ale celorlalte persoane" [Decizia nr.650/2018, par.303-306].

9. Pot exista circumstanţe mai stricte în care guvernul nu poate divulga informaţii instanţei, în special în contextul cauzelor care privesc securitatea naţională şi care implică informaţii clasificate. Curtea dumneavoastră a dat vreodată dovadă de deferenţă din motive de securitate naţională?

Jurisprudenţa CCR nu oferă exemple cu privire la o acordarea unei largi marje de apreciere a legiuitorului în aspecte ce ţin de securitatea naţională. Din contră, CCR a constatat neconstituţionalitatea unor dispoziţii legale care vizau modul de folosire a informaţiilor clasificate în procesul penal.

„Soluţia legislativă criticată rupe justul echilibru între interesele generale şi cele particulare, prin aceea că atribuie decizia de refuz al accesării informaţiilor clasificate cu valoare probatorie în procesul

1717 Publicată în Monitorul Oficial al României, Partea I, nr.104 din 12 februarie 2007.

1718 Publicată în Monitorul Oficial al României, Partea I, nr.505 din 9 iunie 2023.

1719 Publicată în Monitorul Oficial al României, Partea I, nr.661 din 19 iulie 2023.

1720 Publicată în Monitorul Oficial al României, Partea I, nr.97 din 7 februarie 2019.

penal unei autorități administrative, ceea ce echivalează cu un impediment în calea dreptului de informare al inculpatului, cu consecințe directe asupra dreptului său la un proces echitabil, impediment care nu este supus niciunei forme de control judiciar. Într-o atare ipoteză, accesul la informațiile clasificate nu este condiționat doar de parcurgerea unor pași procedurali în vederea obținerii unei autorizații prevăzute de lege, ci, după parcurgerea procedurii legale și obținerea autorizațiilor necesare, apărătorul inculpatului poate fi pus în situația unui refuz al autorității emitente, care are ca efect blocarea efectivă și absolută a accesului la informațiile clasificate. Consecințele juridice sunt cu atât mai grave cu cât solicitarea de acces la aceste informații nu aparține inculpatului/apărătorului inculpatului, ci chiar judecătorului cauzei, care, în prealabil, a constatat caracterul esențial pentru soluționarea procesului penal a acestor informații, atribuindu-le valoare probatorie. Or, în măsura în care, în procesul penal, se utilizează probe care nu pot fi cunoscute de inculpat și avocatul său, chiar dacă, în final, acestea nu pot servi la pronunțarea unei soluții de condamnare, de renunțare la aplicarea pedepsei sau de amânare a aplicării pedepsei, dar care au fost reținute în actul de sesizare al instanței, fundamentând acuzația penală, este evident că nu se mai poate discuta despre o egalitate a armelor și, implicit, despre un proces echitabil" [Decizia nr.21/2018[1721], par.63].

„Curtea nu poate trece cu vederea situația în care se află o categorie de funcționari, care își desfășoară atribuțiile de serviciu aproape exclusiv în legătură cu documente/informații clasificate (cum este cazul inculpaților din dosarul în care a fost invocată prezenta excepție de neconstituționalitate, care sunt angajați ai unui serviciu de informații). Într-o atare împrejurare, prin excluderea probelor clasificate din voința exclusivă a instituției angajatoare [având în vedere că art.352 alin.(12) din Codul de procedură penală prevede că „Dacă autoritatea emitentă nu permite apărătorului inculpatului accesul la informațiile clasificate, acestea nu pot servi la pronunțarea unei soluții de condamnare, de renunțare la aplicarea pedepsei sau de amânare a aplicării pedepsei în cauză" -sn], nesupuse niciunui control judiciar, se poate ajunge la situația unei adevărate „imunități" în fața legii penale pentru această categorie profesională, în ceea ce privește infracțiunile comise în legătură cu serviciul, concluzie pe care Curtea o apreciază ca inadmisibilă într-o societate democratică, guvernată de principiile statului de drept. Statutul juridic distinct, privilegiat, sub aspectul răspunderii penale, contravine principiului egalității în drepturi a cetățenilor" [Decizia nr.21/2018, par.69].

„Este necesar ca avocatul inculpatului, pentru a asigura efectivitatea dreptului la apărare al acestuia, să inițieze și să parcurgă procedura pentru obținerea autorizațiilor prevăzute de lege, respectiv să se supună măsurilor de verificare și control impuse de lege în scopul asigurării protecției informațiilor clasificate, în acord cu dispozițiile constituționale ce vizează apărarea securității naționale. Așadar, reglementarea strictă a accesului la informațiile clasificate ca fiind secrete de stat, inclusiv sub aspectul stabilirii unor condiții pe care trebuie să le îndeplinească persoanele care vor avea acces la astfel de informații, nu are ca efect blocarea efectivă și absolută a accesului la informații esențiale pentru soluționarea cauzei, ci creează tocmai cadrul normativ în care două interese aflate în conflict - interesul particular al inculpatului, bazat pe dreptul fundamental la apărare, respectiv interesul general al societății, bazat pe nevoia de apărare a securității naționale -, coexistă într-un just echilibru, care dă satisfacție ambelor interese legitime, astfel că niciunul dintre ele nu este afectat în substanța sa.

[Acceptarea accesului la] informațiile clasificate ce constituie secret de stat și, respectiv, secret de serviciu al [tuturor] avocaților, ar determina crearea unei breșe în sistemul național de protecție a informațiilor clasificate, respectiv a unei categorii profesionale care ar avea acces la astfel de informații în mod excedentar, peste nevoile ce rezultă din fiecare cauză penală în care avocații desfășoară activități de asistență și reprezentare. [...] din rațiuni ce țin de oportunitate, nu toți angajații unei instituții trebuie să obțină certificate de securitate și că, în caz contrar, există riscul creării unei breșe în sistemul național de protecție a informațiilor clasificate, care, spre deosebire de activitatea specifică actului de justiție, nu poate fi acoperită prin invocarea unor cauze de incompatibilitate ori recuzare. Ca urmare, [...] restricțiile de acces la informațiile clasificate analizate constituie un remediu procesual pentru situațiile în care prezumția de onestitate sau profesionalism ale persoanei care gestionează informații clasificate este pusă la îndoială"

1721 Publicată în Monitorul Oficial al României, Partea I, nr.175 din 23 februarie 2018.

[Decizia nr.199/2021[1722], par.24 şi 25].

„Parlamentul nu se poate subroga în competența originară a puterii executive de a declasifica informațiile secrete de stat, întrucât are doar atribuția constituțională de a crea cadrul legislativ necesar declasificării, iar nu și pe cea de a dispune, prin lege, cu privire la această operațiune juridică. Aplicarea legii, aducerea ei la îndeplinire în această materie, este de resortul puterii executive" [Decizia nr.74/2019[1723], par.136].

10. Având în vedere rolul curților constituționale de gardieni ai Constituției, ar trebui acestea să interfereze cu politicile publice presupus neconstituționale atunci când guvernele sunt pasive în ceea ce privește implementarea reformelor în materie de drepturi fundamentale?

Astfel cum s-a arătat, Parlamentul nu are o marjă absolută de apreciere în niciun domeniu. Marja de apreciere este mai restrânsă sau mai largă, astfel că depășirea sa poate fi sancționată de instanța constituțională. Variabilitatea marjei de apreciere impune intervenția CCR pentru protejarea atât a dimensiunilor constitutivă și atributivă a Constituției, cât și a drepturilor și libertăților fundamentale. Intensitatea controlului de constituționalitate este direct proporțională cu natura domeniul vizat și cu marja de apreciere de care dispune legiuitorul. Cu alte cuvinte, în domeniile în care marja de apreciere a legiuitorului este întinsă, intensitatea evaluării CCR a politicii legislative din acel domeniu este mai redusă, putând lua forma chiar a unor observații.

„Curtea ține să sublinieze că, deşi legiuitorul are dreptul, potrivit Legii fundamentale, de a reglementa salarizarea personalului didactic şi didactic auxiliar, [...] totuşi, în activitatea de legiferare în aceasta materie, legiuitorul trebuie să țină seama că învățământul constituie prioritate națională, iar salarizarea personalului didactic şi didactic auxiliar trebuie să fie în acord cu rolul şi importanța activității prestate" [Decizia nr.212/2015[1724], par.35].

„Intensitatea controlului (level of scrutiny) pe care îl realizează în cadrul acestei atribuții a sa [soluționarea conflictelor juridice de natură constituțională – sn] pentru a asigura supremația Constituției este mai scăzută în ceea ce privește modul de atingere a scopului legii, însă ea este una ridicată în ceea ce privește rezultatul/scopul stabilit de lege pentru a fi atins" [Decizia nr.417/2019[1725], par.160].

II. Factor de decizie

Laura-Iuliana Scântei, judecător

Benke Károly, prim-magistrat-asistent

11. Curtea dumneavoastră acordă mai multă deferență unei legi a Parlamentului decât unei decizii a Executivului? Curtea dumneavoastră dă dovadă de deferență în funcție de nivelul de responsabilitate democratică al factorului decizional inițial?

Potrivit art.146 din Constituție, Curtea Constituțională realizează controlul de constituționalitate a legilor, precum și a ordonanțelor sau ordonanțelor de urgență adoptate de Guvern. Aceste din urmă acte adoptate de Guvern sunt acte de legiferare delegată care au forța juridică a legilor, însă sunt supuse aprobării de către Parlament.

În efectuarea controlului de constituționalitate, Curtea nu realizează nicio distincție întemeiată pe un eventual nivel diferit de responsabilitate democratică a Parlamentului sau Guvernului. Curtea examinează actul supus controlului în considerarea naturii sale legislative, fără ca nivelul controlului său să alterneze în funcție de emitentul actului, respectiv a unui aspect exterior

1722 Publicată în Monitorul Oficial al României, Partea I, nr.640 din 30 iunie 2021.
1723 Publicată în Monitorul Oficial al României, Partea I, nr.200 din 13 martie 2019.
1724 Publicată în Monitorul Oficial al României, Partea I, nr.323 din 13 mai 2015.
1725 Publicată în Monitorul Oficial al României, Partea I, nr.825 din 10 octombrie 2019.

conținutului său normativ.

12. Ce pondere acordă Curtea dumneavoastră procesului legislativ? Ce relevanță juridică, dacă există, ar trebui să aibă analiza parlamentară pentru analiza judecătorilor referitoare la compatibilitatea cu drepturile fundamentale?

Curtea, în deciziile sale, arareori observă modul în care în procedura legislativă comisiile parlamentare s-au raportat la drepturile/ libertățile fundamentale în discuție. Chiar dacă Curtea menționează în cuprinsul deciziei rapoartele comisiilor parlamentare, ca parte a procedurii legislative derulate, concluziile acestora nu sunt analizate și, ca atare, nu sunt determinante în evaluarea constituționalității legii. Eventual, opiniile stakeholder-ilor (Consiliul Legislativ – organ de specialitate a Parlamentului) sunt invocate în susținerea eventualei constituționalități sau neconstituționalități a legii, după ce analiza primară a fost efectuată de CCR, practic pentru a legitima soluția la care a ajuns CCR [a se vedea Decizia nr.198/2021[1726], par.59].

13. Curtea dumneavoastră analizează dacă factorul de decizie și-a justificat decizia sau dacă a fost o decizie pe care Curtea însăși ar fi luat-o dacă ar fi fost factorul de decizie?

În sistemul constituțional românesc, proiectul sau propunerea de lege trebuie obligatoriu să fie însoțit/ă de o expunere de motive. Această expunere de motive este luată în considerare în procesul evaluării constituționalității legii numai ca parte a metodelor de interpretare a prevederilor supuse controlului [Decizia nr.238/2020[1727]]. Justificarea legiferării de cele mai multe ori are în vedere elementul de oportunitate legislativă, neputând fi supusă controlului de constituționalitate. Singurul caz în care se analizează justificarea deciziei de legiferare apare atunci când dispozițiile legale constatate ca fiind neconstituționale sunt puse în acord cu deciziile CCR [Decizia nr.nr.466/2019[1728], Decizia nr.467/2019[1729]]. Totuși, au existat situații în care Curtea a analizat modul în care Parlamentul și-a justificat fondul soluției legislative promovate, iar lipsa justificării acesteia a dus la neconstituționalitatea legii respective (Decizia nr.153/2020[1730]).

În schimb, în privința actelor de legiferare a Guvernului, care trebuie însoțite de a notă de fundamentare, Curtea verifică dacă Guvernul și-a justificat decizia de a legifera, întrucât aceste acte de legiferare se adoptă în condițiile stricte prevăzute de art.115 din Constituție.

Pe fondul reglementării Curtea evaluează soluția legislativă din propria perspectivă, primară, fără a se substitui factorului de decizie politic. În cazul deciziilor intermediare pronunțate de CCR se poate observa că instanța constituțională atașează înțelesuri sau interpretări sau soluții aditive/ complement al legii care indică destul de clar faptul că dacă ar fi fost factorul de decizie, reglementarea respectivă, din punct de vedere al constituționalității sale, ar fi trebuit să cuprindă și alte exigențe/ ipoteze și că, astfel, Curtea ar fi ajuns la o altă decizie. În acest sens, exemplificativ se reține Decizia nr.136/2021[1731], prin care Curtea, în esență, a stabilit că despăgubirea pentru privarea de libertate în cursul procesului penal nu poate fi limitată numai la situația în care această măsură a fost luată nelegal, ci trebuie să cuprindă și situația în care o asemenea măsură a fost nedreaptă din perspectiva finalității procesului judiciar (persoana în final a fost achitată).

Tocmai aceste decizii intermediare demonstrează că paradigma în care se plasează CCR este aceea a realizării unei evaluări proprii, ca a unui decident primar.

14. Curtea dumneavoastră dă dovadă de deferență după cum decizia sau măsura a fost sau nu precedată de o analiză aprofundată a compatibilității cu drepturile fundamentale? De

1726 Publicată în Monitorul Oficial al României, Partea I, nr.421 din 21 aprilie 2021.
1727 Publicată în Monitorul Oficial al României, Partea I, nr.666 din 28 iulie 2020.
1728 Publicată în Monitorul Oficial al României, Partea I, nr.862 din 25 octombrie 2019.
1729 Publicată în Monitorul Oficial al României, Partea I, nr.765 din 20 septembrie 2019.
1730 Publicată în Monitorul Oficial al României, Partea I, nr.489 din 10 iunie 2020.
1731 Publicată în Monitorul Oficial al României, Partea I, nr.494 din 12 mai 2021.

exemplu, cât de profundă trebuie să fie analiza legiuitorului pentru ca instanța dumneavoastră să îi confere greutate?

Astfel cum s-a arătat la întrebarea 12, Curtea nu manifestă deferență față de modul în care s-a realizat analiza conformității legii cu drepturile și libertățile fundamentale în cursul procedurii parlamentare. Curtea efectuează o evaluare proprie a constituționalității legii, indiferent de cât de aprofundată a fost dezbaterea parlamentară referitoare la compatibilitatea legii cu drepturile fundamentale.

15. Curtea dumneavoastră analizează dacă opiniile contrare au fost pe deplin reprezentate în dezbaterea parlamentară atunci când a fost adoptată o anumită măsură? Este suficient să fi existat o dezbatere aprofundată cu privire la conținutul general al legislației sau ar fi trebuit să se acorde o atenție specială implicațiilor asupra drepturilor?

În jurisprudența Curții Constituționale s-a statuat că *„autonomia regulamentară dă dreptul Camerelor Parlamentului de a dispune cu privire la propria organizare și procedurile de desfășurare a lucrărilor parlamentare, însă aceasta nu poate fi exercitată în mod discreționar, abuziv, cu încălcarea atribuțiilor constituționale ale Parlamentului sau a normelor imperative privind procedura parlamentară; normele regulamentare reprezintă instrumentele juridice care permit desfășurarea activităților parlamentare în scopul îndeplinirii atribuțiilor constituționale ale forului legislativ și trebuie interpretate și aplicate cu bună-credință și în spiritul loialității față de Legea fundamentală"* [Decizia nr.209/2012[1732]].

„Curtea Constituțională nu este competentă a se pronunța și asupra modului de aplicare a regulamentelor parlamentare" [Decizia nr.44/1993[1733], Decizia nr.68/1993[1734], Decizia nr.22/1995[1735], Decizia nr.98/1995[1736], Decizia nr.710/2009[1737], Decizia nr.786/2009[1738], Decizia nr.1.466/2009[1739], Decizia nr.209/2012, Decizia nr.738/2012[1740], Decizia nr.260/2015[1741], par.18, sau Decizia nr.223/2016[1742], par.33 și 34].

„Autonomia regulamentară nu poate fi exercitată în mod discreționar, cu încălcarea atribuțiilor constituționale ale Parlamentului". (Decizia nr.209/2012).

„[Cu privire la critica potrivit căreia – sn] raportul Comisiei speciale comune, elaborat în cadrul procedurii din fața Camerei Deputaților, a fost difuzat deputaților în chiar ziua votului, așadar, cu nerespectarea termenului de cel puțin 5 zile înainte de data stabilită pentru dezbaterea proiectului de lege sau a propunerii legislative în plenul Camerei Deputaților, [Curtea a constatat că – sn] *nerespectarea termenului de depunere a raportului constituie o problemă de aplicare a regulamentelor celor două Camere. Cu alte cuvinte, obiectul criticii de neconstituționalitate îl constituie, de fapt, modul în care, ulterior prezentării raportului de către Comisia specială comună a Camerei Deputaților și Senatului pentru sistematizarea, unificarea și asigurarea stabilității legislative în domeniul justiției, au fost respectate normele și procedurile parlamentare de adoptare a legii. Or, în măsura în care dispozițiile regulamentare invocate în susținerea criticilor nu au relevanță constituțională, nefiind consacrate expres sau implicit într-o normă constituțio-*

1732 Publicată în Monitorul Oficial al României, Partea I, nr.188 din 22 martie 2012.
1733 Publicată în Monitorul Oficial al României, Partea I, nr.190 din 10 august 1993.
1734 Publicată în Monitorul Oficial al României, Partea I, nr.12 din 19 ianuarie 1993.
1735 Publicată în Monitorul Oficial al României, Partea I, nr.64 din 7 aprilie 1995.
1736 Publicată în Monitorul Oficial al României, Partea I, nr.248 din 31 octombrie 1995.
1737 Publicată în Monitorul Oficial al României, Partea I, nr.358 din 28 mai 2009.
1738 Publicată în Monitorul Oficial al României, Partea I, nr.400 din 12 iunie 2009.
1739 Publicată în Monitorul Oficial al României, Partea I, nr.893 din 21 decembrie 2009.
1740 Publicată în Monitorul Oficial al României, Partea I, nr.690 din 8 octombrie 2012.
1741 Publicată în Monitorul Oficial al României, Partea I, nr.318 din 11 mai 2015.
1742 Publicată în Monitorul Oficial al României, Partea I, nr.349 din 6 mai 2016.

nală, aspectele invocate de autorii sesizării nu constituie probleme de constituționalitate, ci de aplicare a normelor regulamentare" [Decizia nr.650/2018, par.214 și 216].

„În ansamblul normelor constituționale, dispozițiile care cuprind reguli cu caracter procedural incidente în materia legiferării se corelează și sunt subsumate principiului legalității, consacrat de art.1 alin.(5) din Constituție, la rândul său acest principiu stând la temelia statului de drept, consacrat expres prin dispozițiile art.1 alin.(3) din Constituție. De altfel, și Comisia de la Veneția, în raportul intitulat Rule of law checklist, adoptat la cea de-a 106-a sesiune plenară (Veneția, 11-12 martie 2016), reține că procedura de adoptare a legilor reprezintă un criteriu în aprecierea legalității, care constituie prima dintre valorile de referință ale statului de drept (pct. IIA5). Sub acest aspect sunt relevante, între altele, potrivit aceluiași document, existența unor reguli constituționale clare în privința procedurii legislative, dezbaterile publice ale proiectelor de legi, justificarea lor adecvată, existența evaluărilor de impact înainte de adoptarea legilor. Referitor la rolul acestor proceduri, Comisia reține că statul de drept este legat de democrație prin faptul că promovează responsabilitatea și accesul la drepturile care limitează puterile majorității.

Stabilirea unor reguli clare în privința procedurii legislative, inclusiv la nivelul Legii fundamentale, și respectarea regulilor astfel stabilite constituie o garanție împotriva abuzului de putere al majorității parlamentare, așadar, o garanție a democrației. În măsura în care normele privind procedura legislativă au consacrare constituțională, Curtea Constituțională este competentă să se pronunțe asupra modului în care legile adoptate de Parlament le respectă și să sancționeze în mod corespunzător încălcarea lor" [Decizia nr.128/2019[1743], par.32 și 33].

„Astfel o legiferare accelerată, fără să fi fost aprobată în prealabil procedura de urgență, nu poate fi realizată în cadrul procedurii generale de adoptare a legilor, întrucât excedează cadrului constituțional de referință, fiind contrară art.75 și a art.76 alin.(3) din Constituție, care reprezintă fundamentul dezbaterilor democratice din Parlament și, care, prin substratul lor de valoare, presupun un schimb de idei între cei ce exercită suveranitatea națională. Evitarea sau limitarea dezbaterilor parlamentare prin scurtarea nejustificată a termenelor, fără a respecta prevederile constituționale exprese în acest sens, denotă o atingere adusă însești unei valori fundamentale a statului, și anume caracterului său democratic. Din punct de vedere axiologic, dezbaterile parlamentare în forma lor comună/generală sunt în mod intrinsec legate de democrație, astfel că orice abatere de la aceasta trebuie să fie realizată numai în condițiile și limitele stabilite prin Constituție. Nesocotirea acestei valori supreme plasează destinatarul normei juridice într-o situație de perpetuă insecuritate juridică. Așadar, deși la o primă vedere pare că Parlamentul nu a respectat doar un aspect procedural, poate formal, în realitate, consecințele pe care această neregularitate le implică sunt grave, afectând ideea de democrație și de securitate juridică în substanța lor" [Decizia nr.261/2022[1744], par.75].

Prin urmare, se poate constata că, în anumite situații, puține la număr, Curtea verifică modul de desfășurare a procedurii parlamentare, ca o chestiune de constituționalitate formală/ extrinsecă, respectarea acesteia constituind premisele pentru reprezentarea tuturor opiniilor în dezbaterea parlamentară. Cu alte cuvinte, pentru Curte garanția respectării procedurii reprezintă, în mod implicit, și respectarea substanței dezbaterii parlamentare.

16. Faptul că decizia aparține legiuitorului sau că a fost luată în urma unor consultări publice sau a unor dezbateri publice este o dovadă concludentă a legitimității democratice a deciziei?

Art.2 din Constituția României prevede că suveranitatea națională aparține poporului român, care o exercită prin organele sale reprezentative, constituite prin alegeri libere, periodice și corecte, precum și prin referendum.

Art.90 din Constituție stabilește că Președintele României, după consultarea Parlamentului, poate cere poporului să-și exprime, prin referendum, voința cu privire la probleme de interes național.

Totodată, art.74 alin.(1) din Constituția României prevede că inițiativa legislativă aparține,

1743 Publicată în Monitorul Oficial al României, Partea I, nr.189 din 8 martie 2019.
1744 Publicată în Monitorul Oficial al României, Partea I, nr.570 din 10 iunie 2022.

după caz, Guvernului, deputaților, senatorilor sau unui număr de cel puțin 100.000 de cetățeni cu drept de vot. Cetățenii care își manifestă dreptul la inițiativă legislativă trebuie să provină din cel puțin un sfert din județele țării, iar în fiecare din aceste județe, respectiv în municipiul București, trebuie să fie înregistrate cel puțin 5.000 de semnături în sprijinul acestei inițiative. Conform art.150 alin.(1) din Constituție, revizuirea Constituției poate fi inițiată de Președintele României la propunerea Guvernului, de cel puțin o pătrime din numărul deputaților sau al senatorilor, precum și de cel puțin 500.000 de cetățeni cu drept de vot.

Indiferent că o lege este adoptată ca urmare a unei inițiative guvernamentale, parlamentare sau cetățenești, sau dacă aceasta a valorificat rezultatele unui referendum consultativ, ea va beneficia de aceeași legitimitate democratică. Consultările și dezbaterile publice coagulează inițiativa legislativă și imprimă un anumit conținut acesteia, fără, însă, ca evaluarea constituționalității legii să fie deferentă în raport cu ideile, tezele sau concepțiile dezbătute și promovate.

Nu întotdeauna un referendum consultativ valid sau o inițiativă cetățenească produce efectul așteptat, respectiv adoptarea unei legi în sensul rezultatului referendumului sau al inițiativei cetățenești.

Astfel, data de 22 noiembrie 2009 s-a desfășurat un referendum consultativ al cărui rezultat validat a fost acela de a se trece la un Parlament unicameral compus din 300 de membri, însă inițiativa de revizuire a Constituției care valorifica rezultatul referendumului nu a fost adoptată, fiind respinsă de Parlament (2012).

Totodată, la data de 26 mai 2019 s-a desfășurat un referendum consultativ al cărui rezultat validat a fost acela de a se interzicerea amnistia și grațierea în privința persoanelor condamnate pentru infracțiuni de corupție, însă inițiativa de revizuire a Constituției care valorifica rezultatul referendumului, înainte ca Parlamentul să se pronunțe asupra acesteia, a fost constatată ca fiind neconstituțională, CCR reținând că:

„Interdicția generală de a acorda amnistia sau grațierea în privința „faptelor" de corupție are drept efect negarea vocației persoanelor care au săvârșit fapte de corupție să beneficieze de actul amnistiei sau grațierii. Un asemenea tratament juridic, indiferent de nivelul său normativ, desconsideră existența umană a individului, plasând, din punct de vedere uman, persoanele care au săvârșite „fapte" de corupție într-o situație de inferioritate, ceea ce se constituie într-o limitare a demnității lor umane. Propunerea legislativă de revizuire a Constituției României limitează în mod excesiv puterea statului și a posibilității sale de apreciere, ceea ce afectează, în mod nepermis, exercitarea puterii publice în favoarea/beneficiul cetățenilor. Astfel, ca efect al limitării puterii publice, o categorie de cetățeni este privată de o vocație pe considerente cu caracter circumstanțial, contrar demnității umane. Curtea constată, astfel, că măsura preconizată reprezintă o desconsiderare a principiilor subiective care caracterizează ființa umană, ceea ce se constituie, prin prisma art.152 alin.(2) din Constituție, într-o atingere adusă demnității umane" [Decizia nr.464/2019[1745], par.54].

Totodată, o inițiativă cetățenească de revizuire a Constituției în sensul definirii căsătoriei ca fiind uniunea liber consimțită între un bărbat și o femeie – și nu între soți – a fost adoptată în Parlament, însă, nu a putut fi aprobată prin referendumul desfășurat în perioada 6-7 octombrie 2018, datorită neîntrunirii cvorumului legal de participare, drept pentru care referendumul a fost invalidat de CCR [Hotărârea nr.2/2018[1746]].

III. Sfera drepturilor, legalitate și proporționalitate

Gheorghe Stan, judecător

Cristina Titirișcă, magistrat-asistent

1745 Publicată în Monitorul Oficial al României, Partea I, nr.646 din 5 august 2019.
1746 Publicată în Monitorul Oficial al României, Partea I, nr.1012 din 29 noiembrie 2018.

17. Curtea dumneavoastră a dat vreodată dovadă de deferență în etapa definirii drepturilor, acordând importanță definiției drepturilor guvernului sau aplicării acesteia la faptele în cauză?

Principiul separației și echilibrului puterilor presupune existența unui control reciproc între puterile statului sub aspectul exercitării în conformitate cu legea a atribuțiilor lor specifice, acesta fiind un mecanism specific statului de drept și democratic pentru evitarea abuzurilor din partea uneia sau alteia dintre puterile statului[1747]. În acest sens, Curtea Constituțională a analizat conceptul de loialitate constituțională și, implicit, principiul colaborării loiale între instituțiile statului, fără consacrare constituțională expresă, dar a cărui importanță în cadrul mecanismelor inerente statului de drept a fost relevată printr-o jurisprudență constantă a instanței constituționale, pe care l-a atașat conținutului normativ al art.1 alin.(5) din Constituție[1748]. Astfel, Curtea a reținut[1749] că o primă componentă a statului de drept o reprezintă punerea în aplicare a prevederilor explicite și formale ale legii și ale Constituției. Cu alte cuvinte, sub aspectul colaborării loiale între instituțiile/autoritățile statului, o primă semnificație a conceptului o constituie respectarea normelor de drept pozitiv, aflate în vigoare într-o anumită perioadă temporală, care reglementează în mod expres sau implicit competențe, prerogative, atribuții, obligații sau îndatoriri ale instituțiilor/autorităților statului. Curtea a constatat că respectarea statului de drept nu se limitează la această componentă, ci implică, din partea autorităților publice, comportamente și practici constituționale, care își au sorgintea în ordinea normativă constituțională, privită ca ansamblu de principii care fundamentează raporturile sociale, politice, juridice ale unei societăți. Altfel spus, această ordine normativă constituțională are o semnificație mai amplă decât normele pozitive edictate de legiuitor, constituind cultura constituțională specifică unei comunități naționale. Prin urmare, colaborarea loială presupune, dincolo de respectul față de lege, respectul reciproc al autorităților/instituțiilor statului, ca expresie a unor valori constituționale asimilate, asumate și promovate, în scopul asigurării echilibrului între puterile statului. Loialitatea constituțională poate fi caracterizată, deci, ca fiind o valoare-principiu intrinsecă Legii fundamentale, în vreme ce colaborarea loială între autoritățile/instituțiile statului are un rol definitoriu în implementarea Constituției. Așa cum a subliniat Comisia de la Veneția, „respectul pentru Constituție nu poate fi limitat la executarea literală a dispozițiilor sale operaționale. Constituția prin însăși natura sa, în plus față de garantarea drepturilor omului, oferă un cadru pentru instituțiile statului, stabilește atribuțiile și obligațiile acestora. Scopul acestor dispoziții este de a permite buna funcționare a instituțiilor, în baza cooperării loiale dintre acestea. Șeful statului, Parlamentul, Guvernul, sistemul judiciar, toate servesc scopului comun de a promova interesele țării ca un întreg, nu interesele înguste ale unei singure instituții sau ale unui partid politic care a desemnat titularul funcției. Chiar dacă o instituție este într-o situație de putere, atunci când este în măsură să influențeze alte instituții ale statului, trebuie să facă acest lucru având în vedere interesul statului ca un întreg, inclusiv, ca o consecință, interesele celorlalte instituții și cele ale minorității parlamentare" (Avizul Comisiei de la Veneția privind compatibilitatea cu principiile constituționale și statul de drept a acțiunilor Guvernului României cu privire la alte instituții ale statului și Ordonanța de urgență a Guvernului de modificare a Legii nr.47/1992 privind organizarea și

1747 Decizia Curții Constituționale nr.1.109 din 8 septembrie 2011, publicată în Monitorul Oficial al României, Partea I, nr.773 din 2 noiembrie 2011.

1748 Art.1 din Constituție – Statul român: „(1) România este stat național, suveran și independent, unitar și indivizibil. (2) Forma de guvernământ a statului român este republica. (3) România este stat de drept, democratic și social, în care demnitatea omului, drepturile și libertățile cetățenilor, libera dezvoltare a personalității umane, dreptatea și pluralismul politic reprezintă valori supreme, în spiritul tradițiilor democratice ale poporului român și idealurilor Revoluției din decembrie 1989, și sunt garantate. (4) Statul se organizează potrivit principiului separației și echilibrului puterilor – legislativă, executivă și judecătorească – în cadrul democrației constituționale. (5) În România, respectarea Constituției, a supremației sale și a legilor este obligatorie".

1749 Decizia Curții Constituționale nr.611 din 3 octombrie 2017, publicată în Monitorul Oficial al României, Partea I, nr.877 din 7 noiembrie 2017.

funcţionarea Curţii Constituţionale şi Ordonanţa de urgenţă a Guvernului de modificare şi completare a Legii nr.3/2000 privind organizarea şi desfăşurarea referendumului în România, aviz adoptat de la cea de-a 93-a Sesiune Plenară/Veneţia, 14-15 decembrie 2012, paragraful 87). Conduita instituţională care se circumscrie colaborării loiale are, prin urmare, o componentă *extra legem*, întemeiată pe practici constituţionale, care au ca finalitate primordială buna funcţionare a autorităţilor statului, buna administrare a intereselor publice şi respectul faţă de drepturile şi libertăţile fundamentale ale cetăţenilor. Finalitatea secundară este evitarea conflictelor interinstituţionale şi înlăturarea blocajelor în exerciţiul prerogativelor lor legale. Instrumentele care concură la realizarea acestor finalităţi şi care fac dovada unui comportament loial faţă de valorile constituţionale sunt dialogul instituţional şi stabilirea unor practici reciproc acceptate. Aceste instrumente trebuie să constituie fundamentele soluţionării „împreună", „prin acordul părţilor", iar nu „împotriva", „în detrimentul" uneia sau alteia, a eventualelor diferende ivite în raporturile dintre autorităţi, cauzate de situaţii de fapt sau de drept confuze, echivoce. În virtutea principiului cooperării loiale între autorităţi este, astfel, necesar ca fiecare dintre acestea să depună diligenţe raţionale şi sporite în cadrul dialogului instituţional legal pentru evitarea pe cât cu putinţă a generării de conflicte juridice de natură constituţională. În mod indiscutabil, cooperarea loială nu presupune decât soluţii în acord cu ordinea normativă constituţională, întrucât temeiul acestora poate fi *extra legem*, dar nicidecum *contra legem*. Astfel, nu poate fi calificată drept colaborare loială conduita părţilor care, pentru a evita un conflict, adoptă o soluţie care contravine normelor legale sau constituţionale în vigoare. Este evident că un cadru legislativ clar, riguros, previzibil şi exhaustiv este de natură a înlătura posibile astfel de conflicte interinstituţionale, însă legiuitorului, chiar şi celui constituţional, nu i se poate imputa faptul că soluţiile legislative adoptate nu cuprind în ipotezele lor normative toate posibilele situaţii pe care realitatea (socială, politică, juridică), muabilă în esenţa ei, le poate genera. În această lumină, noţiunea de colaborare loială nu poate avea un conţinut stabil, concret, cuantificabil, ci, dimpotrivă acesta este unul dinamic, variabil de la un caz la altul, în funcţie de actorii implicaţi, dar şi de la o epocă la alta, în funcţie de evoluţia cadrului legislativ care reglementează relaţiile interinstituţionale sau de existenţa unor bune practici/cutume care guvernează aceste relaţii. Însă, ceea ce poate fi stabilit cu caracter peremptoriu este faptul că loialitatea instituţiilor/autorităţilor statului trebuie manifestată întotdeauna faţă de principii şi valori constituţionale, în vreme ce relaţiile interinstituţionale trebuie guvernate de dialog, de echilibru şi de respect reciproc.

Având în vedere aceste considerente, Curtea a observat că rolul de a contribui la configurarea principiului colaborării loiale şi al respectului reciproc îl au, în principal, instituţiile/autorităţile puse în situaţia de a colabora. Acestora le revine sarcina de a contura/structura posibilele forme pe care le poate adopta o conduită loială, în raport cu competenţele legale ale fiecăreia dintre instituţiile/autorităţile aflate în colaborare şi în raport cu valorile şi principiile constituţionale incidente respectivei colaborări. Colaborarea trebuie să fie făcută în formele prevăzute de lege, iar acolo unde legea tace, autorităţile publice trebuie să identifice şi să stabilească, cu bună-credinţă, acele forme de colaborare care valorizează ordinea normativă constituţională şi care nu prejudiciază principiile constituţionale sub imperiul cărora ele funcţionează şi relaţionează şi nici drepturile sau libertăţile fundamentale ale cetăţenilor în serviciul cărora îşi desfăşoară activitatea. Buna-credinţă trebuie manifestată, deci, în scopul găsirii de soluţii care să surmonteze eventualele blocaje instituţionale şi care să asigure funcţionarea eficientă a fiecărei autorităţi în parte, potrivit competenţelor atribuite de lege. În situaţia în care identificarea acestor bune practici este dificil de realizat şi rezolvarea diferendelor inter-instituţionale eşuează, autorităţile publice au posibilitatea de a apela la instrumentele constituţionale de mediere, respectiv la procedura soluţionării conflictelor de natură constituţională, prevăzută de art.146 lit.e) din Constituţie, care are ca scop tocmai restabilirea ordinii normative constituţionale, prin interpretarea normelor Legii fundamentale incidente şi stabilirea reperelor concrete de conduită loială faţă de valorile şi principiile constituţionale.

Având în vedere aceste repere jurisprudenţiale, rezultă că instanţa română de contencios constituţional are rol de mediator între puterile statului şi nu acordă prevalenţă drepturilor/competenţelor unei instituţii în defavoarea alteia. Curtea judecă din perspectiva respectării atribuţiilor conferite de Constituţie.

18. Afectează drepturile aplicabile intensitatea deferenței? Consideră instanța dumneavoastră că anumite drepturi sau aspecte ale drepturilor sunt mai importante și că, prin urmare, ingerințele în exercitarea acestora necesită o examinare mai riguroasă decât altele?

Nu. În ceea ce privește drepturile omului, potrivit art.20 din Constituție, „(1) Dispozițiile constituționale privind drepturile și libertățile cetățenilor vor fi interpretate și aplicate în concordanță cu Declarația Universală a Drepturilor Omului, cu pactele și cu celelalte tratate la care România este parte. (2) Dacă există neconcordanțe între pactele și tratatele privitoare la drepturile fundamentale ale omului, la care România este parte, și legile interne, au prioritate reglementările internaționale, cu excepția cazului în care Constituția sau legile interne conțin dispoziții mai favorabile". România a devenit parte la Convenția pentru apărarea drepturilor omului și a libertăților fundamentale în urma ratificării ei prin Legea nr.30/1994, publicată în Monitorul Oficial al României, Partea I, nr.135 din 31 mai 1994, asumându-și obligația de a respecta prevederile acestei Convenții, precum și interpretarea dată de Curtea Europeană a Drepturilor Omului acestei Convenții, în limitele prevăzute de această Convenție, în conformitate cu prevederile art.46, potrivit cărora „Înaltele părți contractante se angajează să se conformeze hotărârilor definitive ale Curții în litigiile în care ele sunt părți"[1750].

19. Aveți o scară de claritate atunci când examinați constituționalitatea unei legi? Cum decideți cu privire la claritatea unei legi? Când aplicați regula interpretării *In claris non fit interpretatio*?

Curtea Constituțională a României are o bogată jurisprudență cu privire la calitatea legii, care reprezintă considerentele de principiu prin raportare la care se analizează punctual, în speța dedusă judecății, critica de neconstituționalitate referitoare la încălcarea principiului legalității, în componenta sa privind calitatea legii/a reglementării. Curtea, în jurisprudența sa, a stabilit că trăsătura esențială a statului de drept o constituie supremația Constituției și obligativitatea respectării legii[1751] și că „statul de drept asigură supremația Constituției, corelarea tuturor legilor și tuturor actelor normative cu aceasta"[1752], ceea ce înseamnă că acesta „implică, prioritar, respectarea legii, iar statul democratic este prin excelență un stat în care se manifestă domnia legii"[1753]. Curtea a mai reținut că „principiul legalității este unul de rang constituțional"[1754], astfel încât „încălcarea legii are drept consecință imediată nesocotirea art.1 alin.(5) din Constituție, care prevede că respectarea legilor este obligatorie. Încălcarea acestei obligații constituționale atrage implicit afectarea principiului statului de drept, consacrat prin art.1 alin.(3) din Constituție"[1755]. Potrivit jurisprudenței Curții referitoare la încălcarea prevederilor constituționale ale art.1 alin.(5) în componenta sa privind calitatea legii, una dintre cerințele principiului respectării legilor vizează calitatea actelor normative[1756]. Pentru a fi respectată de destinatarii săi, legea trebuie să îndeplinească anumite cerințe de precizie, claritate și previzibilitate, astfel încât acești destinatari să își poată adapta în mod corespunzător conduita. În acest sens, Curtea

1750 A se vedea, în acest sens, Decizia Curții Constituționale nr.233 din 15 februarie 2011, publicată în Monitorul Oficial al României, Partea I, nr.340 din 17 mai 2011.

1751 Decizia Curții Constituționale nr.232 din 5 iulie 2001, publicată în Monitorul Oficial al României, Partea I, nr.727 din 15 noiembrie 2001, Decizia Curții Constituționale nr. 234 din 5 iulie 2001, publicată în Monitorul Oficial al României, Partea I, nr.558 din 7 septembrie 2001, sau Decizia Curții Constituționale nr.53 din 25 ianuarie 2011, publicată în Monitorul Oficial al României, Partea I, nr.90 din 3 februarie 2011.

1752 Decizia Curții Constituționale nr.22 din 27 ianuarie 2004, publicată în Monitorul Oficial al României, Partea I, nr.233 din 17 martie 2004.

1753 Decizia Curții Constituționale nr.13 din 9 februarie 1999, publicată în Monitorul Oficial al României, Partea I, nr.178 din 26 aprilie 1999.

1754 Decizia Curții Constituționale nr.901 din 17 iunie 2009, publicată în Monitorul Oficial al României, Partea I, nr.503 din 21 iulie 2009.

1755 Decizia Curții Constituționale nr.783 din 26 septembrie 2012, publicată în Monitorul Oficial al României, Partea I, nr.684 din 3 octombrie 2012.

1756 Decizia Curții Constituționale nr.1 din 10 ianuarie 2014, publicată în Monitorul Oficial al României, Partea I, nr.123 din 19 februarie 2014, paragraful 225.

Constituțională a statuat în jurisprudența sa că, de principiu, orice act normativ trebuie să îndeplinească anumite condiții calitative, printre acestea numărându-se previzibilitatea, ceea ce presupune că acesta trebuie să fie suficient de precis și clar pentru a putea fi aplicat; astfel, formularea cu o precizie suficientă a actului normativ permite persoanelor interesate - care pot apela, la nevoie, la sfatul unui specialist - să prevadă într-o măsură rezonabilă, în circumstanțele speței, consecințele care pot rezulta dintr-un act determinat. Desigur, poate să fie dificil să se redacteze legi de o precizie totală și o anumită suplețe poate chiar să se dovedească de dorit, suplețe care nu trebuie să afecteze, însă, previzibilitatea legii[1757] . Totodată, Curtea Constituțională s-a referit la jurisprudența Curții Europene a Drepturilor Omului, care a constatat că semnificația noțiunii de previzibilitate depinde în mare măsură de contextul textului despre care este vorba, de domeniul pe care îl acoperă, precum și de numărul și calitatea destinatarilor săi[1758]. Previzibilitatea legii nu se opune ca persoana interesată să fie nevoită să recurgă la o bună consiliere pentru a evalua, la un nivel rezonabil în circumstanțele cauzei, consecințele ce ar putea decurge dintr-o anumită acțiune[1759]. Având în vedere principiul aplicabilității generale a legilor, Curtea de la Strasbourg a reținut că formularea acestora nu poate prezenta o precizie absolută. Una dintre tehnicile standard de reglementare costă în recurgerea mai degrabă la categorii generale decât la liste exhaustive. Astfel, numeroase legi folosesc, prin forța lucrurilor, formule mai mult sau mai puțin vagi, a căror interpretare și aplicare depind de practică. Oricât de clar ar fi redactată o normă juridică, în orice sistem de drept, există un element inevitabil de interpretare judiciară. Nevoia de elucidare a punctelor neclare și de adaptare la circumstanțele schimbătoare va exista întotdeauna. Din nou, deși certitudinea este extrem de dezirabilă, aceasta ar putea antrena o rigiditate excesivă, or legea trebuie să fie capabilă să se adapteze schimbărilor de situație. Rolul decizional conferit instanțelor urmărește tocmai înlăturarea dubiilor ce persistă cu ocazia interpretării normelor, dezvoltarea progresivă a dreptului prin intermediul jurisprudenței ca izvor de drept fiind o componentă necesară și bine înrădăcinată în tradiția legală a statelor membre.

Ca atare, potrivit jurisprudenței constante a Curții Constituționale, legea trebuie să întrunească cele trei cerințe de calitate care rezultă din art.1 alin.(5) din Constituție - claritate, precizie și previzibilitate. Curtea a statuat că respectarea legilor este obligatorie, însă nu se poate pretinde unui subiect de drept să respecte o lege care nu este clară, precisă și previzibilă, întrucât acesta nu își poate adapta conduita în funcție de ipoteza normativă a legii. De aceea, una dintre cerințele principiului respectării legilor vizează calitatea actelor normative. Așadar, orice act normativ trebuie să îndeplinească anumite condiții calitative, respectiv să fie clar, precis și previzibil.[1760] Prin urmare, legiuitorului îi revine obligația ca, în actul de legiferare, indiferent de domeniul în care își exercită această competență constituțională, să dea dovadă de o atenție sporită în respectarea principiului clarității și previ-

1757 Decizia Curții Constituționale nr.743 din 2 iunie 2011, publicată în Monitorul Oficial al României, Partea I, nr.579 din 16 august 2011, Decizia Curții Constituționale nr.1 din 11 ianuarie 2012, publicată în Monitorul Oficial al României, Partea I, nr.53 din 23 ianuarie 2012 sau Decizia Curții Constituționale nr.447 din 29 octombrie 2013, publicată în Monitorul Oficial al României, Partea I, nr.674 din 1 noiembrie 2013

1758 Decizia Curții Constituționale nr.772 din 15 decembrie 2016, publicată în Monitorul Oficial al României, Partea I, nr.315 din 3 mai 2017, paragrafele 22 și 23.

1759 Hotărârea din 24 mai 2007, pronunțată în Cauza Dragotoniu și Militaru-Pidhorni împotriva României, paragraful 35, și Hotărârea din 20 ianuarie 2009, pronunțată în Cauza Sud Fondi – S.R.L. și alții împotriva Italiei, paragraful 109.

1760 De exemplu, Decizia Curții Constituționale nr.1 din 10 ianuarie 2014, publicată în Monitorul Oficial al României, Partea I, nr.123 din 19 februarie 2014, paragrafele 223-225, Decizia Curții Constituționale nr.363 din 7 mai 2015, publicată în Monitorul Oficial al României, Partea I, nr.495 din 6 iulie 2015, paragrafele 16-20, Decizia Curții Constituționale nr.603 din 6 octombrie 2015, publicată în Monitorul Oficial al României, Partea I, nr.845 din 13 noiembrie 2015, paragrafele 20-23, sau Decizia Curții Constituționale nr.405 din 15 iunie 2016, publicată în Monitorul Oficial al României, Partea I, nr.517 din 8 iulie 2016, paragrafele 45, 46, 55.

zibilității legii. Curtea a stabilit că cerința de claritate a legii vizează caracterul neechivoc al obiectului reglementării, cea de precizie se referă la exactitatea soluției legislative alese și a limbajului folosit, în timp ce previzibilitatea legii privește scopul și consecințele pe care le antrenează[1761]. De asemenea, Curtea a mai reținut că legiuitorul trebuie să se raporteze la reglementările ce reprezintă un reper de claritate, precizie și previzibilitate, iar erorile de apreciere în redactarea actelor normative nu trebuie să se perpetueze în sensul de a deveni ele însele un precedent în activitatea de legiferare; din contră, aceste erori trebuie corectate pentru ca actele normative să contribuie la realizarea unei securități sporite a raporturilor juridice[1762].

În ceea ce privește regula interpretării *In claris non fit interpretatio*, aceasta se poate aplica în analiza incidenței actelor obligatorii ale Uniunii Europene în cadrul controlului de constituționalitate, respectiv în cazul în care autorul sesizării de neconstituționalitate invocă nerespectarea prevederilor art.148 din Constituție[1763]. În acest sens, Curtea a reținut că „folosirea unei norme de drept european în cadrul controlului de constituționalitate ca normă interpusă celei de referință implică, în temeiul art.148 alin.(2) și (4) din Constituția României, o condiționalitate cumulativă: pe de o parte, această normă trebuie să fie suficient de clară, precisă și neechivocă prin ea însăși sau înțelesul acesteia să fi fost stabilit în mod clar, precis și neechivoc de Curtea de Justiție a Uniunii Europene, iar, pe de altă parte, norma trebuie să se circumscrie unui anumit nivel de relevanță constituțională, astfel încât conținutul său normativ să susțină posibila încălcare de către legea națională a Constituției - unica normă directă de referință în cadrul controlului de constituționalitate"[1764].

20. Care este nivelul de intensitate al controlului Curții dumneavoastră în ceea ce privește stabilirea obiectivului legitim?

În vederea realizării testului de proporționalitate, Curtea Constituțională a României, stabilește, mai întâi, scopul urmărit de legiuitor prin măsura criticată și dacă acesta este unul legitim, întrucât testul de proporționalitate se va putea raporta doar la un scop legitim. Este o analiză

1761 Decizia Curții Constituționale nr.183 din 2 aprilie 2014, publicată în Monitorul Oficial al României, Partea I, nr.381 din 22 mai 2014, paragraful 23.

1762 Decizia Curții Constituționale nr.390 din 2 iulie 2014, publicată în Monitorul Oficial al României, Partea I, nr.532 din 17 iulie 2014, paragraful 32.

1763 Art.148 – Integrarea în Uniunea Europeană – „(1) Aderarea României la tratatele constitutive ale Uniunii Europene, în scopul transferării unor atribuții către instituțiile comunitare, precum și al exercitării în comun cu celelalte state membre a competențelor prevăzute în aceste tratate, se face prin lege adoptată în ședința comună a Camerei Deputaților și Senatului, cu o majoritate de două treimi din numărul deputaților și senatorilor.
(2) Ca urmare a aderării, prevederile tratatelor constitutive ale Uniunii Europene, precum și celelalte reglementări comunitare cu caracter obligatoriu, au prioritate față de dispozițiile contrare din legile interne, cu
respectarea prevederilor actului de aderare. (3) Prevederile alineatelor (1) și (2) se aplică, în mod corespunzător, și pentru aderarea la actele de revizuire a tratatelor constitutive ale Uniunii Europene. (4) Parlamentul, Președintele României, Guvernul și autoritatea judecătorească garantează aducerea la îndeplinire a obligațiilor rezultate din actul aderării și din prevederile alineatului (2). (5) Guvernul transmite celor două Camere ale Parlamentului proiectele actelor cu caracter obligatoriu înainte ca acestea să fie supuse aprobării instituțiilor Uniunii Europene".

1764 Decizia Curții Constituționale nr.64 din 24 februarie 2015, publicată în Monitorul Oficial al României, Partea I, nr.286 din 28 aprilie 2015, sau Decizia Curții Constituționale nr.668 din 18 mai 2011, publicată în Monitorul Oficial al României, Partea I, nr.487 din 8 iulie 2011.

empirică, întrucât Curtea analizează, de exemplu, contextul economic sau expunerea de motive a măsurii legislative promovate de legiuitorul primar sau delegat. Primul text de proporționalitate a fost efectuat de Curte prin Decizia nr.266 din 21 mai 2013 referitoare la excepția de neconstituționalitate a dispozițiilor art.82 din Legea audiovizualului nr.504/2002, publicată în Monitorul Oficial al României, Partea I, nr.443 din 19 iulie 2013.

21. Ce test de proporționalitate aplică Curtea? Urmărește instanța dumneavoastră toate etapele testului clasic de proporționalitate (adică îndeplinirea unei triple cerințe de adecvare, necesitate și proporționalitate în sens strict)?

Textul art.53 din Constituție stabilește condițiile și limitele restrângerii exercițiului unor drepturi sau al unor libertăți[1765]. El are în vedere drepturile și libertățile fundamentale înscrise în Capitolul II al Titlului II din Constituția României. Conform principiului proporționalității, orice măsură luată trebuie să fie adecvată — capabilă în mod obiectiv să ducă la îndeplinirea scopului, necesară — indispensabilă pentru îndeplinirea scopului și proporțională — justul echilibru între interesele concrete pentru a fi corespunzătoare scopului urmărit. Astfel, în vederea realizării testului de proporționalitate, Curtea trebuie, mai întâi, să stabilească scopul urmărit de legiuitor prin măsura criticată și dacă acesta este unul legitim, întrucât testul de proporționalitate se va putea raporta doar la un scop legitim[1766].

22. Parcurge instanța dumneavoastră toate etapele aplicabile ale testului de proporționalitate?

Da.

23. Există cauze în care instanța dumneavoastră acceptă că măsura contestată îndeplinește una sau mai multe etape ale testului de proporționalitate, chiar dacă există în mod clar probe insuficiente pentru a dovedi acest fapt?

Nu. Curtea Constituțională a României evaluează acte normative prin raportare la normele și principiile constituționale, iar cadrul în care judecă este determinat de lege și de sesizarea care face obiectul analizei Curții.

24. Apariția controlului de proporționalitate în jurisprudența Curții dumneavoastră a coincis cu apariția doctrinei deferenței judiciare?

Nu. Testul de proporționalitate este aplicabil în cauzele în care se invocă nerespectarea dispozițiilor art.53 din Constituție.

25. Jurisprudența Curții Europene a Drepturilor Omului a influențat abordarea Curții dumneavoastră cu privire la deferență? Doctrina Curții Europene a Drepturilor Omului privind marja de apreciere este echivalentul național al marjei de apreciere pe care o acordă Curtea dumneavoastră? În cazul unui răspuns negativ, cât de des se suprapun considerentele referitoare la marja de apreciere a Curții Europene a Drepturilor Omului cu cele referitoare la deferența Curții dumneavoastră în cauze similare?

Nu. Exigențele degajate din jurisprudența Curții Europene a Drepturilor Omului privind aplicarea principiului proporționalității au fost receptate în jurisprudența Curții Constituționale a Româ-

1765 Art.53. - Restrângerea exercițiului unor drepturi sau al unor libertăți – „(1) Exercițiul unor drepturi sau al unor libertăți poate fi restrâns numai prin lege și numai dacă se impune, după caz, pentru: apărarea securității naționale, a ordinii, a sănătății ori a moralei publice, a drepturilor și a libertăților cetățenilor; desfășurarea instrucției penale; prevenirea consecințelor unei calamități naturale, ale unui dezastru ori ale unui sinistru deosebit de grav. (2) Restrângerea poate fi dispusă numai dacă este necesară într-o societate democratică. Măsura trebuie să fie proporțională cu situația care a determinat-o, să fie aplicată în mod nediscriminatoriu și fără a aduce atingere existenței dreptului sau a libertății".

1766 Decizia Curții Constituționale nr.462 din 17 septembrie 2014, publicată în Monitorul Oficial al României, Partea I, nr.775 din 24 octombrie 2014.

niei, iar standardul de protecţie al drepturilor fundamentale reglementate de Constituţia României nu este inferior celui stabilit prin Convenţia pentru apărarea drepturilor omului.

26. A condamnat Curtea Europeană a Drepturilor Omului statul din cauza deferenţei arătate de instanţa dumneavoastră într-o anumită cauză, ceea ce a făcut ca aceasta să fie un remediu ineficient?
Nu.

IV. Alte caracteristici

Gheorghe Stan, judecător

Cristina Titirișcă, magistrat-asistent

27. Cât de des se pune problema deferenţei în cauzele privind drepturile omului aflate pe rolul Curţii?

Atribuţiile Curţii Constituţionale a României sunt prevăzute expres şi limitativ de art.146 din Constituţie şi, corelativ, de Legea nr.47/1992 privind organizarea şi funcţionarea Curţii Constituţionale, republicată[1767], cu modificările şi completările ulterioare. Aceleaşi acte normative stabilesc şi subiectele de drept îndrituite să sesizeze instanţa română de contencios constituţional. Ca atare, Curtea Constituţională se supune numai Constituţiei şi legii ei organice de organizare şi funcţionare, iar, în calitatea ei de unică autoritate de jurisdicţie constituţională, independentă, Curtea este singura în drept să hotărască, în exercitarea atribuţiilor ce îi revin, asupra competenţei sale, care nu poate fi contestată de nicio altă autoritate publică[1768].

Totodată, Curtea Constituţională judecă în limitele sesizării sale, iar posibilitatea de a-şi extinde analiza şi asupra altor prevederi legale decât cele menţionate în sesizare de autorul acesteia este reglementată distinct în cazul controlului de constituţionalitate *a priori*, condiţionat de aprecierea Curţii în sensul că prevederile legale cu privire la care îşi extinde analiza „în mod necesar şi evident, nu pot fi disociate" de cele cu privire la care a fost deja investită[1769], precum şi în cazul controlului de constituţionalitate *a posteriori*, condiţionat de admiterea excepţiei de neconstituţionalitate, situaţie în care „Curtea se va pronunţa şi asupra constituţionalităţii altor prevederi din actul atacat, de care, în mod necesar şi evident, nu pot fi disociate prevederile menţionate în sesizare"[1770].

Aşadar, având în vedere elementele antereferite, deferenţa judiciară nu este un motiv de neconstituţionalitate care să fie invocat de părţi, astfel încât să se poată realiza o statistică în acest sens, a numărului de cauze în care este invocată. Deferenţa judiciară, înţeleasă ca marjă de apreciere/oportunitate de legiferare, este invocată de Curtea Constituţională a României de la caz la caz, în funcţie de motivarea care conduce la o soluţie sau alta a Curţii, fiind unul dintre argumentele pe baza căruia se pronunţă respectiva soluţie. Mai mult, având în vedere Constituţia şi Legea nr.47/1992, deferenţa judiciară nu este un element cu privire la care să existe o obligativitate a invocării sau a analizei sale în considerentele deciziei Curţii.

28. Curtea dumneavoastră a dat dovadă de un grad sporit de deferenţă de-a lungul timpului?
Deferenţa judiciară, respectiv marja de apreciere a legiuitorului primar sau delegat este eva-

1767 Monitorul Oficial al României, Partea I, nr.807 din 3 decembrie 2010.
1768 Decizia Curţii Constituţionale nr.713 din 9 noiembrie 2017, publicată în Monitorul Oficial al României, Partea I, nr.345 din 19 aprilie 2018.
1769 Art.18 alin.(1) din Legea nr.47/1992, republicată, cu modificările şi completările ulterioare.
1770 Art.31 alin.(2) din Legea nr.47/1992, republicată, cu modificările şi completările ulterioare.

luată de la caz la caz în jurisprudența Curții Constituționale, în funcție de elementele concrete ale cauzei deduse judecății.

29. Depinde deferența arătată de numărul de cauze aflate pe rolul Curții?

Nu. Deferența judiciară este unul dintre argumentele folosite de Curte, pentru a demonstra raționamentul logico-juridic pe baza căruia se pronunță soluția acesteia într-o cauză dată.

30. Își poate instanța dumneavoastră întemeia hotărârile pe motive care nu au fost invocate de părți? Poate Curtea dumneavoastră să reîncadreze motivele invocate în temeiul unei dispoziții constituționale diferite de cea invocată de reclamant?

Curtea Constituțională nu își poate fundamenta decizia pe alte motive decât cele invocate de autorul sesizării, întrucât actul de sesizare fixează cadrul procesual din fața Curții Constituționale.

În materia excepției de neconstituționalitate (controlul de constituționalitate *a posteriori*), Curtea a statuat că este inadmisibilă sesizarea sa în mod direct cu o excepție de neconstituționalitate[1771]. De asemenea, cadrul procesual stabilit prin sesizare nu poate fi extins prin formularea unei cereri de intervenție în interes propriu sau în interesul unei părți, sens în care, în jurisprudența sa, Curtea a stabilit că, având în vedere dispozițiile Legii nr.47/1992, dispozițiile din Codul de procedură civilă referitoare la cererile de intervenție sunt aplicabile doar în ceea ce privește procesul civil, iar nu și în fața Curții Constituționale, care își exercită atribuțiile potrivit unei proceduri jurisdicționale autonome[1772].

Există două situații în care Curtea Constituțională a României se pronunță din oficiu, ambele în cadrul procedurii revizuirii Constituției (legile constituționale): Curtea se pronunță, din oficiu, atât asupra inițiativelor de revizuire a Constituției [art.146 lit.a) teza a II-a], cât și asupra legii de revizuire după adoptarea acesteia de către Parlament [art.23 din Legea nr.47/1992].

Într-o primă etapă[1773], obiectul controlului de constituționalitate exercitat din oficiu de Curte îl reprezintă inițiativa de revizuire a Constituției. În ce privește limitele acestui prim control, art.19 din Legea nr.47/1992 prevede obligația Curții de a se pronunța „asupra respectării dispozițiilor constituționale privind revizuirea". Indiferent de autorul inițiativei de revizuire, în sensul că inițiatorul acesteia este fie Președintele României, la propunerea Guvernului, fie cel puțin o pătrime din numărul deputaților ori al senatorilor, fie cel puțin 500.000 de cetățeni cu drept de vot - subiecte de drept expres și limitativ prevăzute de art.150 alin.(1) din Constituție -, aceasta se depune la Curtea Constituțională în vederea verificării de către instanța constituțională a exigențelor privind revizuirea[1774]. Decizia Curții

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1771 Decizia Curții Constituționale nr.3 din 6 ianuarie 1994, publicată în Monitorul Oficial al României, Partea I, nr.145 din 8 iunie 1994.

1772 Decizia Curții Constituționale nr.82 din 15 ianuarie 2009, publicată în Monitorul Oficial al României, Partea I, nr.33 din 16 ianuarie 2009.

1773 Decizia Curții Constituționale nr.539 din 17 septembrie 2018, publicată în Monitorul Oficial al României, Partea I, nr.798 din 18 septembrie 2018, par.23.

1774 - Art.150 din Constituție - Inițiativa revizuirii: „(1) Revizuirea Constituției poate fi inițiată [...] de cel puțin 500.000 de cetățeni cu drept de vot. (2) Cetățenii care inițiază revizuirea Constituției trebuie să provină din cel puțin jumătate din județele țării, iar în fiecare din aceste județe sau în municipiul București trebuie să fie înregistrate cel puțin 20.000 de semnături în sprijinul acestei inițiative."

- Art.152 din Constituție - Limitele revizuirii: „(1) Dispozițiile prezentei Constituții privind caracterul național, independent, unitar și indivizibil al statului român, forma republicană de guvernământ, integritatea teritoriului, independența justiției, pluralismul politic și limba oficială nu pot forma obiectul revizuirii. (2) De asemenea, nicio revizuire nu poate fi făcută dacă are ca rezultat suprimarea drepturilor și a libertăților fundamentale ale cetățenilor sau a garanțiilor acestora. (3)Constituția nu poate fi revizuită pe durata stării de asediu sau a stării de urgență și nici în timp de război."

- În cazul în care inițiativa revizuirii aparține cetățenilor, alături de normele legii orga-

se comunică iniţiatorului/iniţiatorilor, iar iniţiativa de revizuire va fi prezentată Parlamentului, sub forma unui proiect de lege sau a unei propuneri legislative, după caz, numai împreună cu decizia Curţii Constituţionale.

Al doilea control[1775] efectuat din oficiu de Curtea Constituţională în cursul procedurii de revizuire a Constituţiei intervine, în temeiul art.146 lit. l) din Constituţie şi al art.23 din Legea nr.47/1992, imediat după ce proiectul de lege sau, după caz, propunerea legislativă de revizuire a Constituţiei a fost adoptat/ă de Parlament şi a devenit lege pentru revizuirea Constituţiei, deci după finalizarea procedurii legislative parlamentare de revizuire a Constituţiei. Obiectul controlului de constituţionalitate exercitat de Curtea Constituţională îl reprezintă, de această dată, legea de revizuire a Constituţiei. În privinţa limitelor acestui tip de control de constituţionalitate, legiuitorul ordinar nu a reglementat repere diferite faţă de cele fixate pentru exercitarea primului tip de control, având ca obiect proiectul de lege sau propunerea legislativă de revizuire a Constituţiei. În acest sens, art.23 alin.(2) din Legea nr.47/1992 prevede că „Decizia prin care se constată că nu au fost respectate dispoziţiile constituţionale referitoare la revizuire se trimite (...)", sintagmă ce se regăseşte şi la art.19 teza finală din aceeaşi lege. Din economia dispoziţiilor art.19-23 ale Legii nr.47/1992, raportat şi la succesiunea etapelor ce caracterizează procedura de revizuire a Constituţiei, rezultă concluzia potrivit căreia, la efectuarea celui de-al doilea tip de control, exercitat asupra legii de revizuire a Constituţiei, Curtea nu va reanaliza aceleaşi aspecte ce au constituit obiect al controlului exercitat asupra proiectului de lege sau a propunerii legislative referitoare la revizuirea Constituţiei, în măsura în care, în cursul procedurii parlamentare legislative de adoptare a respectivei/respectivului propuneri legislative sau proiect de lege, conţinutul acesteia/acestuia nu a suferit modificări de substanţă. În ipoteza în care nu se va constata o diferenţă specifică normativă de conţinut, Curtea îşi va raporta controlul - din sfera tuturor „dispoziţiilor constituţionale referitoare la revizuire" şi care, în concret, se regăsesc la titlul VII - Revizuirea Constituţiei, art.150-152 din Constituţie - doar la cele care nu au fost avute în vedere de Curte cu prilejul pronunţării deciziei anterioare, referitoare la constituţionalitatea iniţiativei de revizuire. Dacă, dimpotrivă, în exercitarea rolului său de autoritate suverană de legiferare, Parlamentul, în cadrul procedurii parlamentare de revizuire a Constituţiei, a adus modificări asupra propunerii legislative/proiectului de lege de revizuire şi se constată o diferenţă specifică de conţinut normativ substanţial la nivelul legii constituţionale, atunci revine Curţii obligaţia de a reevalua noul conţinut al legii de revizuire prin raportare la prevederile art.152 din Constituţie, referitoare la limitele revizuirii.

Aşadar, şi în ipoteza sesizării din oficiu, Curtea Constituţională este ţinută de analiza în limitele prevăzute de Legea fundamentală şi nu îşi poate întemeia hotărârile pe motive care nu au fost invocate de părţi.

În ceea de priveşte posibilitatea Curţii Constituţionale a României să reîncadreze motivele invocate de autorul sesizării de neconstituţionalitate în temeiul unei dispoziţii constituţionale diferite de cea invocată de acesta, respectiv în ceea ce priveşte stabilirea obiectului excepţiei de neconstituţionalitate, în jurisprudenţa sa, Curtea a statuat cu valoare de principiu că, în exercitarea nice a Curţii Constituţionale care reglementează competenţa acesteia de verificare a constituţionalităţii iniţiativelor cetăţeneşti de revizuire a Constituţiei, sunt aplicabile şi dispoziţiile art.7 din Legea nr.189/1999 privind exercitarea iniţiativei legislative de către cetăţeni, republicată în Monitorul Oficial al României, Partea I, nr.516 din 8 iunie 2004, cu modificările ulterioare. Aceste dispoziţii stabilesc obiectul verificării pe care Curtea o realizează în privinţa îndeplinirii condiţiei prevăzute de art.150 din Constituţie. Potrivit art.7 alin.(1) din Legea nr.189/1999, republicată: „Curtea Constituţională, din oficiu sau pe baza sesizării preşedintelui Camerei Parlamentului la care s-a înregistrat iniţiativa, va verifica: a) caracterul constituţional al propunerii legislative ce face obiectul iniţiativei; b) îndeplinirea condiţiilor referitoare la publicarea acestei propuneri şi dacă listele de susţinători prezentate sunt atestate potrivit art.5; c) întrunirea numărului minim de susţinători pentru promovarea iniţiativei, prevăzut la art.74 şi, după caz, la art.150 din Constituţie, republicată, precum şi respectarea dispersiei teritoriale în judeţe şi în municipiul Bucureşti, prevăzută de aceleaşi articole."

1775 Decizia Curţii Constituţionale nr.539 din 17 septembrie 2018, par.31 şi urm.

controlului de constituționalitate, instanța de contencios constituțional trebuie să țină cont de voința reală a părții care a ridicat excepția de neconstituționalitate, întrucât, în caz contrar, Curtea ar fi ținută de un criteriu procedural strict formal, respectiv indicarea formală de către autorul excepției a textului legal criticat[1776].

Așadar, în considerarea voinței reale a autorului excepției de neconstituționalitate, astfel cum reiese din motivarea excepției[1777], din analiza criticilor de neconstituționalitate, Curtea Constituțională poate să rețină ca fiind invocat un alt temei constituțional decât cel menționat de autor în respectiva motivare/cel reținut în încheierea de sesizare a instanței de judecată prin care se stabilește cadrul procesual din fața Curții Constituționale.

31. Poate Curtea dumneavoastră să își extindă controlul de constituționalitate la o altă lege care nu a fost contestată în fața sa, dar care se referă la situația reclamantului?

Nu, Curtea Constituțională se pronunță în limitele sesizării sale, cu privire la actul normativ a cărui constituționalitate se contestă. În materia controlului de constituționalitate *a posteriori*, elementele de conținut ale actului de sesizare a Curții sunt strict determinate de lege și stabilesc cadrul procesual în care Curtea Constituțională va soluția excepția de neconstituționalitate[1778]. Acest cadru procesual nu poate fi modificat în fața Curții Constituționale prin solicitarea extinderii controlului de constituționalitate cu privire la alte texte normative decât cele reținute în actul de sesizare al instanței judecătorești sau prin adăugarea altor dispoziții constituționale în susținerea excepției de neconstituționalitate formulate. Potrivit jurisprudenței constante a Curții[1779], litigiul constituțional se desfășoară numai în limitele determinate prin încheierea de sesizare, fără ca acestea să poată fi modificate de vreuna dintre părți. Prin urmare, invocarea direct în fața Curții și a altor temeiuri constituționale decât cele arătate la momentul ridicării excepției de neconstituționalitate în fața instanței judecătorești sau extinderea controlului de constituționalitate asupra altor prevederi care nu au fost puse în discuția părților este inadmisibilă. Astfel, au existat situații în care autorul excepției de neconstituționalitate, în concluziile orale susținute în fața Curții Constituționale, a invocat un alt temei constituțional, pe lângă sau în locul celor arătate prin ridicarea excepției de neconstituționalitate în fața instanței judecătorești. Într-o atare situație, Curtea a reținut[1780] că părțile trebuie să își motiveze, în scris sau oral, excepția de neconstituționalitate la momentul invocării ei, adică să indice prevederile și/sau principiile din Constituție pretins a fi încălcate de dispozițiile de lege criticate. Excepția astfel

1776 Decizia Curții Constituționale nr.775 din 7 noiembrie 2006, publicată în Monitorul Oficial al României, Partea I, nr.1.006 din 18 decembrie 2006; Decizia Curții Constituționale nr.297 din 27 martie 2012, publicată în Monitorul Oficial al României, Partea I, nr.309 din 9 mai 2012; Decizia Curții Constituționale nr.244 din 6 aprilie 2017, publicată în Monitorul Oficial al României, Partea I, nr.529 din 6 iulie 2017.

1777 Potrivit art.10 alin.(2) din Legea nr.47/1992, „Sesizările trebuie făcute în formă scrisă și motivate".

1778 A se vedea Benke Károly, Mihaela Senia Costinescu, *Controlul de constituționalitate în România. Excepția de neconstituționalitate*, editura Hamangiu, București, 2020, pag.137 și urm.

1779 Decizia Curții Constituționale nr.1.069 din 14 iulie 2011, publicată în Monitorul Oficial al României, Partea I, nr.638 din 7 septembrie 2011; Decizia Curții Constituționale nr.528 din 15 mai 2012, publicată în Monitorul Oficial al României, Partea I, nr.401 din 15 iunie 2012; Decizia Curții Constituționale nr.272 din 23 mai 2013, publicată în Monitorul Oficial al României, Partea I, nr.564 din 4 septembrie 2013; Decizia Curții Constituționale nr.572 din 12 iu lie 2016, publicată în Monitorul Oficial al României, Partea I, nr.885 din 4 noiembrie 2016, sau Decizia Curții Constituționale nr.548 din 13 iulie 2017, publicată în Monitorul Oficial al României, Partea I, nr.897 din 15 noiembrie 2017.

1780 Decizia Curții Constituționale nr.256 din 25 aprilie 2017, publicată în Monitorul Oficial al României, Partea I, nr.571 din 18 iulie 2017.

invocată este pusă în discuția părților, iar instanța judecătorească trebuie să își formuleze opinia cu privire la temeinicia ei, toate aceste aspecte urmând a fi menționate în actul de sesizare a Curții Constituționale.

The Constitutional Court of the Republic of Serbia

In line with Resolution II adopted by the Circle of the Presidents at its meeting held on 25 May 2022, the theme of the XIX Congress of the Conference of European Constitutional Courts to be held in Chişinău from 21st to 24th May 2024 will be:

FORMS AND LIMITS OF JUDICIAL DEFERENCE: THE CASE OF THE CONSTITUTIONAL COURTS

ANSWER TO QUESTIONNAIRE FOR THE XIX CONGRESS

OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS

CONSTITUTIONAL COURT OF THE REPUBLIC OF SERBIA

I. Non-justiciable questions and deference intensities

1. In your jurisdictions, what is meant by "judicial deference"?

The Constitutional Court of the Republic of Serbia understands its „deference" as a consistent application of the provisions that prescribe its status, role, and jurisdiction.

In the Constitution of the Republic of Serbia, a special chapter is dedicated to the Constitutional Court, which regulates the status, jurisdiction, composition, and the method of decision-making of the Constitutional Court.

When it comes to the status of the Constitutional Court, it is defined as an autonomous and independent state body which protects the constitutionality and legality and human and minority rights and freedoms and its decisions are final, enforceable and generally binding.

The Constitutional Court decides on:

1. Compliance of laws and other general acts with the Constitution, generally accepted rules of the international law and ratified international treaties,

2. Compliance of ratified international treaties with the Constitution,

3. Compliance of other general acts with the Law,

4. Compliance of the Statutes and general acts of autonomous provinces and local self-government units with the Constitution and the Law,

5. Compliance of general acts of organizations with delegated public powers, political parties, trade unions, civic associations, and collective agreements with the Constitution and the Law.

The Constitutional Court also:

1. Decides on the conflict of jurisdictions between courts and other state bodies,

2. Decides on the conflict of jurisdictions between the Republic and provincial bodies or bodies of local self-government units,

3. Decides on the conflict of jurisdictions between provincial bodies and bodies of local self-government units,

4. Decides on the conflict of jurisdictions between bodies of different autonomous provinces or different local self-government units,

5. Decides on electoral disputes, for which the court jurisdiction has not been specified by the Law,

6. Performs other duties stipulated by the Constitution and the Law.

The Constitutional Court decides on the banning of a political party, a trade union organization or a civic association.

The Constitutional Court performs other duties stipulated by the Constitution.

When it comes to assessment of the constitutionality and legality, proceedings for assessment of the constitutionality and legality may be instituted by the state bodies, bodies of territorial autonomy or of local self-government as well as by minimum 25 deputies, and by the Constitutional Court itself, on the basis of the decision handed down by two-thirds majority votes of all the judges.

Proceedings for assessment of the constitutionality or legality of a general act are instituted by the motion of the authorized propounder or by the ruling on the initiation of proceedings. The Constitutional Court may, on its own initiative, hand down the decision on institution of proceedings for assessment of the constitutionality or legality upon a substantiated motion of the president, working body or a judge of the Court. The Constitutional Court hands down such a decision at a session of the Constitutional Court made up of all the judges of the Constitutional Court.

The provisions of the Law on the Constitutional Court prescribe that, in the proceedings for assessment of the constitutionality or legality, the Constitutional Court is not constrained by the request of the authorized propounder or the initiator, as well as that, when an authorized propounder or initiator withdraws the motion or the initiative, the Constitutional Court shall go on with the proceedings for assessment of the constitutionality or legality if its finds grounds for the same.

The possibility of the Constitutional Court to go on with the proceedings even after an authorized propounder or initiator has withdrawn the motion or the initiative, enables the Constitutional Court to go on with the proceedings of public interest even against the will of the authorized propounder or of the initiator, whereby the propounder's withdrawal of the case under a political pressure is avoided. Since the initial motion or the initiative is still required, it cannot be deemed that the Constitutional Court is instituting the proceedings *ex officio*.

In its operations, the Constitutional Court strictly adheres to its jurisdiction regulated by the Constitution. In addition, it endeavours to have its jurisprudence consistent with and based on convincing arguments so that the people could accept it, and to have changes in the case-law well founded and argumented in order to avoid disruption in legal security, as one of the key elements of the rule of law.

In the case-law of the Constitutional Court, separate opinions of certain judges are also present, both concurring and dissenting ones, which, although it might be thought at first sight, do not weaken the Constitutional Court, but have numerous advantages. Dissenting opinions enable public, particularly scientific, discussion about decisions, strengthen independence of judges and ensure their effective participation in examination of cases.

In performing its functions, the Constitutional Court cooperates with the state and other bodies and organizations, scientific and other institutions, companies, and other legal entities, on the issues of interests of the preservation of the constitutionality and legality. The Constitutional Court has international cooperation with foreign and international courts and international organizations in compliance with its jurisdiction.

Example: The attention of professionals and general public was captured by the decision of the Constitutional Court on assessment of the constitutionality and legality of the initialled „First Agreement on Principles Governing the Normalization of Relations" between the Government of the RS and the Provisional Institutions of Self-government in Priština, dated 19 April 2013, the so-called Brussels Agreement.

The issue of the legal nature of this Agreement arose as a debatable legal issue. The Constitutional Court took the view that the contested „First Agreement" had not met the requirements in order to be considered an international treaty, and ipso facto it does not constitute a general act of the domestic law either, but is instead a political agreement. The acts of the Government (the Conclusion about the acceptance of the „First Agreement" and the Report to the National Assembly) and the Decision of the National Assembly on the acceptance of the Report, are not general acts judging by their

contents and could not have been the basis for the contested „First Agreement" to be „introduced" into the judicial system as a general act by their adoption and, therefore, the Constitutional Court took the view that the contested First Agreement is not the act referred to in Article 167 paragraph 1 of the Constitution, which is subject to the Constitutional Court control and, therefore, reached the conclusion to defeat the motion for assessment of the constitutionality and/or legality of this act.

This conclusion of the Constitutional Court attracted attention of a part of the public. It is completely clear that, deciding in those cases, the Constitutional Court found itself in a position to resolve constitutional disputes that have a political content and may produce political consequences. What is positive here is that the Constitutional Court defended its role of the „guardian of the Constitution" and, through its decisions, by legal reasoning and through constitutional argumentation, it demonstrated a drift from the influence of the executive power and any other political and every other influence.

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

See the answer to the first question.

3. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

The Constitutional Court acts within the prescribed status, role, and jurisdiction, whereby the culture and the conditions in our country, historical experiences, the character of fundamental rights and other factors are borne in mind and are taken into consideration depending on the circumstances of the concrete case.

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

There were situations in which the Constitutional Court declared itself to have no jurisdiction. See the answer to the first question.

5. Are there cases where your Court deferred because there was a risk of judicial error?

No, there are no such cases.

6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

See the answer to the question number 4.

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

See the answer to the question number 4.

8. Does your Court accept a general principle of deference in judging penal philosophy

and policies?

No, it does not.

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

By the Decision no. IU-93//2003, dated 8 July 2004, the Constitutional Court dismissed the motions and did not accept the initiatives for establishing of the unconstitutionality of the Decision on declaration of the state of emergency and, in the same decision, it established that, at the time of their validity, certain provisions of the Ordinance imposing special measures to be applied during the state of emergency were not in compliance with the Constitution and the Law, that the Ordinance preventing dissemination of information to the public, distribution of printed materials and other information on the reasons for the declaration of the state of emergency and implementation of measures at the time of the state of emergency, at the time of their validity, were not in compliance with the Constitution and the Law, as well as that the Ordinance imposing special measures in the area of the judiciary to be applied during the state of emergency, at the time of their validity, were not in compliance with the Constitution and the Law.

The Decision on the declaration of the state of emergency in the Republic of Serbia was taken, on 12 March 2003, by the acting president of the Republic, starting from the fact that the assassination of the Prime Minister of the Republic of Serbia Zoran Đinđić threatened the security of the Republic of Serbia in the territory of the Republic of Serbia, freedoms and rights of man and citizen, and the work of the state bodies, for the purpose of detection and catching of perpetrators of the assassination. The contested Ordinances were also passed by the acting president of the Republic.

Substantiating the defeating of the motion and non-acceptance of the initiatives for establishing of the unconstitutionality of the Decision on the declaration of the state of emergency, the Constitutional Court established that the Constitution of the Republic of Serbia allows the possibility of imposing of the state of emergency in the entire territory of the Republic as well. Namely, the Constitution talks about the threatening of specific values in a part of the territory and establishes the reasons for imposition of the state of emergency, but does not exclude the possibility of declaration of the state of emergency in the entire territory, i.e. it does not determine an expressly limited territorial effect of the decision on undertaking of this measure even in the cases when the reasons for the same extend to the entire territory of the Republic.

Assessing the constitutionality of the provisions of the Ordinance imposing special measures to be applied during the state of emergency, the Constitutional Court, *inter alia*, established: that the provision of the contested Ordinance had been unconstitutional and illegal, which had established special powers of the Ministry of the Interior and the possibility of detention of persons in official premises in excess of 48 hours; that the provision of the contested Ordinance had not been in compliance with the Constitution, which had excluded the right to legal counsel to the person who had been detained in official premises of the Ministry of the Interior; that the provision of the Ordinance had not been in compliance with the Constitution and the Law, which had established the authorization of the director of the Security Information Agency to undertake measures towards specific natural and legal persons, which deviate from the principle of inviolability of the secrecy of correspondence and other means of communication even without a court order.

Assessing the constitutionality and legality of the Ordinance preventing dissemination of information to the public, distribution of printed materials and other information on the reasons for the declaration of the state of emergency and implementation of measures at the time of the state of emergency, the Constitutional Court found that freedom of press and other forms of dissemination of information cannot be prohibited or limited, as well as that it is not possible to introduce censorship of the press and other forms of dissemination of information to the public, and that distribution of printed materials and dissemination of other information may be prevented only on the basis of the decision of the court of jurisdiction and only in the cases that are established by the Constitution

and, therefore, concluded that the Ordinance preventing dissemination of information to the public, distribution of printed materials and other information on the reasons for the declaration of the state of emergency, had not been in compliance with the Constitution and the Law.

Assessing the constitutionality and legality of the Ordinance imposing special measures in the area of the judiciary to be applied during the state of emergency, the Constitutional Court established that the acting president of the Republic had not had the authorization to appoint the acting president of the Supreme Court of Serbia, nor to suspend the Republic public prosecutor and to appoint the acting Republic public prosecutor, because, in such a way, he had taken over the electoral powers of the National Assembly in the area of the judiciary.

Moreover, the provision of the Ordinance prescribing the authorization of the acting president of the Supreme Court and the acting Republic public prosecutor to appoint and suspend judicial office holders of immediately lower-instance courts and prosecutor's offices had not been in compliance with the Constitution and the Law, because the powers of the presidents of courts and public prosecutor's offices, as well as election, or removal from office of judicial office holders are the issues, which are regulated by the law, and the law does not stipulate the possibility for this matter to be regulated by an act of a lower legal power during the state of emergency.

Finding that the Decision on the declaration of the state of emergency had been in compliance with the Constitution and the Law and, on the other hand, declaring the two Ordinances, as well as certain provisions of the third Ordinance unconstitutional, which had been passed by the acting president of the Republic during the state of emergency, the Constitutional Court eliminated all the dilemmas as to whether the Decision on the declaration of the state of emergency, which had been taken because of the assassination of the Prime Minister of the Republic of Serbia Zoran Đinđić, had been in compliance with the Constitution and the Law and whether the general acts, adopted during the state of emergency, had also been in compliance with the Constitution or the Law.

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

No, they should not.

II. The decision-maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

No, it does not. The Constitutional Court assesses the constitutionality and/or legality of all the general acts of the National Assembly and of the Government of the RS, adhering to equal rules of proceedings before the Constitutional Court.

To use an example, deciding, in the course of 2022, in the cases in which the provisions of laws had been contested, the Constitutional Court handed down: five decisions establishing the unconstitutionality of certain provisions of laws, or their noncompliance with the ratified international treaties, eight rulings on dismissal of the initiatives for institution of the proceedings for assessment of the constitutionality, or compliance of the contested law with the generally accepted rules of the international law and the ratified international treaties, because the allegations that there had been grounds for initiation of the proceedings for assessment of the constitutionality had not been substantiated by the presented reasons for contestation, 47 conclusions about the defeat of the motions and initiatives for assessment of the constitutionality, because it was established that there had been no procedural presumptions for conducting of the proceedings and decision-making, and

one conclusion about the stay of proceedings. At the same time, two rulings were handed down on institution of the proceedings for assessment of the constitutionality of the provisions of laws and, in both cases, after the institution of the proceedings for assessment of the unconstitutionality and noncompliance with the ratified international treaty, the declaratory judgment was handed down. In addition, in one case, the Court, by the conclusion, dismissed the initiative for initiation of the proceedings for assessment of the constitutionality of the law on ratification of an international treaty.

In the cases of assessment of the constitutionality and legality of decrees and other acts of the Government of the RS, the Constitutional Court handed down one decision establishing the unconstitutionality and illegality, one ruling on dismissal of the initiative for institution of the proceedings for assessment of the constitutionality and legality, and 11 conclusions about dismissal of the initiatives due to the lack of procedural presumptions for proceedings of the Constitutional Court.

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

Laws are adopted and amended by the National Assembly, according to the established procedure. The Constitution, in Article 107, stipulates that the right to propose laws belongs to every deputy, the Government, assemblies of autonomous provinces or at least 30,000 voters. The Government submits draft legislation to the National Assembly, for review, so that the draft is first reviewed by the working bodies of the National Assembly, and then it is discussed at a plenary session. A law is deemed to be adopted when the majority of those present at the session vote in favour of it, which session must be attended by more than a half of the total number of deputies (the majority of the total of 250 deputies).

The Constitutional Court is an autonomous and independent state body which hands down decisions in compliance with the Constitution and the Law on the Constitutional Court, in proceedings in which all the laws that are promulgated by the National Assembly are „equal". Proceedings for assessment of the constitutionality and legality may be instituted by the state bodies, bodies of the territorial autonomy or of local self-governments as well as by minimum 25 deputies. Proceedings may also be instituted by the Constitutional Court itself. Every legal or natural person has the right to the initiative for institution of proceedings for assessment of the constitutionality and legality.

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

Proceedings of the Constitutional Court are not comparable to actions of any other decision-making bodies, and it does not act as the court of the last resort either. In proceedings upon constitutional appeals, the Constitutional Court appraises whether human and minority rights guaranteed by the Constitution have been violated in proceedings before the courts of general and specific jurisdiction, appraising also, *inter alia*, the argumentation of the court decision in such proceedings.

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

Proceedings of the Constitutional Court are determined by the Constitution and the Law on the Constitutional Court and every proceeding conducted before the Court is in compliance with the prescribed procedures.

15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an

extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

As we already indicated in the answer to the previous question, proceedings of the Constitutional Court are determined by the Constitution of the Republic of Serbia and the Law on the Constitutional Court, as well as by the Rules of Procedure of the Constitutional Court and every proceeding conducted before the Court is in compliance with the prescribed procedures.

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

In proceedings for assessment of the constitutionality or legality of general acts, the Constitutional Court may also judge whether the procedures for their passing had been complied with, like the method of and deadlines for publication in official journals, as well as the conducting of a public deliberation if it is prescribed as compulsory in the procedure for adoption of an act.

III. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

It could not be said that the Constitutional Court defines (establishes) a right.

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

It could not be said that the Constitutional Court „ranks" rights according to their importance.

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

The Constitutional Court, when examining the clarity of laws, does not apply any specific scale, it could rather be said that it applies the criteria established in the jurisprudence of the European Court of Human Rights.

20. What is the intensity review of your Court in case of the legitimate aim test?

When applying the legitimate aim test, as a rule, the Constitutional Court refers to the jurisprudence of the European Court of Human Rights.

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

As a rule, the Constitutional Court applies the proportionality test referring to the criteria established in the jurisprudence of the European Court of Human Rights.

22. Does your Court go through every applicable limb of the proportionality test?

The Constitutional Court most often goes through every applicable limb of the proportionality test.

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

We deem that there are no cases in which the Constitutional Court has accepted that the subject measure satisfies one or more stages of the proportionality test even when, by all indications, there is no sufficient evidence that could corroborate that.

24. Has the inception of proportionality review in your Court's case-law been concomi-

tant with the rise of the judicial deference doctrine?

We are not noticing the connection between the introduction into the case-law of our Court of the review from the aspect of proportionality and possible rise of the judicial deference doctrine.

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

The jurisprudence of the European Court of Human Rights as regards the margin of appreciation that is available to the states on specific issues is essentially similar, if not even equivalent, to the judgment of our Court when it comes to discretionary powers.

Examples: On 17 January 2023, the European Court of Human Rights handed down the decision in the case Žegarac *and ten others v. Serbia*, application no. 54805/15 and ten other applications.

The case is related to the temporary reduction of old-age pensions of the applicants, between November 2014 and September 2018, by virtue of the Act on the Temporary Regulation of the Manner of Paying Pensions („the Pension Reduction Act").

On 23 September 2015, the Constitutional Court handed down the ruling IUz-531/2014, dated 23 September 2015, by which it dismissed the initiatives for institution of proceedings for assessment of the constitutionality of the Pension Reduction Act and its compliance with the ratified international treaties.

Referring to Article 1 of Protocol No. 1, the applicants had complained that reduction in their pensions had constituted deprivation of property, which had unjustifiably infringed their right to peaceful enjoyment of their property.

In the light of a broad margin of appreciation of the state and in view of the limited scope and the temporary nature of reduction in pensions of the applicants as a part of the efforts to balance the state expenditure, the ECtHR deems that the complaints of the applicants by virtue of Article 1 of Protocol No. 1 are manifestly ill-founded and must be rejected[1781].

1781 From the judgment of the ECtHR: Article 1 of Protocol No. 1

Whether the interference was lawful – The reduction in pension payments was temporarily introduced by the enactment of the Pension Reduction Act on 26 October 2014. None of the applicants claimed that his/her pension had not been calculated and paid in accordance with the new terms and conditions provided by that Act. Referring to the relevant principles above, the ECtHR reiterates that, as argued by the applicants, the existence of a legal basis in the domestic law does not suffice in itself to satisfy the principle of lawfulness. In addition to being in compliance with the domestic law of the Contracting State (including its Constitution), the legal norms upon which the deprivation of property is based should be sufficiently accessible, precise, and foreseeable in their application. However, the ECtHR cannot uphold the central issue raised by the applicants - that the Pension Reduction Act had not been sufficiently precise and foreseeable. The interference in question had a legal basis in this Act, the constitutionality of which was upheld by the Constitutional Court. While the Constitutional Court did not open the formal proceedings to assess the constitutionality and legality of the Pension Reduction Act, it dismissed several petitioners' arguments to the effect that the measures in question had breached the lawfulness principle, setting out a comprehensive interpretation of the relevant legislation that had caused ambiguities and disputes in this area. Admittedly, it did so mostly in the light of the standards that the ECtHR had developed in respect of Article 1 of Protocol No. 1, which does not have the same wording and the scope as the Articles referred to by the applicants before the Constitutional Court. However, the ECtHR would need compelling reasons to depart from the conclusions ultimately reached by the Constitutional Court and to substitute its own views for those of the Constitutional Court on the question concerning the interpretation of the Constitution of Serbia and the domestic law for which that Court offered acceptable reasoning. The ECtHR does not find any reasons in the applicants' submissions to do so. Lastly, the ECtHR does not consider it necessary to take a position on the lack of clarity as

to the duration of the impugned temporary measures, since the issue will be taken into consideration under the proportionality test.

Whether the interference pursued a legitimate public interest – The ECtHR firstly notes that the Pension Reduction Act was enacted "with the aim of preserving the financial sustainability of the pension system in the Republic of Serbia" (under Article 1 of the Act). According to the Government, the reduction in pension payments formed a part of a wider set of general austerity measures, which were designed by the State authorities over the course of 2014 with the aim, inter alia, of reducing the public expenditure to the level intended. The authorities asserted that the aim had been achieved by 2018, by which time considerable savings had been accrued (approximately EUR 840 million), after which the Pension Reduction Act was repealed. The applicants questioned the justification of the measures and their ultimate effect. A decision to enact laws concerning social insurance and pensions in order to balance the State expenditure and pensions involves the consideration of various political, economic, and social issues, on which opinions within a democratic society may reasonably differ widely. Given that the domestic policymakers should be afforded a wide margin of appreciation in the matters of general social and economic policy (including in the area of pensions), the interests of social justice and economic well-being may legitimately lead them to adjust, cap or even reduce the amount of pensions normally payable to the qualifying population. Having regard to the decision of the Constitutional Court and the available reports and information, the ECtHR accepts that the national authorities were facing the need to reduce the high central budget expenditure in 2014 owing to the ever-growing deficit in the pension system and that the measures were prompted by budgetary shortfalls and rising public debt. Against such a background, the ECtHR has no reason to doubt that, in deciding to temporarily reduce the payment in respect of the State pensions, the legislator pursued a legitimate public interest with the wish to preserve the financial sustainability of the pension system and to balance the State expenditure, and its judgment in that respect does not appear to be manifestly without reasonable foundation.

Whether the respondent State respected the principle of a "fair balance" – The ECtHR established that the key issue was – whether that interference had been reasonably proportionate to the aim sought to be realised. In other words, whether a "fair balance" had been struck between the demands of the protecting the budget and the preservation of the financial sustainability of the pension system in the general interest of the public and the requirement that the applicants' property rights under Article 1 of Protocol No. 1 be protected in order to prevent them from bearing an individual and excessive burden. Admittedly, the State was not, at the time in question, facing a major economic crisis such as that being faced by Greece or Portugal. The State was neither overseeing the comprehensive reforms and/or transformation or merging of different pension schemes. Nevertheless, the ECtHR observes that the temporary and progressive pension reduction in effect between November 2014 and October 2018 formed a part of a wider set of general austerity measures which were prompted by an objective reason - namely, the need to reduce the high public debt and to preserve the financial sustainability of the pension system and obvious budgetary constraints given that the defined contributions were insufficient and that a considerable proportion of the pension fund expenditures had to be covered from the central national budget. According to the Government, the different treatment of certain categories of pensioners had been based on the principles of solidarity and social justice. Those receiving minimum-level pensions, with monthly pensions that had not exceed RSD 25,000 (slightly higher than the "at-risk-of-poverty" threshold), had been exempted, as it had been deemed that those falling within that category of pensioners had not been able to contribute to the overcoming of the financial crisis, as they themselves had been battling for survival. The reduction in pension payments had been directed at the recipients of higher pensions: in accordance with the mathematical formula applied, pensions of between RSD 25,000 and RSD 40,000 a month had been reduced by 22% of the part above the exempted amount (i.e. RSD 25,000), and any amount above RSD 40,000 had been reduced by further 3%. The applicants received reduced pension payments from November 2014, which were calculated in line with the mathematical formula fixed for the third category of pension beneficiaries. By way of example, according to the documents submitted by the parties, the amount of the first applicant's monthly pension between November 2014 and October 2018 would have been between RSD 72,608 and 77,785 (approximately EUR 610 and 655). With the entry into force of the Pension Reduction Act, his pension was reduced during the same period for between RSD 11,452 and 12,305 (a loss of approximately EUR 96-104), leaving him with a monthly payment of between RSD 61,156 and 65,479 (approximately EUR 512-552). The second applicant, for example, could expect to receive a monthly pension payment between RSD 84,767 and 91,371 (approximately EUR 710 and 770), while he received between RSD 70,207 and 75,669 (EUR 589 and 639), his loss amounting to EUR 120-133. Also, the ninth applicant could expect a monthly pension payment between RSD 43,562 and 47,007 (EUR 365 and 397) while she received between RSD 39,371 and 42,395 (EUR 330 and 358) and had a monthly loss from RSD 4,190 to 4,361 (EUR 35-39). The ECtHR finds that the applied method of calculation does not appear to have been unreasonable or disproportionate. For the pensions exceeding the minimum of RSD 25,000, it entailed a gradually increasing reduction in the pensions depending on the amount of pension received before the entry into force of the Pension Reduction Act. Regarding alternative solutions to the budgetary crisis, their possible existence would not in itself mean that the contested legislation had been unjustified. Noting the applicants' argument that they, being among the minority of high-pension recipients, had had to bear an individual and disproportionate burden (while the majority of pensioners had been spared), the ECtHR deems that it is not for it to say, provided that the legislature remained within the bounds of its margin of appreciation, whether the impugned legislation had constituted the best solution for dealing with the problem or whether the legislature's discretion should have been exercised in another way. That said, while the matter must have been of great concern for the applicants and other pensioners, the ECtHR considers that the applicants were obliged to endure only temporarily what was a reasonable and commensurate reduction in their pensions, rather than a total suspension of their pensions or the permanent reduction of their pensions by a

Other alleged violations of the Convention

Referring to Article 14 of the Convention (Prohibition of discrimination), read in conjunction with Article 1 of Protocol No. 1 thereto (Protection of property) and/or Article 1 of Protocol No. 12 thereto (General prohibition of discrimination), three applicants had complained that, according to the contested legislation, they had been treated in a discriminatory manner in comparison with (a) other pensioners to whom the reduction in pensions had not been applied because the level of their pensions had been below the envisaged threshold, and (b) those pensioners to whom it applied, but to a lesser extent than to themselves. According to the applicants, all the pensioners should have been equal before the law and should have equally contributed to the efforts aimed to overcome any budgetary crisis and this difference in the treatment had not had any objective justification, particularly bearing in mind the fact that they had had contributed to the Pension and Disability Insurance Fund significantly more than those pensioners whose pensions had been exempted from the reduction.

The ECtHR notices that this complaint constituted in essence the same complaint as the one that was examined under Article 1 of Protocol No. 1, although observed from another angle. The ECtHR deems that the purpose of the decision of the legislator to set a border point to a specific amount had not been the intent to make a difference between different categories of pensioners in this case so that a specific category would be put in a less favourable position. Instead, it seems that the particular decision had been handed down in order to contribute to a careful balancing, while at the same time reflecting the principles of solidarity and social justice considering that the pensioners having higher pensions had also had benefits from this exemption – their pensions had been deducted only above the minimum amount of RSD 25,000.

The ECtHR sees no reason for reaching a different conclusion in conjunction with Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 and/or Article 1 of Protocol No. 12: in view of its margin of appreciation in the assessment as to whether and to what extent differences in otherwise similar situations justify different proceedings, particularly when general measures of economic and social strategy are in question, the Serbian legislator had not violated the principle of proportionality.

On 30 May 2023, the European Court of Human Rights handed down the Decision in the case ***Baša v. Serbia***, further to the application no. 20874/18.

The applicant had complained about the compulsory vaccination of pre-school and school-age children against certain diseases (tuberculosis, diphtheria, tetanus, whooping cough, poliomyelitis, measles, rubella, mumps, hepatitis B, *Heamophilus influenzae* type b, and diseases caused by *streptococcus pneumoniae*), provided for by Article 32 of the Protection Against Contagious Diseases Act 2016 („the PACDA 2016") and the consequences of not complying with it. Vaccination against those diseases cannot be refused either by the person in question or by the parent/guardian except where a temporary or permanent contraindication is established by a doctor or a team of experts. Children needed to comply with this requirement in order to be able to continue attending nurseries and schools, except in cases of contraindication.

significant amount. In this respect, none of the applicants proved that the reduction in their own pension payments had been such as to place them at risk of having insufficient means to live or that their living conditions had been aggravated to the extent that they risked to fall below the subsistence level. The ECtHR, therefore, considers that the applicants had not been forced to bear an excessive individual burden and that the interference complained of in the present case has not impaired the essence of their pension rights.

– On 23 February 2017, the applicant lodged an initiative with the Constitutional Court for an assessment of the constitutionality of Article 32 of the Protection Against Contagious Diseases Act („the PACDA") and, on 26 October 2017, the Constitutional Court handed down the ruling (IUz-48/2016) dismissing this and a number of other initiatives (some of which also contested the constitutionality of Article 85 of the PACDA 2016). The Constitutional Court took into consideration particularly the fact that the level of vaccination in Serbia, in 2015, was the lowest in the previous ten years. It also concluded that the contested measure had not prohibited enrolment of children in schools, but their stay there had been conditioned by vaccination (immunization) against certain diseases.

– In January 2018, the Ministry of Health issued an instruction to all the preschool institutions that was mandatory for children attending them to be vaccinated.

– On 24 November 2020, the Constitutional Court reached the conclusion (IUz-77/2020) by which it dismissed other similar initiatives, noticing that instruction at school is not the only method of teaching but that, according to the provisions of the Law on Primary Education and Upbringing, there are also the options of homeschooling and distance education (Art. 38 and 38a thereof).

– Art. 3, 16, and 147-151 of the Law on Medicines and Medical Devices, together, stipulate that the state agency for control of medicines (the *Medicines and Medical Devices Agency* of *Serbia*) is in charge of issuing licences for medicines (including vaccines), taking care of their registration, monitoring of their side effects, and exercising of quality control.

– The Rulebook on Immunization, which was in force in the relevant time period, stipulated that vaccination is to be administered by medical staff, except in cases of temporary or permanent contraindications, which are established by general practitioners or specialists and teams of medical experts, respectively.

– The applicant had complained, under Article 8 of the ECHR (Right to respect for private and family life), of compulsory vaccination of children of preschool and school age against certain diseases and of the consequences of noncompliance with that requirement. Under Art. 3 (Prohibition of torture), 6 (Right to a fair hearing), and 14 (Prohibition of discrimination) of the ECHR, Article 2 of Protocol No. 1 (Right to education) and Article 1 of Protocol No. 12 (General prohibition of discrimination), she had complained that the consequences of noncompliance with the compulsory vaccination had constituted inhuman or degrading treatment, violation of the right of unvaccinated children to education, and their discrimination. Besides, she had stated that the decision of the Constitutional Court in connection with the statutory measure in question had been arbitrary and insufficiently substantiated. The applicant, in her observations, had for the first time complained under Article 9 of the ECHR, claiming that the compulsory vaccination had also had violated her freedom of thought, conscience, and religion[1782].

1782 From the judgment of the ECtHR
The complaint of the applicant related to the statutory vaccination of school-going children and the consequences of disregarding of that obligation should be examined under Article 8 of the ECRH (see paragraph 261 of the judgment of the Grand Chamber, *Vavřička and others v. the Czech Republic,* dated 8 April 2021, applications nos. 47621/13, 3867/14, 73094/14, 19306/15, 19298/15, and 43883/15).
Even under the assumption that this complaint is compatible with the specified provision, *ratione personae*, according to the view of the ECtHR it is manifestly ill-founded and as such inadmissible for the reasons specified below.
Despite the fact that, in this case, the applicant had not really been fined, she could still be considered to

be a member of the class of people who are in danger of interference in the right to respect for private life. Concretely, the subject Act requires from her as a parent to vaccinate her son against her will so that he could stay at school or otherwise she would be liable to a fine.
Besides, the parties themselves had not contested that the alleged interference had been in accordance with the Act and that it had aimed for a legitimate goal of health protection. The ECtHR sees no reason not to agree with that position.
The relevant principles related to the urgency of the alleged interference are presented in the judgment *Vavřička and others*.
In 2015, the vaccination rate in Serbia was the lowest in the past ten years and, in 2018, the biggest measles epidemic in the past twenty five years was recorded. Consequently, it can be said that, in Serbia, the duty of vaccination was the response of the domestic authorities to an urgent social need to protect the health of an individual and public health from the subject diseases and to provide for the protection from any drop in vaccination rate among children. The ECtHR, therefore, finds that the approach of the respondent State to make vaccination compulsory had been supported by the relevant and sufficient reasons that had justified its pursuance of that policy.
The duty of vaccination is applied relative to eleven diseases that are well known to the medical science and against which vaccination is deemed to be efficient and safe by the scientific community. An exception from the duty is allowed, particularly in relation to the children having medical contraindications. In addition, compliance with this obligation cannot be directly imposed – i.e., vaccination cannot be applied forcefully. The duty is applied indirectly through imposition of sanctions. The sanction in Serbia can be considered relatively moderate, an administrative fine is in question. The applicant had neither submitted any decision on imposition of a fine due to noncompliance with the duty of vaccination, let alone on imposition of a fine that could be unjustifiably stiff or heavy. Inability of unvaccinated children to continue going to nursery school or school is the consequence, clearly prvoded for by the Act, of noncompliance with the general legal obligation which had been particularly aimed at the protection of the health of small children and which had essentially been protective, and not penal in nature.
The ECtHR sees no reason to question the adequacy of the domestic system with regard to the effectiveness and safety of vaccination. The respondent State also provides for procedural guarantees, by means of which persons may contest the consequences of their noncompliance with the duty of vaccination.
As to the seriousness of the alleged interference, the ECtHR notices that the applicant had neither ever been imposed an administrative fine, nor there had been any consequences for the education of her son. While the applicant had claimed that parents had been exposed to additional expenses and that children had been deprived of education due to inability of unvaccinated children to attend nursery schools and schools, the ECtHR notices that it seems not to have been the case with the applicant.
As to schools, the impugned Act had called for vaccination in order to attend school, but not for entrolment as well. Education can also be provided through homeschooling or distance education. What is more, the line minister had publicly announced that all the children would be enrolled in schools, and the applicant had not submitted any evidence to contest that statement, either generally or related to her son, concerning whom, on the contrary, she had expressly admitted that he had attended his classes at school. The ECtHR reiterates that the personal scope of the case, examined within the „private life" referred to in Article 8, is limited to the applicants themselves and to the repercussions for them of the contested measures.
Bearing in mind the above stated, the ECtHR finds that the legal measures she had complained of are in a reasonable relationship of proportionality to the legitimate goal aspired to and that the State had not overstepped its broad margin of appreciation. Therefore, the contested measures can be deemed to be „necessary in a democratic society".
Consequently, the complaint of the applicant under Article 8 is manifastly ill-founded and it is rejected in accordance with Articles 35 §§ 3(a) and 4 of the ECRH.
The complaint of the applicant under Article 2 of Protocol No. 1 about the right to education is incompatible, *ratione personae,* with the provisions of the ECRH and is rejected in accordance with Article 35 § 4, as it is clear that this right had not been denied to her personally.
In the light of the entire materials possessed by it and to the extent to which the issues she had complained of under Art. 3, 6, and 14 and Article 1 of Protocol No. 12 are within its jurisdiction, the ECtHR does not find the occurrence of violation of the rights and freedoms referred to in the ECRH or in the Protocols thereto and, therefore, that part of the application is also rejected in accordance with Articles 35 §§ 3(a) and 4 of the ECRH as manifastly ill-founded.
The complaint of the applicant under Article 9 had not been included in the original application, but had been presented in her observations of July 2021 and, therefore, the ECtHR finds that it is not appropriate

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

We are pointing to the position of the ECtHR that a constitutional appeal is, in principle, an effective legal remedy, as well as to the above specified decisions of the ECtHR on the applications submitted against Serbia.

IV. Other peculiarities

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

In its cases, the Constitutional Court proceeds while complying with the Constitution of the Republic of Serbia and the Law on the Constitutional Court, as well as with the provisions of its Rules of Procedure.

The proposed decision in each case is prepared by the reporting judge and, by it, he/she expresses his/her position and opinion about a specific constitutional law issue, but the Constitutional Court hands down its decisions as a collective body.

28. Has your Court have grown more deferential over time?

No, it has not.

29. Does the deferential attitude depend on the case load of your Court?

The case load may have impact on the length of duration of proceedings before the Constitutional Court, but the Court is making efforts to act, in all types of proceedings, within the deadlines that imply the respect for the right to trial within a reasonable time.

The case load of the Constitutional Court can rather be focused on the issue as to whether the Constitutional Court performs its role as the guardian of the constitutionality and legality and human and minority rights and freedoms. A major backlog from the previous years calls for undertaking of all the measures for the purpose of more efficient proceedings (the issue of the organization of the Court, the number of judges and the employees working on processing of cases, use of IT equipment and electronic case management, etc.).

However, despite a large caseload, performance of the constitutional role of the Constitutional Court is not questioned, but instead the Court establishes priorities in their disposal in terms of the importance of social relations that are regulated by the contested acts, or of the degree of threat to certain human and minority rights and freedoms.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

In the proceedings for assessment of the constitutionality and legality of general acts, the Constitutional Court is not constrained by the request of an authorized propounder or initiator. Consequently, if an authorized propounder or initiator withdraws the motion or the initiative, the Constitutional Court may go on with the proceedings if it finds that there are grounds for the same. In addition, the Constitutional Court may institute proceedings for assessment of the constitutionality and legality on its own, to wit on the basis of 2/3 of votes of all the judges. The Constitutional Court bases its decisions upon the argumentation, which it lays down in the grounds for the decision.

When it comes to the proceedings on a constitutional appeal, the Constitutional Court appraises the allegations of the applicant, whether the contested individual act or action had violated or denied his/her human or minority right and freedom guaranteed by the Constitution. The position of the Constitutional Court is that, as regards the establishing of violation or denial of a right or freedom,

to reveiw that issue in the context of this application.

it is „bound" by the request from the constitutional appeal and, when deciding, it ranges within the limits of the request made[1783].

In this type of proceedings, the Constitutional Court is more constrained and, therefore, for example, if a request for an interim measure or compensation for damage has not been submitted, the Constitutional Court will not deal with that issue, although it might be in the interest of the protection of the rights of the party in the proceedings.

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

Yes, it can. In the proceedings for assessment of the constitutionality and legality of general acts, the Constitutional Court is not constrained by the request of the authorized propounder or the initiator, so that, if noticing that certain provisions, which are not covered by the initiative or by the motion, are not in compliance with the Constitution or the Law, it can assess them as well.

Consequently, if an authorized propounder or initiator withdraws the motion or the initiative, the Constitutional Court may go on with the proceedings if finding that there are grounds for the same. In addition, the Constitutional Court may institute the proceedings for assessment of the constitutionality and legality on its own, to wit on the basis of 2/3 of votes of all the judges.

1783 POSITIONS OF THE CONSTITUTIONAL COURT IN THE PROCEEDINGS FOR EXAMINATION AND DECIDING UPON THE CONSTITUTIONAL APPEAL (Intergral text), adopted at regular sessions, dated 30 October 2008 and 2 April 2009.

Уставни Суд Републике Србије

У складу са Резолуцијом II, усвојеном од стране Круга Председника на састанку одржаном 25. маја 2022. године, тема XIX Конгреса Конференције европских уставних судова који ће се одржати у Кишињеву, од 21. до 24. маја 2024. године, биће:

ОБЛИЦИ И ГРАНИЦЕ СУДСКЕ УЗДРЖАНОСТИ: СЛУЧАЈ УСТАВНИХ СУДОВА

ОДГОВОР НА УПИТНИК ЗА XIX КОНГРЕС

КОНФЕРЕНЦИЈЕ ЕВРОПСКИХ УСТАВНИХ СУДОВА

УСТАВНИ СУД РЕПУБЛИКЕ СРБИЈЕ

I. Питања која не подлежу судском одлучивању и интензитет уздржаности

1. Шта у вашој јурисдикцији обухвата појам „судске уздржаности"?

Уставни суд Републике Србије своју „уздржаност" схвата као доследну примену одредаба којима су прописани његов положај, улога и надлежности.

У Уставу Републике Србије Уставном суду је посвећено посебно поглавље, у којем су уређени положај, надлежност, састав и начин одлучивања Уставног суда.

Када се ради о положају Уставног суда, он је дефинисан као самосталан и независан државни орган који штити уставност и законитост и људска и мањинска права и слободе и његове одлуке су коначне, извршне и општеобавезујуће.

Уставни суд одлучује о:

1. сагласности закона и других општих аката са Уставом, општеприхваћеним правилима међународног права и потврђеним међународним уговорима,

2. сагласности потврђених међународних уговора са Уставом,

3. сагласности других општих аката са законом,

4. сагласности статута и општих аката аутономних покрајина и јединица локалне самоуправе са Уставом и законом,

5. сагласности општих аката организација којима су поверена јавна овлашћења, политичких странака, синдиката, удружења грађана и колективних уговора са Уставом и законом.

Уставни суд такође:

1. решава сукоб надлежности између судова и других државних органа,

2. решава сукоб надлежности између републичких органа и покрајинских органа или органа јединица локалне самоуправе,

3. решава сукоб надлежности између покрајинских органа и органа јединица локалне самоуправе,

4. решава сукоб надлежности између органа различитих аутономних покрајина или различитих јединица локалне самоуправе,

5. одлучује о изборним споровима за које законом није одређена надлежност судова,

6. врши и друге послове одређене Уставом и законом.

Уставни суд одлучује о забрани рада политичке странке, синдикалне организације или удружења грађана.

Уставни суд обавља и друге послове предвиђене Уставом.

Када се ради о оцени уставности и законитости, поступак за оцену уставности и законитости могу да покрену државни органи, органи територијалне аутономије или локалне самоуправе, као и најмање 25 народних посланика, те сâм Уставни суд, на основу одлуке коју доноси двотрећинском већином гласова свих судија.

Поступак за оцењивање уставности или законитости општег акта покреће се предлогом овлашћеног предлагача или решењем о покретању поступка. Уставни може по сопственој иницијативи донети одлуку о покретању поступка за оцењивање уставности или законитости на образложени предлог председника, радног тела или судије Суда. Ову одлуку Уставни суд доноси на седници Уставног суда коју чине све судије Уставног суда.

Одредбама Закона о Уставном суду прописано је да у поступку оцењивања уставности или законитости Уставни суд није ограничен захтевом овлашћеног предлагача, односно иницијатора, као и да ће, када овлашћени предлагач, односно иницијатор одустане од предлога, односно иницијативе, Уставни суд наставити поступак за оцену уставности или законитости, ако за то нађе основа.

Могућност да Уставни суд настави поступак чак и након што је овлашћени предлагач, односно иницијатор одустао од предлога, односно иницијативе, омогућава Уставном суду да настави поступак од јавног интереса чак и против воље овлашћеног предлагача, односно иницијатора, чиме се избегава да подносилац повуче предмет под политичким притиском. Како је и даље је потребан иницијални предлог, односно иницијатива, не може се сматрати да Уставни суд покреће поступак по службеној дужности.

У свом раду, Уставни суд се стриктно држи својих надлежности уређених Уставом. Такође, настоји да његова јуриспруденција буде конзистентна и заснована на убедљивим аргументима да би је народ прихватио, а да промене судске праксе буду добро утемељене и образложене како се не би нарушила правна сигурност, као један од кључних елемената владавине права.

У пракси Уставног суда присутна су и издвојена мишљења појединих судија, сагласна и несагласна, која, премда би се то могло помислити на први поглед, не слабе Уставни суд, већ имају бројне предности. Издвојена мишљења омогућавају јавну, посебно научну, расправу о одлукама, јачају независност судија и обезбеђују њихово ефективно учешће у испитивању предмета.

У остваривању својих функција Уставни суд сарађује са државним и другим органима и организацијама, научним и другим установама, привредним друштвима и другим правним лицима, о питањима од интереса за очување уставности и законитости. Уставни суд остварује међународну сарадњу са страним и међународним судовима и међународним организацијама у складу са својом надлежношћу.

Пример: Пажњу стручне и опште јавности изазвала је одлука Уставног суда о оцени уставности и законитости парафираног „Првог споразума о принципима који регулишу нормализацију односа" између Владе РС и Привремених институција самоуправе у Приштини, од 19. априла 2013. године, тзв. Бриселског споразума.

Као спорно правно питање поставило се питање правне природе овог споразума. Уставни суд је стао на становиште да оспорени „Први споразум" не испуњава услове да би могао бити сматран међународним уговором, а самим тим не представља ни општи правни акт унутрашњег права, већ је то политички споразум. Акти Владе (Закључак о прихватању „Првог споразума" и Извештај Народној скупштини) и Одлука Народне скупштине о прихватању Извештаја, по својој садржини нису општи правни акти и нису могли бити основ да се оспорени „Први споразум" њиховим доношењем „уведе" у правни поредак као општи правни акт, те је Уставни суд стао на становиште да оспорени Први споразум није акт из члана 167. став 1. Устава, који подлеже уставносудској контроли, те је донео закључак о одбацивању предлога за оцену уставности и/

или законитости овог акта.

Овај закључак Уставног суда је изазвао пажњу дела јавности. Потпуно је јасно да се, одлучујући у овим предметима, Уставни суд нашао у позицији да решава уставноправне спорове који имају политички садржај и могу да производу политичке последице. Оно што је позитивно, је да је Уставни суд одбранио своју улогу „чувара Устава" и кроз своје одлуке, правним резоновањем и кроз уставноправну аргументацију, показао отклон од утицаја извршне власти и било ког другог политичког и сваког утицаја.

2. Да ли за ваш суд постоји спектар (дијапазон) уздржаности? Да ли за ваш суд постоје „забрањене" области или утврђене зоне правне неодговорности или питања која не подлежу судском одлучивању (на пример, питања која изазивају моралне контроверзе, питања која су политички осетљива, изазивају контроверзе у друштву, односе се на опредељивање оскудних ресурса, имају значајне финансијске импликације за власт итд.)?

Видети одговор на прво питање.

3. Да ли постоје чиниоци који одлучују када и како ваш суд треба да испољи уздржаност (на пример, оно што спада у домен културе и услова у вашој држави; историјска искуства ваше државе; апсолутни или квалификовани карактер основних права о којима је реч; меритум предмета који је изнет пред суд; да ли питање на које се тај предмет суштински своди подразумева промену друштвених услова и ставова)?

Уставни суд поступа у оквиру прописаног положаја, улоге и надлежности, при чему су култура и услови у нашој земљи, историјска искуства, карактер основних права и други чиниоци који се имају у виду и узимају у обзир у зависности од околности конкретног случаја.

4. Да ли постоје ситуације у којима је ваш суд испољио уздржаност зато што није имао институционалну надлежност нити одговарајућу стручност?

Било је ситуација у којима се Уставни суд огласио ненадлежним. Видети одговор на прво питање.

5. Да ли је било предмета у којима је ваш суд испољио уздржаност зато што је постојала опасност од судске грешке?

Није.

6. Да ли постоје предмети у којима је ваш суд испољио уздржаност позивајући се на институционални или демократски легитимитет субјекта одлучивања?

Видети одговор на питање број 4.

7. **„Што се више одређени пропис односи на питање из домена шире друштвене политике, то је суд мање спреман да интервенише". Да ли наведена теза представља важећи стандард за ваш суд? Да ли је ваш суд сагласан са концепцијом по којој одлуке о политичким питањима треба доносити кроз демократске процесе, зато што судови нису бирани на изборима и недостаје им демократски мандат да одлучују о политичким питањима?**

Видети одговор на питање број 4.

8. Да ли ваш суд прихвата опште начело уздржаности у просуђивању питања која се односе на казнену филозофију и казнену политику?

Није.

9. Могу постојати ограничене околности у којима власти нису у позицији да обелодане одређене информације суду, нарочито у контексту националне безбедности, када се ради о тајним обавештајним подацима. Да ли је ваш суд био у прилици да испољи уздржаност по основу националне безбедности?

Одлуком број IУ-93/2003 од 8. јула 2004. године, Уставни суд је одбио предлоге и није прихватио иницијативе за утврђивање неуставности Одлуке о проглашењу ванредног стања, а истом одлуком је утврдио да поједине одредбе Наредбе о посебним мерама које се примењују за време ванредног стања у време важења нису биле у сагласности са Уставом и законом, да Наредба о спречавању јавног обавештавања, растурања штампе и других обавештења о разлозима за проглашавање ванредног стања и примени мера у време ванредног стања у време важења није била у сагласности с Уставом и законом, као и да Наредба о посебним мерама у области правосуђа које се примењују за време ванредног стања у време важења није била у сагласности с Уставом и законом.

Одлуку о проглашењу ванредног стања у Републици Србији донео је 12. марта 2003. године вршилац функције председника Републике, полазећи од тога да су убиством председника Владе Републике Србије Зорана Ђинђића на територији Републике Србије угрожени безбедност Републике Србије, слободе и права човека и грађанина и рад државних органа, а у циљу откривања и хватања извршилаца атентата. Оспорене наредбе донео је, такође, вршилац дужности председника Републике.

Образлажући одбијање предлога и неприхватање иницијатива за утврђивање неуставности Одлуке о проглашењу ванредног стања, Уставни суд је утврдио да Устав Републике Србије допушта могућност увођења ванредног стања и на целој територији Републике. Наиме, Устав говори о угрожавању одређених вредности на делу територије и утврђује разлоге за увођење ванредног стања, али не искључује могућност проглашавања ванредног стања на целој територији, односно не одређује изричито ограничено територијално дејство одлуке о предузимању ове мере и у случајевима кад се разлози за то прошире на целу територију Републике.

Оцењујући уставност одредаба Наредбе о посебним мерама које се примењују за време ванредног стања, Уставни суд је, поред осталог, утврдио: да је неуставна и незаконита одредба оспорене Наредбе, која утврђује посебна овлашћења министарства унутрашњих послова и могућност задржавања лица у службеним просторијама дуже од 48 сати; да није у сагласности с Уставом одредба оспорене Наредбе, која искључује право на браниоца лицу које је задржано у службеним просторијама Министарстава унутрашњих послова; да није у сагласности с Уставом и законом одредба Наредбе којом је утврђено овлашћење директора Безбедносно-информативне агенције да према одређеним физичким и правним лицима предузима мере којима се одступа од начела неповредивости тајне писма и других средстава општења и без налога суда.

Оцењујући уставност и законитост Наредбе о спречавању јавног обавештавања, растурања штампе и других обавештења о разлозима за проглашавање ванредног стања и примени мера у време ванредног стања, Уставни суд је оценио да се слобода штампе и други видови обавештавања не могу забранити ни ограничити, као и да се не може уводити цензура штампе и других видова јавног обавештавања, а да се растурање штампе и ширење других обавештења може спречавати само на основу одлуке надлежног суда и само у случајевима који су Уставом утврђени, те је закључио да Наредба о спречавању јавног обавештавања, растурања штампе и других обавештења о разлозима за проглашење ванредног стања, није у сагласности с Уставом и законом.

Оцењујући уставност и законитост Наредбе о посебним мерама у области правосуђа које се примењују за време ванредног стања, Уставни суд је утврдио да вршилац дужности председника Републике није имао овлашћење да именује вршиоца дужности председника Врховног суда Србије, нити да суспендује Републичког јавног тужиоца и именује вршиоца дужности Републичког јавног тужиоца, јер је на тај начин преузео изборна овлашћења Народне скупштине у области правосуђа.

Такође, није у складу с Уставом и законом одредба Наредбе којом се прописује овлашћење

вршиоца дужности председника Врховног суда и вршиоца дужности Републичког јавног тужиоца да именују и суспендују носиоце правосудних функција непосредно нижих судова и тужилаштва, због тога што су овлашћења председника судова и јавних тужилаштава, као и избор, односно удаљење са дужности носилаца правосудних функција питања, која се уређују законом, а закон није предвидео могућност да се ова материја регулише актом ниже правне снаге за време ванредног стања.

Оцењујући да је Одлука о проглашењу ванредног стања била у сагласности с Уставом и законом, а с друге стране, оглашавајући неуставним две Наредбе, као и поједине одредбе треће Наредбе, које је донео вршилац дужности председника Републике за време ванредног стања, Уставни суд је отклонио све дилеме око тога да ли је Одлука о проглашењу ванредног стања која је донета због убиства председника Владе Републике Србије Зорана Ђинђића била у сагласности с Уставом и законом и да ли су и општи акти који су доношени за време ванредног стања били у складу с Уставом или законом.

10. С обзиром на то да уставни судови имају улогу чувара устава, да ли они треба јаче да се мешају у домен политике (да примењују строжи надзор, односно контролу) онда када су власти пасивне према увођењу реформи које би су у складу са правима?

Није.

II. **Субјект одлучивања**

11. Да ли ваш суд испољава већу уздржаност према неком акту парламента него према одлуци извршне власти? Да ли се уздржаност коју испољава ваш суд разликује у зависности од степена демократске одговорности изворног субјекта одлучивања?

Не. Уставни суд цени уставност и/или законитост свих општих правних аката Народне скупштине и Владе РС, поштујући једнака правила поступка пред Уставним судом.

Примера ради, одлучујући током 2022. године у предметима у којима су биле оспорене одредбе закона, Уставни суд је донео: пет одлука о утврђивању неуставности појединих одредаба закона, односно њиховој несагласности са потврђеним међународним уговорима, осам решења о одбацивању иницијатива за покретање поступка за оцену уставности, односно сагласности са општеприхваћеним правилима међународног права и потврђеним међународним уговорима оспореног закона, јер изнетим разлозима оспоравања нису били поткрепљени наводи да има основа за покретање поступка за оцену уставности, 47 закључака о одбацивању предлога и иницијатива за оцену уставности, због тога што је утврђено да не постоје процесне претпоставке за вођење поступка и одлучивање и један закључак о обустави поступка. Истовремено су донета два решења о покретању поступка за оцену уставности одредаба закона и у оба предмета је, након што је покренут поступак за утврђивање неуставности и несагласности са потврђеним међународним уговором, донета утврђујућа одлука. Такође, у једном предмету Суд је закључком одбацио иницијативу за покретање поступка за оцену уставности закона о потврђивању међународног уговора.

У предметима оцене уставности и законитости уредби и других аката Владе РС, Уставни суд је донео једну одлуку о утврђивању неуставности и незаконитости, једно решење о одбацивању иницијативе за покретање поступка за оцену уставности и законитости и 11 закључака о одбацивању иницијатива због недостатка процесних претпоставки за поступање Уставног суда.

12. Коју тежину ваш суд придаје законодавној историји? Какав правни значај треба да има парламентарна расправа за судску процену усклађености са становишта људских права и да ли тај значај уопште треба да постоји?

Законе усваја и мења Народна скупштина, по утврђеној процедури. Устав у члану 107. утврђује да право предлагања закона имају сваки народни посланик, Влада, Скупштина

АП или најмање 30.000 бирача. Предлог закона Влада упућује Народној скупштини, на разматрање, тако да предлог прво разматрају радна тела Народне скупштине, а затим се расправља на пленарној седници. Закон се сматра усвојеним када за њега гласа већина присутних на седници, којој мора присуствовати више од половине од укупног броја народних посланика (већина од укупно 250 народних посланика).

Уставни суд је самосталан и независан државни орган који одлуке доноси у складу са Уставом и Законом о Уставном суду, у поступку у којем су сви закони које доноси Народна скупштина „равноправни". Поступак за оцену уставности и законитости могу да покрену државни органи, органи територијалне аутономије или локалне самоуправе, као и најмање 25 народних посланика. Поступак може покренути и сам Уставни суд. Свако правно или физичко лице има право на иницијативу за покретање поступка за оцену уставности и законитости.

13. Проверава ли ваш суд то да ли је субјект одлучивања оправдао и образложио своју одлуку или да ли је та одлука истоветна са оном коју би сам ваш суд донео, да је он сам, којим случајем, био субјект одлучивања?

Поступање Уставног суда није упоредиво са поступањем било којег другог органа одлучивања, нити делује као суд последње инстанце. Уставни суд у поступцима по уставним жалбама цени да ли су повређена људска и мањинска права гарантована Уставом у поступцима пред судовима опште и посебне надлежности, ценећи, поред осталог и образложеност судске одлуке у тим поступцима.

14. Да ли ваш суд испољава уздржаност у зависности од размера у којима је датој одлуци или мери претходило темељно испитивање усклађености са основним правима? Колико дубоко у својој анализи треба да иде законодавац да би ваш суд на крају тој анализи придао одређену тежину?

Поступање Уставног суда одређено је Уставом и Законом о Уставном суду и сваки поступак који се води пред Судом у складу је са прописаним процедурама.

15. Анализира ли ваш суд то да ли су супротни ставови били у целости заступљени у парламентарној дебати приликом доношења неке мере? Да ли је довољно да се води опсежна дебата о општим одликама одређеног прописа или тежиште мора бити јасно назначено и стављено на импликације које тај пропис има за права?

Као што смо већ и назначили у одговору на претходна питања, поступање Уставног суда одређено је Уставом Републике Србије и Законом о Уставном суду, као и Пословником о раду Уставног суда и сваки поступак који се води пред Судом у складу је са прописаним процедурама.

16. Да ли чињеница да је одређену одлуку донео законодавац или је пак сама одлука проистекла из процеса јавних консултација или јавне расправе има доказну тежину на основу које је могућно утврдити демократски легитимитет саме те одлуке?

У поступку оцене уставности или законитости општих аката Уставни суд може да цени и то да ли су испоштоване процедуре за његово доношење, попут начина и рокова објаве у службеним гласилима, а и заступљености јавне расправе уколико је она као обавезна прописана у поступку доношења акта.

III. Обим права, законитост и сразмерност

17. Да ли је ваш суд икада испољио уздржаност у фази дефинисања права, тако што је придао посебну тежину дефиницији права коју су утврдиле власти или примени те дефиниције на постојеће чињенице и околности?

Не би могло да се каже да Уставни суд дефинише (утврђује) право.

18. Да ли природа примењивих основних права утиче на степен уздржаности? Да ли ваш суд сматра да су нека права или неки аспекти права важнији од других, па самим тим завређују и ригорознију контролу?

Не би могло да се каже да Уставни суд „рангира" права према значају.

19. Да ли имате одређену скалу јасноће када испитујете уставност неког закона? Како одлучујете колико је неки закон јасан? Када примењујете канон ***In claris non fit interpretatio*** **(„Што свак једнако разумије, томе тумача не треба")?**

Уставни суд приликом испитивања јасноће закона не примењује одређену скалу, пре би се могло рећи да примењује критеријуме утврђене у пракси Европског суда за људска права.

20. Колики је интензитет преиспитивања вашег суда онда када се примењује тест легитимности циља?

Приликом примене теста легитимности циља, Уставни суд се по правилу позива на праксу Европског суд за људска права.

21. Који тест сразмерности примењује ваш суд? Да ли ваш суд примењује све фазе „класичног" теста сразмерности (то јест, примерености, нужности и сразмерности у ужем смислу)?

Уставни суд, по правилу, примењује тест сразмерности позивајући се на критеријуме утврђене у пракси Европског суда за људска права.

22. Да ли ваш суд пролази кроз сваки примењиви сегмент теста сразмерности?

Уставни суд најчешће пролази кроз сваки примењив сегмент теста сразмерности.

23. Постоје ли случајеви у којима ваш суд прихвата да предметна мера задовољава једну или више фаза теста сразмерности чак и онда када, по свему судећи, нема довољно доказа који би то поткрепили?

Сматрамо да нема случајева у којима је Уставни суд прихватио да предметна мера задовољава једну или више фаза теста сразмерности чак и онда када, по свему судећи, нема довољно доказа који би то поткрепили.

24. Да ли је увођење преиспитивања са становишта сразмерности у судску праксу вашег суда било пропраћено јачањем доктрине судске уздржаности?

Не уочавамо везу између увођења у судску праксу нашег суда преиспитивања са становишта сразмерности и евентуалног јачања доктрине судске уздржаности.

25. Да ли је судска пракса Европског суда за људска права (ЕСЉП) битно утицала на приступ вашег суда уздржаности? Да ли је доктрина унутрашњег поља слободне процене коју примењује ЕСЉП на домаћем плану еквивалентна пољу дискреционог одлучивања вашег суда? Ако то није случај, колико се често поклапа тумачење (промишљање) унутрашњег поља слободне процене које износи ЕСЉП са тумачењем уздржаности које у сличним случајевима износи ваш суд?

Судска пракса Европског суда за људска права у погледу поља слободне процене које је на располагању државама по одређеним питањима је битно слична, ако не и еквивалентна, оцени нашег суда када се ради о дискреционим овлашћењима.

Примери: Европски суд за људска права је 17. јануара 2023. године донео одлуку у предмету Жегарац и десет других против Србије, по представци број 54805/15 и десет других представки.

Предмет се односи на привремено умањење пензија подносилаца представки, између новембра 2014. године и септембра 2018. године, на основу Закона о привременом уређењу начина исплате пензија.

Уставни суд је 23. септембра 2015. године донео решење IУз-531/2014 од 23. септембра 2015. године, којим су одбачене иницијативе за покретање поступка за оцену уставности и сагласности са потврђеним међународним уговорима Закона о привременом уређивању начина исплате пензија.

Позивајући се на члан 1 Протокола 1, подносиоци представки су се жалили да је умањење њихових пензија представљало лишавање имовине које је неоправдано нарушило њихово право на мирно уживање њихове имовине.

У светлу широког поља слободне процене државе и с обзиром на ограничени обим и привремену природу умањења пензија подносилаца представке као дела напора да се уравнотеже државни расходи, ЕСЉП сматра да су притужбе подносилаца представки на основу члана 1 Протокола 1 очигледно неосноване и морају да буду одбачене[1784].

1784 Из оцене ЕСЉП: Члан 1 Протокола 1

Да ли је мешање било оправдано – Умањење пензијских исплата привремено је уведено доношењем Закона о привременом уређивању начина исплате пензија 26. октобра 2014. године. Нико од подносилаца представки није тврдио да му пензија није била обрачуната и исплаћена у складу са новим условима предвиђеним тим законом.

Позивајући се на (напред наведене) релевантне принципе, ЕСЉП понавља да, како тврде подносиоци представки, постојање правног основа у домаћем закону само по себи није довољно да задовољи принцип законитости. Поред тога што су у складу са домаћим правом државе уговорнице (укључујући њен Устав), законске норме на којима се заснива лишење имовине треба да буду довољно доступне, прецизне и предвидиве у својој примени. ЕСЉП, међутим, не може да подржи централно питање које су покренули подносиоци представки – да Закон о привременом уређењу начина исплате пензија није био довољно прецизан и предвидив. Предметно мешање је имало правни основ у овом закону, чију уставност је потврдио Уставни суд. Иако Уставни суд није отворио формални поступак за оцену уставности и законитости Закона о привременом уређивању начина исплате пензија, одбацио је неколико аргумената подносилаца да су предметне мере прекршиле принцип законитости, износећи свеобухватно тумачење релевантног законодавства које узрокује нејасноће и спорове у овој области. Додуше, то је учинио углавном у светлу стандарда које је ЕСЉП развио у вези са чланом 1 Протокола 1, који нема исту формулацију и обим као чланови на које су се подносиоци позвали пред Уставним судом. Међутим, ЕСЉП би били потребни убедљиви разлози да одступи од закључака до којих је на крају дошао Уставни суд и да својим ставовима замени ставове Уставног суда о питању које се односи на тумачење Устава Србије и домаћег закона за које је тај суд понудио прихватљиво образложење. ЕСЉП у поднесцима подносилаца представки не налази никакве разлоге да то учини. На крају, ЕСЉП не сматра да је потребно да заузме став о недостатку јасноће у погледу трајања оспорених привремених мера, с обзиром на то да ће то питање бити узето у разматрање у оквиру теста пропорционалности.

Да ли је мешање служило легитимном јавном интересу – ЕСЉП пре свега примећује да је Закон о привременом уређивању начина исплате пензија донет „у циљу очувања финансијске одрживости пензијског система у Републици Србији" (члан 1 Закона). Према Влади, умањење пензија чинило је део ширег сета општих мера штедње, које су осмислили државни органи током 2014. године са циљем, између осталог, да се јавна потрошња сведе на предвиђени ниво. Власти су тврдиле да је циљ постигнут до 2018. године, до када су остварене значајне уштеде (око 840 милиона евра), након чега је Закон о привременом уређивању начина исплате пензија престао да важи. Подносиоци представки су довели у питање оправданост мера и њихов крајњи ефекат. Одлука о доношењу закона који се односе на социјално осигурање и пензије како би се уравнотежили државни расходи и пензије укључује разматрање различитих политичких, економских и социјалних питања о којима се мишљења унутар демократског друштва могу разумно веома разликовати. С обзиром на то да домаћим креаторима политике треба омогућити широку слободу процене у питањима опште социјалне и економске политике (укључујући и област пензија), интереси социјалне правде и економског благостања могу их легитимно довести до тога да прилагоде, ограниче или чак смање износ пензија које се иначе исплаћују популацији која испуњава услове. Имајући у виду одлуку Уставног суда и доступне извештаје и информације, ЕСЉП прихвата да су се националне власти суочиле са потребом да 2014. године смање високе расходе централног буџета због стално растућег дефицита у пензионом систему и да су мере подстакнуте буџетским мањком и растућим јавним дугом. С обзиром на такву позадину, ЕСЉП нема разлога да сумња да је, доношењем одлуке о привременом умањењу државних пензија, законодавац тежио легитимном јавном интересу са жељом да очува финансијску одрживост пензионог система и да уравнотежи државне расходе, и његова процена у том погледу не изгледа очигледно без разумног основа.

Да ли је држава поштовала принцип „правичне равнотеже" – ЕСЉП је констатовао да је кључно питање – да

Друге наводне повреде Конвенције

Позивајући се на члан 14 Конвенције (забрана дискриминације), читан у вези са чланом 1 Протокола 1 (заштита имовине) и/или чланом 1 Протокола 12 (општа забрана дискриминације), троје подносилаца представки жалили су се да је према оспореном законодавству према њима поступано дискриминаторно у поређењу са (а) другим пензионерима на које умањење пензија није примењено због тога што је ниво њихових пензија био испод предвиђеног прага, и (б) оним пензионерима на које се то односило, али у мањој мери него у односу на њих. Према подносиоцима представки, требало је да сви пензионери буду једнаки пред законом и да подједнако доприносе напорима да се превазиђе било каква буџетска криза и ова разлика у поступању није имала никакво објективно оправдање, посебно имајући у виду чињеницу да су они значајно више допринели Фонду пензијског и инвалидског осигурања од оних пензионера

ли је то мешање било разумно сразмерно циљу који се желио остварити. Другим речима, да ли је постигнута „правична равнотежа" између захтева заштите буџета и очувања финансијске одрживости пензионог система у општем интересу јавности и захтева да имовинска права подносилаца представки из члана 1 Протокола 1 буду заштићена како би се спречило да сносе појединачно и прекомерно оптерећење. Држава се у то време није суочавала са великом економском кризом попут оне са којом су се суочиле Грчка или Португал. Држава није ни надгледала свеобухватне реформе и/или трансформацију или спајање различитих пензијских схема. Ипак, ЕСЉП примећује да је привремено и прогресивно умањење пензија на снази између новембра 2014. и октобра 2018. године чинило део ширег скупа општих мера штедње које су биле подстакнуте објективним разлогом – наиме, потребом да се смањи висок јавни дуг и да се очувају финансијску одрживост пензијског система и очигледна буџетска ограничења с обзиром на то да су дефинисани доприноси били недовољни и да је значајан део расхода пензионог фонда морао да буде покривен из централног државног буџета. Према Влади, различит третман одређених категорија пензионера био је заснован на принципу солидарности и социјалне правде. Особе које примају минималне пензије, са месечним пензијама које нису прелазиле 25.000 динара (нешто више од прага „ризика од сиромаштва"), биле су изузете, јер се сматрало да они који спадају у ту категорију пензионера нису могли да допринесу превазилажењу финансијске кризе, с обзиром на то да су се и сами борили за опстанак. Умањење пензија било је усмерено на примаоце виших пензија: према математичкој формули која је примењена, пензије од 25.000 до 40.000 динара месечно су смањене за 22% у делу изнад изузетог износа (тј. 25.000 динара), а сваки износ изнад 40.000 динара смањен је за додатних 3%. Подносиоци представки су примали умањене пензије од новембра 2014. године, израчунате у складу са математичком формулом утврђеном за трећу категорију корисника пензија. На пример, према документима које су поднеле стране, износ месечне пензије првог подносиоца представке између новембра 2014. и октобра 2018. године био би између 72.608 и 77.785 динара (око 610 и 655 евра). Ступањем на снагу Закона о привременом уређивању начина исплате пензија, његова пензија је у истом периоду умањена за између 11.452 и 12.305 динара (око 96-104 евра губитка), остављајући му месечну исплату између 61.156 и 65.479 динара (око 512-552 евра). Други подносилац представке, на пример, могао је да очекује месечну исплату пензије између 84.767 и 91.371 динара око 710 и 770 евра), док је примао између 70.207 и 75.669 динара (589 и 639 евра), а његов губитак износи 120-133 евра. Такође, девета подноситељка представке могла је да очекује месечну исплату пензије између 43.562 и 47.007 динара (365 и 397 евра), док је примала између 39.371 и 42.395 динара (330 и 358 евра) и имала месечни губитак од 4.190 до 4,361 динара (35-39 евра). ЕСЉП налази да се примењени метод обрачуна не чини неразумним или несразмерним. За пензије веће од минимума од 25.000 динара, то је подразумевало постепено повећање пензија у зависности од висине пензије добијане пре ступања на снагу Закона о привременом уређивању начина исплате пензија. Што се тиче алтернативних решења за буџетску кризу, њихово постојање само по себи не би значило да је спорни закон неоправдан. Узимајући у обзир аргумент подносилаца представки да су они, као мањина корисника високих пензија, морали да сносе појединачни и несразмеран терет (док је већина пензионера била поштеђена), ЕСЉП сматра да није на њему да каже, под условом да је законодавна власт остала у границама свог поља слободне процене, да ли је оспорено законодавство представљало најбоље решење за решавање проблема или је дискрециono право законодавца требало да се примени на други начин.С тим у вези, ЕСЉП сматра да су, иако је ово питање морало бити од великог значаја за подносиоце представки и друге пензионере, подносиоци представки били обавезни да поднесу само привремено оно што је било разумно и сразмерно смањење њихових пензија, а не потпуну обуставу пензија или њихово трајно умањење за значајан износ. У том погледу, ниједан од подносилаца представки није доказао да је умањење њихових пензија било такво да их доводи у опасност да немају довољно средстава за живот или да су се њихови животни услови погоршали до те мере да су ризиковали да падну испод прага егзистенције. ЕСЉП стога сматра да подносиоци представки нису били приморани да сносе превелики појединачни терет и да мешање на које су се жалили у овом случају није нарушило суштину њихових права на пензију.

чије су пензије изузете од умањења.

ЕСЉП примећује да ова притужба у суштини представља исту притужбу као што је она која је испитана на основу члана 1 Протокола 1, иако посматрано из другог угла. ЕСЉП сматра да сврха одлуке законодавца да постави граничну тачку на одређени износ није намера да се направи разлика између различитих категорија пензионера у овом случају како би одређена категорија била доведена у неповољнији положај. Уместо тога, чини се да је та одлука донета како би се допринело пажљивом балансирању, уз истовремено одражавање принципа солидарности и социјалне правде с обзиром на то да су пензионери са вишим пензијама такође имали користи од овог изузећа – њихове пензије су умањене само изнад минималног износа од 25.000 динара.

ЕСЉП не види разлог за доношење другачијег закључка у вези са чланом 14 Конвенције у вези са чланом 1 Протокола 1 и/или чланом 1 Протокола 12: с обзиром на своје поље слободне процене у процењивању да ли и у којој мери разлике у иначе сличним ситуацијама оправдавају различито поступање, посебно када су у питању опште мере економске и социјалне стратегије, српски законодавац није прекршио принцип пропорционалности.

Европски суд за људска права је 30. маја 2023. године донео одлуку у предмету Баша против Србије, по представци број 20874/18.

Подноситељка представке се жалила због обавезне вакцинације деце предшколског и школског узраста против одређених болести (туберкулоза, дифтерија, тетанус, велики кашаљ, полиомијелитис, богиње, рубеоле, заушци, хепатитис Б, *Haemophilus influenzae* тип Б и болести изазване са *streptococcus pneumoniae*), предвиђених чланом 32 Закона о заштити становништва од заразних болести из 2016. године („ЗЗСЗБ 2016“) и последица непоштовања истог. Вакцинацију против ових болести не може да одбије ни особа која треба да се имунизује, ни родитељ/старатељ, осим у случају постојања привремене или трајне контраиндикације коју утврди лекар или стручни тим. Деца треба да испуне овај услов да би могла да наставе да похађају предшколске и школске установе, осим у случајевима контраиндикација.

– Дана 23. фебруара 2017. године подноситељка представке је Уставном суду поднела иницијативу за оцену уставности члана 32 Закона о заштити становништва од заразних болести (ЗЗСЗБ), а Уставни суд је 26. октобра 2017. године донео решење (ИУз-48/2016) којим је одбацио ову и више других иницијатива (од којих су неке такође оспоравале и уставност члана 85 ЗЗСЗБ 2016). Уставни суд је узео у обзир посебно чињеницу да је ниво вакцинације у Србији у 2015. години био најнижи у претходних десет година. Такође је констатовао да се оспореном мером не забрањује упис деце у школе, већ се њихов боравак условљава вакцинацијом (имунизацијом) против одређених болести.

– Министарство здравља је у јануару 2018. године издало упутство свим предшколским установама да је обавезно да деца која их похађају буду вакцинисана.

– Уставни суд је 24. новембра 2020. године донео закључак (ИУз-77/2020) којим је одбацио друге сличне иницијативе, примећујући да настава у школи није једини начин извођења наставе, већ да према одредбама Закона о основном образовању и васпитању постоје и могућности наставе код куће и наставе на даљину (чл. 38 и 38а).

– Чл. 3, 16 и 147-151. Закона о лековима и медицинским средствима, заједно, предвиђају да је државна агенција за контролу лекова (Агенција за лекове и медицинска средства Србије) надлежна за издавање дозвола за лекове (укључујући и вакцине), старање о њиховој регистрацији, праћење њихових нуспојава и вршење контроле квалитета.

– Правилник о имунизацији, који је био на снази у релевантном времену, предвиђао је да вакцинацију обавља медицинско особље, осим у случајевима привремених или трајних контраиндикација, које утврђују лекари опште праксе или специјалисти и тимови медицинских стручњака, респективно.

– **Подноситељка представке се жалила на основу члана 8** ЕКЉП (право на поштовање приватног и породичног живота) на обавезну вакцинацију деце предшколског и школског узраста против одређених болести и на последице непоштовања тог захтева. На основу **чл. 3** (забрана мучења), 6 (право на правично суђење) **и 14** (забрана дискриминације) ЕКЉП, **члана 2 Протокола** 1 (право на образовање) и **члана 1 Протокола 12** (општа забрана дискриминације), жалила се да су последице непоштовања обавезне вакцинације представљале нечовечно или понижавајуће поступање, повреду права невакцинисане деце на образовање и њихову дискриминацију. Поред тога, **навела је да је одлука Уставног суда у вези са законском мером у питању била произвољна и недовољно образложена**. Подноситељка представке се у својим запажањима први пут жалила на основу **члана 9** ЕКЉП, тврдећи да је обавезна вакцинација такође повредила њену слободу мисли, савести и вероисповести[1785].

1785 ***Из оцене ЕСЉП***

Притужба подноситељке представке у вези обавезе вакцинисања школске деце и последицама непоступања по тој обавези треба да буде испитана на основу члана 8 ЕКЉП (видети став 261 пресуде Великог већа *Вавричка и други против Чешке Републике,* од 8. априла 2021. године, представке бр. 47621/13, 3867/14, 73094/14, 19306/15, 19298/15 и 43883/15).

Чак и под претпоставком да је ова притужба компатибилна са наведеном одредбом *ratione personae*, према гледишту ЕСЉП она је **очигледно неоснована** и као таква неприхватљива **из разлога који се наводе у наставку**.

Упркос томе што подноситељка представке у овом случају заправо није кажњена новчано, она би се и даље могла сматрати припадницом класе људи који су у опасности од мешања у право на поштовање приватног живота. Конкретно, предметни закон од ње као родитеља захтева да вакцинише сина против своје воље како би могао да остане у школи или да буде новчано кажњена. Поред тога, саме странке нису оспориле да је наводно мешање било у складу са законом и да је тежило легитимном циљу заштите здравља. ЕСЉП не види разлог да се не сложи са тим ставом.

Релевантни принципи у вези неопходности наводног мешања изложени су у пресуди *Вавричка и други*.

Стопа вакцинације у Србији је у 2015. години била најнижа у последњих десет година, а 2018. године је забележена највећа епидемија морбила у последњих двадесет пет година. Може се, дакле, рећи да је у Србији обавеза вакцинације представљала одговор домаћих власти на хитну друштвену потребу да заштите здравље појединца и јавно здравље од предметних болести и да се заштите од било каквог пада стопе вакцинације међу децом. ЕСЉП стога сматра да је приступ тужене државе да вакцинацију учини обавезном био подржан релевантним и довољним разлозима који су оправдавали њено спровођење те политике.

Обавеза вакцинације се примењује у односу на једанаест болести које су добро познате медицинској науци и против којих се вакцинација сматра ефикасном и безбедном од стране научне заједнице. Дозвољен је изузетак од обавезе, посебно у односу на децу са медицинским контраиндикацијама. Поред тога, поштовање ове обавезе не може да буде директно наметнуто – то јест, вакцинација се не може применити насилно. Дужност се спроводи индиректно (посредно) кроз изрицање санкција. Санкција у Србији се може сматрати релативно умереном, у питању је административна новчана казна. Подноситељка представке такође није доставила ниједну одлуку о изрицању новчане казне због непоштовања обавезе вакцинације, а камоли о изрицању новчане казне која би могла бити неоправдано оштра или тешка. Немогућност невакцинисане деце да наставе да иду у јаслице или школу је последица, јасно предвиђена законом, непоштовања опште законске обавезе која је имала

26. Да ли је ЕСЉП осудио вашу државу због уздржаности коју је ваш суд испољио у неком конкретном предмету, уздржаности услед које је обраћање вашем суду било неделотворан правни лек?

Указујемо на став ЕСЉП да је уставна жалба, у начелу, делотворан правни лек, као и на напред наведене одлуке ЕСЉП по представкама поднетим против Србије.

IV. **Остале специфичности**

27. Колико се често питање уздржаности отвара у предметима који се тичу људских права а о којима одлучује ваш суд?

Уставни суд у предметима поступа поштујући Устав Републике Србије и Закон о Уставном суду, као и одредбе Пословника о свом раду.

Предлог одлуке у сваком предмету припрема судија известилац и њиме изражава свој став и мишљење о одређеном уставноправном питању, али Уставни суд одлуке доноси као колективни орган.

28. Да ли је ваш суд током времена почео да испољава све већу уздржаност?

Не.

29. Да ли уздржаност као став зависи и од оптерећености вашег суда предметима?

Број предмета може да утиче на дужину трајања поступка пред Уставним судом, али Суд улаже

за циљ да заштити посебно здравље мале деце и која је у суштини заштитне, а не казнене природе. ЕСЉП не види разлог да доведе у питање адекватност домаћег система у погледу ефикасности и безбедности вакцинације. Тужена држава такође предвиђа процедуралне гаранције, помоћу којих лица могу да оспоре последице свог непоштовања обавезе вакцинације.
Што се тиче озбиљности наводног мешања, ЕСЉП примећује да подноситељки представке никада није изречена административна новчана казна, нити је икада било каквих последица на образовање њеног сина. Док је подноситељка представке тврдила да су родитељи били изложени додатним трошковима и да су деца лишена образовања због немогућности невакцинисане деце да похађају јаслице и школе, ЕСЉП примећује да изгледа то није био случај са подноситељком представке.
Што се тиче школа, спорни закон је захтевао вакцинацију за похађање школе, али не и за пријем. Образовање се такође може обезбедити путем школовања код куће или учења на даљину. Штавише, ресорни министар је јавно објавио да ће сва деца бити уписана у школе, а подноситељка представке није поднела никакве доказе којима би оспорила ту изјаву, било генерално или у вези са њеним сином, за кога је, напротив, изричито признала да је похађао његове часове у школи. ЕСЉП понавља да је лични обим предмета који се разматра у оквиру „приватног живота" из члана 8 ограничен на саме подносиоце представке и последице оспорених мера по њих.
Имајући у виду претходно наведено, ЕСЉП сматра да **законске мере на које се жали стоје у разумном односу пропорционалности са легитимним циљем коме се тежило и да држава није прекорачила своје широко поље слободне процене. Стога се спорне мере могу сматрати „неопходним у демократском друштву"**.
Сходно томе, притужба подноситељке представке на основу члана 8 је очигледно неоснована и одбачена је у складу са чланом 35 §§ 3(a) и 4 ЕКЉП.
Притужба подноситељке представке на основу члана 2 Протокола 1 о праву на образовање је неспојива *ratione personae* са одредбама ЕКЉП и одбачена је у складу са чланом 35 § 4, јер је јасно да њој самој то право није ускраћено.
У светлу целокупног материјала који поседује и у мери у којој су питања на које се жали на основу чл. 3, 6 и 14 и члана 1 Протокола 12 у његовој надлежности, ЕСЉП не налази појаву повреде права и слобода из ЕКЉП или протокола уз њу, те је и тај део представке такође одбачен у складу са чланом 35 §§ 3(a) и 4 ЕКЉП као очигледно неоснован.
Притужба подноситељке представке на основу члана 9 није била укључена у првобитну представку, већ је изнета у њеним запажањима из јула 2021. године, па ЕСЉП стога сматра да није примерено да разматра то питање у контексту ове представке.

напоре да у свим врстама поступака поступа у роковима који подразумевају поштовање права на суђење у разумном року.

Оптерећеност Уставног суда великим бројем предмета пре може бити усмерено на питање да ли Уставни суд остварује своју улогу као заштитник уставности и законитости и људских и мањинских права и слобода. Велики број нерешених предмета из ранијих година захтева да се предузимају све мере у циљу ефикаснијег поступања (питање организације у Суду, број судија и запослених који раде на обради предмета, употреба ИТ опреме и електронско вођење предмета и сл.).

Међутим, упркос великом броју нерешених предмета, не доводи се у питање остварење уставне улоге Уставног суда, већ се у Суду утврђују приоритети њиховог решавања у односу на значај друштвених односа који се оспореним актима уређују, односно степен угрожености појединих људских и мањинских права и слобода.

30. Да ли ваш суд може да заснива своје одлуке на аргументацији коју странке у спору нису изнеле? Да ли ваш суд може да изврши преквалификацију изнетих аргумената тако што ће их сврстати под различиту уставну одредбу од оне на коју се позвао подносилац (странка)?

У поступку оцењивања уставности и законитости општих аката Уставни суд није ограничен захтевом овлашћеног предлагача односно иницијатора. Сходно томе, уколико овлашћени предлагач или иницијатор одустане од предлога односно иницијативе, Уставни суд може наставити поступак уколико нађе да има основа за то. Такође, Уставни суд може да покрене самостално поступак за оцену уставности и законитости и то на основу 2/3 гласова свих судија. Своје одлуке Уставни суд заснива на аргументацији коју наводи у образложењу одлуке.

Када је реч о поступку по уставној жалби, Уставни суд цени наводе подносиоца да ли му је оспореним појединачним актом или радњом повређено или ускраћено људско или мањинско право и слобода зајемчена Уставом. Став је Уставног суда да је у погледу утврђивања повреде или ускраћивања права или слободе„везан" захтевом из уставне жалбе и приликом одлучивања креће се у границама постављеног захтева[1786].

У овој врсти поступка Уставни суд је више ограничен, па на пример ако није поднет захтев за привремену меру или накнаду штете, Уставни суд се тим питањем неће бавити, иако би можда било у интересу заштите права странке у поступку.

31. Да ли ваш суд може да прошири преиспитивање уставности тако да њиме обухвати и остале законске одредбе које пред њим нису оспорене, али јесу у вези са положајем подносиоца жалбе односно представке?

Да. У поступку оцењивања уставности и законитости општих аката Уставни суд није ограничен захтевом овлашћеног предлагача односно иницијатора, тако да уколико уочи да поједине одредбе које нису обухваћене иницијативом односно предлогом нису у складу са Уставом или законом и њих може да оцењује.

Сходно томе, уколико овлашћени предлагач или иницијатор одустане од предлога односно иницијативе, Уставни суд може наставити поступак уколико нађе да има основа за то. Такође, Уставни суд може да покрене самостално поступак за оцену уставности и законитости и то на основу 2/3 гласова свих судија.

1786 СТАВОВИ УСТАВНОГ СУДА У ПОСТУПКУ ИСПИТИВАЊА И ОДЛУЧИВАЊА ПО УСТАВНОЈ ЖАЛБИ (Интегрални текст), усвојени на редовним седницама од 30. октобра 2008. године и 2. априла 2009. године

The Constitutional Court of the Slovak Republic

I. NON-JUSTICIABLE QUESTIONS AND DEFERENCE INTENSITIES

1. In your jurisdictions, what is meant by "judicial deference"?

There is no agreed-upon definition of judicial deference either in the case-law of our Court or among legal scholars. The subject has not enjoyed much interest among legal scholars.

A recapitulation of the most relevant powers of the Constitutional Court is needed here.

The most fundamental task of the Slovak Constitutional Court (Art. 125 of the Constitution) is to review the constitutional and international (mainly human rights treaties) compatibility of legislation (the laws of the Parliament) and other regulations (normative acts of the Government and ministries and other central state administration authorities). In the latter case, the Court also reviews their legality. The legislation review may be completely abstract, i.e. unconnected to any particular case, and thus initiated by the President of the Republic, at least 30 MPs, the Prosecutor General, and in some cases the Ombudsperson or the Judicial Council. Or it may arise out of a specific case and be initiated by a court.

Another major task of the Constitutional Court, representing about 90 % of its caseload, is to review individual decisions, inactions and measures by any other public power (but usually courts and most often the Supreme Court) for human rights violations, but in this case the Court only has jurisdiction as a last resort, i.e. if no other court has jurisdiction (Art. 127 of the Constitution). These cases, submitted by individuals, so far cannot give rise to legislation review, but that is to change when the last part of an important 2020 constitutional amendment enters into force in 2025.

The Court also conducts preventive review of constitutionality of referendum questions if asked to do so by the President of the Republic before they call the referendum (Art. 125b of the Constitution). This is because the Constitution prohibits conducting referendums on certain matters.

The Court also reviews the constitutionality of declarations and prolongations of exceptional constitutional regimes (Art. 129 par. 6 of the Constitution). The Court settles disputes of public authorities regarding the correct interpretation of the Constitution. The Court's interpretation is generally binding (Art. 128 of the Constitution). The Court reviews the regularity of electoral and referendum process at the national level (Art. 129 par. 2 and 3 of the Constitution).

The main point to be made here is that, unlike judicial review in common law countries, where the judicial deference doctrine comes from, Slovakia has a constitutional court set up by the framers specifically to check on legislative and executive powers and invalidate their unconstitutional acts. This in itself makes deferential approaches much less likely. On the other hand, the Court's powers are precisely defined in the Constitution and then in more detail in Law no. 314/2018 on the Constitutional Court of the Slovak Republic. This means that the Court may not decide any dispute that arrives but it must have the explicit power to do so. If a request arrives at the Court that the Court does not have the power to decide at all, the Court must refuse to decide the issue.

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

There is no real spectrum of deference, no scale which would be part of established case law.

If a deferential approach does happen, it happens on a case-by-case basis (see Q6, Q8 and Q11).

There are likewise no no-go zones, every law may be reviewed in proceedings under Article 125 of the Constitution. Controversial cases may nonetheless take longer to decide. The best illustration of this is the judgment on abortions (**PL. ÚS 12/01**), which took almost seven years to decide but was ultimately decided, even if the Court was very divided on this issue. The Court's majority finally

upheld a law which allowed abortion on demand in the first 12 weeks of pregnancy. This after all does not seem to be a case of deference since balancing was conducted between the constitutional precept of protecting unborn life and the constitution rights of the woman to privacy and physical integrity.

3. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

No such factors can be clearly inferred from the case law. The Court does tend profess the Parliament's greater margin of appreciation in some areas, such as criminal policy (see Q8), taxes and similar contributions (PL. ÚS 5/2012, PL. ÚS 9/2014, PL. ÚS 2/2020. PL. ÚS 38/2015), large-scale reforms (see Q26), elections (see Q6), legislative procedure (see Q11 and PL. ÚS 6/2017).

But then it seems that individual cases are resolved on an ad hoc basis. A good illustration is criminal policy, where the Court tends to repeat that the legislator enjoys a wide margin of appreciation. But if we compare the three strikes case and the penalty aggravation case, the Court was very deferential in the former and not so in the latter, even if both cases concerned disproportionately severe penalties (see Q8).

Sometimes the Court accepts the Parliament's greater margin of appreciation but invalidates the challenged legislation anyway. An illustration is the case concerning minimal salaries of nurses (**PL. ÚS 13/2012**). As a result of a general strike of nurses in 2011, the Parliament passed a law regulating the minimal salary classes for nurses, effectively forcing the employers (hospitals and ambulances) to increase their salaries, as these minimal salaries were higher than most of their current salaries and definitely higher than the general minimal wage. The law was then contested by the (acting) Prosecutor General and the Court found violation of the property rights of employers, as those were to be disproportionately burdened by the increase.

"Aware of the complexity of the health sector and the wide discretion of the legislature and its own expert and democratic limits, the Constitutional Court cannot, however, fail to see the scale and temporal context of the increase in costs for health care providers. The documents submitted by the petitioners, admittedly, but which can be considered credible, show that the providers were supposed to increase the nurses' wages significantly within two months. For example, for small practices with one doctor and one senior nurse, this can create significant economic problems with considerations about the viability of continuing to be in business. What is of utmost importance in this assessment is that this is not a classic market environment where the provider can compensate for increased costs by increasing the price. The impugned law may thus have a disincentive effect for some providers, with consequences for nurses' employment. The Chamber's arguments can be countered both by the fact that Article 20 of the Constitution also protects enterprise, wider property freedom and by the particularity of the (non-)market environment of the healthcare sector.

. . .

In addition, it can be noted that even if the Constitutional Court states in its decision that the contested regulation is unconstitutional, it remains true that the executive and, indirectly, the legislature are much better equipped to assess the economic possibilities in the health care sector and to implement related operational and conceptual changes, including statutory changes. They bear both political and constitutional responsibility for this. … In this regard, it should be noted that the Constitutional Court does not consider the substance, the very idea of the impugned law to be unconstitutional, but the combination of the specific economic pressure and time pressure that the current model of healthcare exerts on some providers."

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

On the contrary, there is, in fact, at least one case where the Court granted itself powers that it did

not explicitly have under the Constitution (**PL. ÚS 21/2014**). The Court declared parts of the Constitution regulating judicial vetting procedures unconstitutional for violating core constitutional principles held to be implicitly unamendable.

In 2014, the National Council passed a constitutional amendment and an implementing law that introduced a mandatory vetting procedure for both serving judges and candidates for judicial office.

Pursuant to the amendments, the National Security Authority was to collect data necessary for assessing the integrity of the serving judges or judicial candidates. It was to gather such information in cooperation with the Police Force, Military Intelligence and the Slovak Information Service. The information was then to be submitted to the Judicial Council, which was then to decide whether the judge or judicial candidate was suitable for public office. Should the verdict be negative, the judicial candidate would not become a judge and the serving judge would lose their office. The decision could be appealed to the Constitutional Court.

The President of the Judicial Council challenged the amendments before the Constitutional Court. She did so, arguing that they violated the principles of non-retroactivity, judicial independence and legal certainty. As the petitioner sought the invalidation of not only the implementing law but also of the constitutional amendment, the Court had to address the question of whether such a review of the constitutional amendment was necessary and even possible.

In respect of the necessity of taking this course of action, the Court observed that by limiting its review to the ordinary legislation and if it only annulled the implementing law, it would create a situation in which the legislature would find itself with a constitutional obligation it would be unable to implement. Thus, with the implementing law annulled, the legislature would have to harmonise the annulled law with the Constitution within six months. However, the Constitution would still contain an obligation requiring the legislature to pass legislation implementing the constitutional provisions requiring the implementation of a vetting procedure. This, however, was precisely the position that the Constitutional Court found to be unconstitutional. This would create a paradoxical situation for the legislature, making it impossible for it to comply with the Constitution.

It was therefore necessary to consider the possibility of reviewing a constitutional amendment. The Court conducted extensive comparative, historical and theoretical research in order to answer several crucial questions. In so doing it considered a significant number of theoretical legal scholars, comparative researchers and foreign constitutional case-law.

It was established that even constitutional provisions must be in line with the substantive core of the Constitution. However, it remained unclear whether the Constitutional Court had the power to review those constitutional provisions. The fundamental role of the Constitutional Court is the protection of constitutionality. This constitutional mandate is universal in that it applies to all of the legal relationships subject to constitutional regulation. The existence of any areas of the Constitution deprived of this protection would entail the denial of the substantive rule of law. Article 124 of the Constitution establishes the Constitutional Court as the universal guardian of constitutionality in Slovakia. Therefore, when the Constitution assigns to the Constitutional Court the power to review the constitutionality of "laws", this must be interpreted in an extensive manner. It must therefore also include the power to review constitutional laws in so far as their compliance with the substantive core is concerned. The nature of the state as democratic and governed by the rule of law must be granted protection, even against unconstitutional constitutional laws.

Drawing on its previous conclusions, the Court proceeded to identify the elements of the substantive core of the Constitution. It referred to one of its previous decisions, PL. ÚS 7/2017, which concerned the repeal of amnesties issued during the Mečiar administration (although that might sound very activist, it was in fact the Parliament that amended the Constitution and granted itself the power to repeal amnesties clearly incompatible with the democratic rule of law and this resolution must then be double-checked by the Constitutional Court). In that decision, the Court recapitulated the principles of rule of law identified in its previous caselaw, noting that the list was not exhaustive, and reiterated that those principles together formed the implicit substantive core of the Slovak Consti-

tution. They included the principles of separation of powers, judicial independence, legal certainty and non-retroactivity.

The Court conceded that judicial independence is not limitless and self-serving and that certain types of interference with it are permissible. However, any such interference would violate judicial independence and separation of powers if it was so severe that it undermined the proper administration of justice.

The Court noted that systematic background checks of active judges, which might result in the risk that they lost their judicial office was only permissible immediately after the fall of an authoritarian regime and during the transition to democracy. In the Slovak context, this meant that they were permissible shortly after November 1989 but were certainly not permissible in 2014. A variety of standard legal means were noted as existing at the present time that protected the public against judges who lacked integrity and failed to act with a proper regard for justice. Such judges could, for instance, be held accountable according to the law in criminal, civil and disciplinary proceedings. The Court accepted that the competent authorities had so far failed to put into action an effective working system for monitoring judges' behaviour and holding them accountable. This, however, could not justify the use of full-scale vetting procedures, such as the ones proposed in the challenged regulation.

With regard to judicial candidates, the Court did not object to the idea of conducting integrity assessments as part of the selection process. Unlike active judges, for whom such procedures would constitute an unexpected and retroactive interference with their independence and might entail the risk to their continuing in office, for judicial candidates this would be just another requirement they had to fulfil and of which they had been notified in advance.

The principal problem of the constitutional amendment challenged in this case, however, lay in the way the vetting procedure was carried out. The background checks were conducted by the National Security Authority, a de facto secret service body, in cooperation with the Police Force, Military Intelligence and Slovak Information Service. The process lacked constitutional guarantees of fair trial, and it was carried out by means which included invasive, secretive methods typical of secret services' modus operandi. The file containing such information as was gathered was then submitted to the Judicial Council, which then had to decide whether the judge or judicial candidate was suitable for that office. The problem with this was that the Judicial Council had no real way of verifying whether the information submitted was true, complete and objective. It also meant that appellate review by the Constitutional Court was merely illusory as it was equally not in a position to verify the information submitted by the secret service.

5. Are there cases where your Court deferred because there was a risk of judicial error?

No such cases are known.

6. Are there cases when your Court deferred invoking the institutional or democratic legitimacy of the decision-maker?

Yes. One such example is case no. **PL ÚS 26/2019**, where the Court reviewed a provision prohibiting the publication of electoral opinion polls in the 50 days before the elections. The contested ban was introduced a few months before the upcoming 2020 parliamentary elections by the outgoing ruling majority and prolonged a pre-existing 14-day ban introduced in 2014.

Both the 50-day ban and the 14-day ban were challenged by the President of the Republic (it should be noted here that Section 91 par. 3 of the Law on the Constitutional Court expressly allows the Court to strike down even provisions supplanted by the contested provision).

While the Court did conduct a classic proportionality test in relation to the 50-day ban and found it to violate the freedom of speech, it deferred with regard to the 14-day ban, essentially stating that the Parliament was better suited to decide the matter. One judge went even so far in his concurring opinion as to call the pre-election opinion poll ban an element of the parliamentary *forum internum*.

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

It is impossible to generalise like that. However, there have been cases where the majority of the Court proved to be reluctant to strike down contested legislation that was part of a largescale reform.

One such example is case no. **PL ÚS 38/03**, where the Court had to review several provisions of a major 2003 healthcare reform introducing small additional fees for "services connected with healthcare provision", most notoriously the fee of 20 SKK during most visits at the doctor's office corresponding to about two euros in today's money. Those fees were challenged because Article 40 of the Constitution says that "the citizens shall have the right to free healthcare and medical equipment for disabilities on the basis of medical insurance under the terms to be laid down by a law". The government tried to circumvent this constitutional precept by redefining what constituted "healthcare" and introducing a new legal term "services connected with healthcare provision", with some categories of people exempt from those fees (mainly due to their financial and other situation).

The Court's argumentation for upholding the reform was basically threefold:

No healthcare is ever truly free of charge. Even if the state chose not to set up any public healthcare insurance and cover the healthcare expenses of everyone directly from the national budget, that too would need to be paid by the people with their taxes. The word "free" in Article 40 of the Constitution must not therefore be understood too literally.

The small fees did not constitute excessive burden on the citizens, with some categories of people who might not be able to afford even those small fees exempt from them.

The government tried to prevent the collapse of the entire healthcare system, which was in acute need of additional financing, and had basically two options: *"to specify the extent of healthcare by defining the concept of healthcare in a new way that respects the substance, meaning and purpose of Art. 40 of the Constitution, or to ensure that there are sufficient resources to provide for the 'unchanged' extent and nature of the healthcare provided under the health insurance scheme by mechanically increasing insurance contributions on the basis of simple 'calculations' in order to ensure that there is sufficient revenue to cover the expenditure incurred, either by increasing the percentage of the premium or by adding a certain absolute amount to the premium, without thereby raising doubts as to the compatibility of such an arrangement with the Constitution."*

Two judges dissented and maintained that free healthcare simply meant free healthcare and such extra fees had to be considered unconstitutional.

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

The Court accepts the general principle that the legislator enjoys a wide margin of appreciation in penal policies, first articulated in decision no. **PL. ÚS 6/09**. This constitutionality review case initiated by a criminal court concerned two provisions of the Criminal Code: one introducing the so-called three strikes rule, which made it obligatory for courts to impose life sentences (save exceptional circumstances warranting mitigating the punishment to 25 years) on repeated offenders who were being convicted of one of the listed felonies for the third time; another one precluding early release in such cases.

The Court started on a rather deferential note: *"The field of criminal law has traditionally belonged to the sovereign competence of States. This fact is reflected in the considerable degree of discretion the legislature has in choosing specific criminal policies. The Constitution, the Convention, as well as other sources of international law, in particular international human rights treaties, treaties by which States have assumed an obligation to criminalise certain acts or omissions or, conversely, an obligation to refrain from criminalising certain acts or omissions, treaties relating to international (inter-State) cooperation (assistance)*

in criminal matters, and, finally, in specific areas, European Union law, define the scope and limits within which the 'traditional right of the State' to punish may be exercised. However, this space is rather wide due to the different approaches to criminal law (criminal policy), which correspond to the legal, cultural and social conditions or traditions of the individual States.

. . .

The establishment of a system of criminal sanctions, the conditions for their imposition and enforcement or setting the limits of criminal penalties is a matter for the States, or, to put it another way, the legislature. The limiting provision in this respect is, in particular, Article 3 of the Convention prohibiting torture and inhuman or degrading treatment or punishment. Similar protection is also guaranteed by the Constitution through Article 16(2)."

The principle of proportionality of punishment was only marginally mentioned.

The legislator changed the law in the course of the proceedings, repealing the provision precluding early release and modifying the three strikes provision so that the life sentence was only mandatory if absolutely necessary for public safety and 25 years should be applied as a rule instead, with exceptional circumstances allowing courts to mitigate the sentence down to 20 years. The Constitutional Court thus found the life sentence to be no longer mandatory save as a last resort and noted that courts now had wide margin of appreciation in whether to impose a life sentence, thus rejecting the challenge.

It added: *"From the point of view of the severity of the punishment, i.e. the proportionality (in the narrower sense) of the legal means chosen, especially in some, although based on the previous judicial practice rather isolated cases, the legal regulation under consideration may appear to be on the edge of constitutionality. The Constitutional Court, having considered all the constitutional aspects, taking into account the sovereign power of the legislator to determine the limits of penal policy, and at the same time guided by the principle of selfrestraint, nevertheless concluded, that Section 47(2) of the Criminal Code does not interfere with the recognised and, in the present case relevant constitutional principles arising in particular from Article 1(1) and other related Articles of the Constitution to such an extent as to make it possible to conclude that the penalties resulting therefrom constitute cruel and inhuman punishments and, consequently, that the contested provision would be incompatible with Article 16(2) of the Constitution and Article 3 of the Convention.*"

Several dissenting judges contested the fact that the list of crimes that trigger the three strikes rule in the case of repeated recidivism included several that could hardly justify the imposition of a prison sentence of no less than 20 years. They mainly mention robbery, in which case even the most basic form of it (such as a minor street robbery resulting in the loss of a small amount of money), if committed for the third time, could send someone for at the very least 20 years to prison.

The Constitutional Court was no longer deferent two years later in a landmark case (**PL. ÚS 106/2011**) concerning the penalty aggravation mechanism for offenders having committed multiple offences. The challenged provision stated that if the offender committed at least two offences through two separate actions, the applicable penalty would be the more severe one of the two, the penalty minimum there should be increased by a third and a sentence imposed in the upper half of the resulting interval. The Court struck down the provision due to the fact that it could often result in the imposition of disproportionately strict penalties, declaring it inconsistent with the principle of proportionality inferred from Article 1(1) of the Constitution.

"Within these limits, the legislator has a wide margin of discretion in determining the type of penalties, their quantum, guidelines and methods of their imposition. Neither the Constitution nor international sources of law prescribe a coherent concept of penal policy for the legislator. It is therefore at the discretion of the legislator to determine the extent to which the various forms of protection of society by means of criminal law are applied, i.e. to decide how much emphasis to place on punitive elements versus individual prevention or general prevention elements. However, the Constitutional Court has already pointed out in the preceding parts of its reasoning that the legislator's discretion is not without limits and must not suffer

from arbitrariness.

. . .

Particularly in relation to the legal regulation of punishment as a legal consequence of a criminal offence, it is true that it is not sufficient to comply with the nulla poena sine lege requirement, but it is essential that the types of punishments, the conditions for their imposition, be regulated by law, and the conditions of their enforcement fully respect, in particular, the fundamental human right not to be subjected to torture or to inhuman or degrading treatment or punishment, as well as the right to have a punishment proportionate to the offence for which it is imposed."

Neither did the Constitutional Court prove to be deferent when reviewing provisions of the Criminal Code criminalising certain types of hate speech (case no. **PL. ÚS 5/2017**). The applicants here contested the fact that criminal-law provisions introduced in a 2016 antiextremist amending law criminalised not only hate speech directed against people of a different race, ethnicity, nationality and religion, but also against "another group of persons". They argued that this last phrase was too vague and violated the *nullum crimen sine lege* principle and freedom of expression. The applicants further contested the introduction of "political opinions" among the categories protected against hate speech in two of the contested provisions, claiming a violation of the freedom of expression.

The Court agreed and struck down the contested provisions. In order to satisfy the *nullum crimen sine lege* principle, it is insufficient that the definitions of crimes be included in a law passed by the parliament, as the principle also implies certain standards with regard to the quality of the legal definitions. With regard to the "another group of persons", the applicants objected that it was overly vague and that a fifth characteristic could not be induced from the four preceding ones (race, ethnicity, nationality and religion).

The Court first stated that the "another group of persons" formulation could theoretically be constitutionally acceptable, provided that courts and other state authorities active in criminal proceedings could be expected to interpret it in conformity with the Constitution. However, given the present state of affairs with regard to the interpretation methods used by those bodies, the Court concluded that, for the time being, the contested formulation could not be maintained. The Court argued that it could not disregard the way the law is interpreted in practice, stating that prosecution authorities needed clear rules regarding these types of crimes. In addition, it is the duty of the legislative and executive branches to monitor pressing social issues. They should take responsibility for regulating explicitly the characteristics of protected groups and for making sure that the definitions of different types of hate speech crimes are consistent with one another, as well as with the protection guaranteed by and definitions contained in the Minor Offences Act. If one of the legislator's main intentions in criminalising these types of conduct is to condemn hatred against different groups of people, then these groups are certainly worthy of being explicitly mentioned in the definition of the crimes in question. Furthermore, comparative law shows that hate speech crime definitions tend to contain the disturbance of public order and violence as constitutive elements. Since these elements are absent from Sections 421.1 and 422.1, the contested clauses must be interpreted all the more restrictively.

Freedom of speech cannot be restricted so vaguely, the definitions of the corresponding crimes cannot be so open, the government must have proper constitutional justification for restricting free speech, and citizens' duties must be clearly defined. It follows, therefore, that the contested clauses of Sections 421.1 and 422.1 violate the constitutional requirement of legality (the nullum crimen sine lege principle), freedom of speech and the rule of law.

With regard to the "political opinions" criterion, the Court stressed that an individual's political opinions are normally protected from persecution by the government or entities affiliated with it. The Court warned that it could be precisely the government or its affiliated entities which might be tempted to use these Criminal Code provisions against the opposition, especially since there appear to be still tendencies that encourage and exploit social conflicts.

Furthermore, the provisions in question do not require the disturbance of public order as a constitutive element and Section 424.1 does not even contain any element of violence in its definition. Therefore, even non-violent and non-disturbing political debate could face the risk of criminalisation. The contested formulations could thus discourage political discussion.

The Court finally added that the entire 2016 amendment was incoherent and it was difficult to find a unifying purpose in it. For these reasons, it was concluded that the contested provisions failed to meet the legality requirement.

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

The Court's most recent judgment in this area is from March 2023 (**PL. ÚS 15/2020**) and the decision shows no signs of deference. The Court invalidated three provisions of the Asylum Act, of which only two were actually challenged by the Supreme Court, the third was invalidated *ultra petitum*, as the Court saw a connection to the other two and all three violated the same reference norms. Under the challenged provisions, applications for (the award or prolongation of) supplementary protection had to be rejected if the secret services informed the Interior Ministry (competent to decide on the application) that the applicant posed threat to national security. The reasons for conclusion were kept secret from the applicant and from the competent employee of the Ministry handling the application. The Court conducted the classic proportionality test and the challenged provisions failed the necessity test:

"A less invasive alternative to the complete non-disclosure of the reasons for which the Slovak Information Service or the Military Intelligence Service issued the negative opinion in question could be the possibility to get informed about the reasons to the extent strictly necessary. This possibility should include both the applicant concerned and the ministry which decides on the granting of subsidiary protection in the asylum procedure. This would enable the applicant, knowing at least the key reasons why the Slovak Information Service or the Military Intelligence Service disagreed with the granting of subsidiary protection, to assess whether it is useful for him or her to apply to the administrative court under Section 21(2) of the Asylum Act at all. The fundamental right to judicial protection in the administrative justice system presupposes not only formal access to judicial protection for the person being examined, but also such access as will constitute an effective means of attempting to protect the individual interests of such a person. That effectiveness depends on a number of factors, but above all on the right of the person concerned to defend his or her interests in the best possible conditions, which, in the context of the law under consideration, means that the person concerned is able to require the competent authority to communicate at least the main reasons for its decision and thus to assess, with knowledge of the matter, whether it is useful for him or her to bring an appropriate action before the courts. The competent court can ensure effective protection of the rights and legally protected interests of the person concerned only if the lawfulness of the grounds of the contested decision is the subject of its review. Only in this way can arbitrariness or other constitutionally unacceptable practice in the pursuit of the purpose of the law on the protection of classified information in relation to the person subject to review be ruled out from the point of view of the person concerned. …

In order to preserve the constitutionality of Section 19a(10), the relevant facts should also be disclosed to the applicant to the extent necessary through the opinion of the Slovak Information Service or the Military Intelligence Service, i.e. at least the substance of the reasons relating to public security which form the basis of the decisions under the contested legislation, in a manner which takes into account the necessary confidentiality of the intelligence and operational information (cf. PL. ÚS 8/2016, paragraph 112). Thus, the opinion of the Slovak Information Service and the Military Intelligence Service could no longer contain only a mere agreement or disagreement with the granting of subsidiary protection. This would ensure that the applicant would have the opportunity to comment on the evidence carried out which led to the negative opinion of the intelligence services concerning the threat to the security of the Slovak Republic. Such a measure would ensure the protection of some classified information and at the same time would fulfil the necessary framework for the exercise of the rights guaranteed by the Constitution. It would enable the persons concerned to defend their interests under substantially better conditions than the contested

legislation allows.

Of course, in the outlined procedure of getting informed about the facts necessary for the guarantee of the constitutional Article 46(1) and (2), it cannot be completely excluded that in certain circumstances the level of security of the Slovak Republic will actually be threatened or at least reduced. However, the restriction of a fundamental right cannot pursue the maximisation of one constitutional value at the total expense of another relevant constitutional value. In other words, a statutory restriction cannot deprive a constitutional right of its essential meaning, as expressed in the first sentence of Article 13(4) of the Constitution."

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

This particular question has not been explicitly addressed in the Court's case law. It merits repeating, however, that the Constitutional Court has been established by the framers precisely with the mission of reviewing the constitutionality (and conventionality) of legislation and other regulations and invalidating laws (provisions) found to be unconstitutional.

If the question is to be read as aiming at constitutionality review of legislative inaction, this is a controversial topic and the Court has not gone this far yet. This is partly due to how the effects of the Court's decisions are regulated in the Constitution (as per Article 125 par. 3, the challenged provision loses effect following the official publication of the Court's judgment declaring its unconstitutionality). There is, however, a case pending where the petitioners ask the Court to declare the unconstitutionality of legislative inaction in the area of same-sex couples' rights, namely the non-existence of registered partnerships.

II. THE DECISION-MAKER

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

The Court respects the Parliament's greater margin of appreciation in the latter's internal matters, such as its rules of procedure and legislative procedure (see in that regard the landmark case no. **PL. ÚS 13/2022**), as well as with regard to interferences with socio-economic rights (see Q21 for why this is the case) and some other matters (see Q3). When it comes to (other) human rights violations, however, there is no greater deference with regard to the Parliament and the challenged law (measure) must satisfy all the steps in the proportionality test.

In Slovakia it is the Government that is constitutionally authorised to declare a state of emergency in the case of natural disasters and other similar events, this then allowing it to restrict human rights, which would otherwise only be possible by a law passed by the Parliament. Between September 2020 and spring 2021 the Government declared and prolonged the state of emergency several times and two such resolutions were challenged before the Court. In both cases (**PL. ÚS 22/2020**, **PL. ÚS 2/2021**) the Court proved to be rather deferential towards the Government, but this was most likely caused by the exceptional and unforeseen situation which was the Covid-19 pandemic.

12. What weight does your Court give to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

Parliamentary consideration has no relevance for the judicial assessment of human rights compatibility (see also Q13).

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been

the decision maker?

Yes, a verification of this kind is certainly involved in human rights cases in examining the challenged provision (legal act) as part of the legitimate aim test. The Court verifies whether the decision-maker has justified the decision by a legitimate aim. This, however, is not a question of deference. In other words, the Court will not defer to the decision-maker if the challenged measure pursues a legitimate aim, the existence of a legitimate aim is merely a first pre-condition for the measure to be constitutional (see Q20).

However, the Court does not verify whether it would itself have reached the same decision as the Court does not require the decision to be the best possible one, it only verifies that the decision stays within the limits of the Constitution.

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

The Court does not defer in such cases (see Q13).

15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

Not unless the Court is asked to invalidate a law due to violations of the legislative procedure rules (see in this regard the recent landmark case PL. ÚS 13/2022, where the Court invalidated a law on procedural grounds for the first time in history). But that is a different matter.

The Court traditionally examines the explanatory memorandum or even the parliamentary debate only in order to the extract the legitimate aim pursued, but then carries on with subsequent steps of the proportionality test. It is thus not a question of deterrence, but rather the Parliament must first meet the condition of pursuing a legitimate aim and if it does not, the challenged piece of legislation must be declared unconstitutional (see Q20).

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

No, see the answers to the questions above (mainly Q13).

III. RIGHTS' SCOPE, LEGALITY AND PROPORTIONALITY

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

No, the Court does not give weight to how governmental authorities define human/constitutional rights. In fact, the Constitutional Court is the final arbiter of what the constitutional meaning of individual human rights guaranteed therein is. This is also showcased by the fact that Article 128 of the Constitution entrusts the Court with giving binding interpretation of the Constitution and other constitutional laws. In other words, there is a specific type of proceedings on deciding what the constitutional provisions, including those on human rights, actually mean and the Court is the final and supreme arbiter.

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and

hence more deserving of rigorous scrutiny, than others?

Our Constitution gives the legislator a greater margin of appreciation when restricting second- and third-generation rights. See Q21.

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

The Constitutional Court has so far not developed any scale of clarity in its case law or precise criteria of assessing the clarity of challenged legislation.

20. What is the intensity review of your Court in case of the legitimate aim test?

The Court seems to be growing stricter at least in some cases. In case no. **PL. ÚS 14/2018** the challenged legislation restricted access to the mineral oil market for the purposes of preventing tax evasion and protecting the environment. While this was accepted by the Court as legitimate in general, the Court required a more specific attestation:

"61. In general, the public interest as defined by the defendant and the intervener (prevention of tax evasion and protection of the environment) can be accepted as relevant to justify the restriction of a fundamental right and freedom. Restrictions imposed by the legislator on the parameters of volume and asset security for commercial activities could be considered compatible with the principle of proportionality only if they could be justified by a legitimate aim protecting a specific public interest. However, no specific reasons of this nature were given in the course of the proceedings by the National Council or the Ministry of Justice in this respect, nor do they emerge from the relevant documents relating to the legislative process (the explanatory memorandum and the transcript of the debate of the 21st session of the National Council in connection with the discussion and approval of the contested law on 10 and 11 October 2017). The record of the debate of the National Council in connection with the discussion and approval of the contested law shows that even the then Minister of Finance of the Slovak Republic could not convincingly defend this legislation.

. . .

64. The Constitutional Court reiterates that in order to prove whether a legitimate aim is real or merely pretended, it is not sufficient, taking into account the circumstances of the particular case, to merely assert the existence of a legitimate aim, but it is also necessary to prove it in a proper manner in the abstract constitutional review to such an extent that no reasonable doubts arise as to its existence in concreto. The result of that attestation must provide the Constitutional Court with a sufficient guarantee for a finding that the legitimate aim appears to be extremely (highly) probable in the light of all the circumstances, and not as merely pretended (fictitious).

65. The degree of proof of a legitimate aim may vary from case to case and, taking into account the nature of the case, it is not always sufficient to merely state a legitimate aim and explain it verbally by means of abstract constitutional argumentation. Sometimes the nature and background of the case requires corroboration on the basis of facts and supporting evidence. This is particularly so in situations where legislation is introduced based on purely factual arguments and reasons arising from certain empirical knowledge, which cannot be regarded as generally known or known to the Constitutional Court from its own decision-making. In addition, it should be noted that it is not excluded that in some cases, depending on the nature of the case, a legitimate aim may be identified a priori and ex cathedra, i.e. without the need for a more in-depth assessment on the basis of empirical evidence supporting its actual existence.

66. Although the legislation does not explicitly provide how the Constitutional Court is to ascertain the factual basis justifying the legitimate aim, it follows from the logic of the case that a purely textualist argument of the legislator or the party to the proceedings will not suffice in all circumstances. Otherwise, any legislative change would be defensible simply on the basis of an assertion that might not actually be true in practice. Such an approach would lead to the unacceptable conclusion that the legitimate aim would be present whenever the legislator or a party to the proceedings before the Constitutional Court says so, thereby rendering the first step of the proportionality test meaningless."

A similar approach has been used in another recent judgment from late 2021 (**PL. ÚS 25/2019**). A group of MPs challenged the provisions of a law regulating the use of electronic cash register. The basis of the challenge was the claim that the law required entrepreneurs to collect and send to the central register of the financial administration a substantial amount of data relating to both entrepreneurs themselves and buyers. The gathering of certain types of data was found not be covered by any legitimate aim, because the Court required a precise explanation of the purpose for data collection.

"Even after months, the legislator and the Financial Administration could not adequately articulate the reason for collecting this data. The only thing they communicated to the Constitutional Court are abstract plans that have not yet been implemented or even finalized. In relation to buyers who are entrepreneurs, the statements emphasize the future client zone. According to their statements, if the VAT number were to be used as data in the future, every entrepreneur could have certain advantages when proving their expenses in the tax system. However, currently the data is not limited to the entrepreneur's VAT number, it is not mandatory or clearly favoured, and such a client zone does not exist.

The lack of a specific legitimate purpose is even more apparent with non-entrepreneurial buyers. Even here, the Financial Administration could not sufficiently articulate any specific purpose in the context of data collection that would justify this collection. One of the documents, which internally presents e-cash register, briefly mentions block lottery or complaints procedure as ways of using data. However, the lottery is implemented differently today, as the verification of cash blocks requires the initiative of the customer. It is therefore obvious that any data on the purchasing non-entrepreneur are introduced in the system completely unnecessarily.

Currently, there is no specific legitimate purpose for which the state would collect a unique buyer identifier in the context of e-cash register. The only thing that the Constitutional Court noticed in the statements are the already mentioned plans for the future. In its previous jurisprudence, the Constitutional Court has already clearly said that it is not possible for the state to justify data collection only with future plans (PL. ÚS 13/2020, also BVerfG, file no. 1 BvR 1550/03, point 97).

However, legislation can also be uncertain in the formulation of its specific legitimate purpose. Legislation can be specific about what is to be collected and how, but it can also obscure the reasons for doing so. This is precisely the case with the buyer's unique identifier, because such a provision does not pursue a specific aim. The specific purpose for which the data in question is collected must be clear already from the legislative process. Without a clear plan in the legislative process for what the data is to be used for, it is not possible to talk about a specific legitimate purpose of their processing. The legislator can already do so today in its explanatory report or directly in the normative text. If the Constitutional Court were to accept such "vague" provisions in the legal order, any collection and use of data could be easily justified if there is at least some conceivable future goal that can be completed ex post at will. If the state needs specific data from its citizens, it must first of all be able to explain for what specific purpose it needs it. It is not enough to state that he may need them one day."

21. What proportionality test does your Court employ? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

The Court applies two different tests depending on the human right referred to. It generally tends to apply the classic (or full) proportionality test to the classic liberal rights and a less strict test to socio-economic rights. Art. 51 of the Constitution stipulates that the latter category of rights may only be invoked within the limits of the legislation implementing them, whereas no such restriction applies to the classic liberal rights.

While the Court first outlined the proportionality test's components in 2001 (PL. ÚS 3/00), it was only truly defined and used in the 2011 case concerning health insurance companies' profit (**PL. ÚS 3/09**):

"The proportionality test is classically based on three successive steps (stages). The first step is the assessment of the contested regulation from the point of view of suitability (Geeignetheit) or the existence of a

sufficiently important objective (test of legitimate aim/effect) and the rational link between the relevant (contested) legal norm and the objective (purpose) of the regulation. The second step is the assessment of the contested legislation by applying the criteria of necessity, indispensability or the use of the least drastic or least restrictive means (Erforderlichkeit, test of necessity, test of subsidiarity, sufficiently important objective). Finally, the third step is the proportionality test in the strict sense (Angemessenheit, test of proportionality in the strict sense, proportionate effect), i.e. in particular from the point of view of its proportionality in relation to the intended objective (m. m. PL. ÚS 23/06)."

In case no. **PL. ÚS 10/2013** concerning compulsory childhood vaccination, the Constitutional Court even used Robert Alexy's Weight Formula in the last step of the proportionality test and concluded that it was evident that both of the colliding values (public health protection v. privacy) could not be satisfied concurrently, and for that reason the Constitutional Court had to employ the Weight Formula in order to decide which value should be satisfied. The Court concluded that the intensity of interference with the right to respect for private life was moderate or serious (vaccination could have detrimental side effects, but it would not be applied in cases of contraindications and there were legal instruments to seek damages if any side effects happened to occur), whereas the satisfaction of the principle of protection of public health had a serious weight' (if compulsory vaccination were to be abolished, there would be no other means to control infectious diseases). It followed that the principle of protection of public health must be preferred to the principle of protection of the right to respect private life.

The Court uses a modified, less strict version of the proportionality test when examining claimed violations of socio-economic rights. This was recently summarised in case no.

PL. ÚS 14/2018, where legislative measures limiting access to mineral oil market were found to be unconstitutional for failing the legitimate aim test.

The Court then went on to describe this modified proportionality test, which it also refers to as reasonableness test (inspired by the methodology of the Constitutional Court of the Czech Republic):

"40. The proportionality test carried out in the context of the constitutional review of the contested legislation is based on three successive steps. The first step involves, first, a test of a sufficiently important objective not excluded by the Constitution, and the test of a rational connection between the impugned legislation and the and the objective (purpose) pursued by the challenged regulation, i.e. the test of suitability. The second step is establishing the criterion of necessity or the use of the least drastic or least restrictive measures, i.e. the least drastic means of achieving the objective pursued by the contested legislation. Finally, the third step is the criterion of proportionality in the narrower sense of the term, the content of which consists of a comparison of the degree of interference with constitutionally protected values caused by the application of the contested legislation (e.g. PL. ÚS 11/2013, PL. ÚS 3/09, m. m. PL. ÚS 19/09, m. m. PL. ÚS 23/06).

41. The proportionality test outlined above is a test designed for the first generation of human rights (civil and political rights). For the examination of the second generation of human rights (economic, social and cultural rights), which also includes the fundamental right to conduct a business under Article 35(1) of the Constitution, a modified proportionality test is applied (PL. ÚS 12/2014, PL. ÚS 14/2014, PL. ÚS 16/2018). It is excluded that the methodology of the inquiry into economic, social and cultural rights should be identical to the methodology of the inquiry used in relation to civil and political rights. The proportionality test is, based on the nature of economic, social and cultural rights, too 'strict', as it significantly restricts the legislator in adopting legislation aimed at regulating this area of social relations (PL. ÚS 14/2014, PL. ÚS 16/2018, similarly Constitutional Court of the Czech Republic in case No. Pl. ÚS 1/08).

42. The Constitutional Court has already stated in its previous decisions that economic, social and cultural rights are second-generation rights, the form and content of which depend to a significant extent on economic possibilities of the state (PL. ÚS 19/08, PL. ÚS 8/2014, PL. ÚS 16/2018). Economic, social and cultural rights may be invoked only within the limits of the laws which implement them (Article 51(1) of the Constitution), i.e. only to the extent deducible from the cited constitutional reservation, through which the Constitution undoubtedly grants the legislator greater leeway (in comparison to other groups of fundamental rights and freedoms) for the purpose of determining the extent, quality and conditions under

which they are guaranteed. This opens up a wide margin for the legislator to choose a wide variety of solutions. However, the Constitutional Court has already opined that the margin of discretion granted by the Constitution to the legislator in the adoption of these laws cannot be understood as absolute; its limits must be sought above all in constitutional principles and in the requirement to protect other values on which the Constitution is based and which it protects. These fundamental rights, by their very nature, while they call for regulation by the State (which will fulfil their content), the State must not interfere with the very essence of these rights or affect other rights enshrined in the Constitution and international treaties on human rights and fundamental freedoms by which the Slovak Republic is bound (PL. ÚS 11/2013, PL. ÚS 8/2014).

43. Legislation restricting economic, social and cultural rights need not be strictly proportionate to the aim pursued, i.e. it does not have to be necessary in a democratic society, as is the case with legislation restricting civil and political rights. In the case of economic, social and cultural rights, such legislation will pass the test of proportionality, if it can be found to pursue a legitimate aim and does so in a way that can be conceived of as a reasonable means of achieving it, even though it may not be the best, most appropriate, most effective or wisest measure. The requirement of reasonableness (proportionality) in restricting economic, social and cultural rights does not impose on the legislator demands comparable to those imposed in restricting civil and political rights. For the legislator, it brings an increase in the margin of discretion in the legal regulation of the mechanisms by which it grants economic, social and cultural rights a specific content (PL. ÚS 1/2012, PL. ÚS 14/2014, PL. ÚS 16/2018).

…

56. The proportionality test, as well as its modified version (the reasonableness test), must first of all address the question whether the contested legal norm respects the essence of the fundamental right and pursues a legitimate aim. The content of the first step (stage) of the proportionality test is, first of all, the assessment of the legal norm in question in terms of the existence of a legitimate aim, since a restriction of a fundamental right which is arbitrary is constitutionally impermissible. The legal norm must be directed towards the fulfilment of a purpose which is sufficiently important to justify (justify) the restriction of a fundamental right or freedom."

22. Does your Court go through every applicable limb of the proportionality test?

If the case at hand concerns one of the first-generation rights, generally speaking, yes. That notwithstanding the fact that the Court has been accused by some constitutional scholars of inconsistencies in the application of the proportionality test, such as sometimes conflating two steps into one.[1787]

If the case at hand concerns one of the socio-economic rights, the Court applies a modified, less strict test (see Q21).

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

No such cases are known.

24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

There does not seem to be any connection between the two. While the Court does mention in numerous decisions that it should be practising self-restraint, one can hardly speak of a "judicial deference doctrine".

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations

1787 Tomáš Ľalík: Test proporcionality a ústavný súd: vzostupy a pády, in: Justičná revue, 74, 2022, č. 12, p. 1400 – 1424.

regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

In general, the Constitutional Court has been greatly influenced by the case law of the European Court of Human Rights. The Court has been reiterating for decades that the Constitution should also be interpreted through the prism of human rights treaties (PL. ÚS 5/93, PL. ÚS 15/98, PL. ÚS 17/00, PL. ÚS 10/2014, PL. ÚS 24/2014), where the Strasbourg case law is of utmost relevance. The constitutional provisions on fundamental rights are commonly interpreted with reference to the ECHR case law (II. ÚS 55/98, PL. ÚS 10/2010, PL. ÚS 24/2014).

Sometimes, however, the Court does not hesitate to grant a higher standard of rights under the Constitution than is required by the ECHR. This is because the ECHR constitutes merely a minimal standard and the Contracting States are free to provide their citizens with more rights. A good example is the judgment on the penalty aggravation mechanism (see Q8):

"In relation to the question of the jurisprudence of the Strasbourg rights protection authorities regarding (not only) criminal sanctions and the adequacy of punishments, it is necessary to emphasize here that the convention and subsequently the jurisprudence of the Strasbourg rights protection authorities do not establish the maximum possible guarantees of human rights protection, but only a minimum standard protection of human rights. The Constitutional Court is thus bound by the jurisprudence of the Strasbourg rights protection bodies only in the sense that the protection of human rights provided by it must meet this minimum standard. The jurisprudence of the Strasbourg rights protection bodies cannot therefore be an obstacle to the constitutional court providing the protection of human rights with higher guarantees than those resulting from the jurisprudence of the Strasbourg rights protection bodies."

So while the Strasbourg Court has so far never found violation of the ECHR due to grossly disproportionate punishments and continues to give the States the so-called greater margin of appreciation in this area, this Court – while accepting the greater margin of appreciation in criminal policy cases as stated in the ECtHR case law – did find a constitutional violation on the same grounds, thus granting a higher level of protection than currently exists under the ECHR.

Fully answering the question regarding how often this Court's and the Strasbourg Court's approaches differ or overlap would amount to a proper dissertation thesis requiring profound and prolonged scientific study, which places it outside of the scope of the present questionnaire. See Q26 for an example of one such difference.

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

Yes, in **Urbárska obec Trenčianske Biskupice v. Slovakia**,[1788] the ECtHR found violation of Art. 1 par. 1 of the Additional Protocol, where the Constitutional Court had adopted a rather deferential approach in reviewing a law regulating land ownership in the context of consolidation of ownership and use of agricultural land after Slovakia's transition to a democratic society and market-oriented economy. The background situation is well summarised in the Strasbourg judgment:

"Under the communist regime in Czechoslovakia owners of land were in most cases obliged to put their land at the disposal of State-owned or cooperative farms. They formally remained owners of the land but in practice had no possibility of availing themselves of the property.

Some of the land in question was, for various reasons, not cultivated by the farms. It was the State policy to promote the use of such land for gardening. For that purpose allotment gardens (záhradkové osady) were established, mainly in the vicinity of urban agglomerations. Individual plots of land were put at the disposal of persons belonging to the Slovakian Union of Allotment and Leisure Gardeners (Slovenský zväz záhradkárov), who were allowed to cultivate the land as a pastime activity for their individual needs.

In the context of Czechoslovakia's transition to a market-oriented economy following the fall of the communist regime, Parliament adopted the Land Ownership Act 1991, the purpose of which was to mitigate

1788 CASE OF URBÁRSKA OBEC TRENČIANSKE BISKUPICE v. SLOVAKIA, Application no. 74258/01, Judgment of 27 November 2007.

certain wrongs and to improve the care of agricultural and forest land.

Under the Land Ownership Act 1991 the plots of land on which allotment gardens had been established were not to be restored in natura to the original owner where ownership of the land had passed from the original owners to the State or a legal person. In such cases the original owners were entitled to compensation in kind or in pecuniary form. In this category of cases the legislator gave precedence to legal certainty for the existing users of the property, as the use of land for gardening was considered to be of greater public interest than restoring the land in natura to its original owners.

In the second category of cases, where the original owners maintained their ownership rights, albeit in name only (nuda proprietas), the Land Ownership Act 1991 established conditions enabling the owners to enjoy their property rights to a greater extent. In particular, it provided for the land to be let to the existing users, with a notice period expiring on the date when the temporary right to use the land came to an end. The tenants were, however, entitled to have the lease extended by ten years unless an agreement to the contrary was reached between the parties. The landowners were also entitled to request, within three years of the coming into effect of the 1991 Act, the exchange of their property for a different plot of land owned by the State.

The above approach, permitting the owners to recover full possession of their land after the expiry of the ten years for which the tenants had the right to have the lease extended, was modified with the adoption of Act 64/1997. As a result, owners have only a limited possibility of terminating the lease, mainly on the grounds of the tenants' failure to comply with their obligations. The position of the tenants has been strengthened in that they are entitled to acquire ownership of the land they use for gardening. As to the owners, Act 64/1997 gives them the right to obtain either a different plot of land or pecuniary compensation.

In introducing Act 64/1997 the legislator abandoned the philosophy of giving general priority to the rights of the owners of plots of land on allotment sites and took the position that it was in the general interest that the rights of persons who had been using the land for gardening should prevail."

Thirty-five members of Parliament and the Prosecutor General brought proceedings before the Constitutional Court claiming that several provisions of Act 64/1997 were contrary to the Constitution and Article 1 of Protocol No. 1. In particular, the members of Parliament relied on the ECtHR's case-law, arguing that there existed no genuine public interest in the interference with the landowners' rights and that the compensation which the landowners were to receive under the relevant provisions of Act 64/1997 was not appropriate.

On 30 May 2001 the Constitutional Court concluded (PL. ÚS 17/00) that section 17(3) of Act 64/1997 was contrary to, inter alia, the constitutional protection of ownership rights. It dismissed the remainder of the submissions.

The Constitutional Court noted that the regulation of relations in respect of land used for gardening in allotments mainly concerned, as in the case of restitution laws, the undoing or mitigation of the wrongs which had occurred in the past when the principle of the rule of law had not been respected. The legislator had a certain margin of appreciation when deciding on the relevant issues, provided the constitutional guarantees were upheld.

With regard to the compulsory letting of the land to the gardeners under section 3 of Act 64/1997, it was merely a temporary measure pending the transfer of its ownership to the gardeners in accordance with the provision of that Act. It pursued the aim of providing the users with legal certainty and of ensuring optimal use of the land in question with due regard to the requirements of the landscape and the environment. It was as such in the public interest. The measure was limited in duration and it was not disproportionate as it filled the gap which arose following the quashing of section 22(3) of the Land Ownership Act 1991. Parliament, by obliging the owners to let the land to the gardeners, had not overstepped its margin of appreciation and had struck a fair balance between the general interest and the protection of individuals' rights. Section 3 was therefore not contrary to Article 1 of Protocol No. 1 to the Convention or its constitutional equivalent.

As to the argument that the rent payable under section 4 of Act 64/1997 was disproportionately low, the Constitutional Court held that Article 1 of Protocol No. 1 imposed on the Contracting Parties to the Convention no specific obligations as regards compensation for the use of property in the general interest. There was no appearance that the relevant provision was unconstitutional.

The plaintiffs also argued that the transfer of ownership of the land to the gardeners under sections 7 et seq. of Act 64/1997 was not in the general interest as it restricted the rights of the owners to the benefit of a different group of individuals without any relevant justification.

In the Constitutional Court's view, that transfer of ownership was to be seen in the broader context of land consolidation, the purpose of which was set out in section 19 of the Land Ownership Act 1991 and in section 2(a) of the Land Consolidation Act 1991. Consolidation pursued the aim of setting up integrated land entities in accordance with the needs of individual owners, with their consent, and with due regard to general requirements as regards the creation of the landscape, the environment and investment development. Land consolidation was also justified with a view to adjusting the existing relations between owners and users and eliminating any obstacles which had arisen as a result of past developments. Sections 7 et seq. of Act 64/1997 in no way affected the above general interest in land consolidation.

The plaintiffs further alleged that the compensation for land under section 11 of Act 64/1997 was inappropriate as it was substantially lower than the market value of the land.

The Constitutional Court noted that the owners had the choice between alternative plots of land and financial compensation. The gardeners could not be held liable and they should not be penalised for the fact that the owners had been deprived of the possibility of enjoying their property under a regime which had disregarded democratic principles. Furthermore, the users, by cultivating the land, had substantially increased its value. The Constitutional Court therefore accepted as just the relevant provisions under which compensation to the owners should be based on the value of the property at the time when the gardeners had started using it. The compensation under Act 64/1997 was therefore appropriate and compatible with the requirements of Article 1 of Protocol No. 1.

Finally, the Constitutional Court found that section 17(3) of Act 64/1997 was unconstitutional as there was no justifiable public interest in transferring ownership of land to the State in cases where the user had failed to pay the amount due.

In a separate opinion three judges stated that the compulsory letting under section 3 of Act 64/1997 was unconstitutional and that the compensation payable under section 11 was not appropriate as it was based on the value of the property at the time when the gardeners had acquired the right to use the land.

The dissenting judges expressed the view that the parties to proceedings under Act 64/1997 were in an unequal position. In particular, the applicable law did not permit the administrative authorities or courts called upon to review their decisions to balance the interests of the persons involved, assess whether the transfer of ownership was justified in the particular circumstances of the case or examine the question whether the compensation provided to the owner was appropriate.

In the particular case under consideration before the European Court of Human Rights, the ownership of the land of the applicant association was transferred to the tenants and the applicant association was given an alternative plot of land of a much lesser development potential and of a fraction of market value, in addition to first being compulsorily let to the tenants for a decade for a rent which was, again, grossly disproportionate. The Strasbourg Court, given this gross disproportionality to the aim pursued, held that there had been violation of Article 1 of Protocol no. 1.

IV. OTHER PECULIARITIES

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

Human rights violation claims are most often found in constitutional complaint cases, which comprise about 90 % of the total caseload. In Slovakia, a constitutional complaint may only be filed against individual decisions or inaction or measures in individual cases, not against legislation. This means that the Constitutional Court mainly reviews decisions of other courts, occasionally those of prosecutors and administrative authorities, but for the time being at least, the Court may not review the legal rules on which those decisions are based in the first place.

This is unlike in many other countries.

28. Has your Court grown more deferential over time?

There is no discernible trend of the Court becoming either less or more deferential.

29. Does the deferential attitude depend on the case load of your Court?

There are no indications that this would be the case.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

Under § 45 of the Law on the Constitutional Court, the Court is bound by the reasons and purview of the motion for commencement of proceedings.

However, the Court provided a different interpretation in some cases in the past. In an abstract legislation review case no. PL. ÚS 14/2014, the Court stated the following:

"What has been stated in paragraph 50 above is related to the question of the extent to which the Constitutional Court is bound by the petition in the procedure for abstract review of norms. In this context, it is necessary to distinguish between being bound by the prayer for relief, which the Constitutional Court has repeatedly confirmed in its decision-making (e.g. by the opinion that the Constitutional Court could not consider reference norms other than those identified in the prayer for relief, being bound by the prayer for relief), and being bound by the reasoning or argumentation, by which the Constitutional Court does not feel itself bound. Therefore, with regard to the argumentation of the petition (its scope and content), it should be confirmed that the Constitutional Court may also take into account arguments other than those put forward by the petitioners in the proceedings for abstract review of the norms."

On the other hand, in constitutional complaint proceedings, the Court did not find itself bound by the referred human rights (I. ÚS 41/2015):

"The Constitutional Court as the supreme authority for the protection of constitutionality is bound in its decision not only by the petition (complaint) but also by its factual grounds in the sense of the "iura novit curia" principle, so it can be said that it is authorised to also examine violations of other fundamental rights and freedoms guaranteed by the Constitution than those referred to by the complainant in her complaint."

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

Yes, § 89 of the Law on the Constitutional Court expressly allows that.

The Constitutional Court of the Republic of Slovenia

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Constitutional cultures vary and the courts' perceptions of their own role in a constitutional democracy affect the intensity of their scrutiny in fundamental rights cases. Many courts profess judicial deference.

Judicial deference is a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters which are perceived to be beyond their expertise or legitimacy to decide. The tool has been employed, most prominently, in human rights cases. This is due to their transcendent quality, capable of cutting across all substantive areas of public decision-making.

It is said that over-deferential attitude threatens the rule of law and separation of powers as much as excessive judicial activism does. The way judges exercise judicial deference is, therefore, a fundamental matter of constitutional principle that concerns the proper role of each branch of government in relation to significant questions of public policy.

The following questions aim to discover the differences in exercising judicial deference by European constitutional courts.

Questionnaire

for the national reports

I. Non-justiciable questions and deference intensities

1. In your jurisdictions, what is meant by "judicial deference"?

The concept of judicial deference or restraint has not been comprehensively studied in the Slovene legal sphere. In Slovene legal literature, the concept of judicial activism can be encountered more frequently. Although both concepts elude direct and unambiguous definition,[1789] it can be generally concluded that they refer to the relationship of the courts or the judicial branch of power towards the authorities of other branches of power. The notion of judicial activism is often associated with qualifiers that make it either *positive*, *permissible* or *desirable* or *negative*, *impermissible* or *undesirable*,[1790] with the line between the former and the latter being difficult to draw and, and in fact, in debates, it often depends on the debater's evaluation of concrete decisions.

In the Slovene legal sphere, the concept of judicial activism or restraint is most often used in connection with the relationship between the Constitutional Court and the National Assembly as the legislature or constitution-framer.[1791] In terms of the topics covered by this questionnaire, three aspects can be highlighted where the issue of judicial activism or restraint may arise, namely (i) in the interpretation of regulations, in particular constitutional provisions, (ii) in relation to specific decisions of the Constitutional Court, and (iii) in relation to the Court's approach to the assessment of a specific case (i.e. different tests of constitutional review).

When the Constitutional Court interprets regulations, the issue of activism or restraint is particularly accentuated when the Constitutional Court interprets the provisions of the Constitution when assessing the constitutional consistency of statutory provisions. Allegations of activism are thus most

1789 On the intangibility of the concept of judicial activism in the USA, see S. A. Lindquist, F. B. Cross, Measuring Judicial Activism, Oxford University Press, New York 2009, pp. 29 *ff*. This intangibility is also referred to by M. Accetto, O aktivizmu in zadržanosti pri sodniškem odločanju, ius kolumna, 28. 11. 2016, available at: https://www.iusinfo.si/medijsko-sredisce/kolumne/183448.

1790 See, e.g., C. Ribičič, Ustavno sodišče kot pozitivni zakonodajalec, Podjetje in Delo, No. 6-7 (2015), p. 1334; M. Novak, Delitev oblasti: medigra prava in politike, Cankarjeva založba, Ljubljana (2003), pp. 166-180.

1791 In the Republic of Slovenia, the Parliament consists of the National Assembly as the general representative body, which plays a central role in the legislative process, and the National Council, which represents the various interests of society and has the power of suspensive veto over laws passed by the National Assembly. In the event of a veto, the latter has to vote again on the relevant law, which requires a stricter majority to be passed. The National Assembly also plays a key role in amending the Constitution.

frequently raised with regard to more high-profile decisions of the Constitutional Court, which receive greater public attention, especially if their content is polarising. Such applies, for example, to cases where the Constitutional Court has interpreted the Constitution broadly, especially where the text of the Constitution was not clear or the intention of the constitution-framer was not evident. It is worth noting here that constitutional case law contains both cases where the Constitutional Court has been criticised for allegedly impermissibly broadening the scope of individual human rights and fundamental freedoms or introducing new concepts of constitutional law through it interpretation of the Constitution,[1792] as well as cases where the Constitutional Court has interpreted constitutional provisions in an (excessively) restrictive manner. [1793]

A certain degree of judicial activism, from the point of view of the separation of powers, is built into the very essence of the Constitutional Court's functioning, as it is also assigned an important role in the legislative sphere. This is partly due to its constitutionally conferred power to abrogate unconstitutional laws or individual statutory provisions (as well as other unconstitutional or unlawful regulations and general acts), when it thus acts as a so-called negative legislator. The legislative role of the Constitutional Court becomes even more evident due to two powers determined by the Constitutional Court Act,[1794] namely the power to issue declaratory decisions and the power of the Constitutional Court to determine the manner of implementation of its decisions. The latter includes the possibility of the Court to adopt a temporary regulation that is generally binding, has the force of law, and applies until the legislature (or other competent authority) has remedied the established unconstitutionality. In these cases, the Constitutional Court therefore assumes the role of a so-called positive legislator.[1795]

With regard to the relationship between the Constitutional Court and the legislature, former President of the Constitutional Court, Dr Jadranka Sovdat, for example, linked the notion of judicial restraint to the role of the Constitutional Court as a negative legislator, and judicial activism to its role as a positive legislator.[1796] The notion of constitutional judicial activism is frequently understood as the Constitutional Court's intervention in the field of positive legislative activity.[1797] In this context, the notions of judicial restraint and judicial activism refer primarily to the question of the limits of the legislative (or, more broadly, law-making) activity of the Constitutional Court.[1798]

1792 The most notorious example of an activist decision of the Constitutional Court is probably Decision No. U-I-114/11, dated 9 June 2011, by which the Court established the Municipality of Ankaran. This is discussed in more detail in the final part of the answer to question 3. Some have also seen the decisions by which the Constitutional Court developed the rights of same-sex couples as examples of excessive constitutional judicial activism. See the reply to question 10.

1793 The ECtHR's decision in *Rutar and Rutar Marketing v. Slovenia*, dated 15 December 2022, application no. 21164/20, can also be understood in this sense – see reply to question 26. The Constitutional Court has sometimes been criticised for being overly strict also due to its strict interpretation of legal interest and other procedural requirements in Constitutional Court proceedings.

1794 *Zakon o Ustavnem sodišču – ZUstS*, Official Gazette RS, No. 64/07 – official consolidated text, 109/12, 23/20, and 92/21, available in Slovene at: http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO325 and in English at: https://www.us-rs.si/wp-content/uploads/2020/02/The-Constitutional-Court-Act.pdf.

1795 Regarding the legislative role of the Constitutional Court, see S. Nerad, Ustavno sodišče kot (pozitivni) normodajalec, in: Izzivi ustavnega prava v 21. stoletju: liber amicorum Ciril Ribičič, Inštitut za lokalno samoupravo in javna naročila, Maribor 2017, pp. 247-264, and A. Teršek, Ustavnosodno pravotvorje v sodobnem ustavništvu, in: Izzivi ustavnega prava v 21. stoletju: liber amicorum Ciril Ribičič, pp. 227-245.

1796 J. Sovdat, Judicial Activism in the Case-Law of the Slovenian Constitutional Court, Collected Papers of the International Conference Constitutional Court – Between a Negative Legislator and Positive Activism, Sarajevo, 27. 3. 2014, Ustavni sud BiH, Sarajevo 2015, p. 95.

1797 A. Teršek, Vrnitev v ustavnopravno preteklost, Nova Univerza, Nova Gorica 2020, pp. 16, 25, 35. M. Novak, Ustavnosodni aktivizem, ius kolumna, 14. 2. 2022, available at: https://www.iusinfo.si/medijsko-sredisce/kolumne/292489. C. Ribičič, Ustavno sodišče kot pozitivni zakonodajalec, Podjetje in delo, Vol. 41(2015), No. 6-7, pp. 1332-1344. See also B. Bugarič, Ustavna sodišča v srednji in vzhodni Evropi: med sojenjem in politiko, Teorija in praksa, Vol. 35 (1998), No. 2, pp. 287-305, and M. Krivic, Ustavno sojenje in politika, Teorija in praksa, Vol. 35 (1998), No. 5, pp. 929-941.

1798 S. Nerad, *op. cit.*, p. 250.

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

An explanation of the competences of the Constitutional Court is in order at the outset of this questionnaire. In accordance with the first paragraph of Article 21 of the Constitutional Court Act, the Constitutional Court decides on the conformity of laws with the Constitution, the conformity of laws and other regulations with ratified international treaties and general principles of international law, the conformity of regulations with the Constitution and laws, the conformity of regulations of local authorities with the Constitution and laws, and the conformity of general acts issued for the exercise of public authority with the Constitution, laws, and regulations. The second paragraph of Article 21 of the Constitutional Court Act also establishes the competence of the Constitutional Court, in the process of ratifying a treaty, to issue an opinion on its conformity with the Constitution, and the third paragraph of the same Article determines that the Constitutional Court also decides on the constitutionality and legality of the procedures by which the mentioned regulations were adopted. In addition, it decides on constitutional complaints alleging breaches of human rights and fundamental freedoms by individual acts. Constitutional complaints account for the majority of cases brought before the Constitutional Court.[1799] The Constitutional Court is also competent to decide jurisdictional disputes between the State and local communities and among the local communities themselves, between courts and other state authorities, and between the National Assembly, the President of the Republic, and the Government. The Constitutional Court also decides on the liability of the President of the Republic and the Prime Minister and ministers, the unconstitutionality of acts and activities of political parties, appeals in the procedure for confirming the election of deputies, and other matters determined by laws.

The competences of the Constitutional Court are therefore very broad, and include matters that are inherently political, such as jurisdictional disputes of between the highest state authorities from different branches of state power, electoral disputes, deciding on the unconstitutionality of acts and actions of political parties, impeachment proceedings against the highest representatives of the state, and legislative referenda. In addition, the applicants who can request a decision of the Court in a procedure for the constitutional review are first and foremost political stakeholders and include, *inter alia*, the National Assembly, one-third of its deputies, the National Council, and the Government. Two institutions vested with the protection of human rights, namely the Ombudsperson and the Advocate of the Principle of Equality, may also submit a request for constitutional review to the Court. As the Constitutional Court is the highest national authority for the protection of constitutionality and legality as well as human rights and fundamental freedoms, it is relatively often faced with socially and politically highly sensitive legal issues that have not been adequately resolved in the legislative process or in proceedings before administrative authorities and regular courts, such as the fate of the so-called Erased, the savers of branches of the bank Ljubljanska banka from other republics of former Yugoslavia, the regulation of the rights of same-sex couples, the measures to contain the Covid-19 pandemic, the Swiss franc loans, etc.

The competences of the Constitutional Court are determined by the Constitution and the laws, and the Court cannot refuse to decide a case that is referred to it and that falls within its jurisdiction. The political question doctrine is therefore not established in the Slovene legal order. The Court, however, does not function in a vacuum, but always decides in a particular social, moral, and political context. The intensity of the Court's review depends on the characteristics of each specific case.

In its decisions, the Constitutional Court has repeatedly emphasised that in a constitutional democracy, the conduct of all public authorities is limited by constitutional principles and human rights and fundamental freedoms. Therefore, in such a legal order, all state authorities from all three branches of power are obliged to respect the Constitution and exercise their powers in accordance with the

1799 In 2022, the Constitutional Court received 1,754 constitutional complaints (78%) and 482 applications for review of the conformity of legislation (21%).

Constitution. In this framework, the National Assembly, as the legislature, is the first guardian of the Constitution, as the laws it adopts must be in conformity with the Constitution. The Government, as the main proposer of laws that are drafted by the administration, also plays an important role in this context. When drafting proposals, it must aim to ensure that its response to the current social situation is consistent with the Constitution. An important role in monitoring the work of the legislature is entrusted already to the regular courts, which rule on the basis of the Constitution and the laws and have to initiate proceedings for a review of the constitutionality of provisions of a law if they consider that they are not in conformity with the Constitution and they would have to be applied to decide a case. The Constitutional Court is thus the highest and final guardian of the Constitution, ensuring respect for constitutionality and legality and the protection of human rights and fundamental freedoms.

With regard to the approach of the Constitutional Court to the review in a specific case, it is first important to distinguish between cases that concern constitutional principles and those that concern human rights and fundamental freedoms. The legislature is bound by the Constitution in both formal and substantive terms. Indeed, the substantive conformity of a law with the Constitution requires not only conformity with specific constitutional provisions, but also with the fundamental values of a free democratic constitutional order as a constitutional value.

When reviewing statutory provisions that do not touch upon the field of human rights, the Constitutional Court examines whether the provision in question is consistent with the relevant constitutional requirements as the major premise of its review. In this context, the tests of the consistency of a statutory regulation with the constitutional principles of trust in the law, the prohibition of retroactive effect of regulations, the clarity and precision of regulations (the manner of assessing violations of this principle is presented in the reply to question 19), and equality before the law should be outlined.

In assessing compliance with the principle of trust in the law, which is derived from Article 2 of the Constitution, it follows from settled constitutional case law that this principle "guarantees to an individual that the State will not worsen his or her legal position arbitrarily, i.e. without an objective reason grounded in an overriding and constitutionally admissible public interest. As it is a general legal principle and not directly a human right, which are entitled to stricter protection against possible restrictions and other interferences by Article 15 of the Constitution, this principle does not have an absolute character and is subject to potential limitations to a greater extent than individual human rights, i.e. in the event of a conflict or collision between this principle and other constitutional principles or values, a so-called balancing of values must be carried out to determine which of the constitutionally protected values should be given precedence in an individual case. In particular, when assessing the principle of trust in the law, it is important to consider whether changes in the legal sphere are relatively foreseeable, and therefore the affected persons could have anticipated the change, and the gravity of the change and the significance of the existing legal situation for the beneficiaries, on the one hand, and the public interest justifying a different regulation than the existing one, on the other hand."[1800]

The Constitutional Court also applies a special test to review the consistency of regulations with the prohibition of the retroactive effects of legal acts (Article 155 of the Constitution). The test is based on the second paragraph of Article 155, which determines a number of cumulative conditions under which such retroactivity may be constitutionally permissible, namely: 1) only a law may establish retroactivity, 2) only certain provisions of a law may have retroactive effect, but only if 3) the public interest so requires, and 4) if the rights acquired are not thereby infringed.[1801]

1800 Decision No. U-I-303/18, dated 18 September 2019, ECLI:SI:USRS:2019:U.I.303.18, Official Gazette RS, No. 59/19, and OdlUS XXIV, 15, para. 17, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=113545; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=114260.

1801 Among more recent decisions, see Decision No. U-I-64/22, U-I-65/22, dated 17.11.2022, ECLI:SI:USRS:2022:U.I.64.22, Official Gazette RS, No. 157/22, CODICES SLO-2022-2-005, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=118521 and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=118635.

It is also necessary to mention the test of compliance with the general principle of equality determined by the second paragraph of Article 14 of the Constitution. This constitutional principle "requires the legislature to regulate substantially identical situations in the same manner and substantially different situations differently. In order to assess which similarities and differences of specific positions are essential, it is necessary to proceed from the regulated subject matter. If the legislature regulates substantially identical situations differently, there must exist reasonable grounds for such a regulation that are objectively connected to the subject matter. The principle of equality before the law does not entail that the legislature may not regulate substantially identical positions of legal entities differently, but that it must not do so arbitrarily, without sound and objective reasons."[1802]

The next group includes cases where the Constitutional Court reviews the constitutionality (and legality) of regulations in the field of human rights. In accordance with the first paragraph of Article 15, human rights and fundamental freedoms are exercised directly on the basis of the Constitution. The second paragraph of this Article provides the manner in which human rights and fundamental freedoms are exercised may be regulated by law where the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom. According to the third paragraph, human rights may be limited only by the rights of others and in the instances determined by the Constitution. The legislature is therefore more limited with regard to the statutory regulation of human rights.

In these cases, the intensity of the review depends first of all on whether the Constitutional Court assesses that the measure (statutory regulation) in question constitutes an interference with a human right or merely regulates the manner of its exercise. In the latter case, the court applies a more lenient test, namely the so-called rationality test. It is established case law that "the review of a statutory regulation which, in substance, merely constitutes a determination of the manner in which a right may be exercised [...] must necessarily be reserved, and in this context the Constitutional Court, as a general rule, examines only whether the legislature had reasonable grounds for determining the manner of the exercise of the right.[...] The reasonableness of the grounds must be understood as a connection between the measure and the objective, i.e. as the requirement that there exists an objective connection between the measure and the regulated subject matter."[1803] The Constitutional Court has repeatedly stressed that the "line between regulating the manner of the exercise of human rights and their limiting is not always easy to determine."[1804] "In some instances, this delineation depends on the intensity of the "narrowing" effect of a certain provision. Elsewhere, it is important to analyse the systemic placement of the provision at issue and to assess its overall effect in conjunction with other provisions of the same and other regulations. Moreover, it follows from constitutional case law that, when assessing whether there has been an interference with a human right, the degree of the impact of the negative consequence that disregarding the provision entails for the right must also be taken into account."[1805]

It should be noted that cases in which the Constitutional Court, after having carried out a rationality test, found that the challenged regulation was reasonable are much more frequent than cases in which the challenged measure was found to be unreasonable. This might indicate that the Court

1802 Decision No. U-I-809/21 of 23 June 2022, ECLI:SI:USRS:2022:U.I.809.21, Official Gazette RS, No. 99/22, para. 48, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117926; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=118611.

1803 Decision No. U-I-491/18, dated 6 May 2021, ECLI:SI:USRS:2021:U.I.491.18, Official Gazette RS, No. 86/21, and OdlUS XXVI, 14, para. 39, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=116393.

1804 Decision No. Up-676/19, U-I-7/20, dated 4 June 2020, ECLI:SI:USRS:2020:Up.676.19, Official Gazette RS, No. 93/20, and OdlUS XXV, 14, para. 20, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=114356; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=116064.

1805 Decision No. U-I-793/21, U-I-822/21, dated 17 February 2022, ECLI:SI:USRS:2022:U.I.793.21, Official Gazette RS, No. 29/22, item 41, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117441; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=118648. Similarly, Decision No. U-I-502/18, dated 9 December 2021, ECLI:SI:USRS:2021:U.I.502.18, Official Gazette RS, No.1/22, and OdlUS XXVI, 38, paras 23-24, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=1; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=11757917136.

is relatively restrained in its assessment within the framework of the rationality test, or that it grants the legislature a wide margin of appreciation. The unreasonableness of the challenged regulation was, for example, established by the Constitutional Court in a case from 2019, where it ruled on an interference with the right to one's home. The challenged provision of the law regulating the enforcement of claims limited the court's ability to defer enforcement through eviction and the seizure of residential real property that is the debtor's home. The Constitutional Court clarified that the objective of the deferment of enforcement is to enable the protection of the debtor's position in those exceptional cases where the invasiveness of eviction and the seizure of real property that is the debtor's home would result in particular hardship and would be contrary to the attained values of society and the obligation to observe human dignity and would deny individuals any manner of care. It found that the challenged regulation undermined the attainment of that objective and was therefore not objectively related to the regulated subject matter – i.e. that, when deciding on deferment for particularly compelling reasons, the ordinary court must weigh the competing interests and take into account all the circumstances of the case in order to strike a fair balance between the protection of the positions of the creditor and the debtor. Since the restriction under review was not objectively connected to the regulated subject matter, the Court concluded that it was not reasonable. It therefore held that the challenged provision was inconsistent with the right determined by Article 35 of the Constitution.[1806] The Constitutional Court adopted a similar decision in a case from 2017, when it reviewed the regulation of legal protection in the event of errors with regard to the granting of the right to a pension. The legislature did not regulate a specific remedy for such cases, and therefore the general regime prevailed, which, however, did not allow individuals to effect the rectification of such errors in all cases. The Constitutional Court held that there were no reasonable grounds for a regulation which was not adapted to the nature of the right to a pension. It was therefore inconsistent with the first paragraph of Article 50 of the Constitution, which guarantees the right to a pension.[1807]

The Constitutional Court reviews the admissibility of a regulation that constitutes an interference with a human right on the basis of two related tests, namely the legitimate aim test and the proportionality test. The legitimate aim test entails an assessment of whether the measure pursues a constitutionally admissible aim. The proportionality test, on the other hand, is an examination of the measure's reasonableness, necessity, and its proportionality in the strict sense.

The Constitutional Court examination summarised the test for reviewing the admissibility of an interference with a human right in a recent decision concerning the measures to contain the Covid-19 pandemic as follows:

"A human right may only be restricted in the instances expressly provided for by the Constitution and in order to protect the human rights of others (the third paragraph of Article 15 of the Constitution). According to established constitutional case law, a human right may be restricted if the legislature pursued a constitutionally admissible aim and if the restriction is consistent with the principles of a state governed by the rule of law (Article 2 of the Constitution), to be precise, with the principle that prohibits excessive state interference (the principle of proportionality). The Constitutional Court assesses whether the interference is excessive on the basis of the so-called strict proportionality test, which encompasses an assessment of the reasonableness, necessity, and proportionality of the interference."[1808]

For further details on the legitimate aim test, see the answer to question 20 and on the proportion-

1806 Decision No U-I-171/16, Up-793/16, dated 11 July 2019, ECLI:SI:USRS:2019:U.I.171.16, Official Gazette RS, No. 53/19, and OdlUS XXIV, 13, paras. 21-22, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=113492; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=114242.

1807 Decision No. Up-195/13, U-I-67/16, dated 26 January 2017, ECLI:SI:USRS:2017:Up.195.13, Official Gazette RS, No. 9/17, and OdlUS XXII, 4, para. 17, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=112368; an abstract in English is available at https://www.us-rs.si/decision/?lang=en&q=&id=112521.

1808 Decision No. U-I-83/20, dated 27 August 2020, ECLI:SI:USRS:2020:U.I.83.20, Official Gazette RS, No. 128/20, and OdlUS XXV, 18, para. 41, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=114985; an abstract in English is available at https://www.us-rs.si/decision/?lang=en&q=&id=112521.

ality test, see to questions 21-22.

The Constitutional Court has also developed specific tests in relation to certain rights. This applies, for example, to the review of alleged violations of the prohibition of discrimination. "The first paragraph of Article 14 of the Constitution determines that everyone in the Republic of Slovenia shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political, or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance. […] In accordance with the established case law of the Constitutional Court, the following questions must be answered when assessing an allegation of discriminatory treatment: 1) whether the alleged different treatment refers to the guarantee or exercise of a human right or fundamental freedom; 2) if so, whether there is a difference in treatment between the affected person and the person to whom the affected person is being compared; 3) whether the actual positions that are being compared are essentially the same and thus the differentiation is based on a ground determined in the first paragraph of Article 14 of the Constitution; and, 4) if the differentiation is indeed based on a ground determined in the first paragraph of Article 14 of the Constitution and therefore there is an interference with the right to non-discriminatory treatment, whether such an interference is constitutionally admissible."[1809] The assessment of the admissibility of the interference comprises the mentioned legitimate aim and proportionality tests.

To review interferences with social rights and the rights of persons with disabilities (see the answer to question 7) and with freedom of enterprise, the Constitutional Court applies tailored tests that are slightly different from the general test for the admissibility of an interference with a human right. In assessing interferences with free economic initiative guaranteed by the first paragraph of Article 74 of the Constitution, the power conferred on the legislature by the first sentence of the second paragraph of this Article to determine the conditions for the establishment of companies and the constitutional prohibition to exercise economic activities contrary to the public interest play an important role. The legislature's power to regulate the manner in which free economic initiative may be exercised may also be based on the second paragraph of Article 15 of the Constitution, which allows the legislature to regulate the manner of its exercise in other cases relating to the field of entrepreneurship and economic activity, in particular when determining the conditions for carrying out an economic activity.

In regulating the exercise of economic activity, the legislature "is establishing economic policy in individual areas of social life that it deems to be the most appropriate for the achievement of the general welfare of society, and enjoys a wide margin of discretion in doing so.[...] According to established constitutional case law, the right to free economic initiative is limited when a regulation narrows the field of entrepreneurial freedom in a particularly intensive manner.[...] When determining the conditions for performing an economic activity, we are only dealing with the manner of exercise of the right when the condition in question has a true substantive connection to the concretely regulated economic activity.[...] Such is the case in particular when the legislature averts a threat or mitigates the risks that follow from a certain concrete activity (e.g. in the field of safety at work or the protection of a healthy living environment).[...] However, if the legislature limits free economic initiative in order to achieve general public objectives or objectives in a certain separate field of social life, this entails an interference with the right to free economic initiative determined by the first paragraph of Article 74 of the Constitution."[1810]

With regard to the prohibition of economic activities contrary to the public interest, the Constitu-

1809 Decision No. U-I-91/21, Up-675/19, dated 16 June 2022, ECLI:SI:USRS:2022:U.I.91.21, Official Gazette RS, No. 94/22, CODICES SLO-2023-2-004, para. 35, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117905, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=117934. Similarly also, Decision No. U-I-486/20, Up-572/18, dated 16 June 2022, ECLI:SI:USRS:2022:U.I.486.20, Official Gazette RS, No. 94/22, CODICES SLO-2023-2-003, para. 25, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117906, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=117933.

1810 Decision No. U-I-491/18, dated 6 May 2021, ECLI:SI:USRS:2021:U.I.491.18, Official Gazette RS, No. 86/21, and OdlUS XXVI, 14, para. 36 and the cases cited therein, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=116393.

tional Court has already clarified that restraint is needed "when assessing individual measures by which the legislature implements economic policy, not only when it comes to determining the manner in which the free economic initiative is exercised, but also when it comes to assessing the admissibility of its restrictions. However, [...] the legislature's powers in giving effect to that constitutional prohibition are nevertheless neither absolute nor completely unrestricted. When regulating economic activity, the legislature is also bound by the general principle of proportionality (Article 2 of the Constitution), which allows it to restrict a constitutional right only to the extent necessary to protect the public interest."[1811] "The legislature may determine conditions for the pursuit of a particular activity and, within that framework, conditions for the pursuit of particular types of work or service constituting that activity, if such is necessary for the protection of the public interest. The legislature has a wide margin of discretion in this respect. The constitutional review of such a legal regulation is therefore restrained. However, the legislature must pursue legitimate aims which are in the public interest and the measures taken must be reasonably connected to those aims [...]."[1812]

In the performance of its tasks, the Constitutional Court regularly dwells at the intersection of law and politics, and the Court does not *a priori* refuse to rule on political issues if they have a certain legal dimension. It is already evident from the outlined cases relating to the freedom of enterprise that the legislature, in regulating this freedom, is formulating economic policy and that the Constitutional Court's review must therefore necessarily be restrained. Similarly, in Decision No. U-I-129/19,[1813] which concerned the State budget, the Constitutional Court explained that the budget is an abstract and general legal act of a specific type, which has external effects and the force of law, and must therefore be accorded the legal character of a regulation with the hierarchical status of a law, and the Constitutional Court is competent to review its consistency with the Constitution.[1814] With regard to the standards fro reviewing the budget, it noted that the budget "is, in its essence, both the State's financial plan for a given year and its economic and political programme. It is the means by which the Government, which prepares it, provides the means for the implementation of the programme and the political priorities to be financed from the budget in a given year. When reviewing the consistency of the budget with the Constitution, the Constitutional Court must bear in mind this political, economic, financial, and social dimensions of the budget, all of which are elements of the budget that cannot be regarded as its legal dimension.[...] In doing so, the Constitutional Court must consider that the democratically elected Parliament has a wide margin of discretion when deciding on the amount of the budget and on the allocation of budgetary resources. The wider its margin of appreciation, the more deferential is the Constitutional Court's review. The Constitutional Court must not be an instrument for the "de-parliamentarisation" of political controversies concerning the amount and structure of public spending.[...] Budgetary issues which are also of a (constitutional) legal nature are, for example, the preservation of the State's basic financial capacity and financial fiscal sovereignty (the second paragraph of Article 148 of the Constitution), and the guarantee of the financing of all the functions of the State, including the constitutionally mandated minimum extent of the social state (Article 2 of the Constitution)."[1815]

The regulation of elections at national and local levels is also an area where legal and political issues are intertwined. In 2018, the Constitutional Court decided on the constitutionality of the law reg-

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1811 Decision No. U-I-446/20, U-I-448/20, U-I-455/20, U-I-467/20, dated 15 April 2021, ECLI:SI:USRS:2021:U.I.446.20, Official Gazette RS, No. 72/21, and OdlUS XXVI, 13, para. 15, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=116317; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=117088.

1812 Decision No. U-I-293/04, dated 6 October 2005, ECLI:SI:USRS:2005:U.I.293.04, Official Gazette RS, No. 93/2005, and OdlUS XIV, 73, para. 8, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=105229; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=105326.

1813 Decision No. U-I-129/19, dated 1 July 2020, ECLI:SI:USRS:2020:U.I.129.19, Official Gazette RS, No. 108/20, and OdlUS XXV, 17, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=114816; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=116234.

1814 *Ibid*., paras. 64-65.

1815 Ibid, paras 64-65.

ulating elections to the National Assembly and the law defining electoral districts.[1816] The National Council argued, *inter alia*, that the current regulation of elections to the National Assembly did not comply with the constitutional requirement that voters must have a decisive influence on the allocation of seats to candidates. In this respect, the Constitutional Court clarified that the constitutional principle of proportional representation and the constitutional requirement that the electorate have a decisive influence on the election of candidates enable the legislature to choose different kinds of proportional electoral systems, which are characterised by the fact that voters vote for candidates, not only for lists of candidates. However, it pointed out that the Constitution does not determine how voters vote for candidates. The fifth paragraph of Article 80 of the Constitution also does not require that voters as individuals must have the possibility to choose among different candidates from the same list or among candidates from different lists within a constituency. Different systems, which ensure a voter's influence in a different manner, and perhaps also to a greater extent, would be constitutionally admissible, as they are not prohibited by the Constitution. However, since they are not constitutionally mandated, the choice between them is "a question of the appropriateness of the statutory regulation and a political question *par excellence*. Hence, it falls within the legislature's margin of appreciation."[1817] The Constitutional Court found that the law was not unconstitutional in this regard.

3. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

As mentioned above, the competences of the Constitutional Court, which are determined by the Constitution, the Constitutional Court Act, and other laws, already provide for a certain degree of legislative activity of the Court. A more activist approach in the Constitutional Court's decision-making was particularly necessary when establishing the foundations of the new legal order in independent Slovenia, when the Court assumed an important guiding and developmental role in consolidating the rule of law and the protection of human rights and fundamental freedoms.

While the Slovene Constitution does not provide for absolute rights, a certain classification may be derived from its Article 16. This Article provides for the possibility of suspending or limiting rights in a state of war or emergency, but under no conditions does it allow for the suspension or limitation of the rights set out in Articles 17, 18, 21, 27, 28, 29, and 41. It follows from constitutional case law that the right determined by Article 18 of the Constitution, which provides for the prohibition of torture, is an absolute right.[1818] For example, when assessing the constitutionality of an amendment to the Aliens Act, the Court pointed out, *inter alia*, that it is clear from established constitutional case law and the case-law of the ECtHR and the CJEU that the right determined by Article 18 of the Constitution cannot be limited. Any interference with it is inadmissible. Without further consideration, the Court held that the challenged provisions of the law were inconsistent with Article 18 of the Constitution and abrogated them.[1819] The nature of the right determined by Article 17 of the Constitution, which governs the inviolability of human life, is also absolute in relation to the authorities.[1820]

1816 Decision No. U-I-32/15, dated 8 November 2018, ECLI:SI:USRS:2018:U.I.32.15, Official Gazette RS, No. 82/18, and OdlUS XXIII, 12, CODICES SLO-2021-3-007, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=113116, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=113507.

1817 *Ibid*., para. 33.

1818 See Decision No. U-I-388/22, dated 8 June 2023, ECLI:SI:USRS:2023:U.I.388.22, Official Gazette RS, No. 69/23, para. 26 and the decisions cited therein, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=120075, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=120384.

1819 Decision No. U-I-59/17, dated 18 September 2019, ECLI:SI:USRS:2019:U.I.59.17, Official Gazette RS, No. 62/19, and OdlUS XXIV, 14, para. 62. Available in Slovene at: https://www.us-rs.si/odlocitev/?q&id=113557, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=113724.

1820 See Decision No Up-679/12, dated 16 October 2014, ECLI:SI:USRS:2014:Up.679.12, Official Gazette RS, No. 81/14, and OdlUS XX, 39, para. 8, available in Slovene at https://www.us-rs.si/odlocitev/?q=&id=111658, and in

Similarly follows from constitutional case law with regard to one aspect of the freedom of religion guaranteed by Article 41 of the Constitution, namely the freedom to hold religious beliefs. At the level of a personal, individual decision on religious affiliation (*forum internum*), freedom of religion entails the right of an individual to hold a religious belief (positive aspect) without interference from public authorities, and at the same time the right of an individual not to hold a religious belief if he or she does not wish to do so and not to be forced to do so (negative aspect). Freedom of religion as *forum internum* enjoys absolute protection from state interference - the state may not in any event or in any manner prescribe or force individuals to adopt (a certain) religion or other beliefs nor prescribe or force them to not hold or adopt a religion or other beliefs.[1821]

The intensity of the review may also be influenced by the fact that the Constitution itself regulates certain rights relatively comprehensively. The Constitution thus allows for the limitation of certain rights and provides for appropriate safeguards in these cases. For example, the requirement of a court order for a search warrant (the second paragraph of Article 36 of the Constitution) and for interferences with the privacy of correspondence and other means of communication (the second paragraph of Article 37 of the Constitution) already follows from the text of the Constitution itself. On the other hand, the intensity of the review may also be influenced by the fact that, with regard to certain rights, the Constitution itself already provides for the regulation by law of the manner in which they are to be exercised, whereas, in the case of so-called positive status rights, the need for further regulation may also arise out of the very nature of the right itself. Moreover, the intensity of the assessment may depend on whether the statutory regulation has interfered with the very core or essence of the right.

A telling example of the distinction between determining the manner of the exercise of a right and interferences with the right by taking into account the core of the right in question follows from a more recent decision on the regulation of bilingual education in areas inhabited by members of the Hungarian national community.[1822] The National Council requested a review of the regulation of primary education in these areas. It argued that the regulation, which provides for bilingual education for all children, constitutes an interference with the right to education of children belonging to the majority nation because it does not allow them to receive instruction exclusively in the Slovene language. The Constitutional Court therefore considered whether instruction in bilingual schools constituted merely a determination of the manner of exercising the right to schooling and education of children belonging to the majority nation, or whether it had already developed into an interference with that right. First, it reiterated that "[t] line between limiting constitutional rights (under the third paragraph of Article 15 of the Constitution) and prescribing the manner of their exercise (under the second paragraph of the same article) is not always easy to draw.[…] In some instances, this delineation depends on the intensity of the "narrowing" effect of a certain provision. Elsewhere, it is important to analyse the systemic placement of the provision at issue and to assess its overall effect in conjunction with other provisions of the same and other regulations. In instances of a conflict, the first question is whether, in a particular case, the prescription of the manner of the exercise of a certain right has become a limitation thereof or not. [...]"[1823] "The legislature has a wide margin of appreciation in regulating the right to education and schooling, and the scope of this right can be adapted over time, taking into account the needs and available resources of society and individuals.[…] However, the legislature must observe the constitutionally protected core of the right to education and schooling (Article 57 of the Constitution).[…] It is necessary to ensure that the level of compulsory primary education is such that the individual is able to continue his or her education

English at: https://www.us-rs.si/decision/?lang=en&q=&id=111753.

1821 Decision No. U-I-92/07, dated 15 April 2010, ECLI:SI:USRS:2010:U.I.92.07, Official Gazette RS, No. 46/10, and OdlUS XIX, 4, para. 82, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=109908, and in Eglish at: https://www.us-rs.si/decision/?lang=en&q=&id=110642.

1822 Decision No. U-I-191/19, dated 18 May 2023, ECLI:SI:USRS:2023:U.I.191.19, Official Gazette RS, No. 63/23, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=120001, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=120297.

1823 *Ibid*., para. 42.

upon completing primary school, according to his or her wishes and abilities, and is prepared for life as required by the current state of society.[…] In addition to the above, it should be borne in mind that the freedom of choice of schooling and education in the context of primary education refers primarily to the choice between education in public primary schools, private primary schools with a publicly valid curriculum, private schools without a publicly valid curriculum, or home education […], and to a lesser extent to the choice of the specific institution that will provide the education."[1824] In that case, the Constitutional Court considered that the statutory regulation under review did not have an excessively oppressive effect on the very content of the human right to education and schooling and did not interfere with its constitutionally protected core, and therefore it constituted a determination of the manner of exercising that right, not an interference with that right, which entails that it reviewed only its reasonableness.[1825]

With regard to judicial restraint, the Constitutional Court follows in particular the delineation between the competences of the individual branches of state power according to the principle of the separation of powers. It intervenes at the legislative level only when such is in order to protect constitutionality and legality and human rights and fundamental freedoms. As a general rule, the Constitutional Court intervenes in the sphere of the legislature to the minimum extent that is still enables the protection of the constitutional value in question. In certain cases, for example, the Constitutional Court has also applied the concept of *escalation of sanctions* after the legislature failed to observe its original, less invasive decision.

The most notable example of such escalation was the establishment of the municipality of Ankaran. The Constitutional Court initially received a petition to review the law governing the establishment of municipalities and the delimitation of their territories and the act calling local elections. The petitioners claimed that the National Assembly violated the Constitution by failing to establish the municipalities of Ankaran and Mirna. In reaching its decision, the Constitutional Court took into account that the National Assembly had previously found that the two territories in question fulfilled the legal conditions for the establishment of a municipality and that the inhabitants of those territories had already voted in favour of establishing their own municipalities in referenda, but subsequently the laws establishing them had not been adopted by the National Assembly. The Constitutional Court clarified that from the Constitution derives the right of the inhabitants of the Republic of Slovenia to exercise local self-government in a municipality established in accordance with the conditions and in accordance with the procedure laid down by law. It emphasised that the National Assembly is entitled to determine the conditions under which it assesses individual proposals for the establishment of a municipality. However, the principle of a state governed by the rule of law requires that it then abide by the rules it has set for itself, and that it also observes the general principle of equality before the law. Therefore, once it has established in a specific case that a certain territory fulfils the legal conditions for the establishment of a municipality, the National Assembly is, as a general rule, bound by the will of the electorate expressed in a referendum when establishing municipalities and changing their territories. In Decision No U-I-137/10, the Constitutional Court therefore concluded that the National Assembly acted arbitrarily by omitting to adopt the laws on the establishment of the municipalities of Mirna and Ankaran. It then merely established that the challenged law was inconsistent with the Constitution and required the National Assembly to remedy the inconsistency within two months of the publication of the Decision. It also suspended local elections in the municipalities concerned until the inconsistency had been remedied.[1826]

The National Assembly responded to the Decision only in part, i.e. by establishing the Municipality of Mirna, but it failed to adopt a law establishing the Municipality of Ankaran. To that extent, the case was again brought before the Constitutional Court, which this time clarified that such lack of responsive of the legislature to the obligation arising from a decision of the Constitutional Court

1824 *Ibid*., para. 43.

1825 *Ibid*., paras 47-48.

1826 Decision No. U-I-137/10, dated 26 November 2010, ECLI:SI:USRS:2010:U.I.137.10, Official Gazette RS, No. 99/10, and OdlUS XIX, 9, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=110159, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=110336.

constituted a violation of the principles of the rule of law (Article 2 of the Constitution) and the principle of the separation of powers (The second paragraph of Article 3 of the Constitution). In the light of the National Assembly's failure to respond, in this decision, the Constitutional Court, established a new manner of implementation of Decision No U-I-137/10 on the basis of the second paragraph of Article 40 of the Constitutional Court Act, thus ensuring the exercise of the constitutional rights to elections and to local self-government of the inhabitants of the Municipality of Koper, as well as the constitutional right to local self-government of the inhabitants of the town of Ankaran. In the operative provisions, it held that the Municipality of Ankaran is established and determined all the necessary arrangements for the first local elections to be held in that municipality. The Constitutional Court thus ensured the effectiveness of the constitutional protection and definitively secured the petitioners' constitutional position.[1827] This is probably the decision of the Constitutional Court that has been most criticised for excessive constitutional judicial activism.[1828]

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

Such conduct would most likely not be classified as judicial restraint in our legal order. The jurisdiction of the Constitutional Court is one of the procedural requirements for the initiation of proceedings that the Constitutional Court monitors *ex officio*. If a case does not fall within the jurisdiction of the Constitutional Court, it rejects the application. As in such instances, the Constitutional Court, in principle, only states the reason or legal basis for the rejection, decisions wherein the Constitutional Court found that it did not have jurisdiction, but nevertheless clarified why the challenged acts were problematic from the point of view of the Constitution, may be of interest from the point of view of judicial restraint.

In Order No. U-I-128/98 of 23 September 1998, it thus held that a secret agreement between the military intelligence services of Slovenia and Israel on the confidentiality of arms sales should have been concluded as an international treaty and, in order to become part of the Slovene legal order, it should have been ratified by the National Assembly or the Government by law or regulation and appropriately published, otherwise it should not have been allowed to enter into force and be applied. However, as it was not a regulation, the Constitutional Court had no jurisdiction to review it.[1829] The Constitutional Court acted similarly in Order No. U-I-87/99 of 8 July 1999, which concerned overflights by NATO aircraft. The Court explained that the challenged decision had the effect of a regulation and should therefore also have been adopted in the form of a regulation, namely in the form of a law adopted by the National Assembly.[1830] As in both cases, the Constitutional Court's decisions were adopted at a time when the objective of the challenged act had already been largely achieved, their significance was limited to preventing the same or similar breaches of the constitutional regulation in the future.

With regard to deciding on expert and scientific questions that are not questions of law, it follows from established constitutional case law, *inter alia*, that the Constitutional Court cannot assess the substantive appropriateness of the opinions of expert institutions, since these are questions of expertise and not of law.[1831] Due to the general and abstract nature of statutory regulation, this ques-

1827 Decision No. U-I-114/11, dated 9 June 2011, ECLI:SI:USRS:2011:U.I.114.11, Official Gazette RS, No.47/11, and OdlUS XIX, 23, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=110349, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=110668.

1828 See, e.g., I. Kristan, Ali za "državo suverenega parlamenta" ali za "državo ustavne demokracije"?, Pravna praksa, 2011, No. 30-31, p. 11; M. Cerar, V primeru U-I-491/18 na so ustavni sodniki prekoračili meje ustave, Dnevnik, 24. junij 2011, 24 June 2011.

1829 Order No. U-I-128/98, dated 23 September 1998, ECLI:SI:USRS:1998:U.I.128.98, OdlUS VII, 173, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=99206; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=95933.

1830 Order No. U-I-87/99, dated 8 July 1999, ECLI:SI:USRS:1999:U.I.87.99, Official Gazette RS, No. 60/99, and OdlUS VIII, 180, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=99701, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=96146.

1831 Order No. U-I-123/03, dated 9 June 2005, ECLI:SI:USRS:2003:U.I.123.03, para. 12, available in Slovene at:

tion arises more frequently in relation to implementing regulations, which are usually of a more technical nature, and in this context the question of the adequacy of the authorisation to legislate may arise. The Court, for example, already clarified that the requirement of certainty for regulations governing public levies is satisfied if the legislature determines the essential provisions of the public levy with sufficient precision. In doing so, it is not necessary for the legislature to decide every single question, which, given the complexity of the procedures, it is not even qualified to do. If the more detailed determination of the individual elements which define a particular statutory criterion for determining the amount of a public levy depends on the findings of various disciplines, the legislature must, by the very nature of the matter, leave the executive branch greater scope for its own discretion. The Constitutional Court's review is therefore restrained when assessing the constitutionality and legality of such a regulation.[1832] The Court further clarified that may review the consistency of an implementing regulation with the law which provided it the basis for further regulating specific rights or obligations, but it cannot assess the consistency of an implementing regulation with the findings of various disciplines, in particular not concerning non-legal questions. The Constitutional Court is thus not in a position to assess the greater or lesser relevance and appropriateness of the individual elements which define a particular legal criterion for determining the amount of a public levy, if that criterion depends on the findings of various disciplines. [1833]

However, the question of the assessment of technical or scientific issues may also arise in the context of a review of the admissibility of interferences with human rights. The Constitutional Court grants the legislature (and the Government) more room for manoeuvre when regulating technical or scientific issues that are not from the field of law. In Case No. U-I-140/14[1834] concerning the ritual slaughter of animals, it thus clarified that it cannot be an arbiter in matters of complex scientific issues. In that case, animals' perception of pain, i.e. a technical question of animal physiology, was at issue. The Court explained that, in such cases, the legislature must be accorded a wider margin of appreciation, such entails that "it may only examine the appropriateness and necessity of the disputed measure for attaining the pursued objective (in a complex scientific or expert field) if from the claims in the petition it is manifest that the extreme limits of the legislature's margin of appreciation were exceeded."[1835] The Constitutional Court found that there was no reason to doubt the legislature's assessment that pre-stunning serves the well-being of animals, regarding which the Government also reasonably explained that it was scientifically based and not, for instance, an entirely political decision.[1836]

In this regard, the reasoning of the Constitutional Court in its decision on the constitutional consistency of measures for containing the spread of the Covid-19 pandemic is also relevant. When assessing the appropriateness of the challenged measure, the Constitutional Court explained that, where the appropriateness of the measure is directly connected to expert reasons, this assessment must be conducted "in the light of the knowledge of the relevant disciplines available at the time of the decision to impose the measures. If scientific knowledge is still evolving at the time of the first occurrence of a previously unknown communicable disease for which an epidemic or pandemic has to be declared, and the opinion of the scientific community may not be entirely unanimous, a wider margin of discretion must be allowed to the competent decision-maker in assessing which expert opinion to follow and to what extent. In the absence of its own experience, in such cases the state may also draw on the experience of other countries which have shown that the spread of an epidemic of an infectious disease could seriously endanger human health or life and that, with

https://www.us-rs.si/odlocitev/?q=&id=104802.

1832 Decision No. U-I-215/11, Up-1128/11, dated 10 January 2013, ECLI:SI:USRS:2013:U.I.215.11, Official Gazette RS, No. 14/13, para. 8, available at: https://www.us-rs.si/odlocitev/?q=&id=111018; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=111135.

1833 *Ibid*., para. 15.

1834 Decision No. U-I-140/14, dated 25 April 2018, ECLI:SI:USRS:2018:U.I.140.14, Official Gazette RS, No. 35/18, and OdlUS XXIII, 6, CODICES SLO-2019-3-004, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=112755, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=113499.

1835 *Ibid*., para. 30.

1836 *Ibid*., paras. 30-31.

certain measures, such spread can be prevented or at least contained. Delaying action until more reliable expert studies have been carried out could prove unacceptable in the light of the positive obligations of the state to protect human health and, consequently, human life in a manner that meets the standards of human rights protection in a democratic society. Thus, in order to fulfil its positive obligations, the state must, even in uncertain circumstances, take measures to control the risks of the spread of an infectious disease before the disease spreads and thus seriously endangers public health and human life. Such does not, however, relieve the public authorities of their duty, both before and after the measures are taken, to actively seek, in cooperation with the scientific community, to minimise uncertainty as regards the assessment of the risks and the appropriateness of the measures chosen. Subsequent scientific and expert knowledge therefore has an impact on the continued implementation of measures, on the modification of measures adopted, or on their revocation. It is also the duty of the state to provide transparent position concerning the measures taken."[1837]

5. Are there cases where your Court deferred because there was a risk of judicial error?

The Constitutional Court has not yet encountered such a situation.

6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

Within the Slovene legal order, the Constitutional Court is the supreme guardian of constitutionality and legality, as well as of human rights and fundamental freedoms. Its decisions are binding and final. In cases where the Constitutional Court decides that a law or other regulation is unconstitutional or illegal as it does not regulate a certain issue that it should regulate or regulates such in a manner that does not enable abrogation or annulment, it adopts a so-called declaratory decision and determines a time limit by which the legislature or other authority that issued such act must remedy the established unconstitutionality or illegality. In accordance with the constitutional principles of a state governed by the rule of law (Article 2 of the Constitution) and the principle of the separation of powers (the second sentence of the second paragraph of Article 3 of the Constitution), the competent issuing authority must respond to a declaratory decision of the Constitutional Court and remedy the established unconstitutionality or illegality within the specified time limit. The Constitutional Court has repeatedly stressed that the failure of a competent issuing authority to respond to a Constitutional Court decision within the specified time limit entails a serious violation of the principles of a state governed by the rule of law and the principle of the separation of powers. The Constitutional Court regularly monitors the implementation of its declaratory decisions and draws attention in its annual report to instances where the competent authority, most often the legislature, has failed to respond adequately to a decision of the Constitutional Court.

The Constitutional Court has linked the institutional or democratic legitimacy of the competent decision-maker primarily to the delineation between the powers of the National Assembly as the legislature and those of the executive. Already in a decision from 1993, it thus explained that "the principle of democracy (Article 1 of the Constitution) requires that directly elected deputies take the most important decisions affecting citizens and that therefore administrative authorities may act only on the basis of and within the framework of the laws. The principles of a state governed by the rule of law (Article 2 of the Constitution) also require that the fundamental relations between the state and the citizens are governed by laws that are generally applicable and abstract."[1838] The principle of legality (Article 120 of the Constitution) and the question of the line between statutory and non-statutory subject matter was also crucial in the review of the implementing regulations determining measures to combat the Covid-19 pandemic.[1839]

1837 Decision No. U-I-83/20, dated 27 August 2020, ECLI:SI:USRS:2020:U.I.83.20, Official Gazette RS, No. 128/20, and OdlUS XXV, 18, para. 50, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=114985; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=115159.

1838 Decision No. U-I-123/92, dated 18 November 1993, ECLI:SI:USRS:1993:U.I.123.92, Official Gazette RS, No. 67/93, and OdlUS II, 109, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=97513.

1839 See, e.g., Decision No. U-I-79/20, dated 13 May 2021, ECLI:SI:USRS:2021:U.I.79.20, Official Gazette RS, No.

At several instances, the Constitutional Court stressed the importance of respecting the powers of the democratically elected decision-maker as an additional argument when determining the room for manoeuvre for statutory regulation. In Decision No. U-I-129/19, for example, the Court emphasised the wide margin of appreciation of the democratically elected Parliament in the adoption of the budget, adding that the constitutional review of the state budget by the Constitutional Court must be restrained. It also stressed that the Constitutional Court must not be an instrument for the "de-parliamentarisation" of political controversies concerning the amount and structure of public spending.[1840]

In deciding on the establishment of the Municipality of Ankaran, the Constitutional Court distinguished the case from the general decision-making of the National Assembly when adopting laws. Although a municipality is established by law, "in such an instance the legislature, despite using the form of a law, nevertheless does not have a wide margin of appreciation in the sense of political discretionary decision-making, so as to be able to – having drawn its democratic legitimacy from general elections – decide on whether to establish a municipality or not only on the basis of a value-oriented and interest-oriented assessment. The margin of the legislature's appreciation is present in the general and abstract legal regulation of rights and obligations, as only there – taking into account the constitutional framework – may the democratically elected legislature freely decide on the most appropriate legal regulation. In deciding on whether in a concrete case the residents of a particular territory may exercise their constitutional right to local self-government in the framework of a new municipality, however, the legislature enjoys less freedom, as it has to respect the rules that it itself defined."[1841]

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

In this context, it is worth mentioning some specific features arising from the constitutional review of interferences with social rights. These rights are characterised by the fact that the Constitution already explicitly provides for their further regulation by law. The Constitution empowers and obliges the legislature to determine the content of a human right by law (i.e. a requirement of statutory regulation). Individual human rights in the field of social security (social rights) are implemented on the basis of laws which determine the circle of beneficiaries, the type and scope of entitlements, the conditions for obtaining the rights, and the manner in which they are exercised. The Constitution does not require the legislature to adopt specific measures, but rather gives the legislature a choice as to how to ensure these rights.[1842] Moreover, the Court has already explained that the regulation of social rights necessarily interferes with the regulation of the economic system of the state, which is an additional reason for the Constitutional Court's restraint in reviewing the constitutionality of statutory measures in this area.[1843]

88/21, and OdlUS XXVI, 18, para. 68, available at: https://www.us-rs.si/odlocitev/?q=&id=116431; and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=116471.

1840 Decision No. U-I-129/19, dated 1 July 2020, ECLI:SI:USRS:2020:U.I.129.19, Official Gazette RS, No. 108/20, and OdlUS XXV, 17, in particular points 63-65, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=114816; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=116234. For more details, see the reply to question 2.

1841 Decision No. U-I-137/10, dated 26 November 2010, ECLI:SI:USRS:2010:U.I.137.10, Official Gazette RS, No. 99/10, and OdlUS XIX, 9, para. 22, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=110159, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=110336.

1842 Decision No. U-I-303/18, dated 18 September 2019, ECLI:SI:USRS:2019:U.I.303.18, Official Gazette RS, No. 59/19, and OdlUS XXIV, 15, para. 33, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=113545 an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=114260.

1843 Decision No. U-II-1/11, dated 10 March 2011, ECLI:SI:USRS:2011:U.II.1.11, Official Gazette RS, No. 20/11, para. 18, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=110249; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=110674.

It follows from established constitutional case law that the legislature has a wide margin of appreciation in regulating the human right to social security, including the right to a pension. However, the legislature is not entirely unrestrained. The second paragraph of Article 50 of the Constitution determines the state's obligation to regulate and ensure the proper functioning of compulsory health, pension, disability, and other social insurance. Moreover, when regulating this right, the legislature must take into consideration the purpose and the objective of the first and second paragraphs of Article 50 of the Constitution, namely that individuals are ensured economic security and human dignity, and it must also take into account the applicable international instruments in this field that are binding on the Republic of Slovenia. The legislature must not overlook that the human right to social security also has its constitutionally guaranteed core, i.e. the very essence of this human right. When defining the content and scope of the human right, the legislature is thus constitutionally bound by the constitutionally defined content of the human right and is not within the field its own discretion. As regards the core of the right to a pension, the Constitutional Court has distinguished between its social and its pecuniary aspects. The social aspect entails ensuring the income security of insured persons in instances when they are no longer required to work and provide for their income in such manner. The essence or the core of the pecuniary aspect of the right to a pension entails (*inter alia*) the right of an individual to obtain and enjoy, on the basis of contributions paid for pension insurance and subject to the fulfilment of other reasonable conditions, a pension that guarantees his or her social security.[1844]

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

It is left to the legislature to formulate policy on the definition and sanctioning of criminal conduct, but constitutional review can be a very important corrective in this regard. The Constitutional Court thus reviews legal provisions determining criminal offences or minor offences from the perspective of Article 28 of the Constitution (the principle of legality in criminal lawe), from which the Court has derived four conditions for the application of criminal law repression, namely: (1) the prohibition of determining offences and penalties by means of executive regulations or by customary law (*nullum crimen, nulla poena sine lege scripta*); (2) the prohibition of determining offences and penalties by means of empty, indefinite or vague concepts (*nullum crimen, nulla poena sine lege certa*); (3) the prohibition of analogy in determining the existence of offences and in imposing penalties (*nullum crimen, nulla poena sine lege stricta*); and (4) the prohibition of retroactive application of rules defining offences and the respective penalties (*nullum crimen, nulla poena sine lege praevia*).[1845]

In Decision No. U-I-183/96, the Constitutional Court had already adopted the explicit position that the Constitutional Court's review of the legislature's decision on the type of criminal sanction and its amount was restrained.[1846] It further follows from the constitutional case law that the chosen criminal sanction is contrary to the Constitution if it violates the principle of legality (Article 28 of the Constitution) or if the legislature did not have a reasonable and objective ground for its determination (the second paragraph of Article 14 of the Constitution). In addition to the consequences of the prohibited conduct and the consequences of the prescribed sanction, the importance of the protected value, the frequency of the conduct, the degree of undesirability and danger of the conduct, and the legislature's decision on the purpose of the punishment, both in general and in the individual case, are also important factors in deciding the type of criminal sanction and its duration or amount.[1847]

1844 Decision No. U-I-303/18, dated 18 September 2019, ECLI:SI:USRS:2019:U.I.303.18, Official Gazette RS, No. 59/19, and OdlUS XXIV, 15, paras. 34-36, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=113545 an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=114260.

1845 Decision No. U-I-335/02, dated 24 March 2005, ECLI:SI:USRS:2005:U.I.335.02, Official Gazette RS, No. 37/05, and OdlUS XIV, 16, para. 10, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=104584; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=104775.

1846 Decision No. U-I-183/96, dated 16 July 1998, ECLI:SI:USRS:1998:U.I.183.96, Official Gazette RS, No. 56/98, and OdlUS VII, 146, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=99152, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=96006.

1847 Decision No. U-I-213/98, dated of 16 March 2000, ECLI:SI:USRS:2000:U.I.213.98, Official Gazette RS,

The Constitutional Court has also clarified that it is for the legislature to assess which conduct reaches such a level of social danger that even its attempt is punishable.[1848]

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

The Constitutional Court has not yet encountered a case where the Government, relying on national security, would have refused to disclose information necessary for a decision. In accordance with Article 3 of the Classified Information Act,[1849] Constitutional Court judges are already guaranteed access to classified information in connection with the performance of their duties. The protection of classified information in proceedings before the Constitutional Court is regulated in more detail in the Rules on Internal Organisation and Office Work of the Constitutional Court of Slovenia.[1850]

The Constitutional Court has granted the legislature a wide margin of appreciation in matters of national security or national defence. When reviewing the refusal to call a referendum on the law regulating the provision of funds for investments in the Slovenian Armed Forces for the years 2021 to 2026, it explained that "in this case, the Court must assess whether the National Assembly and the Government presented reasonable grounds (i.e. facts, circumstances) from which it follows that the preparedness and equipment of the Slovenian Armed Forces are in such a poor state that, without further delay, short-term and medium-term investments are necessary in order for the satisfactory defence capability of the state to be progressively ensured. The Constitutional Court is not in a position to assess the necessity of individual investments, nor their technical merits. It cannot assess this either in the light of the amount of funds allocated to individual investments or in the light of the total amount of the planned investments. It is also irrelevant for the assessment of urgency that the legislature has adopted a special law as the basis for the medium-term commitment (2021-2026) [...] and has not regulated this in the law governing the execution of the state budget.[...] On all these issues, the legislature has a wide margin of appreciation, both as to the law in which it will regulate them and as to their content."[1851]

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

"[I]n accordance with the Constitution, the legislature has the duty to ensure that the legal acts it adopts are in conformity with the Constitution (Articles 87 and 153 of the Constitution). As the bearer of the legislative function, the legislature has to respond to the needs in all areas of life in society, which is all the more true if the needs in question concern the foundations of the functioning of the state or the ability to effectively ensure human rights and fundamental freedoms.[...] In performing the legislative function, it is bound only by the Constitution and in such framework it alone decides which matters it will regulate by law and in what manner."[1852] However, it follows from constitutional case law that "that the decisions of the Constitutional Court and the judgments of the ECtHR are

No. 33/2000 and 39/2000 (corr.), and OdlUS IX, 58, para. 42, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=100108, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=96610.

1848 Order No. U-I-5/94, dated 30 June 1994, ECLI:SI:USRS:1994:U.I.5.94, OdlUS III, 79, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=97622, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=95067.

1849 *Zakon o tajnih podatkih – ZTP*, Official Gazette RS, No. 50/06 - official consolidated text, 9/10, 60/11, and 8/20, available in Slovene at: http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO2133.

1850 *Pravilnik o notranji organizaciji in pisarniškem poslovanju Ustavnega sodišča*, Official Gazette RS, No. 93/03, 56/11, and 142/22, available in Slovene at: http://pisrs.si/Pis.web/pregledPredpisa?id=PRAV5281.

1851 Decision No. U-I-483/20, dated 1 April 2021, ECLI:SI:USRS:2021:U.I.483.20, Official Gazette RS, No. 64/21, and OdlUS XXVI, 11, para. 43, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=116240; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=117145.

1852 Decision No. U-II-1/15, dated 28 September 2015, ECLI:SI:USRS:2015:U.II.1.15, Official Gazette RS, No. 80/15, and OdlUS XXI, 5, CODICES SLO-2018-3-004, para. 47, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=111991, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=112671.

binding on the National Assembly and that the latter has the duty to implement them within the imposed time limits. Disrespect for such decisions entails a severe violation of the principles of a state governed by the rule of law determined by Article 2 of the Constitution and the principle of the separation of powers determined by the second paragraph of Article 3 of the Constitution."[1853]

The Constitutional Court has taken an active role in promoting the protection of human rights and fundamental freedoms. It is for this purpose that the Court relatively frequently applies the power to determine the manner in which its decision is to be implemented (the second paragraph of Article 40 of the Constitutional Court Act). In this manner, the Constitutional Court most often provisionally settles an issue that would otherwise remain unresolved after its decision, in order to protect important constitutional values, especially where human rights or fundamental freedoms may be affected. In this respect, our Court is considered to be extremely activist.[1854] In 2022, of the 49 decisions adopted by the Constitutional Court in proceedings to the review the conformity of regulations, 8 also determined the manner in which they shall be implemented.[1855] In fact, the use of this power has become so well-established that the National Assembly and the general public often expect the Constitutional Court to cut the (political) Gordian knot through legislative action.[1856]

It might be useful to highlight some concrete examples of determination of the manner of implementation. Having established that the statutory regulation allowing marriage only to persons of different sexes was inconsistent with the Constitution, the Court, by determining the manner in which its decision was to be implemented, immediately enabled marriage irrespective of the sex of the spouses:

> "4. Until the unconstitutionality referred to in Point 2 of these operative provisions is remedied, marriage shall be deemed to be a union of two persons."[1857]

Similarly, in its decision concerning the right of same-sex couples to be included on a list of potential adoptive parents, the Court held as follows:

> "5. Until the inconsistency established in Point 3 of the operative provisions of this Decision is remedied, the same rules apply to joint adoption by same-sex partners living in a civil union as apply to joint adoption by spouses under the statutory regulation currently in force."[1858]

Even in the case where it found that the different treatment of convicted persons applying for commutation of their prison sentence by community service, depending on whether or not they had already started serving their sentence at the time of their application, was not compatible with the Constitution, the Court itself established a provisionally constitutionally compatible regime:

> "3. Until the unconstitutionality is remedied, the conversion of imprisonment into community service may also be requested while the convicted person is already serving the prison sentence or, to be precise, until the end of the period of serving the

1853 *Ibid*., para. 48.

1854 J. Sovdat, Časovni vidiki v ustavnosodni presoji in: M. Pavčnik, T. Štajnpihler Božič (eds.), Časovnost razlage zakona, Slovenska akademija znanosti in umetnosti, Ljubljana 2018, p. 159.

1855 Decisions No. U-I-189/21, dated 26 May 2022, No. U-I-464/20, dated 1 December 2022, No. U-I-26/20, dated 29 September 2022, No. U-I-180/19, dated 5 May 2022, No. U-I-91/21, Up-675/19, dated 16 June 2022, No. U-I-486/20, Up-572/18, dated 16 June 2022, No. U-I-14/18, dated 15 September 2022, and No. Up-290/17, U-I-51/17, dated 23 June 2022.

1856 S. Nerad, *op. cit*., pp. 254-255.

1857 Point 4 of the operative provisions of Decision No. U-I-486/20, Up-572/18, dated 16 June 2022, ECLI:SI:USRS:2022:U.I.486.20, Official Gazette RS, No. 94/22, CODICES SLO-2023-2-003, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117906, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=117933.

1858 Point 5 of the operative provisions of Decision No. U-I-91/21, Up-675/19, dated 16 June 2022, ECLI:SI:USRS:2022:U.I.91.21, Official Gazette RS, No. 94/22, CODICES SLO-2023-2-004, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117905, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=117934.

prison sentence."[1859]

By determining the manner in which its decision is to be implemented, the Constitutional Court temporarily fills an unconstitutional legal gap that has been identified or that would arise as a result of a decision of the Constitutional Court, for example, as a result of the abrogation of an unconstitutional statutory provision. In this manner, it is also possible to immediately ensure a constitutionally consistent situation in cases where the Constitutional Court finds that a challenged statutory provision is unconstitutional but cannot abrogate it. The manner of implementation laid down by the Constitutional Court in its decision has the force of law and is generally binding, however, the legislature is not bound by it when remedying the established unconstitutionality and may also choose another constitutionally consistent solution.

When discussing the active role of the Constitutional Court in the protection and development of human rights and fundamental freedoms, it is worth highlighting its role in resolving the situation of the so-called *Erased*. These are citizens of other republics of the former Socialist Federal Republic of Yugoslavia (hereinafter SFRY) who resided in the Republic of Slovenia, but lost their permanent resident status after Slovenia gained independence and were entered in the register of foreigners. The Constitutional Court has examined statutory attempts to regulate the situation of *the Erased* on several occasions. In Decision No. U-I-284/94, dated 4 February 1999,[1860] it found that the Aliens Act was not in conformity with the Constitution because it did not specifically regulate the situation of these persons, which was contrary to the principle of trust in the law as one of the principles of a state governed by the rule of law (Article 2 of the Constitution). Although the individuals concerned had permanent resident status prior to the establishment of the Republic of Slovenia as an independent State, the challenged law treated them even less favourably than persons who, prior to independence, were regarded as foreigners and had permanent residence in Slovenia at the relevant time and who, unlike the *Erased*, were able to retain their permanent residence. If the *Erased* did not apply for Slovene citizenship, they were treated in the same way as foreigners entering the country for the first time. Since there was no constitutionally admissible objective reason for such a distinction, such treatment was also contrary to the principle of equality before the law (the second paragraph of Article 14 of the Constitution). When reviewing the special law that aimed to regulate the situation of the *Erased*, the Constitutional Court found that it was inconsistent with the Constitution because it laid down stricter conditions for the acquisition of a permanent residence permit for nationals of other republics of the former SFRY than were determined for the acquisition of a permanent residence permit for aliens under the Aliens Act.[1861] In Decision No. U-I-246/02, dated 3 April 2003, it stressed that the legislature should have regulated the situation of the persons concerned with retroactive effect. In view of the lengthy resolution of the issue and the inadequate response of the legislature, it also determined the manner in which its decision was to be implemented, granting the affected persons permanent residence status with retroactive effect and ordering the competent ministry to issue them with supplementary decisions establishing their permanent residence in the Republic of Slovenia as from the moment of their erasure.[1862] The legislature reacted to this decision only after seven years by adopting an amendment to the relevant law. At that time, a group of deputies requested a legislative referendum that could have prevented the amendment from entering into force, but the Constitutional Court found that the rejection of the legislative amendments would

1859 Point 3 of the operative provisions of Decision No. Up-290/17, U-I-51/17, dated 23 June 2022, ECLI:SI:USRS:2022:U.I.51.17, Official Gazette RS, No. 96/22, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117916; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=118638.

1860 Decision No U-I-284/94 of 4 February 1999, Official Journal of the RS, No 14/99, and ECR VIII, 22,

1861 Decision No. U-I-295/99, dated 18 May 2000, ECLI:SI:USRS:2000:U.I.295.99, Official Gazette RS, No. 54/2000, and OdlUS IX, 113, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=100209; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=96346.

1862 Decision No. U-I-246/02, dated 3 April 2003, ECLI:SI:USRS:2003:U.I.246.02, Official Gazette RS, No. 36/03, and OdlUS XII, 24, CODICES SLO-2003-M-001, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=102303, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=104485.

lead to unconstitutional consequences and prevented the referendum from taking place.[1863] The ECtHR also issued a pilot judgment against Slovenia in this context.[1864] The Constitutional Court is still deciding on constitutional complaints of affected individuals.[1865]

The Constitutional Court played a similarly active role in the progressive regulation of the rights of same-sex couples. In Decision No. U-I-425/06, dated 2 July 2009, the Court found that the statutory regulation of inheritance was incompatible with the Constitution because the circle of legal heirs did not include the deceased's partner from a registered partnership, which was the first form of legally recognised partnership for same-sex couples in the Republic of Slovenia. The Court held that, in terms of the right to inherit from a deceased partner, the position of partners in registered same-sex partnerships was comparable to that of spouses in its essential factual and legal elements and that the differences in the inheritance regime between spouses and between partners in registered same-sex partnerships were not based on an objective, non-personal distinction, but rather on sexual orientation. Although not explicitly mentioned in the first paragraph of Article 14 of the Constitution, sexual orientation is one of the personal circumstances which may not be the basis for different treatment in the exercise of human rights and fundamental freedoms. The Court found that there was no constitutionally admissible ground for differentiation at issue and that the challenged regulation was therefore inconsistent with the first paragraph of Article 14 of the Constitution. It also held that, until the inconsistency is remedied, the same rules apply to inheritance between partners of a registered same-sex partnership as apply to inheritance between spouses.[1866] In Decision No. U-I-212/10, it found that the statutory regime of inheritance was also inconsistent with the Constitution because it treated same-sex partners who lived in stable partnerships but did not register them less favourably than common-law spouses.[1867] The Constitutional Court also ensured that same-sex partners were included among the family members of an applicant for international protection who are entitled to family reunification.[1868] In addition, in 2022, the Court held that the regulation of marriage exclusively as a union between a man and a woman and the exclusion of same-sex partners from the possibility of joint adoption were also unconstitutional.[1869]

II. The decision-maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the

1863 Decision No. U-II-1/10, dated 10 June 2010, ECLI:SI:USRS:2010:U.II.1.10, Official Gazette RS, No. 50/10, and OdlUS XIX, 11, CODICES SLO-2010-2-004, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=109973, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=110013.

1864 Judgment of the ECtHR in *Kurić and Others v Slovenia* of 12 March 2014, available at: https://hudoc.echr.coe.int/eng?i=001-141899.

1865 For a recent substantive decision, see, e.g., Decision No. Up-268/20, dated 10 June 2021, ECLI:SI:USRS:2021:Up.268.20, OdlUS XXVI, 46, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=116501.

1866 Decision No. U-I-425/06, dated 2 July 2009, ECLI:SI:USRS:2009:U.I.425.06, Official Gazette RS, No. 55/09, and OdlUS XVIII, 29, CODICES SLO-2009-2-005, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=109411, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=109459.

1867 Decision No. U-I-212/10, dated 14 March 2013, ECLI:SI:USRS:2013:U.I.212.10, Official Gazette RS, No. 31/13, and OdlUS XX, 4, CODICES SLO-2013-3-005, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=111086, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=111137.

1868 Decision No. U-I-68/16, Up-213/15 of 16 June 2016, ECLI:SI:USRS:2016:U.I.68.16, Official Gazette RS, No. 49/16, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=112236; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=112944.

1869 Decisions No. U-I-91/21, Up-675/19, dated 16 June 2022, ECLI:SI:USRS:2022:U.I.91.21, Official Gazette RS, No. 94/22, CODICES SLO-2023-2-004, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117905, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=117934, and No. U-I-486/20, Up-572/18, dated 16 June 2022, ECLI:SI:USRS:2022:U.I.486.20, Official Gazette RS, No. 94/22, CODICES SLO-2023-2-003, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117906, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=117933.

executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

These are not, in principle, relevant criteria for the Constitutional Court's decision. From the point of view of the principle of legality, the question whether the legislature has fulfilled its constitutional duties by providing sufficiently comprehensive regulation, or whether the executive has not encroached on the legal level by its normative activity, may play an important role in the decision of the Constitutional Court. This question was, for example, addressed by the Constitutional Court in its assessment of the measures taken to contain the spread of the Covid-19 pandemic.

It is also possible that the legislature intervenes inadmissibly in the sphere of the executive branch of power or the judiciary. From the principle of the separation of powers there namely follows the requirement that no individual branch of power may assume the powers of other branches nor inadmissibly interfere with the exercise of their authority. The legislative branch of power therefore may not assume powers that are of a typically executive nature and thus pertain to the executive (or administrative) branch, and it may also not interfere with the typical powers of the judicial branch to decide on the rights, obligations, and legal benefits of individuals and legal entities and supervise the legality of the decisions of the executive branch in concrete individual relationships. The Court encountered such a situation when reviewing the law regulating the intervention culling of specimens of brown bear and common wolf from the wild. It found that in an essential part this law determined in a concrete manner the exact number of culled bears and wolves in terms of time and territory and the conditions and restrictions that hunting associations must observe when carrying out such culling. Although it was adopted in the form of a law, the challenged regulation therefore had in its essential aspect the nature of an individual legal act. It was therefore inconsistent with the principle of the separation of powers determined by the second sentence of the second paragraph of Article 3 of the Constitution, and the Constitutional Court abrogated it.[1870]

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

When reviewing the challenged legal regulation, the Constitutional Court often also examines the legislative materials, in particular the draft law, which also contains explanations as to its content. This is particularly important when determining the constitutionally admissible aim of interferences with human rights or the legislature's intent (see also the reply to question 20). For example, in Decision No. U-I-91/15, dated 16 March 2017, which concerned the legal regulation of the confiscation of property of illicit origin, the Constitutional Court directly referred to the legislative material for a more detailed explanation of the purpose of the measure.[1871] Sometimes the Court also uses positions from the legislative materials to resolve contradictory statements made by the parties to the proceedings. In Decision No. U-I-113/17, dated 30 September 2020, for example, the Court found that the statements concerning the purpose of the regulation in the legislative materials, which were consistent with the statements of the National Assembly, contradicted the statements in the opinion submitted to the Constitutional Court by the Government in the proceedings.[1872]

It is worth noting that the Constitutional Court also refers to constitutional legislative materials when interpreting constitutional provisions. When reviewing the constitutionality of the statutory regulation of elections to the National Assembly, for example, in interpreting the constitutional requirement that the electorate have a decisive influence on the allocation of seats, it "proceeded from established methods of legal interpretation, particularly from the linguistic meaning of the text of

1870 Decision No. U-I-194/19, dated 9 April 2020, ECLI:SI:USRS:2020:U.I.194.19, Official Gazette RS, No. 58/20, and OdlUS XXV, 5, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=114238; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=114699.

1871 Decision No. U-I-91/15, dated 16 March 2017, ECLI:SI:USRS:2017:U.I.91.15, Official Gazette RS, No. 16/17, and OdlUS XXII, 6, para. 40, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=112414; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=112918.

1872 Decision No. U-I-113/17, dated 30 September 2020, ECLI:SI:USRS:2020:U.I.113.17, Official Gazette RS, No. 145/20, and OdlUS XXV, 21, para. 19, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=115133; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=116202.

the Constitution and also considering the intention of the Constitution framer as follows from the materials for the adoption of the [Constitutional Act amending Article 80 of the Constitution governing elections to the National Assembly] (i.e. historical interpretation)."[1873]

In this respect, it is worth reiterating that the Constitutional Court is also competent to review the constitutionality and legality of the procedure for adopting regulations. See also the answer to question 15.

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

Only instances of retroactive application of statutory provisions require that the legislature justify its choice of a particular regulation already in the legislative procedure itself. "In accordance with the established constitutional case law, retroactive effect may be justified only by a special public interest justifying precisely the retroactive effect of the regulation, without which the pursued objective of the regulation could not be achieved. However, since such public interest justifies an exception to the constitutional prohibition on the retroactive effect of a regulation – and exceptions must be interpreted restrictively – it must be specifically identified in the legislative procedure and explained in the legislative material. These justifications cannot be replaced by any subsequent justifications (given for the first time after the legislative procedure has been completed) of the objectives of the law which are not apparent from the legislative material." (footnotes omitted).[1874]

Otherwise, the legislature may also clarify its legislative choices in proceedings before the Constitutional Court. In proceedings to review the constitutionality and legality of regulations, the authority that adopted the regulation in question has the position of an opposing party. Thus, the legislature always has the opportunity to respond to allegations raised against statutory provisions by a petition or request. In such instances, the Government, as the main proposer of laws, also regularly submits its opinion. The justification of the legislature's specific choices, as derived from the positions taken by the legislature and the Government in the proceedings or from legislative materials, may be relevant in determining the constitutionally admissible aim of the challenged measure or in the context of the proportionality test.

The Constitutional Court considers the reasoning of decisions when it decides on individuals' constitutional complaints against violations of human rights and fundamental freedoms by individual acts. Due to the requirement of exhaustion of legal remedies, these are mainly decisions of Higher Courts or the Supreme Court. Article 22 of the Constitution, which guarantees the equal protection of rights, also implies the right to a reasoned judicial decision. According to established constitutional case law, such includes the obligation of the court to take into consideration all of the statements of a party, to weigh their relevance and admissibility, and to take a position in the reasoning on those allegations that are admissible and could be essential for the decision. In order to ensure the constitutional right to a fair trial as well as trust in the judiciary, it is of great importance that it is clear to the parties that the court noted and considered their arguments, even if their claim or legal remedy is not successful, and that the parties do not remain in doubt as to whether the court may have simply overlooked their arguments. The right to be heard also applies to questions of law. The court is not obliged to reply specifically to every legal argument raised by the party, but it must adopt a position regarding the party's essential legal views that are sufficiently substantiated, that are not manifestly unfounded, and that in the court's reasonable assessment are not irrelevant to the decision in the

1873 Decision No. U-I-32/15, dated 8 November 2018, ECLI:SI:USRS:2018:U.I.32.15, Official Gazette RS, No. 82/18, and OdlUS XXIII, 12, CODICES SLO-2021-3-007, para. 29, available in Slovene at: https://www.us-rs.si/odloc-itev/?q=&id=113116, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=113507. See in particular also para. 43, where the Court refers directly to specific sections of the draft of the mentioned Constitutional Act.

1874 Decision No. U-I-64/22, U-I-65/22, dated 17 November 2022, ECLI:SI:USRS:2022:U.I.64.22, Official Gazette RS, No. 157/22, CODICES SLO-2022-2-005, para. 34, available in Slovene at: https://www.us-rs.si/odloc-itev/?q=&id=118521, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=118635. The legislature is also required to provide a statement of reasons in cases where it decides that it is not admissible to call for a legislative referendum in accordance with the second Article 90 of the Constitution; however, such entails a different situation from that of a legislative procedure in the narrower sense.

case. When a higher court confirms the legal position of a lower court, the requirement to provide reasons for such may in principle be less strict than the requirement of a reasoned judicial decision in general; however, such only applies if the reasons underlying the challenged legal position can be discerned from the judgment of the lower court and if the lower court already adopted positions regarding the party's relevant statements and legal views. Depending on the circumstances of the case in question, from the perspective of the content and scope of the duty to provide reasons for a judicial decision, the requirement to observe the principle of constitutionally consistent interpretation as well as the principle of consistent interpretation of EU law may also arise.[1875]

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

A measure that constitutes an interference with human rights is constitutionally admissible if it pursues a constitutionally admissible aim and passes the proportionality test. The Constitutional Court assesses such on the basis of the legislative materials, the statements of the participants in the proceedings before the Constitutional Court, as well as on the basis of general life experience. Although, in principle, the legislature must carry out a weighing of the relevant interests and strike a fair balance between human rights and other constitutional values that are in conflict with each other already in the process of regulating the content of human rights and fundamental freedoms, the admissibility of a measure is not determined solely on the basis of the legislative materials. The legislature or other competent authority may also provide the relevant justification in their opinion within the framework of the proceedings before the Constitutional Court. The Constitutional Court always informs the authority which adopted the challenged measure of an initiated procedure of constitutional review. When statutory provisions are challenged, the Government, as the main proposer of laws, also regularly submits its opinion on the allegations of a petitioner or an applicant. See also the reply to question 20.

15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

As general rule, parliamentary debates are not reviewed by the Constitutional Court. However, certain aspects of the consideration of a draft law in the National Assembly could be relevant in the context of the assessment of the constitutionality of the procedure for adopting the law in question. In this respect, it should be noted that the Constitutional Court may only review the conformity of a legislative procedure with the requirements arising from the Constitution,[1876] but not with various statutory requirements or the rules laid down in the Rules of Procedure of the National Assembly.[1877] The Constitutional Court already clarified that its competence to review the constitutionality and legality of the procedures for adopting different types of regulations is governed by its competence to review the relevant regulation in terms of its substance. As the Constitutional Court lacks the competence to review a constitutional act amending the Constitution, it is therefore also not competent to review the procedure by which a constitutional act was adopted.[1878]

1875 Decision No. Up-14/21, dated 13 January 2022, ECLI:SI:USRS:2022:Up.14.21, Official Gazette RS, No. 16/22, CODICES SLO-2022-2-007, para. 22 and the decisions cited therein, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117295, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=117482.

1876 Decision No. U-I-483/20, dated 1 April 2021, ECLI:SI:USRS:2021:U.I.483.20, Official Gazette RS, No. 64/21, and OdlUS XXVI, 11, para. 19 and the decisions cited in footnote 5, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=116240; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=117145.

1877 Order No. U-I-409/98, dated 30 November 2000, ECLI:SI:USRS:2000:U.I.409.98, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=100553.

1878 Order No. U-I-242/00, dated 10 April 2003, ECLI:SI:USRS:2003:U.I.242.00, OdlUS XII, 34, para. 4, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=102350.

From the point of view of public participation in the adoption of laws, the Constitutional Court may be confronted in particular with the question of violations of constitutional rules governing legislative referenda, which form part of the legislative procedure in the broader sense. In the context of the review of the constitutionality of a legislative procedure, the Constitutional Court is also entrusted with the protection of the constitutional right of 40,000 voters to request a referendum. If the state authorities involved in the referendum procedure, by their acts or conduct, violated the constitutional rules of the referendum procedure and thus prevented a referendum from being held, the law, which should have been put to a vote in a legislative referendum, would have been adopted in an unconstitutional manner. The Court thus already decided on a case where the National Assembly refused to call a referendum on a law on the grounds that it is a law on urgent measures to ensure the defence of the state, security, or the elimination of the consequences of natural disasters, on which it is not admissible to call a referendum in accordance with the first indent of the second paragraph of Article 90 of the Constitution. Upon a request by a voter, the Constitutional Court had to decide whether the law in question satisfied such criteria. Otherwise, the procedure for adopting the law would have been unconstitutional, as the National Assembly would have breached the constitutional rule on when it is not admissible to call a referendum. In the case at hand, however, the Court confirmed the decision of the National Assembly.[1879]

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

From the point of view of the constitutional review of regulations, public debate is relevant when it is a formal element of their adoption procedure. Such applies, for example, to implementing regulations in the field of the environment, where the obligation of public participation derives from the Aarhus Convention that was incorporated into the Slovene legal order by ratification on the basis of Article 8 of the Constitution. In recent years, the Constitutional Court has also relaxed its interpretation of the legal interest for filing a petition or standing of NGOs active in the field of environmental protection.[1880]

With regard to the consideration of public opinion in legislative regulation and subsequent constitutional review, it should be noted that in this respect the Constitutional Court is sometimes even placed in the role of a so-called counter-majoritarian institution, limiting the power of majority decision-making in Parliament and voters' decision-making in referenda. It follows from constitutional case law that "[t]he Constitution, the decisions of the Constitutional Court, and the judgments of the ECtHR are not only binding on the National Assembly as the legislature, but also on citizens when they exercise power directly by voting in a referendum on a particular law."[1881]

The Constitutional Court does not directly decide whether the decisions of the legislature or other competent authority are democratically legitimate. However, as stated above, it may monitor compliance with the constitutional rules of the legislative procedure and the constitutional and statutory rules of the procedure for adopting implementing regulations. In this context, the Constitutional Court, for example, pointed out in relation to municipal regulations that municipalities must respect the principle of legality when adopting regulations. The requirement that municipal regulations be consistent with the laws covers both substantive and formal consistency with the law. Substantive consistency entails the requirement that the municipality does not regulate legal relations in a manner contrary to the law, while formal consistency entails the requirement that the municipal regulations are adopted in accordance with the procedure provided for by law. The form or procedure for

1879 Decision No. U-I-483/20, dated 1 April 2021, ECLI:SI:USRS:2021:U.I.483.20, Official Gazette RS, No. 64/21, and OdlUS XXVI, 11, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=116240; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=117145.

1880 Order No. U-I-25/17, dated 9 June 2022, ECLI:SI:USRS:2022:U.I.25.17, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=118585; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=119185.

1881 Decision No. U-II-1/15, dated 28 September 2015, ECLI:SI:USRS:2015:U.II.1.15, Official Gazette RS, No. 80/15, and OdlUS XXI, 5, CODICES SLO-2018-3-004, para. 48, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=111991, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=112671.

the adoption of general normative acts contributes to the democratic and legitimate formation of legal rules, and that those rules are predictable and treat legal entities equally. A breach of the procedural rules may render a general act legally deficient to such a degree that it must be abrogated or annulled.[1882]

III. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

It is the Constitutional Court that, through its decisions, endows the Constitution with content, including its provisions governing human rights and fundamental freedoms. In doing so, the Constitutional Court is completely independent of other state authorities and is not bound by their views. Of course, the Court may take into account the arguments put forth by the Government (or other participants in proceedings before the Constitutional Court) if they are convincing. In this respect, international human rights instruments binding on the Republic of Slovenia, including in particular the ECHR and the case law of the ECtHR, as well as European Union law, in particular the Charter, may serve as an important guide in interpreting the Constitution.

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

See the reply to question 3 on the absolute nature of certain rights and an illustration of how the core of the right may inform a decision on whether a particular measure entails regulating the exercise of a right or and interference with the right.

See also the reply to question 7 regarding rights subject to a requirement of statutory regulation and the distinction between the core or essence of a right and its other elements.

The intensity of the review of interferences with individual rights also depends in part on how they are regulated by the Constitution. The Constitution already contains a relatively detailed regulation of the content of certain rights, which limits the legislature's room for manoeuvre, and the Constitutional Court has to verify whether the constitutional requirements have been observed in their regulation by law. For example, the Constitution itself regulates in relative detail the guarantees that must be ensured in order to allow interferences with the right to inviolability of the home guaranteed by the first paragraph of Article 36 of the Constitution. The second paragraph of this Article thus provides that no one may enter or search another person's dwelling or other premises against the will of the resident without a court order. According to the third paragraph, the person whose dwelling or premises are being searched or his or her representative has the right to be present during the search, and the fourth paragraph determines that the search may be conducted only in the presence of two witnesses. The fifth paragraph sets out the conditions under which an official may conduct a search without a court order and, exceptionally, without witnesses being present. The legislature's margin of appreciation is thus already considerably limited by the constitutional requirements, and the review by the Constitutional Court must therefore be correspondingly more intense.

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

It follows from the constitutional case law that the principle of clarity and precision of regulations is one of the principles of a state governed by the rule of law determined by Article 2 of the Constitution. This principle requires, *inter alia*, that regulations be defined clearly and precisely so that they can be implemented, so that they do not allow arbitrary actions, and so that they determine the legal situation of the entities to which they refer unambiguously and with sufficient precision. This does not entail that rules should be such that they require no interpretation, since the application of

1882 Decision No. U-I-2/21, U-I-3/21, dated 20 May 2021, ECLI:SI:USRS:2021:U.I.2.21Official Gazette RS, No. 88/21, Official Bulletin of Slovene Municipalities, No, 30/21 of 4 June 2021, and OdlUS XXVI, 19, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=116430; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=117146.

rules always implies their interpretation. This principle does not require that the wording of the regulation itself has to answer all the questions that may arise in practice. From the point of view of legal certainty, a regulation becomes disputable when its clear content cannot be discerned through interpretation. A regulation therefore satisfies the requirement of clarity and precision if the content of the rule it contains can be construed by established methods of interpretation and the conduct of the addressees is thus determinate and foreseeable.[1883]

With regard to the required degree of clarity and precision of regulations, the Court explained, *inter alia*, that such is particularly important in the case of rules containing legal norms that determine the rights or obligations.[1884] The more important the protected good, the more the requirement that the law be precise is emphasised. For example, the powers of repressive authorities, such as a search of premises, which constitute a severe interference with the human rights of the affected individual, must be based on a particularly precise regulation with clear and detailed rules. The statutory regulation must be such as to exclude the possibility of arbitrary State action.[1885]

The requirement that a legal rule be precise is stricter concerning a legal rule that defines a criminal act, and, within this framework, it is the strictest when defining a criminal offence. In criminal law, the principle of legal certainty is expressed particularly through the principle of the legality of substantive criminal law (the first paragraph of Article 28 of the Constitution). Procedural provisions, such as those governing special investigative measures, also fall within the broader field of penal law. Special investigative measures concurrently entail the processing of personal data of suspects and other persons against whom such measures have been applied. Since these measures entail a severe interference with a field protected by various aspects of the human right to privacy, their regulation is subject to an emphasised constitutional requirement of clarity, intelligibility, precision, unambiguity and predictability of the relevant statutory provisions. Such applies not only to the legal bases for the implementation of these measures in the narrow sense (i.e. the intrusion into the sphere of privacy through the acquisition and recording of various data), but also to the regulations governing the further processing of the relevant findings, e.g. storage, use, transfer between different beneficiaries, etc.[1886]

With regard to an alleged overlapping of the statutory definitions of a criminal offence and a minor offence, the Constitutional Court stressed that the principle of legality determined by the first paragraph of Article 28 of the Constitution imposes several restrictions on the application of criminal law repression, including the principle of precision (*lex certa*), which is intended to prevent arbitrary application of punitive sanctions by the state in instances that are not precisely defined in advance. The principle of precision also requires that legal rules can be distinguished from one another (*lex distincta*).[1887]

The criteria for assessing tax legislation are particularly strict. From constitutional case law follows the position "that Article 2 of the Constitution requires that what the state requires of the taxpayer be clear and foreseeable already from the law.[...] It is an equally well-established position in constitu-

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1883 Decision No. U-I-260/19, dated 5 May 2022, ECLI:SI:USRS:2022:U.I.260.19, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117778.

1884 Decision No. U-I-65/08, dated 25 September 2008, ECLI:SI:USRS:2008:U.I.65.08, Official Gazette RS, No. 96/08, and OdlUS XVII, 49, para. 8, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=108846; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=109116.

1885 Decision No. U-I-144/19, dated 17 February 2022, ECLI:SI:USRS:2022:U.I.144.19, Official Gazette RS, No. 35/22, para. 38, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117461; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=117646.

1886 Decision No. U-I-246/14, dated 24 March 2017, ECLI:SI:USRS:2017:U.I.246.14, Official Gazette RS, No. 16/17, and ECR XXII, 7, paras. 20-22, available at: https://www.us-rs.si/odlocitev/?q=&id=112412; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=112919.

1887 Decision No. U-I-32/15, dated 8 November 2018, ECLI:SI:USRS:2018:U.I.32.15, Official Gazette RS, No. 82/18, and OdlUS XXIII, 12, CODICES SLO-2021-3-007, para. 29, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=113116, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=113507.

tional case law that Article 147 of the Constitution requires the state to define at least the taxpayer, the object of taxation, the tax base, and the tax rate. A combined reading of both positions entails that the requirement that what the state requires of the taxpayer must be clear and foreseeable already from the law applies to all the elements of tax liability listed above."[1888]

With regard to the delineation between subject matter that has to be regulated by laws and such that may be regulated by regulations inferior to law, the Constitutional Court connected the requirement that the laws be precise, which derives from the general principle of legality determined by the second paragraph of Article 120 of the Constitution, and the requirement of the clarity and precision of regulations derived from Article 2 of the Constitution to the significance of the subject matter regulated by the law under review. An amplification of the interference or effect of the law in the field of fundamental rights, is reflected in the requirement that the statutory authorisation be more restrictive and precise and the requirement of clarity and precision be more accentuated. The most stringent requirements of clarity and precision and respect for the principle of legality are reserved for instances of restriction of human rights and fundamental freedoms. When such rights are to be interfered with by a general act, i.e. an act that refers to an indeterminate number of individuals, the legislature must determine sufficiently precise criteria for such regulation. In this respect, the statutory authorisation granted to the executive branch of power must be all the more restrictive and precise the greater is the interference with or effect of the law on individual human rights and fundamental freedoms. It must always be sufficiently precise in order to not allow the executive power to regulate in an originary manner a limitation of human rights and fundamental freedoms Thereby, predictability and legal certainty with respect to the exercise of human rights and fundamental freedoms are ensured, and concurrently the threat of an arbitrary limitation thereof by the authorities is reduced. From the viewpoint of the state administration being bound by the Constitution and the law, a sufficiently precise statutory basis entails a key safeguard against arbitrary interferences by the executive power with human rights and fundamental freedoms.[1889]

20. What is the intensity review of your Court in case of the legitimate aim test?

In its earlier decisions, the Constitutional Court still spoke of a legitimate, objectively justified aim, but the term of a constitutionally admissible aim has since become established. The Constitutional Court ascertains the legislature's aim (intent) from the text of the law, the legislative materials, the reply submitted by the legislature in constitutional review proceedings, the opinion of the Government or other relevant authority.[1890] If the aim cannot be ascertained in this manner, the Constitutional Court may also derive it from general life experience, provided it is sufficiently clearly identifiable.[1891] However, if the existence of a constitutionally admissible aim for the interference in question is not clearly and unequivocally identifiable in this manner, it is not the task of the Constitutional Court to review the consistency of the regulation with the Constitution in the light of possible purely hypothetical aims. In such a case, the already first condition determined by the Constitution for the restriction of a human right is not fulfilled and the measure constitutes an inadmissible interference that inconsistent with the Constitution.[1892]

1888 Decision No. U-I-497/18, dated 20 January 2022, ECLI:SI:USRS:2022:U.I.497.18, Official Gazette RS, No. 14/22, para. 18, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117286.

1889 Decision No. U-I-262/19, dated 6 April 2023, ECLI:SI:USRS:2023:U.I.262.19, Official Gazette RS, No. 54/23, para. 32, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=119651.

1890 When searching for a constitutionally admissible aim for an interference with the right to privacy of legal persons, it relied on the response of the National Assembly, the opinion of the Government, and the views of the Slovene Agency for the Protection of Competition. See Decision No. U-I-40/12, dated 11 April 2013, ECLI:SI:USRS:2013:U.I.40.12, Official Gazette RS, No. 39/13, and OdlUS XX, 5, para. 48, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=111113, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=111326.

1891 Decision No. U-I-155/11, dated of 18 December 2013, ECLI:SI:USRS:2013:U.I.155.11, Official Gazette RS, No. 114/13, and OdlUS XX, 12, CODICES SLO-2014-3-013, para. 43, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=111395, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=111686.

1892 Decision No. U-I-41/13, dated 10 October 2013, ECLI:SI:USRS:2013:U.I.41.13, Official Gazette RS, No. 89/13, para. 20, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=111332; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=111389.

When reviewing whether a specific aim of a law is constitutionally admissible, the Constitutional Court also takes into account relevant provisions of international instruments, in particular the ECHR and the case law of the ECtHR and EU law.[1893] As a general rule, the Constitutional Court carries out the legitimate aim test in all cases of review of an interference with human rights or fundamental freedoms. An exception applies to cases where already the petitioner submits that only the excessiveness of the interference, and not its legitimacy, is constitutionally disputable. In such a case, the Constitutional Court did not determine the constitutionally admissible aim of the challenged measure, but proceeded directly to an examination of its proportionality.[1894]

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

The Constitutional Court applies the classic proportionality test, which comprises an examination of the appropriateness and necessity of the challenged measure and its proportionality in the narrower sense, i.e. whether the gravity of the consequences of the assessed interference with the human right affected is proportionate to the value of the pursued objective or the benefits that will ensue from the interference. A measure which passes all three aspects of the test is constitutionally admissible.

When assessing the appropriateness of an interference with human rights, the Constitutional Court assesses whether the interference is an appropriate means for achieving the constitutionally admissible aim underlying the restriction of the human right in question and whether this aim can be achieved by the measure under review. A measure is only inappropriate if the means for achieving the aim is not reasonably connected to that aim and if that aim could never be achieved by such means.[1895] The appropriateness of a measure is assessed in its relevant context, also taking into account the effect of that measure in combination with other measures, either from the same or from other regulations.[1896] A measure whose effects on the aim pursued could already at the time of its adoption be judged as negligible or merely incidental would not be appropriate, whereby such must be assessed in the light of all the specific circumstances which could have been known at the time the measure was adopted.[1897]

An interference with a human right or fundamental freedom is necessary if the aim pursued cannot be achieved without the interference or by a less restrictive yet equally effective measure,[1898] or if less restrictive measures for achieving the aim pursued that would entail a lesser interference with the human rights of individuals are not available.[1899] If the Constitutional Court finds a less restrictive

1893 See e.g. Decision No. U-I-260/19, dated 5 May 2022, ECLI:SI:USRS:2022:U.I.260.19, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117778, where the Court held as follows: "Article 39 of the Constitution does not explicitly define admissible grounds for restricting the right to freedom of expression. Such grounds are, however, set out in the second paragraph of Article 10 of the ECHR and the third paragraph of Article 19 [of the ICCPR], which are binding in the light of Article 8 and the fifth paragraph of Article 15 of the Constitution. Therefore, when assessing the constitutionally admissible aim for interfering with the right to freedom of expression, the Constitutional Court may not disregard the grounds set out in second paragraph of Article 10 of the ECHR and the third paragraph of Article 19 of the Covenant." (para. 10, footnotes omitted).

1894 Decision No. U-I-47/15, dated 24 September 2015, ECLI:SI:USRS:2015:U.I.47.15, Official Gazette RS, No. 76/15, para 19, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=111970, wherein the Court proceeded directly to the proportionality test in the narrower sense.

1895 Decision No. U-I-260/19, dated 5 May 2022, ECLI:SI:USRS:2022:U.I.260.19, para. 22, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117778.

1896 Decision No. U-I-118/09, dated 10 June 2010, ECLI:SI:USRS:2010:U.I.118.09, Official Gazette RS, No. 52/10, and OdlUS XIX, 6, para. 16, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=109982; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=110092.

1897 Decision No. U-I-83/20, dated 27 August 2020, ECLI:SI:USRS:2020:U.I.83.20, Official Gazette RS, No. 128/20, and OdlUS XXV, 18, para. 47, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=114985; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=115159.

1898 Ibid, para. 52.

1899 Decision No. U-I-260/19, dated 5 May 2022, ECLI:SI:USRS:2022:U.I.260.19, para. 23, available in Slovene at:

measure, which interferes with the right in question to a lesser degree, the measure in question is not necessary.[1900] The Court considered the question of the necessity of the challenged measure in detail in a case concerning the privacy of attorneys. It found that the aim pursued could have been achieved just as effectively by two less restrictive measures, and that the regulation at issue was therefore inconsistent with the Constitution.[1901]

An interference with a human right is proportionate in the strict sense if the gravity of the interference is proportionate to the value of the aim pursued or the benefits expected to ensue from the interference. Such thus entails a weighing of the benefits of the aim pursued by the interference on one side of the scales and the burden of the consequences of the interference on the holders of the human right on the other. The Constitutional Court must therefore decide whether the benefits that ensue from the challenged measure outweigh the restriction of the affected human right. In doing so, it regularly elaborates on the benefits and the burden of the consequences of the interference on the holders of the relevant right.[1902]

22. Does your Court go through every applicable limb of the proportionality test?

In principle, the Constitutional Court applies the proportionality test in its entirety. The Court thus applied the test in its entirety when assessing whether a general prohibition on slaughtering animals that have not been previously stunned constitutes an unconstitutional interference with the right of members of the Islamic religious community to the freely exercise their religion. The challenged measure passed all three aspects of the test, and the Court therefore held that it was not unconstitutional.[1903]

Where the court finds that the challenged measure failed to pass a particular aspect of the proportionality test, it does not proceed to assess the other aspects, but the review ends at that stage. The Court, for example, found that the statutory regulation that denied the possibility of joint adoption to same-sex partners living in a stable, formally registered civil union was contrary to the very essence of adoption, which is to provide a stable, loving, and supportive environment for the development of a child. The greater the number of potential candidates for joint adoption, the greater the likelihood that the most suitable adoptive parents for a child will be selected in an individual procedure and that the best interests of the individual child will thus be safeguarded. An assessment of the best interests of a child can, by its nature, only be carried out in the context of an individual procedure for assessing whether a couple – comprised either of same-sex or different-sex partners – are indeed the most suitable adoptive parents for a specific child. Therefore, the measure of the *a priori* exclusion of partners living in a civil union from the possibility of being included in the list of candidates for adoption is not appropriate for achieving the aim of protecting the best interests of an adopted child, but may, in certain cases, even prevent the best interests of a particular child from being realised. The Constitutional Court concluded that the challenged measure constituted an excessive interference with the right of same-sex-oriented persons to non-discriminatory treatment under the first paragraph of Article 14 in conjunction with the third paragraph of Article 53 of the Constitution and Article 1 of Protocol No. 12 to the ECHR.[1904]

https://www.us-rs.si/odlocitev/?q=&id=117778.

1900 Decision No. U-I-91/15, dated 16 March 2017, ECLI:SI:USRS:2017:U.I.91.15, Official Gazette RS, No. 16/17, and OdlUS XXII, 6, paras. 45-48, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=112414; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=112918.

1901 Decision No, U-I-115/14, Up-218/14, dated 21 January 2016, ECLI:SI:USRS:2016:U.I.115.14, Official Gazette RS, No. 8/16, and OdlUS XXI, 20, CODICES SLO-2017-1-001, paras. 49-52, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=112089, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=112377.

1902 Decision No. U-I-83/20, dated 27 August 2020, ECLI:SI:USRS:2020:U.I.83.20, Official Gazette RS, No. 128/20, and OdlUS XXV, 18, paras 55-59, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=114985; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=115159.

1903 Decision No. U-I-140/14, dated 25 April 2018, ECLI:SI:USRS:2018:U.I.140.14, Official Gazette RS, No. 35/18, and OdlUS XXIII, 6, CODICES SLO-2019-3-004, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=112755, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=113499.

1904 Decision No. U-I-91/21, Up-675/19, dated 16 June 2022, ECLI:SI:USRS:2022:U.I.91.21, Official Gazette

The Constitutional Court sometimes departs from the established order of the assessment of the individual aspects of the proportionality test. It skips certain stages and proceeds directly to the stage in respect of which it is evident that the measure will fail to pass it, i.e. is most often the proportionality test in the narrower sense. In Decision No, U-I-196/17, dated 20 June 2019, after having established the constitutionally admissible aim of the challenged measure, the Court found that the challenged regulation was not proportionate in the strict sense, without beforehand conducting an assessment of the appropriateness and necessity of the measure.[1905]

It is also worth mentioning those instances where the restriction of the right is so intense that its holder is completely prevented from exercising it effectively and it can be deemed to entail a hollowing-out of the right in question. In such cases, the assessment of the admissibility of the interference does not even require the establishment of a constitutionally admissible aim for the interference, much less a weighing of the proportionality between the interference with the human right and a possible constitutionally admissible aim. The hollowing-out of a right can never be justified.[1906]

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

In instances where the Constitutional Court proceeds directly to one of the later stages of the proportionality test, the question of whether the measure passed the preceding remains open, but it would be an exaggeration to claim that the Constitutional Court tacitly confirmed that the measure passed these stages. In principle, the petitioner or applicant for the procedure for the review of a particular regulation must justify that the regulation constitutes an interference with human rights, and the burden of proof then shifts to the competent authority, who must justify the regulation at issue.

24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

Yes, both approaches have been present in the decision-making of the Constitutional Court since it took up its function in 1991. Although the Court has applied the admissibility test, including the proportionality test, from the very beginning of its work, it was finally established in its current form and wording in Decision No U-I-18/02, dated 24 October 2003.[1907]

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

A relevant difference between the two concepts may lie in the angle from which the courts approach this issue. In the case law of the Constitutional Court, the notion of margin of appreciation refers to the room for manoeuvre of the legislature (or other competent authority), and in the decision-making Constitutional Court it ususally arises in proceedings for the review of the constitu-

RS, No. 94/22, CODICES SLO-2023-2-004, paras. 70-72, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117905, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=117934.

1905 Decision No. U-I-196/17, dated 20 June 2019, ECLI:SI:USRS:2019:U.I.196.17, Official Gazette RS, No. 45/19, and OdlUS XXIV, 10, para. 10, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=113405; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=113515.

1906 Decisions No. U-I-157/17, Up-143/15, dated 5 April 2018, ECLI:SI:USRS:2018:U.I.157.17, Official Gazette RS, No. 32/18, para. 25, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=112743, and No. U-I-227/14, Up-790/14, dated 4 June 2015, ECLI:SI:USRS:2015:U.I.227.14, Official Gazette RS, No. 42/15, and OdlUS XXI, 3, para. 10, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=111859 ; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=112056.

1907 Decision No. U-I-18/02, dated 24 October 2003, ECLI:SI:USRS:2003:U.I.18.02, Official Gazette RS, No. 108/03, and OdlUS XII, 86, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=102821; an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=110742.

tionality and legality of regulations, i.e. when general and abstract legal acts are at issue, and not in proceedings involving constitutional complaints due to violations of human rights in individual cases. Proceedings before the ECtHR, on the other hand, arise precisely from individual cases, and the concept of margin of appreciation also applies, for example, to courts and other bodies deciding in individual cases. Moreover, the notion of margin of appreciation before the ECtHR is closely linked to the question of the existence of consensus in the legal systems and the practice of the States Parties to the Convention, whereas in the Slovene legal order it is based primarily on the room for manoeuvre granted to the legislature by the Constitution and relevant international instruments. Since the Constitutional Court also takes into account the international legal framework in its decision-making, as well as the regulations and case law of foreign countries, the scope of this margin in the national context also depends to a certain extent on comparative-law arguments, in which the case law of the ECtHR plays a particularly important role. Thus, in principle, the margin of appreciation which the Constitutional Court would grant to the legislature will not be wider than the margin of appreciation granted to States by the ECtHR with regard to a given right. At most, the potentially stricter requirements of our Constitution or other international instruments may narrow the legislature's margin of appreciation within national law. For example, the second paragraph of Article 37 of the Constitution provides a higher level of protection of communication privacy than Article 8 of the ECHR because it requires a court order for any interference with the right to communication privacy.[1908]

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

The Judgment of the ECtHR in the case of *Rutar and Rutar Marketing v Slovenia*, dated 15 December 2022 could perhaps be understood in this sense. The Constitutional Court dismissed the constitutional complaint in this case because it concerned a minor offence, which the Constitutional Court, as a general, does not accept for consideration on the merits unless it raises an important constitutional law issue that goes beyond the significance of the concrete case, and the complainants did not claim and substantiate such. Before the ECtHR, the Government thus argued that the appellants failed to exhaust domestic legal remedies because they did not substantiate that their case raised an important question of constitutional law. The ECtHR rejected this argument and stated that the fact that a complainant did not expressly raise an important question of constitutional law did not entail that the Constitutional Court could not assess whether the conditions for an exceptional hearing had been fulfilled in substantive terms.

IV. **Other peculiarities**

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

The question of the need for judicial restraint can arise in most human rights cases. The intensity of the need for judicial restraint depends on the circumstances of the case, and it is difficult to make general statements on the matter. Moreover, judicial restraint is not a phenomenon that is always externally perceptible, i.e. evident from the text of the decision or a dissenting opinion, and it is therefore virtually impossible to monitor its occurrence.

28. Has your Court have grown more deferential over time?

It would be difficult to argue that the Constitutional Court's review has become less strict over time, but with the development of the constitutional case law it has become more precisely formulated, clearly structured, and consistent. Since it began functioning, the Constitutional Court has adopted a large body of decisions that have established the fundamental criteria for constitutionally conform conduct by stakeholders in various spheres of life in our country. The National Assembly and the Government, and in particular also the courts, have generally respected and followed these guidelines

1908 Decision No. U-I-40/12, dated 11 April 2013, ECLI:SI:USRS:2013:U.I.40.12, Official Gazette RS, No. 39/13, and OdlUS XX, 5, paras. 27, 29, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=111113, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=111326.

in the exercise of their functions. To a certain extent, there are fewer acute constitutional deficiencies in our legal order today, and as a consequence, the Constitutional Court's interventions in the field reserved for the legislature are less frequent or at least less intense. Whereas at the beginning of its functioning it dealt with fundamental questions of the constitutional order, it could be said that the Constitutional Court is now, at least to some extent, addressing the finer points of our legal order, which could perhaps also have an impact on the perception that its review has become less rigorous. Nevertheless, the Constitutional Court often uses its power to determine the manner in which its decisions are to be implemented, which can constitute a significant encroachment onto the legislature's field, and the general public and the central political authorities even expect such legislative activity on the part of the Constitutional Court to a certain extent. See also the reply to question 10.

29. Does the deferential attitude depend on the case load of your Court?

The Constitutional Court has been burdened by a heavy caseload for several years, but it has nevertheless made every effort to ensure the highest possible level of protection of human rights and respect for the rule of law in all cases that it decided, as well to decide all cases within a reasonable time. The question of judicial restraint is a question of the merits of the individual case, not of the economy of the procedure. It is also a question of how individual judges, as well as the specific composition of the Court as a collegial body, perceive their role and where they see the limits imposed on the functioning of the Constitutional Court by the principle of the separation of powers.

In light of the mentioned relatively frequent use of power to determine the manner in which the decisions of the Constitutional Court are to be implemented, even the opposite could be claimed – namely that judicial economy has led to an increase in constitutional judicial activism. In fact, the Constitutional Court has increasingly rarely used the possibility of so-called escalation of sanctions, in the sense that, when it first examines a statutory regulation, it would merely establish its unconstitutionality and set a deadline for the legislature to remedy it, which is often regarded as a less intensive interference with the legislature's domain. Only as a potential subsequent alternative – upon a possible re-examination of the case if the unconstitutionality were not remedied in time – would it then determine the manner in which its declaratory decision is to be implemented, or abrogate the challenged statutory provision and fill the legal vacuum created by its own manner of implementation. In general, the Constitutional Court immediately declares a particular regulation unconstitutional or abrogates such and concurrently determines a temporary legal regulation which is to remain in force until the legislature takes appropriate action.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

In accordance with Article 24b of the Constitutional Court Act, the request and the petition for a review of the conformity of a regulation must also contain a statement of the grounds for its inconsistency with the Constitution or the laws. In this regard, it follows from the constitutional case law that the applicant or petitioner must clearly state the grounds for the unconstitutionality of the challenged statutory provision or the unconstitutionality or illegality of the challenged implementing regulation. If the applicant or petitioner fails to state the such reasons, the Constitutional Court rejects the request or petition (the first and third paragraphs of Article 25 of the Constitutional Court Act).

In certain cases, the Constitutional Court itself determines the actual scope of the challenged provisions. It clarified, for example, that the petitioner or the applicant is challenging several provisions or individual provisions in their entirety, but in fact only individual provisions or only parts of these provisions were in dispute – for example, only a single Article instead of several Articles or a regulation in its entirety, only a specific paragraph or a narrower unit of an Article instead of a specific Article in its entirety, etc.[1909] The Constitutional Court acts in a similar manner when the petitioner

1909 For example, in Decision No. U-I-191/19, dated 18 May 2023, ECLI:SI:USRS:2023:U.I.191.19, Official Gazette RS, No. 63/23, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=120001, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=120297, where para.18 reads as follows: "The applicant alleges that it chal-

or the applicant alleges that the challenged regulation is inconsistent with a specific constitutional provision, but their allegation must in fact be subsumed under another constitutional provision.[1910]

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

In accordance with Article 30 of the Constitutional Court Act, when deciding on the constitutionality and legality of a regulation or general act issued for the exercise of public authority, the Constitutional Court is not bound by the proposal of a request or petition, but may also review the constitutionality and legality of other provisions of the same or other regulation or general act issued for the exercise of public authority for which a review of constitutionality or legality has not been proposed, if such provisions are mutually related or if such is necessary to resolve the case. This entails that, when reviewing a specific provision of a law, the Constitutional Court may extend the procedure other related provisions of the same law or to related provisions of another law. In Case No. U-I-462/18, where a provision of the Criminal Procedure Act was challenged, the Constitutional Court, on the basis of Article 30 of the Constitutional Court Act, initiated a procedure for the review of the provisions of the Rules of Procedure of the National Assembly which regulated the authentic interpretation of a law.[1911]

In addition, when deciding on a constitutional complaint, the court may also initiate a review of the regulation on the basis of which the challenged decision was adopted in accordance with the second paragraph of Article 59 of the Constitutional Court Act. The Court, for example, applied this power in the aforementioned decisions concerning the rights of same-sex couples to marry and adopt children together, where it has itself initiated the procedure to review the constitutionality of the relevant provisions of the relevant laws on the basis of the constitutional complaints lodged.[1912]

This power of the Constitutional Court cannot be interpreted in such a way as to allow the Court to review provisions of regulations which are not directly related to the case at hand, and even less so that the Court itself could initiate the review of a regulation. A connection with an existing case is required.

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lenges Article 48 of the PSA and Article 11 of the ASRIHE in their entirety. However, from its submissions it follows that it only objects to the first paragraph of Article 48 of the PSA and the first paragraph of Article 11 of the ASRIHE, which regulate school districts in ethnically mixed areas. In view of the above, the Constitutional Court only carried out a review within this scope."

1910 See, for example, Decision No. U-I-303/18, dated 18 September 2019, ECLI:SI:USRS:2019:U.I.303.18, Official Gazette RS, No. 59/19, and OdlUS XXIV, 15, para. 32, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=113545 an abstract in English is available at: https://www.us-rs.si/decision/?lang=en&q=&id=114260, where the Constitutional Court explains that the petitioner claims that the challenged measure interferes with the pecuniary aspect of the right to a pension and is inconsistent with Articles 33 and 50 of the Constitution. It then explains that the pecuniary aspect of the right to a pension is guaranteed to citizens of the Republic of Slovenia by the first paragraph of Article 50 of the Constitution (i.e. *lex specialis*, as compared with Article 33 of the Constitution, which guarantees the right to private property), and that Article 33 of the Constitution was relevant for the protection of that aspect of the right to a pension only in the case of persons who were not citizens of the Republic of Slovenia. Since the initial social dispute did not involve a foreign national, the Constitutional Court examined the allegations of inconsistency of the challenged regulation with the pecuniary aspect of the right to a pension in that case only from the point of view of conformity with the first paragraph of Article 50 of the Constitution.

1911 Decision No. U-I-462/18, dated 3 June 2021, ECLI:SI:USRS:2021:U.I.462.18, , Official Gazette RS, No. 105/21, and OdlUS XXVI, 21, para. 11, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=116523, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=117565.

1912 Decisions No. U-I-91/21, Up-675/19, dated 16 June 2022, ECLI:SI:USRS:2022:U.I.91.21, Official Gazette RS, No. 94/22, CODICES SLO-2023-2-004, para. 11, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117905, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=117934, and No. U-I-486/20, Up-572/18, dated 16 June 2022, ECLI:SI:USRS:2022:U.I.486.20, Official Gazette RS, No. 94/22, CODICES SLO-2023-2-003, para. 4, available in Slovene at: https://www.us-rs.si/odlocitev/?q=&id=117906, and in English at: https://www.us-rs.si/decision/?lang=en&q=&id=117933.

Ustavno sodišče Republike Slovenije

Oblike in meje sodniškega samoomejevanja: Primer ustavnih sodišč

Ustavne kulture se razlikujejo in kako sodišča dojemajo svojo vlogo v ustavni demokraciji vpliva na intenzivnost njihove presoje na področju temeljnih pravic. Številna sodišča se poslužujejo sodniškega samoomejevanja.[1913]

Sodniško samoomejevanje je pravno orodje, razvito v sodni praksi, z namenom utrjevanja delitve oblasti oziroma preprečevanja posegov v zadeve, za katere velja, da sodniki o njih ne morejo odločati, ker presegajo njihovo strokovno znanje ali zaradi pomanjkanja legitimnosti takega odločanja. To orodje se uporablja predvsem v zadevah s področja človekovih pravic. Razlog za to je njihova transcendentna narava, saj lahko segajo na vsa vsebinska področja javnega odločanja.

Pretirana zadržanost naj bi pravno državo in delitev oblasti ogrožala v enaki meri kot pretiran sodni aktivizem. Način, kako sodniki uporabljajo sodniško samoomejevanje, je torej načelno ustavnopravno vprašanje, ki se nanaša na ustrezno vlogo vsake veje oblasti v povezavi s pomembnimi javnopolitičnimi vprašanji.

Namen naslednjih vprašanj je ugotoviti razlike pri uporabi sodniškega samoomejevanja na evropskih ustavnih sodiščih.

Vprašalnik

za nacionalna poročila

I. Vprašanja, ki jih ni mogoče predložiti v odločanje, in intenzivnost sodne zadržanosti

1. Kaj v vaših sodnih pristojnostih pomeni „sodniško samoomejevanje"?

Koncept sodniškega samoomejevanja v slovenskem pravnem prostoru ni bil izčrpno preučevan. V slovenski pravni literaturi je sicer pogosteje mogoče zaslediti pojem sodniškega aktivizma. Čeprav se oba pojma izmikata neposredni in enoznačni opredelitvi,[1914] je na splošno mogoče zaključiti, da se nanašata na odnos sodišč oziroma sodne veje oblasti do nosilcev drugih vej oblasti. Pojem sodniškega aktivizma se pogosto povezuje s kvalifikatorji, ki ga delajo bodisi *pozitivnega*, *dovoljenega* ali *zaželenega* bodisi *negativnega*, *nedovoljenega* ali *nezaželenega*,[1915] pri čemer je meja med enim in drugim težko določljiva, v razpravah pa je pogosto odvisna od razpravljavčevega vrednotenja konkretnih odločitev.

Pojem sodniškega aktivizma ali samoomejevanja se v slovenskem pravnem prostoru najpogosteje uporablja prav v zvezi z odnosom med Ustavnim sodiščem in Državnim zborom kot zakonodajalcem oziroma ustavodajalcem.[1916] Z vidika tem, ki jih obravnava ta vprašalnik, je mogoče izpostaviti zlasti tri vidike, kjer se lahko pojavi vprašanje sodniškega aktivizma ali samoomejevanja, in sicer (i) pri razlagi predpisov, zlasti ustavnih določb, (ii) v zvezi s konkretnimi odločitvami Ustavnega sodišča in (iii) glede pristopa sodišča k presoji v konkretni zadevi (testi ustavnosodne presoje).

1913 Angleška različica sicer uporablja izraz *judicial deferment*, vendar je bil na podlagi nemške različice vprašalnika, ki govori o *richterliche Selbstbeschränkung*, izbran prevod sodniško samoomejevanje.

1914 O neoprijemljivosti koncepta sodniškega aktivizma v ZDA glej S. A. Lindquist, F. B. Cross, Measuring Judicial Activism, Oxford University Press, New York 2009, str. 29 in nasl. Na to neoprijemljivost se je navezal tudi M. Accetto, O aktivizmu in zadržanosti pri sodniškem odločanju, ius kolumna, 28.11.2016, dostopno na: https://www.iusinfo.si/medijsko-sredisce/kolumne/183448.

1915 Glej na primer C. Ribičič, Ustavno sodišče kot pozitivni zakonodajalec, Podjetje in Delo, št. 6–7 (2015), str. 1334; M. Novak, Delitev oblasti: medigra prava in politike, Cankarjeva založba, Ljubljana (2003), str. 166–180.

1916 V Republiki Sloveniji sicer parlament sestavljata Državni zbor kot splošno predstavniško telo, ki igra osrednjo vlogo v zakonodajnem postopku, in Državni svet, v katerem so zastopani različni družbeni interesi in ki ima možnost suspenszivnega veta na zakone, ki jih sprejme Državni zbor. Slednji mora v primeru veta o zakonu ponovno glasovati, za njegovo sprejetje pa je potrebna strožja večina. Državni zbor igra tudi ključno vlogo pri spreminjanju Ustave.

Kadar Ustavno sodišče razlaga predpise, pride vprašanje aktivizma oziroma zadržanosti najbolj do izraza, ko Ustavno sodišče v postopku presoje ustavne skladnosti zakonskih določb razlaga določbe Ustave. Očitki o aktivizmu se tako najpogosteje pojavljajo ob odmevnejših odločitvah Ustavnega sodišča, ki so deležne večje pozornosti javnosti, še zlasti, če so zaradi svoje vsebine bolj polarizirajoče. Gre na primer za zadeve, kjer je Ustavno sodišče široko razlagalo Ustavo, še posebej, če besedilo Ustave ni bilo jasno ali pa ni bil jasno razviden namen ustavodajalca. Pri tem velja omeniti, da najdemo v ustavnosodni presoji tako primere, ko je bilo Ustavno sodišče deležno kritik, ker naj bi s svojo razlago Ustave nedopustno širilo domet posameznih človekovih pravic in temeljnih svoboščin ali uvajalo nove ustavnopravne koncepte,[1917] kot tudi primere, ko naj bi ustavne določbe razlagalo (preveč) restriktivno.[1918]

Za slovenski pravni red je sicer značilno, da je določena stopnja sodniškega aktivizma, z vidika načela delitve oblasti, vgrajena že v samo bistvo delovanja Ustavnega sodišča, saj mu je dodeljena tudi pomembna vloga na zakonodajnem področju. Delno je to že posledica njegove ustavno določene pristojnosti, da lahko razveljavlja protiustavne zakone ali posamezne zakonske določbe (ter druge protiustavne ali nezakonite predpise in splošne akte), ko torej ravna kot t. i. negativni zakonodajalec. Zakonodajna vloga Ustavnega sodišča pa postane še bolj izrazita zaradi dveh pooblastil, ki jih določa Zakon o Ustavnem sodišču,[1919] in sicer pristojnosti za sprejemanje ugotovitvenih odločb in pooblastila Ustavnega sodišča, da določi način izvršitve svojih odločitev. Slednja vključuje možnost, da sodišče sprejme začasna pravna pravila, ki so splošno pravno zavezujoča, imajo moč zakona, in se uporabljajo, dokler zakonodajalec (ali drug pristojni normodajalec) ne odpravi ugotovljene protiustavnosti. V teh primerih torej Ustavno sodišče prevzame vlogo t. i. pozitivnega zakonodajalca.[1920]

V zvezi z odnosom med Ustavnim sodiščem in zakonodajalcem je nekdanja predsednica Ustavnega sodišča, dr. Jadranka Sovdat, na primer pojem sodniškega samoomejevanja povezala z vlogo Ustavnega sodišča kot negativnega zakonodajalca, sodniški aktivizem pa z njegovo vlogo pozitivnega zakonodajalca.[1921] Sicer pa se pojem ustavnosodnega aktivizma redno razume kot poseg ustavnega sodišča na področje pozitivne zakonodajne dejavnosti.[1922] V tem okviru se torej pojma sodniško samoomejevanje oziroma sodniški aktivizem nanašata predvsem na vprašanje meja zakonodajne (oziroma širše pravodajne) dejavnosti Ustavnega sodišča.[1923]

2. Ali je vaše sodišče razvilo spekter različnih stopenj intenzivnosti presoje? Ali obstajajo „nedotakljiva" področja, uveljavljena področja, kjer ni pravne odgovornosti, ali vprašanja, ki jih vaše

1917 Najbolj odmeven primer aktivistične odločitve Ustavnega sodišča je najverjetneje odločba št. U-I-114/11 z dne 9. 6. 2011, s katero je sodišče ustanovilo občino Ankaran. O tem podrobneje v sklepnem delu odgovora na vprašanje št. 3. Nekateri so na primer odločitve, s katerimi je Ustavno sodišče razvijalo pravice istospolnih parov, videli kot pretirani ustavnosodni akitivizem. Glej odgovor na vprašanje št. 10.

1918 Odločitev ESČP v zadevi *Rutar in Rutar Marketing proti Sloveniji* z dne 15. 12. 2022, pritožba št. 21164/20, je mogoče razumeti tudi v tem smislu – glej odgovor na vprašanje št. 26. Pretirana strogost se je Ustavnemu sodišču občasno očitala tudi zaradi restriktivne razlage pravnega interesa in nekaterih drugih procesnih predpostvk v postopku pred Ustavnim sodiščem.

1919 Zakon o Ustavnem sodišču – ZUstS, Uradni list RS, št. 64/07 – uradno prečiščeno besedilo, 109/12, 23/20 in 92/21, dostopen na: http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO325.

1920 V zvezi z zakonodajno vlogo Ustavnega sodišča glej S. Nerad, Ustavno sodišče kot (pozitivni) normodajalec, v: Izzivi ustavnega prava v 21. stoletju: liber amicorum Ciril Ribičič, Inštitut za lokalno samoupravo in javna naročila, Maribor 2017, str. 247–264, in A. Teršek, Ustavnosodno pravotvorje v sodobnem ustavništvu, v: Izzivi ustavnega prava v 21. stoletju: liber amicorum Ciril Ribičič, str. 227–245.

1921 J. Sovdat, Judicial Activism in the Case-Law of the Slovenian Constitutional Court, Collected Papers of the International Conference Constitutional Court – Between a Negative Legislator and Positive Activism, Sarajevo, 27. 3. 2014, Ustavni sud BiH, Sarajevo 2015, str. 95.

1922 A. Teršek, Vrnitev v ustavnopravno preteklost, Nova Univerza, Nova Gorica 2020, str. 16, 25, 35. M. Novak, Ustavnosodni aktivizem, ius kolumna, 14. 2. 2022, dostopno na: https://www.iusinfo.si/medijsko-sredisce/kolumne/292489. C. Ribičič, Ustavno sodišče kot pozitivni zakonodajalec, Podjetje in delo, l. 41(2015), št. 6–7, str. 1332–1344. Glej tudi B. Bugarič, Ustavna sodišča v srednji in vzhodni Evropi: med sojenjem in politiko, Teorija in praksa, l. 35 (1998), številka 2, str. 287–305, in M. Krivic, Ustavno sojenje in politika, Teorija in praksa, l. 35 (1998), številka 5, str. 929–941.

1923 S. Nerad, op. cit., str. 250.

sodišče ne sme obravnavati (*npr.* sporna moralna vprašanja, politično občutljiva vprašanja, spori znotraj družbe, delitev omejenih sredstev, znatne finančne posledice za proračun itd.)?

Za namen tega vprašalnika je uvodoma na mestu pojasnilo glede pristojnosti Ustavnega sodišča. V skladu s prvim odstavkom 21. člena Zakona o Ustavnem sodišču Ustavno sodišče odloča o skladnosti zakonov z Ustavo, skladnosti zakonov in drugih predpisov z ratificiranimi mednarodnimi pogodbami in s splošnimi načeli mednarodnega prava, skladnosti podzakonskih predpisov z Ustavo in zakoni, skladnosti predpisov lokalnih skupnosti z Ustavo in zakoni ter skladnosti splošnih aktov, izdanih za izvrševanje javnih pooblastil, z Ustavo, zakoni in podzakonskimi predpisi. Drugi odstavek 21. člena Zakona o Ustavnem sodišču določa še pristojnost Ustavnega sodišča, da v postopku ratifikacije mednarodne pogodbe izreče mnenje o njeni skladnosti z Ustavo, tretji odstavek istega člena pa določa, da odloča Ustavno sodišče tudi o ustavnosti in zakonitosti postopkov, po katerih so bili zgoraj navedeni predpisi sprejeti. Poleg tega odloča o ustavnih pritožbah zaradi kršitev človekovih pravic in temeljnih svoboščin s posamičnimi akti. Ustavne pritožbe pomenijo večinski delež zadev, ki pridejo pred Ustavno sodišče.[1924] Nadalje je pristojno še za odločanje o sporih glede pristojnosti med državo in lokalnimi skupnostmi in med samimi lokalnimi skupnostmi, med sodišči in drugimi državnimi organi ter med Državnim zborom, Predsednikom republike in Vlado. V pristojnost Ustavnega sodišča pa sodi tudi odločanje o odgovornosti Predsednika republike in Predsednika vlade ter ministrov, protiustavnosti aktov in delovanja političnih strank, o pritožbah v postopku potrditve poslanskih mandatov in v drugih zadevah, ki so mu naložene z zakoni.

Pristojnosti Ustavnega sodišča so torej zelo široke, med njimi pa so tudi zadeve, ki so že same po sebi izrazito politične, kot so kompetenčni spori med najvišjimi državnimi organi iz različnih vej državne oblasti, odločanje v volilnih sporih, odločanje o protiustavnosti aktov in delovanja političnih strank, odločanje o obtožbi zoper najvišje predstavnike države in odločanje, povezano z zakonodajnimi referendumi. Poleg tega so predlagatelji, ki lahko od Ustavnega sodišča zahtevajo odločitev v postopku presoje skladnosti predpisov, v prvi vrsti politični deležniki, to so med drugim Državni zbor, tretjina poslancev, Državni svet in Vlada. Zahtevo za presojo ustavnosti in zakonitosti predpisov pa lahko na sodišče vložita tudi instituciji, zadolženi za varstvo človekovih pravic, in sicer Varuh človekovih pravic in Zagovornik načela enakosti. Tudi zato, ker je Ustavno sodišče najvišja notranjepravna instanca za varstvo ustavnosti in zakonitosti ter človekovih pravic in temeljnih svoboščin, pa se pred njim relativno pogosto znajdejo prav pravna vprašanja, ki so družbeno in politično izredno občutljiva in ki niso bila ustrezno razrešena že v zakonodajnem postopku ali v postopkih pred upravnimi organi in rednimi sodišči, kot na primer usoda t. i. izbrisanih, primer varčevalcev podružnic Ljubljanske banke iz drugih republik nekdanje Jugoslavije, urejanje pravic istospolnih parov, ukrepi za zajezitev pandemije Covid-19, krediti, vezani na švicarske franke, ipd.

Pristojnosti Ustavnega sodišča so določene z Ustavo in zakoni, in sodišče ne more zavrniti odločanja o zadevi, ki mu je predložena v odločanje in ki sodi v njegovo pristojnost. Doktrina političnih vprašanj torej v slovenskem pravnem redu ni uveljavljena. Sodišče pa pri odločanju seveda ne deluje v vakuumu, ampak vselej odloča v določenem družbenem, moralnem in političnem kontekstu. Kako intenzivna bo presoja Ustavnega sodišča, je odvisno od značilnosti konkretne obravnavane zadeve.

Ustavno sodišče je v svojih odločbah večkrat poudarilo, da je v ustavni demokraciji ravnanje vseh oblastnih organov pravno omejeno z ustavnimi načeli ter človekovimi pravicami in temeljnimi svoboščinami. Zato so v takšni ureditvi vsi državni organi iz vseh treh vej oblasti dolžni spoštovati Ustavo in svoje pristojnosti izvrševati v skladu z Ustavo. V tem okviru je Državni zbor kot zakonodajalec prvi varuh Ustave, saj morajo biti zakoni, ki jih sprejema, v skladu z Ustavo. Pomembno vlogo igra v tem okviru tudi Vlada kot glavna predlagateljica zakonov, ki jih pripravlja državna uprava. Pri pripravi predlogov si mora prizadevati, da je odziv na aktualne družbene razmere skladen z Ustavo. Pomembna vloga pri nadzoru nad delom zakonodajalca je zaupana že rednim sodiščem, ki odločajo na podlagi Ustave in zakonov in so dolžna začeti postopek presoje ustavnosti zakonskih določb, če menijo, da niso skladne z Ustavo in bi jih morala uporabiti pri sojenju. Ustavno sodišče je tako najvišji

1924 V letu 2022 je Ustavno sodišče prejelo 1754 ustavnih pritožb (78 %) in 482 vlog za presojo skladnosti predpisov (21 %).

in poslednji varuh Ustave, ki skrbi za spoštovanje ustavnosti in zakonitosti ter varstvo človekovih pravic in temeljnih svoboščin.

Z vidika pristopa Ustavnega sodišča k presoji v konkretni zadevi je najprej pomembno razlikovanje med zadevami, ki se nanašajo na ustavna načela, in tistimi, ki zadevajo človekove pravice in temeljne svoboščine. Zakonodajalec je vezan na Ustavo tako v formalnem, kot tudi v vsebinskem smislu. Vsebinska skladnost zakona z Ustavo namreč ne zahteva le skladnosti s posebnimi ustavnimi določbami, ampak tudi s temeljnimi vrednotami svobodne demokratične ustavne ureditve kot ustavnopravne vrednostne kategorije.

Pri presoji zakonskih določb, ki ne posegajo na področje človekovih pravic, Ustavno sodišče preverja, ali je sporna določba skladna z upoštevnimi ustavnimi zahtevami kot zgornjo premiso njegove presoje. V tem okviru velja predstaviti teste skladnosti zakonske ureditve z ustavnimi načeli zaupanja v pravo, prepovedi povratne veljave predpisov, jasnosti in (pomenske) določljivosti predpisov (način presoje kršitev tega načela je predstavljen v odgovoru na vprašanje št. 19) in enakosti pred zakonom.

Glede presoje skladnost z načelom zaupanja v pravo, ki izhaja iz 2. člena Ustave, iz ustaljene ustavnosodne presoje izhaja, da to načelo posamezniku »zagotavlja, da mu država njegovega pravnega položaja ne bo poslabšala arbitrarno, torej brez stvarnega razloga, utemeljenega v prevladujočem in ustavno dopustnem javnem interesu. Ker gre za splošno pravno načelo in ne neposredno za eno od človekovih pravic, katerim po 15. členu Ustave pripada strožje varstvo zoper morebitne omejitve in druge posege, to načelo nima absolutne veljave in je v večji meri kot posamezne človekove pravice podvrženo mogočim omejitvam, torej temu, da je treba v primeru konflikta oziroma kolizije med tem in drugimi ustavnimi načeli oziroma dobrinami v t. i. tehtanju dobrin presoditi, kateri izmed ustavno varovanih dobrin je v posameznem primeru treba dati prednost. Pri vrednotenju načela varstva zaupanja v pravo je zlasti pomembno, ali so spremembe na pravnem področju relativno predvidljive in so torej prizadeti s spremembo lahko vnaprej računali ter kakšna sta teža spremembe in pomen obstoječega pravnega položaja za upravičence na eni strani in javni interes, ki utemeljuje drugačno ureditev od obstoječe, na drugi strani.«[1925]

Poseben preizkus uporabi Ustavno sodišče tudi za presojo skladnosti predpisov s prepovedjo povratne veljave pravnih aktov (155. člen ustave). Preizkus temelji na določbi drugega odstavka 155. člena Ustave, ki določa več kumulativno zahtevanih pogojev, pod katerimi je takšna retroaktivnost lahko ustavno dopustna, in sicer: 1) samo zakon lahko določi retroaktivnost, 2) samo posamezne zakonske določbe imajo lahko učinek za nazaj, vendar le tedaj, 3) kadar to zahteva javna korist in 4) če se s tem ne posega v pridobljene pravice.[1926]

Omeniti je treba še preizkus skladnosti s splošnim načelom enakosti iz drugega odstavka 14. člena Ustave. To ustavno načelo »terja, da zakonodajalec v bistvenem enake položaje ureja enako, v bistvenem različne položaje pa različno. Za presojo o tem, katere podobnosti in razlike v položajih so bistvene, je treba izhajati iz predmeta pravnega urejanja. Če zakonodajalec bistveno enake položaje ureja različno, mora za to obstajati razumen razlog, stvarno povezan s predmetom urejanja. Načelo enakosti pred zakonom namreč ne pomeni, da zakonodajalec v bistvenem enakih položajev pravnih subjektov ne bi smel različno urejati, ampak da tega ne sme početi samovoljno, brez razumnega in stvarnega razloga. «[1927]

V naslednji sklop sodijo zadeve, kjer ustavno sodišče presoja ustavnost (in zakonitost) predpisov s področja človekovih pravic. V skladu s prvim odstavkom 15. člena Ustave, se človekove pravice in temeljne svoboščine uresničujejo neposredno na podlagi Ustave. Drugi odstavek tega člena določa,

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1925 Odločba št. U-I-303/18 z dne 18. 9. 2019, ECLI:SI:USRS:2019:U.I.303.18, Uradni list RS, št. 59/19, in OdlUS XXIV, 15, tč. 17, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=113545.

1926 Med novejšimi odločitvami glej odločbo št. U-I-64/22, U-I-65/22 z dne 17. 11. 2022, ECLI:SI:USRS:2022:U.I.64.22, Uradni list RS, št. 157/22, CODICES SLO-2022-2-005, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=118521.

1927 Odločba št. U-I-809/21 z dne 23. 6. 2022, ECLI:SI:USRS:2022:U.I.809.21, Uradni list RS, št. 99/22, tč. 48, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117926.

da je mogoče z zakonom predpisati način uresničevanja človekovih pravic in temeljnih svoboščin, kadar tako določa Ustava, ali če je to nujno zaradi same narave posamezne pravice ali svoboščine. V skladu s tretjim odstavkom tega člena pa je človekove pravice in temeljne svoboščine mogoče omejiti samo s pravicami drugih in v primerih, ki jih določa Ustava. Pri zakonskem urejanju, ki se nanaša na človekove pravice je zato zakonodajalec bolj omejen.

V teh primerih je intenzivnost presoje najprej odvisna od tega, ali Ustavno sodišče oceni, da gre pri obravnavanem ukrepu (zakonski ureditvi) za poseg v človekovo pravico ali le za urejanje načina njenega uresničevanja. V slednjem primeru sodišče uporabi milejši test, in sicer t. i. test razumnosti. V zvezi s tem se je ustalilo stališče, da mora biti »presoja zakonske ureditve, ki po vsebini pomeni le določitev načina uresničevanja pravice […] nujno zadržana in Ustavno sodišče v tem okviru praviloma preizkuša le, ali je imel zakonodajalec za določitev načina uresničevanja pravice razumen razlog.[…] Pri tem je treba razumnost razumeti kot zvezo med ukrepom in ciljem, torej kot zahtevo po stvarni povezanosti ukrepa s predmetom urejanja. «[1928] Ustavno sodišče je že večkrat poudarilo, da »meja med urejanjem načina uresničevanja človekovih pravic in njihovim omejevanjem ni vedno lahko določljiva.«[1929] »V nekaterih primerih je ta razmejitev odvisna od intenzivnosti „zožujočega" učinka, ki ga ima neka določba. Spet drugje sta pomembni analiza sistemske umestitve sporne določbe in celovita presoja njenega učinkovanja skupaj z drugimi določbami istega predpisa in drugih predpisov. Poleg tega iz ustavnosodne presoje izhaja, da je treba pri oceni, ali gre za poseg v človekovo pravico, upoštevati tudi stopnjo vpliva negativne posledice, ki jo neupoštevanje določbe pomeni za to pravico.«[1930]

V zvezi s tem naj omenimo, da so primeri, ko je Ustavno sodišče po opravljenem testu razumnosti ugotovilo, da je izpodbijana ureditev razumna, veliko pogostejši od primerov, kjer je bila ugotovljena nerazumnost izpodbijanega ukrepa, kar bi lahko nakazovalo, da je sodišče pri presoji v okviru testa razumnosti relativno zadržano oziroma da zakonodajalcu priznava široko polje proste presoje. Nerazumnost izpodbijane ureditve je tako Ustavno sodišče na primer ugotovilo v zadevi iz leta 2019, kjer je odločalo o posegu v pravico do doma. Izpodbijana določba zakona o izvršbi je omejevala možnost sodišča, da odloži izvršbo, ki se opravi z izpraznitvijo in izročitvijo stanovanjske nepremičnine, ki je dolžnikov dom. Ustavno sodišče je pojasnilo, da je namen odloga izvršbe iz posebno upravičenih razlogov omogočiti varstvo dolžnikovega položaja v tistih izjemnih primerih, ko bi invazivnost izpraznitve in izročitve nepremičnine, ki je dolžnikov dom, pomenila zanj posebno breme in bi nasprotovala doseženim civilizacijskim vrednotam in zapovedi spoštovanja človekovega dostojanstva ter bi odrekala skrb za človeka. Ugotovilo je, da je izpodbijana ureditev spodkopavala uresničitev tega namena odloga izvršbe in zato ni bila stvarno povezana s predmetom urejanja – to je, da redno sodišče ob odločanju o odlogu iz posebno upravičenih razlogov ob tehtanju nasprotujočih si interesov, upoštevaje vse okoliščine primera, poišče pravično ravnovesje med varstvom položaja upnika in dolžnika. Ker izpodbijana omejitev ni bila stvarno povezana s predmetom urejanja, je sodišče sklenilo, da ni razumna. Glede na to je ugotovilo, da je bila sporna določba v neskladju s pravico iz 35. člena Ustave.[1931] Podobno je Ustavno sodišče odločilo v zadevi iz leta 2017, ko je presojalo ureditev pravnega varstva v primeru napak pri priznanju pravice do pokojnine. Zakonodajalec namreč za te primere ni zagotovil posebnega pravnega sredstva, zato je obveljala splošna ureditev, ki pa posameznikom ni v vseh primerih omogočala, da bi dosegli odpravo takih napak. Ustavno sodišče je ugotovilo, da za ureditev, ki ni bila prilagojena naravi pravice do pokojnine, niso obstajali razumni razlogi. Zato je bila

1928 Odločba št. U-I-491/18 z dne 6. 5. 2021, ECLI:SI:USRS:2021:U.I.491.18, Uradni list RS, št. 86/21, in OdlUS XXVI, 14, tč. 39, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=116393.

1929 Odločba št. Up-676/19, U-I-7/20 z dne 4. 6. 2020, ECLI:SI:USRS:2020:Up.676.19, Uradni list RS, št. 93/20, in OdlUS XXV, 14, tč. 20, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=114356.

1930 Odločba št. U-I-793/21, U-I-822/21 z dne 17. 2. 2022, ECLI:SI:USRS:2022:U.I.793.21, Uradni list RS, št. 29/22, tč. 41, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117441. Podobno tudi Odločba št. U-I-502/18 z dne 9. 12. 2021, ECLI:SI:USRS:2021:U.I.502.18, Uradni list RS, št. 1/22, in OdlUS XXVI, 38, tč. 23-24, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117136.

1931 Odločba št. U-I-171/16, Up-793/16 z dne 11. 7. 2019, ECLI:SI:USRS:2019:U.I.171.16, Uradni list RS, št. 53/19, in OdlUS XXIV, 13, tč. 21–22, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=113492.

v neskladju s prvim odstavkom 50. člena Ustave, ki zagotavlja pravico do pokojnine.[1932]

Dopustnost ureditve, ki pomeni poseg v človekovo pravico, Ustavno sodišče presoja na podlagi dveh povezanih testov, in sicer testa legitimnosti in testa sorazmernosti. Test legitimnosti pomeni presojo, ali ukrep zasleduje ustavno dopusten cilj. Test sorazmernosti pa pomeni preizkus primernosti in nujnosti ukrepa ter njegove sorazmernosti v ožjem smislu.

Preizkus dopustnosti posega v človekovo pravico je Ustavno sodišče v odločitvi glede ukrepov za zajezitev pandemije Covid-19 povzelo kot sledi:

»Človekovo pravico je mogoče omejiti le v primerih, ki jih izrecno določa Ustava, in zaradi varstva človekovih pravic drugih (tretji odstavek 15. člena Ustave). Po ustaljeni ustavnosodni presoji je mogoče omejiti človekovo pravico, če je zakonodajalec zasledoval ustavno dopusten cilj in če je omejitev skladna z načeli pravne države (2. člen Ustave), in sicer s tistim izmed teh načel, ki prepoveduje prekomerne posege države (splošno načelo sorazmernosti). Oceno, ali ne gre morda za čezmeren poseg, opravi Ustavno sodišče na podlagi t. i. strogega testa sorazmernosti, ki obsega presojo primernosti, nujnosti in sorazmernosti posega.«[1933]

Podrobneje o testu legitimnosti glej odgovor na vprašanje št. 20, o testu sorazmernosti pa pri vprašanjih št. 21–22.

V zvezi z določenimi pravicami je Ustavno sodišče razvilo tudi posebne teste. To velja na primer za presojo zatrjevanih kršitev prepovedi diskriminacije. »Prvi odstavek 14. člena Ustave določa, da so v Republiki Sloveniji vsakomur zagotovljene enake človekove pravice in temeljne svoboščine, ne glede na narodnost, raso, spol, jezik, vero, politično ali drugo prepričanje, gmotno stanje, rojstvo, izobrazbo, družbeni položaj, invalidnost ali katerokoli drugo osebno okoliščino. […] Skladno z ustaljeno presojo Ustavnega sodišča je treba pri presoji očitka o diskriminatornem obravnavanju odgovoriti na naslednja vprašanja: 1) ali se zatrjevano različno obravnavanje nanaša na zagotavljanje oziroma uresničevanje človekove pravice oziroma temeljne svoboščine; 2) če se, ali obstaja različno obravnavanje pobudnika in tistega, s katerim se pobudnik primerja; 3) ali sta dejanska položaja, ki ju pobudnik primerja, v bistvenem enaka in torej razlikovanje temelji na okoliščini iz prvega odstavka 14. člena Ustave; ter 4) če gre za razlikovanje na podlagi okoliščine iz prvega odstavka 14. člena Ustave in torej za poseg v pravico do nediskriminatornega obravnavanja, ali je ta poseg ustavno dopusten.«[1934] Presoja dopustnosti posega obsega omenjena testa legitimnosti in sorazmernosti.

Za presojo posegov v socialne pravice in pravice invalidov (glej odgovor na vprašanje št. 7.) ter podjetniško svobodo Ustavno sodišče uporablja prilagojene teste, ki se nekoliko razlikujejo od splošnega preizkusa dopustnosti posega v človekovo pravico. Pri presoji posegov v podjetniško svobodo, ki jo zagotavlja prvi odstavek 74. člena Ustave, igrata pomembno vlogo pooblastilo zakonodajalcu iz prvega stavka drugega odstavka tega člena, da določi pogoje za ustanovitev gospodarskih družb, in ustavna prepoved opravljanja gospodarske dejavnosti v nasprotju z javno koristjo. Sicer pa se lahko zakonsko pooblastilo za urejanje načina izvrševanja svobodne gospodarske pobude opira tudi na drugi odstavek 15. člena Ustave, ki omogoča zakonodajno urejanje načina njenega izvrševanja tudi v drugih primerih, ki se tičejo področja podjetništva in gospodarskega poslovanja, zlasti v primerih določanja pogojev poslovanja oziroma pogojev opravljanja gospodarske dejavnosti.

Ker zakonodajalec pri urejanju opravljanja gospodarske dejavnosti »vzpostavlja ekonomsko politiko na posameznih področjih družbenega življenja, ki jo šteje kot najprimernejšo za doseganje splošne družbene blaginje, ima pri tem široko polje proste presoje.[…] Po ustaljeni ustavnosodni presoji

1932 Odločba št. Up-195/13, U-I-67/16 z dne 26. 1. 2017, ECLI:SI:USRS:2017:Up.195.13, Uradni list RS, št. 9/17, in OdlUS XXII, 4, tč. 17, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=112368.

1933 Odločba št. U-I-83/20 z dne 27. 8. 2020, ECLI:SI:USRS:2020:U.I.83.20, Uradni list RS, št. 128/20, in OdlUS XXV, 18, tč. 41, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=114985.

1934 Odločba št. U-I-91/21, Up-675/19 z dne 16. 6. 2022, ECLI:SI:USRS:2022:U.I.91.21, Uradni list RS, št. 94/22, CODICES SLO-2023-2-004, tč. 35, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117905. Podobno tudi odločba in št. U-I-486/20, Up-572/18 z dne 16. 6. 2022, ECLI:SI:USRS:2022:U.I.486.20, Uradni list RS, št. 94/22, CODICES SLO-2023-2-003, tč. 25, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117906.

gre za omejitev pravice do svobodne gospodarske pobude, ko predpis posebej intenzivno oži polje podjetniške svobode.[…] Pri določanju pogojev za opravljanje gospodarske dejavnosti gre lahko za določanje načina uresničevanja pravice le tedaj, ko ima pogoj realno vsebinsko zvezo s konkretno urejevano gospodarsko dejavnostjo.[…] Ta je zlasti podana v primerih, ko zakonodajalec odvrača nevarnost ali blaži tveganja, ki izhajajo iz opravljanja neke konkretne dejavnosti (npr. na področju varstva pri delu, varstva zdravega življenjskega okolja).[…] Če pa zakonodajalec omeji podjetniško svobodo ravnanja zaradi doseganja splošnih javnih ciljev ali ciljev na nekem ločenem področju družbenega življenja, gre za poseg v pravico do svobodne gospodarske pobude iz prvega odstavka 74. člena Ustave.[…].«[1935]

Glede prepovedi opravljanja gospodarske dejavnosti v nasprotju z javno koristjo je Ustavno sodišče že pojasnilo, da potrebna zadržanost »pri presoji posameznih zakonskih ukrepov, s katerimi zakonodajalec udejanja gospodarsko politiko, in to ne le, ko gre za predpisovanje načina uresničevanja svobodne gospodarske pobude, ampak tudi, ko gre za presojo dopustnosti njenih omejitev. Vendar […] zakonodajalčeva pooblastila pri udejanjanju navedene ustavne prepovedi kljub temu niso niti absolutna niti povsem neomejena. Zakonodajalca namreč tudi pri urejanju gospodarske dejavnosti veže splošno načelo sorazmernosti (2. člen Ustave), ki mu dovoljuje, da posamezno ustavno pravico omeji le toliko, kolikor je to potrebno zaradi varovanja javne koristi.«[1936] »Zakonodajalec lahko predpisuje pogoje za opravljanje določene dejavnosti in v tem okviru pogoje za opravljanje določenega dela, storitve, ki tvorijo to dejavnost, če je to potrebno zaradi varstva javnega interesa oziroma javne koristi. Pri tem ima zakonodajalec široko polje proste presoje. Ustavnosodna presoja takšne zakonske ureditve je zato zadržana. Vendar mora zakonodajalec pri tem zasledovati upravičene cilje, ki so v javnem interesu, uporabljeni ukrepi pa morajo biti v razumni zvezi s temi cilji […].«[1937]

Ustavno sodišče se pri izpolnjevanju svojih nalog redno giblje v prostoru, kjer se srečujeta pravo in politika in sodišče tudi *a priori* ne zavrača odločanja o političnih vprašanjih, če imajo ta tudi določeno pravno razsežnost. Že iz predstavljenega preizkusa zadev, povezanih s podjetniško svobodo, izhaja, da zakonodajalec pri njenem urejanju oblikuje gospodarsko politiko in mora biti presoja Ustavnega sodišča v tem obsegu zato nujno zadržana. Podobno je Ustavno sodišče pri odločanju v zadevi št. U-I-129/19,[1938] ki se je nanašala na državni proračun, pojasnilo, da je proračun abstraktni in splošni pravni akt posebne vrste, ki ima eksterne učinke in moč zakona, zato mu je treba priznati pravno naravo predpisa s hierarhičnim položajem zakona, Ustavno sodišče pa je pristojno za presojo njegove skladnosti z Ustavo.[1939] V zvezi s standardi presoje proračuna je opozorilo, da je proračun »po svojem bistvu tako finančni načrt države za določeno leto kot tudi njen ekonomsko-politični program. Z njim Vlada, ki ga pripravi, zagotovi sredstva za uresničitev programa in političnih prednostnih nalog, ki bodo iz proračuna financirane v določenem letu. Ustavno sodišče mora pri presoji skladnosti proračuna z Ustavo imeti pred očmi to politično, ekonomsko, finančno in socialno dimenzijo proračuna, kar so vse prvine proračuna, ki jih ni mogoče obravnavati kot njegovo pravno razsežnost.[…] Ustavno sodišče mora pri tem upoštevati, da ima demokratično izvoljeni parlament široko polje proste presoje pri sprejemanju odločitev o višini proračunskih sredstev in o njihovi razporeditvi. Kolikor je njegovo polje proste presoje širše, toliko bolj je presoja Ustavnega sodišča zadržana. Ustavno sodišče ne sme biti instrument „deparlamentarizacije" političnih nasprotij o višini in strukturi javne porabe. […] Proračunski vprašanji, ki imata tudi (ustavno)pravno naravo, sta na primer ohranjanje temeljnih finančnih zmožnosti države in finančne fiskalne suverenosti (drugi odstavek 148. člena Ustave) ter zagotavljanje financiranja vseh funkcij države, vključno z ustavno zapovedanim minimumom socialne

1935 Odločba št. U-I-491/18 z dne 6. 5. 2021, ECLI:SI:USRS:2021:U.I.491.18, Uradni list RS, št. 86/21, in OdlUS XXVI, 14, tč. 36 in tam navedene zadeve, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=116393.

1936 Odločba št. U-I-446/20, U-I-448/20, U-I-455/20, U-I-467/20 z dne 15. 4. 2021, ECLI:SI:USRS:2021:U.I.446.20, Uradni list RS, št. 72/21, in OdlUS XXVI, 13, tč. 15, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=116317.

1937 Odločba št. U-I-293/04 z dne 6. 10. 2005, ECLI:SI:USRS:2005:U.I.293.04, Uradni list RS, št. 93/2005 in OdlUS XIV, 73, tč. 8, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=105229.

1938 Odločba št. U-I-129/19 z dne 1. 7. 2020, ECLI:SI:USRS:2020:U.I.129.19, Uradni list RS, št. 108/20, in OdlUS XXV, 17, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=114816.

1939 Prav tam, zlasti tč. 63.

države (2. člen Ustave).«[1940]

Tudi ureditev volitev na državni in lokalni ravni je področje, kjer se prepletajo pravna in politična vprašanja. Ustavno sodišče je v letu 2018 odločalo o skladnosti zakona, ki je urejal volitve v Državni zbor, in zakona, ki je določal volilne enote, z Ustavo.[1941] Državni svet je med drugim zatrjeval, da veljavna ureditev volitev v Državni zbor ni v skladu z ustavno zahtevo, da morajo imeti volivci odločilen vpliv na dodelitev mandatov kandidatom. Ustavno sodišče je v zvezi s tem pojasnilo, da ustavno načelo sorazmernega predstavništva in ustavna zahteva po odločilnem vplivu volivcev zakonodajalcu omogočata izbiro različnih vrst proporcionalnih volilnih sistemov, za katere je značilno tudi glasovanje o kandidatih, ne le o listah kandidatov. Poudarilo pa je, da Ustava ne določa, kakšen mora biti način glasovanja o kandidatih. Ustava v petem odstavku 80. člena tudi ne zahteva, da morajo imeti volivci kot posamezniki možnost izbire med različnimi kandidati istoimenske liste ali med kandidati različnih list v volilni enoti. Različni sistemi, ki na drug način, morda tudi v večji meri, zagotavljajo vpliv volivca, bi bili ustavno dopustni, ker jih Ustava ne prepoveduje. Ker niso ustavno zapovedani, pa je izbira med njimi »vprašanje primernosti zakonske ureditve in politično vprašanje *par excellence*. Zato spada v polje proste presoje zakonodajalca.«[1942] Ustavno sodišče je ugotovilo, da zakon v tem pogledu ni bil v neskladju z Ustavo.

3. Ali obstajajo dejavniki, ki določajo, kdaj in kako vaše sodišče uresničuje samoomejevanje (*npr.* kultura in posebnosti razmer v vaši državi; zgodovinske izkušnje v vaši državi; absolutna ali posebna narava upoštevnih temeljnih pravic; predmet zadeve, ki jo obravnava sodišče; dejstvo, da se zadeva nanaša na spreminjanje družbenih razmer in odnosov)?

Kot rečeno, pristojnosti Ustavnega sodišča, ki so določene v Ustavi, Zakonu o Ustavnem sodišču in drugih zakonih, že predvidevajo določeno zakonodajno dejavnost sodišča. Bolj aktivističen pristop k odločanju Ustavnega sodišča je bil zlasti nujen ob vzpostavljanju temeljev novega pravnega reda v samostojni Sloveniji, ko je sodišče prevzelo pomembno usmerjevalno in razvojno vlogo pri utrjevanju načel pravne države in varstva človekovih pravic in temeljnih svoboščin.

Slovenska Ustava sicer ne določa absolutnih pravic, vendar določeno razvrščanje izhaja iz njenega 16. člena. Ta člen ureja možnost začasnega razveljavljanja ali omejevanja pravic v vojnem ali izrednem stanju, vendar v nobenem primeru ne dopušča začasnega razveljavljanja ali omejevanja pravic, določenih v 17., 18., 21., 27., 28., 29. in 41. členu. Iz ustavnosodne presoje sicer izhaja, da je pravici iz 18. člena Ustave, ki ureja prepoved mučenja, absolutna pravica.[1943] Tako je na primer sodišče pri presoji ustavnosti novele Zakona o tujcih med drugim poudarilo, da iz ustaljene ustavnosodne presoje ter sodne prakse ESČP in SEU izhaja, da pravice iz 18. člena Ustave ni mogoče omejiti. Vsak poseg vanjo je nedopusten. Na tej podlagi je brez nadaljnje presoje ugotovilo, da sta bili izpodbijani zakonski določbi v neskladju z 18. členom Ustave in ju je razveljavilo.[1944] V razmerja do oblastnih organov je absolutna tudi narava pravice iz 17. člena Ustave, ki ureja nedotakljivost človekovega življenja.[1945] Podobno iz ustavnosodne presoje izhaja za enega od vidikov svobode vere iz 41. člena Ustave, in sicer za svobodo verovanja. Na ravni osebne, individualne odločitve o verski pripadnosti (*forum internum*) pomeni svoboda vere pravico posameznika, da ima neko versko prepričanje (pozitivni vidik) brez vmešavanja javne oblasti, ter hkrati pravico posameznika, da verskega prepričanja nima, če tega ne želi, in da ga v to ni dopustno siliti (negativni vidik). Svoboda vere kot *forum internum* uživa absolutno varstvo pred posegi države – država v nobenem primeru ne sme kakor koli predpisovati ljudem ali jih

1940 Prav tam, tč. 64–65.

1941 Odločba št. U-I-32/15 z dne 8. 11. 2018, ECLI:SI:USRS:2018:U.I.32.15, Uradni list RS, št. 82/18, in OdlUS XXIII, 12, CODICES SLO-2021-3-007, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=113116.

1942 Prav tam, tč. 33.

1943 Glej odločbo št. U-I-388/22 z dne 8. 6. 2023, ECLI:SI:USRS:2023:U.I.388.22, Uradni list RS, št. 69/2023, tč. 26 in tam navedene odločitve, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=120075.

1944 Odločba št. U-I-59/17 z dne 18. 9. 2019, ECLI:SI:USRS:2019:U.I.59.17, Uradni list RS, št. 62/19, in OdlUS XXIV, 14, tč. 62. Dostopna na: https://www.us-rs.si/odlocitev/?q&id=113557.

1945 Glej odločbo št. Up-679/12 z dne 16. 10. 2014, ECLI:SI:USRS:2014:Up.679.12, Uradni list RS, št. 81/14, in OdlUS XX, 39, tč. 8, dostopna na https://www.us-rs.si/odlocitev/?q=&id=111658.

siliti, naj imajo oziroma naj sprejmejo (določeno) vero ali drugo prepričanje ali naj ju nimajo oziroma naj ju ne sprejmejo.[1946]

Na intenzivnost presoje lahko vpliva tudi dejstvo, da Ustava pri določenih pravicah že sama relativno izčrpno ureja določena vprašanja. Ustava tako pri določenih pravicah omogoča njihovo omejevanje, pri čemer za te primere redoma določa tudi ustrezna jamstva. Že iz samega ustavnega besedila na primer izhaja zahteva po sodni odredbi za hišno preiskavo (drugi odstavek 36. člena Ustave) in za posege v tajnost pisem in drugih občil (drugi odstavek 37. člena Ustave). Po drugi strani lahko na strogost presoje vpliva tudi dejstvo, da glede določenih pravic že Ustava sama predvideva zakonsko ureditev načina njihovega uresničevanja, pri t. i. pravicah pozitivnega statusa pa lahko potreba pa njihovem nadaljnjem zakonskem urejanju izhaja tudi iz narave same pravice. Poleg tega je strogost presoje lahko odvisna od tega, ali je zakonodajno urejanje poseglo v samo jedro oziroma bistvo pravice.

Razlikovanje med določitvijo načina uresničevanja pravice in posegom v pravico samo ob upoštevanju jedra upoštevne pravice je lepo ponazorjeno v novejši odločbi glede ureditve dvojezičnega šolstva na področjih, kjer živijo pripadniki madžarske narodne skupnosti.[1947] Državni svet je zahteval presojo ureditve osnovnošolskega izobraževanja na teh področjih. Trdil je, da pomeni zakonska ureditev, ki predvideva dvojezični pouk za vse otroke, poseg v pravico do izobraževanja otrok, ki so pripadniki večinskega naroda, ker jim ne omogoča pouka zgolj v slovenskem jeziku. Ustavno sodišče je zato presojalo, ali pomeni pouk v dvojezičnih šolah le določitev načina uresničevanja pravice do šolanja in izobraževanja otrok, pripadnikov večinskega naroda, ali je takšna ureditev že prerasla v poseg v to pravico. Najprej je ponovilo, da »[m]eja med omejevanjem ustavnih pravic (po tretjem odstavku 15. člena Ustave) in predpisovanjem načina njihovega uresničevanja (po drugem odstavku istega člena) sicer ni vedno lahko določljiva. […] V nekaterih primerih je ta razmejitev odvisna od intenzivnosti „zožujočega" učinka, ki ga ima neka določba. Spet drugje sta pomembni analiza sistemske umestitve sporne določbe in celovita presoja njenega učinkovanja skupaj z drugimi določbami istega in drugih predpisov. V spornih primerih gre torej najprej za presojo, ali je v posameznem primeru predpisovanje načina uresničevanja pravice že preraslo v njeno omejevanje ali še ne. […]«[1948] »Zakonodajalec ima pri zakonskem urejanju pravice do šolanja in izobraževanja široko polje proste presoje, obseg te pravice se lahko prilagaja času, upoštevaje potrebe in razpoložljiva sredstva družbe in posameznikov«, vendar pa mora pri tem »upoštevati ustavno varovano jedro pravice do izobraževanja in šolanja (57. člen Ustave). […] Zagotoviti je treba pridobitev take ravni obvezne osnovnošolske izobrazbe, da bo posameznik lahko glede na svoje želje in sposobnosti po končani osnovni šoli nadaljeval ustrezno izobraževanje in da bo pripravljen na življenje, kot ga zahteva vsakokratno stanje v družbi. […] Poleg navedenega je treba upoštevati, da se svoboda izbire šolanja in izobraževanja v okviru osnovnošolskega izobraževanja nanaša predvsem na izbiro med izobraževanjem v javnih osnovnih šolah, v zasebnih osnovnih šolah s pridobljenim javno veljavnim programom izobraževanja, v zasebnih šolah brez pridobljenega javno veljavnega programa izobraževanja ali izobraževanjem na domu […], na izbiro konkretne ustanove, ki bo izobraževanje izvajala, pa manj.«[1949] V konkretni zadevi je Ustavno sodišče je ocenilo, da presojana zakonska ureditev nima preveč utesnjujočih učinkov na samo vsebino človekove pravice do šolanja in izobraževanja in ne posega v njeno ustavno varovano jedro, zato je ukrep presojalo kot določitev načina uresničevanja te pravice, ne kot poseg v to pravico, kar pomeni, da je presojalo, le njegovo razumnost.[1950]

V zvezi s sodniškim samoomejevanjem Ustavno sodišče zlasti sledi razmejitvi med pristojnostmi posameznih vej državne oblasti, kot sledi iz načela delitve oblasti. Na zakonodajno raven poseže le, kadar je to nujno zaradi varstva ustavnosti in zakonitosti ter človekovih pravic in temeljnih svoboščin.

1946 Odločba št. U-I-92/07 z dne 15. 4. 2010, ECLI:SI:USRS:2010:U.I.92.07, Uradni list RS, št. 46/10, in OdlUS XIX, 4, tč. 82, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=109908.

1947 Odločba št. U-I-191/19 z dne 18. 5. 2023, ECLI:SI:USRS:2023:U.I.191.19, Uradni list RS, št. 63/23, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=120001.

1948 Prav tam, tč. 42.

1949 Prav tam, tč. 43.

1950 Prav tam, tč. 47–48.

Praviloma Ustavno sodišče v zakonodajalčevo sfero poseže v najmanjši možni meri, s katero je še mogoče zagotoviti varstvo upoštevne ustavne vrednote. V določenih primerih je Ustavno sodišče na primer uporabilo tudi koncept *stopnjevanja sankcije*, potem ko zakonodajalec ni sledil njegovi prvotni, manj invazivni odločitvi.

Najbolj odmeven primer takšnega stopnjevanja je bila ustanovitev občine Ankaran. Ustavno sodišče je prvotno prejelo pobudo za presojo zakona, ki je urejal ustanovitev občin in določitev njihovih območij, in akt o razpisu lokalnih volitev. Pobudniki so trdili, da je Državni zbor kršil Ustavo, ker ni ustanovil občin Ankaran in Mirna. Pri odločanju je Ustavno sodišče upoštevalo, da je Državni zbor predhodno že ugotovil, da obe sporni območji izpolnjujeta zakonske pogoje za ustanovitev občine, prebivalci teh območij pa so na referendumih že glasovali v prid ustanovitvi lastnih občin, nato pa v Državnem zboru nista bila izglasovana zakona o njuni ustanovitvi. Ustavno sodišče je pojasnilo, da iz Ustave izhaja pravica prebivalcev Republike Slovenije do uresničevanja lokalne samouprave v občini, ki je ustanovljena v skladu s pogoji in po postopku, ki jih določa zakon. Poudarilo je, da je Državni zbor upravičen določiti pogoje, po katerih ocenjuje posamezne predloge za ustanovitev občine, da pa načelo pravne države terja, da se nato ravna po pravilih, ki si jih je sam določil, in spoštuje tudi splošno načelo enakosti pred zakonom. Potem ko v konkretnem primeru ugotovi, da določeno območje izpolnjujejo zakonske pogoje za ustanovitev občine, je Državni zbor zato pri ustanavljanju občin in pri spreminjanju njihovih območij praviloma vezan na voljo volivcev, izraženo na referendumu. Ustavno sodišče je zato v odločbi št. U-I-137/10 sklenilo, da je Državni zbor ravnal arbitrarno oziroma samovoljno, ker ni sprejel zakonov o ustanovitvi občin Mirna in Ankaran. Nato je zgolj ugotovilo, da je bil izpodbijani zakon v neskladju z Ustavo in Državnemu zboru naložilo, naj ugotovljeno neskladje odpravi v roku dveh mesecev po objavi odločbe. Do odprave tega neskladja je zadržalo tudi lokalne volitve v upoštevnih občinah.[1951]

Državni zbor se je na odločbo odzval le delno, z ustanovitvijo Občine Mirna, zakona, ki bi ustanovil Občino Ankaran, pa ni sprejel. Zadeva je v tem obsegu znova prišla pred Ustavno sodišče, ki je tokrat pojasnilo, da takšna neodzivnost zakonodajalca glede obveznosti, ki je izhajala iz odločbe Ustavnega sodišča, pomeni kršitev načel pravne države (2. člen Ustave) in načela delitve oblasti (drugi odstavek 3. člena Ustave). Glede na neodzivnost Državnega zbora je v tej odločbi na podlagi drugega odstavka 40. člena Zakona o Ustavnem sodišču določilo nov način izvršitve odločbe št. U-I-137/10 in tako zagotovilo uresničevanje ustavnih pravic do volitev in do lokalne samouprave prebivalcev Mestne občine Koper, kot tudi ustavno pravico do lokalne samouprave prebivalcev Ankarana. V izreku je odločilo, da se ustanovi Občina Ankaran, ter določilo vse potrebno za izvedbo prvih lokalnih volitev v to občino. Na ta način je Ustavno sodišče zagotovilo učinkovitost ustavnosodnega varstva in dokončno zavarovalo ustavnopravni položaj pobudnikov.[1952] Gre sicer bržkone za odločitev Ustavnega sodišča, ki je bila deležna največ kritik zaradi pretiranega ustavnosodnega aktivizma.[1953]

4. Ali obstajajo primeri, ko je vaše sodišče ravnalo v skladu z načelom sodniškega samoomejevanja, ker ni bilo institucionalno pristojno ali strokovno usposobljeno?

Takšnega ravnanja v našem pravnem redu ne bi opredelili kot sodniško samoomejevanje. Pristojnost Ustavnega sodišča je ena od procesnih predpostavk za začetek postopka, na katero Ustavno sodišče pazi po uradni dolžnosti. Če zadeva ne sodi v pristojnost Ustavnega sodišča, sodišče vlogo za njeno obravnavo zavrže. Pri tem načeloma navede le razlog oziroma pravno podlago za zavrženje, zato so z vidika sodniškega samoomejevanja lahko zanimive odločitve, v katerih je Ustavno sodišče sicer ugotovilo, da ni pristojno za odločanje, pa je kljub temu obrazložilo, zakaj so bili izpodbijani akti problematični z vidika Ustave.

1951 Odločba št. U-I-137/10 z dne 26. 11. 2010, ECLI:SI:USRS:2010:U.I.137.10, Uradni list RS, št. 99/10, in OdlUS XIX, 9, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=110159.

1952 Odločba št. U-I-114/11 z dne 9. 6. 2011, ECLI:SI:USRS:2011:U.I.114.11, Uradni list RS, št. 47/11, in OdlUS XIX, 23, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=110349.

1953 Glej, npr., I. Kristan, Ali za „državo suverenega parlamenta" ali za „državo ustavne demokracije"?, Pravna praksa, 2011, št. 30-31,str. 11; M. Cerar, V primeru U-I-491/18 na so ustavni sodniki prekoračili meje ustave, Dnevnik, 24. junij 2011.

Tako je na primer v sklepu št. U-I-128/98 z dne 23. 9. 1998 zapisalo, da bi moral biti tajni sporazum med obveščevalnima vojaškima službama Slovenije in Izraela o zaupnosti prodaje orožja sklenjen kot mednarodna pogodba, da bi postal del slovenskega pravnega reda, pa bi ga moral Državni zbor ali Vlada ratificirati z zakonom ali uredbo in ustrezno javno objaviti, sicer ne bi smel veljati in se uporabljati. Ker ni šlo za predpis, sicer Ustavno sodišče ni bilo pristojno za njegovo presojo.[1954] Podobno je Ustavno sodišče ravnalo v sklepu št. U-I-87/99 z dne 8. 7. 1999, ki se je nanašal na prelete Natovih letal. Tudi tu je sodišče pojasnilo, da je izpodbijani sklep učinkoval kot predpis, zato bi moral biti tudi sprejet v obliki predpisa, in sicer v obliki zakona, ki ga sprejme Državni zbor.[1955] V obeh navedenih primerih sta bili odločitvi Ustavnega sodišča sprejeti v času, ko je bil cilj izpodbijanega akta že pretežno uresničen, zato je bil njun pomen omejen na preprečevanje enakih ali podobnih kršitev ustavne ureditve v prihodnje.

Glede odločanja o strokovnih in znanstvenih vprašanjih, ki niso pravna vprašanja, iz ustaljene ustavnosodne presoje med drugim izhaja, da se Ustavno sodišče ne more spuščati v vsebinsko primernost mnenj strokovnih institucij, ker gre za strokovna in ne pravna vprašanja.[1956] Zaradi splošne in abstraktne narave zakonodajnega urejanja se to vprašanje pogosteje pojavlja v zvezi s podzakonskimi akti, ki so redoma bolj strokovno tehnične narave, pri čemer se lahko zastavi vprašanje ustreznosti pooblastila za podzakonsko urejanje. Tako je sodišče na primer že pojasnilo, da je zahtevi po določnosti pri predpisih, ki urejajo javne dajatve, zadoščeno, če zakonodajalec sprejme bistvene določbe o javni dajatvi z zadostno natančnostjo. Pri tem mu ni treba odločiti o vsakem posameznem vprašanju, za kar ob upoštevanju zapletenosti postopkov niti ni usposobljen. Če je podrobnejša določitev posameznih elementov, ki opredelijo določeno zakonsko merilo za določitev višine javne dajatve, odvisna od dognanj različnih strok, mora zakonodajalec že zaradi narave stvari prepustiti izvršilni veji večje možnosti za lastno presojo. Zato je presoja Ustavnega sodišča, ko presoja ustavnost in zakonitost takega podzakonskega akta, zadržana.[1957] Pojasnilo je tudi, da lahko presoja skladnost podzakonskega predpisa z zakonom, ki mu je dal podlago za podrobnejše opredeljevanje posameznih pravic oziroma obveznosti, ne more pa ocenjevati skladnosti predpisa z ugotovitvami različnih strok, zlasti ne, če gre za nepravna vprašanja. Ustavno sodišče tako ne more presojati večje ali manjše ustreznosti in primernosti posameznih elementov, ki opredelijo določeno zakonsko merilo za določitev višine javne dajatve, če je ta odvisna od dognanj različnih strok.[1958]

Sicer pa se vprašanje presoje strokovnih oziroma znanstvenih vprašanj lahko pojavi tudi v okviru presoje dopustnosti posegov v človekove pravice. Ustavno sodišče v zvezi s strokovnimi oziroma znanstvenimi vprašanji, ki niso s pravnega področja, zakonodajalcu (in Vladi) pri pravnem urejanju odmerja širši manevrski prostor. Tako je na primer v zadevi št. U-I-140/14[1959] glede obrednega zakola živali pojasnilo, da ne more biti arbiter v zadevah zahtevnih znanstvenih vprašanj. V konkretnem primeru je šlo za vprašanje živalskega zaznavanja bolečine, torej strokovno vprašanje živalske fiziologije. Sodišče je pojasnilo, da mora v takih zadevah zakonodajalcu priznati določeno polje proste presoje, kar pomeni, da »lahko podvomi o primernosti in nujnosti spornega ukrepa za dosego zasledovanega cilja (na kompleksnem znanstvenem ali strokovnem področju) le, če je na podlagi trditev pobude očitno, da so bile prekoračene skrajne meje njegovega polja proste presoje.«[1960] V konkretni zadevi je Ustavno sodišče ocenilo, da ni razloga za dvom v zakonodajalčevo presojo, da predhodno

1954 Sklep št. U-I-128/98 z dne 23. 9. 1998, ECLI:SI:USRS:1998:U.I.128.98, OdlUS VII, 173, dostopen na: https://www.us-rs.si/odlocitev/?q=&id=99206.

1955 Sklep št. U-I-87/99 z dne 8. 7. 1999, ECLI:SI:USRS:1999:U.I.87.99, Uradni list RS, št. 60/99, in OdlUS VIII, 180, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=99701.

1956 Sklep št. U-I-123/03 z dne 9. 6. 2005, ECLI:SI:USRS:2003:U.I.123.03, tč. 12, dostopen na: https://www.us-rs.si/odlocitev/?q=&id=104802.

1957 Odločba št. U-I-215/11, Up-1128/11 z dne 10. 1. 2013, ECLI:SI:USRS:2013:U.I.215.11, Uradni list RS, št. 14/13, tč. 8, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=111018.

1958 Prav tam, tč. 15.

1959 Odločba št. U-I-140/14 z dne 25. 4. 2018, ECLI:SI:USRS:2018:U.I.140.14, Uradni list RS, št. 35/18, in OdlUS XXIII, 6, CODICES SLO-2019-3-004, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=112755.

1960 Prav tam, tč. 30.

omamljanje služi dobrobiti živali, za katero je Vlada v odgovoru na pobudo tudi razumno pojasnila, da temelji na strokovnih podlagah, ne na goli politični odločitvi.[1961]

V tem oziru je upoštevno tudi razlogovanje Ustavnega sodišča v odločitvi glede ustavne skladnosti ukrepov za zajezitev širjenja pandemije Covid-19. Pri presoji primernosti izpodbijanega ukrepa je tako pojasnilo, da je to presojo, kadar je primernost ukrepa neposredno povezana s strokovnimi razlogi, treba opraviti »v luči spoznanj ustreznih strok, ki so dosegljiva v času odločanja o uvedbi ukrepov. Če so strokovna spoznanja ob prvem pojavu pred tem neznane nalezljive bolezni, za katero je treba razglasiti epidemijo oziroma pandemijo, še v razvoju in stroka morda tudi nima docela enotnih stališč, je treba pri presoji, katerim strokovnim stališčem in v kolikšnem obsegu slediti, dopustiti širše polje proste presoje pristojnega odločevalca. Ob odsotnosti lastnih izkušenj se v tovrstnih primerih lahko državna oblast opre tudi na izkušnje drugih držav, ki kažejo, da bi širjenje epidemije nalezljive bolezni lahko resno ogrozilo zdravje ali življenje ljudi ter da je z določenimi ukrepi mogoče to širjenje preprečiti ali vsaj omejiti. Odlašanje z ukrepanjem na čas, ko bi bile izdelane zanesljivejše strokovne študije, bi se namreč lahko izkazalo za nesprejemljivo z vidika pozitivnih obveznosti države, da varuje zdravje in posledično življenje ljudi na način, ki dosega standarde varovanja človekovih pravic v demokratični družbi. Država mora tako zaradi izpolnjevanja pozitivnih obveznosti tudi v negotovih okoliščinah sprejeti ukrepe za obvladovanje predstavljenih tveganj širjenja nalezljive bolezni, in sicer še preden pride do razširjanja bolezni in s tem resne ogrozitve javnega zdravja, pa tudi življenja ljudi. Navedeno pa državne oblasti ne odvezuje od dolžnosti, da si tako pred uvedbo ukrepov kot tudi po njej v sodelovanju s stroko aktivno prizadeva kar najbolj zmanjšati negotovost glede ocene tveganj in glede primernosti izbranih ukrepov. Naknadna oziroma kasnejša spoznanja v znanosti in stroki zato vplivajo na nadaljnje uveljavljanje ukrepov, na spreminjanje sprejetih ukrepov oziroma njihov preklic. Dolžnost države je tudi, da transparentno pojasni stališča glede sprejetih ukrepov.«[1962]

5. Ali obstajajo zadeve, v katerih je vaše sodišče ravnalo v skladu z načelom sodniškega samoomejevanja, ker je obstajalo tveganje sodne napake?

S takšnim položajem se Ustavno sodišče še ni srečalo.

6. Ali obstajajo primeri, ko je vaše sodišče ravnalo v skladu z načelom sodniškega samoomejevanja zaradi institucionalne ali demokratične legitimnosti pristojnega odločevalca?

V okviru slovenskega pravnega reda ima Ustavno sodišče položaj najvišjega varuha ustavnosti in zakonitosti ter človekovih pravic in temeljnih svoboščin. Njegove odločbe so obvezujoče in dokončne. V primerih, ko Ustavno sodišče presodi, da je zakon ali drug predpis protiustaven ali nezakonit zato, ker določenega vprašanja, ki bi ga moral urediti, ne ureja ali ga ureja na način, ki ne omogoča razveljavitve oziroma odprave, sprejme o tem t. i. ugotovitveno odločbo in zakonodajalcu oziroma drugemu normodajalcu določi rok za odpravo ugotovljene protiustavnosti oziroma nezakonitosti (48. člen Zakona o Ustavnem sodišču). V skladu z ustavnimi načeli pravne države (2. člen Ustave) in delitve oblasti (drugi stavek drugega odstavka 3. člena Ustave) se mora pristojni normodajalec na ugotovitveno odločbo Ustavnega sodišča v roku odzvati in odpraviti ugotovljene protiustavnosti oziroma nezakonitosti. Ustavno sodišče je v svojih odločbah že večkrat opozorilo, da gre za hudo kršitev načel pravne države in delitve oblasti, če se pristojni normodajalec v roku ne odzove na odločbo Ustavnega sodišča. Ustavno sodišče tudi redno spremlja uresničevanje svojih ugotovitvenih odločb ter v svojem letnem poročilu opozarja na primere, ko se pristojni normodajalec, najpogosteje gre za zakonodajalca, ni ustrezno odzval na odločbo Ustavnega sodišča.

Ustavno sodišče je institucionalno ali demokratično legitimnost pristojnega odločevalca v prvi vrsti povezalo z razmejitvijo med pristojnostmi Državnega zbora kot zakonodajalca in organi izvršilne oblasti. Tako je na primer že v odločitvi iz leta 1993 pojasnilo, da »načelo demokratičnosti (1. člen ustave) zahteva, da neposredno izvoljeni poslanci sprejemajo najpomembnejše odločitve, ki se nanašajo na državljane, in da zaradi tega upravni organi lahko delujejo samo na podlagi in v okviru zakona. Načela

1961 Prav tam, tč. 31.

1962 Odločba št. U-I-83/20 z dne 27. 8. 2020, ECLI:SI:USRS:2020:U.I.83.20, Uradni list RS, št. 128/20, in OdlUS XXV, 18, tč. 50, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=114985.

pravne države (2. člen ustave) tudi zahtevajo, da se temeljna razmerja med državo in državljani urejajo s splošno veljavnimi in abstraktnimi zakoni.«[1963] Načelo legalitete (120. člen Ustave) in vprašanje razmejitve med zakonsko in podzakonsko materijo je bilo ključnega pomena tudi pri presoji podzakonskih ukrepov za boj proti pandemiji Covid-19.[1964]

Sicer pa je Ustavno sodišče na nekaj mestih poudarilo pomen spoštovanja pristojnosti demokratično izvoljenega odločevalca kot dodatni argument pri odmerjanju manevrskega prostora za zakonodajno urejanje. Tako je na primer ravnalo v odločbi št. U-I-129/19, kjer je poudarilo široko polje proste presoje demokratično izvoljenega parlamenta pri sprejemanju proračuna ter dodalo, da mora biti ustavnosodna presoja državnega proračuna zadržana. Poudarilo je tudi, da Ustavno sodišče ne sme biti instrument »deparlamentarizacije« političnih nasprotij o višini in strukturi javne porabe.[1965]

Pri odločanju o ustanovitvi občine Ankaran je Ustavno sodišče zadevo razlikovalo od splošnega odločanja Državnega zbora pri sprejemanju zakonov. Čeprav se občino ustanovi z zakonom, »zakonodajalec v tem primeru, kljub formi zakona, vendarle nima širokega polja proste presoje v smislu politično diskrecijskega odločanja, tako da bi – črpajoč svojo demokratično legitimacijo iz splošnih volitev – lahko le na podlagi vrednostne in interesne presoje odločil o tem, ali občino ustanovi ali ne. Polje proste presoje zakonodajalca je prisotno pri splošnem in abstraktnem pravnem urejanju pravic in obveznosti, saj se lahko demokratično izvoljeni zakonodajalec tedaj – ob spoštovanju ustavnih okvirjev – prosto odloči o najprimernejši pravni ureditvi. Pri odločanju o tem, ali bodo v konkretnem primeru prebivalci določenega območja lahko uresničili svojo ustavno pravico do lokalne samouprave v okviru nove občine, pa je zakonodajalec bistveno bolj vezan, saj je dolžan spoštovati pravila, ki si jih je sam določil.«[1966]

7. »Bolj ko se zakonodaja nanaša na zadeve široke socialne politike, manjša bo pripravljenost sodišča posredovati.« Ali je to veljavno merilo za vaše sodišče? Ali se vaše sodišče strinja s konceptom, da je treba o vprašanjih politike odločati v demokratičnih postopkih, saj sodišča niso izvoljena in nimajo demokratičnega mandata za odločanje o vprašanjih politike?

V tem kontekstu velja omeniti nekatere posebnosti, ki izhajajo iz ustavnosodne presoje posegov v socialne pravice. Za te pravice je značilno, da že Ustava izrecno predvideva njihovo nadaljnje zakonsko urejanje. Gre za primere, ko Ustava zakonodajalca pooblašča in zavezuje, da določi vsebino človekove pravice z zakonom (t. i. zakonski pridržek). Posamezne človekove pravice na področju socialne varnosti (socialne pravice) se uresničujejo na podlagi zakonov, ki določajo krog upravičencev, vrsto in obseg upravičenj, pogoje za pridobitev in način uresničevanja pravic. Ustava namreč zakonodajalca ne zavezuje, da sprejme točno določene ukrepe, ampak mu daje možnost izbire, kako bo te pravice zagotovil.[1967] Poleg tega je sodišče že pojasnilo, da urejanje socialnih pravic nujno poseže v urejanje ekonomskega sistema države, kar je še dodaten razlog, ki narekuje zadržanost Ustavnega sodišča pri presoji ustavnosti zakonodajnih ukrepov na tem področju.[1968]

V ustavnosodni presoji se je tako ustalilo stališče, da je zakonodajalcu zagotovljeno široko polje proste presoje pri urejanju človekove pravice do socialne varnosti, vključno s pravico do pokojnine. Vendar zakonodajalec kljub temu ni povsem neomejen. Drugi odstavek 50. člena Ustave določa obvez-

1963 Odločba št. U-I-123/92 z dne 18. 11. 1993, ECLI:SI:USRS:1993:U.I.123.92, Uradni list RS, št. 67/93, in OdlUS II, 109, dostopno na: https://www.us-rs.si/odlocitev/?q=&id=97513.

1964 Glej npr. Odločbo št. U-I-79/20 z dne 13. 5. 2021, ECLI:SI:USRS:2021:U.I.79.20, Uradni list RS, št. 88/21, in OdlUS XXVI, 18, tč. 68, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=116431.

1965 Odločba št. U-I-129/19 z dne 1. 7. 2020, ECLI:SI:USRS:2020:U.I.129.19, Uradni list RS, št. 108/20, in OdlUS XXV, 17, zlasti tč. 63–65, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=114816. Podrobneje pri vprašanju št. 2.

1966 Odločba št. U-I-137/10 z dne 26. 11. 2010, ECLI:SI:USRS:2010:U.I.137.10, Uradni list RS, št. 99/10, in OdlUS XIX, 9, tč. 22, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=110159.

1967 Odločba št. U-I-303/18 z dne 18. 9. 2019, ECLI:SI:USRS:2019:U.I.303.18, Uradni list RS, št. 59/19 in OdlUS XXIV, 15, tč. 33, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=113545.

1968 Odločba št. U-II-1/11 z dne 10. 3. 2011, ECLI:SI:USRS:2011:U.II.1.11, Uradni list RS, št. 20/11, tč. 18, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=110249.

nost države, da uredi obvezno zdravstveno, pokojninsko, invalidsko in drugo socialno zavarovanje ter skrbi za njihovo delovanje. Poleg tega mora zakonodajalec pri zakonskem urejanju te pravice upoštevati namen oziroma cilj prvega in drugega odstavka 50. člena Ustave, tj. da sta posamezniko zagotovljeni ekonomska varnost in človekovo dostojanstvo, upoštevati pa mora tudi veljavne mednarodne instrumente s tega področja, ki zavezujejo Republiko Slovenijo. Zakonodajalec pri tem ne sme spregledati, da ima človekova pravica do socialne varnosti tudi svoje ustavno zagotovljeno jedro, to je samo bistvo te človekove pravice. Na tem področju je zakonodajalec pri opredeljevanju vsebine in obsega človekove pravice ustavno vezan z ustavno določeno vsebino same človekove pravice in se ne nahaja na polju njegove lastne presoje. V zvezi z jedrom pravice do pokojnine, je Ustavno sodišče razlikovalo med njenim socialnim in premoženjskim vidikom. Socialni vidik pomeni, zagotavljanje dohodkovne varnosti zavarovanca za primer, ko mu ni treba biti več delovno aktiven in si mu na ta način dohodka ni treba več zagotavljati. Bistvo ali jedro premoženjskega vidika pravice do pokojnine pa pomeni (tudi) pravico posameznika, da na podlagi plačanih prispevkov pokojninskega zavarovanja in ob izpolnjenih vseh drugih razumno določenih pogojih pridobi in uživa pokojnino, ki mu zagotavlja socialno varnost.[1969]

8. Ali vaše sodišče sprejema splošno načelo sodniškega samoomejevanja pri presoji kazenskopravne filozofije in politike?

Oblikovanje politike določanja kaznivih ravnanj in sankcij zanje je pridržano zakonodajlacu, vendar je lahko ustavanosodna kontrola pri tem zelo pomemben korektiv. Ustavno sodišče tako kazenskopravne oziroma prekrškovne norme preizkuša z vidika 28. člena Ustave (načelo zakonitosti v kazenskem pravu), iz katerega je sodišče izpeljalo štiri pogoje za uporabo kazenskopravne represije, in sicer: (1) prepoved določanja kaznivih dejanj in kazni s podzakonskimi akti ali z običajnim pravom (*nullum crimen, nulla poena sine lege scripta*); (2) prepoved določanja kaznivih dejanj in kazni s pomočjo praznih, nedoločljivih ali nejasnih pojmov (*nullum crimen, nulla poena sine lege certa*); (3) prepoved analogije pri ugotavljanju obstoja kaznivih dejanj in izrekanju kazni (*nullum crimen, nulla poena sine lege stricta*); in (4) prepoved povratne veljave predpisov, ki določajo kazniva dejanja in kazni zanje (*nullum crimen, nulla poena sine lege praevia*).[1970]

Že v odločbi št. U-I-183/96 z dne 16. 7. 1998 je Ustavno sodišče sicer sprejelo izrecno stališče, da je ustavnosodna presoja zakonodajalčeve odločitve o vrsti kazenske sankcije in njeni višini zadržana.[1971] Iz ustavnosodne presoje izhaja, da je izbrana kazenska sankcija v nasprotju z Ustavo, če krši načelo zakonitosti (28. člen Ustave) ali če zakonodajalec za njeno določitev ni imel razumnega in stvarnega razloga (drugi odstavek 14. člena Ustave). Poleg posledic prepovedanega ravnanja in posledic predpisane sankcije so pri odločanju o vrsti kazenske sankcije in njeni višini pomembni dejavniki tudi pomen varovane dobrine, pogostnost določenega ravnanja, stopnje njegove nezaželenosti in nevarnosti, pomembno pa vpliva nanjo tudi zakonodajalčeva odločitev o namenu kaznovanja, tako nasploh kot v posameznem primeru.[1972] Ustavno sodišče je pojasnilo tudi, da je v pristojnosti zakonodajalca, da oceni, katera ravnanja dosegajo takšno stopnjo družbene nevarnosti, da je kazniv že njihov poskus.[1973]

9. V izrednih okoliščinah lahko Vlada zavrne razkritje informacij sodišču, zlasti v kontekstu nacionalne varnosti, ki vključuje tajne obveščevalne podatke. Ali je vaše sodišče ravnalo v skladu z načelom sodniškega samoomejevanja iz razlogov nacionalne varnosti?

1969 Odločba št. U-I-303/18 z dne 18. 9. 2019, ECLI:SI:USRS:2019:U.I.303.18, Uradni list RS, št. 59/19 in OdlUS XXIV, 15, tč. 34–36, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=113545.

1970 Odločba št. U-I-335/02 z dne 24. 3. 2005, ECLI:SI:USRS:2005:U.I.335.02, Uradni list RS, št. 37/05, in OdlUS XIV, 16, tč. 10, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=104584.

1971 Odločba št. U-I-183/96 z dne 16. 7. 1998, ECLI:SI:USRS:1998:U.I.183.96, Uradni list RS, št. 56/98, in OdlUS VII, 146, dostopno na: https://www.us-rs.si/odlocitev/?q=&id=99152.

1972 Odločba št. U-I-213/98 z dne 16. 3. 2000, ECLI:SI:USRS:2000:U.I.213.98, Uradni list RS, št. 33/2000 in 39/2000 (popr.), in OdlUS IX, 58, tč. 42, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=100108.

1973 Sklep št. U-I-5/94 z dne 30. 6. 1994, ECLI:SI:USRS:1994:U.I.5.94, OdlUS III, 79, dostopen na: https://www.us-rs.si/odlocitev/?q=&id=97622.

Ustavno sodišče se še ni srečalo s primerom, ko mu Vlada ob sklicevanju na nacionalno varnost ne bi bila pripravljena razkriti informacij, potrebnih za odločanje. Sicer pa imajo že v skladu s 3. členom Zakona o tajnih podatkih[1974] ustavni sodniki v zvezi z opravljanjem svoje funkcije zagotovljen dostop do tajnih podatkov. Varovanje tajnih podatkov v postopkih pred Ustavnim sodiščem je podrobneje urejeno v Pravilniku o notranji organizaciji in pisarniškem poslovanju Ustavnega sodišča.[1975]

Ustavno sodišče je v zvezi z vprašanji nacionalne varnosti oziroma obrambe države zakonodajalcu priznalo široko polje proste presoje. Tako je na primer pri presoji zavrnitve razpisa referenduma glede zakona, ki je urejal zagotavljanje sredstev za investicije v Slovenski vojski v letih 2021 do 2026, pojasnilo, da mora »v tej zadevi presoditi, ali sta Državni zbor oziroma Vlada izkazala razumne razloge (dejstva, okoliščine), iz katerih izhaja, da je stanje pripravljenosti in opremljenosti Slovenske vojske tako slabo, da so brez odlašanja potrebne kratkoročne in srednjeročne investicije, da se postopoma zagotovi njena zadovoljiva obrambna sposobnost. Pri tem Ustavno sodišče ne more presojati nujnosti posameznih investicij, kot tudi ne njihove strokovne utemeljenosti. Tega ne more ocenjevati niti z vidika višine sredstev, namenjenih za posamezne investicije, niti z vidika skupnega zneska načrtovanih investicij. Za presojo nujnosti prav tako ni upoštevno, da je zakonodajalec za podlago za srednjeročno prevzemanje obveznosti (2021–2026) sprejel poseben zakon […] in tega ni uredil v zakonu, ki ureja izvrševanje državnega proračuna.[…] Glede vseh teh vprašanj ima zakonodajalec široko polje proste presoje tako glede tega, v katerem zakonu jih bo uredil, kot tudi glede vsebine.«[1976]

10. Ali bi morala sodišča glede na svojo vlogo varuha ustave močneje posegati v politike (izvajati strožji nadzor), kadar so vlade pasivne pri uvajanju reform, ki so potrebne za varstvo temeljnih pravic?

»Zakonodajalec je […] v skladu z Ustavo dolžan skrbeti, da so njegovi pravni akti ustavnoskladni (87. in 153. člen Ustave). Kot nosilec zakonodajne funkcije se mora odzivati na potrebe na vseh področjih družbenega življenja, kar velja še toliko bolj, če te potrebe zadevajo temelje delovanja države ali sposobnost učinkovitega zagotavljanja človekovih pravic in temeljnih svoboščin.[…] Pri opravljanju zakonodajne funkcije je vezan le na Ustavo in v tem okviru sam presoja, katere zadeve bo uredil z zakonom in kako.«[1977] Iz ustavnosodne pa izhaja, da »so odločbe Ustavnega sodišča in sodbe ESČP za Državni zbor obvezne in da jih je dolžan izvršiti v postavljenih rokih. Nespoštovanje teh odločb pomeni hudo kršitev načel pravne države iz 2. člena Ustave in načela delitve oblasti iz drugega odstavka 3. člena Ustave.«[1978]

Ustavno sodišče je prevzelo aktivno vlogo pri uveljavljanju varstva človekovih pravic in temeljnih svoboščin. Prav s tem namenom sodišče pri odločanju relativno pogosto uporabi pooblastilo, da določi način izvršitve svoje odločitve (drugi odstavek 40. člena Zakona o ustavnem sodišču). Tako Ustavno sodišče največkrat začasno uredi vprašanje, ki bi po njegovi odločitvi sicer ostalo neurejeno, da bi zavarovalo pomembne ustavne vrednote, še posebno če bi lahko bile prizadete človekove pravice ali temeljne svoboščine. V tem pogledu velja naše sodišče za izredno aktivistično.[1979] V letu 2022 je Ustavno sodišče izmed 49 odločb, ki jih je sprejelo v postopku presoje skladnosti predpisov, v 8 odločbah določilo tudi način njihove izvršitve.[1980] Medtem je postala uporaba tega pooblastila tako

1974 Uradni list RS, št. 50/06 – uradno prečiščeno besedilo, 9/10, 60/11 in 8/20, dostopen na: http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO2133.

1975 Uradni list RS, št. 93/03, 56/11 in 142/22, dostopen na: http://pisrs.si/Pis.web/pregledPredpisa?id=PRAV5281.

1976 Odločba št. U-I-483/20 z dne 1. 4. 2021, ECLI:SI:USRS:2021:U.I.483.20, Uradni list RS, št. 64/21, in OdlUS XXVI, 11, tč. 43, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=116240.

1977 Odločba št. U-II-1/15 z dne 28. 9. 2015, ECLI:SI:USRS:2015:U.II.1.15, Uradni list RS, št. 80/15, in OdlUS XXI, 5, CODICES SLO-2018-3-004, tč. 47, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=111991.

1978 Prav tam, tč. 48.

1979 J. Sovdat, Časovni vidiki v ustavnosodni presoji v: M. Pavčnik, T. Štajnpihler Božič (ur.), Časovnost razlage zakona, Slovenska akademija znanosti in umetnosti, Ljubljana 2018, str. 159.

1980 Odločbe št. U-I-189/21 z dne 26. 5. 2022, št. U-I-464/20 z dne 1. 12. 2022, št. U-I-26/20 z dne 29. 9. 2022, št. U-I-180/19 z dne 5. 5. 2022, št. U-I-91/21, Up-675/19 z dne 16. 6. 2022, št. U-I-486/20, Up-572/18 z dne 16. 6.

uveljavljena, da Državni zbor pa tudi širša javnost od Ustavnega sodišča pogosta pričakujeta, da bo z ustavnosodnim normiranjem presekalo (politični) gordijski vozel.[1981]

Na tem mestu je smiselno navesti tudi nekaj konkretnih primerov določitve načina izvršitve. Ko je ugotovilo, da je zakonska ureditev, ki je sklenitev zakonske zveze omogočala le med osebama različnih spolov, v neskladju z Ustavo, je sodišče z določitvijo načina izvršitve svoje odločitve nemudoma omogočilo sklepanje zakonske zveze ne glede na spol zakoncev:

> »4. Do odprave ugotovljene protiustavnosti iz 2. točke tega izreka se šteje, da je zakonska zveza življenjska skupnost dveh oseb.«[1982]

Podobno je ravnalo v odločbi glede pravice istospolnih parov, da se uvrstijo na seznam potencialnih posvojiteljev, kjer je odločilo, kot sledi:

> »5. Do odprave ugotovljenega neskladja iz 3. točke izreka te odločbe veljajo za skupno posvojitev s strani istospolnih partnerjev, ki živita v partnerski zvezi, enaka pravila, kot veljajo po veljavni zakonski ureditvi za skupno posvojitev s strani zakoncev.«[1983]

Tudi v zadevi, kjer je ugotovilo, da različno obravnavanje obsojencev, ki zaprosijo za nadomestitev kazni zapora z delom v splošno korist, glede na to, ali so v času vložitve prošnje že začeli prestajati kazen ali ne, ni bilo skladno z Ustavo, je sodišče samo vzpostavilo začasno ustavnoskladno ureditev:

> »3. Do odprave ugotovljene protiustavnosti se nadomestitev kazni zapora z delom v splošno korist lahko predlaga tudi, ko obsojenec že prestaja kazen zapora oziroma do konca prestajanja kazni zapora.«[1984]

Z določitvijo načina izvršitve svoje odločbe torej Ustavno sodišče začasno zapolni ugotovljeno protiustavno pravno praznino ali praznino, ki bi nastala kot posledica odločitve Ustavnega sodišča, na primer zaradi razveljavitve protiustavne zakonske določbe. Na ta način je nemudoma mogoče zagotoviti tudi ustavnoskladno stanje v primerih, ko Ustavno sodišče ugotovi, da je izpodbijana zakonska določba protiustavna, vendar je ne more razveljaviti. Način izvršitve, ki ga določi Ustavno sodišče v svoji odločitvi ima moč zakona in je splošno zavezujoč, vendar zakonodajalec nanj ni vezan pri odpravljanju ugotovljene protiustavnosti in lahko izbere drugačno ustavnoskladno rešitev.

Ko govorimo o aktivni vlogi Ustavnega sodišča pri varstvu in razvoju človekovih pravic in temeljnih svoboščin velja izpostaviti njegovo vlogo pri razreševanju položaja t. i. *izbrisanih*. Gre za državljane drugih republik nekdanje Socialistične federativne republike Jugoslavije (v nadaljevanju SFRJ), ki so prebivali v Republiki Sloveniji, vendar so po osamosvojitvi Slovenije izgubili status stalnega prebivališča in so bili vpisani v evidenco tujcev. Ustavno sodišče je večkrat obravnavalo zakonodajne poskuse urejanja položaja *izbrisanih*. V odločbi št. U-I-284/94 z dne 4. 2. 1999[1985] je ugotovilo, da Zakon o tujcih ni bil v skladu z Ustavo, ker ni posebej uredil položaja teh oseb, kar je bilo v nasprotju z načelom zaupanja v pravo kot enim od načel pravne države (2. člen Ustave). Čeprav so imeli prizadeti posamezniki status stalnih prebivalcev pred ustanovitvijo Republike Slovenije kot samostojne države, jih je izpodbijani zakon namreč obravnaval celo manj ugodno kot osebe, ki so pred osamosvojitvijo štele za tujce in so v upoštevnem trenutku stalno prebivale v Sloveniji ter so za razliko od *izbrisanih* lahko obdržale stalno prebivališče. Če *izbrisani* niso zaprosili za slovensko državljanstvo, so bili obravnavani enako kot tujci, ki prvič vstopijo v našo državo. Ker za takšno razlikovanje ni bilo nobenega ustavno dopustnega objektivnega razloga, je bila takšna obravnava tudi v nasprotju z načelom enakosti pred zakonom (drugi odstavek 14. člena Ustave). Pri presoji posebnega zakona, ki naj bi uredil položaj

2022, št. U-I-14/18 z dne 15. 9. 2022 in št. Up-290/17, U-I-51/17 z dne 23. 6. 2022.

1981 S. Nerad, nav. delo, str. 254-255.

1982 4. točka izreka odločbe št. U-I-486/20, Up-572/18 z dne 16. 6. 2022, ECLI:SI:USRS:2022:U.I.486.20, Uradni list RS, št. 94/22, CODICES SLO-2023-2-003, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117906.

1983 5. točka izreka odločbe št. U-I-91/21, Up-675/19 z dne 16. 6. 2022, ECLI:SI:USRS:2022:U.I.91.21, Uradni list RS, št. 94/22, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117905.

1984 3. točka izreka odločbe št. Up-290/17, U-I-51/17 z dne 23. 6. 2022, ECLI:SI:USRS:2022:U.I.51.17, Uradni list RS, št. 96/22, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117916.

1985 Odločba št. U-I-284/94 z dne 4. 2. 1999, Uradni list RS, št. 14/99, in OdlUS VIII, 22,

izbrisanih, je Ustavno sodišče ugotovilo, da ta ni bil skladen z Ustavo, ker je za državljane drugih republik nekdanje SFRJ določal strožje pogoje za pridobitev dovoljenja za stalno prebivanje, kot so bili določeni za stalno prebivanje tujca na podlagi Zakona o tujcih.[1986] V odločbi št. U-I-246/02 z dne 3. 4. 2003 je poudarilo, da bi moral zakonodajalec položaj prizadetih oseb urediti za nazaj. Zaradi dolgotrajnega razreševanja te problematike in neustreznega odziva zakonodajalca je tokrat določilo tudi način izvršitve svoje odločitve in prizadetim osebam za nazaj podelilo status stalnega prebivališča ter pristojnemu ministrstvu naložilo, naj jim izda dopolnilne odločbe o ugotovitvi stalnega prebivališča v Republiki Sloveniji od trenutka njihovega izbrisa.[1987] Na to odločitev se je zakonodajalec s prejetjem novele upoštevnega zakona odzval šele po sedmih letih. Takrat je skupina poslancev zahtevala razpis zakonodajnega referenduma, ki bi lahko preprečil uveljavitev novele, vendar je Ustavno sodišče ugotovilo, da bi zaradi zavrnitve zakonskih sprememb nastale protiustavne posledice in je referendum preprečilo.[1988] V tej zadevi je ESČP proti Sloveniji izdalo tudi pilotno sodbo.[1989] Ustavno sodišče še vedno odloča o ustavnih pritožbah prizadetih posameznikov.[1990]

Podobno aktivno vlogo je Ustavno sodišče igralo tudi pri postopnem urejanju pravic istospolnih parov. V odločbi št. U-I-425/06 z dne 2. 7. 2009 je tako ugotovilo, da je bila zakonska ureditev dedovanja v neskladju z Ustavo, ker v krog zakonitih dedičev ni bil vključen tudi zapustnikov partner iz registrirane partnerske skupnosti, ki je bila prva oblika pravno priznane skupnosti za istospolne pare v Republiki Sloveniji. Sodišče je ugotovilo, da je položaj partnerjev registriranih istospolnih skupnosti z vidika pravice do dedovanja po umrlem partnerju v svojih bistvenih dejanskih in pravnih prvinah primerljiv s položajem zakoncev in da razlike v ureditvi dedovanja med zakonci ter med partnerji registriranih istospolnih skupnosti ne temeljijo na neki stvarni, neosebni razlikovalni okoliščini, temveč na spolni usmerjenosti. Čeprav v prvem odstavku 14. člena Ustave ni izrecno navedena, je spolna usmerjenost ena od osebnih okoliščin, ki ne smejo biti podlaga za razlikovanje pri uresničevanju človekovih pravic in temeljnih svoboščin. Sodišče je ugotovilo, da za upoštevno razlikovanje ni bilo ustavno dopustnega razloga, zato je bila izpodbijana ureditev v neskladju s prvim odstavkom 14. člena Ustave. Odločilo je tudi, da do odprave neskladja za dedovanje med partnerjema registrirane istospolne partnerske skupnosti veljajo enaka pravila, kot veljajo za dedovanje med zakoncema.[1991] V odločbi št. U-I-212/10 je ugotovilo, da je bila zakonska ureditev dedovanja neskladna z Ustavo tudi zato, ker je istospolne partnerje, ki so živeli v stabilnih skupnostih, vendar teh niso registrirali, obravnavala manj ugodno kot raznospolne partnerje, ki so živeli v zunajzakonski skupnosti.[1992] Ustavno sodišče je s svojo odločitvijo zagotovilo tudi vključitev istospolnih partnerjev med družinske člane prosilca za mednarodno zaščito, ki so upravičeni do združevanja družine.[1993] Z odločitvama iz leta 2022 pa je sodišče ugotovilo, da sta bili v neskladju z Ustavo tudi zakonska ureditev zakonske zveze kot zgolj skupnosti moškega in ženske ter izključitev istospolnih partnerjev iz možnosti skupne posvojitve.[1994]

1986 Odločba št. U-I-295/99 z dne 18. 5. 2000, ECLI:SI:USRS:2000:U.I.295.99, Uradni list RS, št. 54/2000, in OdlUS IX, 113, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=100209.

1987 Odločba št. U-I-246/02 z dne 3. 4. 2003, ECLI:SI:USRS:2003:U.I.246.02, Uradni list RS, št. 36/03, in OdlUS XII, 24, CODICES SLO-2003-M-001, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=102303.

1988 odločba št. U-II-1/10 z dne 10. 6. 2010, ECLI:SI:USRS:2010:U.II.1.10, Uradni list RS, št. 50/10, in OdlUS XIX, 11, CODICES SLO-2010-2-004, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=109973.

1989 Sodba ESČP v zadevi *Kurić in drugi proti Sloveniji* z dne 12. 3. 2014, dostopna na: https://hudoc.echr.coe.int/eng?i=001-141899.

1990 Med novejšimi vsebinskimi odločitvami glej na primer odločbo št. Up-268/20 z dne 10. 6. 2021, ECLI:SI:USRS:2021:Up.268.20, OdlUS XXVI, 46, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=116501.

1991 Odločba št. U-I-425/06 z dne 2. 7. 2009, ECLI:SI:USRS:2009:U.I.425.06, Uradni list RS, št. 55/09, in OdlUS XVIII, 29, CODICES SLO-2009-2-005, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=109411.

1992 Odločba št. U-I-212/10 z dne 14. 3. 2013, ECLI:SI:USRS:2013:U.I.212.10, Uradni list RS, št. 31/13, in OdlUS XX, 4, CODICES SLO-2013-3-005, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=111086.

1993 Odločba št. U-I-68/16, Up-213/15 z dne 16. 6. 2016, ECLI:SI:USRS:2016:U.I.68.16, Uradni list RS, št. 49/16, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=112236.

1994 Odločbi št. U-I-91/21, Up-675/19 z dne 16. 6. 2022, ECLI:SI:USRS:2022:U.I.91.21, Uradni list RS, št. 94/22, CODICES SLO-2023-2-004, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117905, in št. U-I-486/20, Up-

II. Odločevalec

11. Ali vaše sodišče bolj upošteva akte parlamenta kot odločitve izvršilne oblasti? Ali vaše sodišče pri odločanju upošteva stopnjo demokratične odgovornosti prvotnega odločevalca?

To načeloma niso upoštevna merila za odločanje Ustavnega sodišča. Z vidika načela zakonitosti lahko pri odločanju Ustavnega sodišča pomembno vlogo odigra vprašanje, ali je zakonodajalec z zagotovitvijo dovolj izčrpne ureditve izpolnil svoje ustavne dolžnosti oziroma ali ni izvršilna oblast s svojo normodajno dejavnostjo posegla na zakonsko raven. To vprašanje je Ustavno sodišče na primer obravnavalo pri presoji ukrepov za zajezitev širjenja pandemije Covid-19. Podrobneje v zvezi s tem tudi v odgovoru na vprašanje št. 6.

Sicer pa lahko pride tudi do nasprotnega položaja, da torej zakonodajalec nedopustno poseže v sfero izvršilne ali sodne oblasti. Iz načela delitve oblasti namreč izhaja zahteva, da posamezna veja oblasti ne sme prevzemati pristojnosti drugih vej oblasti, niti nedopustno posegati v izvrševanje njunih tipičnih oblastnih funkcij. Zato zakonodajna oblast ne sme prevzemati funkcij, ki so tipično izvršilne narave in pripadajo izvršilni (oziroma upravni) oblasti, prav tako pa ne sme posegati v tipični funkciji sodne veje oblasti, da odloča o pravicah, obveznostih ali pravnih koristih posameznikov oziroma pravnih oseb ter nadzoruje zakonitost izvršilne funkcije odločanja o konkretnih posamičnih razmerjih. S takšnim položajem se je Ustavno sodišče srečalo pri presoji zakona, s katerim je Državni zbor uredil interventni odvzem osebkov rjavega medveda in volka iz narave. Ugotovilo je, da je zakon v bistvenem delu konkretno določal obseg ter časovno in prostorsko razporeditev načrtovanega odstrela točno določenega števila medvedov in volkov ter pogoje in omejitve, ki jih morajo lovske družine upoštevati pri izvedbi tega odstrela. Zato je imela izpodbijana ureditev, čeprav je bila sprejeta v obliki zakona, v bistvenem naravo posamičnega pravnega akta. Posledično je bila v neskladju z načelom delitve oblasti iz drugega stavka drugega odstavka 3. člena Ustave, zato jo je Ustavno sodišče razveljavilo.[1995]

12. Kakšno težo daje vaše sodišče zakonodajni zgodovini? Kakšen pravni pomen, če sploh, bi morala imeti parlamentarna obravnava zadeve za sodno presojo njene skladnosti s človekovimi pravicami?

Pri presoji izpodbijane zakonske ureditve Ustavno sodišče pogosto pregleda tudi zakonodajno gradivo, zlasti predlog zakona, ki vsebuje tudi pojasnila glede njegove vsebine. To je še posebej pomembno pri določanju ustavno dopustnega cilja za posege v človekove pravice oziroma namena zakonodajalca (glej tudi odgovor na vprašanje št. 20). V odločbi št. U-I-91/15 z dne 16. 3. 2017, ki se je nanašala na zakonsko ureditev odvzema premoženja nezakonitega izvora, se je Ustavno sodišče na primer za podrobnejšo obrazložitev namena ukrepa neposredno sklicevalo na zakonodajno gradivo.[1996] Včasih sodišče navedbe v zakonodajnem gradivu uporabi tudi za razreševanje protislovnih navedb udeležencev v postopku. Tako je na primer v odločbi št. U-I-113/17 z dne 30. 9. 2020 ugotovilo, da so navedbe o namenu zakonske ureditve v zakonodajnem gradivu, ki so bile skladne z navedbami Državnega zbora, nasprotovale navedbam v mnenju, ki ga je Ustavnemu sodišču v tem postopku poslala Vlada.[1997]

Omeniti velja, da Ustavno sodišče tudi pri razlagi ustavnih določb poseže po ustavodajnem gradivu. Tako je na primer ravnalo pri presoji skladnosti zakonske ureditve volitev v Državni zbor z Ustavo, kjer je pri razlagi ustavne zahteve po odločilnem vplivu volivcev na dodelitev mandatov »izhajalo iz ustaljenih metod pravne razlage, zlasti iz jezikovnega pomena ustavnega besedila, pri čemer je upoš-

572/18 z dne 16. 6. 2022, ECLI:SI:USRS:2022:U.I.486.20, Uradni list RS, št. 94/22, CODICES SLO-2023-2-003, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117906.

1995 Odločba št. U-I-194/19 z dne 9. 4. 2020, ECLI:SI:USRS:2020:U.I.194.19, Uradni list RS, št. 58/20, in OdlUS XXV, 5, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=114238.

1996 Odločba št. U-I-91/15 z dne 16. 3. 2017, ECLI:SI:USRS:2017:U.I.91.15, Uradni list RS, št. 16/17, in OdlUS XXII, 6, tč. 40, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=112414.

1997 Odločba št. U-I-113/17 z dne 30. 9. 2020, ECLI:SI:USRS:2020:U.I.113.17, Uradni list RS, št. 145/20 in OdlUS XXV, 21, tč. 19, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=115133.

tevalo tudi namen ustavodajalca, kot izhaja iz gradiva ob sprejemanju [Ustavnega zakona, s katerim je bil spremenjen 80. člen Ustave, ki ureja volitve v Državni zbor] (zgodovinskonamenska razlaga).«[1998]

V zvezi s tem velja ponoviti, da je Ustavno sodišče pristojno presojati tudi ustavnost in zakonitost postopka sprejemanja predpisov. Glej tudi odgovor na vprašanje št. 15.

13. Ali vaše sodišče preveri, ali je odločevalec utemeljil odločitev oziroma ali je odločitev takšna, kot bi jo sprejelo sodišče, če bi samo odločalo?

Le v primeru povratne veljave zakonskih določb mora zakonodajalec svojo izbiro določene ureditve utemeljiti že v samem zakonodajnem postopku. »Po ustaljeni ustavnosodni presoji[…] lahko povratno učinkovanje upraviči le posebna, prav povratno učinkovanje predpisa utemeljujoča javna korist, brez katere ne bi bilo mogoče doseči zasledovanega cilja ureditve. Taka javna korist pa mora biti glede na to, da se z njo utemeljuje izjema od ustavne prepovedi povratnega učinkovanja predpisa – izjeme pa je treba razlagati restriktivno –, v zakonodajnem postopku posebej ugotovljena[…] in pojasnjena že v zakonodajnem gradivu.[…] Te utemeljitve ne morejo nadomestiti morebitna kasnejša (po zaključenem zakonodajnem postopku prvič podana) utemeljevanja ciljev zakona, ki iz zakonodajnega gradiva niso razvidna.«[1999]

Sicer pa lahko zakonodajalec svoje zakonodajne izbire pojasni tudi šele v postopku pred Ustavnim sodiščem. V postopkih presoje ustavnosti in zakonitosti predpisov ima namreč organ, ki je obravnavani predpis sprejel, položaj nasprotnega udeleženca. Tako ima zakonodajalec vselej možnost, da odgovori na navedbe v pobudi ali zahtevi, s katero se izpodbijajo zakonske določbe. V teh primerih svoje mnenje redno poda tudi Vlada kot poglavitna predlagateljica zakonov. Utemeljitev konkretnih zakonodajalčevih izbir, kot izhaja iz stališč, ki jih zakonodajalec in Vlada podata v postopku, ali iz zakonodajnega gradiva, je lahko upoštevna pri ugotavljanju ustavno dopustnega cilja izpodbijanega ukrepa ali v okviru preizkusa njegove sorazmernosti.

Z utemeljitvijo odločitve se Ustavno sodišče sicer podrobneje ukvarja, ko odloča o ustavnih pritožbah posameznikov zaradi kršitev človekovih pravic in temeljnih svoboščin z individualnimi akti. Zaradi zahteve po predhodnem izčrpanju pravnih sredstev so to predvsem odločitve višjih sodišč ali Vrhovnega sodišča. Iz 22. člena Ustave, ki zagotavlja enako varstvo pravic, izhaja tudi pravica do obrazložene sodne odločbe. V skladu z ustaljeno ustavnosodno presojo ta obsega obveznost sodišča, da vse navedbe stranke vzame na znanje, da pretehta njihovo relevantnost in dopustnost ter da se do tistih navedb, ki so za odločitev lahko bistvenega pomena in so dopustne, v obrazložitvi tudi opredeli. Za zagotovitev ustavne pravice do poštenega sojenja kot tudi za zagotovitev zaupanja v sodstvo je velikega pomena, da lahko stranka, tudi če njenemu zahtevku ali pravnemu sredstvu ni ugodeno, spozna, da se je sodišče z njenimi argumenti seznanilo in jih je obravnavalo, da torej ne ostane v dvomu, ali jih morda ni enostavno prezrlo. Pravica do opredelitve se nanaša tudi na pravna vprašanja. Sodišče ni dolžno posebej odgovarjati na vsak pravni argument stranke, dolžno pa se je opredeliti vsaj do nosilnih pravnih naziranj stranke, ki so dovolj argumentirana, ki niso očitno neutemeljena in ki za odločitev v zadevi po razumni presoji sodišča niso neupoštevna. Kadar instančno sodišče pritrdi pravnemu naziranju nižjega sodišča, je sicer zahteva po obrazloženosti odločbe načeloma lahko nižja od siceršnje zahteve po obrazloženosti sodnih odločb, vendar to lahko velja le, če je iz sodbe nižjega sodišča mogoče razbrati razloge za sporno pravno stališče in se je nižje sodišče že opredelilo do upoštevnih trditev in pravnih naziranj stranke. Ob tem se z vidika vsebine in obsega dolžnosti do obrazložene sodne odločbe lahko pojavi tudi zahteva po spoštovanju načela ustavnoskladne razlage, glede na okoliščine konkretne zadeve pa tudi spoštovanje načela lojalne razlage prava EU.[2000]

1998 Odločba št. U-I-32/15 z dne 8. 11. 2018, ECLI:SI:USRS:2018:U.I.32.15, Uradni list RS, št. 82/18, in OdlUS XXIII, 12, CODICES SLO-2021-3-007, tč. 29, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=113116. Glej zlasti tudi tč. 43, kjer se sodišče neposredno sklicuje na posamezne dele obrazložitve predloga navedenega ustavnega zakona.

1999 Odločba št. U-I-64/22, U-I-65/22 z dne 17. 11. 2022, ECLI:SI:USRS:2022:U.I.64.22, Uradni list RS, št. 157/22, CODICES SLO-2022-2-005, tč. 34, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=118521. Obrazložitev se od zakonodajalca zahteva tudi v primerih, ko odloči, da v skladu z drugim odstavkom 90. člena Ustave ni dopustno razpisati zakonodajnega referenduma, ko gre tudi sicer za drugačen položaj kot v zakondajnem postopku v ožjem smislu.

2000 Odločba št. Up-14/21 z dne 13. 1. 2022, ECLI:SI:USRS:2022:Up.14.21, Uradni list RS, št. 16/22, CODICES

14. Ali je stopnja zadržanosti vašega sodišča odvisna od tega, v kolikšni meri je bilo pred sprejetjem odločitve ali ukrepa opravljeno temeljito preverjanje skladnosti s temeljnimi pravicami? Kako temeljito mora na primer biti takšno preverjanje s strani zakonodajalca, da ga bo vaše sodišče upoštevalo?

Ukrep, ki pomeni poseg v človekove pravice, je ustavno dopusten, če zasleduje ustavno dopusten cilj in prestane test sorazmernosti. Ustavno sodišče to presoja na podlagi zakonodajnega gradiva, navedb udeležencev v postopku pred Ustavnim sodiščem in tudi splošnih življenjskih izkušenj. Načeloma mora sicer že zakonodajalec pri urejanju vsebine človekovih pravic in temeljnih svoboščin opraviti tehtanje in vzpostaviti pravično ravnovesje med človekovimi pravicami in drugimi ustavnimi dobrinami, ki so v medsebojnem konfliktu, vendar se dopustnost ukrepa ne opravi le na podlagi zakonodajnega gradiva. Ustrezno utemeljitev lahko zakonodajalce ali drugi pristojni normodajalec poda tudi v svojem mnenju v okviru postopka pred Ustavnim sodiščem. Ustavno sodišče organ, ki je izpodbijani ukrep sprejel, vselej obvesti o začetem postopku presoje. Ko so izpodbijane zakonske določbe, svoje mnenje o očitkih pobudnika ali predlagatelja redno poda tudi Vlada kot poglavitna predlagateljica zakonov. Glej tudi odgovor na vprašanje št. 20.

15. Ali vaše sodišče analizira, ali so bila v parlamentarni razpravi pri sprejemanju ukrepa v celoti zastopana nasprotna stališča? Ali zadošča obsežna razprava o splošnih koristih ukrepa ali pa se je treba bolj ciljno osredotočiti na njegove učinke na upoštevne pravice?

Ustavno sodišče se načeloma ne spušča v presojo parlamentarne razprave. Določeni vidiki obravnave predloga zakona v Državnem zboru pa bi lahko bili upoštevni v okviru presoje ustavnosti postopka sprejemanja zakona. V zvezi s tem je treba poudariti, da lahko Ustavno sodišče presoja le skladnost zakonodajnega postopka z zahtevami, ki izhajajo iz Ustave,[2001] ne pa tudi z različnimi zakonskimi zahtevami ali pravili iz Poslovnika Državnega zbora.[2002] Ustavno sodišče je že tudi pojasnilo, da ni pristojno odločati o postopku sprejemanja aktov, s katerimi se spreminja Ustavo, saj se njegova pristojnost za presojo ustavnosti in zakonitosti postopkov sprejemanja predpisov ravna po njegovi pristojnosti za vsebinsko presojo upoštevnega predpisa. Ker Ustavno sodišče ni pristojno presojati ustavnega zakona, tudi ni pristojno presojati postopka, po katerem je bil ustavni zakon sprejet.[2003]

Z vidika sodelovanja javnosti pri sprejemanju zakona se lahko pred Ustavnim sodiščem zastavi zlasti vprašanje kršitev ustavnih pravil v zvezi z referendumskim odločanjem, ki je del zakonodajnega postopka v širšem smislu. V okviru presoje ustavnosti zakonodajnega postopka namreč Ustavno sodišče skrbi tudi za varstvo ustavne pravice 40.000 volivcev zahtevati razpis referenduma. Če bi državni organi, vključeni v referendumski postopek, s svojimi akti ali ravnanjem kršili ustavna pravila referendumskega postopka in s tem preprečili izvedbo referenduma, bi bil zakon, o katerem bi sicer moral biti izveden referendum, sprejet po protiustavnem postopku. Tako je na primer že prišlo do položaja, kjer je Državni zbor zavrnil razpis referenduma o zakonu z obrazložitvijo, da gre za zakon o nujnih ukrepih za zagotovitev obrambe države, varnosti ali odprave posledic naravnih nesreč, o katerem v skladu s prvo alinejo drugega odstavka 90. člena Ustave ni dopustno razpisati referenduma. Ustavno sodišče je moralo na podlagi zahteve volivca odločiti o tem, ali gre za tak zakon. V nasprotnem primeru bi namreč bil postopek sprejemanja zakona v neskladju z Ustavo, saj bi Državni zbor kršil ustavno pravilo o tem, kdaj ni dopustno razpisati referenduma. V omenjeni zadevi je sicer sodišče pritrdilo Državnemu zboru.[2004]

SLO-2022-2-007, tč. 22 in tam navedene odločitve, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117295.

2001 Odločba št. U-I-483/20 z dne 1. 4. 2021, ECLI:SI:USRS:2021:U.I.483.20, Uradni list RS, št. 64/21, in OdlUS XXVI, 11, tč. 19 in odločitve, navedene pod opombo št. 5, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=116240.

2002 Sklep št. U-I-409/98 z dne 30. 11. 2000, ECLI:SI:USRS:2000:U.I.409.98, dostopen na: https://www.us-rs.si/odlocitev/?q=&id=100553.

2003 Sklep št. U-I-242/00 z dne 10. 4. 2003, ECLI:SI:USRS:2003:U.I.242.00, OdlUS XII, 34, tč. 4, dostopen na: https://www.us-rs.si/odlocitev/?q=&id=102350.

2004 Odločba št. U-I-483/20 z dne 1. 4. 2021, ECLI:SI:USRS:2021:U.I.483.20, Uradni list RS, št. 64/21, in OdlUS XXVI, 11, tč. 43, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=116240.

16. Ali je dejstvo, da je odločitev sprejel zakonodajalec ali da je bila sprejeta po javnem posvetovanju ali javni razpravi, prepričljiv dokaz demokratične legitimnosti odločitve?

Javna razprava je z vidika ustavnosodne presoje predpisov pomembna, kadar je formalna sestavina postopka njihovega sprejemanja. To na primer velja pri podzakonskih predpisih z okoljskega področja, kjer izhaja obveznost sodelovanja javnosti iz Aarhuške konvencije, ki je bila na podlagi 8. člena Ustave z ratifikacijo inkorporirana v slovenski pravni red. V zadnjih letih je tudi Ustavno sodišče omililo razlago pravnega interesa za vložitev pobude za nevladne organizacije, ki delujejo na področju varstva okolja.[2005]

V zvezi z upoštevanjem javnega mnenja pri zakonodajnem urejanju in kasnejši ustavnosodni kontroli velja poudariti, da je v tem smislu Ustavno sodišče včasih postavljeno celo v vlogo t. i. protivečinske institucije, ki omejuje moč večinskega odločanja parlamenta in referendumskega odločanja. Iz ustavnosodne presoje tako izhaja, da »Ustava in odločbe Ustavnega sodišča ter sodbe ESČP torej ne zavezujejo samo Državnega zbora kot zakonodajalca, temveč tudi državljane, kadar oblast izvršujejo neposredno z odločanjem o posameznem zakonu na referendumu.«[2006]

Ustavno sodišče ne odloča neposredno o tem, ali so odločitve zakonodajalca ali drugega normodajalca demokratično legitimne. Kot navedeno, pa lahko bdi nad spoštovanjem ustavnih pravil zakonodajnega postopka ter ustavnih in zakonskih pravil postopka sprejemanja podzakonskih predpisov. V tem smislu je Ustavno sodišče na primer glede občinskih predpisov izpostavilo, da morajo občine pri sprejemanju predpisov spoštovati načelo zakonitosti. Zahteva po skladnosti občinskih predpisov zajema tako materialno kot tudi formalno skladnost z zakonom. Materialna skladnost vsebuje zahtevo, da občina pravnih razmerij po vsebini ne ureja na način, da bi bila v nasprotju z zakonom, formalna pa zahtevo, da je občinski predpis sprejet v skladu z zakonsko predvidenim postopkom. Oblika oziroma postopek sprejemanja splošnih normativnih aktov prispeva, da je nastajanje pravnih pravil demokratično in legitimno, da tako nastala pravila predvidljivo in enako obravnavajo pravne subjekte. Kršitev postopkovnih pravil lahko povzroči, da je splošni akt v tolikšni meri pravno nepravilen, da ga je treba razveljaviti ali odpraviti.[2007]

III. Področje varstva določene pravice, zakonitost in sorazmernost

17. Ali je vaše sodišče v fazi opredelitve pravic kdaj ravnalo zadržano, v smislu, da je sprejelo vladno opredelitev pravice ali njeno uporabo te opredelitve v praksi?

Ustavno sodišče je tisto, ki skozi svoje odločitve napolnjuje Ustavo z vsebino, vključno z njenimi določbami, ki urejajo človekove pravice in temeljne svoboščine. Pri tem je Ustavno sodišče popolnoma neodvisno od drugih državnih organov in ni vezano na njihova stališča. Seveda pa lahko sodišče argumente Vlade (ali drugih udeležencev v postopku pred Ustavnim sodiščem) upošteva, če so prepričljivi. V tem oziru so pomembno vodilo pri razlagi Ustave tudi mednarodni akti s področja človekovih pravic, ki zavezujejo Republiko Slovenijo, med njimi zlasti EKČP in sodna praksa ESČP, pa tudi pravo Evropske Unije, z vidika varstva človekovih pravic zlasti Listina.

18. Ali je intenzivnost presoje odvisna od narave upoštevne temeljne pravice? Ali vaše sodišče meni, da so nekatere pravice ali vidiki pravic pomembnejši in si zato zaslužijo strožjo presojo kot druge? Kakšni so kriteriji za to razlikovanje?

Glej odgovor na vprašanje št. 3 glede absolutne narave nekaterih pravic ter primera upoštevanja jedra pravice pri odločanju o tem, ali gre v konkretnem primeru za urejanje načina uresničevanja

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2005 Sklep št. U-I-25/17 z dne 9. 6. 2022, ECLI:SI:USRS:2022:U.I.25.17, dostopen na: https://www.us-rs.si/odlocitev/?q=&id=118585.

2006 Odločba št. U-II-1/15 z dne 28. 9. 2015, ECLI:SI:USRS:2015:U.II.1.15, Uradni list RS, št. 80/2015 in OdlUS XXI, 5, CODICES SLO-2018-3-004, tč. 48, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=111991.

2007 Odločba št. U-I-2/21, U-I-3/21 z dne 20.05.2021, ECLI:SI:USRS:2021:U.I.2.21, Uradni list RS, št. 88/21, Uradno glasilo slovenskih občin, št. 30/21 z dne 4. 6. 2021, in OdlUS XXVI, 19, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=116430.

pravice ali poseg v pravico.

Glej tudi odgovor na vprašanje št. 7 glede pravic z zakonskim pridržkom in razlikovanja med jedrom ali bistvom pravice in njenimi drugimi elementi.

Delno je intenzivnost presoje posegov v posamezne pravice odvisna tudi od tega, kako jih ureja Ustava. Pri nekaterih pravicah že Ustava vsebuje relativno podrobno ureditev njihove vsebine, ki omejuje zakonodajalčev manevrski prostor, Ustavno sodišče pa mora preveriti, ali so bile pri normiranju spoštovane ustavne zahteve. Tako na primer že sama Ustava relativno podrobno ureja jamstva, ki morajo biti zagotovljena, da bodo dopustni posegi v pravico do nedotakljivosti stanovanja, ki jo zagotavlja prvi odstavek 36. člena Ustave. Drugi odstavek tega člena tako določa, da ne sme nihče brez odločbe sodišča proti volji stanovalca vstopiti v tuje stanovanje ali v druge tuje prostore, niti jih ne sme preiskovati. V skladu s tretjim odstavkom ima pri preiskavi pravico biti navzoč tisti, čigar stanovanje ali prostori se preiskujejo, ali njegov zastopnik, četrti odstavek pa določa, da se sme preiskava opraviti samo v navzočnosti dveh prič. V petem odstavku so določeni pogoji, pod katerimi sme uradna oseba opraviti preiskavo brez odločbe sodišča in izjemoma brez navzočnosti prič. Zakonodajalčevo polje proste presoje je tako znatno omejeno že z ustavnimi zahtevami in zato mora biti tudi presoja, ki jo opravi Ustavno sodišče, ustrezno bolj intenzivna.

19. Ali imate pri presoji ustavnosti zakona določeno lestvico jasnosti? Kako odločite, kako jasen je zakon? Kdaj uporabite kanon *In claris non fit interpretatio?*

Iz ustavnosodne presoje izhaja, da je načelo jasnosti in (pomenske) določljivosti predpisov eno od načel pravne države iz 2. člena Ustave. To načelo med drugim zahteva, da morajo biti predpisi opredeljeni jasno in določno, tako da jih je mogoče izvajati, da ne omogočajo arbitrarnega ravnanja ter da nedvoumno in dovolj določno opredeljujejo pravni položaj subjektov, na katere se nanašajo. To ne pomeni, da morajo biti predpisi taki, da jih sploh ne bi bilo treba razlagati, saj uporaba predpisov vedno pomeni njihovo razlago. To načelo ne zahteva, da bi samo besedilo predpisa moralo odgovarjati na vsa vprašanja, ki se utegnejo pojaviti v praksi. Z vidika pravne varnosti postane predpis sporen takrat, ko s pomočjo razlage ne moremo priti do njegove jasne vsebine. Predpis torej izpolnjuje zahtevo po jasnosti in določljivosti, če je mogoče z ustaljenimi metodami razlage ugotoviti vsebino pravila, ki ga vsebuje, in je na ta način dolžno ravnanje naslovnikov določno in predvidljivo.[2008]

V zvezi z zahtevano stopnjo jasnosti in določnosti predpisov je sodišče med drugim pojasnilo, da je ta posebej pomembna pri predpisih, ki vsebujejo pravne norme, s katerimi se določajo pravice ali dolžnosti.[2009] Čim pomembnejša je varovana dobrina, tem bolj poudarjena je zahteva po določnosti zakona. Tako na primer velja, da morajo pooblastila represivnih organov, kot na primer hišna preiskava, ki pomenijo močan poseg v človekove pravice posameznika, temeljiti na posebno natančni ureditvi z jasnimi in podrobnimi pravili. Zakonska ureditev mora biti taka, da izključuje možnost arbitrarnega ravnanja države.[2010]

Zahteva po določnosti pravnega pravila je strožja, če gre za pravno pravilo, ki opredeljuje kaznivo ravnanje, in v tem okviru najstrožja, ko opredeljuje kaznivo dejanje. V kazenskem pravu se načelo določnosti izraža posebej prek načela zakonitosti kazenskega materialnega prava (prvi odstavek 28. člena Ustave). Na področje kaznovalnega prava pa sodijo tudi postopkovne določbe, kot so na primer tiste, ki urejajo posebne preiskovalne ukrepe. Pri slednjih je pomembno tudi dejstvo, da posegajo na področje obdelave osebnih podatkov osumljencev in drugih oseb, proti katerim so bili uporabljeni posebni preiskovalni ukrepi. Ker ti ukrepi izjemno intenzivno posegajo na področje, ki ga varujejo različni vidiki človekove pravice do zasebnosti, za njihovo urejanje velja ustavna zahteva poudarjene jasnosti, razumljivosti, določnosti, nedvoumnosti in predvidljivosti upoštevnih zakonskih

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2008 Odločba št. U-I-260/19 z dne 5. 5. 2022, ECLI:SI:USRS:2022:U.I.260.19, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117778.

2009 Odločba št. U-I-65/08 z dne 25. 9. 2008, ECLI:SI:USRS:2008:U.I.65.08, Uradni list RS, št. 96/08, in OdlUS XVII, 49, tč. 8, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=108846.

2010 Odločba št. U-I-144/19 z dne 17. 2. 2022, ECLI:SI:USRS:2022:U.I.144.19, Uradni list RS, št. 35/22, tč. 38, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117461.

določb. To ne velja samo za pravne podlage za izvajanje teh ukrepov v ožjem smislu (torej za vdiranje v sfero zasebnosti s pridobivanjem in beleženjem različnih podatkov), temveč tudi za predpise, ki urejajo nadaljnjo obdelavo ustreznih izsledkov, npr. hrambo, uporabo, posredovanje med različnimi upravičenci itd.[2011]

V zadevi, ki se je nanašala na zatrjevano prekrivanje zakonskih dejanskih stanov kaznivega dejanja in prekrška, je Ustavno sodišče izpostavilo, da postavlja načelo zakonitosti iz prvega odstavka 28. člena Ustave več omejitev za uporabo kazenskopravne represije, med drugim tudi načelo določnosti (*lex certa*), ki naj prepreči samovoljno in arbitrarno uporabo državnega kaznovalnega sankcioniranja v primerih, ki ne bi bili vnaprej točno opredeljeni. Načelo določnosti pa zahteva tudi, da je omogočeno medsebojno razlikovanje med pravnimi pravili (*lex distincta*).[2012]

Strožja merila kot sicer veljajo tudi za presojo davčne zakonodaje. V ustavnosodni presoji je »uveljavljeno stališče, da iz 2. člena Ustave izhaja zahteva, da mora biti že iz zakona razvidno in predvidljivo, kaj država zahteva od davkoplačevalca.[…] Enako dobro uveljavljeno stališče v ustaljeni ustavnosodni presoji je, da 147. člen Ustave zahteva, da zakon opredeli najmanj davčnega zavezanca, davčni predmet, davčno osnovo in davčno stopnjo.[…] Povezava obeh stališč pomeni, da zahteva, da mora biti že iz zakona razvidno in predvidljivo, kaj država zahteva od davkoplačevalca, velja za vse prej naštete elemente davčne obveznosti«[2013]

V zvezi z razmejitvijo med zakonsko in podzakonsko materijo je Ustavno sodišče zahtevo po podrobnosti (preciznosti) zakona, ki izhaja iz splošnega legalitetnega načela po drugem odstavku 120. člena Ustave, in zahtevo po jasnosti in določnosti predpisov iz 2. člena Ustave povezalo s pomenom vsebine, ki jo presojani zakon ureja. Čim večji je poseg ali učinek zakona na področje temeljnih pravic, bolj restriktivno in precizno mora biti zakonsko pooblastilo in bolj poudarjena je zahteva po jasnosti in določnosti. Najstrožje zahteve glede jasnosti in določnosti predpisov ter spoštovanja legalitetnega načela so pridržane za primere omejevanja človekovih pravic in temeljnih svoboščin. Ko torej gre za poseganje v te pravice s splošnim aktom, tj. aktom, ki se nanaša na nedoločeno število posameznikov, mora zakonodajalec določiti dovolj določna merila za tako urejanje. Pri tem mora biti zakonsko pooblastilo izvršilni oblasti toliko bolj restriktivno in precizno, kolikor večji je poseg ali učinek zakona na posamezne človekove pravice in temeljne svoboščine. Vselej pa mora biti dovolj natančno, da izvršilni oblasti ne omogoča izvirnega urejanja omejitev človekovih pravic in temeljnih svoboščin. S tem se zagotavljata predvidljivost in pravna varnost v zvezi z udejanjanjem človekovih pravic in temeljnih svoboščin, obenem pa se zmanjšuje nevarnost njihovega arbitrarnega oblastnega omejevanja. Z vidika vezanosti uprave na Ustavo in zakon pomeni dovolj določna zakonska podlaga ključno varovalo pred arbitrarnim poseganjem izvršilne oblasti v človekove pravice in temeljne svoboščine.[2014]

20. Kakšna je intenzivnost presoje vašega sodišča v primeru testa legitimnega cilja?

V svojih zgodnejših odločitvah je Ustavno sodišče še govorilo o legitimnem, stvarno utemeljenem cilju, nato pa se je ustalil pojem ustavno dopustnega cilja. Ta je lahko bodisi v pravicah drugih bodisi v javni koristi (tretji odstavek 15. člena Ustave). Ustavno sodišče ugotavlja cilj (namen) zakonodajalca iz besedila zakona, zakonodajnega gradiva, odgovora, ki ga poda zakonodajalec v postopku ustavnosodne presoje, mnenja Vlade ali drugega ustreznega organa.[2015] Če cilja ni mogoče ugotoviti na ta

2011 Odločba št. U-I-246/14 z dne 24. 3. 2017, ECLI:SI:USRS:2017:U.I.246.14, Uradni list RS, št. 16/17, in OdlUS XXII, 7, tč. 20–22, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=112412.

2012 Odločba št. U-I-132/15 z dne 15. 3. 2018, ECLI:SI:USRS:2018:U.I.132.15, Uradni list RS, št. 24/18, CODICES SLO-2021-3-007, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=112706.

2013 Odločba št. U-I-497/18 z dne 20. 1. 2022, ECLI:SI:USRS:2022:U.I.497.18, Uradni list RS, št. 14/22, tč. 18, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117286.

2014 Odločba št. U-I-262/19 z dne 6. 4. 2023, ECLI:SI:USRS:2023:U.I.262.19, Uradni list RS, št. 54/23, tč. 32, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=119651.

2015 Tako se je na primer pri iskanju ustavno dopustnega cilja za poseg v pravico pravnih oseb do zasebnosti oprlo na odgovor Državnega zbora, mnenje Vlade in stališča Agencije Republike Slovenije za varstvo konkurence. Glej odločbo št. U-I-40/12 z dne 11. 4. 2013, ECLI:SI:USRS:2013:U.I.40.12, Uradni list RS, št. 39/13, in OdlUS XX, 5, tč. 48, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=111113.

način, ga lahko ugotovi tudi Ustavno sodišče samo, če je dovolj očitno določljiv na podlagi splošnih življenjskih izkušenj.[2016] Če obstoj ustavno dopustnega cilja za obravnavani poseg tudi na ta način ni očitno in nedvomno določljiv, pa ni naloga Ustavnega sodišča, da presoja skladnost ureditve z Ustavo glede na morebitne povsem hipotetične cilje. V takem primeru že prvi z Ustavo določeni pogoj za omejitev človekove pravice ni izpolnjen in gre za nedopusten poseg, ki ni skladen z Ustavo.[2017]

Pri presoji, ali je konkretni cilj zakona tudi ustavno dopusten, upošteva Ustavno sodišče tudi morebiti upoštevne določbe mednarodnih instrumentov, zlasti EKČP in sodne prakse ESČP ter prava EU.[2018] Ustavno sodišče načeloma test legitimnosti opravi v vseh primerih presoje posega v človekove pravice ali temeljne svoboščine. Izjema velja za primere, kjer že predlagatelj navaja, da je ustavno sporna le prekomernost posega, ne pa njegova legitimnost. V taki zadevi Ustavno sodišče ni ugotavljalo ustavno dopustnega cilja izpodbijanega ukrepa, temveč je prešlo neposredno na preizkus njegove sorazmernosti.[2019]

21. Kakšen test sorazmernosti uporablja vaše sodišče? Ali vaše sodišče uporablja vse stopnje „klasičnega" testa sorazmernosti (tj. primernost, nujnost in sorazmernost v ožjem smislu)?

Ustavno sodišče uporablja klasičen test sorazmernosti, ki obsega preizkus primernosti in nujnosti izpodbijanega ukrepa ter njegove sorazmernosti v ožjem smislu, tj. ali je teža posledic ocenjevanega posega v prizadeto človekovo pravico sorazmerna vrednosti zasledovanega cilja oziroma koristim, ki bodo nastale zaradi posega. Ukrep, ki prestane vse tri vidike testa, je ustavno dopusten.

Pri presoji primernosti posega v človekove pravice Ustavno sodišče ocenjuje, ali je poseg sploh primerno sredstvo za dosego ustavno dopustnega cilja omejitve človekove pravice in ali je ta cilj s presojanim ukrepom sploh mogoče doseči. Ukrep je neprimeren šele takrat, ko sredstvo za dosego cilja ni v razumni zvezi s tem ciljem in ko navedenega cilja v nobenem primeru ni mogoče doseči s sredstvom za dosego cilja.[2020] Primernost ukrepa se presoja v njenem vsakokratnem upoštevnem kontekstu, pri tem pa je upoštevno tudi učinkovanje tega ukrepa v kombinaciji z drugimi ukrepi, bodisi iz istega bodisi iz drugega predpisa.[2021] Ukrep, katerega učinke na zasledovani cilj bi bilo mogoče že v času njegovega sprejetja oceniti za zanemarljive ali zgolj naključne, ne bi bil primeren, pri čemer je tudi to treba oceniti glede na vse konkretne okoliščine, ki so lahko bile znane ob času sprejetja ukrepa.[2022]

Poseg v človekovo pravico ali temeljno svoboščino je nujen, če zasledovanega cilja ni mogoče doseči brez posega ali z milejšim, a enako učinkovitim ukrepom,[2023] oziroma če za uresničitev cilja, ki mu

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2016 Odločba št. U-I-155/11 z dne 18. 12. 2013, ECLI:SI:USRS:2013:U.I.155.11, Uradni list RS, št. 114/13, in OdlUS XX, 12, CODICES SLO-2014-3-013, tč. 43, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=111395.

2017 Odločba št. U-I-41/13 z dne 10. 10. 2013, ECLI:SI:USRS:2013:U.I.41.13, Uradni list RS, št. 89/13, tč. 20, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=111332.

2018 Glej npr. odločbo št. U-I-260/19 z dne 5. 5. 2022, ECLI:SI:USRS:2022:U.I.260.19, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117778, kjer je v tč. 10 navedeno, kot sledi: »Ustava v 39. členu izrecno ne opredeljuje dopustnih razlogov za omejitev pravice do svobode izražanja. Taki razlogi pa so navedeni v drugem odstavku 10. člena EKČP in tretjem odstavku 19. člena [Mednarodnega pakta o političnih in državljanskih pravicah], ki sta glede na 8. člen in peti odstavek 15. člena Ustave zavezujoča. Zato Ustavno sodišče pri presoji ustavno dopustnega cilja za poseg v pravico do svobode izražanja ne sme spregledati razlogov, ki so navedeni v drugem odstavku 10. člena EKČP in tretjem odstavku 19. člena Pakta.« (opombe so izpuščene).

2019 Odločba št. U-I-47/15 z dne 24. 9. 2015, ECLI:SI:USRS:2015:U.I.47.15, Uradni list RS, št. 76/15, tč. 19, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=111970. V tej zadevi je ustavno sodišče prešlo neposredno na preizkus sorazmernosti v ožjem smislu.

2020 Odločba št. U-I-260/19 z dne 5. 5. 2022, ECLI:SI:USRS:2022:U.I.260.19, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117778.

2021 Odločba št. U-I-118/09 z dne 10. 6. 2010, ECLI:SI:USRS:2010:U.I.118.09, Uradni list RS, št. 52/10, in OdlUS XIX, 6, tč. 22, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=109982.

2022 Odločba št. U-I-83/20 z dne 27. 8. 2020, ECLI:SI:USRS:2020:U.I.83.20, Uradni list RS, št. 128/20, in OdlUS XXV, 18, tč. 47, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=114985.

2023 Prav tam, tč. 52.

sledi, niso na voljo manj invazivni ukrepi, ki bi manj posegli v človekove pravice posameznikov.[2024] Kadar Ustavno sodišče ugotovi, da obstaja blažji ukrep, ki manj intenzivno posega v upoštevno pravico, obravnavani ukrep ni nujen.[2025] Podrobno se je z vprašanjem nujnosti izpodbijanega ukrepa sodišče ukvarjalo v zadevi, ki se je nanašala na odvetniško zasebnost. Ugotovilo je, da bi zasledovani cilj lahko enako učinkovito dosegli tudi z dvema blažjima ukrepoma, zato je bila obravnavana ureditev v neskladju z Ustavo.[2026]

Poseg v človekovo pravico je sorazmeren v ožjem smislu, če je teža tega posega sorazmerna vrednosti zasledovanega cilja oziroma pričakovanim koristim, ki bodo zaradi posega nastale. Gre torej za tehtanje, kjer so na eni strani tehtnice koristi od cilja, ki ga poseg zasleduje, na drugi strani tehtnice pa breme posledic posega za naslovnike človekove pravice. Ustavno sodišče mora torej odločiti, ali koristi, ki izvirajo iz izpodbijanega ukrepa, odtehtajo omejitev prizadete človekove pravice. Pri tem običajno podrobneje razčleni koristi in breme posledic posega za nosilce pravice.[2027]

22. Ali vaše sodišče preverja vse veljavne dele testa sorazmernosti?

Ustavno sodišče načeloma uporablja test sorazmernosti v celoti. V celoti je sodišče test na primer opravilo pri presoji ali splošna prepoved zakola živali, ki niso bile predhodno omamljene, pomeni protiustaven poseg v pravico pripadnikov islamske verske skupnosti do svobodnega izvrševanja vere. Izpodbijani ukrep je prestal vse tri vidike preizkusa, zato je sodišče odločilo, da ni bil v neskladju z Ustavo.[2028]

Kadar sodišče ugotovi, da izpodbijani ukrep ne prestane določenega vidika preizkusa sorazmernosti, ne nadaljuje s presojo ostalih vidikov, temveč se obravnava na tej stopnji zaključi. Tako je na primer sodišče ugotovilo, da je zakonska ureditev, ki istospolnima partnerjema, ki sta živela v stabilni, formalno priznani partnerski zvezi, odrekala možnost skupne posvojitve, nasprotovala samemu bistvu posvojitve, ki je v zagotovitvi stabilnega, ljubečega in podpornega okolja za otrokov razvoj. V splošnem namreč drži, da večje kot je število potencialnih kandidatov za skupno posvojitev, večja je možnost, da bo otroku v konkretnem postopku izbran najprimernejši posvojitelj in da bo na ta način zavarovana največja korist otroka. Presoja največje koristi otroka se po naravi stvari lahko opravi le v okviru konkretnega postopka, kjer bo presojano, ali sta partnerja (bodisi istospolna bodisi raznospolna) res najprimernejša posvojitelja za konkretnega otroka. Zato ukrep splošne in vnaprejšnje izključitve istospolnih partnerjev partnerske zveze od možnosti uvrstitve na seznam kandidatov za skupno posvojiteljev ni primeren za dosego cilja varstva koristi otrok, ampak lahko v določenih primerih celo preprečuje uresničitev največje koristi konkretnega otroka. Ustavno sodišče je zaključilo, da je izpodbijani ukrep pomenil prekomeren poseg v pravico istospolno usmerjenih oseb do nediskriminatorne obravnave iz prvega odstavka 14. člena v zvezi s tretjim odstavkom 53. člena Ustave oziroma iz 1. člena Protokola št. 12 k EKČP.[2029]

V posamičnih primerih Ustavno sodišče tudi ne sledi ustaljenemu vrstnemu redu presoje posameznih vidikov testa sorazmernosti ter določene faze preskoči in preide neposredno v tisto fazo, glede katere je očitno, da je ukrep ne bo prestal, najpogosteje je to preizkus sorazmernosti v ožjem smislu. Tako je na primer v zadevi št. U-I-196/17 z dne 20. 6. 2019 po ugotovitvi ustavno dopustnega cilja

2024 Odločba št. U-I-260/19 z dne 5. 5. 2022, ECLI:SI:USRS:2022:U.I.260.19, tč. 23, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117778.

2025 Odločba št. U-I-91/15 z dne 16. 3. 2017, ECLI:SI:USRS:2017:U.I.91.15, Uradni list RS, št. 16/17, in OdlUS XXII, 6, tč. 45-48, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=112414.

2026 Odločba št. U-I-115/14, Up-218/14 z dne 21. 1. 2016, ECLI:SI:USRS:2016:U.I.115.14, Uradni list RS, št. 8/16, in OdlUS XXI, 20, CODICES SLO-2017-1-001, tč. 49–52, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=112089.

2027 Odločba št. U-I-83/20 z dne 27. 8. 2020, ECLI:SI:USRS:2020:U.I.83.20, Uradni list RS, št. 128/20, in OdlUS XXV, 18, tč. 55–59, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=114985.

2028 Odločba št. U-I-140/14 z dne 25. 4. 2018, ECLI:SI:USRS:2018:U.I.140.14, Uradni list RS, št. 35/18, in OdlUS XXIII, 6, CODICES SLO-2019-3-004, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=112755.

2029 Odločba št. U-I-91/21, Up-675/19 z dne 16. 6. 2022, ECLI:SI:USRS:2022:U.I.91.21, Uradni list RS, št. 94/22, CODICES SLO-2023-2-004, tč. 70–72, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117905.

izpodbijanega ukrepa, ne da bi se spuščalo tudi v presojo primernosti in nujnosti ukrepa, ugotovilo, da izpodbijana ureditev ni sorazmerna v ožjem smislu.[2030]

Omeniti velja tudi posebne primere, ko gre za tako intenzivno omejitev pravice, da je naslovniku povsem onemogočeno njeno učinkovito uresničevanje in je mogoče govoriti o njeni izvotlitvi. V teh primerih presoja dopustnosti posega ne zahteva niti ugotavljanja ustavno dopustnega cilja za poseg, še manj pa tehtanja sorazmerja med posegom v človekovo pravico in morebitnim ustavno dopustnim ciljem. Izvotlitve pravice namreč ni mogoče utemeljiti.[2031]

23. Ali obstajajo primeri, v katerih vaše sodišče priznava, da izpodbijani ukrep izpolnjuje eno ali več stopenj testa sorazmernosti, čeprav očitno ni zadostnih dokazov za to?

V primerih, ko Ustavno sodišče preide neposredno na katero od kasnejših stopenj preizkusa sorazmernosti, ostane vprašanje izpolnjevanja predhodnih faz odprto, vendar bi bilo pretirano trditi, da je v teh primerih Ustavno sodišče molče potrdilo, da ukrep izpolnjuje te stopnje. Načeloma mora predlagatelj ali pobudnik postopka presoje določenega predpisa utemeljiti, da pomeni predpis poseg v človekove pravice, nato pa preide dokazno breme na pristojnega normodajalca, ki mora določeno ureditev utemeljiti.

24. Ali je bil začetek nadzora sorazmernosti v sodni praksi vašega sodišča sočasen z razvojem doktrine sodne zadržanosti?

Da, oba pristopa sta v delovanju Ustavnega sodišča prisotna od samega začetka njegovega delovanja v letu 1991. Čeprav sodišče test dopustnosti, vključno s testom sorazmernosti, uporablja že od samega začetka svojega delovanja, je bil ta v svoji aktualni obliki in ubeseditvi dokončno določen v odločbi št. U-I-18/02 z dne 24. 10. 2003.[2032]

25. Ali je sodna praksa Evropskega sodišča za človekove pravice vplivala na pristop vašega sodišča k samoomejevanju? Ali je doktrina ESČP o polju proste presoje domači ekvivalent polja proste presoje, ki ga zagotavlja vaše sodišče? Če ne, kako pogosto se razumevanje polja proste presoje ESČP prekriva z razumevanjem polja proste presoje vašega sodišča v podobnih zadevah?

Upoštevna razlika med obema pojmoma je morda v zornem kotu, iz katerega sodišči pristopata k temu vprašanju. Pojem polja proste presoje se v praksi Ustavnega sodišča nanaša na manevrski prostor zakonodajalca (ali drugega pristojnega pravodajnega organa) in se pri odločanju Ustavnega sodišča praviloma pojavi v postopkih presoje ustavnosti in zakonitosti predpisov, ko gre torej za splošne in abstraktne pravne akte, ne pa v postopkih z ustavnimi pritožbami zaradi kršitev človekovih pravic v individualnih primerih. Postopki pred ESČP pa izhajajo prav iz posamičnih primerov in pojem polja proste presoje se nanaša na primer tudi na sodišča in druge organe, ki odločajo v konkretnih zadevah. Poleg tega je pojem polja proste presoje pred ESČP tesno povezan z vprašanjem obstoja soglasja v pravnih ureditvah in praksah v državah podpisnicah Konvencije, medtem ko v slovenskem pravnem redu temelji predvsem na manevrskem prostoru, ki ga zakonodajalcu odmerjajo Ustava in upoštevni mednarodni instrumenti. Ker Ustavno sodišče pri svojem odločanju upošteva tudi mednarodnopravni okvir ter tudi ureditve in sodno prakso v tujih državah, pa je velikost tega polja tudi v nacionalnem okviru do določene mere odvisna od primerjalnopravnih argumentov, pri čemer igra pomembno vlogo zlasti praksa ESČP. Tako načeloma polje, ki bi ga Ustavno sodišče odmerilo zakonodajalcu ne bi smelo biti širše od polja proste presoje, ki ga državam v zvezi z določeno pravico priznava ESČP. Zaradi strožjih zahtev naše Ustave ali drugih mednarodnih instrumentov je lahko zako-

2030 Odločba št. U-I-196/17 z dne 20. 6. 2019, ECLI:SI:USRS:2019:U.I.196.17, Uradni list RS, št. 45/19, in OdlUS XXIV, 10, tč. 10, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=113405.

2031 Odločbi št. U-I-157/17, Up-143/15 z dne 5. 4. 2018, ECLI:SI:USRS:2018:U.I.157.17, Uradni list RS, št. 32/18, tč. 25, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=112743, in št. U-I-227/14, Up-790/14 z dne 4. 6. 2015, ECLI:SI:USRS:2015:U.I.227.14, Uradni list RS, št. 42/15, in OdlUS XXI, 3, tč. 10, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=111859.

2032 Odločba št. U-I-18/02 z dne 24. 10. 2003, ECLI:SI:USRS:2003:U.I.18.02, Uradni list RS, št. 108/03, in OdlUS XII, 86, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=102821.

nodajalčevo polje proste presoje v nacionalnem pravu kvečjemu ožje. Tako na primer drugi odstavek 37. člen Ustave zagotavlja višjo raven varstva komunikacijske zasebnosti kot 8. člen EKČP, ker za vsak poseg v pravico do komunikacijske zasebnosti zahteva sodno odredbo.[2033]

26. Ali je bila vaša država pred ESČP obsojena zaradi samoomejevanja vašega sodišča v določeni zadevi, ki je povzročilo neučinkovitost pravnega sredstva?

Morda bi bilo v tem smislu mogoče razumeti sodbo ESČP v zadevi *Rutar in Rutar Marketing proti Sloveniji* z dne 15. 12. 2022. Ustavno sodišče je ustavno pritožbo v tej zadevi zavrglo, ker je šlo za prekrškovno zadevo, ki jih Ustavno sodišče načeloma ne sprejme v obravnavo, razen če gre za pomembno ustavnopravno vprašanje, ki presega pomen konkretne zadeve, pritožnika pa tega nista zatrjevala in utemeljila. Vlada je zato pred ESČP zatrjevala, da pritožnika nista izčrpala domačih pravnih sredstev, ker nista utemeljila, da je v njuni zadevi šlo za pomembno ustavnopravno vprašanje. ESČP je ta argument zavrnilo in navedlo, da dejstvo, da pritožnik ni izrecno izpostavil pomembnega ustavnopravnega vprašanja, še ne pomeni, da Ustavno sodišče ne more presojati, ali so bili pogoji za izjemno obravnavo zadeve vsebinsko izpolnjeni.

IV. **Druge posebnosti**

27. Kako pogosto se v zadevah s področja človekovih pravic, o katerih odloča vaše sodišče, pojavi vprašanje samoomejevanja?

Vprašanje potrebe po sodniškem samoomejevanju se lahko pojavi v večini zadev, ki se nanašajo na človekove pravice. Stopnja intenzivnosti potrebe po samoomejevanju je pri tem odvisna od okoliščin konkretne zadeve, zato je o tem težko podati splošne trditve. Poleg tega pri sodniškem samoomejevanju ne gre za pojav, ki bi bil vselej zaznaven navzven, torej očiten iz besedila odločbe ali ločenega mnenja, tako da je njegovo pojavnost praktično nemogoče spremljati.

28. Ali je presoja vašega sodišča sčasoma postala manj stroga?

Težko bi trdili, da je presoja Ustavnega sodišča skozi čas postala manj stroga, vendar je z razvojem sodne prakse postala bolj strokovno dovršena, jasno strukturirana in konsistentna. Ustavno sodišče je sicer od začetka svojega delovanja sprejelo obsežno telo odločitev, s katerimi je izoblikovalo temeljna merila za ustavnoskladno ravnanje deležnikov na različnih področjih življenja v naši državi. Državni zbor in Vlada ter zlasti tudi sodišča pri uresničevanju svojih nalog te usmeritve praviloma tudi spoštujejo in jim sledijo. Do določene mere je tako danes v našem pravnem redu manj perečih ustavnopravnih pomanjkljivosti, posledično pa so tudi posegi Ustavnega sodišča na polje, ki je pridržano zakonodajalcu, manj pogosti ali manj intenzivni. Medtem ko se je ob začetku svojega delovanja ukvarjalo s temeljnimi vprašanji ustavne ureditve, bi lahko rekli, da se Ustavno sodišče sedaj vsaj v določenem delu ukvarja bolj s finesami našega pravnega reda, kar bi morda lahko vplivalo tudi na dojemanje njegove presoje kot manj stroge. Kljub temu pa Ustavno sodišče pogosto uporablja pristojnost, da določi način izvršitve svojih odločitev, ki lahko pomeni znaten poseg na zakonodajalčevo polje, pri čemer širša javnost in osrednji politični organi takšno normodajno dejavnost Ustavnega sodišča v določeni meri celo pričakujejo. Glej tudi odgovor na vprašanje št. 10.

29. Ali je odnos vašega sodišča do samoomejevanja odvisen od obremenjenosti sodišča?

Ustavno sodišče se že več let sooča z veliko obremenjenostjo, vendar si z vsemi razpoložljivimi sredstvi prizadeva, da kljub temu v vseh obravnavnih zadevah zagotovi najvišjo možno raven varstva človekovih pravic in spoštovanja načel pravne države ter da v vseh zadevah odloči v razumnem času. Vprašanje sodniškega samoomejevanja je sicer vprašanje vsebinske presoje posamične zadeve, in ne ekonomičnosti postopka. Pri tem je pomembno tudi, kako posamezni sodniki in sodnice, pa tudi konkretna sestava sodišča kot kolegijski organ, dojemajo svojo vlogo in kje vidijo meje, ki jih delovan-

2033 Odločba št. U-I-40/12 z dne 11. 4. 2013, točki 27, 29.

ju Ustavnega sodišča odmerja načelo delitve oblasti.

Glede na omenjeno pogostost uporabe pristojnosti za določitev načina izvršitve odločitev Ustavnega sodišča bi sicer morda lahko trdili celo obratno – da je namreč ekonomičnost privedla do večjega ustavnosodnega aktivizma. Ustavno sodišče namreč vse redkeje uporablja možnost t. i. stopnjevanja sankcij, v smislu, da bi ob prvi presoji neke zakonske ureditve zgolj ugotovilo njeno protiustavnost in zakonodajalcu določilo rok za njeno odpravo, kar se pogosto ocenjuje kot manj intenziven poseg v zakonodajalčevo domeno. Šele subsidiarno – ob morebitni vnovični obravnavi zadeve, če protiustavnost ne bi bila pravočasno odpravljena – pa bi nato določilo način izvršitve svoje ugotovitvene odločbe ali pa bi sporno zakonsko določbo razveljavilo in nastalo pravno praznino zapolnilo s svojim načinom izvršitve. V praksi namreč Ustavno sodišče pogosteje kar nemudoma ugotovi protiustavnost določene ureditve ali jo razveljavi ter hkrati določi začasno pravno ureditev, ki naj velja, dokler zakonodajalec ne bo ustrezno ukrepal.

30. Ali lahko vaše sodišče svoje odločitve utemeljuje z razlogi, ki jih stranke niso navedle? Ali lahko Sodišče prekvalificira razloge, ki jih je navedel vlagatelj, in jih umesti pod drugo ustavno določbo, kot je tista, na katero se sklicuje vlagatelj?

V skladu s 24.b členom Zakona o Ustavnem sodišču morata zahteva in pobuda za presojo skladnosti predpisa vsebovati tudi navedbo razlogov neskladnosti z Ustavo ali zakonom. V tem pogledu iz ustavnosodne presoje izhaja, da mora predlagatelj oziroma pobudnik jasno navesti, v čem je protiustavnost izpodbijane zakonske norme oziroma protiustavnost ali nezakonitost podzakonskega predpisa, ki ga izpodbija. Če ne navede razlogov, zakaj naj bi bile izpodbijane zakonske določbe protiustavne ali nezakonite, Ustavno sodišče zahtevo oziroma pobudo zavrže (prvi oziroma tretji odstavek 25. člen Zakona o Ustavnem sodišču).

Ustavno sodišče v določenih primerih precizira izpodbijane določbe. V tem okviru lahko na primer pojasni, da pobudnik ali predlagatelj izpodbija več določb ali posamezne določbe v celoti, dejansko pa so sporne le posamezne določbe ali pa zgolj deli teh določb – na primer le posamezen člen, namesto več členov ali predpisa v celoti, le določen odstavek ali ožja enota člena, namesto določenega člena v celoti, ipd.[2034] Podobno ravna Ustavno sodišče tudi, kadar pobudnik ali predlagatelj zatrjuje neskladje izpodbijane ureditve z določeno ustavno določbo, pa bi bilo njune očitke treba subsumirati pod drugo ustavno določbo.[2035]

31. Ali lahko vaše sodišče razširi svojo presojo ustavnosti na druge zakonske določbe, ki niso bile izpodbijane pred sodiščem, vendar so povezane s položajem vlagatelja?

V skladu s 30. členom Zakona o Ustavnem sodišču Ustavno sodišče pri odločanju o ustavnosti in zakonitosti predpisa ni vezano na predlog iz zahteve oziroma pobude, ampak lahko oceni tudi ustavnost in zakonitost drugih določb istega ali drugega predpisa, katerih ocena ustavnosti ali zakonitosti ni bila predlagana, če so te določbe v medsebojni zvezi ali če je to nujno za rešitev zadeve. To pomeni, da lahko Ustavno sodišče pri presoji posamezne določbe nekega zakona postopek razširi tudi na druge povezane določbe tega istega zakona ali pa na določbe drugega zakona. V zadevi št. U-I-462/18 z dne 3. 6. 2021, kjer je bil izpodbijana določba Zakona o kazenskem postopku, je na primer

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2034 Tako na primer v odločbi št. U-I-191/19 z dne 18. 5. 2023, ECLI:SI:USRS:2023:U.I.191.19, Uradni list RS, št. 63/23, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=120001, kjer je v tč. 18 navedeno: »Predlagatelj zatrjuje, da izpodbija 48. člen ZOsn in 11. člen ZPIMVI v celoti. Iz njegovih navedb pa izhaja, da nasprotuje le prvemu odstavku 48. člena ZOsn in prvemu odstavku 11. člen ZPIMVI, ki urejata šolske okoliše na narodnostno mešanem območju. Glede na navedeno je Ustavno sodišče presojo opravilo le v tem obsegu.«

2035 Glej na primer odločbo št. U-I-303/18 z dne 18. 9. 2019, ECLI:SI:USRS:2019:U.I.303.18, Uradni list RS, št. 59/19 in OdlUS XXIV, 15, tč. 32, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=113545, kjer Ustavno sodišče pojasni, da predlagatelj zatrjuje, da izpodbijani ukrep posega v premoženjski vidik pravice do pokojnine in je v neskladju s 33. in 50. členom Ustave. Nato pa pojasni, da premoženjski vidik pravice do pokojnine državljanom Republike Slovenije zagotavlja prvi odstavek 50. člena Ustave (kot *lex specialis* v primerjavi s 33. členom Ustave, ki zagotavlja pravico do zasebne lastnine), 33. člen Ustave pa je bil za varstvo tega vidika pravice do pokojnine upošteven takrat, ko je šlo za osebe, ki niso državljani Republike Slovenije. Ker v izhodiščnem socialnem sporu ni šlo za tujega državljana, je Ustavno sodišče očitke o neskladju izpodbijane ureditve s premoženjskim vidikom pravice do pokojnine v tej zadevi preizkusilo le z vidika skladnosti s prvim odstavkom 50. člena Ustave.

Ustavno sodišče na podlago 30. člena Zakona o Ustavnem sodišču začelo postopek presoje določb Poslovnika Državnega zbora, ki so urejale avtentično razlago zakona.[2036]

Prav tako lahko sodišče na podlagi drugega odstavka 59. člena Zakona o Ustavnem sodišču pri odločanju o ustavni pritožbi začne tudi postopek presoje predpisa, na katerem temelji odločitev v izhodiščnem primeru. Tako je na primer ravnalo v že omenjenih odločitvah glede pravic istospolnih parov, da sklenejo zakonsko zvezo in skupaj posvojijo otroke, kjer je na podlagi vloženih ustavnih pritožb samo začelo postopek presoje skladnosti upoštevnih zakonskih določb z Ustavo.[2037]

Tega pooblastila Ustavnega sodišča ni mogoče razlagati tako, da bi sodišču omogočalo presojo določb predpisov, ki niso neposredno povezane z obravnavano zadevo, še manj pa, da bi lahko sodišče samo začelo postopek presoje nekega predpisa. Potrebna je povezava z obravnavano zadevo.

2036 Odločba št. U-I-462/18 z dne 3. 6. 2021, ECLI:SI:USRS:2021:U.I.462.18, Uradni list RS, št. 105/21, in OdlUS XXVI, 21, tč. 27, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=116523.

2037 Odločbi št. U-I-91/21, Up-675/19 z dne 16. 6. 2022, ECLI:SI:USRS:2022:U.I.91.21, Uradni list RS, št. 94/22, CODICES SLO-2023-2-004, tč. 11, dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117905, in št. U-I-486/20, Up-572/18 z dne 16. 6. 2022, ECLI:SI:USRS:2022:U.I.486.20, Uradni list RS, št. 94/22, CODICES SLO-2023-2-003, tč. 4., dostopna na: https://www.us-rs.si/odlocitev/?q=&id=117906.

Tribunal fédéral suisse

Rapport du Tribunal fédéral suisse

Formes et limites de la déférence judiciaire: le cas des cours constitutionnelles [2038]

Remarques préliminaires

Le Tribunal fédéral est l'autorité judiciaire suprême de la Confédération[2039]. Il assume un double rôle. En tant qu'autorité supérieure de dernière instance, il lui incombe de faire respecter la législation fédérale dans tous les domaines juridiques. En tant que juridiction constitutionnelle, il garantit la protection des droits constitutionnels et des droits fondamentaux des citoyens. Les actes de l'Assemblée fédérale (pouvoir législatif) et du Conseil fédéral (pouvoir exécutif) ne peuvent toutefois pas être portés devant le Tribunal fédéral suisse, sous réserve des cas où la loi ou le droit international prévoient des exceptions[2040]. Le Tribunal fédéral est de plus tenu d'appliquer les lois fédérales et le droit international[4], et cela même si une loi fédérale devait s'avérer inconstitutionnelle. La juridiction constitutionnelle du Tribunal fédéral s'exerce ainsi exclusivement à l'égard des actes normatifs (lois et ordonnances) et des décisions émanant des cantons. Le recours en matière de droit public permet au particulier de s'en prendre directement à une règle cantonale, dont le Tribunal fédéral contrôlera abstraitement la constitutionnalité et la conformité au droit fédéral, ou de l'attaquer de manière indirecte à l'occasion d'une décision d'application (contrôle normatif concret). En ce sens, la Suisse dispose d'une juridiction constitutionnelle limitée. Ce principe fondamental sera précisé plus en détail dans les développements relatifs aux différentes réponses aux questions. Celles-ci doivent être considérées à la lumière de la compétence limitée du Tribunal fédéral suisse en matière de contrôle de constitutionnalité.

I. Matières non justiciables et intensités de déférence

1. Votre Cour envisage-t-elle un éventail de déférence? Existe-t-il des zones «interdites», ou des zones prédéterminées de non-responsabilité, ou des questions non justiciables pour votre Cour (par exemple, des questions morales controversées, des sensibilités politiques, des controverses sociétales, l'allocation de ressources limitées, des implications financières importantes pour le gouvernement, etc.)?

Oui, le principe de déférence – on parle de «retenue judiciaire» dans l'ordre judiciaire suisse – revêt également de l'importance pour le Tribunal fédéral suisse et influence son mode de fonctionnement. Il s'applique, d'une part, à la limitation du pouvoir d'examen prévue par la loi et, d'autre part, à la limitation du pouvoir d'examen fondée sur le droit matériel en présence de particularités locales ou autres (voir à ce sujet la réponse à la question 2). L'une des principales raisons de la limitation légale du pouvoir d'examen du Tribunal fédéral est la surcharge chronique de celui-ci[2041] et la crainte qui en découle que le Tribunal fédéral ne puisse plus remplir ses tâches principales, à savoir prodiguer la protection juridictionnelle dans les cas concrets, sauvegarder l'application uniforme du droit

2038 Rédigé par Alberta L›Eplattenier, Eldina Kurtic et Sonia Sanchez.

2039 Art. 188 de la Constitution fédérale de la Confédération suisse [Cst., RS 101]. L'ensemble de la législation suisse peut être consulté à l'adresse http://www.admin.ch/ch/f/rs/rs.html en introduisant le n° RS dans le champ «chercher».

2040 Art. 189 al. 4 Cst.; cf. également ATF 134 V 443 consid. 3.2: «Au regard des art. 29a et 189 al. 4 Cst., on doit déduire qu'il appartient au législateur fédéral d'examiner et de décider dans quelle situation il entend soumettre les actes du gouvernement fédéral au contrôle du juge (...), sous réserve des cas dans lesquels le droit international imposerait l'accès juridictionnel». [4] Art. 190 Cst.

2041 FF 2001 4025.

et le développement de la jurisprudence. En vertu de l'art. 29a 2e phrase en relation avec l'art. 191 al. 3 Cst., la Confédération et les cantons peuvent, par la loi, exclure l'accès au juge dans des cas exceptionnels. Une telle exclusion peut consister à soustraire totalement certains domaines du contrôle judiciaire ou à limiter le pouvoir d'examen du juge pour certains types de litiges à des questions de droit, voire à un simple contrôle sous l'angle de l'arbitraire. La loi sur le Tribunal fédéral[2042] prévoit les limitations légales suivantes du pouvoir d'examen du Tribunal fédéral:

Etablissement des faits: Le Tribunal fédéral statue sur la base des faits établis par l'autorité précédente[2043]. Il peut rectifier ou compléter d'office les constatations de l'autorité précédente si les faits ont été établis de façon manifestement inexacte ou en violation du droit[2044].

Application du droit d'office: Le Tribunal fédéral applique le droit d'office[2045]. Il n'examine cependant la violation de droits fondamentaux ainsi que celle de dispositions de droit cantonal et intercantonal que si ce grief a été invoqué et motivé par le recourant[10].

Valeurs litigieuses minimales: La LTF prévoit des seuils de valeur litigieuse – qui ne s'appliquent cependant pas lorsqu'une question juridique de principe est soulevée – pouvant limiter l'accès au Tribunal fédéral[2046].

Exceptions à l'accès au Tribunal fédéral[2047]: Dans ce contexte, il convient de mentionner en particulier la liste d'exceptions de l'article 83 LTF, qui énonce de façon détaillée les domaines pour lesquels l'accès au Tribunal fédéral est exclu. Sont ainsi exclus les recours contre les décisions concernant la sûreté intérieure ou extérieure du pays, la neutralité, la protection diplomatique et les autres affaires relevant des relations extérieures, à moins que le droit international ne confère un droit à ce que la cause soit jugée par un tribunal (let. a), les décisions relatives à la naturalisation ordinaire (let. b), les décisions en matière de droit des étrangers (let. c) et en matière d'asile (let. d), pour n'en citer que quelques-unes. L'art. 83 LTF en dresse la liste exhaustive. L'exclusion d'un domaine a pour conséquence que la responsabilité de veiller en dernière instance au respect du droit fédéral (y compris à celui des droits fondamentaux) par les décisions rendues dans ce domaine est dévolue soit au Tribunal administratif fédéral soit à une autorité judiciaire cantonale[2048]. Il sied toutefois de relever que le législateur ne peut procéder à de telles exclusions de l'accès au juge que «dans des cas exceptionnels»[2049].

2. Existe-t-il des facteurs qui déterminent comment et quand votre Cour doit faire preuve de déférence (par exemple la culture et les conditions de votre pays; les expériences historiques de votre pays; le caractère absolu ou restreint des droits fondamentaux en question; la question débattue devant la Cour; si les circonstances de l'affaire impliquent un changement des conditions sociales et des attitudes)?

2042 Loi sur le Tribunal fédéral, LTF, RS 173.110.
2043 Art. 105 al. 1 et art. 118 al. 1 LTF.
2044 Art. 97, art. 105 al. 2 et art. 118 al. 2 LTF.
2045 Art. 106 al. 1 LTF.
[10] Art. 106 al. 2 LTF.
2046 Art. 74, 75 et 85 LTF.
2047 Art. 73, 79 et 83 LTF.
2048 FF 2001 4029.
2049 Art. 29a deuxième phrase Cst.

Outre les cas où la limitation du pouvoir d'examen du juge est prévue par la loi, le Tribunal fédéral fait régulièrement preuve de retenue dans l'appréciation des décisions des instances inférieures. Les facteurs pouvant inciter le Tribunal fédéral à faire preuve de retenue judiciaire sont multiples. Le Tribunal fédéral fait ainsi preuve de retenue lorsque les instances précédentes disposent de connaissances spécifiques. Dans le cadre de ce «pouvoir d'appréciation en matière technique», il concède à l'autorité qui a rendu la décision une certaine marge de manoeuvre dans l'évaluation des questions techniques soulevées, pour autant qu'elle ait examiné les points de vue déterminants et qu'elle ait réuni les éléments nécessaires de manière consciencieuse et complète[2050]. Il a ainsi reconnu la qualité d'autorité spécialisée à une commission en matière d'expérience sur les animaux, à la Commission fédérale de l'électricité[2051], à la Commission fédérale pour la protection de la nature et du paysage ainsi qu'aux services spécialisés de la protection de l'environnement[17]. Le Tribunal fédéral s'impose également une retenue particulière dans le contrôle matériel de résultats d'examens; il n'intervient que si l'autorité s'est laissée guider par des considérations sans rapport avec le cas ou manifestement insoutenables, de sorte que sa décision apparaisse indéfendable sous l'angle du droit constitutionnel et, par conséquent, arbitraire[2052].

Le Tribunal fédéral s'impose encore une certaine retenue en ce qui concerne les particularités locales spécifiques que les autorités cantonales connaissent mieux[2053], comme par exemple en matière d'aménagement du territoire.

Dans le cadre du contrôle abstrait des normes de droit cantonal, le Tribunal fédéral limite également son pouvoir d'examen pour des raisons de fédéralisme et du principe de proportionnalité (pour plus de détails, voir la réponse à la question 5).

3. Existe-t-il des situations dans lesquelles votre Cour a fait preuve de déférence parce qu'elle ne disposait pas de la compétence ou de l'expertise institutionnelle nécessaire?

Voir à ce sujet les réponses aux questions 2 et 5.

4. Avez-vous des cas où votre Cour a fait preuve de déférence parce qu'il y avait un risque d'erreur judiciaire?

Comme évoqué dans les remarques préliminaires, le Tribunal fédéral est l'autorité judiciaire suprême de la Confédération suisse. En tant qu'autorité supérieure de dernière instance, il lui incombe de faire respecter la législation fédérale dans tous les domaines juridiques.

Il peut déroger au principe selon lequel il statue sur la base des faits établis par l'autorité précédente[20] et rectifier ou compléter d'office les constatations de l'autorité précédente si les faits ont été établis de façon manifestement inexacte ou en violation du droit[2054] (pour plus de détails, voir la

2050 Cf. ATF 135 II 384 consid. 2.2; la jurisprudence du Tribunal fédéral peut être consultée en ligne gratuitement sous https://www.bger.ch/ext/eurospider/live/de/php/clir/http/index.php?type=s_tart&lang=de .
2051
ATF 142 II 451
consid. 4.5.1. [17]
ATF 139 II 185
consid. 9.2.
2052 ATF 136 I 229 consid. 6.2: contrôle matériel d'un résultat d'examen universitaire ; ATF 131 I 467 consid. 3.1: examens d'avocat ou de notariat.
2053 ATF 147 II 465 consid. 4.3.2; examen du caractère digne de protection d'une construction en raison de facteurs liés à la protection des monuments et à la protection du paysage; ATF 147 I 433: site de décharge dans le plan directeur cantonal. [20] Art. 105 al. 1 et art. 118 al. 1 LTF.
2054 Art. 97, art. 105 al. 2 et art. 118 al. 2 LTF.

réponse à la question 1).

En outre, le Tribunal fédéral peut déroger au principe selon lequel il fait preuve de retenue judiciaire lorsque la cause implique des connaissances spéciales, des particularités locales spécifiques ou des considérations fédéralistes ou de proportionnalité lorsque la décision de l'instance inférieure est manifestement insoutenable et contraire aux principes d'un Etat de droit (pour plus de détails, voir la réponse à la question 2).

Compte tenu de ce qui précède, le contrôle judiciaire exercé par le Tribunal fédéral doit au contraire être considéré comme un moyen de corriger les éventuelles erreurs judiciaires commises par les instances inférieures.

5. Y a-t-il des cas où votre Cour a fait preuve de déférence en invoquant la légitimité institutionnelle ou démocratique du décideur?

La séparation des pouvoirs est un principe fondamental de l'ordre étatique suisse (lequel se compose des pouvoirs législatif, exécutif et judiciaire) et assure le respect des compétences établies par la Constitution[2055]. Du fait de sa légitimation démocratique (les lois fédérales sont soumises au vote du peuple lorsque 50 000 citoyens ou 8 cantons le demandent [référendum facultatif]), le Parlement prime le pouvoir judiciaire[2056]. L'ordre juridique suisse accorde donc la primauté au principe démocratique.

La Constitution fédérale assure, par certaines de ses dispositions, que la séparation des pouvoirs est respectée et que le pouvoir judiciaire ne se place pas au-dessus du pouvoir législatif. Comme indiqué dans les remarques préliminaires, les actes de l'Assemblée fédérale et du Conseil fédéral ne peuvent pas être portés devant le Tribunal fédéral (art. 189 al. 4 Cst.), les exceptions étant déterminées par la loi et le droit international. En outre, l'art. 190 Cst. dispose que «[l]e Tribunal fédéral et les autres autorités sont tenus d'appliquer les lois fédérales et le droit international», ce même si une loi fédérale devait être anticonstitutionnelle.

En revanche, comme déjà mentionné dans les remarques préliminaires, les réglementations cantonales peuvent faire l'objet d'un contrôle de constitutionnalité et de conformité au droit fédéral par le Tribunal fédéral, soit directement, dans le cadre d'une procédure de contrôle abstrait des normes, soit indirectement, à l'occasion de leur application dans un cas d'espèce (contrôle concret des normes). Toutefois, dans le cadre du contrôle abstrait de la constitutionnalité des normes cantonales, le Tribunal fédéral se fonde sur la légitimité institutionnelle ou démocratique du décideur. Dans ce cas, le Tribunal fédéral contrôle en principe l'acte législatif avec un libre pouvoir d'examen, mais s'impose une certaine retenue, eu égard notamment aux principes découlant du fédéralisme et de la proportionnalité et – dans le cadre du contrôle du droit communal – de l'autonomie communale. Selon la jurisprudence du Tribunal fédéral, l'élément déterminant est de savoir si, selon les règles d'interprétation reconnues, la norme en question se prête à une interprétation conforme au droit constitutionnel ou législatif invoqué. Le Tribunal fédéral n'annule une norme cantonale (ou communale) que si elle ne se prête à aucune interprétation conforme au droit constitutionnel ou fédéral supérieur, mais s'en abstient si une telle interprétation est possible de manière soutenable[2057]. S'il apparaît qu'une réglementation générale et abstraite, mise en relation avec des circonstances normales comme celles sur lesquelles le législateur s'est basé, apparaît de manière soutenable conforme à la Constitution, alors l'incertaine éventualité que, dans un cas particulier spécial, cette réglementation puisse apparaître non conforme à la Constitution ne permet pas encore de justifier l'intervention du juge constitutionnel au stade du contrôle abstrait des normes en général; les intéressés conservent la possibilité de

2055 Cf. par ex. ATF 147 I 478, ATF 145 V 380.

2056 F$_{EDERICA}$ D$_{E}$ R$_{OSSA}$ G$_{ISIMUNDO}$, Die Rolle der Verfassungsgerichte in der "Multi-Level-Governance", 2016, pp. 43 ss.

2057 ATF 148 I 198 consid. 2.2; ATF 147 I 308 consid. 3; ATF 145 I 26 consid. 1.4; ATF 143 I 272 consid. 2.5; ATF 137 I 77 consid. 2.

faire valoir une éventuelle inconstitutionnalité lors d'un cas d'application particulier[2058]. Le Tribunal fédéral respecte ainsi la marge de manoeuvre politique du législateur (cantonal et communal) et fait preuve d'une certaine retenue lors du contrôle des normes.

Parmi les exemples où le Tribunal fédéral a fait preuve de retenue dans sa prise de décision, on peut citer l'évaluation de l'interdiction de manifester décrétée par le canton de Schwyz pour endiguer la pandémie de Covid-19. Dans cette affaire, le Tribunal fédéral s'est également appuyé sur la légitimité institutionnelle du Conseil d'Etat du canton de Schwyz et a considéré que l'interdiction de manifester était conforme à la loi et à la Constitution, compte tenu de la marge d'appréciation dont disposait le Conseil d'Etat, et notamment qu'elle était proportionnée. Il a ainsi précisé: «Le Tribunal fédéral examine librement la proportionnalité de restrictions des droits fondamentaux. Il s'impose toutefois une certaine retenue lorsque la solution du litige dépend de pures questions d'appréciation ou de l'évaluation de circonstances locales dont les autorités cantonales ont une meilleure connaissance»[2059]. Se fondant sur le principe de la libre appréciation de la proportionnalité, le Tribunal fédéral a jugé différemment la situation juridique dans une affaire concernant le canton de Berne et ne s'est pas retenu de rejeter la pratique cantonale[2060]. Il a jugé que la limitation du nombre de participants aux manifestations politiques et de la société civile à quinze personnes était disproportionnée[2061] et constituait dès lors une atteinte anticonstitutionnelle à la liberté de réunion[2062].

6. «Plus la législation concerne une question de politique sociale publique au sens large, moins le tribunal sera disposé à intervenir.» Est-ce une norme valide pour votre Cour? Votre Cour partage-t-elle le point de vue selon lequel les questions d'ordre public devraient être tranchées par des processus démocratiques parce que les tribunaux ne sont pas élus et n'ont pas le mandat démocratique de trancher les questions d'ordre public?

La Suisse est une démocratie représentative qui met à la disposition des électrices et électeurs des instruments de démocratie directe leur permettant de participer à l'élaboration de la politique suisse[2063]. Le préambule et l'article 2 de la Constitution fédérale mettent l'accent sur la protection et le développement de la démocratie et des droits de chaque citoyenne et citoyen. Le principe de démocratie est profondément ancré en Suisse. Cette conception de la démocratie doit également être respectée par le Tribunal fédéral dans ses arrêts: «L'importance de la démocratie exige du juge suisse qu'il statue avec la sensibilité rationnelle nécessaire sur des décisions démocratiquement légitimées, afin de recueillir l'acceptation sociale nécessaire et de promouvoir ainsi la paix juridique et de prévenir la désobéissance sociale»[2064]. Le Tribunal fédéral fait souvent preuve de retenue judiciaire face à des questions politiquement sensibles. L'arrêt du Tribunal fédéral en la cause «Aînées pour la protection du climat» mérite d'être mentionné dans ce contexte[2065]. Par leur recours, les recourantes demandaient que le gouvernement suisse prenne davantage de mesures concernant la problématique du réchauffement climatique et réglemente le cadre juridique des effets de ce dernier. En réponse à cette demande, le Tribunal fédéral a fait preuve de retenue et souligné que, selon le droit constitutionnel suisse, les propositions tendant à la mise en oeuvre d'une politique publique déterminée dans un domaine actuellement sujet à débat peuvent en principe être introduites par les

2058 ATF 137 I 77 consid. 2.
2059 ATF 147 I 450 consid. 3.2.5.
2060 ATF 148 I 33.
2061 ATF 148 I 33 consid. 7.7.
2062 ATF 148 I 33 consid. 8.
2063 Cf. M$_{ARTIN}$ E. L$_{OOSER}$, Verfassungsgerichtliche Rechtskontrolle gegenüber schweizerischen Bundesgesetzen, 2011, pp. 650 ss. n° 16 et 17.
2064 Cf. M$_{ARTIN}$ E. L$_{OOSER}$, Verfassungsgerichtliche Rechtskontrolle gegenüber schweizerischen Bundesgesetzen, 2011, p. 65 n°17.
2065 ATF 146 I 145.

voies de la participation démocratique[2066]. Le Tribunal fédéral a ainsi rappelé aux recourantes leurs droits politiques, tels que le droit de lancer une initiative populaire tendant à la révision totale ou partielle de la Constitution fédérale[2067], le droit de pétition[2068], le droit d'initiative des membres de l'Assemblée fédérale, des groupes parlementaires, des commissions parlementaires et des cantons[2069] et le droit de proposition des membres de chacun des conseils et ceux du Conseil fédéral par rapport à un objet en délibération[2070] [2071]. Il a fait valoir que «[l]es objectifs de ce genre ne s'accomplissent pas par la voie juridique mais par des moyens politiques que le système suisse offre en suffisance avec ses instruments démocratiques»[2072].

De même, le Tribunal fédéral fait souvent preuve de retenue dans sa jurisprudence sur des questions délicates de politique sociale. On peut mentionner à cet égard des décisions en matière de prestations d'assurance-accidents pour des étudiants salariés[2073][2074], d'examen des conditions d'octroi d'une rente de veuve ou de veuf[41], ainsi qu'en matière de regroupement familial avec une personne ayant acquis la nationalité suisse[2075].

7. Votre Cour accepte-t-elle un principe général de déférence dans le jugement des politiques et de la philosophie criminelles?

Oui, le Tribunal fédéral respecte par principe la jurisprudence des instances inférieures en matière de politique et de philosophie criminelles lors de l'examen des recours en matière pénale au sens des art. 78 à 81 LTF. Le Tribunal fédéral connaît des recours en matière pénale contre les décisions prises par les autorités cantonales de dernière instance ou par le Tribunal pénal fédéral[43]. Les faits considérés comme établis par l'instance inférieure ne peuvent toutefois être examinés que de manière très limitée par le Tribunal fédéral. Conformément à l'art. 105 al. 1 LTF, le Tribunal fédéral est en principe lié par les faits établis par l'instance précédente. En tant qu'autorité judiciaire suprême de la Confédération[2076], le Tribunal fédéral doit examiner les décisions attaquées sous l'angle de l'application du droit. C'est aux juridictions du fond qu'il incombe de compléter l'examen des faits et des preuves. L'art. 105 al. 2 LTF n'oblige donc pas le Tribunal fédéral à compléter l'état de fait. Si toutefois ce dernier devait être lacunaire, la décision attaquée doit être annulée en vertu de l'art. 107 al. 2 LTF et l'affaire renvoyée à l'autorité précédente pour qu'elle complète l'état de fait et prenne une nouvelle décision[2077]. La plupart des recours sont de nature réformatoire. Lorsqu'une affaire est en état d'être jugée, le tribunal doit statuer en réforme. Cela s'applique en principe aussi aux deux cours de droit pénal du Tribunal fédéral[2078].

2066 ATF 146 I 145 consid. 4.
2067 Art. 138 s Cst.
2068 Art. 33 Cst.
2069 Art. 160 al. 1 Cst.
2070 Art. 160 al. 2 Cst.
2071 ATF 146 I 145 consid. 4.
2072 ATF 146 I 145 consid. 5.5.
2073 ATF 148 V 84 consid. 4.6.1 et 7.4; cf. à ce sujet la réponse à la question 5.
2074 C_617/2011 du 4 mai 2012 consid. 3.5; cf. à ce sujet la réponse à la question 9.
2075 ATF 136 II 120 consid. 3.5.2; cf. à ce
sujet la réponse à la question 9. [43] Art. 80 LTF.
2076 Art. 1 al. 1 LTF.
2077 Cf. par ex. l'ATF 133 IV 293 consid. 3.4.2.
2078 $C_{HRISTOPH}$ H_{URNI}, Gerichte legen Regeln schärfer aus als nötig, plädoyer 5/2019, p. 11: «Mais cette Cour a pour pratique – contrairement à la lettre de l'art. 107 al. 2 LTF – de toujours casser sans jamais statuer en réforme. Cependant, si cette Cour conclut que la peine a été fixée de manière incorrecte et qu'elle connaît tous les éléments de fait, il n'y a aucune raison de ne pas fixer la peine elle-même» (nous traduisons); cf. aussi par ex. 6B_146/2007 du 24 août 2007 consid. 7.2 (considérant non publié à l'ATF 133 IV 293)

8. Il peut y avoir des circonstances plus strictes dans lesquelles le gouvernement ne peut pas divulguer des informations à la Cour, en particulier dans le contexte d'affaires de sécurité nationale impliquant des informations classifiées. Votre Cour a-t-elle déjà fait preuve de déférence pour des raisons de sécurité nationale?

Oui, le Tribunal fédéral peut faire preuve de retenue pour des motifs liés à la sécurité nationale. Selon l'art. 83 let. a LTF, est irrecevable tout recours, concernant pour l'essentiel des questions politiques, formé contre les décisions concernant la sûreté intérieure ou extérieure du pays, la neutralité, la protection diplomatique et les autres affaires relevant des relations extérieures, à moins que le droit international ne confère un droit à ce que la cause soit jugée par un tribunal. Il est question, à cet égard, d'»actes de gouvernement», c'est-à-dire de décisions relevant de l'appréciation du gouvernement et qui doivent relever de sa seule responsabilité[2079]. Le Tribunal fédéral souligne dans sa jurisprudence que de telles décisions ne sont pas ou guère justiciables et que le gouvernement doit demeurer seul responsable des décisions prises, puisque les mesures tendant à protéger l'intégrité de l'Etat et à maintenir de bonnes relations avec l'étranger font partie de ses tâches essentielles[2080]. Sont considérées comme des mesures visant à préserver la sécurité nationale, en premier lieu, les ordonnances édictées par le Conseil fédéral et l'administration fédérale sur la base de l'art. 184 al. 3 ou de l'art. 185 al. 3 Cst.[2081]. Le Tribunal fédéral a également appliqué l'art. 83 let. a LTF dans des affaires portant sur des mesures policières visant directement à prévenir le terrorisme, l'espionnage, l'extrémisme violent, le crime organisé ou l'agitation politique. Des décisions émanant du Préposé spécial au traitement des documents établis pour assurer la sécurité de l'Etat[2082] ou concernant la confiscation de matériel de propagande du Parti des travailleurs du Kurdistan PKK[51] ont été qualifiées comme concernant la sûreté intérieure ou extérieure du pays au sens de l'art. 83 let. a LTF. Le Tribunal fédéral s'est prononcé de la même façon concernant une interdiction d'entrée prononcée dans l'intérêt de l'ordre public et de la sécurité nationale à l'encontre d'un activiste du LPK et de l'UÇK[2083].

9. Compte tenu du rôle des cours constitutionnelles en tant que gardiennes de la Constitution, devraient-elles interférer avec des politiques publiques prétendument inconstitutionnelles lorsque les gouvernements sont passifs dans la mise en oeuvre des réformes des droits fondamentaux?

Comme déjà mentionné à plusieurs reprises, la Suisse ne dispose que d'une juridiction constitutionnelle partielle. Contrairement à la plupart des autres Etats, l'art. 190 Cst. dispose que «le Tribunal fédéral et les autres autorités sont tenus d'appliquer les lois fédérales et le droit international», et ce même si la loi fédérale est inconstitutionnelle. L'art. 190 Cst. n'interdit toutefois pas au Tribunal fédéral d'examiner la constitutionnalité d'une loi fédérale.

Il est habilité à constater qu'une loi fédérale viole le droit constitutionnel. En revanche, il ne peut pas sanctionner ce constat par l'annulation ou l'inapplicabilité de la loi en question et doit quand

2079 T$_{HOMAS}$ H$_{ÄBERLI}$, in Basler Kommentar, Bundesgerichtsgesetz, 3^{e} éd. 2018, n° 20 ad art. 83 LTF.

2080 Par ex. ATF 132 II 342 consid. 1: ordonnance Interpol; ATF 137 I 371 consid. 1.2: intervention de la Suisse auprès de la Banque des règlements internationaux (BRI) dans le but de favoriser un accord exprès au séquestre.

2081 Ainsi par ex. 1A.157/2005: Mesures de coercition pour appliquer les sanctions de l'ONU au sens des art. 1 ss de la loi fédérale du 22 mars 2002 sur l'application de sanctions internationales (Loi sur les embargos, RS 946.231).

2082 «Affaire des fiches», ATF 117 Ia 202 consid. 6b, ATF 117 Ia 221 consid. 4 et ATF 118 Ib 277 consid. 2b. [51] ATF 125 II 417 consid. 4.

2083 ATF 129 II 193 consid. 2.1.

même appliquer la disposition légale[2084]. Le Tribunal fédéral peut également, dans certaines circonstances, recommander au législateur de procéder à une adaptation législative[2085]. Il peut en outre attirer l'attention du législateur sur des points problématiques rencontrés dans l'application de la loi qui n'étaient pas évidents lors de l'adoption de cette dernière. Le Tribunal fédéral peut donc donner des impulsions au législateur[2086].

A titre d'exemple, on peut citer l'arrêt 9C_617/2011, dans lequel le Tribunal fédéral a constaté qu'en réglant différemment les conditions d'octroi des rentes de veuve et de veuf à l'art. 24 al. 2 LAVS, le législateur avait explicitement établi une distinction spécifiquement fondée sur le sexe, non justifiée par des raisons biologiques ou fonctionnelles. Il s'agit là d'une situation d'inconstitutionnalité incompatible avec l'actuel art. 8 al. 3 Cst. qui perdure encore aujourd'hui. Le Tribunal fédéral et les autres autorités d'application du droit sont néanmoins tenus de respecter cette disposition. Cette décision a été portée devant la Cour européenne des droits de l'homme (CEDH) à Strasbourg (voir également la réponse à la question 30).

Parmi les autres possibilités d'intervention du Tribunal fédéral dans le processus législatif, on peut citer l'ajout d'obiter dicta[2087], la formulation d'indications à l'attention du législateur dans les rapports de gestion annuels, la participation de certains membres du Tribunal fédéral comme experts spécialisés au sein de commissions d'experts ou encore l'implication officielle du Tribunal fédéral dans des groupes de travail chargés d'élaborer des projets de loi.

II. Décideur

10. Votre Cour témoigne-t-elle plus de déférence à une loi du Parlement qu'à une décision de l'exécutif? Votre Cour fait-elle preuve de déférence en fonction du niveau de responsabilité démocratique du décideur initial?

Voir la réponse à la question 5.

11. Quel poids votre Cour accorde-t-elle au processus législatif? Quelle pertinence juridique, le cas échéant, l'analyse parlementaire devrait-elle avoir pour l'analyse par les juges de la compatibilité avec les droits fondamentaux?

Il convient de mentionner à cet égard les travaux préparatoires et leur interprétation par le Tribunal fédéral. Par travaux préparatoires, nous entendons les «documents officiels relatifs aux travaux législatifs préliminaires et à la procédure législative proprement dite (tels que les avant-projets et projets de loi, les avis de droit, les exposés des motifs, les messages, les directives, les procès-verbaux des commissions et du Parlement)»[2088].

«La loi doit d'abord être interprétée pour elle-même, c'est-à-dire selon son libellé, son esprit, son but et les valeurs sur lesquelles elle repose, dans une approche téléologique. L'interprétation de la loi doit être guidée par l'idée que ce qui importe n'est pas seulement son sens littéral, mais le sens qu'elle prend dans son contexte, une fois qu'elle est appliquée à un cas concret. Le but de l'interprétation

2084 Arrêt du Tribunal fédéral 9C_617/2011 du 4 mai 2012.

2085 A$_{RTUR}$ T$_{EREKHOV}$, Von der gebotenen Differenzierung zwischen Verfassungsgerichtsbarkeit gegenüber kantonalem Recht und Bundesrecht im Lichte der Gewaltenteilung, in ius.full 6/20 p. 163.

2086 Susanne Leuzinger, Hinweise des Bundesgerichts an den Gesetzgeber, in Justice – Justiz – Giustizia, 2013/3.

2087 Par ex. ATF 139 I 16 consid. 4 et 5.

2088 A$_{RTHUR}$ M$_{EIER}$-H$_{AYOZ}$, Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Vol. I: Einleitung und Personenrecht, Einleitung: Artikel 1-10 ZGB (1966), ad art. 1 CC.

est de rendre une décision juste d'un point de vue objectif, compte tenu de la structure normative, et d'aboutir à un résultat satisfaisant fondé sur la ratio legis. C'est la raison pour laquelle le Tribunal fédéral recourt, de manière pragmatique, à une pluralité de méthodes sans fixer entre elles un ordre de priorité (...). Les travaux préparatoires ne sont certes pas directement déterminants, mais peuvent aider à comprendre le sens de la norme. Lorsqu'il s'agit d'interpréter des dispositions récentes, les travaux préparatoires revêtent une importance particulière (...)»[2089].

12. Votre Cour vérifie-t-elle si le décideur a justifié sa décision ou s'il s'agit d'une décision que la Cour elle-même aurait rendue si elle avait été le décideur?

Voir les réponses aux questions 5 et 9.

13. Votre Cour fait-elle preuve de déférence quant à la mesure dans laquelle la décision ou la mesure a été précédée d'une analyse approfondie de la compatibilité avec les droits fondamentaux? Quelle doit être, par exemple, la profondeur de l'analyse du législateur pour que votre Cour lui donne du poids?

Voir les réponses aux questions 1 (concernant l'application du droit d'office), 5 et 9.

Il est toutefois important de mentionner également l'art. 141 al. 2 let. a LParl[2090]. Comme les tribunaux ne peuvent pas refuser d'appliquer une loi fédérale inconstitutionnelle (art. 190 Cst.) et étant donné que les actes de l'Assemblée fédérale et du Conseil fédéral ne peuvent pas être portés devant le Tribunal fédéral, il est extrêmement important que l'administration opère un contrôle préventif de la constitutionnalité des actes adoptés par l'Assemblée fédérale. Elle doit tout particulièrement examiner, en cas de restriction de droits fondamentaux, si les conditions requises à cet égard sont réunies[2091]. L'art. 141 al. 2 let. a LParl prévoit ainsi l'obligation du Conseil fédéral d'exposer, dans ses messages accompagnant un projet d'acte législatif, les effets de la nouvelle réglementation sur les droits fondamentaux. On veut ainsi éviter que le Conseil fédéral soumette au Parlement un projet contraire à la Constitution.

14. Votre Cour examine-t-elle si les points de vue opposés ont été pleinement représentés dans le débat parlementaire lors de l'adoption d'une mesure? Suffit-il qu'il y ait eu un débat approfondi sur le contenu général de la législation, ou faut-il qu'il y ait eu une considération spéciale des implications sur le droit?

Voir les réponses aux questions 5 et 9.

15. Le fait que la décision appartienne au pouvoir législatif ou qu'elle ait été prise après des consultations publiques ou des débats publics est-il une preuve concluante de la légitimité démocratique de la décision?

Voir la réponse à la question 5.

III. Le champ d'application des droits, légalité et proportionnalité

16. Votre Cour a-t-elle déjà fait preuve de déférence à l'étape de la définition des droits, en donnant du poids à la définition des droits du gouvernement ou à son application aux faits en cause?

2089 ATF 148 IV 96 consid. 4.4.1, ATF 146 II 201 consid. 4.1.
2090 Loi sur le Parlement, LParl, RS 171.10.
2091 GUIDE DE LÉGISLATION, Guide pour l'élaboration de la législation fédérale, 2019, p. 176.

En raison de la séparation des pouvoirs, le Tribunal fédéral ne joue qu'un rôle mineur dans la procédure législative ordinaire et, par conséquent, dans la définition des droits ou l'élaboration du droit nouveau. Dans de rares cas, le Tribunal fédéral est consulté en tant que destinataire supplémentaire dans le cadre de la consultation des offices[2092]. Le Tribunal fédéral n'est même pas mentionné dans la loi sur la consultation[2093]. Lorsqu'il est invité à donner son avis, il est considéré comme faisant partie des «autres milieux concernés par le projet dans le cas d'espèce» (art. 4 al. 2 let. e LCo). Dans de tels cas, il fait preuve de retenue en raison de la séparation des pouvoirs et s'abstient de toute appréciation politico-juridique.

Cependant, l'une des particularités du droit constitutionnel suisse réside dans le fait que sous l'ancienne Constitution de la Confédération suisse (1874), la formation d'un droit constitutionnel non écrit était permise. De cette façon, le Tribunal fédéral a contribué au développement de la Constitution actuelle, dont la version antérieure était encore qualifiée de «lacunaire et parfois avare de détails»[2094]. Encouragés par la doctrine, les juges fédéraux ont ainsi élaboré une jurisprudence innovante, en étendant des principes constitutionnels déjà établis ou en reconnaissant de nouveaux droits fondamentaux. C'est ainsi que sont nés la majorité des droits sociaux désormais garantis par l'actuelle Constitution fédérale (1999). Le nouveau droit constitutionnel s'est inspiré non seulement du texte constitutionnel de la Confédération suisse, mais également de la volonté de tenir compte de l'évolution des circonstances politiques, économiques et sociales. Le Tribunal fédéral a ainsi pu rester fidèle à la volonté du constituant, tout en garantissant la possibilité d'adapter le droit constitutionnel aux besoins des époques à venir. La Constitution fédérale actuelle, acceptée par le peuple et les cantons le 18 avril 1999, avait pour objectif de mettre à jour le droit constitutionnel écrit et non écrit, de le rendre compréhensible, de l'ordonner systématiquement et d'unifier la langue ainsi que la densité normative[2095]. L'actuelle version de notre Constitution fédérale est désormais censée avoir codifié tous les droits fondamentaux qui n'étaient auparavant mentionnés que dans la jurisprudence du Tribunal fédéral et dans la doctrine. Elle ne prétend cependant pas à l'exhaustivité[2096] et il demeure incontesté que le Tribunal fédéral pourra poursuivre le développement de la protection des droits fondamentaux à chaque fois que le catalogue existant ne suffira pas à garantir de manière fiable les besoins humains les plus élémentaires en termes de respect et de protection des droits et libertés individuels[66].

Le Tribunal fédéral a également la possibilité d'influencer «indirectement» la définition d'un droit dans le cadre de l'interprétation de la loi. Selon la jurisprudence du Tribunal fédéral, la loi s'interprète en premier lieu selon sa lettre (interprétation littérale). «On peut, voire même on doit cependant s'écarter du texte clair lorsqu'il existe des raisons fondées d'admettre qu'il ne correspond pas au sens véritable – au sens juridique – de la disposition. De tels motifs peuvent être tirés de la genèse de la disposition (historique), de son but (téléologique) ou de sa relation avec d'autres dispositions légales (systématique). On peut en outre s'écarter du texte clair lorsque l'interprétation littérale conduit à un résultat que le législateur ne peut pas avoir voulu»[2097].

17. Des droits applicables affectent-ils l'intensité de la déférence? Votre Cour considère-t-elle que certains droits ou aspects de droits sont plus importants

2092 P. AUL T. SCHÜMPERLIN, Die Rolle des Bundesgerichts im Gesetzgebungsprozess, LEGES 2016/3 p. 450.

2093 Loi sur la consultation, LCo, RS 172.061.

2094 Message relatif à une nouvelle constitution fédérale du 20 novembre 1996, FF 1997 I 44.

2095 Message relatif à une nouvelle constitution fédérale du 20 novembre 1996, FF 1997 I 9, 26 s., 44 s. et 118 s.

2096 Message relatif à une nouvelle constitution fédérale du 20 novembre 1996, FF 1997 I 44 s. et 140. [66] Message relatif à une nouvelle constitution fédérale du 20 novembre 1996, FF 1997 I 119.

2097 ATF 148 V 162 consid. 5.2

et que, par conséquent, des ingérences dans leur exercice méritent un examen plus rigoureux que d'autres? Avez-vous des facteurs qui déterminent la nature du droit fondamental en question?

Selon l'art. 36 Cst., des restrictions aux droits fondamentaux sont admissibles lorsqu'elles reposent sur une base légale, sont prises dans l'intérêt public, sont proportionnées et respectent le noyau intangible de ce droit. Le TF examine librement si une mesure déterminée respecte l'intérêt public et le principe de la proportionnalité. En revanche, il n'examine que sous l'angle de l'arbitraire la question de savoir si une mesure repose sur une base légale suffisante en droit cantonal, à moins qu'une grave atteinte à la liberté personnelle ne soit en cause. La gravité d'une atteinte se détermine selon des critères objectifs[2098]. La garantie de la dignité humaine (art. 7 Cst.) tient un rôle important. Le noyau intangible n'est en général pas identique au champ d'application ou de protection du droit fondamental. Il en va autrement des droits fondamentaux dont le champ de protection et le noyau intangible se confondent. Tel est le cas de l'interdiction de la peine de mort et de la torture (art. 10 Cst.), ainsi que du droit à la vie (art. 10 Cst.), du droit d'obtenir de l'aide dans des situations de détresse (art. 12 Cst.) et de l'interdiction de la censure (art. 17 Cst.)[2099].

18. Disposez-vous d'une échelle de clarté lors du contrôle de constitutionnalité d'une loi? Comment décidez-vous de la clarté d'une loi? Quand appliquez-vous la règle d'interprétation *In claris non fit interpretatio*?

Comme indiqué plus haut dans les remarques introductives, le recours en matière de droit public permet aux particuliers de faire soumettre les réglementations cantonales à un contrôle de constitutionnalité et de conformité au droit fédéral par le Tribunal fédéral, soit directement dans le cadre d'une procédure de contrôle abstrait des normes, soit indirectement à l'occasion de leur application dans un cas d'espèce (contrôle concret des normes).

Selon la jurisprudence du Tribunal fédéral, lors de l'examen de la constitutionnalité d'un acte législatif cantonal dans le cadre du contrôle abstrait des normes, ce qui est décisif, c'est que la norme mise en cause puisse, d'après les principes d'interprétation reconnus, se voir attribuer un sens compatible avec les droits fondamentaux invoqués. Le Tribunal fédéral n'annule dès lors une norme cantonale que lorsque celle-ci ne se prête à aucune interprétation conforme à la Constitution ou à la Convention européenne des droits de l'Homme; il s'en abstient si une pareille interprétation est possible de manière soutenable. En principe, le sens d'une disposition doit être déterminé sur la base de son texte, selon les méthodes d'interprétation traditionnelles. Une interprétation conforme au droit constitutionnel et conventionnel entre notamment en considération lorsque le texte se révèle lacunaire, ambigu ou obscur. Le sens clair et univoque d'une disposition ne peut en revanche pas être écarté par une interprétation conforme à la Constitution. Il est tenu compte, en particulier, de la portée de l'atteinte aux droits fondamentaux en cause, de la possibilité d'obtenir ultérieurement, par un contrôle concret de la norme, une protection juridique suffisante et des circonstances concrètes dans lesquelles ladite norme sera appliquée, mais aussi de ses effets sur la sécurité juridique. A elle seule, l'éventualité que, dans certains cas, son application puisse se révéler inconstitutionnelle ne saurait en principe justifier son annulation[2100].

19. Quelle est l'intensité du contrôle de votre Cour au stade de l'établissement du but légitime?

Le Tribunal fédéral ne joue qu'un rôle mineur dans la procédure législative ordinaire.

2098 ATF 128 II 259 consid. 3.3

2099 G$_{\text{IOVANNI}}$ B$_{\text{IAGGINI}}$, Kommentar BV, n° 24-25 ad art. 36 Cst.

2100 ATF 140 I 2 consid. 4, cf. également l'ATF 138 II 173 consid. 8.1 ou l'ATF 134 I 293 consid. 2.

(voir la réponse à la question 16). Dans le cadre de l'interprétation d'une loi, le Tribunal fédéral peut également en examiner la genèse, et ce de manière pragmatique, comme exposé précédemment (voir la réponse à la question 11).

20. Quel test de proportionnalité votre Cour applique-t-elle? Votre Cour applique-telle toutes les étapes du test classique de proportionnalité (c'est-à-dire satisfaire à une triple exigence d'adéquation, de nécessité et de proportionnalité au sens strict)?

Le principe de la proportionnalité a fait sa percée juridique dans le droit de police et le droit économique. Son champ d'application s'est progressivement étendu à l'ensemble des activités de l'Etat. Ce n'est que dans le cadre de la révision constitutionnelle de 1999 que la proportionnalité a été introduite dans le texte constitutionnel en tant que «principe de l'activité de l'Etat régi par le droit» (art. 5 al. 2 Cst.) et en tant que limitation des droits fondamentaux (art. 36 al. 3 Cst.). Auparavant, elle était perçue comme un «principe non écrit» (art. 4 aCst.)[2101].

Selon l'art. 5 al. 2 Cst., l'activité de l'Etat doit répondre à un intérêt public et être proportionnée au but visé. L'application du principe de proportionnalité est globale et chacun des trois pouvoirs de l'Etat est tenu de l'observer. Son champ d'application englobe tous les actes, qu'ils relèvent de la puissance publique ou non. En outre, le principe de proportionnalité s'applique dans le domaine de l'administration de restriction comme dans celui de l'administration de prestation, ainsi que dans le cadre de l'activité de l'Etat *de iure* et *de facto*. Le contrôle se décompose en pratique en celui de l'adéquation, de la nécessité et de la proportionnalité au sens étroit[2102]. Pour le Tribunal fédéral, le principe de la proportionnalité exige «que la mesure prise par l'autorité soit raisonnable et nécessaire pour atteindre le but d'intérêt public (ou privé) poursuivi, et que sous l'angle de la gravité de l'atteinte aux droits fondamentaux, elle réponde, à l'égard des personnes concernées, aux critères de la nécessité et de la proportionnalité. Le rapport entre le but à atteindre et les moyens engagés doit être raisonnable. Une mesure est disproportionnée s'il est possible d'atteindre le même résultat par un moyen moins incisif»[2103].

Comme nous l'avons vu, le principe de la proportionnalité découle déjà de l'art. 5 Cst. Dans le contexte de la juridiction constitutionnelle, il ne peut toutefois être invoqué qu'en rapport avec un droit fondamental particulier[2104]. Le principe de proportionnalité consacré par l'art. 36 al. 3 Cst. concrétise donc l'exigence générale de l'art. 5 al. 2 Cst. pour le cas où l'activité de l'Etat, exercée dans l'intérêt public, porte atteinte à un droit fondamental. L'art. 36 Cst. est donc en relation étroite avec l'art. 5 Cst. et met en évidence des préoccupations centrales du principe de l'Etat de droit pour la question de l'admissibilité des restrictions des droits fondamentaux. La relation entre ces deux articles se définit à la lumière de la notion de *lex specialis*: alors que l'art. 5 Cst. vise l'action de l'Etat de façon générale, qui inclut la restriction des droits fondamentaux, seule cette dernière disposition doit être prise en compte dans ce contexte. Selon la jurisprudence du Tribunal fédéral, l'intérêt public doit primer l'intérêt protégé par le droit fondamental, alors que dans le cadre de l'art. 5 al. 2 Cst., tout intérêt est en principe suffisant. Lorsqu'il s'agit de droit cantonal, le Tribunal fédéral examine le respect de l'art. 5 al. 2 Cst. uniquement sous l'angle de l'arbitraire. Pour l'art. 36 Cst., il procède à un examen libre. Cette marge de manoeuvre accordée par le législateur lors de l'examen de la proportionnalité

2101 M$_{ARKUS}$ M$_{ÜLLER}$, Verhältnismässigkeit, Ein Verfassungsprinzip zwischen Rechtsregel und Metareel, in Verhältnismässigkeit als Grundsatz in der Rechtsetzung und Rechtsanwendung, 17. Jahrestagung des Zentrums für Rechtsetzungslehre, p. 10.

2102 D$_{AVID}$ H$_{OFSTETTER}$, Schematisierungen und Verhältnismässigkeit, in Verhältnismässigkeit als Grundsatz in der Rechtsetzung und Rechtsanwendung, 17. Jahrestagung des Zentrums für Rechtsetzungslehre, p. 87.

2103 ATF 136 I 87 consid. 3.2.

2104 G$_{IOVANNI}$ B$_{IAGGINI}$, Kommentar BV, n° 23 ad art. 36 Cst.

d'une mesure étatique est donc nettement plus étroite à l'art. 36 Cst. qu'à l'art. 5 al. 2 Cst. La garantie des droits fondamentaux se voit donc conférer une importance particulière[2105].

21. Votre Cour passe-t-elle par chaque étape applicable du test de proportionnalité?

Cf. la réponse à la question 20.

22. Existe-t-il des affaires dans lesquelles votre Cour admet que la mesure litigieuse satisfait à une ou plusieurs étapes du test de proportionnalité, même s'il n'y a manifestement pas suffisamment de preuves pour démontrer ce fait?

Les organes étatiques compétents disposent d'une certaine marge de manoeuvre lors de l'examen de la proportionnalité. Cette flexibilité du principe de proportionnalité permet une application différenciée en fonction de l'état de fait, des intérêts en présence, du domaine concerné et des destinataires. Il en va de même pour

l'opportunité; il s'agit ici d'une véritable «pesée» des différents intérêts, lorsqu'il faut prendre en compte les jugements de valeur constitutionnels, de sorte qu'une atteinte aux droits fondamentaux sera plus lourde qu'une atteinte à des intérêts purement privés. Il existe également une marge de manoeuvre en ce qui concerne l'adéquation et la nécessité, en particulier dans les situations où l'effet de certaines mesures ne peut pas être prédit, comme dans le droit de l'environnement. Dans de telles situations, les autorités sont toutefois tenues de clarifier soigneusement les circonstances essentielles[2106].

Lors de l'examen de l'adéquation et de la nécessité, le Tribunal fédéral analyse en principe les dispositions légales et fait valoir une certaine compréhensibilité, qu'il détermine en grande partie sur la base de l'expérience de la vie et qu'il n'étaye que sporadiquement par de véritables expertises. En conclusion, plus l'atteinte aux droits fondamentaux est grave, plus l'examen est approfondi[2107].

23. L'apparition du contrôle de la proportionnalité dans la jurisprudence de votre Cour a-t-elle coïncidé avec l'essor de la théorie de la déférence judiciaire?

Le contrôle de la proportionnalité peut effectivement coïncider avec la retenue judiciaire. Comme déjà évoqué aux questions 2 et 5, le Tribunal fédéral restreint également sa cognition pour des motifs de proportionnalité. «Le Tribunal fédéral examine librement la proportionnalité en cas d'atteinte aux droits fondamentaux; il s'impose toutefois une certaine retenue lorsqu'il s'agit de trancher de pures questions d'appréciation ou de tenir compte de circonstances locales que les autorités cantonales connaissent et maîtrisent mieux que le Tribunal fédéral»[2108]. Dans ce contexte, il convient de mentionner que le Tribunal fédéral fait preuve de retenue en ce qui concerne les actes juridiques cantonaux, en particulier lorsque des circonstances locales sont en cause et qu'il s'agit avant tout de compétences cantonales[2109].

2105 A_{STRID} E_{PINEY}, in Waldmann/Belser/Epiney, BSK Bundesverfassung, 2015, n° 6-7 ad art. 5 Cst.

2106 A_{STRID} E_{PINEY} in Waldmann/Belser/Einey (Hrsg.), Basler Kommentar, Bundesverfassung, Basel 2015, n°71 ad art. 5 al. 2 Cst., p. 111.

2107 A_{STRID} E_{PINEY}, in Waldmann/Belser/Einey (Hrsg.), Basler Kommentar, Bundesverfassung, Basel 2015, n° 59 ad art. 36 al. 3 Cst., p. 767 s.

2108 ATF 147 I 450 consid. 3.2.5.

2109 A_{STRID} E_{PINEY}, in Waldmann/Belser/Einey (Hrsg.), Basler Kommentar, Bundesverfassung, Basel 2015, n° 59 ad art. 36 al. 3 Cst., p. 768.

Autres particularités

24. À quelle fréquence la question de la déférence se pose-t-elle dans les affaires relatives aux droits de l›homme jugées par votre Cour?

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25. Votre Cour est-elle devenue plus déférente avec le temps?

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26. L'attitude déférente dépens-elle du nombre d'affaires inscrites au rôle de la Cour?

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27. Votre Cour peut-elle fonder ses décisions sur des motifs non avancés par les parties?

Voir la réponse à la question 1 en relation avec l'application du droit d'office.

28. Votre Cour peut-elle étendre son contrôle de constitutionnalité à une autre loi non contestée devant elle mais liée à la situation du requérant?

Voir la réponse à la question 1 en relation avec l'application du droit d'office.

29. La jurisprudence de la Cour européenne des droits de l'homme a-t-elle façonné l'approche de votre Cour en matière de déférence? La doctrine de la Cour européenne des droits de l'homme sur la marge d'appréciation est-elle l'équivalent national de la marge d'appréciation que votre Cour accorde? Si non, à quelle fréquence les considérations relatives à la marge d'appréciation de la Cour européenne des droits de l'homme recoupent-elles les considérations relatives à la déférence de votre Cour dans des affaires similaires?

La contribution apportée par la jurisprudence de la CourEDH est très importante pour la Suisse. Ainsi, les arrêts du Tribunal fédéral peuvent en principe être portés devant la CourEDH, qui peut cas échéant constater une violation de la CEDH. En vertu de l'art. 46 CEDH, un tel constat entraîne l'obligation de remédier à cette violation de la Convention. La conception européenne de la justice constitutionnelle façonne le droit suisse de manière durable. En outre, la CourEDH peut examiner la conformité des décisions des autorités suisses avec la CEDH, sans que cet examen soit limité par des dispositions spécifiques du droit national. Enfin, le sens et la portée de chaque droit sont déterminés par la CEDH de manière indépendante et contraignante pour notre Cour suprême. Le Tribunal fédéral se réfère régulièrement à la jurisprudence de Strasbourg et la reprend souvent à son compte[2110]. La CEDH a pour effet de renforcer la protection des droits fondamentaux en Suisse[2111].

Dans ce contexte, il sied de souligner qu'en Suisse, les droits de l'homme sont garantis en premier lieu par la Constitution fédérale. Il convient de mentionner, par exemple, les garanties des droits de l'homme contenues dans le chapitre Droits fondamentaux des art. 7 ss Cst. et l'art. 5 Cst., qui énonce les principes de l'activité de l'Etat régi par le droit. Ces articles constitutionnels correspondent en grande partie aux dispositions de la CEDH. Si ces dispositions sont appliquées conformément à la

2110 Voir par ex. ATF 149 I 72, ATF 149 I 14 et ATF 148 I 233.

2111 Voir à cet égard R$_{EGINA}$ K$_{IENER}$, Der Einfluss der EMRK auf die BV 1999, in: 40 Jahre Beitritt der Schweiz zur EMRK, 2015, p. 72 ss.

Constitution et à la Convention, une violation de la CEDH ne devrait être possible que si la Suisse et la Cour européenne des droits de l'homme ont apprécié de façon divergente le pouvoir d'appréciation et/ou l'état des faits dans un cas concret[2112].

Une appréciation divergente d'une question juridique par le Tribunal fédéral ou la Cour européenne des droits de l'homme peut s'expliquer par la différence des règles de procédure et par la conception distincte du pouvoir d'examen des deux instances judiciaires. Aux termes de l'art. 106 al. 2 LTF, le Tribunal fédéral n'examine la violation de droits fondamentaux que si ce grief a été invoqué et motivé par le recourant. De plus, en vertu de l'art. 105 LTF, le Tribunal fédéral est en principe lié par les faits établis par l'autorité précédente. En revanche, se fondant sur l'art. 38 CEDH, la CourEDH examine les questions de fait de manière plus complète que le Tribunal fédéral. Pour la CourEDH, la marge d'appréciation limitée du Tribunal fédéral n'a pas d'importance[2113]. Cette situation juridique peut avoir pour conséquence que la CourEDH, dans sa prise de décision, se fondant sur la théorie de la protection de la confiance légitime, parte d'un état de fait plus large que celui sur lequel le Tribunal fédéral a basé son arrêt[2114]. A cet égard, on peut mentionner l'affaire *Neulinger et Shuruk contre Suisse* du 6 juillet 2010[2115]. Dans cet arrêt, la Suisse a été condamnée pour violation du droit au respect de la vie privée et familiale[86]: l'ordre de retour en Israël d'un enfant de sept ans, enlevé par sa mère vers la Suisse en 2005, a été jugé incompatible avec l'intérêt supérieur de l'enfant. Même si, au moment de l'arrêt du Tribunal fédéral, la Suisse n'a pas outrepassé son pouvoir d'appréciation en ordonnant ce retour, il faut tenir compte des développements survenus entre-temps – développements que la Cour a d'ailleurs elle-même provoqués en ordonnant des mesures provisoires pour le maintien de l'enfant en Suisse.

En particulier, le séjour de cinq ans de l'enfant en Suisse, le caractère limité du droit de visite du père en Israël ainsi que l'éventualité d'un emprisonnement de la mère en Israël auraient conduit, en cas de retour de l'enfant, à une ingérence injustifiée dans le droit au respect de la vie privée et familiale tant de l'enfant que de la mère. Si le droit procédural national et conforme à la CEDH interdit au Tribunal fédéral de juger une affaire sur la base d'un état de fait élargi par la CourEDH, cette dernière devrait se montrer plus réservée et renoncer en principe à juger de telles questions, afin de ne pas faire échec au principe de l'épuisement des voies de recours internes énoncé à l'art. 35 par. 1 CEDH[2116]. Dans ce contexte, il convient également de souligner que les juges de la CourEDH ne tiennent souvent pas ou trop peu compte de la sensibilité juridique de la Suisse[2117] et étendent de plus en plus souvent le champ d'application des droits de l'homme consacrés par la CEDH à de nouveaux développements sociétaux, comme par ex. aux questions en lien avec la protection contre les pratiques néfastes pour l'environnement[2118].

30. La Cour européenne des droits de l'homme avait-elle condamné votre Etat en raison de la déférence dont votre Cour a fait preuve dans une affaire précise, déférence qui en a fait un recours inefficace?

2112 H_{EINZ} $A_{EMISEGGER}$, Probleme der Umsetzung der EMRK im schweizerischen Recht, in: 40 Jahre Beitritt der Schweiz zur EMRK, 2015, p. 208.

2113 H_{EINZ} $A_{EMISEGGER}$, Probleme der Umsetzung der EMRK im schweizerischen Recht, in: 40 Jahre Beitritt der Schweiz zur EMRK, 2015, p. 210.

2114 S_{TEFAN} $S_{CHÜRER}$, in: Heinz Aemisegger, Probleme der Umsetzung der EMRK im schweizerischen Recht, in 40 Jahre Beitritt der Schweiz zur EMRK, 2015, p. 211.

2115 Arrêt de la CourEDH *Neulinger et Shuruk contre Suisse* du 6 juillet 2010, 41615/07. [86] Art. 8 CEDH.

2116 S_{TEFAN} $S_{CHÜRER}$, in Heinz Aemisegger, Probleme der Umsetzung der EMRK im schweizerischen Recht, in: 40 Jahre Beitritt der Schweiz zur EMRK, 2015, p. 212.

2117 Cf. à ce sujet l'arrêt de la CourEDH *Beeler contre Suisse* du 11 octobre 2022; 78630/12 et les remarques concernant la question 30.

2118 Cf. à ce sujet l'arrêt de la CourEDH *Howald Moor et autres contre Suisse* du 11 mars 2014, 52067/10 et 41072/11. [90] 78630/12.

Oui, la CEDH a déjà condamné la Suisse en raison de la retenue judiciaire dans le cadre du prononcé du jugement.

A cet égard, on peut citer l'arrêt *Beeler contre Suisse* (cf. la réponse à la question 9). Dans cette affaire, la Grande Chambre de la CourEDH a jugé[90] que la différence entre les conditions d'octroi d'une rente de veuve ou de veuf de l'assurance-vieillesse et survivants suisse était discriminatoire. Selon la Cour, l'inégalité de traitement dont le requérant a été victime ne saurait passer pour reposer sur une justification raisonnable et objective. Bien que se trouvant dans une situation analogue pour ce qui est de son besoin d'assurer sa subsistance, le requérant n'a pas été traité de la même façon qu'une femme/veuve. Il a donc subi une inégalité de traitement. Le gouvernement n'a pas démontré qu'il existe des considérations très fortes ou des raisons particulièrement solides et convaincantes propres à justifier cette différence de traitement fondée sur le sexe. Pour la Cour, le gouvernement ne peut se prévaloir de la présomption selon laquelle l'époux entretient financièrement son épouse (concept du «mari pourvoyeur») afin de justifier une différence de traitement défavorisant les veufs par rapport aux veuves. À ses yeux, cette législation contribue plutôt à perpétuer des préjugés et des stéréotypes concernant la nature ou le rôle des femmes au sein de la société et constitue un désavantage tant pour la carrière des femmes que pour la vie familiale des hommes.

Une affaire récente et actuellement pendante devant la CourEDH (déjà mentionnée dans la réponse à la question 6) concerne la requête de l'association «Aînées pour la protection du climat» qui, en saisissant le Tribunal fédéral[2119] souhaitait que le gouvernement suisse prenne davantage de mesures concernant la problématique du changement climatique et réglemente le cadre juridique des effets du changement climatique. Le Tribunal fédéral fait souvent preuve de retenue judiciaire face à des problématiques politiquement sensibles. En réponse à cette requête, le Tribunal fédéral a fait preuve de retenue en soulignant que, selon le droit constitutionnel suisse, les propositions tendant à la mise en oeuvre d'une politique publique déterminée dans un domaine actuellement sujet à débat peuvent en principe être introduites par les voies de la participation démocratique[2120]. Il reste à voir quelle sera la décision de la CourEDH sur ce point de droit, qui pourrait également intéresser d'autres Etats signataires de la CEDH.

31. L'existence d'opinions dissidentes influence-t-elle la déférence dont fait preuve votre Cour?

Le Tribunal fédéral se prévaut d'une tradition de motivation de qualité de ses arrêts, dans le cadre de laquelle il aborde directement les arguments de la doctrine et de la jurisprudence, mais aussi, cas échéant, les éventuelles opinions minoritaires exprimées par les juges[2121]. Le Tribunal fédéral est conçu comme une autorité collégiale, ce qui doit empêcher la concentration de pouvoirs entre les mains d'un seul juge[2122]. Conformément à l'art. 20 al. 1 LTF, les cours statuent en règle générale à trois juges. S'il n'y a pas unanimité, le Tribunal fédéral délibère en audience puis procède à un vote[2123]. La procédure devant le Tribunal fédéral ne prévoit pas la publication des opinions minoritaires expri-

2119 ATF 146 I 145.

2120 ATF 146 I 145 c. 4 et la réponse à la question 6.

2121 K$_{ELLER}$/Z$_{IMMERMANN}$, Dissenting opinions am Bundesgericht – Individuelle Transparenz oder Gefährdung der richterlichen Unabhängigkeit?, Revue de droit suisse 138/2019, p. 151

2122 H$_{EINRICH}$ M$_{ÜLLER}$, in Basler Kommentar, Bundesgerichtsgesetz, 3^{e} éd. 2018, n° 29 ad art. 2 LTF.

2123 Art. 58 al. 1 lit. b LTF.

mées par les juges[2124]. Le Tribunal fédéral ne les intègre pas dans ses arrêts[2125]. Ces opinions peuvent être mentionnées en guise de motivation alternative dans l'arrêt[2126] ou encore être intégrées dans un arrêt non publié au recueil officiel[2127].

Contrairement au Tribunal fédéral, certains cantons (Zurich, Berne, Vaud, Bâle-

Campagne, Bâle-Ville, Soleure, Schaffhouse, Neuchâtel et Lucerne) connaissent la possibilité de publier des opinions minoritaires dans les jugements de leurs instances judiciaires[2128]. Dans des cas où il a été saisi de telles décisions cantonales de dernière instance, le Tribunal fédéral a parfois fais sienne l'opinion minoritaire des instances cantonales précédentes. C'est le cas par exemple dans l'affaire 2C_48/2014 du 9 octobre 2014, dans laquelle le Tribunal fédéral s'est rallié à l'opinion minoritaire publiée par l'autorité précédente et a admis le recours[2129]. Il était question de la reconnaissance d'un mariage de nationalité entre deux époux vivant dans un grand ménage. Dans son arrêt, le Tribunal administratif n'avait pas reconnu ce mariage après le divorce et n'a pas prolongé le permis de séjour de l'épouse étrangère. Un juge administratif et la greffière étaient d'un avis contraire et l'ont fait publier dans l'arrêt cantonal. Dans une autre affaire, portant également sur la prolongation d'un permis de séjour accordé à une Turque kurde qui avait contracté un mariage fictif pour obtenir un permis de séjour en Suisse, des obstacles à l'exécution du renvoi ont été invoqués dans la procédure devant les instances judiciaires cantonales et l'octroi de l'assistance judiciaire gratuite a été demandé. Ces deux demandes ont été rejetées par la majorité des juges cantonaux, la décision comportant une opinion minoritaire divergente selon laquelle il ne pouvait être exclu que la recourante puisse faire l'objet d'une répression en Turquie et ne puisse pas bénéficier de soins médicaux suffisants. Le raisonnement majoritaire du tribunal se fondait uniquement sur la situation en Turquie avant la tentative de coup d'Etat de l'été 2016. Saisi de l'arrêt, le Tribunal fédéral a certes nié l'existence d'obstacles à l'exécution du renvoi, mais a accordé l'assistance judiciaire gratuite à la recourante en invoquant le motif suivant: «En revanche, selon une opinion minoritaire de l'instance inférieure sur le point du renvoi, le recours adressé au Tribunal administratif n'était pas d'emblée voué à l'échec (...). Selon la jurisprudence du Tribunal fédéral, on ne saurait en tous les cas pas considérer qu'un recours est voué à l'échec lorsque – comme en l'espèce – il y a eu une dissension manifeste au sein de la Cour ayant

2124 A. Arnold/M. Arti, Offenlegen von Minderheitsmeinungen ("dissenting opinion") – eine Forderung von Transparenz und Fairness im gerichtlichen Verfahren, in "Justice - Justiz - Giustizia" 4/2012, n° 8.

2125 P. Ueberax, in: Basler Kommentar, Bundesgerichtsgesetz, 3e éd. 2018, n° 57 ad art. 24 LTF.

2126 K. Keller/Z. Immermann, Dissenting opinions am Bundesgericht – Individuelle Transparenz oder Gefährdung der richterlichen Unabhängigkeit?, Revue de droit suisse 138/2019, p. 150; A. Arnold/M. Arti, Offenlegen von Minderheitsmeinungen ("dissenting opinion") – eine Forderung von Transparenz und Fairness im gerichtlichen Verfahren, in: "Justice - Justiz - Giustizia" 4/2012 , n° 8; ATF 137 II 431, notamment consid. 4, pp. 445 ss.

2127 Voir par ex. la publication «inofficielle» (non publiée aux ATF) d'une opinion minoritaire en lien avec l'ATF 137 II 431, ZBl 113/2012, p. 30 ss.: l'arrêt a été rendu par trois voix contre deux, avec pour résultat que l'Autorité fédérale de surveillance des marchés financiers a reconnu l'admissibilité de la transmission de données de clients de l'UBS aux autorités américaines sur la base de la clause générale de police. Le juge minoritaire a estimé que ce n'était pas en vertu de la clause générale de la police que la divulgation des données bancaires était autorisée.

2128 A. Arnold/M. Arti, Offenlegen von Minderheitsmeinungen ("dissenting opinion") – eine Forderung von Transparenz und Fairness im gerichtlichen Verfahren, in "Justice - Justiz - Giustizia" 4/2012, n° 8.

2129 Arrêt du Tribunal fédéral 2C_48/2014 consid. 3.2.4: «Il sied plutôt de suivre - du moins en principe - l'opinion divergente de la minorité au sein de la 4e Cour du Tribunal administratif (cf. arrêt attaqué pp. 15 s.) (…)» (nous traduisons).

statué en tant qu'autorité précédente (...). Il faut se tenir à ce principe ici également. L'indigence de la recourante ne semble pas être contestée. C'est donc à tort que l'assistance judiciaire gratuite a été refusée»[2130]. Le Tribunal fédéral s'est, peu de temps après, de nouveau rallié à l'opinion minoritaire divergente sur la question de l'octroi de l'assistance judiciaire gratuite[2131].

32. Votre Cour a-t-elle plus de juges déférents que d'autres?

Cf. la réponse à la question 31.

Schweizerisches Bundesgericht

Bericht des Schweizerischen Bundesgerichts

Formen und Grenzen der richterlichen Ehrerbietung: der Fall der Verfassungsgerichte [2132]

Vorbemerkungen

Das Bundesgericht ist die oberste Recht sprechende Behörde der Schweizerischen Eidgenossenschaft[2133]. Es nimmt eine Doppelfunktion wahr. Als letztinstanzliche oberste Behörde wacht es über die Einhaltung der Bundesgesetzgebung in allen Rechtsgebieten. Als Verfassungsgericht schützt es die Verfassungs- und Grundrechte der Bürger. Akte der Bundesversammlung (gesetzgebende Gewalt) und des Bundesrates (vollziehende Gewalt) können aber nicht vor das Schweizerische Bundesgericht gebracht werden, es sei denn, das Gesetz oder internationales Recht sehen Ausnahmen vor[2134]. Das Bundesgericht ist ausserdem verpflichtet, die Bundesgesetze und das Völkerrecht anzuwenden4 auch wenn ein Bundesgesetz verfassungswidrig sein sollte. Gegenstand der Verfassungsgerichtsbarkeit des Bundesgerichts sind somit ausschliesslich kantonale Erlasse (Gesetze und Verordnungen) oder Entscheide. Die Beschwerde in öffentlich-rechtlichen Angelegenheiten ermöglicht es Privaten, kantonale Regelungen direkt im abstrakten Normenkontrollverfahren oder indirekt anlässlich ihrer Anwendung im Einzelfall (konkrete Normenkontrolle) durch das Bundesgericht auf ihre Verfassungsmässigkeit und ihre Übereinstimmung mit dem Bundesrecht überprüfen zu lassen. Insofern gilt für die Schweiz eine beschränkte Verfassungsgerichtsbarkeit. Dieses Grundprinzip wird in den Ausführungen zu den einzelnen Antworten näher erläutert werden. Die Antworten auf die gestellten Fragen müssen vor dem Hintergrund der beschränkten Zuständigkeit des Schweizerischen Bundesgerichts für die Prüfung der Verfassungsmässigkeit gesehen werden.

I. Nicht justiziable Angelegenheiten und Intensität der Präferenz

1. Berücksichtigt Ihr Gericht ein Spektrum von gerichtlichen Rücklegungen? Gibt es "un-

2130 Arrêt du Tribunal fédéral 2C_192/2017 du 9 janvier 2018 consid. 4.2.

2131 Arrêt du Tribunal fédéral 2C_847/2017 du 25 mai 2018 consid. 4: «La demande d'assistance judiciaire gratuite du recourant indigent est admise, le recours déposé au Tribunal fédéral ne pouvant être considéré d'emblée comme voué à l'échec (art. 64 al. 1 LTF), compte tenu de l'avis divergent d'une minorité des juges de l'instance précédente» (nous traduisons).

2132 verfasst von: Alberta L'Eplattenier, Eldina Kurtic et Sonia Sanchez

2133 Art. 188 der Bundesverfassung der schweizerischen Eidgenossenschaft [BV, SR 101]. Die vollständige schweizerische Gesetzessammlung kann mit Eingabe der SR-Nummer im Feld "Suche" unter der Adresse http://www.admin.ch/ch/d/sr/sr.html konsultiert werden.

2134 Art. 189 Abs. 4 BV; siehe auch BGE 134 V 443 E. 3.2: «Au regard des art. 29a et 189 al. 4 Cst., on doit déduire qu'il appartient au législateur fédéral d'examiner et de décider dans quelle situation il entend soumettre les actes du Gouvernement fédéral au contrôle du juge (...), sous réserve des cas dans lesquels le droit international imposerait l'accès juridictionnel». ◦ Art. 190 BV

bekannte" Bereiche oder vorher festgelegte Bereiche, in denen keine rechtliche Verantwortlichkeit besteht, oder nicht justiziable Fragen für **Ihren Gerichtshof (z.B. kontroverse moralische Fragen, politische Empfindlichkeiten, Kontroversen in der Gesellschaft, begrenzte Ressourcenzuweisung, erhebliche finanzielle Auswirkungen** für die **Regierung usw.)?**

Ja, das Prinzip der richterlichen Zurückhaltung ist auch für das Schweizer Bundesgericht von Bedeutung und beeinflusst seine Arbeitsweise. Es findet seine Anwendung einerseits in der gesetzlichen Kognitionsbeschränkung, andererseits aber auch in der materiellrechtlich begründeten Kognitionsbeschränkung bei Vorliegen von ortsabhängigen oder sonstigen partikulären Besonderheiten (siehe dazu Antwort zu Frage 2). Ein Hauptgrund der gesetzlichen Kognitionsbeschränkung des Bundesgerichts ist dessen chronische Überlastung[2135] und damit die Befürchtung, dass das Bundesgericht seine Hauptaufgaben, nämlich die Gewährung des Rechtsschutzes im konkreten Fall, die schweizweite einheitliche Rechtsanwendung und die Weiterentwicklung der Rechtsfortbildung, nicht mehr erfüllen könnte. Gestützt auf Art. 29a Satz 2 in Verbindung mit Art. 191 Abs. 3 BV können Bund und Kantone die richterliche Beurteilung in Ausnahmefällen durch Gesetz ausschliessen. Ein solcher Ausschluss kann darin bestehen, dass gewisse Bereiche von der richterlichen Überprüfung gänzlich ausgenommen werden, oder auch darin, dass die richterliche Kognition für bestimmte Arten von Streitigkeiten auf Rechtsfragen oder gar nur auf eine Willkürprüfung beschränkt wird. Das Bundesgerichtsgesetz[2136] sieht folgende gesetzliche Kognitionsbeschränkungen des Bundesgerichts vor:

Sachverhaltsfeststellung: Das Bundesgericht legt seinem Urteil den Sachverhalt zugrunde, den die Vorinstanz festgestellt hat.[2137] Es kann die Sachverhaltsfeststellung der Vorinstanz von Amtes wegen berichtigen oder ergänzen, wenn sie offensichtlich unrichtig ist oder auf einer Rechtsverletzung beruht.[2138]

Rechtsanwendung von Amtes wegen: Das Bundesgericht wendet das Recht von Amtes wegen an.[2139] Es prüft aber die Verletzung von Grundrechten und von kantonalem und interkantonalem Recht nur insofern, als eine solche Rüge in der Beschwerde vorgebracht und begründet worden ist.[2140]

Streitwertgrenzen: Das Bundesgesetz über das Bundesgericht[2141] sieht Streitwertgrenzen vor - dies allerdings nur wenn nicht Rechtsfragen von grundsätzlicher Bedeutung geltend gemacht werden -, die den Zugang zum Bundesgericht begrenzen können[2142].

Ausnahmen vom Zugang zum Bundesgericht [2143]: Besonders zu erwähnen ist in diesem Zusammenhang der Ausnahmekatalog von Art. 83 BGG. Er sieht einen reichhaltigen Katalog von Sachgebieten vor, die vom Zugang zum Bundesgericht ausgeschlossen sind. Ausgeschlossen sind zum Beispiel Entscheide auf dem Gebiet der inneren oder äusseren Sicherheit des Landes, der Neutralität, des diplomatischen Schutzes und der übrigen auswärtigen Angelegenheiten, soweit das Völkerrecht nicht einen Anspruch auf gerichtliche Beurteilung einräumt,

2135 BBl 2001 4211
2136 Bundesgerichtsgesetz, BGG, SR 173.110
2137 Art. 105 Abs. 1 und Art. 118 Abs. 1 BGG
2138 Art. 97, Art. 105 Abs. 2 und Art. 118 Abs. 2 BGG
2139 Art. 106 Abs. 1 BGG
2140 Art. 106 Abs. 2 BGG
2141 Bundesgerichtsgesetz, BGG, SR 173.110
2142 Art. 74, 75 und 85 BGG
2143 Art. 73, 79 und 83 BGG [14] BBl 2001 4230

Entscheide zum Einbürgerungsrechts (lit. b), zum Ausländerrecht (lit. c) und zum Asylrecht (lit. d), um nur einige zu nennen.

Eine abschliessende Auflistung findet sich in Art. 83 BGG. Der Ausschluss eines Sachgebietes hat zur Folge, dass die Verantwortung, letztinstanzlich die Einhaltung des Bundesrechts (einschliesslich der Grundrechte) zu gewährleisten, in diesen Gebieten beim Bundesverwaltungsgericht oder bei den kantonalen Gerichten liegt[14]. Zu bemerken ist aber, dass der Gesetzgeber solche Ausschlüsse von der richterlichen Beurteilung nur für «Ausnahmefälle" vorsehen darf[2144].

2. Gibt es Faktoren, die ausschlaggebend dafür sind, wie und wann Ihr Verfassungsgericht sich respektvoll verhalten sollte (z. B. die Kultur und die Bedingungen Ihres Landes; die historischen Erfahrungen Ihres Landes; der absolute oder eingeschränkte Charakter der fraglichen Grundrechte; die Frage, die vor dem Verfassungsgericht erörtert wird; ob die Umstände des Falles veränderte soziale Bedingungen und Einstellungen beinhalten)?

Neben der vom Gesetz vorgesehenen richterlichen Kognitionsbeschränkung hält sich das Bundesgericht auch immer wieder bei der Beurteilung von Entscheiden der Vorinstanzen zurück. Faktoren, die das Bundesgericht zu richterlicher Zurückhaltung bewegen können, sind vielfältig. Das Bundesgericht übt eine gewisse Zurückhaltung, wenn die Vorinstanzen über ein besonderes Fachwissen verfügen. Im Rahmen dieses "technischen Ermessens" belässt es der verfügenden Behörde bei der Bewertung von ausgesprochenen Fachfragen einen gewissen Beurteilungsspielraum, soweit sie die für den Entscheid wesentlichen Gesichtspunkte geprüft und die erforderlichen Abklärungen sorgfältig und umfassend durchgeführt hat[2145]. So bezeichnet es zum Beispiel die Tierversuchskommission, die Eidgenössische Elektrizitätskommission[17], die Natur- und Heimatschutzkommission und Umweltschutzfachstellen als solche Fachbehörden[2146]. Auch bei der materiellen Beurteilung von Prüfungsentscheiden übt das Bundesgericht Zurückhaltung, indem es erst einschreitet, wenn sich die Behörde von sachfremden oder sonst wie ganz offensichtlich unhaltbaren Erwägungen hat leiten lassen, so dass ihr Entscheid unter rechtsstaatlichen Gesichtspunkten als nicht mehr vertretbar und damit als willkürlich erscheint[2147].

Bei Vorliegen von spezifischen örtlichen Besonderheiten, wie z.B. im Rahmen des Raumplanungsrechts der Kantone, welche die kantonalen Behörden besser kennen, übt das Bundesgericht eine gewisse Zurückhaltung[2148].

Im Rahmen der abstrakten Normenkontrolle kantonalen Rechts schränkt das Bundesgericht seine Kognition auch aus Gründen des Föderalismus und der Verhältnismässigkeit ein (für weitere Ausführugen siehe Antwort zu Frage 5).

3. Gibt es Situationen, in denen Ihr Verfassungsgericht aufgrund mangelnder institutioneller Zuständigkeit oder mangelnden Fachwissens Ehrerbietung geübt hat?

Siehe dazu Antwort zu Frage 2 und zu Frage 5.

2144 Art. 29a zweiter Satz BV

2145 vgl. BGE 135 II 384 E. 2.2; die Rechtsprechung des Bundesgerichts kann auf der Webseitehttps://www.bger.ch/ext/eurospider/live/de/php/clir/http/index.php?type=start&lang=de kostenlos konsultiert werden [17]BGE 142 II 451 E. 4.5.1

2146 BGE 139 II 185 E. 9.2

2147 BGE 136 I 229 E. 6.2: Überprüfung einer Prüfungsnote an einer Universität; BGE 131 I 467 E. 3.1: Rechtsanwalts- oder Notariatsprüfungen

2148 BGE 147 II 465 E. 4.3.2; Überprüfung der Schutzwürdigkeit einer Baute aus Gründen des Denkmalschutzes und des Landschaftsschutzes; Deponiestandort in Richtplan: BGE 147 I 433

4. Gibt es Fälle, in denen Ihr Verfassungsgericht eine Ausnahme gemacht hat, weil die Gefahr eines Justizirrtums bestand?

Wie in den Vorbemerkungen erwähnt, ist das Bundesgericht die oberste rechtsprechende Behörde der Schweizerischen Eidgenossenschaft. Als letztinstanzliche oberste Behörde wacht es über die Einhaltung der Bundesgesetzgebung in allen Rechtsgebieten.

Es kann vom Grundsatz, dass es seinem Urteil den Sachverhalt zugrunde legt, den die Vorinstanz festgestellt hat, abweichen[2149] und die Sachverhaltsfeststellung der Vorinstanz von Amtes wegen berichtigen oder ergänzen, wenn sie offensichtlich unrichtig ist oder auf einer Rechtsverletzung beruht[2150] (für weitere Ausführungen siehe Antwort zu Frage 1).

Des weiteren kann das Bundesgericht vom Prinzip der richterlichen Zurückhaltung im Zusammenhang mit Fachwissen, spezifischen örtlichen Besonderheiten oder aus föderalistischen Überlegungen und zugunsten der Verhältnismässigkeit vom Prinzip der richterlichen Zurückhaltung abweichen, wenn der Entscheid der Vorinstanz offensichtlich unhaltbar und den Prinzipien eines Rechtsstaates entgegensteht (weitere Ausführungen dazu siehe Antwort zu Frage 2).

In Anbetracht der obigen Ausführungen ist die vom Bundesgericht vorgenommene richterliche Kontrolle im Gegenteil ein Mittel, um mögliche Justizfehler der unteren Instanzen zu korrigieren.

5. Gibt es Fälle, in denen sich Ihr Verfassungsgericht auf die institutionelle oder demokratische Legitimation des Entscheidungsträgers berufen hat?

Der Grundsatz der Gewaltenteilung ist ein wichtiges Grundprinzip der schweizerischen Staatsordnung (zusammengesetzt aus Legislative, Exekutive und Judikative) und schützt gemäss bundesgerichtlicher Rechtsprechung die Einhaltung der verfassungsmässigen Zuständigkeitsordnung[2151]. Aufgrund seiner demokratischen Legitimation (Bundesgesetze werden dem Volk zur Abstimmung vorgelegt, wenn 50'000 Bürger oder 8 Kantone dies verlangen [fakultatives Referendum]) steht das Parlament über der judikativen Gewalt[2152]. Die Schweizer Rechtsordnung verleiht also dem demokratischen Prinzip eine Vorrangstellung.

Die Bundesverfassung gewährleistet mit einigen Bestimmungen, dass die Gewaltenteilung eingehalten wird und die Judikative sich nicht über die Legislative stellt. Wie in den Vorbemerkungen schon erwähnt, können Akte der Bundesversammlung und des Bundesrates können beim Bundesgericht nicht angefochten werden (Art. 189 Abs. 4 BV); Ausnahmen bestimmt das Gesetz und das internationale Recht. Zudem bestimmt Artikel 190 BV, dass «Bundesgesetze und Völkerrecht für das Bundesgericht und die anderen rechtsanwendenden Behörden massgebend sind», auch wenn ein Bundesgesetz verfassungswidrig sein sollte.

Wie ebenfalls in den Vorbemerkungen erwähnt, können hingegen kantonale Regelungen direkt im abstrakten Normenkontrollverfahren oder indirekt anlässlich ihrer Anwendung im Einzelfall (konkrete Normenkontrolle) durch das Bundesgericht auf ihre Verfassungsmässigkeit und ihre Übereinstimmung mit dem Bundesrecht überprüfen werden. Im Rahmen der abstrakten Kontrolle der Verfassungsmässigkeit kantonaler Normen beruft sich das Bundesgericht jedoch auf die institutionelle oder demokratische Legitimation des Entscheidungsträgers. In diesem Fall überprüft das Bundesgericht den Erlass grundsätzlich mit freier Kognition, auferlegt sich aber aus Gründen des Föderalismus, der Verhältnismässigkeit und - bei der Überprüfung kommunalen Rechts - der Gemeindeautonomie eine gewisse Zurückhaltung. Nach der Rechtsprechung des Bundesgerichts ist dabei massgebend, ob der betreffenden Norm nach

2149 Art. 105 Abs. 1 und Art. 118 Abs. 1 BGG

2150 Art. 97, Art. 105 Abs. 2 und Art. 118 Abs. 2 BGG

2151 vgl. z.B. BGE 147 I 478, BGE145 V 380

2152 Federica De Rossa Gisimundo, Die Rolle der Verfassungsgerichte in der "Multi-Level-Governance", 2016, S. 43ff.

anerkannten Auslegungsregeln ein Sinn beigemessen werden kann, der sie mit dem angerufenen Verfassungs- oder Gesetzesrecht vereinbar erscheinen lässt. Das Bundesgericht hebt eine kantonale (oder kommunale) Norm nur auf, wenn sie sich jeder verfassungskonformen bzw. mit dem höherstufigen Bundesrecht vereinbarten Auslegung entzieht, nicht jedoch, wenn sie einer solchen in vertretbarer Weise zugänglich ist[2153]. Erscheint eine generell-abstrakte Regelung unter normalen Verhältnissen, wie sie der Gesetzgeber voraussetzen durfte, als verfassungsrechtlich zulässig, so vermag die ungewisse Möglichkeit, dass sie sich in besonders gelagerten Einzelfällen als verfassungswidrig erweisen könnte, ein Eingreifen des Verfassungsrichters im Stadium der abstrakten Normenkontrolle im Allgemeinen noch nicht zu rechtfertigen; den Betroffenen verbleibt die Möglichkeit, eine allfällige Verfassungswidrigkeit bei der Anwendung im Einzelfall geltend zu machen[2154]. Das Bundesgericht respektiert somit den politischen Spielraum des (kantonalen und kommunalen) Gesetzgebers und übt bei der Normenkontrolle eine gewisse Zurückhaltung.

Als Beispiel, in dem sich das Bundesgericht in seiner Entscheidfindung zurückhaltend geäussert hat, ist die Beurteilung des Veranstaltungsverbots des Kantons Schwyz zur Eindämmung der Covid-19-Pandemie zu erwähnen. In diesem Fall hat sich das Bundesgericht ebenfalls auf die institutionelle Legitimation des Regierungsrats des Kantons Schwyz abgestützt und das Veranstaltungsverbot in Anbetracht des dem Regierungsrat zustehenden Ermessensspielraums als gesetzes- und verfassungskonform und namentlich als verhältnismässig erachtet. Es führte unter anderem aus: «Das Bundesgericht prüft bei Grundrechtseingriffen die Verhältnismässigkeit frei. Es auferlegt sich aber eine gewisse Zurückhaltung, wenn sich ausgesprochene Ermessensfragen stellen oder besondere örtliche Umstände zu würdigen sind, welche die kantonalen Behörden besser kennen und überblicken als das Bundesgericht»[2155]. Gestützt auf den Grundsatz der freien Verhältnismässigkeitsprüfung hat das

Bundesgericht die Rechtslage in einem Fall den Kanton Bern betreffend anders beurteilt und sich nicht zurück gehalten die kantonale Praxis zu verwerfen[2156].Es betrachtete die Beschränkung der Teilnehmerzahl an politischen und zivilgesellschaftlichen Kundgebungen auf 15 Personen als unverhältnismässig[2157] und als verfassungswidrigen Eingriff in die Versammlungsfreiheit[2158].

6. «Je mehr die Gesetzgebung ein breites sozialpolitisches Problem betrifft, desto weniger wird das Gericht bereit sein, einzugreifen». Ist dies ein gültiger Maßstab für Ihren Gerichtshof? Teilt Ihr Gerichtshof die Auffassung, dass Fragen der öffentlichen **Ordnung durch demokratische Verfahren entschieden werden sollten, da die Gerichte nicht gewählt sind und nicht** über **das demokratische Mandat verfügen,** über **Angelegenheiten der** öffentlichen **Politik zu entscheiden?**

Die Schweiz ist eine repräsentative Demokratie, die den Stimmbürgerinnen und Stimmbürgern direkt-demokratische Instrumente zur Verfügung stellt, die es ihnen erlauben, an der politischen Ausgestaltung der Schweiz teilzunehmen[2159]. Die Präambel und Art. 2 der Bundesverfassung unterstreichen den Schutz und die Weiterentwicklung der Demokratie und der Rechte der einzelnen Bürgerinnen und Bürger. Der Demokratiegrundsatz ist in der Schweiz tief verankert. Dieses Demokratieverständnis ist auch vom Bundesgericht in seinen Urteilen zu beachten:

2153 BGE 148 I 198 E. 2.2; BGE 147 I 308 E. 3; BGE 145 I 26 E. 1.4; BGE 143 I 272 E. 2.5; BGE 137 I 77 E. 2

2154 BGE 137 I 77 E. 2

2155 BGE 147 I 450 E. 3.2.5

2156 BGE 148 I 33

2157 BGE 148 I 33 E. 7.7

2158 BGE 148 I 33 E. 8

2159 vgl. M. E. Looser, verfasssungsgerichtliche Rechtskontrolle gegenüber schweizerischen Bundesgesetzen, 2011, S. 650 ff. Rz. 16 und 17

«Die Bedeutung der Demokratie erfordert vom schweizerischen Richter, dass er mit notwendiger rationaler Sensibilität über demokratisch legitimierte Entscheidungen urteilt, um die nötige soziale Akzeptanz zu bekommen und damit den Rechtsfrieden zu fördern sowie dem sozialen Ungehorsam entgegen zu wirken»[2160]. Das

Bundesgericht übt in politisch heiklen Problemstellungen des öfteren richterliche Zurückhaltung. Zu erwähnen ist in diesem Zusammenhang der Entscheid des Bundesgerichts in Sachen "Klimaseniorinnen"[2161]. Mit ihrer Klage wollten die Beschwerdeführerinnen die Schweizer Regierung dazu bringen, in der Problematik des Klimawandels mehr zu unternehmen und den rechtlichen Rahmen der Auswirkungen des Klimawandels zu regeln. In der Beantwortung dieses Anliegens verhielt sich das Bundesgericht zurückhaltend und betonte, dass Anträge auf eine bestimmte Gestaltung aktueller Politikbereiche nach dem schweizerischen Verfassungsrecht grundsätzlich auf dem Weg der demokratischen Mitwirkungsmöglichkeiten eingebracht werden könnten[2162]. Das Bundesgericht verwies die Beschwerdeführerinnen dabei auf die politischen Rechte, wie die Ergreifung einer Volksinitiative zur Total- oder Teilrevision der

2160 vgl. M. E. Looser, verfasssungsgerichtliche Rechtskontrolle gegenüber schweizerischen Bundesgesetzen, 2011, S 65 Rz. 17

2161 BGE 146 I 145

2162 BGE 146 I 145 E. 4

Bundesverfassung[2163], das Petitionsrecht[36], das Initiativ- und Antragsrecht der Mitglieder der Eidgenössischen Räte, der Fraktionen, parlamentarischen Kommissionen und Kantone[2164] und das Antragsrecht der Ratsmitglieder und des Bundesrats zu einem in Beratung stehenden Geschäfts[2165] [2166]. Es argumentierte:

"Derartige Anliegen sind nicht auf dem Rechtsweg, sondern mit politischen Mitteln durchzusetzen, wozu das schweizerische System mit seinen demokratischen Instrumenten hinreichende Möglichkeiten eröffnet"[2167].

Auch in sozialpolitisch brisanten Fragestellungen verhält sich das Bundesgericht in seiner Rechtsprechung des öfteren zurückhaltend. So sind Entscheide im Bereich der Berechnung von Unfallversicherungsleistungen für Werkstudenten[21682169], die Auseinandersetzung mit den Anspruchsvoraussetzungen für eine Witwen- und Witwerrente[42] und im Bereich des Familiennachzugs für Schweizer Bürger[2170] in diesem Zusammenhang erwähnenswert.

7. Akzeptiert Ihr Verfassungsgericht einen allgemeinen Grundsatz der Ehrerbietung gegenüber der Rechtsprechung im Bereich der Strafrechtspolitik und -philosophie?

Ja, das Bundesgericht respektiert bei der Beurteilung von Beschwerden in Strafsachen gemäss Art. 78 bis 81 BGG grundsätzlich die Rechtsprechung im Bereich der Strafrechtspolitik und -philosophie der unteren Gerichtsinstanzen. Das Bundesgericht beurteilt Beschwerden in Strafsachen, die gegen letztinstanzliche kantonale Urteile und gegen Urteile des Bundesstrafgerichts erhoben werden[2171]. Der von der Vorinstanz als erwiesen angesehene Sachverhalt kann vom Bundesgericht aber nur sehr beschränkt überprüft werden. Gemäss Art. 105 Abs. 1 BGG ist das Bundesgericht grundsätzlich an den von der Vorinstanz festgestellten Sachverhalt gebunden. Als oberste Recht sprechende Behörde[2172] hat das Bundesgericht die angefochtenen Entscheidungen auf die richtige Rechtsanwendung hin zu überprüfen. Für ergänzende Tatsachen- und Beweiserhebungen sind die Sachgerichte zuständig. Art. 105 Abs. 2 BGG verpflichtet das Bundesgericht somit nicht zur Sachverhaltsergänzung. Ist aber ein Sachverhalt lückenhaft, so ist gestützt auf Art. 107 Abs. 2 BGG das angefochtene Urteil aufzuheben und die Sache zur ergänzenden Tatsachenfeststellung und neuen Beurteilung an die Vorinstanz zurück zu weisen[2173]. Die meisten Rechtsmittel sind reformatorisch. Wenn ein Fall spruchreif ist, soll das Gericht refomatorisch entscheiden. Das gilt grundsätzlich auch für die strafrechtliche Abteilung des Bundesgerichts[2174].

8. Es kann strengere Umstände geben, unter denen die Regierung keine Informationen an den Gerichtshof weitergeben darf, insbesondere im Zusammenhang mit Fällen der nationalen Sicherheit, die Verschlusssachen betreffen. Hat der Gerichtshof Ihnen jemals aus Gründen der nationalen Sicherheit Nachsicht entgegengebracht?

Ja, das Bundesgericht kann aus Gründen der nationalen Sicherheit richterliche Zurückhaltung üben. Gemäss

2163 Art. 138
f. BV [36] Art. 33 BV
2164 Art. 160 Abs. 1 BV
2165 Art. 160 Abs. 2 BV
2166 BGE 146 I 145 E. 4
2167 BGE 146 I 145 E. 5.5
2168 BGE 148 V 84, dort E. 4.6.1 und 7.4; siehe dazu Antwort zu Frage 5
2169 C_617/2011 vom 4. Mai 2012 E. 3.5; siehe dazu Antwort zu Frage 9
2170 BGE 136 II 120 E. 3.5.2; siehe dazu Antwort zu Frage 9
2171 Art. 80 BGG
2172 Art. 1 Abs. 1 BGG
2173 vgl. z.B. 133 IV 293 E. 3.4.2
2174 C. Hurni, Gerichte legen Regeln schärfer aus als nötig, plädoyer 5/2019 S. 11: "Doch diese Abteilung hat die Praxis – entgegen dem Wortlaut von Artikel 107 Absatz 2 BGG –, stets zu kassieren und nie reformatorisch zu entscheiden. Kommt diese Abteilung aber zum Schluss, dass die Strafzumessung unrichtig vorgenommen wurde, und kennt sie sämtliche Tatsachenelemente, dann gibt es keinen Grund, die Strafe nicht selbst festzulegen."; siehe auch z.B. 6B_146/2007 vom 24. August 2007 E. 7.2 (Erwägung nicht publiziert in BGE 133 IV 293)

Art. 83 lit. a BGG sind Entscheide auf dem Gebiet der inneren und äusseren Sicherheit des Landes, der Neutralität, des diplomatischen Schutzes und der übrigen auswärtigen Angelegenheiten, soweit das Völkerrecht nicht einen Anspruch auf gerichtliche Beurteilung einräumt, die im Wesentlichen politische Fragen betreffen, vom Zugang zum Bundesgericht ausgeschlossen. Es handelt sich dabei um eigentliche Regierungsakte (sog. "actes de gouvernement") also Ermessensentscheide, für welche die Verantwortung allein bei der Regierung liegen muss[2175]. Das Bundesgericht betont in seiner Rechtsprechung, dass derartige Entscheidungen nicht oder kaum justiziabel sind und die Regierung für die getroffenen Entscheidungen allein verantwortlich bleiben muss, da die Massnahmen, welche den Schutz der staatlichen Integrität und die Aufrechterhaltung der guten Beziehungen mit dem Ausland betreffen, zu ihren wesentlichen Aufgaben gehören[2176]. Als Massnahmen zur Wahrung der nationalen Sicherheit gelten vorab Anordnungen des Bundesrates und der Bundesverwaltung gestützt auf Art. 184 Abs. 3 oder Art. 185 Abs. 3 BV[2177]. Das Bundesgericht hat ebenfalls Art. 83 lit. a BGG angewendet, wenn polizeiliche Massnahmen in Frage stehen, welche unmittelbar auf eine Prävention vor Terrorismus, Spionage, gewalttätigem Extremismus, organisiertem Verbrechen oder politischer Agitation ausgerichtet sind. Die Entscheidungen des Sonderbeauftragten über die

Einsicht in die Staatsschutzakten des Bundes[51] oder die Beschlagnahme von Propagandamaterial der Kurdischen Arbeiterpartei PKK[52] sind von der Rechtsprechung als die nationale Sicherheit i. S. v. Art. 83 lit. a BGG betreffend beurteilt worden. Gleich hat das Bundesgericht bezüglich eines Einreiseverbots entschieden, welches im Interesse der öffentlichen Ordnung und der nationalen Sicherheit gegen einen LPKund UÇK-Aktivisten[2178] verhängt worden ist.

9. In Anbetracht der Rolle der Verfassungsgerichte als Hüter der Verfassung sollten sie in angeblich verfassungswidrige staatliche Maßnahmen eingreifen, wenn die Regierungen bei der Umsetzung von Reformen zur Einhaltung der Grundrechte passiv sind?

Wie bereits mehrfach erwähnt, kennt die Schweiz nur eine partielle Verfassungsgerichtsbarkeit. Im Gegensatz zu den meisten anderen Staaten bestimmt Artikel 190 BV, dass "Bundesgesetze und Völkerrecht für das Bundesgericht und die anderen rechtsanwendenden Behörden massgebend sind", auch wenn das Bundesgesetz verfassungswidrig sein sollte. Artikel 190 BV verbietet es dem Bundesgericht aber nicht, die Verfassungsmässigkeit eines Bundesgesetzes zu prüfen. Es ist befugt, festzustellen, dass ein Bundesgesetz Verfassungsrecht verletzt. Es kann diese Feststellung hingegen nicht mit der Aufhebung oder der Nichtanwendbarkeit des betreffenden Gesetzes sanktionieren, und muss die gesetzliche Bestimmung trotzdem anwenden[2179]. Das Bundesgericht kann aber auch dem Gesetzgeber unter Umständen eine Gesetzesanpassung empfehlen[2180]. Weiter kann es den Gesetzgeber über Problempunkte bei der Gesetzesanwendung in Kenntnis setzen, die beim Erlass eines Gesetzes nicht ersichtlich waren. Das Bundesgericht kann also Impulse an den Gesetzgeber geben[2181].

2175 T. Häberli, in: Basler Kommentar, Bundesgerichtsgesetz, 2018, Art. 83 BGG Rz. 20

2176 z.B. BGE 132 II 342 E. 1: Interpol-Verordnung; BGE 137 I 371 E. 1.2: Intervention der Schweiz bei der Bank für Internationalen Zahlungsausgleich (BIZ) mit dem Ziel, einer ausdrücklichen Zustimmung zu einem Arrest Vorschub zu leisten

2177 so z. B. 1A.157/2005: Zwangsmassnahmen zur Durchsetzung von UNO-Sanktionen gemäss Art. 1 ff. des Bundesgesetzes vom 22. März 2002 über die Durchführung von internationalen Sanktionen, EmbG, SR 946.231 [51] "Fichen-Affäre", BGE 117 Ia 202 E. 6b, BGE 117 Ia 221 E. 4 und BGE 118 Ib 277 E. 2b [52] BGE 125 II 417 E. 4

2178 BGE 129 II 193 E. 2.1

2179 Urteil des Bundesgerichts 9C_617/2011 vom 4. Mai 2012

2180 Artur Terekhov, Von der gebotenen Differenzierung zwischen Verfassungsgerichtsbarkeit gegenüber kantonalem Recht und Bundesrecht im Lichte der Gewaltenteilung, in: ius.full 6/20 S. 163

2181 Susanne Leuzinger, Hinweise des Bundesgerichts an den Gesetzge-

Als Beispiel ist der Fall 9C_617/2011 zu erwähnen, in dem das Bundesgericht festgestellt hat, dass der Gesetzgeber mit der unterschiedlichen Regelung der Voraussetzungen für Witwen- und Witwerrente in Art. 24 Abs. 2 AHVG explizit eine geschlechtsspezifische Unterscheidung vorgenommen hat, die sich weder wegen biologischer noch wegen funktionaler Verschiedenheiten aufdrängt. Das ist eine mit dem heutigen Art. 8 Abs. 3 BV unvereinbare Verfassungswidrigkeit, die bis heute besteht. Das Bundesgericht und die anderen rechtsanwendenden Behörden sind indes an die Bestimmung gebunden. Dieser Entscheid wurde an den Europäischen Gerichtshof für Menschenrechte (EGMR) in Strassburg weiter gezogen (siehe dazu auch Antwort zu Frage 30).

Das Bundesgericht hat als weitere Möglichkeiten, sich in den Gesetzgebungsprozess einzubringen, das Anfügen von obiter dicta[57], Hinweise an den Gesetzgeber in den jährlichen Geschäftsberichten, die Mitwirkung von einzelnen Mitgliedern des Bundesgerichts als besondere Sachverständige in den Expertenkommissionen oder die offizielle Einbindung des Bundesgerichts in Arbeitsgruppen zur Vorbereitung von Gesetzesprojekten.

II. Beschlussfassung

10. Schenkt Ihr Verfassungsgericht einem Rechtsakt des Parlaments mehr gerichtlichen Rücklegungen als einer Entscheidung der Exekutive? Gewährt Ihr Verfassungsgericht dem Grad der demokratischen Verantwortlichkeit des ursprünglichen Entscheidungsträgers Ehrerbietung?

Siehe Antwort zu Frage 5.

11. Welche Gewichtung weist Ihr Verfassungsgericht dem Gesetzgebungsverfahren zu? Welche rechtliche Bedeutung sollte die parlamentarische Analyse, wenn überhaupt**, für die Prüfung der Kompatibilität mit den Grundrechten durch die Richter haben?**

In diesem Zusammenhang ist auf die Gesetzesmaterialien und deren Auslegung durch das Bundesgericht hinzuweisen. Unter Gesetzesmaterialien verstehen wir die "amtlichen Dokumente der gesetzgeberischen Vorarbeiten und des eigentlichen Gesetzgebungsverfahrens (wie Vorentwürfe, Entwürfe, Gutachen, Motivenberichte, Botschaften, Weisungen, Kommissions- und Parlamentsprotokolle)"[2182].

"Das Gesetz ist in erster Linie aus sich selbst heraus auszulegen, d.h. nach dem Wortlaut, Sinn und Zweck und den ihm zugrunde liegenden Wertungen auf der Basis einer teleologischen Verständnismethode. Die Gesetzesauslegung hat sich vom Gedanken leiten zu lassen, dass nicht schon der Wortlaut die Norm darstellt, sondern erst das an Sachverhalten verstandene und konkretisierte Gesetz. Gefordert ist die sachlich richtige Entscheidung im normativen Gefüge, ausgerichtet auf ein befriedigendes Ergebnis der ratio legis. Das Bundesgericht befolgt einen pragmatischen Methodenpluralismus und lehnt es namentlich ab, die einzelnen Auslegungselemente einer hierarchischen Prioritätsordnung zu unterstellen (...). Die Gesetzesmaterialien sind zwar nicht unmittelbar entscheidend, dienen aber als Hilfsmittel, um den Sinn der Norm zu erkennen. Bei der Auslegung neuerer Bestimmungen kommt den Materialien eine besondere Stellung zu (...)"[2183].

12. Prüft Ihr Verfassungsgericht, ob der Entscheidungsträger seine Entscheidung ge-

ber, in: Justice – Justiz – Giustizia, 2013/3 [57] z.B. BGE 139 I 16 E. 4 und 5

2182 Arthur Meier-Hayoz, in: Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Bd. I: Einleitung und Personenrecht, Einleitung: Artikel 1-10 ZGB (1966) Art. 1 ZGB

2183 BGE 148 IV 96 E. 4.4.1, BGE 146 II 201 E. 4.1

rechtfertigt hat oder ob die Entscheidung eine ist, die das Gericht selbst getroffen hätte, wenn es der Entscheidungsträger wäre?

Siehe Antworten zu Frage 5 und 9.

13. Achtet Ihr Verfassungsgericht darauf, inwieweit der Entscheidung oder Maßnahme eine umfassende Prüfung der Kompatibilität mit den Grundrechten vorausgegangen ist? Wie gründlich muss zum Beispiel die Analyse des Gesetzgebers sein, damit Ihr Verfassungsgericht ihrer Bedeutung beimisst?

Siehe Antworten zu Frage 1 (in Verbindung mit der Rechtsanwendung von Amtes wegen), 5 und 9.

Es ist aber auch wichtig hier auf Art. 141 Abs. 2 lit. a ParlG[2184] hinzuweisen. Aufgrund der fehlenden Verfassungsgerichtsbarkeit gegenüber Bundesgesetzen (Art.190 BV) und der Tatsache, dass Akte der Bundesversammlung und des Bundesrates beim Bundesgericht nicht angefochten werden können (Art. 189 Abs. 4 BV), ist es essenziell, dass die Verfassungskonformität der Entwürfe zu Erlassen der Bundesversammlung von der Verwaltung vorgängig gründlich begutachtet wird. Besonders wichtig ist es zu untersuchen, ob die Voraussetzungen für die Grundrechtsbeschränkung erfüllt sind[2185]. So sieht Art. 141 Abs. 2 lit a ParlG die Verpflichtung des Bundesrates vor, in der Botschaft zu einem Erlassentwurf die Auswirkungen der neuen Regelung auf die Grundrechte zu erläutern. Damit soll den Räten ein verfassungswidriger Erlassentwurf erspart bleiben.

14. Analysiert Ihr Verfassungsgericht, ob bei der Verabschiedung einer Maßnahme die gegensätzlichen Standpunkte in der parlamentarischen Debatte umfassend vertreten waren? Reicht es aus, dass eine breite Debatte über **den allgemeinen Inhalt der Rechtsvorschriften stattgefunden hat, oder muss den Auswirkungen auf die Rechte besondere Aufmerksamkeit geschenkt werden?**

Siehe Antworten zu Frage 5 und 9.

15. Ist die Tatsache, dass die Entscheidung vom Gesetzgeber getroffen wurde oder dass sie nach einer öffentlichen **Anhörung oder einer** öffentlichen **Debatte getroffen wurde, ein schlüssiger Nachweis** für die **demokratische Legitimität der Entscheidung?**

Siehe Antwort zu Frage 5.

III. Geltungsbereich der Rechte, Rechtmäßigkeit und Verhältnismäßigkeit

16. Hat Ihr Gerichtshof die gerichtliche Rücklegung in der Phase der Definition von Rechten gezeigt und der Definition von Rechten durch die Regierung oder ihrer Anwendung auf den fraglichen Sachverhalt Gewichtung verliehen?

Aufgrund der Gewaltenteilung hat das Bundesgericht nur eine unwesentliche Bedeutung im ordentlichen Gesetzgebungsverfahren und folglich auch in der Definition von Rechten bzw. in der Gestaltung von neuem Recht. In seltenen Fällen wird das Bundesgericht als zusätzlicher Adressat in die Ämterkonsultation einbezogen[2186]. Im Vernehmlassungsgesetz[63] wird das Bundesgericht nicht einmal erwähnt. Wenn es jedoch in Frage kommt, fällt es in die Kategorie der "weiteren, im Einzelfall interessierten Kreise" (Art. 4 Abs. 2 lit. e VlG). In solchen Fällen übt es mit Rücksicht auf die Gewaltenteilung Zurückhaltung und enthält sich rechtspolitischer Wer-

2184 Parlamentsgesetz, ParlG, SR 171.10

2185 GESETZGEBUNGSLEITFADEN, Leitfaden für die Ausarbeitung von Erlassen des Bundes, 2019, S. 180

2186 Paul Tschümperlin, Die Rolle des Bundesgerichts im Gesetzgebungsprozess, LEGES 2016/3 S. 450 [63] Vernehmlassungsgesetz, VlG, SR 172.061

tungen.

Eine der Besonderheiten des schweizerischen Verfassungsrechts besteht jedoch darin, dass unter der alten Verfassung der Schweizerischen Eidgenossenschaft (1874) die Entstehung eines ungeschriebenen Verfassungsrechts erlaubt war. So hat das Bundesgericht zur Entwicklung der heutigen Verfassung beigetragen, die zuvor noch als "lückenhaft und in gewissen Teilen karg"[2187] galt. Von der Doktrin ermutigt, haben die Bundesrichter so eine innovative Rechtsprechung aufgebaut, indem sie bereits etablierte Verfassungsgrundsätze erweiterten oder neue Grundrechte anerkannten. Auf diese Weise entstand die Mehrheit der sozialen Rechte, die nunmehr durch die aktuelle Bundesverfassung (1999) garantiert werden. Das neue Verfassungsrecht orientierte sich neben dem Verfassungstext der Schweizerischen Eidgenossenschaft, am Wunsch den sich verändernden politischen, wirtschaftlichen und sozialen Umständen Rechnung zu tragen. So konnte das Bundesgericht dem Willen des Verfassungsgebers treu bleiben und gleichzeitig eine zeitgemässe Anpassung gewährleisten. Die aktuelle Bundesverfassung, die am 18. April 1999 von Volk und Ständen angenommen wurde, hatte zum Ziel, das geschriebene und ungeschriebene Verfassungsrecht nach zu führen, verständlich zu machen, systematisch zu ordnen und die Sprache sowie die Regelungsdichte zu vereinheitlichen[2188]. Die neueste Fassung unserer Bundesverfassung sollte nun alle Grundrechte kodifiziert haben, die zuvor nur in der Rechtsprechung des Bundesgerichts und in der Lehre erwähnt wurden. Sie erhebt jedoch keinen Anspruch auf Vollständigkeit[2189] und es bleibt unbestritten, dass das Bundesgericht den Grundrechtsschutz weiterentwickeln kann, wenn der bestehende Katalog nicht ausreicht, um die elementarsten menschlichen Bedürfnisse nach Achtung und Schutz der individuellen Rechte und Freiheiten zuverlässig zu gewährleisten[2190].

Das Bundesgericht kann auch im Rahmen der Gesetzesauslegung "indirekt" die Definition eines Rechtes beeinflussen. In der bundesgerichtlichen Rechtsprechung heisst es, dass den Anfang jeder Gesetzesauslegung zunächst der Wortlaut einer Bestimmung (grammatikalisches Element) ausmacht. "Ist dieser klar, d.h. eindeutig und unmissverständlich, so darf davon nur abgewichen werden, wenn ein triftiger Grund für die Annahme besteht, der Wortlaut ziele am "wahren Sinn" - am Rechtssinn - der Regelung vorbei. Anlass für eine solche Annahme können die Entstehungsgeschichte der Bestimmung (historisch), deren Zweck (teleologisch) oder der Zusammenhang mit anderen Vorschriften (systematisch) geben, so namentlich, wenn die grammatikalische Auslegung zu einem Ergebnis führt, welches der Gesetzgeber so nicht gewollt haben kann"[2191].

17. Hat eines der anwendbaren Rechte Auswirkungen auf die Intensität der Befolgung? Ist Ihr Gericht der Ansicht, dass einige Rechte oder Aspekte von Rechten wichtiger sind und dass Eingriffe in ihre Ausübung daher strenger geprüft werden müssen als andere? Gibt es Faktoren, die den Charakter des fraglichen Grundrechts begründen?

Gemäss Art. 36 BV sind Einschränkungen von Grundrechten erlaubt, wenn sie über eine gesetzliche Grundlage verfügen, im öffentlichen Interesse stehen, verhältnismässig sind und den Kerngehalt des Grundrechts nicht verletzen. Das Bundesgericht beurteilt in freier Kognition, ob das öffentliche Interesse und die Verhältnismässigkeit hinsichtlich einer bestimmten Massnahme gegeben sind. Ob eine kantonale Vorschrift eine genügende gesetzliche Grund-

2187 Botschaft über eine neue Bundesverfassung vom 20. November 1996, BBl 1997 I 44

2188 Botschaft über eine neue Bundesverfassung vom 20. November 1996, BBl 1997 I 9, 26, 45, 46 und 117

2189 Botschaft über eine neue Bundesverfassung vom 20. November 1996, BBl1997 I 45 und 138

2190 Botschaft über eine neue Bundesverfassung vom 20. November 1996, BBl 1997 I 117

2191 BGE 148 V 162 E. 5.2

lage aufweist, überprüft das Bundesgericht nur auf Willkür hin, ausser es handle sich um einen schweren Eingriff in das betreffende Grundrecht. Die Schwere eines Eingriffs wird nach objektiven Kriterien begutachtet[2192].

Eine wichtige Rolle nimmt die Garantie der Menschenwürde ein (Art. 7 BV). Der Kerngehalt ist gewöhnlich nicht mit dem Anwendungs- oder Schutzbereich des Grundrechts identisch. Bei Grundrechten, deren Schutzbereich und Kerngehalt sich decken, sieht es anders aus. Dies ist der Fall für das Verbot der Todesstrafe und das Folterverbot (Art. 10 BV), sowie auch für das Recht auf Leben (Art. 10 BV), das Recht auf Hilfe in Notlagen (Art. 12 BV) und das Zensurverbot (Art. 17 BV)[2193].

18. Haben Sie einen Maßstab für die **Klarheit bei der Prüfung der Verfassungsmäßigkeit eines Gesetzes? Wie entscheiden Sie, wie klar ein Gesetz ist? Wann wenden Sie die Regel In claris non fit interpretatio?**

Wie anfangs in den Vorbemerkungen festgehalten, ermöglicht die Beschwerde in öffentlichrechtlichen Angelegenheiten Privaten, kantonale Regelungen direkt im abstrakten Normenkontrollverfahren oder indirekt anlässlich ihrer Anwendung im Einzelfall (konkrete Normenkontrolle) durch das Bundesgericht auf ihre Verfassungsmässigkeit und ihre Übereinstimmung mit dem Bundesrecht beurteilen zu lassen.

Gemäss bundesgerichtlicher Rechtsprechung ist bei der Prüfung der Verfassungsmässigkeit eines kantonalen Erlasses im Rahmen der abstrakten Normkontrolle massgebend, ob der betreffenden Norm nach anerkannten Auslegungsregeln ein Sinn zugemessen werden kann, der mit den angerufenen Verfassungs- oder EMRKGarantien vereinbar ist. Das Bundesgericht hebt eine kantonale Norm nur auf, sofern sie sich jeglicher verfassungs- und konventionskonformen Auslegung entzieht, nicht jedoch, wenn sie einer solchen in vertretbarer Weise zugänglich bleibt. Es ist grundsätzlich vom Wortlaut der Gesetzesbestimmung auszugehen und der Sinn nach den überkommenen Auslegungsmethoden zu bestimmen. Eine verfassungs- und konventionskonforme Auslegung ist namentlich zulässig, wenn der Normtext lückenhaft, zweideutig oder unklar ist. Der klare und eindeutige Wortsinn darf indes nicht durch eine verfassungskonforme Interpretation beiseite geschoben werden. Im Einzelnen wird auf die Tragweite des Grundrechtseingriffs, die Möglichkeit eines hinreichenden verfassungsrechtlichen Schutzes bei einer späteren Normkontrolle, die konkreten Umstände der Anwendung und die Auswirkungen auf die Rechtssicherheit abgestellt. Der blosse Umstand, dass die angefochtene Norm in einzelnen Fällen in verfassungswidriger Weise angewendet werden könnte, führt für sich allein noch nicht zu deren Aufhebung[2194].

19. Wie intensiv ist die Prüfung Ihres Verfassungsgerichts in der Phase der Feststellung des rechtmäßigen Ziels?

Das Bundesgericht hat eine unwesentliche Bedeutung im ordentlichen Gesetzgebungsverfahren (siehe Antwort zu Frage 16). Im Zusammenhang mit der Auslegung kann das Bundesgericht auch die Entstehungsgeschichte eines Gesetzes untersuchen; dies - wie schon geschildert – auf eine pragmatische Art und Weise (siehe Antwort zu Frage 11).

20. Welche Verhältnismäßigkeitsprüfung wendet Ihr Verfassungsgericht an? Wendet Ihr Gericht alle Schritte der klassischen Verhältnismäßigkeitsprüfung an (d. h. Angemessenheit, Erforderlichkeit und Verhältnismäßigkeit im engeren Sinne)?

Das Verhältnismässigkeitsprinzip hatte seinen juristischen Durchbruch im Polizei- und Wirtschaftsrecht. Sukzessiv breitete sich der Geltungsbereich auf die umfassende staatliche Tätigkeit aus. Erst im Zusammenhang mit der Verfassungsrevision von 1999 wurde die Verhältnismässigkeit als "Maxime des rechtsstaatlichen Handelns" (Art. 5 Abs. 2 BV) und als Grun-

2192 BGE 128 II 259 E. 3.3

2193 BIAGGINI, Komm. BV, Art. 36, N 24-25

2194 BGE 140 I 2 E. 4, vgl. auch BGE 138 II 173 E. 8.1 oder BGE 134 I 293 E. 2

drechtsschranke (Art. 36 Abs. 3 BV) in den Verfassungstext eingeführt. Zuvor wurde sie als "ungeschiebener Grundsatz" wahrgenommen (Art. 4 aBV)[2195].

Gemäss Art. 5 Abs. 2 BV muss staatliches Handeln im öffentlichen Interesse liegen und verhältnismässig sein. Das Verhältnismässigkeitsprinzip ist umfassend anwendbar und alle drei Staatsgewalten sind daran gebunden. Der Geltungsbereich erstreckt sich auf hoheitliches wie auch auf nicht hoheitliches Handeln. Weiter ist das Verhältnismässigkeitsprinzip in der Eingriffs- und in der Leistungsverwaltung zu berücksichtigen sowie auch im Rahmen des rechtlichen und tatsächlichen staatlichen Handelns. Praxisgemäss wird die Aufteilung der Prüfung in Geeignetheit (Angemessenheit), Erforderlichkeit (Notwendigkeit) und Zumutbarkeit (Verhältnismässigkeit im engeren Sinne) umgesetzt[2196]. Für das Bundesgericht verlangt das Gebot der Verhältnismässigkeit, "dass eine behördliche Massnahme für das Erreichen des im öffentlichen (oder privaten) Interesse liegenden Zieles geeignet und erforderlich ist und sich für die Betroffenen in Anbetracht der Schwere der Grundrechtseinschränkung zumutbar und verhältnismässig erweist. Erforderlich ist eine vernünftige Zweck-Mittel-Relation. Eine Massnahme ist unverhältnismässig, wenn das Ziel mit einem weniger schweren Grundrechtseingriff erreicht werden kann"[74].

Das Prinzip der Verhältnismässigkeit ergibt sich wie gesehen bereits aus Art. 5 BV. Im Zusammenhang mit der Verfassungsgerichtsbarkeit kann es allerdings nur mit einem besonderen Grundrecht beansprucht werden[2197]. Der in Art. 36 Abs. 3 BV enthaltene Grundsatz der Verhältnismässigkeit konkretisiert demnach das allgemeine Erfordernis von Art. 5 Abs. 2 BV für den Fall, dass die staatliche Tätigkeit, die im öffentlichen Interesse ausgeübt wird, ein Grundrecht verletzt. Art. 36 BV steht also in einer engen Beziehung zu Art. 5 BV und verdeutlicht zentrale Anliegen des Rechtsstaatsprinzips für die Frage nach der Zulässigkeit von Grundrechtsbeschränkungen. Die Verhältnis dieser beiden Artikel zu einander kann unter dem Aspekt der lex specialis festgestellt werden: Während Art. 5 BV generell das staatliche Handeln zum Inhalt hat, das die Grundrechtseinschränkung umfasst, ist in diesem Zusammenhang nur die letzte Bestimmung zu berücksichtigen, Nach der bundesgerichtlichen Rechtsprechung muss das öffentliche Interesse das entgegenstehende Grundrechtsinteresse überwiegen, während im Rahmen des Art. 5 Abs. 2 BV prinzipiell jedes Interesse ausreicht. Im Zusammenhang mit kantonalem Recht prüft das Bundesgericht die Einhaltung des Art. 5 Abs. 2 BV nur auf Willkür. Beim Art. 36 BV wird eine freie Prüfung vorgenommen. Dieser vom Gesetzgeber eingeräumte Gestaltungsspielraum bei der Prüfung der Verhältnismässigkeit einer staatlichen Massnahme ist bei Art. 36 BV somit deutlich enger ausgestaltet als dies bei Art. 5 Abs. 2 BV der Fall ist. Der Grundrechtsgewährleistung wird demnach eine besondere Bedeutung verliehen[2198].

21. Befolgt Ihr Verfassungsgericht alle anwendbaren Schritte der Verhältnismäßigkeitsprüfung?

Siehe Antwort zu Frage 20.

22. Gibt es Fälle, in denen Ihr Verfassungsgericht annimmt, dass die angefochtene Maßnahme einen oder mehrere Schritte der Verhältnismäßigkeitsprüfung erfüllt, auch wenn es offensichtlich keine ausreichenden Beweise gibt, um dies zu belegen?

Den zuständigen Staatsorganen wird bei der Abklärung der Verhältnismässigkeit ein gewisser

2195 Markus Müller, Verhältnismässigkeit, Ein Verfassungsprinzip zwischen Rechtsregel und Metareel, in: Verhältnismässigkeit als Grundsatz in der Rechtsetzung und Rechtsanwendung, 17. Jahrestagung des Zentrums für Rechtsetzungslehre, S. 10

2196 David Hofstetter, Schematisierungen und Verhältnismässigkeit, in: Verhältnismässigkeit als Grundsatz in der Rechtsetzung und Rechtsanwendung, 17. Jahrestagung des Zentrums für Rechtsetzungslehre, S. 87 [74] BGE 134 I 49 E. 7.2

2197 BIAGGINI, Komm. BV, Art. 36, N 23

2198 Astrid Epiney, in: Bernhard Waldmann, Eva Maria Belser, Asrid Epiney, BSK Bundesverfassung, 2015, N. 6-7

Gestaltungsspielraum gewährt. Dank dieser Flexibilität des Verhältnismässigkeitsprinzips wird eine differenzierte Anwendung je nach Sachlage, Interessenkonstellationen, betroffenem Bereich und Adressaten ermöglicht. Dies gilt freilich für die Angemessenheit; hier geht es um ein eigentliches "Wiegen" verschiedener Anliegen, wenn die verfassungsrechtlichen Wertentscheidungen einzubeziehen sind, so dass eine Beeinträchtigung von Grundrechten schwerer lastet als eine Beeinträchtigung bloss privater Interessen. Bei der Geeignetheit und Erforderlichkeit gibt es auch Spielräume; vor allem in Konstellationen, in denen die Wirkung bestimmter Massnahmen nicht vorhergesagt werden kann, wie zum Beispiel im Umweltrecht. In solchen Situationen sind die Behörden aber verpflichtet die wesentlichen Umstände sorgfältig abzuklären[2199].

Das Bundesgericht analysiert bei der Prüfung der Geeignetheit und der Erforderlichkeit grundsätzlich die gesetzlichen Bestimmungen und macht eine gewisse Nachvollziehbarkeit geltend, wobei es diese weitgehend auf der Grundlage der allgemeinen Lebenserfahrung ermittelt und nur vereinzelt mit eigentlichen Gutachten belegt. Festzuhalten ist, dass die Prüfungsdichte umso intensiver ausfällt, je schwerwiegender der Grundrechtseingriff ist[2200].

23. Fällt das Aufkommen der Verhältnismäßigkeitsprüfung in der Rechtsprechung Ihres Gerichtshofs mit dem Aufkommen der Theorie der richterlichen Ehrerbietung zusammen?

Die Verhältnismässigkeitsprüfung kann in der Tat mit der richterlichen Ehrerbietung zusammenfallen. Wie bereits in Frage 2 und 5 erwähnt, schränkt das Bundesgericht seine Kognition auch aus Gründen der Verhältnismässigkeit ein. "Das Bundesgericht prüft bei Grundrechtseingriffen die Verhältnismässigkeit frei. Es auferlegt sich aber eine gewisse Zurückhaltung, wenn sich ausgesprochene Ermessensfragen stellen oder besondere örtliche Umstände zu würdigen sind, welche die kantonalen Behörden besser kennen und überblicken als das Bundesgericht"[2201]. Zu erwähnen ist in diesem Zusammenhang, dass sich das Bundesgericht in Bezug auf kantonale Rechtsakte zurückhält, vorallem wenn örtliche Verhältnisse zur Debatte stehen und es vorrangig um kantonale Kompetenzen geht[2202].

IV. Andere Besonderheiten

24. Wie oft stellt sich die Problematik der gerichtlichen Rücklegung in den grundlegenden Rechtssachen, mit denen Ihr Verfassungsgericht befasst ist?

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25. Ist Ihr Gerichtshof im Laufe der Zeit ehrerbietiger geworden?

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26. Hängt die gerichtliche Rücklegung von der Anzahl der beim Gerichtshof anhängigen Rechtssachen ab?

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27. Kann Ihr Verfassungsgericht seine Beschlüsse auf Gründe stützen, die von den Partei-

2199 Astrid Epiney, Kommentar zu Art. 5 Abs. 2 BV, in: Waldmann/Belser/Einey (Hrsg.), Basler Kommentar, Bundesverfassung, Basel 2015, S. 111

2200 Astrid Epiney, Kommentar zu Art. 36 Abs. 3 BV, in: Waldmann/Belser/Einey (Hrsg.), Basler Kommentar, Bundesverfassung, Basel 2015, S. 767 f.

2201 BGE 147 I 450 E. 3.2.5

2202 Astrid Epiney, Kommentar zu Art. 36 Abs. 3 BV, in: Waldmann/Belser/Einey (Hrsg.), Basler Kommentar, Bundesverfassung, Basel 2015, S. 768

en nicht vorgebracht wurden? Kann Ihr Gerichtshof die geltend gemachten Gründe auf eine andere als die vom Antragsteller angegebene Verfassungsbestimmung stützen?

Siehe Antwort zu Frage 1 in Verbindung mit der Rechtsanwendung von Amtes wegen.

28. Kann Ihr Verfassungsgericht seine Prüfung der Verfassungsmäßigkeit auf ein anderes Gesetz ausdehnen, das nicht vor ihm angefochten wurde, das aber für die Situation des **Antragstellers relevant ist?**

Siehe Antwort zu Frage 1 in Verbindung mit der Rechtsanwendung von Amtes wegen.

29. Hat die Rechtsprechung des EGMR den Ansatz Ihres Gerichtshofs in Bezug auf die gerichtliche Rücklegung beeinflusst? Ist die vom EGMR vertretene Theorie des Vertrauensschutzes das juristische Äquivalent **zum Ermessensspielraum, den Ihr Gericht anerkennt? Wenn nicht, wie oft** überschneiden **sich die Erwägungen des EGMR zum Wertungsspielraum mit den Erwägungen Ihres Gerichtshofs in** ähnlichen **Fällen?**

Der Beitrag, den die Rechtsprechung des EGMR leistet, ist für die Schweiz sehr wichtig. So können Entscheidungen des Bundesgerichts grundsätzlich an den EGMR weiter gezogen werden, der eine Verletzung der EMRK feststellen kann. Diese Feststellung zieht gemäss Artikel 46 EMRK die Verpflichtung zur Behebung dieser Konventionsverletzung nach sich. Die europäische Betrachtungsweise der Verfassungsgerichtsbarkeit prägt das Schweizer Recht nachhaltig. Ausserdem kann der EGMR die EMRK-Konformität von Entscheidungen der Schweizer Behörden überprüfen, ohne dass diese Überprüfung durch spezifische Bestimmungen des innerstaatlichen Rechts eingeschränkt wird. Letztendlich wird die Bedeutung und Reichweite jedes Rechts vom EGMR auf eine unabhängige Weise bestimmt, die für unser Oberstes Gericht bindend ist. Das Bundesgericht beruft sich regelmässig auf die Strassburger Rechtsprechung und übernimmt diese häufig[2203]. Die EMRK hat zur Folge, dass der Schutz der Grundrechte in der Schweiz gestärkt wird[2204].

In diesem Zusammenhang ist zu betonen, dass die Menschenrechte in der Schweiz vorab von der Bundesverfassung gewährleistet werden. Zu erwähnen sind z.B. die unter dem Kapitel Grundrechte enthaltenen Menschenrechtsgarantien der Art. 7 ff. BV und der Art. 5 BV, der die Grundsätze des rechtlichen Handelns festhält. Diese Verfassungsartikel entsprechen grösstenteils den EMRK-Bestimmungen. Bei verfassungs- und konventionskonformer Anwendung dieser Bestimmungen sollte eine Verletzung der EMRK nur dann möglich sein, wenn die Schweiz und der EGMR in einem konkreten Einzelfall eine unterschiedliche Ermessens- und/oder Sachverhaltseinschätzung vorgenommen haben[2205].

Gründe für die unterschiedlichen Beurteilungen einer Rechtsfrage durch das Bundesgericht oder den EGMR sind in der Verschiedenheit der Verfahrensbestimmungen und in der differenzierten Ausgestaltung der Kognitionsbefugnis der beiden Gerichtsinstanzen zu finden. Nach Art. 106 Abs. 2 BGG prüft das Bundesgericht die Verletzung von Grundrechten nur insofern, als eine solche Rüge in der Beschwerde vorgebracht und begründet worden ist. Zudem ist das Bundesgericht gemäss Art. 105 BGG grundsätzlich an den von der Vorinstanz festgelegten Sachverhalt gebunden. Der EGMR prüft demgegenüber gestützt auf Art. 38 EMRK Sachverhaltsfragen umfassender als das Bundesgericht. Für den EGMR ist der beschränkte Ermessensspielraum des Bundesgerichts nicht erheblich[2206]. Diese Rechtslage kann dazu führen, dass der EGMR in seiner Entscheidfindung gestützt auf die Theorie des Vertrauensschutzes von einem

2203 siehe z.B.: BGE 149 I 72, BGE 149 I 14 und BGE 148 I 233

2204 vgl. dazu Regina Kiener, Der Einfluss der EMRK auf die BV 1999, in: 40 Jahre Beitritt der Schweiz zur EMRK, 2015, S. 72 ff.

2205 Heinz Aemisegger, Probleme der Umsetzung der EMRK im schweizerischen Recht, in: 40 Jahre Beitritt der Schweiz zur EMRK, 2015, S. 208

2206 Heinz Aemisegger, Probleme der Umsetzung der EMRK im schweizerischen Recht, in: 40 Jahre Beitritt der Schweiz zur EMRK, 2015, S. 210

erweiterten Sachverhalt ausgeht als demjenigen, den das Bundesgericht als Grundlage für seinen Entscheid hatte[2207]. Zu erwähnen ist im diesem Zusammenhang das Urteil des EGMR Neulinger und Shuruk gegen Schweiz vom 6. Juli 2010[2208]. Mit diesem Urteil wurde die Schweiz wegen Verletzung des Rechts auf Achtung des Privat- und Familienlebens[2209] verurteilt: Die Anordnung der Rückkehr eines siebenjährigen Kindes, das 2005 von seiner Mutter in die Schweiz entführt wurde, nach Israel, ist mit dem Kindeswohl nicht vereinbar. Auch wenn die Schweiz im Zeitpunkt des Bundesgerichtsurteils mit der Anordnung der Rückkehr ihren Ermessensspielraum nicht überschritten hat, müssen die inzwischen eingetretenen Entwicklungen - die durch die Anordnung von provisorischen Massnahmen zum Verbleib des Kindes in der Schweiz auch durch den Gerichtshof selber verursacht wurden - mitberücksichtigt werden. Namentlich der fünfjährige Aufenthalt des Kindes in der Schweiz, das eingeschränkte Besuchsrecht des Vaters in Israel sowie eine mögliche Gefängnisstrafe der Mutter in Israel führen, bei einer Rückführung des Kindes, zu einem ungerechtfertigten Eingriff in das Recht auf Achtung des Privat- und Familienlebens sowohl des Kindes als auch der Mutter. Ist dem Bundesgericht durch innerstaatliches und EMRK-konformes Verfahrensrecht verwehrt eine auf der Grundlage eines vom EGMR erweiterten Sachverhalts basierenden Angelegenheit zu beurteilen, sollte der EGMR zurückhaltender sein und auf die Beurteilung solcher Fragen grundsätzlich verzichten, um damit den in Art. 35 Ziff. 1 EMRK festgelegten Grundsatz der Ausschöpfung des innerstaatlichen Instanzenzuges nicht zu vereiteln[2210]. Desweiteren ist in diesem Zusammenhang auch darauf hinzuweisen, dass die Richter und Richterinnen des EGMR nicht selten das Rechtsempfinden der Schweiz nicht oder zu wenig beachten[2211] und den Geltungsbereich der Menschenrechte der EMRK vermehrt auf neue Gesellschaftsentwicklungen ausdehnen, so z.B. Fragestellungen zum Schutz vor schädlichen Umwelteinflüssen[90].

30. Hat der EGMR Ihren Staat verurteilt, weil Ihr Gerichtshof in einem bestimmten Fall Nachsicht walten ließ, wodurch sein Rechtsbehelf unwirksam geworden ist?

Ja, der EGMR hat die Schweiz bezüglich der richterlichen Zurückhaltung bei der Urteilsfällung bereits verurteilt.

Zu erwähnen ist in diesem Zusammenhang der Fall 9C_617/2011 (siehe Antwort zu Frage 9). Die grosse Kammer des EGMR hat entschieden[91], dass die unterschiedlichen Anspruchsvoraussetzungen für den Anspruch auf eine Witwen- und Witwerrente in der schweizerischen Alters- und Hinterlassenenversicherung diskriminierend sind. Nach Meinung des EGMR kann die ungleiche Behandlung, der der Beschwerdeführer ausgesetzt war, nicht gestützt auf eine vernünftige und objektive Rechtfertigung angenommen werden. Obwohl sich der Beschwerdeführer in einer ähnlichen Situation befand, was seine Notwendigkeit, seinen Lebensunterhalt zu sichern, betraf, wurde er nicht auf die gleiche Weise wie eine Witwe behandelt. Er erlitt daher eine Ungleichbehandlung. Die Regierung hat nicht nachgewiesen, dass es sehr stichhaltige Argumente oder besonders stichhaltige und überzeugende Gründe gibt, die eine unterschiedliche Behandlung aufgrund des Geschlechts rechtfertigen könnten. Nach Ansicht des EGMR kann sich die Regierung nicht auf die Annahme berufen, dass der Ehemann seine Frau finanziell unterstützt (Konzept des versorgenden Ehemanns), um eine unterschiedliche Behandlung zu rechtferti-

2207 Stefan Schürer, in: Heinz Aemisegger, Probleme der Umsetzung der EMRK im schweizerischen Recht, in: 40 Jahre Beitritt der Schweiz zur EMRK, 2015, S. 211

2208 Urteil des EGMR *Neulinger und Shuruk gegen Schweiz* vom 6. Juli 2010, 41615/07

2209 Art. 8 EMRK

2210 Stefan Schürer, in: Heinz Aemisegger, Probleme der Umsetzung der EMRK im schweizerischen Recht, in: 40 Jahre Beitritt der Schweiz zur EMRK, 2015, S. 212

2211 vgl. dazu Urteil des EGMR *Beeler gegen Schweiz* vom 11. Oktober 2022; 78630/12 und die Anmerkungen zu Frage 30 [90] vgl. dazu das Urteil des EGMR *Howald Moor u.a. gegen Schweiz* vom 11. März 2014, 52067/10 und 41072/11 [91] 78630/12

gen, die Witwer gegenüber Witwen benachteiligt. In seinen Augen trägt diese Gesetzgebung vielmehr dazu bei, Vorurteile und Stereotypen über die Natur oder die Rolle der Frau in der Gesellschaft aufrecht zu erhalten, und stellt eine Benachteiligung sowohl für die Karriere von Frauen als auch für das Familienleben von Männern dar.

Ein aktueller und zurzeit beim EGMR hängiger Fall (bereits in der Antwort zu Frage 6 erwähnt) betrifft das Anliegen des Vereins "Klimaseniorinnen", die mit ihrer Klage an das Bundesgericht[2212] die Schweizer Regierung dazu bringen wollten, in der Problematik des Klimawandels mehr zu unternehmen und den rechtlichen Rahmen der Auswirkungen des Klimawandels zu regeln. Das Bundesgericht übt in politisch heiklen Problemstellungen des öfteren richterliche Zurückhaltung. In der Beantwortung dieses Anliegens verhielt sich das Bundesgericht zurückhaltend und betonte, dass Anträge auf eine bestimmte Gestaltung aktueller Politikbereiche nach dem schweizerischen Verfassungsrecht grundsätzlich auf dem Weg der demokratischen Mitwirkungsmöglichkeiten eingebracht werden könnten[2213]. Es bleibt abzuwarten, wie der Entscheid des EGMR zu dieser Rechtsfrage, die auch andere Staaten, die die EMRK ratifiziert haben, interessieren könnte, ausfallen wird.

31. Beeinflusst das Vorhandensein abweichender Meinungen die gerichtliche Rücklegungen, die Ihr Gericht zeigt?

Das Bundesgericht hat eine Tradition von qualitativen Entscheidbegründungen, in denen es sich mit den Argumenten der Lehre und Rechtsprechung sowie möglicherweise auch mit abweichenden Richtermeinungen in seinen Urteilen direkt auseinandersetzt[2214]. Das Bundesgericht ist als Kollegialbehörde konzipiert, wodurch eine Machtkonzentration bei einem Richter verhindert werden soll[95]. Gemäss Art. 20 Abs. 1 BGG entscheiden die Abteilungen in der Regel in der Besetzung mit drei Richtern oder Richterinnen (Spruchkörper). Wird keine Einstimmigkeit erzielt, berät das

Bundesgericht in einer mündlichen Beratung und Abstimmung[96]. Die Bekanntmachung der Meinungen der unterlegenen Richter und Richterinnen ist im Verfahrensablauf des Bundesgerichts nicht vorgesehen[2215]. Das Bundesgericht nimmt abweichende Meinungen nicht in seine Urteile auf[2216]. Diese Meinungen können als alternative Begründungen im Urteil erwähnt werden[2217], oder auch als nichtamtliche Publikationen veröffentlicht werden[2218].

2212 BGE 146 I 145

2213 BGE 146 I 145 E. 4 und Antwort zu Frage 6

2214 Keller/Zimmermann, Dissenting opinions am Bundesgericht? Zeitschrift für Schweizerisches Recht, 2019 S. 151 [95] Heinrich Müller, in: Basler Kommentar, Bundesgerichtsgesetz, 2018, Art. 2 BGG Rz. 29 [96] Art. 59 Abs. 1 lit. b BGG

2215 Arnold Marti, Offenlegen von Minderheitsmeinungen ("dissenting opinion") – eine Forderung von Transparenz und Fairness im gerichtlichen Verfahren, in: "Justice - Justiz - Giustizia" 2012/4 Rz. 8

2216 Peter Uebersax, in: Basler Kommentar, Bundesgerichtsgesetz, 2018, Art. 24 BGG Rz. 57

2217 Keller/Zimmermann, Dissenting opinions am Bundesgericht? Zeitschrift für Schweizerisches Recht, 2019 S. 150 und Arnold Marti, Offenlegen von Minderheitsmeinungen ("dissenting opinion") – eine Forderung von Transparenz und Fairness im gerichtlichen Verfahren, in: "Justice - Justiz - Giustizia" 2012/4 Rz. 8; BGE 137 II 431 ff. insb. E. 4 S. 445 ff.

2218 so z.B. nichtamtliche Publikation einer Minderheitsmeinung in Zusammenhang mit BGE 137 II 431, ZBl 113/2012, S. 30 ff.: Das Urteil des Bundesgerichts erging mit drei gegen zwei Stimmen mit dem Ergebnis, dass die Zulässigkeit der Herausgabe der Kundendaten der UBS an die amerikanischen Behörden durch die Eidgenössische Finanzmarktaufsicht gestützt auf die polizeiliche Generalklausel bejaht wurde. Der den

Im Gegensatz zum Bundesgericht kennen einige Kantone (Zürich, Bern, Waadt, Basel-Landschaft, Basel-Stadt, Solothurn, Schaffhausen, Neuenburg und Luzern) die Möglichkeit Minderheitsmeinungen in den Gerichtsurteilen ihrer Gerichtsinstanzen zu veröffentlichen[2219]. Beim Weiterzug solcher kantonaler letztinstanzlicher Entscheide an das Bundesgericht, hat dieses sich bei der Beurteilung der Gerichtsfälle vereinzelt im Sinne der Minderheitsmeinungen der kantonalen Vorinstanzen entschieden. So z.B. im Fall 2C_48/2014 vom 9. Oktober 2014, in welchem das Bundesgericht der publizierten Minderheitsmeinung der Vorinstanz folgte und die Beschwerde guthiess[2220]. Es ging um die Frage der Anerkennung einer ausländerrechtlichen Ehe, die in einem Grosshaushalt gelebt wurde. Das Verwaltungsgericht anerkannte in seinem Entscheid diese Ehe nach der Scheidung nicht an und verlängerte die Aufenthaltsbewilligung der ausländischen Ehefrau nicht. Ein Verwaltungsrichter und die Gerichtsschreiberin waren gegenteiliger Meinung und liessen dies auch im kantonalen Entscheid publizieren. In einem anderen Fall, in dem es ebenfalls um die Verlängerung einer Aufenthaltsbewilligung geht, die einer kurdischen Türkin, die eine Scheinehe eingegangen war um in der Schweiz eine Aufenthaltsbewilligung zu erhalten, wurden im Verfahren vor den kantonalen Gerichtsinstanzen Hindernisse im Wegweisungsvollzug geltend gemacht und die Gewährung der unentgeltlichen Rechtspflege verlangt. Beide Anliegen wurden von der kantonalen Gerichtsmehrheit abgewiesen, woabei der Entscheid eine abweichende Minderheitsmeinung enthielt, die besagt, dass nicht ausgeschlossen werden könne, dass die Beschwerdeführerin in der Türkei Repressionen zu erwarten und keine genügende medizinische Versorgung erhalten könnte. Die Überlegungen der Gerichtsmehrheit stützten sich einzig auf die Situation in der Türkei vor dem Putschversuch vom Sommer 2016 ab. Mit dem Weiterzug des Urteils verneinte das Bundesgericht zwar das Vorliegen von Hindernissen des Wegweisungsvollzugs, gewährte der Beschwerdeführerin aber die unentgeltliche Rechtspflege mit folgender Begründung: "Hingegen hat eine Minderheit der Vorinstanz im Wegweisungspunkt erwogen, das an das Verwaltungsgericht gerichtete Rechtsmittel sei nicht von vornherein chancenlos gewesen (...). Gemäss bundesgerichtlicher Rechtsprechung kann von einer aussichtslosen Beschwerde zumindest dann nicht gesprochen werden, wenn - wie im vorliegenden Fall innerhalb des vorinstanzlichen Spruchkörpers offensichtlich Uneinigkeit geherrscht hat (...). Daran ist auch hier festzuhalten. Die Bedürftigkeit der Beschwerdeführerin scheint unbestritten zu sein. Insoweit ist die unentgeltliche Prozessführung damit zu Unrecht verweigert worden"[2221]. Die abweichende Minderheitsmeinung zur Gewährung der unentgeltlichen Rechtspflege wurde kurze Zeit später vom Bundesgericht erneut übernommen[2222].

32. Gibt es an Ihrem Gerichtshof Richter, die mehr Ehrerbietung als andere nehmen?

Siehe Antwort zu Frage 31.

Minderheitsstandpunkt vertretende Richter vertrat die Meinung, dass die Herausgabe der Bankdaten nicht gestützt auf die polizeiliche Generalklausel zulässig war.

2219 Arnold Marti, Offenlegen von Minderheitsmeinungen ("dissenting opinion") – eine Forderung von Transparenz und Fairness im gerichtlichen Verfahren, in: "Justice - Justiz - Giustizia" 2012/4 Rz. 8

2220 Urteil des Bundesgerichts 2C_48/2014 E. 3.2.4: Vielmehr ist - zumindest im Grundsatz - der abweichenden Meinung der Minderheit der 4. Abteilung des Verwaltungsgerichts (vgl. angefochtenes Urteil S. 15 f.) zu folgen (…).

2221 Urteils des Bundesgerichts 2C_192/2017 vom 9. Januar 2018 E. 4.2

2222 Urteil des Bundesgerichts 2C_847/2017 vom 25. Mai 2018 E. 4: «Das Gesuch um Gewährung der unentgeltlichen Rechtspflege des bedürftigen Beschwerdeführers wird gutgeheissen, konnte doch die dem Bundesgericht eingereichte Beschwerde angesichts der abweichenden Meinung einer Minderheit der Gerichtspersonen der Vorinstanz nicht zum Vornherein als aussichtslos bezeichnet werden (Art. 64 Abs. 1 BGG)».

The Constitutional Court of the Czech Republic

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

I. Non-justiciable questions and deference intensities

1.

The Constitutional Court of the Czech Republic does not use the term "deference". The term was used once in the sense relevant to this questionnaire in the judgment file No I. ÚS 980/14 of 18 June 2014, in which the Constitutional Court ruled on a detention case and stated the following: "*However, this certain deference on the part of the Constitutional Court to the decisions of the general courts on detention is conditioned precisely by the general courts' careful assessment of the specific circumstances of individual cases.*"

The Constitutional Court most often uses terms such as the principle of self-limitation, the principle of self-restraint, and the principle of minimal interference with the powers of other public authorities.

The Constitutional Court of the Czech Republic is outside the system of general courts and, as it states in many of its dismissive resolutions, "*it is therefore not entitled to interfere in their decision-making activities, it is bound by the doctrine of minimising its interference with the activities of public authorities and the principle of self-limitation*" (e.g. resolution file No II. 2821/11 of 19 April 2012, file No II. ÚS 3417/12 of 20 December 2012). In its case law, the Constitutional Court states that "*its activity is governed by the principle of self-limitation and not by judicial activism*" (e.g. II. ÚS 110/02 of 3 June 2003). As follows from Article 83 of the Constitution of the Czech Republic, the Constitutional Court is a judicial body created to protect constitutionality, and it has repeatedly expressed itself in its resolutions to the effect that is not called upon to review the decision-making of general courts and that its powers to conduct such a review stems solely from the fact that the principles of constitutional law have not been respected by the courts and that the constitutional provisions guaranteeing the rights and freedoms of the parties to the proceedings have been infringed.

In judgment file No Pl. ÚS 54/05 of 22 January 2008, the concept of self-limitation is characterised as "*the maximum effort to minimise interference with the activities of other public authorities, including the legislature*". Justice Jan Musil also comments on the concept in a dissenting opinion on the resolution file No Pl. ÚS 24/09 of 18 November 2009, where he states that "*the generally accepted principle of constitutional justice is the judicial self-restraint of the Constitutional Court. This term has innumerable definitions, but I consider the formulation used in 1973 by the German Federal Constitutional Court in one of its fundamental rulings (BVerfGE 36, 1, 14 f.) to be very fitting for our context: "The principle of judicial self-restraint to which the Federal Constitutional Court subscribes does curtail or weaken its ... competences, it simply means that the court does not 'participate in politics', i.e. it does not interfere in the constitutionally created and limited space of free political creation. Therefore, it intends to keep open the space of free political creation guaranteed by the Constitution for other constitutional bodies.*"

Justice Jan Musil further commented on this issue in a dissenting opinion on the judgment file No Pl. ÚS 18/15 of 28 June 2016 and thus supplemented the above definition of the principle of judicial self-restraint with the following: "*This doctrine is based on the fundamental principle of the democratic rule of law, which is the principle of the separation of powers; the judiciary should refrain from assuming powers belonging to the legislature and the executive. The Constitutional Court is also bound by this self-restraint* [...]."

In its judgment file No II. ÚS 2988/19 of 26 April 2021, the Constitutional Court found that "*with its specific role as the guardian of constitutionality, it stands outside the system of general courts and its objective is not to react to any and every illegality, but to annul those acts of public authorities, or those court decisions, whose illegality constitutes unconstitutionality, i.e. a substantially intensive violation of fundamental rights and freedoms guaranteed by the constitutional order. When applying the doctrine of the review of judicial decisions based on the principle of self-restraint, the Constitutional Court has been finding typical groups of defects consisting, for example, in the lack of constitutional conformity of the interpretation of lower than constitutional norms, in the application of an incorrectly selected norm or in the arbitrary application of a subconstitutional norm, where the legal conclusion is extremely inconsistent with the findings of fact and law. The case law of the Constitutional Court has gradually specified these 'qualified defects', meaning a violation of constitutionality, both on the substantive and procedural level. In the first case, it is, for example, a failure to take into account the impact of a fundamental right or freedom on the matter at hand, an unacceptable arbitrariness consisting in disregarding the unambiguous wording of a mandatory norm, an obvious and unjustified deviation from the standards of interpretation corresponding to the accepted (doctrinal) concept of a legal institute (concept), or an interpretation that is in extreme conflict with the principles of justice (excessive formalism). In the latter case, within the framework of the principles (components) of a fair trial, these include, for example, the absence of proper, comprehensible and logical reasoning of the decision, the deviation of the general court from the constant case law without sufficient explanation of the reasons and many other defects (see the judgments file Nos III. ÚS 84/94, III. ÚS 166/95, III. ÚS 269/99, Pl. ÚS 85/06, III. ÚS 3397/17 and others)*".

2.

It can be generally said that the Constitutional Court does not have a clearly defined spectrum of deference; however, it applies deferential review in a number of areas (see below), and this more restrained review is reflected in a lower level of intensity of review of acts of the legislator, especially in the case of statutory regulation of policies where the legislator is allowed a wide margin of discretion and bears political responsibility for these decisions (e.g. judgment file No Pl. ÚS 7/03 of 18 August 2004).

The Constitutional Court has consistently exercised restraint in its review of tax legislation (including local charges), but also more generally in matters of economic policy. For example, in its judgment file No Pl. ÚS 50/06 of 20 November 2007 in the case of a motion to repeal a provision of the Act on Budgetary Allocation of Taxes concerning the allocation of part of public finances, the Constitutional Court stated that it has no jurisdiction to assess the expediency, fairness or reasonableness of the legal regulation allocating the proceeds of certain taxes to municipal budgets, as this is primarily a political issue in the hands of the legislature, which reflects the result of free and open competition of political forces translating various proposals on the allocation of the State budget. Moreover, given the nature of the judiciary's functioning, it does not and cannot have any information in these areas. The key reason for deference here is the fact that tax legislation is a highly complex, polycentric issue to which no single correct answer can be given in a democratic state and the Constitutional Court would find itself 'on thin ice' by conducting a thorough review, as the Constitutional Court stated in its review of the 2020 tax package (see paragraph 100 of judgment file No Pl. ÚS 87/20 of 18 May 2021).

The Constitutional Court is also as restrained as possible on issues that may cause controversy in society, such as issues of compulsory vaccination, adoption of children by same-sex couples, or the legal regulation of sex determination or reassignment. In its judgment file No III. ÚS 449/06 of 3 February 2011, the Constitutional Court stated that the legislator's decision to make a certain type

of vaccination compulsory is primarily a political and expert question, and therefore there is a very limited space for interference by the Constitutional Court (these conclusions were later repeated in decisions file No II. ÚS 409/14 of 15 April 2014, file No Pl. ÚS 19/14 of 27 January 2015 and file No III. ÚS 1479/14 of 16 April 2015).

Regarding the issues of the legal regulation of the determination or change of sex (judgment file No Pl. ÚS 2/20 of 9 November 2021), the recognition of a foreign decision on the adoption of a child by registered partners (judgment file No Pl. ÚS 6/20 of 15 December 2020), or the prohibition of the adoption of a child by the partner of a parent in an unmarried relationship (judgment file No Pl. ÚS 10/15 of 19 November 2015), the Constitutional Court has stated that the legislator is better suited than the European Court of Human Rights and the Constitutional Court itself to deal with such issues, which are fundamental to humans as a biological species, their lives and relationships, i.e. the issues of family, parenthood and marriage.

3.

The factors that lead the Constitutional Court to exercise restraint include not only the nature of the individual rights at issue, the subject matter of the proceedings (e.g., tax, criminal or family law), but also relevant social developments. As already mentioned above, the Constitutional Court exercises restraint in the area of tax legislation and economic policy of the State. Assessing the appropriateness and necessity of individual components of tax policy is left to the discretion of the democratically elected legislator as long as the impact of the tax on persons does not have a "choking effect" (i.e. it is not extremely disproportionate) and does not violate the principle of equality (paragraph 49 of judgment file No Pl. ÚS 29/08 of 21 April 2009). Thus, any public law obligatory monetary payment (tax, fee, monetary sanction) cannot have confiscatory consequences in relation to the individual's property (judgment file No Pl. ÚS 7/03 of 18 August 2004). Therefore, the legislator must not interfere with property rights in a way that would destroy the very essence of the property, i.e. the taxpayer's basic property. The restraint of the Constitutional Court in the area of tax laws is thus manifested in the lower intensity of the review of tax laws, where it only examines the extreme disproportionality of the tax burden (or the impact of the tax) instead of applying the intensity of proportionality as an order to optimise (see paragraphs 103 and 104 of judgment file No Pl. ÚS 87/20 of 18 May 2021). However, this does not limit the review of the law in terms of compliance with the equality principle in accordance with Article 1 of the Charter of Fundamental Rights and Freedoms or the prohibition of discrimination under Article 3(1) of the Charter of Fundamental Rights and Freedoms. Provided that the limits of discretion thus defined are maintained, the legislator has the final say in relation to the necessity of setting a certain maximum amount of a financial penalty (see also paragraph 264 of judgment file No Pl. ÚS 30/16 of 7 April 2020).

On the other hand, when reviewing violations of economic, social and cultural rights (hereinafter the "social rights"), the Constitutional Court applies the rational basis test, precisely with regard to Article 41(1) of the Charter of Fundamental Rights and Freedoms, which provides that social rights can only be sought within the limits of the laws implementing these provisions. The main reason for creating the rational basis test was the need to distinguish the method of reviewing social rights from the strict review of personal and political rights, where the Constitutional Court usually applies the proportionality test in the intensity of an "order to optimise". However, this leaves virtually no discretion to the legislator or the body whose decision is under review. The rational basis test was first used in judgment file No Pl. ÚS 1/08 of 20 May 2008, and the main reason why the Constitutional Court applied such a restrained approach was the subject matter of the proceedings. Several provisions of the laws were challenged, which were part of a major reform of health care financing, which was in turn a part of broader legislation aimed at improving the state of public finances in various areas. The Constitutional Court pointed out that its restrained approach was motivated by the knowledge that

these laws are quite complex and polycentric.

A deferential attitude can also be detected in the case law of the Constitutional Court in constitutional complaints against, for example, decisions of municipal courts on detention, decisions on the costs of proceedings or preliminary rulings. In these types of proceedings, however, deference is not applied by default, e.g. with regard to decisions on detention, it is conditional on a careful assessment of the specific circumstances of individual cases by the general courts (e.g. judgment file No I. ÚS 980/14 of 18 June 2014). In the case of preliminary rulings, the Constitutional Court examines only whether the decision to issue (or not) such ruling had a legal basis, i.e. if it was issued by a competent authority and was not arbitrary. This is another case where deference is not applied by default or as a blanket approach. The Constitutional Court has carried out a standard proportionality review, for example, if the preliminary ruling interfered with the freedom of expression (paragraph 26 of judgment file No II. ÚS 1440/21 of 23 August 2021) or the right to family life (e.g. judgment file No I. ÚS 2903/14 of 12 May 2015). Deference is thus exercised not only because the issue at hand concerned a preliminary ruling, but also due to other relevant circumstances. The court exercises deference when the complaint is based solely on the usual allegation of a violation of the right to a fair trial. The standard methods of examining violations of the right to a fair trial are then applied – for example, with regard to the fact that the Constitutional Court is not a court of fourth instance, that the interpretation of subconstitutional norms belongs primarily to the general courts and not to the Constitutional Court, or that the fairness of the proceedings must be assessed as a whole (paragraph 24 of judgment file No III. ÚS 1121/20 of 11 August 2020). The Constitutional Court takes a similar approach to the review of decisions on costs of proceedings.

The consideration that individual countries have their own directions and pace of social development, as well as their own histories and cultures, is reflected, for example, in the deferential position of the Constitutional Court regarding the recognition of a foreign decision on the adoption of a child by registered partners (see paragraph 33 of judgment file No Pl. ÚS 6/20 of 15 December 2020).

4.

I. In a number of cases, the Constitutional Court has exercised restraint, stating that the matter should be decided primarily by the legislator and not by the courts. In most of these cases, the decision depended primarily on other than legal expertise. An example of this approach is the decision on compulsory vaccination (judgment file No Pl. ÚS 19/14 of 27 January 2015). The Constitutional Court conducted a restrained review of the legislation in the context of the right to inviolability of the person, emphasising that this is a technical rather than a legal question. In a previous decision, the Constitutional Court stated that *"the decision of the legislator to make a certain type of vaccination compulsory is* [...] *made on a political and expert basis, and therefore there is a very limited space for interference by the Constitutional Court"* (judgment file No III. ÚS 449/06 of 3 February 2011). These conclusions were repeated in other decisions concerning vaccination (judgment file No III. ÚS 1479/14 of 16 April 2015 and resolution file No II. ÚS 409/14 of 15 April 2014).

II.

III. In its judgment file No Pl. ÚS 4/18 of 18 December 2018, the Constitutional Court reviewed the constitutionality of a government regulation setting limits on traffic noise. The Government argued that the case did not fall within the jurisdiction of the courts at all as it depended on the assessment of technical and scientific questions. However, the Constitutional Court disagreed with this claim and ruled that: *"the courts should not and cannot refrain from reviewing cases in which the decision depends on an assessment*

of technical or scientific issues". However, it proceeded to exercise deference in its review because it *"cannot have the ambition to embark on a review of purely technical matters* [...] *The necessary administrative and expert background and resources to make such decisions are available to the Government and it is therefore primarily the Government's task to consider all the necessary factors in their totality and in the light of the current knowledge."* In these cases, the Constitutional Court has maintained a restrained stance primarily because of the superior expertise of the previous decision-maker.

Self-restraint of the Constitutional Court is also mentioned in dissenting opinions on judgments where, on the contrary, the Constitutional Court did not exercise restraint and proceeded to review the matter. In judgment file No Pl. ÚS 18/15 of 28 June 2016, in the case of the unconstitutionality of taxing the pensions of high-income working pensioners, Justice Jan Musil used an institutional argument in the aforementioned dissenting opinion, where he argued in favour of judicial restraint, claiming that the judiciary should not assume the powers of the legislative and executive branches.

Another Justice arguing for an institutional view of judicial restraint was, for example, Vladimír Sládeček, who used it in his dissenting opinion on judgment Pl. ÚS 7/15 of 14 June 2016, in the case of registered partnership as an obstacle to individual adoption of a child. He stated that the Constitutional Court should respect the autonomous will of the legislator and adhere to the judicial self-restraint doctrine, i.e. avoid excessive activism and not interfere in the regulation of issues belonging to the legislator.

To offer a further example of inconsistency between the opinions of individual Justices on the level of review by the Constitutional Court, we can cite judgment file No Pl. ÚS 106/20 of 9 February 2021, concerning restrictions on retail and services imposed due to the coronavirus epidemic. According to the dissenting opinion of Justice Jaroslav Fenyk, the Constitutional Court replaced the Government's reasoning on professional, strategic and security issues with its own reasoning. In the dissenting opinion, he stated that "*the Constitutional Court is thereby entering the field of political decision-making with activism, which is not its place under the Constitution of the Czech Republic.*". In its judgment, the Constitutional Court granted the senators' motion, which stated that the Government's ban disproportionately and irrationally interferes with the fundamental right to freedom of enterprise under Article 26 of the Charter of Fundamental Rights and Freedoms. In particular, it objected to the unequal treatment of entrepreneurs based on the type of goods they sell. However, according to the dissenting opinion of Jaroslav Fenyk, the Constitutional Court cannot be both a court and a legislator. "*Questions that can only be answered using political criteria must be decided by the political representation, i.e. the legislative or executive branches of government, and not by the activist approach of the Constitutional Court.*" The judgment, he said, was evidence of the Constitutional Court's political activism and an example of the Plenum departing from the principle of self-restraint. According to Fenyk's dissenting opinion, the Constitutional Court has embarked on an expert epidemiological debate as to whether even short-distance mobility to establishments where customers meet is relevant to the spread of the epidemic. Here, in his opinion, the Constitutional Court Justice should exercise restraint. Justice Josef Fiala also criticised the approach of the Constitutional Court in this case and stated that the extraordinary nature of the current situation caused by the spread of the contagious respiratory disease COVID-19 requires the Constitutional Court to consistently respect the judicial self-restraint doctrine.

IV. In summary, it can be said that the Constitutional Court is more restrained especially in situations where the issue under review is complex and involves a considerable amount of other than legal expertise. In these cases, the Constitutional Court often

finds that the legislature and the executive are in a better position to make the right decision due to their better staffing and financial resources, as well as with regard to the separation of powers.

5.

The Constitutional Court is not aware of such a case of restraint.

6.

V. For example, the Constitutional Court deferred from reviewing disciplinary decisions of both chambers of the Parliament of the Czech Republic. In its resolution file No Pl. ÚS 17/14 of 13 January 2015, the Constitutional Court stated that decisions by which parliamentary bodies decide in disciplinary proceedings on infractions committed by deputies and senators are among those decisions which are an expression of the Parliament's autonomy as a legislative body and which are therefore not subject to review by the Constitutional Court. It can be concluded from Article 27(3) of the Constitution that disciplinary powers in matters of liability for infractions of deputies and senators are the exclusive competence of the parliamentary chambers, irrespective of whether the infractions in question are "official" infractions (i.e. committed in the Chamber of Deputies or the Senate) or "non-official" infractions (i.e. committed outside the Parliament).

VI.

VII. The Constitutional Court has also consistently ruled that the resolution of fundamental issues concerning human beings as a biological species, their life and their relationships, i.e. issues of family, parenthood and marriage, belongs exclusively to the national legislator, i.e. the Parliament of the Czech Republic (cf. the above-mentioned judgments file No Pl. ÚS 2/20 of 9 November 2021, file No Pl. ÚS 10/15 of 19 November 2015 and file No Pl. ÚS 6/20 of 15 December 2020). If these issues were to be turned into judicial issues, it could lead to the politicisation of the Constitutional Court and thus to the weakening of its position as an impartial and independent judicial body protecting the constitutional order.

7.

VIII. The Constitutional Court approaches the review of cases concerning social rights with an attempt to restrain itself as much as possible, especially in relation to political power. Given that Article 41 of the Charter of Fundamental Rights and Freedoms provides that social rights may be sought only within the limits of the laws that implement these provisions, the Constitutional Court applies the rational basis test when reviewing alleged violations of social rights.

IX. The main reason for creating the rational basis test was the need to distinguish the method of reviewing social rights from the strict review of personal and political rights, where the Constitutional Court usually applies the proportionality test. Therefore, in its case law, the Constitutional Court has concluded that, in view of the wording of Article 41(1) of the Charter, the scope for reviewing the constitutionality of laws regulating social rights is narrower than in the case of personal and political rights: *"the specific balance between the liberal and social aspects is fundamentally determined by the parliamentary majority* [...] *Therefore, in these cases, the Constitutional Court must exercise stronger restraint with regard to the democratic will of the legislator."*(judgment file No Pl. ÚS 55/13

of 12 May 2015, which concerned the decisive period for assessing unemployment benefit entitlements). Elsewhere, the Constitutional Court says that the legislator *"is given a wide degree of discretion"* (judgment file No Pl. ÚS 93/20 of 22 June 2021 regarding the role of school counselling facilities in recommending support measures under the Education Act). However, the reasons for deference in review of social rights do not lie solely in the text of the Charter. The main reason why the Constitutional Court applied deferential review in judgment file No Pl. ÚS 1/08 of 20 May 2008, where the rational basis test was applied for the first time, was the subject matter of the proceedings. Several provisions of the laws were challenged, which were part of a major reform of health care financing, which was in turn a part of broader legislation aimed at improving the state of public finances in various areas. The Constitutional Court pointed out that its restrained approach was motivated by the knowledge that these laws are rather complex and polycentric.

X. The rational basis test has so far been applied in areas such as adjusting the level of payments to health care providers from the public health insurance system, the sickness insurance system, the level of child benefits, the introduction of electronic sales registration for some businesses or the law regulating commercial relations between small suppliers and large customers (judgments file Nos Pl. ÚS 19/13, Pl. ÚS 54/10, Pl. ÚS 31/17, Pl. ÚS 26/16 and Pl. ÚS 30/16). These issues were quite complex and involved cases with a significant impact on public finances or the course of business in healthcare and similar fields. These regulations have often been an integral part of larger reform packages with many interlinked measures. The level of complexity was thus different compared to the usual issues of personal and political rights, and the Constitutional Court thus exercises a greater degree of restraint in this area.

In its judgment file No Pl. ÚS 31/09 of 9 January 2013, the Constitutional Court stated that "*in its judgments, the Constitutional Court usually expresses itself with restraint with regard to the implementation of social rights enshrined in Title Four of the Charter, as it is aware that the scope of social rights (...) is limited by the possibilities of the State budget, based on the State's economic performance. The limits set by the relevant articles of the Charter governing social rights thus apply only within these possibilities. The Constitutional Court leaves the assessment of the effectiveness and appropriateness of the statutory regulation in this area to the legislator, whose activities the Constitutional Court cannot interfere with except in cases of established unconstitutionality. These issues are political in their nature (...)" (see judgment file Nos Pl. ÚS 8/07, Pl. ÚS 2/08).*"

In a recent judgment file No II. ÚS 2533/20 of 25 April 2023, the Constitutional Court assessed the absence of statutory regulation of social housing in the Czech Republic. The Constitutional Court agreed with the general courts that the complainants did not have a public subjective right to housing. This is a social right that must be reflected in law. Although the Constitutional Court did not expressly state this and simply referred to the aforementioned judgment file No Pl. ÚS 31/09, it exercised restraint in this respect.

8.

The Constitutional Court has consistently held that penal policy, including infraction policy, involves complex decision-making with criminological, social, or political considerations. As a result, it declared its reticence towards suggestions that certain offences should not be criminalised or that the punishment for illegal acts was disproportionate. The legislator's decision to qualify a certain type of conduct as a criminal act in terms of its formal definition and to set the breadth of the limits of crim-

inalisation of certain types of conduct is primarily a manifestation of the State's penal policy, which falls within the competence of State bodies other than the Constitutional Court (see resolution file No Pl. ÚS 4/03 of 18 March 2003 or judgment file No Pl. ÚS 5/2000 of 20 February 2001).

In judgment file No Pl ÚS 14/09 of 25 October 2011, it stated that the considerations regarding whether certain defective acts should be criminal or not (criminalisation or decriminalisation), the definition of the elements of wrongdoing (crimes, misdeamenours) and the determination of the type and amount of sanctions (intensity of criminal and administrative repression) are conditioned by many social determinants that change in the course of historical development. It is not uncommon for previously non-punishable conduct to be declared criminal by the legislator through a new legal regulation (criminalisation), or, conversely, for previously criminal conduct to be decriminalised. The legal categorisation of wrongdoing is also often changed – formerly criminal acts become classified as misdeamenour under the new legislation or, conversely, former infractions become criminal acts. By monitoring the development of regulation over a longer period of time, it is easy to see that the determination of the type and severity of penalty for crimes is also subject to relatively dynamic changes.

Legislative regulation of all these issues thus lies within the exclusive competence of the legislator, who is guided by criminally political criteria, e.g. the aspect of general prevention, the frequency of crimes in a given historical period, the intensity of the risks and the resulting degree of threat to orderly human coexistence ("legal peace"), changes in the public's axiological view of the importance of individual and social values and legal goods damaged by the wrongdoer's behaviour, etc. (see paragraphs 34 and 35 of judgment file No Pl ÚS 14/09 of 25 October 2011).

The Constitutional Court also exercises deference with regard to sanction proportionality, as it has consistently ruled that it is not competent to comment on the amount and type of the sentence imposed (e.g. judgment file No II. ÚS 455/05 of 24 April 2008 or file No IV. ÚS 136/21 of 8 February 2022), as the decision-making of the general (criminal) courts is irreplaceable in this area within the meaning of Article 90 of the Constitution in conjunction with Article 40(1) of the Charter of Fundamental Rights and Freedoms. In several decisions (e.g. resolution file No ÚS 2719/15 of 3 May 2016 or resolution File No Pl. ÚS 15/16 of 16 May 2018), the Constitutional Court stated that it is generally competent to review the proportionality of a penalty, which it will declare unconstitutional only if it is extremely disproportionate (the extreme disproportionality test). For example, in its judgment file No IV. ÚS 767/21 of 20 July 2021, the Constitutional Court overturned the decisions of the criminal courts imposing punishment for petty theft, albeit committed during the state of emergency declared in connection with the coronavirus pandemic.

9.

We can mention judgment file No Pl. ÚS 5/16 of 11 October 2016 and file No 39/17 of 2 July 2019, in which the Constitutional Court assessed the constitutionality of the contested provisions of Act No 186/2013 Sb., on citizenship of the Czech Republic. In this case, it exercised restraint and rejected the motions. This was due to the institutional aspect in relation to the legislator and, consequently, to the executive. However, the main reason for the judicial self-restraint exercised by the Constitutional Court was probably the fact that it was a question of State security. The judicial self-restraint doctrine is not explicitly mentioned in the judgments, but the Constitutional Court seems to have implicitly relied on it.

In judgment file No Pl. 5/16 of 11 October 2016, the Constitutional Court rejected a motion to repeal

Section 22(3) of the Citizenship Act, which requires the Ministry not to disclose in the justification of a decision rejecting an application for State citizenship the reasons for such rejection that stem from the opinions of the security services. In this case, the Constitutional Court concluded that the intended result of the above-mentioned procedure is that the specific reasons for not granting the application will not be disclosed to the applicant for citizenship only in those cases where there is a real concern that such disclosure could jeopardise the security of the State or third parties. In view of the above, the contested legislation pursues a legitimate aim, i.e. the security interests of the State. In the opinion of the Constitutional Court, the contested legislation is a manifestation of the optimisation of the contradictory effect of mechanisms protecting the values under the Constitution, where, on the contrary, it would be disproportionate if the Citizenship Act provided full justification for the rejection of an application on the grounds of a threat to State security at the expense of the protection of such State interests.

In judgment file No 39/17 of 2 July 2019, the Constitutional Court commented on the exclusion of judicial review of a decision not to grant citizenship to a foreigner on the grounds of State security. It dismissed the motion to repeal Section 26 of the Citizenship Act, which excludes from judicial review only those decisions rejecting an application for citizenship on the grounds of classified information about a threat to State security. Such a provision cannot be considered an expression of the legislator's arbitrariness. The Constitutional Court has ruled that the contested provision is not contrary to the principle of the democratic rule of law within the meaning of Article 1(1) of the Constitution.

10.

The Constitutional Court is, of course, the guardian of constitutionality and should have a supervisory role over the observance of human rights, but on the other hand, it should avoid excessive activism and not interfere in the regulation of issues that belong to the legislature. Therefore, it is about finding the desired balance between these two. The issue of regulated rents is an example where the Constitutional Court intervened in the case of the legislator's prolonged inactivity. This concerned a restriction of the basic human rights of property owners, when Czech politicians were unable to definitively resolve the issue of regulated rents, a remnant of communism, for several decades. Although the Constitutional Court maintained a restrained approach for quite a long time, it stated in its judgment file No Pl. ÚS 20/05 of 28 February 2006 that the prolonged inaction of the Parliament of the Czech Republic consisting in the failure to adopt a special legal regulation defining the cases in which the lessor is entitled to unilaterally increase the rent, the fees for services provided with the use of the apartment, and to change other terms of the lease contract is unconstitutional and violates Articles 4(3), 4(4) and 11 of the Charter of Fundamental Rights and Freedoms and Article 1(1) of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

II. **The decision-maker**

11.

In general, it cannot be stated, and no study shows, that the Constitutional Court exercises more restraint when reviewing acts of the Parliament as opposed to acts of the executive. The concept of restraint, which the Czech Constitutional Court prefers in terminology to the concept of judicial self-restraint, basically means that the Constitutional Court seeks to avoid excessive activism and tries not to interfere in issues that are the responsibility of the legislature or the executive. Although the Constitutional Court repeals laws to a quantitatively and qualitatively significant extent, it is not apparent that it seeks to restrict the Parliament extensively; on the contrary, it is apparent that it

shows a strong willingness to exercise self-restraint. If the Constitutional Court comes to the conclusion that a law is unconstitutional or that a decision is contrary to the constitutional order, it will, in accordance with the minimal interference principle, limit itself to repealing only those provisions of the law or parts of the decision that are strictly necessary.[2223]

Deference is applied in review by the Czech Constitutional Court for various reasons (legitimacy, separation of powers, better position for taking decisions, etc.), and it can be seen in certain legislative areas; however, there are frequent developments in the case law for these areas. The most prominent manifestations of the judicial self-restraint doctrine are the principle of priority of constitutionally-conforming interpretation of a legal norm over derogation or the concept of the political issue doctrine, where the Constitutional Court does not intervene in areas reserved for political decision-makers. Restraint is not consistently exercised by the Constitutional Court. The decision-making of the Constitutional Court has not yet elaborated on exactly when the various techniques that allow judges to exercise institutional restraint are to be applied and what the relationship between them is, including whether there is any hierarchy or conditionality between them.[2224]

With regard to **acts of Parliament**, here the legislature, the Constitutional Court, referring to the political issue principle (by arguing the separation of powers, the autonomy of the Parliament or its own restraint), has rejected the idea that it could review decisions by which the chambers of the Parliament decided on disciplinary torts of its members and sanctions for them (resolution file No Pl. ÚS 17/14 of 13 January 2015), as well as part of the decisions by which the chambers of the Parliament, their officials or parliamentary bodies (committees) take decisions in the framework of the procedure for approving draft acts (resolution file No Pl. ÚS 11/16 of 24 May 2016, paragraph 15). Similarly, when reviewing the Act regulating the departmental, professional, company and other health insurance companies, the Constitutional Court stated that the review of the legislature's decision to establish a public authority and define its powers cannot be reviewed except in the situation where the legislator violated one of the elementary constitutional principles (judgment file No Pl. ÚS 21/15 of 4 September 2018).[2225]

There are some decisions in the Constitutional Court's case law where it has exercised restraint in its review **of legal acts of the executive branch**. In resolution file No Pl. ÚS 4/13 of 5 March 2013, the Constitutional Court refused to review the decision of the President of the Republic to declare an amnesty in January 2013, citing respect for the separation of powers.[2226] The Constitutional Court has also exercised restraint when reviewing the constitutionality of the Government Regulation on noise (judgment file No Pl. ÚS 4/18 of 18 December 2018). It rejected the idea that the question of noise regulation was outside the competence of the judiciary due to it being a technical issue, but at the same time stated that the Constitutional Court could not aspire to review purely technical matters. Therefore, the Constitutional Court has carried out a specific review of the contested regulation, using a narrower version of the rational basis test.[2227]

2223 Malíř, J.: *Institucionální zdrženlivost ústavních soudů se zřetelem k Ústavnímu soudu ČR* [Institutional restraint of constitutional courts with regard to the Constitutional Court of the Czech Republic], in: Ústavní soud ČR: strážce ústavy nad politikou nebo v politice? [The Constitutional Court of the Czech Republic: guardian of the Constitution above or in politics?], p. 117

2224 Ibid, p. 127.

2225 Ibid, pp. 111–112.

2226 Stádník, J.: Dělba moci v judikatuře Ústavního soudu ČR [Separation of powers in the case law of the Constitutional Court of the Czech Republic], p. 106

2227 Malíř, J.: *Institucionální zdrženlivost ústavních soudů se zřetelem k Ústavnímu sou-*

The Constitutional Court was also relatively restrained during the recent COVID pandemic. The Government declared a state of emergency and issued emergency measures that affected a number of human rights. The reason for exercising restraint here was an objective lack of knowledge regarding the new coronavirus. In its resolution file No Pl. ÚS 8/20 of 22 April 2020, the Constitutional Court stated that the Government's declaration of a state of emergency is primarily an act of applying constitutional law; it constitutes an "act of governance" that has a normative impact, is not subject to review by the Constitutional Court in principle, and is "reviewable" by the primary democratically elected political ("non-judicial") body, which is the Chamber of Deputies. If the legislature has not set an appropriate standard of judicial review in the form of special procedural rules, traditional constitutional law proportionality review cannot be applied to a political decision on a state of emergency. The Government bears political responsibility for declaring a state of emergency. If the decision on a state of emergency within the meaning of Article 6(1) of the Constitutional Law on the Security of the Republic does not itself contain specific crisis measures, its direct and isolated review by the Constitutional Court is excluded in principle, since in such a case it is primarily an act of governance of a political nature (paragraphs 29 and 30).

The Constitutional Court has repeatedly dealt with the question whether the Government's resolution on the adoption of emergency measures constitutes an act eligible to be the subject of a motion to repeal a law or other legal regulation in accordance with Section 64 et seq. of the Constitutional Court Act. It stated that Government decisions (resolutions) on the adoption of crisis measures, which interfere directly with fundamental rights and freedoms or which create a legal basis for such interference through an individual administrative act, may have different forms and content, which is why they cannot be collectively classified under a single category of legal acts. In terms of proceedings before the Constitutional Court, depending on their content, they may be reviewable either as a legal regulation or as a decision or other intervention of a public authority. The Constitutional Court must assess this nature of the crisis measure in each individual case based on its content (e.g. resolution file No Pl. ÚS 20/20 of 16 June 2020; resolution file No Pl. ÚS 11/20 of 12 May 2020; resolution file No Pl. ÚS 15/20 of 5 May 2020; further on the assessment of the legal nature and the question of review of the extraordinary measure of the Ministry of Health, e.g. resolution file No Pl. ÚS 13/20 of 5 May 2020; resolution Pl. ÚS 12/20 of 5 May 2020; resolution file No Pl. ÚS 16/20 of 26 May 2020; resolution file No Pl. ÚS 106/20 of 9 February 2021).

The significant institutional self-restraint of the Constitutional Court in relation to the legislator, but also to the executive (the legislator here entrusts relevant and independently uncontrolled decision-making to the executive), and also partly towards the Constitutional Court itself, meaning a restrained approach to its own case law, is then evident in the judgment of the Plenum file No Pl. ÚS 5/16 of 11 October 2016 and file No Pl. ÚS 39/17 of 2 July 2019. In these judgments, the Constitutional Court confirmed the constitutionality of Section 22(3) of the Act on Citizenship of the Czech Republic (hereinafter the "Citizenship Act"), which limits the applicant's access to classified security information on which the decision to reject his application (i.e. not to grant the citizenship) is based, and which establishes only minimalist justification of the decision, as well as the constitutionality of Section 26 of the Citizenship Act, according to which judicial review is excluded in cases where a decision to reject is made on the grounds of a threat to State security.[2228]

du ČR [Institutional restraint of constitutional courts with regard to the Constitutional Court of the Czech Republic], in: Ústavní soud ČR: strážce ústavy nad politikou nebo v politice? [The Constitutional Court of the Czech Republic: guardian of the Constitution above or in politics?], p. 113

2228 Kindlová, M.: *Sebeomezení Ústavního soudu, státní občanství a bezpečnost státu* [Self-restraint of the Constitutional Court, citizenship and State security], pp. 164–165

According to the dissenting opinion of Vojtěch Šimíček, the Constitutional Court combined excessive activism with excessive restraint in its judgment file No Pl. ÚS 22/22 of 9 May 2023, in which the Constitutional Court subsequently annulled, among other things, a Government Regulation that set the remuneration of members of local government assemblies (see below).

The idea of separation of powers is often in the background of considerations of deferential review, but it is not in itself sufficient to explain when to apply deferential review. When reviewing alleged violations of fundamental rights, the issue of separation of powers is almost always relevant. Accordingly, the Constitutional Court should exercise restraint whenever it reviews decisions of the executive or legislative branch.

However, the reference to higher legitimacy does not help answer the key question of when the Constitutional Court is (should be) deferential. For example, why should the Constitutional Court exercise restraint when reviewing tax laws, but not when reviewing the legal conditions for house searches? The superior democratic legitimacy of other branches may be a legitimate argument for a deferential review, but it does not in itself explain whether the review should be strict or deferential. To identify situations where deference is to be paid, other considerations must come into play. Deference on the grounds of the superior democratic legitimacy of bodies other than the courts is also difficult to defend when the rights of underrepresented minorities are at stake.[2229]

The Constitutional Court resorts to deference primarily in situations where the issue under review is complex and polycentric and involves a considerable amount of other than legal knowledge. In these cases, it is quite difficult to insist that there is just one right answer to resolving conflicting interests. Therefore, the Constitutional Court relies on epistemic deference. It notes that other actors, such as the legislature and the executive, are better positioned to make the right decision because of their better staffing and financial resources. The Constitutional Court also sometimes refers to the separation of powers, i.e., what has been called deference on the grounds of legitimacy (e.g., when reviewing crisis measures or deciding on compensation for other than proprietary harm). [2230]

Judicial limitations of the Constitutional Court in the sense of respect for the decisions of other bodies, primarily due to the recognition of their greater expert competence in the given area and further judicial self-restraint in the sense of respect for the elected legislator can be seen, for example, in the above-cited judgments file Nos Pl. ÚS 5/16 and Pl. ÚS 39/17.

12.

The Act (on the Constitutional Court) obliges the Constitutional Court to examine three components in the framework of the norm review procedure, which together constitute the issue of compliance of a law with the constitutional order or the compliance of another legal regulation with the constitutional order and the law. These components are the competence of the authority which issued the contested legal regulation, the procedure by which it was issued, and its content. The sequence of the review is determined by a precise algorithm: given the nature of the case, the Constitutional Court first examines the competence of the competent public authority to issue the contested le-

2229 Kratochvíl, J.: *Důvody pro zdrženlivý přezkum Ústavním soudem*, Časopis pro právní vědu a praxi č. 4/2022 [Reasons for Deference by the Czech Constitutional Court, Journal of Legal Science and Practice No 4/2022], p. 826

2230 Ibid, pp. 821–822.

gal regulation, then, if it establishes that such competence exists, it examines compliance with the constitutionally prescribed procedure for issuing the contested legal regulation, and finally, if it finds that the procedure has been followed, it examines the substantive compliance of the contested regulation with the constitutional order or with the law.[2231]

The penalties for breaching the legislative process rules vary according to the seriousness of the breach. The legislative process doctrine distinguishes special types of procedural defects so significant that the result of a trial affected by such defects cannot stand in any event and must be set aside. Such defects include, for example, the lack of consent of one of the chambers of Parliament to a draft act requiring approval in both chambers, or the adoption of a draft act without approval by the expected majority. As stated by the Constitutional Court in its judgment file No Pl. ÚS 5/19 of 1 October 2019 (taxation of church restitution), the review by the Constitutional Court usually includes an assessment of whether the constitutionally prescribed procedure of the legislative process has been observed in terms of the participation of the various constitutional bodies in the process and whether the prescribed majority of deputies or senators in each chamber voted in favour of the draft acts. These are facts for which a breach of the constitutionally established rules would bring in question the very legitimacy of the legal regulation, so they must be taken into account whenever the compatibility of a legal regulation with the constitutional order is assessed (see e.g. judgment file No Pl. ÚS 1/12 of 27 November 2012). A less serious violation of the legislative process rules does not in itself imply derogatory intervention by the Constitutional Court. A situation may also arise where a large number of minor defects in the same legislative process cause, in its complexity, a serious breach of the legislative process rules (e.g. judgment file NoPl. ÚS 16/11 of 2 August 2011).[2232] It may be noted that the contested law is being repealed in its entirety due to procedural defects (as opposed to a substantive review of the law), which undoubtedly has a greater impact on the integrity of the legal order.[2233]

There are many types of defects and thus several categories of judgments of the Constitutional Court. These include, firstly, purely technical defects in the legislative process, i.e., those which clearly contravene the procedure laid down in the Rules of Procedure of the Chamber of Deputies or the Rules of Procedure of the Senate (repeated vote on a draft act cf. judgment file No Pl. ÚS 12/02 of 19 February 2003 or the referral of a draft act to the Senate in a wording different than approved by the Chamber of Deputies cf. judgment file No Pl. US 23/04 of 14 July 2005). Secondly, the use and abuse of the legislative process institutes (legislative riders cf. judgment file No Pl. ÚS 77/06 of 15 February 2007; judgment file NoPl. ÚS 10/09

of 24 January 2012; collective amendments cf. judgment file No Pl. ÚS 24/07 of 31 January 2008; complete draft amendments, e.g. judgment file No Pl. ÚS 21/14 of 30 July 2015.) The third category of defects in the legislative process is the limitation of parliamentary debate (limitation of the opposition rights in the debate cf. judgment file No Pl. ÚS 55/10 of 1 March 2011; judgment file No Pl. ÚS 53/10 of 19 April 2011 (in a state of legislative emergency); judgment file No Pl. ÚS 1/12 of 27 November 2012 see below, judgment file No Pl. ÚS 10/13 of 29 May 2013).

2231 Filip, J., Holländer, P., Šimíček, V.: *Zákon o Ústavním soudu, komentář*, 2. vydání, 2007 [Constitutional Court Act, Commentary, 2nd edition, 2007] p. 399

2232 Šírová, B.: *Přezkum legislativního procesu Ústavním soudem a vnitřní autonomie Parlamentu*, diplomová práce [Review of the Legislative Process by the Constitutional Court and the Internal Autonomy of the Parliament, Master Thesis], 2012/2013 pp. 24–25

2233 Zámečníková, M.: *Některé vady zákonodárného procesu v judikatuře Ústavního soudu* [Certain defects of the legislative process in the case law of the Constitutional Court], p. 490

The legislative rules and the determination of the degree of review of the legislative process regularity by the Constitutional Court have considerably developed and changed over time. While the Constitutional Court initially placed considerable demands on the integrity of the legislative process and was not reluctant to strike down entire laws for rule violations, it later corrected this strictness and adopted a certain restraint. Although the Constitutional Court often mentions the principle of restraint in its decisions when interfering with the Parliament's autonomy, it frequently happens that the constitutional rules are judicially shaped and laws are repealed because of their unconstitutional adoption. The outvoted parliamentary minority quite often uses its right to file a motion to repeal a law with the Constitutional Court, where objections to the unconstitutionality of the legislative procedure usually appear in conjunction with the alleged substantive conflict of the law with the constitutional order. The primary guarantors of compliance with the legislative process rules are the Speakers and chairs of the two chambers of the Parliament controlling the proceedings, the Senate checking the activities of the Chamber of Deputies with the possibility of rejecting a draft act or returning it with amendments, and the President with the right of suspensive veto. It is only when these safeguards fail that the Constitutional Court comes into play, if properly called upon. It intervenes only when the violation of parliamentary rules has also violated constitutional rules.[2234] The Constitutional Court, when assessing the constitutionality of the legislative process, does not usually abandon the principle of restraint and minimal interference, but in the case law in question there are elements of both judicial self-restraint and activism (exceeding the competence of the Constitutional Court).[2235]

In a number of its judgments, the Constitutional Court has dealt with the criteria of constitutionality of the legislative process, and has formulated its basis. In judgment file No Pl. ÚS 7/03 of 18 August 2004, in which the Constitutional Court assessed the constitutionality of a derivative legal regulation, the Constitutional Court stated that a violation of the legal rules of the legislative process may lead to the derogation of such regulation only if these rules also express a constitutional principle. In judgment file No Pl. ÚS 77/06 of 15 February 2007, the Constitutional Court stressed that formal defects in the legislative process cannot lead to the derogation of the legal regulation under review, as such possible intervention by the Constitutional Court must always be measured in relation to the principle of justified trust of citizens in the law, the principle of legal certainty and the protection of acquired rights. In judgment file No Pl. ÚS 55/10 of 1 March 2011, the Constitutional Court ruled that a law can be deregulated on the grounds of defects in the process of its adoption if there was a direct violation of the constitutional order in the legislative process or if there was a violation of lower than constitutional law (e.g., the Rules of Procedure of the Chamber of Deputies) if the violation had a constitutional dimension. In such cases, the Constitutional Court's intervention is justified in particular by the protection of free competition between political parties or political forces and the protection of minorities, in particular the parliamentary opposition (cf. in particular Articles 5 and 6 of the Constitution and Article 22 of the Charter).

In other words, the Constitutional Court respects the principle of restraint and repeals legislation only in exceptional cases where the essential rules of the legislative process have not been observed and the error reaches the importance of constitutional law (e.g. judgment file NoPl. ÚS 6/21 of 22 June 2022, tax package abolishing the super gross wage and presidential veto, paragraph 45). It follows from the case law of the Czech Constitutional Court that deferential review should only be applied when the interference with the law is not overly intense. Deference should always be based on the condition that human rights have been taken into account by the previous decision-maker. If

2234 Šírová, B.: *Přezkum legislativního procesu Ústavním soudem a vnitřní autonomie Parlamentu, diplomová práce* [Review of the Legislative Process by the Constitutional Court and the Internal Autonomy of the Parliament, Master Thesis], 2012/2013 p. 68

2235 e.g. in judgments file No Pl. ÚS 55/10 and file No Pl. ÚS 53/10 concerning legislative emergency; ibid. p. 69

the legislative process, or any previous process, has ignored the human rights dimension of an issue, deference can hardly be an option.[2236]

The Constitutional Court has applied the above-mentioned principles, for example, in its judgment Pl. ÚS 1/12 of 27 November 2012 when it stated that: "*the inconsistency of the contested laws with the constitutional order may in particular impose such a restriction on the rights of the parliamentary opposition that affects its very ability to participate in the legislative procedure as an adequate participant, i.e. depriving it of the possibility of actually becoming acquainted with the draft act and expressing its opinion, and thus making it impossible or substantially more difficult for it to exercise control in relation to the Government or the parliamentary majority. Depending on the severity of such a restriction, the same consequence could be attributed to the arbitrary procedure for the consideration of such proposals. ... in addition to establishing that such a restriction has been made, it will always be necessary to examine its significance in terms of the opposition's participation in the legislative process. It will also be relevant at what stage of the legislative process the restriction was made and whether its prospective negative consequences were mitigated at earlier or subsequent stages"* (paragraph 208). In the case at hand, there was a violation of the Rules of Procedure of the Chamber of Deputies, but it was not a violation of such intensity that, in view of the overall assessment of the manner in which the contested laws were adopted, was sufficient to establish incompatibility with constitutional law.

By analogy, in judgment file No Pl. ÚS 26/16 of 12 December 2017 (electronic sales registration) as well as in paragraph 86 and 87 of judgment file No Pl. ÚS 87/20 of 18 May 2021 (tax package for 2020, increasing public budget revenues), the Constitutional Court did not establish that the defects in the legislative process were capable of violating the constitutional order. In that judgment (paragraph 90), the Constitutional Court also recalled that "*the consideration of the draft in both chambers of the Parliament must enable the persons concerned to have a realistic assessment and consideration of the draft by the Parliament, and the individual deputies or senators must have a true opportunity to become familiar with the content of the draft act submitted and to take a position on it in the context of its consideration by the relevant chamber of the Parliament or its bodies (Pl. ÚS 53/10, paragraph 106).*"

In the cited judgment file No Pl. ÚS 53/10 of 19 April 2011, which concerned the consideration of a law during a state of legislative emergency, the Constitutional Court found that the failure to comply with the legal conditions for declaring a state of legislative emergency constituted an interference with a constitutional democratic principle and therefore annulled the contested laws.

13.

The starting point for a merits review of the contested law or its individual provisions (contested derivate regulation) by the Constitutional Court is, among other things, the explanatory report to the draft act and its argumentation, to which the Constitutional Court almost regularly refers in its reasoning. The explanatory report is a non-binding part of the draft act that is being presented to the Parliament. It is intended to serve both to justify its individual provisions and to explain its overall purpose. No draft act has to be accompanied by an explanatory report, but it is the rule, especially for draft acts submitted by the Government, which are governed by otherwise non-binding Government legislative rules. These regulate the procedure of ministries and other central State administration bodies in the drafting and discussion of draft legislation, as well as the requirements concerning the content and form of draft legislation.

2236 Kratochvíl, J.: *Důvody pro zdrženlivý přezkum Ústavním soudem*, Časopis pro právní vědu a praxi č. 4/2022 [Reasons for Deference by the Czech Constitutional Court, Journal of Legal Science and Practice No 4/2022], p. 823

For example, in the already mentioned judgment file No Pl. ÚS 5/16 and in judgment file No Pl. ÚS 39/17, the Constitutional Court start its merit review of the contested provision of the Citizenship Act by first referring to the explanatory report to the Act and its argument that there is a risk of a serious threat to the operative search operations of the Police and intelligence services if the applicant had access to relevant security information of a classified nature and if the reasons for the rejection of the decision contained such information. Also, e.g. in judgment file No Pl. ÚS 48/13 of 18 January 2022, the Constitutional Court refers, among other things, to the explanatory report (paragraph 44) when assessing the legitimacy of the objective of legislation. Also, in judgment file No Pl. ÚS 17/22 of 21 February 2023 (Obligation of financial institutions to manage and keep a protected account free of charge), the Constitutional Court assessed, as part of the third step of the rational basis test, whether the objective pursued by the contested provision can be considered legitimate, referring to the specific part of the explanatory report which justifies the stipulated gratuitousness and thus the purpose of the regulation (paragraph 68).

If the applicant often refers in his constitutional complaint to a more appropriate solution from his point of view, the Constitutional Court emphasises that it can solely repeal provisions of the law that are contrary to fundamental rights and freedoms, but it cannot replace or supplement them in any way. Therefore, it "only" plays the role of a "negative legislator" in this respect. Only the legislature could change the text of the law itself. Therefore, the Constitutional Court cannot interfere in any way with the decision of the legislative body on how to regulate the social relations in question, it can only assess whether the contested provisions are constitutionally compatible, and if not, it can annul them. E.g. in the above-mentioned judgment file No Pl. ÚS 48/13the Constitutional Court has stated that the choice of control instruments and the extent to which they are applied in labour-law relations is primarily the task of the legislator, who assesses in particular whether the newly introduced measures can lead to the pursued objective (paragraph 54).

In spite of the above, the Constitutional Court is often perceived as activist when it has not hesitated in some decisions to state the unconstitutionality of the legislator's inaction.[2237] The same applies to various decisions in which the Constitutional Court has more (e.g. through interpretative statements) or less directly (by stating "*obiter dictum*"), but conspicuously, expressed a preference for a particular way of regulating socially significant matters.[2238]

We can point out a recent dissenting opinion of Justice Šimíček on judgment file No Pl. ÚS 22/22 of 9 May 2023 (paragraph 4 and 5), in which he stated the following: *"Therefore, the reason why the Plenum partially granted the applicant's request is not really what is unconstitutional in the law and therefore what should be repealed, but what is missing in the law. Therefore, the reason for the derogation was found in the silence of the legislator. Therefore, the essence of the matter is rather simple: the question is exclusively whether the specific amount of remuneration (or the coefficient) must be directly enshrined in the law, or if it is enough for it to be set in a Government Regulation. . . . .[...]. "Therefore, I consider the adopted judgment to be highly activist: in essence, the Constitutional Court is saying that additional criteria for determining the amount of remuneration for released assembly members must be enshrined directly in*

2237 Judgment file No Pl. ÚS 20/05 of 28 February 2006 (regulation of apartment leases) or judgment file No Pl. ÚS 9/07 of 1 July 2010 (church restitutions; paragraph 68 an.)

2238 Malíř, J.: *Institucionální zdrženlivost ústavních soudů se zřetelem k Ústavnímu soudu ČR* [Institutional restraint of constitutional courts with regard to the Constitutional Court of the Czech Republic], in: Ústavní soud ČR: strážce ústavy nad politikou nebo v politice? [The Constitutional Court of the Czech Republic: guardian of the Constitution above or in politics?], p. 101

law. At the same time, however, this advice is directly ambiguous and equivocal: it is not clear what kind of regulation will pass the constitutionality test in the future. The decision of the Constitutional Court under dissent paradoxically combined excessive activism (it struck down the legal regulation, thus removing the Government's ability to set the amount of remuneration) with excessive restraint (it did not specify what legal limits it considered acceptable)."

14.

The explanatory report is an important guide for the Constitutional Court in assessing the compliance of the contested legal regulation with the constitutional order, which should ideally describe the impact of the specific measure on the fundamental rights of the persons concerned. In the context of the chosen test of constitutionality, the Constitutional Court examines whether the legislator has considered these effects, in particular when assessing the legitimate objective of the contested legislation, i.e. whether this legislation constitutes an arbitrary and fundamental reduction of the overall standard of fundamental rights. When reviewing the "anti-smoking law", which introduced a complete ban on smoking in restaurants, the Constitutional Court found that the legislator in this case was able to shield the pursued objective of protecting life and health "from the commercial and other interests of the tobacco industry" when adopting the law. This reference to the intent of the legislator to protect life and health should lead to the restrained approach of the Constitutional Court. It pointed out that the explanatory report showed that the legislator had carefully considered interventions in the tobacco and hospitality industries. For all these reasons, the Constitutional Court concluded that the contested smoking ban pursues legitimate aims and is not an arbitrary interference with fundamental rights (paragraph 124 of judgment file No Pl. ÚS 7/17 of 27 March 2018). Generally speaking, the more attention the legislator pays to potential infringements on fundamental rights, the more likely it is that the legislation will pass the Constitutional Court's review.

15.

The assessment of whether the rights of the parliamentary minority were duly taken into account is an integral part of the Constitutional Court's review of the constitutionality of the procedure for adopting the contested legal regulation. According to the Constitutional Court, the fundamental rights of the parliamentary minority or its members can be primarily considered to be rights guaranteeing participation in parliamentary procedures and enabling the parliamentary opposition to exercise supervision and control over the ruling majority, which can be understood as a basic feature of the rule of law. The Constitutional Court considers the right to block or delay decisions taken by the majority to be a right of the parliamentary minority. Individual deputies or senators must be given a real opportunity to become familiar with the content of the submitted draft act, to assess it and to take a position on it in the context of its consideration in the relevant chamber of the Parliament or its bodies, for which they must be given sufficient time (paragraphs 71–72 of judgment file No Pl. ÚS 7/22 of 13 September 2022). The second part of the question is not answered in detail in the existing case law of the Constitutional Court.

16.

We are not aware of this factor ever playing a role in the Constitutional Court's decision. However, it may be noted that the above requirements for parliamentary debate (see the answer to question 15) should, according to the Constitutional Court, also apply to the wider public, which should not be denied the opportunity to scrutinise and critically evaluate the legislative proposal in question. From the perspective of the Constitutional Court, elected representatives of citizens are forced to publicly justify and defend their proposals in direct confrontation with the views of their opponents, thus allowing the public to find out whether and for what reasons they supported a particular proposal. Therefore, mutual confrontation is not limited to the exchange of arguments between individual

deputies and senators, but must be understood in a broader sense, in connection with the simultaneous public debate, which can take the most varied forms imaginable. At the same time, it holds that elected representatives influence public opinion on particular issues of public interest and that public opinion also influences the attitudes and decisions of individual deputies and senators. According to the Constitutional Court, this ultimately fulfils the legitimation function of the legislative process (paragraph 206 of judgment file No Pl. ÚS 1/12 of 27 November 2012).

III. Rights, scope, legality and proportionality

17.

In proceedings before the Constitutional Court, there is space for hearing of the parties concerned, which in the case of proceedings for the review of norms are the legislator (the one who issued the law or other legal regulation the repeal of which is proposed), the government, and the Public Defender of Rights (cf. Section 69 of the Constitutional Court Act). The Constitutional Court bases its definition of a fundamental right on the constitutional order and on its previous case law (judgments of the Constitutional Court are binding), and it often refers to expert literature when defining a fundamental right, and it also takes into account the comments of the parties to the proceedings. However, it is the Constitutional Court that is called upon to protect and thus define fundamental rights, e.g. in reviewing interference with economic, social and cultural rights, it directly defines the core of the fundamental right itself, and in proceedings to repeal legal regulations, it assesses whether the contested regulation directly interferes with the core of that fundamental right (regarding the matter of the rational basis test applied in reviewing economic, social and cultural rights, see the answer to the following question).

In the rich decision-making practice of the Constitutional Court, there are also decisions in which the Constitutional Court agreed with the Government's argumentation. For example, in its dismissing judgment File No Pl. ÚS 17/11 of 15 May 2012, the Constitutional Court referred to the detailed statement of the Ministry of Finance on the applicants' objections pointing to the lack of competence of the Ministry of the Environment in the area of pricing and the related public-law nature of the permits, which, in its opinion, was contrary to the private-law nature of the provisions in question (gift tax), and stated that it agreed with it. We may also mention judgment file No Pl. ÚS 15/15 of 30 January 2018 (N 12/88 SbNU 171; 62/2018 Sb.), in which the Constitutional Court stated in the norm-review procedure that the Government's statement "*that the technical games affected by the contested regulation cannot be compared with betting terminals of numerical lotteries, given the different principles of these types of gambling, where betting terminals register players in a game whose outcome is determined after some time and usually elsewhere*" can be accepted. In this case, the Constitutional Court subsequently concluded that the applicant had not demonstrated arbitrariness or capriciousness on the part of the legislator in imposing a higher or entirely special new tax obligation on the operators of gaming machines and other technical games devices. In resolution file No Pl. ÚS 32/21 of 24 May 2022, in which the applicant sought the annulment of Section 94(a) of Act No 6/2002 Sb., on courts and judges, according to which the office of judge shall cease upon the expiry of the calendar year in which the judge reaches the age of 70, as he considered that the contested provision was contrary to Article 26 of the Charter of Fundamental Rights and Freedoms, the Constitutional Court upheld the argumentation of the Government, which questioned the applicant's active legitimacy in its statement.

18.

The Constitutional Court itself admits in the reasoning of its decision that it is more restrained in some areas, and the deference in the Constitutional Court's case law is also addressed by authors of expert literature. For example, Kratochvíl states that a close examination of hundreds of decisions containing the keywords ("discretion", "expert", "disproportional", "wide discretion", "deference" and "restraint") can define areas where deferential review has indeed been exercised in cases involving tax legislation, State economic policy, violations of social rights, measures related to a state of emergency (COVID-19), decisions requiring a high degree of non-legal expertise (e.g. vaccination), review of legislation defining the criminality of conduct and the corresponding penalty, the amount of compensation for other than proprietary harm, preliminary rulings and decisions on costs (cf. Kratochvíl, Jan. Důvody pro zdrženlivý přezkum Ústavním soudem/Reasons for Deference by the Czech Constitutional Court, 2022. Časopis pro právní vědu a praxi, č. 4, ročník XXX. [Journal of Legal Science and Practice, No 4, Vol. XXX] pp. 813–821.) It may be added that the Constitutional Court has repeatedly stated that it exercised rather strict deference when reviewing decisions of general courts issued in proceedings concerning the custody of minors (cf. resolution file No III. ÚS 3012/22 of 15 November 2022); it is necessary to mention here that this is a proceeding on constitutional complaints, which is a type of proceeding in which the Constitutional Court decides on complaints of legal or natural persons against a final decision (or other intervention of public authorities) against their constitutionally guaranteed fundamental rights and freedoms. Kratochvíl further states that when the Constitutional Court exercises deference in its case law, it usually applies either the extreme disproportionality test or the rational basis test (Kratochvíl, op. cit, p. 823). In contrast, these tests will be applied in the case of norm-review proceedings. The object of the procedure for the review of norms is the protection of constitutional norms, including fundamental rights. This means that the reference criterion for review is the specific fundamental right with which the contested legal provision is confronted (cf. resolution file No Pl. ÚS 5/22 of 26 April 2022).

As regards economic, social and cultural rights, the enforceability of which is to some extent limited by Article 41(1) of the Charter of Fundamental Rights and Freedoms, which provides that the rights referred to in Articles 26, 27(4), 28 to 31, 32(1) and (3), 33 and 35 of the Charter may be sought only within the limits of the laws implementing those provisions. These include the right to freely choose a profession and prepare for it, as well as the right to engage in business and other economic activities, the right to strike, the right to fair remuneration for work and satisfactory working conditions, the right to protection of women, adolescents and the disabled in labour-law relations, the public subjective right to social security, the right to health protection, protection of parenthood and the family, special protection of children and adolescents, the right to education and the right to a favourable environment and the right to information on the state of the environment.

In judgment file No Pl. ÚS 1/08 of 20 May 2008 (N 91/49 SbNU 273; 251/2008 Sb.), reviewing part of Act No 261/2007 Sb. on the stabilisation of public budgets, the Constitutional Court for the first time formulated the rational basis test, which it applies in the review of social rights. In this judgment, the Constitutional Court stated that it could not disregard the fact that part of the contested law is an integral part of the stabilisation of public budgets. In this context, it then focused on the principle of restraint and minimal interference and on the question of the competence of the Constitutional Court to make a cassation decision, adding that it considered it possible that, even if it found sufficient grounds for a negative decision after finding the answer to this set of questions, it would not decide on the basis of procedural economy without applying the rational basis test; in other words, the Constitutional Court thus dealt with the primary substantive issue – whether the contested legislation violates any of the provisions of the Constitution or the Charter, or whether it infringes any right protected by the Charter (cf. judgment of the Constitutional Court file No Pl. ÚS 1/08 of 20 May 2008, paragraph 88). In paragraph 103 of judgment file No Pl. ÚS 1/08 of 20 May 2008, the Constitutional Court defined four steps leading to a conclusion on the (un)constitutionality of a law implementing constitutionally guaranteed social rights, which are as follows:

(1) defining the meaning and essence of social rights, i.e. certain essential content; and

(2) assessing whether the law affects the very existence of a social right or its actual implementation (essential content). If the Constitutional Court finds that the contested regulation interferes in its content with the essential content of the fundamental right itself, the (stricter) proportionality test comes into play. If it does not influence the essential content of social law, the process continues as follows:

(3) assessing whether the statutory regulation pursues a legitimate aim; that is, whether it is an arbitrary and fundamental reduction of the overall standard of fundamental rights; and finally

(4) considering whether the legal means used to achieve it are reasonable (rational), though not necessarily the best, most appropriate, most effective or wisest.

It can be stated that the proportionality test is a stricter test (e.g. Kratochvíl states that the proportionality test leaves the legislator with virtually no discretion – cf. Kratochvíl, op. cit, p. 815), and therefore it can also be concluded that in the case of economic, social and cultural rights the protection is lower **due to their nature**, since the Constitutional Court leaves the legislator more room for discretion to interfere with these rights. In order for a legal regulation to pass the rational basis test in a constitutional review, it is sufficient if it is "*in some rational relationship to the purpose of the law, i.e. if it can in some way affect the achievement of that purpose*" (see judgment file No Pl. ÚS 8/07 of 23 March 2010).

19.

In its case law, the Constitutional Court has repeatedly expressed its views on the constitutional requirements for clarity and predictability of the law, but the specific steps of the test of clarity of the law do not appear in the case law of the Constitutional Court, nor does the "*in claris non fit interpretatio*" canon appear in the reasoning of its decisions (it appears only once in a complainant's argument). In general, the Constitutional Court has warned in its case law of the risks of excessive generality of a legal norm, which may lead to its arbitrary application. At the same time, however, the Constitutional Court emphasises in its case law that if a provision does not offer an unambiguous answer for certain situations, this does not in itself mean that it is unconstitutional. In this context, it is necessary to recall the obligation of constitutional interpretation of norms, where the Constitutional Court consistently reminds that a constitutionally conforming interpretation of a provision of a law or other legal regulation takes precedence over its annulment by the Constitutional Court. It can be added that the Constitutional Court has already admitted the possibility to repeal a provision of a law even in the case of the legislator's omissions ["gaps in the law", see e.g. judgment file No Pl. ÚS 83/06 of 12 March 2008 (N 55/48 SbNU 629; 116/2008 Sb.)], it always dealt with cases where it established unconstitutionality in this omission, e.g. in the form of constitutionally unacceptable inequality.

With regard to the generality or excessive vagueness of a legal regulation, in judgment file No Pl. ÚS 25/97 of 13 May 1998, the Constitutional Court (in the first decade of its existence) dealt with the provision of Section 14(1)(f) of Act No. 123/1992 Sb., on the residence of foreign national in the territory of the Czech and Slovak Federative Republic, which was in force in the 1990s, which provided that a foreign national could be banned from staying in the territory of the Czech Republic for at least one year if he violated an obligation established by the Act on the Residence of Foreign Nationals or "*another generally binding legal regulation*". In this case, the Constitutional Court emphasised that the concept of "expulsion" must be understood as an autonomous institution, independent of the definition under national law. It recalled that the concept of expulsion under international law cannot be mechanically identified with the concept of expulsion under national law, since its international con-

cept – within the meaning of Article 1 of Protocol No 7 to the Convention – is broader and includes, with the exception of extradition, any measure forcing the departure of a foreign national, and in the case of the Czech Republic, therefore also the institution of the prohibition of residence. It concluded that the regulation of the expulsion regime under Article 1 of Protocol No 7 to the Convention also applied to the regulation of the prohibition of residence under the aforementioned Section 14 of Act No 123/1992 Sb. In the present case, the Constitutional Court concluded that the contested provision suffers from the defect of being too general. According to the Constitutional Court, the contested provision allowed for an interpretation and application which, in its consequences, constituted a restriction on the freedom of movement and residence that went beyond what the Charter permitted. The Constitutional Court has recalled that one of the essential features of the rule of law is the principle of proportionality, which assumes that measures restricting fundamental human rights and freedoms must not have negative consequences that exceed the positive effects of the public interest in such measures. However, the cited provision of Section 14(1)(f) of the Act on the Residence of Foreign National was quite general and did not exclude the possibility of arbitrariness.

In its judgment file No Pl. ÚS 98/20 of 27 April 2021, the Constitutional Court commented on the use of vague terms in law in a case in which it reviewed part of Section 289(3) of the Criminal Code, which empowered the Government to specify the concept of a quantity greater than small (in connection with the possession of narcotic drugs and psychotropic substances). It stressed that the terms used in law should undoubtedly be clear and unambiguous in terms of legal certainty, but at the same time they must be sufficiently abstract to be able to capture the widest possible range of eventualities that occur or may in future occur in real life. However, the use of vague terms is, according to the Constitutional Court, necessary in law, where the legislator uses this possibility quite often, especially in order to respond to dynamically changing conditions and various situations in life, and criminal law is no exception in this respect. Therefore, the Constitutional Court has concluded that the use of vague legal terms, especially in cases where the legislator intends to limit the scope of criminalisation of a certain conduct (act or omission), or to set a lower quantitative limit of criminality [e.g., a quantity greater than small in Sections 284(1) or 285(1), (2) of the Criminal Code], is constitutionally consistent.

In judgment file No Pl. ÚS 8/08 of 8 July 2010, in which the Constitutional Court expressed its opinion on the limitation of the right of ownership under Act No 114/1992 Sb., on the protection of nature and landscape, the Constitutional Court admitted that the contested provision of Section 68(3) of the Act on the Protection of Nature and Landscape does not directly imply what form the interventions for the improvement of the natural environment may take, but it did not find it unconstitutional. According to the Constitutional Court, this premise follows from the nature of the case and is necessary to achieve the pursued legitimate objective of species preservation, richness of nature and maintaining the system of ecological stability. In this regard, the Constitutional Court stated that it is not possible to a priori formulate into law the form of (all) conceivable measures for the purpose of species preservation, richness of nature and maintaining the system of ecological stability that may occur in real life.

In its judgment file No Pl. ÚS 18/17 of 25 September 2018, concerning an amendment to the Nature and Landscape Protection Act, the Constitutional Court added that vagueness of legal terms is not unusual in the legal system, it essentially stems from the abstract and regulatory nature of legal norms and does not in itself render a legal regulation unconstitutional. According to the Constitutional Court, vagueness could be considered to be contrary to the requirement of legal certainty, which is one of the components of the rule of law [Article 1(1) of the Constitution], if its intensity precludes the possibility of determining the normative content of a legal regulation using the usual interpretation processes. There would be room to repeal a provision of a law "*only in the case where*

there is a violation of the constitutional order and the imprecision, vagueness and unpredictability of the legal regulation extremely disturbs the basic requirements of laws under the rule of law" [see judgment of 27 March 2008, file No Pl. ÚS 56/05 (N 60/48 SbNU 873; 257/2008 Sb.), paragraph 50]. Furthermore, in judgment file No Pl. ÚS 18/17 of 25 September 2018, the Constitutional Court recalled that the legislative use of "vague terms" is based on the fact that their specific content is fulfilled only by the application activities of public authorities, without this being a violation of the constitutional order (e.g. legal certainty) in a State governed by the rule of law; otherwise, it would be impossible to effectively implement public administration. It added that this is in a sense a manifestation of a broader ideological premise – the doctrine of scepticism about norms. According to the Constitutional Court, not all rules of conduct and legal concepts can be (precisely) formulated pro futuro; for certain types of cases – due to their nature – principles and objectives are formulated, which are then put into practice by courts and State authorities through application [cf. judgment of the Constitutional Court of 8 July 2010 file No Pl. ÚS 8/08 (N 137/58 SbNU 115; 256/2010 Sb.)]. In this context, however, the Constitutional Court has also emphasised that the unconstitutionality of a provision of a legal regulation is not, in principle, based on any difficulties in interpreting the law. If a provision does not offer an unambiguous answer for certain situations, this does not in and of itself mean that it is unconstitutional. In this ruling, the Constitutional Court, while respecting the principle of minimal interference, repeated what it had already stated in its judgment of 3 February 1999, file No Pl. ÚS 19/98 (N 19/13 SbNU 131; 38/1999 Sb.), i.e. the following: "[of] *the many conceivable interpretations of the law, only the one that respects constitutional principles (if such an interpretation is possible) should be applied in each case, and only if the provision in question cannot be applied without violating constitutionality (the minimal interference principle) should the provision be repealed for unconstitutionality*".

20.

The legitimate aim test, sometimes referred to as the legitimacy criterion, is part of the Constitutional Court's review of the conflict between fundamental rights and freedoms or their limitations. The Constitutional Court examines whether this restriction pursues a constitutionally approved objective, based on the premise that fundamental rights defined by the Charter of Fundamental Rights and Freedoms (hereinafter the "Charter")[2239] may be restricted only in favour of constitutionally protected (approved) values.[2240] If the restrictive measure does not pursue any legitimate aim, or pursues an aim that is prohibited by the constitutional order, it is considered a violation of a fundamental right.

In the Charter and the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "Convention"), legitimate aims are "*defined by vague terms such as State security, national security, public order, public safety,...*."[2241] Some of these terms are defined by law, while others, although frequently used, such as public order, need to be interpreted through the case law of the courts or decisions of other public authorities.

As regards the structure of the constitutional review itself, the legitimate aim test, as applied by the Constitutional Court, cannot be viewed in isolation, but as part of a comprehensive assessment of the constitutionality of interference with fundamental rights. This review consists of the following steps: (1) defining the scope and content of the right under review; (2) the interference or restriction

2239 Charter of Fundamental Rights and Freedoms, viz https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Charter_of_Fundamental_Rights_and_Freedoms.pdf.

2240 Černívek, Zdeněk. *Legitimita, proporcionalita a doktrína vyloučených důvodů* [Legitimacy, proportionality and the excluded grounds doctrine]. Právník [Lawyer, journal] 7/2021.

2241 Judgment of the Constitutional Court of 15 September 2009, file No Pl. ÚS 18/07.

by the public authority; (3) the legality criterion; (4) the legitimacy criterion; and (5) the proportionality test.

Whether to include the legitimacy test as a separate step of the constitutionality review or as part of the proportionality test has not yet been clearly resolved by the doctrine or case law of the Constitutional Court. In principle, the Constitutional Court views the legitimate aim test in three variations. The legitimate aim test may be (1) a separate step of the assessment of the restriction of the right preceding the proportionality test;[2242] or (2) implicitly included in the appropriateness criterion of the three-step proportionality test;[2243] or (3) the initial (special) step of the proportionality test, in which case we will talk about the four-step proportionality test[2244].

The latter can be seen in one of the latest judgments of the Constitutional Court from April 2023[2245]. In this decision, the Constitutional Court adopted the three-stage structure of the proportionality test, where the first criterion is the assessment of the ability to fulfil the pursued legitimate aim (the criterion of appropriateness), followed by the assessment of the necessity of the contested legislation, where the court examines whether the most appropriate instrument was used, which is the most gentle to the restricted fundamental right, and finally the court examines proportionality, i.e. applies the proportionality test in the narrower sense.

It follows from the foregoing that the legitimate aim test, however embedded in the structure of the review of the constitutionality of a restrictive measure, constitutes a kind of "gateway" to the proportionality test and at the same time to some extent predetermines the content of its following steps.[2246] Defining the legitimate aim of the measure under review is a necessary prerequisite for further application of the proportionality test and also helps to clearly define the constitutional values that are in conflict in the given case and that will be assessed in the following steps.

Legitimate aims are constitutionally conforming objectives, which may be explicitly enshrined in the constitutional text or implicitly derived therefrom. It is the Charter that contains both the fundamental rights and the limitation clauses attached thereto, identifying a legitimate aim to limit a particular right. If, however, the restriction, although legitimate at first sight, is not promoting the constitutionally envisaged purpose, but will only cause, for example, harm to another person, such an aim cannot be considered legitimate, as it will be an abuse of the right. As this is a somewhat more complex review, the Constitutional Court does not conclude its review at the legitimacy criterion stage, but takes into account the manner in which the law is exercised and the intended purpose

2242 Judgment of the Constitutional Court of 7 September 2005, file No IV. ÚS 113/05; judgment of the Constitutional Court 13 July 2011, file No III. ÚS 3363/10; judgment of the Constitutional Court 11 September 2012, file No II. ÚS 1375/11.
2243 Judgment of the Constitutional Court of 20 February 2018, file No Pl. ÚS 6/17; see also judgment of the Constitutional Court 2 April 2013, file No Pl. ÚS 6/13; judgment of the Constitutional Court 18 December 2018, file No Pl. ÚS 27/16; judgment of the Constitutional Court 3 November 2020, file No Pl. ÚS 10/17.
2244 Judgment of the Constitutional Court of 12 May 2009, file No Pl. ÚS 10/08; judgment of the Constitutional Court 27 November 2012, file No Pl. ÚS 1/12; judgment of the Constitutional Court 22 October 2013, file No Pl. ÚS 19/13; judgment of the Constitutional Court 16 May 2018, file No Pl. ÚS 15/16.
2245 Judgment of the Constitutional Court of 11 April 2023, file No Pl. ÚS 92/20.
2246 Dissenting opinion of Justice Ludvík David in judgment of the Constitutional Court of 20 February 2018, file No Pl. ÚS 6/17.

of such exercise (possible abuse of the law) in the subsequent steps of the review, especially under the proportionality criterion.[2247]

In the case of implicit legitimate aims or constitutional values, the Constitutional Court takes the initiative and must derive these objectives in the specific case. For example, the Constitutional Court derived the principle of autonomy of will from the right to protection of property[2248] or the right of a journalist to confidentiality of his source from the right to freedom of expression[2249]. In these cases, the Constitutional Court derived legitimate objectives from constitutionally enshrined fundamental rights. A legitimate aim can also be derived from the principle of public interest. However, in such a case, the Constitutional Court is faced with a much more difficult task in its review, since in the case of implicit legitimate aims, the legislator has a much wider margin of discretion to pursue any legitimate aim, unless it is constitutionally prohibited.

Therefore, the legitimacy test acts as a threshold criterion or filter that distinguishes legitimate and illegitimate reasons. The Constitutional Court has a precise and rich case law in this respect. An example is a relatively recent decision of the Constitutional Court, where it filtered out the formal reasons in favour of judicial restraint in the area of tax legislation and, using the legitimacy test, concluded that there were no legitimate reasons for adopting the measure in question in that particular case. The subject of the review was a provision of the Income Tax Act that aimed at retroactive taxation of financial compensation to be paid to churches as compensation for property confiscated by the communist regime. The compensation did not pursue only the restitution purposes, but it was also intended to function as a means of separating the church from the State. In the case at hand, the Constitutional Court refused to exercise deference otherwise paid[2250] in matters of tax legislation, and instead set out to review the legitimate aims of the measure, finding that the legislator's aim was not simply to collect taxes and secure the revenue side of the State budget, or any other constitutionally-compliant aim, but to reduce the financial compensation the State had undertaken to pay, thereby harming a minority group (churches).

In defining the criterion of legitimacy, the practice of the Constitutional Court most often approximates the decision-making practice of the Federal Constitutional Court of Germany. As a standard rule, the Constitutional Court says that the decisive factor "*in this context is the maxim according to which a fundamental right or freedom may be restricted only in the interests of another fundamental right or freedom or a public good*"[2251]. Thus, it will be sufficient to fulfil the legitimacy criterion that the measure under review protects another fundamental right or public interest. However, if it is concluded that the restrictive measure pursues a legitimate aim, the constitutional review does not end there and moves on to the next steps of the review, i.e. whether the measure is actually capable of achieving the aim in question, whether there are other alternative measures that would be less damaging to the rights at stake and, finally, whether there is a fair balance between the two conflicting values. The Constitutional Court will then proceed to the proportionality test and only then will it be possible to conclude whether the measure is justified in a democratic society.

2247 Judgment of the Constitutional Court of 1 June 2005, file No IV. ÚS 8/05.
2248 Judgment of the Constitutional Court of 28 February 2006, file No Pl. ÚS 20/05.
2249 Judgment of the Constitutional Court of 27 September 2005, file No I. ÚS 394/04.
2250 Judgment of the Constitutional Court of 1 October 2019, file No Pl. ÚS 5/19.
2251 Judgment of the Constitutional Court of 11 June 2003, file No Pl. ÚS 40/02, see also the judgment of the Constitutional Court of 3 November 2020, file No Pl. ÚS 10/17.

21.

Although the proportionality test as a methodological instrument for the application of principles is not directly enshrined in the Constitution or other constitutional regulations, the Constitutional Court considers it a rule arising from the principle of the substantive rule of law, applying it in the review of the constitutionality of interference with fundamental rights (in particular their conflict with other rights and constitutionally approved values). The proportionality test began to appear in the case law of the Constitutional Court first in the proceedings on abstract and specific control of norms and later also in the proceedings on constitutional complaints. At the same time, the differences in the application of the proportionality test to these proceedings have been overcome and the method is applied in the same structure to both the norm control proceedings and the constitutional complaint proceedings.[2252]

In this context, the Constitutional Court distinguishes in its case law three types of standards for reviewing the constitutionality of a restrictive measure – the traditional proportionality test, the proportionality test in the intensity of the exclusion of extreme disproportionality and the rational basis test. The traditional proportionality test is a general methodological starting point; the proportionality test in the intensity of the exclusion of extreme disproportionality is used to review the constitutionality of taxes, fees, fines, etc.; and the rational basis test is applied to the review of interference with economic, social and cultural rights. The Constitutional Court does shy away from their simultaneous application and it does not always set out the exact limits of their application. At the beginning of the formulation of the proportionality test, the Constitutional Court was inspired both by Alexy's theory and the decision-making practice of the Federal Constitutional Court of Germany.[2253]

In its traditional structure, the proportionality test is defined by the Constitutional Court as a three-stage test, including the standard criteria of appropriateness (the suitability of the chosen measure to achieve the objective pursued), necessity (analysis of a plurality of available, equally effective measures and their subsidiarity in terms of limiting the fundamental rights concerned) and proportionality (the criterion of proportionality in the narrower sense, i.e. the weighting formula), in which the Constitutional Court examines whether the measures limiting fundamental rights have not exceeded the positive consequences of their adoption in favour of other fundamental rights or public interests.[2254] The Constitutional Court sometimes includes in the above structure the criterion of legitimacy, which was discussed in the previous question. If any of the criteria of the test are not met, the Constitutional Court will have no choice but to establish incompatibility with the constitutional order.

The traditional proportionality test is a general test that comes into play when there is a conflict between fundamental rights themselves or fundamental rights and public interests. The proportionality test aims to ensure that restrictions on fundamental rights are minimised and that the rights concerned can be exercised to the greatest extent possible.[2255] Based on the test, the only constitutionally acceptable restrictions are those that are absolutely necessary, which implies a significant limitation of the legislator's discretion, as it requires the legislator to use the most lenient means possible in terms of the rights concerned.

2252 Červínek, Zdeněk. *Metoda proporcionality v praxi Ústavního soudu* [The proportionality method in the practice of the Constitutional Court]. Praha Leges, 2021.

2253 Alexy, R.: *Theory of Constitutional Rights*, Oxford 2002. Judgment of the Constitutional Court of 2 April 2013, file No Pl. ÚS 6/13.

2254 Judgment of the Constitutional Court of 12 October 1994, file No Pl. ÚS 4/94.

2255 Judgment of the Constitutional Court of 16 October 2007, file No Pl. ÚS 78/06.

Beyond this, the Constitutional Court has had to deal with issues where the standard of the traditional proportionality test seemed inadequate and inappropriate because of its strictness, which gave rise to the exceptions to the general approach. Thus, the proportionality test in the intensity of the exclusion of extreme disproportionality and the rational basis test were gradually developed. The criteria on the basis of which the exceptions were formulated are the separation of powers, the principle of democratic decision-making and, through them, the principle of *judicial self-restraint or deference*. It is precisely the more restrained approach of the court that is reflected in the lower intensity of review of the legislator's acts, especially in the case of regulation of policies where the legislator is allowed a wide margin of discretion and bears political responsibility for these decisions.[2256]

22.

Since these two questions are closely related, we decided to answer them together. The Constitutional Court is consistent in its application of the proportionality test. It approaches the individual parts of the test in turn and then justifies their fulfilment or non-fulfilment, thus mostly following the structure of the test in its practice. The different phases of the proportionality test have a "cascading" or "step-by-step" relationship, where the individual criteria are examined in a precise order, i.e., appropriateness, necessity and proportionality. Therefore, if the interference with fundamental rights under review fails to pass one of the first criteria, the court does not proceed further with the proportionality test. This is due to both the principle of procedural economy and the fact that in order to justify an interference with fundamental rights, the measure in question must meet all the criteria. As an example, we can look at judgment of the Constitutional Court, file No Pl. ÚS 8/06, where, after non-fulfilment of the appropriateness criterion, the Constitutional Court did not continue its assessment of the criteria of necessity and proportionality and annulled the contested provision.[2257]

The Constitutional Court usually goes through all parts of the proportionality test in turn, as described above. If one criterion is not met, it then does not proceed with its review and simply "ends" the proportionality test. Nevertheless, there are exceptions to this rule where the Constitutional Court has not carried out the proportionality test in a "step-by-step" manner. In its decision of October 1994, the Constitutional Court stated that since it was not possible to conclude unequivocally whether the criterion of necessity was met, it decided to proceed to the criterion of proportionality and only on that basis to assess whether the contested restrictive measure was proportionate.[2258] Another example of deviation was the assessment of all three criteria of the proportionality test after the Constitutional Court had clearly established non-fulfilment of the necessity criterion. In the end, the Court concluded that the contested legislation, or the interference with fundamental rights, was not proportionate.[2259]

23.

No.

24.

The Constitutional Court referred to the proportionality method for the first time in a landmark ruling

2256 Judgment of the Constitutional Court of 18 August 2004, file No Pl. ÚS 7/03.
2257 See e.g. judgment of the Constitutional Court of 1 March 2007, file No Pl. ÚS 8/06.
2258 Judgment of the Constitutional Court of 12 October 1994, file No Pl. ÚS 4/94.
2259 Judgment of the Constitutional Court of 13 August 2002, file No Pl. ÚS 3/02.

from 1994,[2260] which repealed part of the Criminal Code. It derived the proportionality test from the principle of the substantive rule of law, which "*is based on the priority of the citizen over the State and thus on the priority of fundamental civil and human rights*". The Constitutional Court emphasised the importance of protecting the fundamental rights of individuals, but at the same time emphasised that their limitations were a natural part of life. This decision was significant primarily because the Constitutional Court identified the starting points from which it derived the proportionality test, i.e. the limitation clause in the Charter, the principle of the substantive rule of law with an emphasis on the individual and the protection of fundamental rights of the individual. The complex structure and content of the proportionality method was subsequently defined six months later by the Constitutional Court in its judgment file No Pl. ÚS 4/94.[2261] In this judgment, the structure of the proportionality test was defined as a three-stage test of the criteria of appropriateness, necessity and proportionality (proportionality in the narrower sense), which is still used today with minor variations (different variations in the application of the legitimacy criterion as a step preceding the proportionality test).

However, over time, the Constitutional Court encountered the issue of the review of taxes and economic and social policies, to which the general proportionality test could not be applied and a more restrained approach was needed. It was with the idea of self-restraint in mind that it carved out the exceptions to the general test and soon developed a modified test of exclusion of extreme disproportionality for reviewing taxes, fees, penalties and other statutory compulsory payments, as well as a rational basis test for reviewing the constitutionality of interference with social and economic rights. Both of these tests show signs of judicial restraint, where the test for the exclusion of extreme disproportionality lies primarily in the assessing the absolute protection of the core of the fundamental rights concerned, where the Constitutional Court does not examine the conflicting public interests and their importance. The rational basis test, on the other hand, focuses on the reasons in favour of the contested measure. Thus, there are currently two deferential standards of constitutional review side by side, which do not, however, exhaust the set of cases in which the Constitutional Court should exercise deference.

25.

No, the case law of the ECtHR did not have a significant impact on the Constitutional Court's position on restraint or deference. Only in the case of the decision on compulsory vaccination, the Constitutional Court referred to the doctrine of *margin of appreciation* – judgment file No Pl. ÚS 19/14 of 27 January 2015 or judgment file No III. ÚS 449/06 of 3 February 2011 (see also question 2). It did the same in the case of decision-making on regulated rent (judgment file No Pl. ÚS 20/05 of 28 February 2006 or judgment file No Pl. ÚS 3/2000 of 21 June 2000.

26.

The ECtHR has considered both of the above issues. In the case of compulsory vaccination, the Grand Chamber dismissed the complaint against the Czech Republic in *Vavřička and Others v. Czech Republic,* judgment of 8 April 2021, application Nos 3867/14 and more. On the contrary, in matters of regulated rents, the ECtHR has found violations of the complainants' rights in several judgments, including *R & L, s. r. o. and Others,* judgment of 3 July 2014, application Nos 25784/09 and more. However, the reason was not a question of restraint, but the legality of regulated rents.

IV. Other peculiarities

2260 Judgment of the Constitutional Court of 12 April 1994, file No Pl. ÚS 43/93.
2261 Judgment of the Constitutional Court of 12 October 1994, file No Pl. ÚS 4/94.

27.

As it is clear from the preceding text, the Constitutional Court has been constant in its restraint or deference on a limited range of thematic issues (see answers to questions 2, 3 and 18). Therefore, the degree of restraint in the case law depends on the number of motions submitted in these areas.

28.

Given the approximately 4 000 decisions issued annually by the Constitutional Court, it is difficult to draw similar conclusions. However, it can be noted that the Plenum is now repealing contested norms less frequently than in the past.

29.

The Court's case load has remained roughly the same over the last 15 years and has been more or less declining.

30.

Yes, the Constitutional Court is bound only by the prayer for relief. It may, however, base its decision on grounds other than those advanced by the applicant.

31.

In the case of review of norms, the Constitutional Court cannot go beyond the prayer for relief, i.e. it deals only with the contested regulations or their provisions. However, in the case of constitutional complaints, the Constitutional Court may also find violations of other fundamental rights than those claimed by the complainant.

The Constitutional Court of the Republic of Türkiye

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Constitutional cultures vary and the courts' perceptions of their own role in a constitutional democracy affect the intensity of their scrutiny in fundamental rights cases. Many courts profess judicial deference.

Judicial deference is a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters which are perceived to be beyond their expertise or legitimacy to decide. The tool has been employed, most prominently, in human rights cases. This is due to their transcendent quality, capable of cutting across all substantive areas of public decision-making.

It is said that over-deferential attitude threatens the rule of law and separation of powers as much as excessive judicial activism does. The way judges exercise judicial deference is, therefore, a fundamental matter of constitutional principle that concerns the proper role of each branch of government in relation to significant questions of public policy.

The following questions aim to discover the differences in exercising judicial deference by European constitutional courts.

Questionnaire

for the national reports

IX. Non-justiciable questions and deference intensities

94. In your jurisdictions, what is meant by "judicial deference"?

There is no clear definition of this concept in the judgments of the Turkish Constitutional Court. Nevertheless, the Court leaves a certain margin of discretion to the public authorities with regard to certain criteria when conducting a review of constitutionality.

95. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government, etc.)?

The Constitutional Court takes into account changes and developments in society and the needs of the economy, especially when discussing the grounds for restricting fundamental rights and freedoms or determining whether the restriction is necessary in the context of proportionality. Economic difficulties are also taken into consideration, especially in disputes concerning wages and social security.

In individual application cases where the violation is caused by the law, the Court does not annul the law but sends its decision to the Parliament to make the necessary amendments. The Court also sends the judgment to the courts of first instance for retrial.

96. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

Whether the fundamental right and freedom being analysed by the Court is confinable affects the Court's decision, and changes and developments in the society may also affect

the outcome of the decision.

97. Are there situations when your Court deferred because it had no institutional competence or expertise?

Article 46 of the Constitution guarantees the payment of the real value of the immovable property in the event of expropriation. However, the Constitutional Court has accepted that the expropriation value can be determined by the competent courts and the competent chamber of the Court of Cassation in their respective fields, and that it cannot, as a rule, interfere in the calculation of the value, since it has no expertise in this field (see *Mukadder Sağlam and Others*, no. 2013/2511, 22 January 2015, § 49; *Abdülkerim Çakmak* and Others, no. 2014/1964, 23 February 2017, § 52).

98. Are there cases where your Court deferred because there was a risk of judicial error?

As mentioned above, expropriation cases can be taken as an example.

99. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

When assessing the criteria of legitimate aim and necessity, the Constitutional Court pays particular attention to the discretionary power of the legislator. According to the Court, public authorities have a certain degree of discretion in deciding which measure to apply. The Court may conclude that the interference is not necessary if the preferred instrument significantly aggravates the interference in relation to the objective to be achieved. However, the Court's control in this context does not focus on the degree of precision of the chosen instrument, but on the gravity of the interference with rights and freedoms (see *Ö. Ltd. Şti.*, no. 2018/18975, 15 September 2021, § 46). According to the Court, the competent public authorities are in a better position to make an accurate decision as to which instrument will produce effective and efficient results in terms of achieving the objective sought (see *D.C.*, no. 2018/13863, 16 June 2021, § 48).

100. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

According to the Turkish Constitution, the principle of separation of powers is valid, and according to the second paragraph of Article 6 of the Constitution, "The Turkish nation shall exercise its sovereignty through the authorised organs as prescribed by the principles set forth in the Constitution". Article 9 of the Constitution states that "Judicial power shall be exercised by independent and impartial courts on behalf of the Turkish nation".

101. Does your Court accept a general principle of deference in judging penal philosophy and policies?

According to the Constitutional Court, in a state governed by the rule of law, the rules of punishment and the security measures that substitute for punishment are determined in accordance with the crime and punishment policy that takes into account the social and cultural structure, moral values and the needs of the economic life of the country, without contradicting the Constitution. The legislator has the discretionary power to determine which acts in society are to be regarded as crimes and the nature and extent of criminal sanctions, provided that it observes the constitutional principles of criminal law in exercis-

ing its power to punish in accordance with its policy on crime and punishment (see the Court's decision no. E.2022/120, K.2023/107, 01 June 2023, § 24).

102. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

The Constitutional Court has recognised as a legitimate aim the purpose of fulfilling the duty and responsibility to establish national security intelligence throughout the State and to carry out counter-intelligence activities on existing and potential activities directed from within and outside against the existence, independence, security and constitutional order of the country. Within this framework, a wide discretionary power has been granted in terms of limitations for the purpose of ensuring national security and public order; however, the Court has considered that this discretionary power is not unlimited and it carefully examines whether the constitutional guarantees are fulfilled.

103. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

Although the Court does not recognise new rights, it can interpret the rights and guarantees enshrined in the Constitution in a more dynamic way according to the needs of the time. Recent judgments on the right to request a review of a decision (*Mahir* Şahap *Bostan*, no: 2017/19906, 2/6/2020) and on the *ne bis in idem* principle (Ünal *Gökpınar* [Plenary], no: 2018/9115, 27/3/2019) are examples of this.

X. The decision-maker

104. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

According to the Turkish Constitution, fundamental rights and freedoms can only be restricted by law. On the other hand, the hierarchy of norms in our country is listed as the Constitution, the law and regulatory acts. Regulatory acts cannot contradict the law. However, presidential decrees, which are limited to certain subjects, can also be issued.

105. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

The Court attaches particular importance to the preparatory stages of the law and, in particular, to the reasoning of the legislator, both in its decisions in the context of constitutionality review and in its judgments in the context of individual application.

106. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

Within the limits set by the Constitution, the Court fulfils its role only as a negative legislator and does not take decisions in place of the legislator.

107. Does your Court defer depending on the extent to which the decision or measure

was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

In its decision/judgment, the Court takes into account the legislator's assessment of the protection of fundamental rights and freedoms or the constitutionality of the norm.

108. Does your Court analyse whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

When examining constitutionality, the Court takes into account the discussions that took place during the preparatory phase of the law. Rather than a general discussion, a discussion of the impact on fundamental rights and freedoms may be more important.

109. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

The Constitution attaches particular importance to the criterion of lawfulness, and thus democratic legitimacy, with regard to the restriction of fundamental rights and freedoms. This is evidenced by the fact that both Article 13 of the Constitution and various provisions on fundamental rights and freedoms separately include the criterion of lawfulness.

XI. Rights' scope, legality and proportionality

110. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

The Court has adopted the doctrine of autonomous interpretation. The government's interpretation is only one of the elements taken into account in determining the scope of the right.

111. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

The nature of the right and the limits placed on it by the Constitution may affect the outcome of the judgment. In addition, core rights such as the right to life and the prohibition of ill-treatment may be subject to stricter scrutiny.

112. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *in claris non fit interpretatio* canon?

According to the Constitutional Court, it is not enough for the law to exist only in formal terms; the quality of the law is also important. Within this framework, the law must be accessible, specific and foreseeable. The principle of certainty, on the other hand, means that legislative acts must be sufficiently clear, precise, comprehensible and applicable so as not to give rise to any hesitation or doubt on the part of the administration or individuals (see the Court's decision no. E.2013/39, K.2013/65, 22 May 2013; no. E.2010/80, K.2011/178, 29 December 2011). The Court has emphasised that the laws, which are the main basis for any interference in accordance with the principle of lawfulness, must be easily accessible,

clear, precise and sufficiently specific to enable the person concerned to determine his/her conduct and to understand them, even with professional assistance if necessary. However, it has been explained that absolute clarity cannot always be expected in the laws and, for this reason, the issues requiring interpretation in the legal provisions may be resolved by interpretations in practice (*Türkiye İş Bankası A.Ş. (9)*, no. 2016/2400, 3 April 2019, § 61).

113. What is the intensity review of your Court in case of the legitimate aim test?

According to Article 13 of the Constitution, fundamental rights and freedoms may be restricted only on the grounds set out in the relevant articles of the Constitution. The Court therefore determines the legitimate aim by taking into account the specific grounds for the restriction. However, according to the Court, it cannot be assumed that this is an absolute right that cannot be restricted in any way, even if no reason for restriction is foreseen. In the decisions/judgments of the Court, it is accepted that the rights and freedoms provided for in other articles of the Constitution and the duties imposed on the State may constitute a limitation of the rights and freedoms for which no specific reason for limitation has been provided (see the Court's decisions no. E.2013/95, K.2014/176, 13 November 2014; no. E.2014/177, K.2015/49, 14 May 2015). Moreover, the Court recognises that public authorities have a wide margin of appreciation in determining the legitimate aim.

114. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

According to Article 13 of the Constitution, a restriction on fundamental rights and freedoms cannot be contrary to the principle of proportionality. According to the Court, the principle of proportionality in Article 13 of the Constitution consists of three sub-principles: suitability, necessity and proportionality in the strict sense.

115. Does your Court go through every applicable limb of the proportionality test?

The Court applies the sub-principles of proportionality.

116. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

There is no such example.

117. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

The principle of proportionality has been incorporated into Turkish law through a constitutional amendment.

118. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

The Constitutional Court, like the ECtHR, recognises the doctrine of margin of appreciation. Unlike the ECtHR, since the Constitutional Court is a national court, the application of this

doctrine may differ in such reviews.

119. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

The ECtHR found a violation in its judgment in *Üçdağ v. Türkiye*. In this judgment, the Court's strict interpretation of the individual application period was cited as the reason for the violation.

XII. **Other peculiarities**

120. How often does the issue of deference arise in human rights cases adjudicated by your Court?

The Court often applies the doctrine of margin of appreciation.

121. Has your Court have grown more deferential over time?

The Turkish Constitution entrusts the Court with the task of raising the level of fundamental rights and freedoms. The Court continues to exercise its powers in a balanced manner within the framework of this objective.

122. Does the deferential attitude depend on the case load of your Court?

Due to its workload, the Court has developed certain working methods and applied stricter admissibility criteria. However, it has continued to successfully fulfil the judicial functions entrusted to it.

123. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

Claims and objections within the scope of the individual application must be raised by the applicants. However, the Court is not bound by the legal qualification of the applicants.

124. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

The Court may not add to or amend the facts and the complaint submitted by the applicant, but shall make a legal qualification of the facts and the complaint *ex officio*.

The Constitutional Court of Ukraine

ANSWERS

to the Questionnaire for the XIX Congress of the Conference of European Constitutional Courts „Forms and Limits of Judicial Deference: The Case of Constitutional Courts"

I. Non-justiciable questions and deference intensities

1. In your jurisdictions, what is meant by "judicial deference"?

With regard to the jurisdiction of the Constitutional Court of Ukraine, the concept of "judicial deference" means a decision taken by the Court to refuse to consider an issue, raised before it, which formally seems to be within its powers, however, in terms of its substance is incompatible with the legal nature of the Constitutional Court of Ukraine.

The Constitutional Court of Ukraine applies the judicial deference concept only in case of a real risk of its interference with the competence of other state authorities. The Court's refusal to consider the issue, raised before it, occurs due to the Court's application of judicial deference in favour of another state actor, in particular another public authority, usually a political one.

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (e.g. questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government, etc.)?

No, there is no such spectrum of judicial deference measures. Both the Constitution of Ukraine and the Law of Ukraine "On the Constitutional Court of Ukraine", which define the powers of the Constitutional Court of Ukraine, do not set out the limits of the Court's judicial deference. When deciding whether to initiate constitutional proceedings in a case, considering the case on its merits, the Court may conclude that there is a strong reason to apply this judicial technique and to refuse to consider the case, given the specific circumstances of the situation. This mostly concerns the consideration of political questions.

In particular, the Constitutional Court of Ukraine noted that the consideration of political issues contradicts the Court's mission as the only body of constitutional jurisdiction since any political activity is incompatible with the activities either of general courts or judges of the Constitutional Court of Ukraine (paragraph 3.2 of the reasoning part of the Ruling No. 15-u/98 dated March 5, 1998,). The Verkhovna Rada of Ukraine is empowered to make political decisions to voice its position and assess certain events, facts and circumstances; the jurisdiction of the Constitutional Court of Ukraine is limited to resolving issues of a purely legal (not political) nature (Rulings No. 2-up/2000 dated June 27, 2000, No. 2-up/2005 dated January 12, 2005, No. 8-up/2019 dated March 7, 2019, No. 12-up/2019 dated December 10, 2019).

Refusing to initiate constitutional proceedings in the case upon the constitutional petition of 48 People's Deputies of Ukraine regarding the constitutionality of the provisions of paragraph 8 of Article 73.1 of the Labour Code of Ukraine, establishing 7 and 8 November as national holidays to mark the anniversary of the Great October Socialist Revolution, the Court proceeded from the fact that "in accordance with paragraph 7 of Article 92.2 of the Constitution of Ukraine, national holidays are established exclusively by the laws of Ukraine. The legislator is primarily guided by political considerations when establishing national holidays, in particular those set out in the constitutional petition of the People's Deputies of Ukraine: the importance of strengthening civil harmony on the territory of Ukraine, ensuring political and ideological diversity, *etc*. The assessment of whether or not these views are in line with the present real situation in public life in Ukraine is a political, not a legal, question" (Ruling No. 15-u/98 dated March 5, 1998).

While refusing to initiate constitutional proceedings in the case upon the constitutional petition of 47 People's Deputies of Ukraine regarding the constitutionality of the Resolution of the Verkhovna Rada of Ukraine "On Supporting the Appeal of the President of Ukraine to Ecumenical

Patriarch Bartholomew on Granting the Tomos of Autocephaly to the Orthodox Church in Ukraine", the Court observed that the issues raised in the Resolution are of a purely political nature and should be resolved within the competence and political expediency of the relevant public authorities. In the Ruling on the refusal to initiate constitutional proceedings, the Court held that the Verkhovna Rada of Ukraine is authorised to make political decisions to voice its position and assess certain events, facts and circumstances. By adopting the Resolution, the Verkhovna Rada of Ukraine confirmed its political position in support of the President of Ukraine's appeal to Ecumenical Patriarch Bartholomew to grant the Tomos of Autocephaly to the Orthodox Church in Ukraine (Ruling of the Constitutional Court of Ukraine No. 8-u/2019 dated March 7, 2019).

3. Are there factors to determine when and how your Court should defer (e.g. the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

The Constitution of Ukraine and the Law of Ukraine "On the Constitutional Court of Ukraine", which define the powers of the Constitutional Court of Ukraine, do not provide for such factors. When deciding whether to initiate constitutional proceedings in a case, considering the case on its merits, the Court may conclude that there is a strong reason to apply this judicial technique and to refuse to consider the case, given the specific circumstances of the situation. This mostly concerns the consideration of political questions.

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

The Constitutional Court of Ukraine applied judicial deference in cases involving the lack of institutional competence, for instance, in situations where there were legislative gaps and the Court needed to regulate certain legal relations to resolve the issue raised before it; in situations when it was necessary to develop a consistent judicial practice on a certain controversial issue, which is the fundamental function of the Supreme Court; in situations where the issues raised by the subject of the right to appeal to the Constitutional Court of Ukraine concerned the political and internal organisational activities of the Parliament, *etc*.

Namely, the Court has noted that:

– "ensuring the stability and consistency of judicial practice is a fundamental function of the Supreme Court (Article 36.1 of the Law of Ukraine "On the Judiciary and the Status of Judges"), a function that cannot be performed by another public authority, particularly by the Constitutional Court of Ukraine" (paragraph 8.4 of the reasoning part of the Decision No. 6-r(II)/2022 dated June 22, 2022);

– „the Constitutional Court of Ukraine <...> is not granted with the right to interfere in political and internal organisational issues of the Verkhovna Rada of Ukraine, to improve the existing normative acts, to fill in the existing gaps therein" (paragraph 7.3 of the reasoning part of the Ruling No. 2-up/2000 dated June 27, 2000).

There have been no cases when the Constitutional Court of Ukraine deferred due to the lack of relevant expertise.

5. Are there cases where your Court deferred because there was a risk of judicial error?

The Constitutional Court of Ukraine is a court of law, not of fact; therefore, it does not review court decisions and does not interfere with the competence of courts in their administration of justice.

If the Constitutional Court of Ukraine concludes that the subject of the appeal, asserting the unconstitutionality of the law, actually raises the question of the correctness of its application by the courts, it refuses to initiate constitutional proceedings in the case.

Thus, the Constitutional Court of Ukraine has repeatedly emphasised that law enforcement activity, which consists of the individualisation of legal norms regarding specific subjects and specific cases. That is, establishing the actual circumstances of the case and selecting legal norms that correspond to these circumstances, is a component of law enforcement and does not belong to the powers of the Constitutional Court of Ukraine (Decisions of the Constitutional Court of Ukraine No. 15-u/2010 dated March 31, 2010, No. 73-u/2014 dated July 3, 2014, No. 14-u/2016 dated February 24, 2016, No. 15-u(II)/2018 dated June 6, 2018, No. 23-u(II)/2018 dated June 26, 2018, No. 5-up(II)/2022 dated September 7, 2022).

According to the Law of Ukraine "On the Constitutional Court of Ukraine" (Article 89.3), the Court, when considering the case upon a constitutional complaint, found the law of Ukraine (provisions thereof) as being in conformity with the Constitution of Ukraine, but at the same time found that a court had applied the law of Ukraine (provisions thereof), by interpreting it in a manner that is not compliant with the Constitution of Ukraine, the Constitutional Court shall indicate this in the operative part of its decision. Currently, the mentioned provision of the Law has never been applied by the Court.

6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

> XI. Yes, there are some. For example, the Constitutional Court of Ukraine closed the proceedings in the case regarding the constitutionality of the Law of Ukraine "On Depriving V. Yanukovych of the Title of President of Ukraine" No. 144-VIII dated February 4, 2015, due to the non-belonging of the issues raised in the constitutional petition to his powers, noting the following:

"The Verkhovna Rada of Ukraine adopted the Law in view of the events that took place in Ukraine during the Revolution of Dignity.

The Grand Chamber of the Constitutional Court of Ukraine believes that the content of the contested act is an expression of the political will of the parliament under the exceptional situation for the state, which was created amid the self-removal of V. Yanukovych from the exercise of the powers of the President of Ukraine established by the Constitution of Ukraine as the head of state.

The Constitutional Court of Ukraine noted that the Verkhovna Rada of Ukraine can make decisions of a political nature to express its position and evaluate certain events, facts, and circumstances; the jurisdiction of the Constitutional Court of Ukraine includes the resolution of issues of a legal (not political) nature (Ruling of the Constitutional Court of Ukraine No. 2-u/2005 dated January 12, 2005, Ruling of the Grand Chamber of the Constitutional Court of Ukraine No. 8-u/2019 dated March 7, 2019)" (subparagraphs 4 to 6 of paragraph 3 of the Ruling of the Grand Chamber of the Constitutional Court of Ukraine on closing the constitutional proceedings in the case upon the constitutional petition of President of Ukraine P. Poroshenko regarding the compliance of the Law of Ukraine "On Depriving V. Yanukovych of the Title of President of Ukraine" No. 12-up/2019 dated December 10, 2019, with the Constitution of Ukraine (constitutionality)).

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

1) Yes, the standard is valid, provided that there is no violation of fundamental constitutional principles, values, human rights and freedoms.

2) Yes, the Constitutional Court of Ukraine shares the conception that questions of policy should be decided within the democratic processes, as courts are unelected and they lack the democratic mandate to decide questions of policy.

For example, after deliberating the case upon the constitutional petition of 62 People's Deputies of Ukraine regarding the conformity of the Decree of the President of Ukraine "On the early

termination of the powers of the Verkhovna Rada of Ukraine and the appointment of early elections" with the Constitution of Ukraine (constitutionality), the Constitutional Court of Ukraine pointed out:

"…the people are the bearers of sovereignty and the only source of power in Ukraine; the people exercise power directly and through bodies of state power and bodies of local self-government (Article 5.2 of the Constitution of Ukraine). This fundamental provision is specified by the provision of Article 69 of the Constitution of Ukraine that the will of the people is exercised through elections.

Thus, the resolution of the constitutional conflict by the people by holding early elections to the Verkhovna Rada of Ukraine are in line with the requirements of Article 5.2 of the Constitution of Ukraine" (subparagraphs 14, 15 of paragraph 3 of the reasoning part of the Decision No. 6-r/2019 dated June 20, 2019).

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

There is currently no such jurisprudence.

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

No, the Constitutional Court of Ukraine has not deferred on national security grounds.

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

No, they should not, as in this case, the Constitutional Court of Ukraine will turn into a political body.

At the same time, the Constitutional Court of Ukraine has the opportunity, and in appropriate cases uses it, to state in a decision, an opinion about the need for the Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine to settle a certain issue.

Therefore, for example, in Decision No. 1-r(II)/2023 dated March 1, 2023, the Constitutional Court of Ukraine declared unconstitutional clause 6 of Section II "Final and Transitional Provisions" of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Regarding Priority Measures to Reform the Prosecution Office" No. 113-IX dated September 19, 2019, once again emphasised the need for the state to ensure the effectiveness of the provision of Article 152.3 of the Constitution of Ukraine, according to which material or moral damages inflicted on individuals or legal entities by the acts and actions declared unconstitutional, are compensated by the State under the procedure established by law.

In addition, in accordance with Article 97 of the Law of Ukraine "On the Constitutional Court of Ukraine", the Court in its decision, opinion may establish the procedure for and terms of the execution thereof and oblige the relevant state bodies to ensure monitoring over the execution of the decision, compliance with the opinion, and may demand a written confirmation of the execution of a decision, compliance with an opinion from the relevant authorities.

II. The decision-maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

Based on the jurisprudence of the Court, the Court often paid greater deference to the acts of Parliament. However, this is not so much related to the issue of democratic accountability of the subject of the initial (contested) decision, as to the fact that the Constitutional Court of Ukraine is more often challenged about the constitutionality of the acts of the parliament itself.

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

The Constitutional Court of Ukraine attaches considerable importance to the legislative history of the contested act, especially when it concerns human and citizen´s rights and freedoms, their restriction (from the study of the purpose of the proposed draft law to the question of compliance with the procedure established by the Constitution of Ukraine for their review, adoption or entry into force). This applies to both ordinary laws and laws on amendments to the Constitution of Ukraine.

Thus, for example, according to the Constitution of Ukraine, the draft law on introducing amendments to the Constitution of Ukraine is considered by the Verkhovna Rada of Ukraine upon the availability of an opinion of the Constitutional Court of Ukraine regarding the compliance of the draft law with the requirements of Articles 157 and 158 of this Constitution (Article 159). The Constitution of Ukraine shall not be amended if the amendments foresee, in particular, the abolition or restriction of human and citizen's rights and freedoms (Article 157.1).

In Decision No. 2-r/2022 dated November 1, 2022, the Constitutional Court of Ukraine, confirmed that it has the power to exercise not only preliminary (*a priori*), but also subsequent (*a posteriori*) constitutional review of amendments to the Constitution of Ukraine (after they enter into force), and emphasised that the lack of judicial control over the procedure for consideration and adoption of relevant laws, which is defined by the provisions of Chapter XIII of the Constitution of Ukraine, may result in the restriction or abolition of human and citizen's rights and freedoms, liquidation of independence or violation of territorial integrity or change of the constitutional order in a manner not provided for by the Constitution of Ukraine (paragraph 2.4 of the reasoning part).

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

The Constitutional Court of Ukraine verifies the justification of legislative regulation in case of the introduction of restrictions on the realization of constitutional rights and freedoms.

Thus, according to the legal position of the Constitutional Court of Ukraine, restrictions on the realization of constitutional rights and freedoms cannot be arbitrary and unfair, they must be established exclusively by the Constitution and laws of Ukraine, pursue a legitimate aim, be conditioned by the social need to achieve this aim, be proportionate and justified; in case restriction of a constitutional right or freedom, the legislator is obliged to introduce such legal regulation, which will make it possible to optimally achieve a legitimate aim with minimal interference in the realization of this right or freedom and not to violate the essential content of such a right (paragraph 2.1.3 of the reasoning part of the Decision No. 2-rp/2016 of June 1, 2016).

The Constitutional Court of Ukraine also noted that the legitimate restriction of the constitutional human and citizen's rights and freedoms should be understood as the possibility of state intervention by legal means in the content and scope of the constitutional human and citizen's rights and freedoms, provided by the Constitution of Ukraine, which meets the requirements of the rule of law, necessity, expediency, and proportionality in a democratic society; the aim of such a restriction is the protection of fundamental values in society, which include, in particular, life, freedom and human dignity, health and morality of the population, national security, public order (paragraph 6.2 of the reasoning part of Decision № 5-r(I)/2019 of July 12, 2019).

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

No, it does not defer. When it comes to a possible violation of fundamental rights, the Constitutional Court of Ukraine does not consider it possible to refuse to deliberate the case.

15. Does your Court analyze whether the opposing views were fully represented in the

parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

Depends on the background of the case. The Constitutional Court of Ukraine can apply different approaches. In the event that the issue of violation of the procedure established by the Constitution of Ukraine for consideration, adoption, or entry into force of laws, other acts is being considered, the Court can analyse whether opposing views were fully represented in the parliamentary debates at the time of decision-making. At the same time, there may be cases when it is important to examine the content of the adopted act. Under such conditions, the Court focuses more on what are the consequences for rights.

Thus, in Decision No. 2-r/2022 dated November 1, 2022, the Constitutional Court of Ukraine emphasised that, when exercising constitutional review over the observance of the constitutional procedure of consideration, adoption or entry into force of laws of Ukraine in accordance with Article 152.1 of the Basic Law of Ukraine, it verifies not only compliance with the formal procedures provided for in the Constitution of Ukraine. The parliament as a representative body of the people is also subject to verification of its democratic essence, in particular the consideration, consistency, and reasonableness of the process of discussion of the decisions it adopts, the real possibility of People's Deputies of Ukraine to exercise their rights in this process (paragraph 5.2.6 of the reasoning part).

In Decision No. 2-r/2018 dated February 28, 2018, the Constitutional Court of Ukraine, recognising the contested law as unconstitutional in general due to the violation of the procedure for its review and adoption, noted the following: "the subject of the right to a constitutional submission substantiates the unconstitutionality of the Law not only by violation of the constitutional procedure of its review and adoption, but also by the inconsistency of the content of the Law with the Constitution of Ukraine. However, compliance with the procedure for consideration, adoption and entry into force of laws established by the Constitution of Ukraine is one of the conditions for the legitimacy of the legislative process, in the case of its violation, not the content of the law is subject to constitutional review, but the procedure for its consideration and adoption established by the Constitution of Ukraine" (paragraph 5 of the reasoning part).

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

In general, yes, but it is necessary to take into account the specific circumstances of the case.

Thus, for example, when a decision is made by a legislative body, the constitutional procedure may be violated.

At the present moment, there is no relevant jurisprudence of the Constitutional Court of Ukraine on these issues.

III. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

No. The Constitutional Court of Ukraine has never deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts.

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

No, the nature of applicable fundamental rights does not affect the degree of deference.

No, the Constitutional Court of Ukraine does not see some rights or aspects of rights as

more important, and hence more deserving of rigorous scrutiny, than others.

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the In claris non fit interpretatio canon?

The question of the clarity of the law, in particular, and the application of the *In claris non fit interpretatio* canon, is decided by the Court depending on the circumstances of the case under deliberation and the relevant legislative regulation. "Clearness of the law" is understood and measured by the Court in relation to the rule of law. Thus, according to the legal positions of the Court:

– "the principle of legal certainty requires clarity, comprehensibility and unequivocalness of legal norms, in particular their predictability and stability" *(paragraph 2.1.6 of the reasoning part of Decision No. 2-r/2017dated December 20, 2017);*

– „the availability of an act of law to the participants of social relations for perusal does not guarantee the availability of its content, if the provision of such an act is presented in a poor quality, in particular unclear or contradictory" (paragraph 4.2.1 of the reasoning part of the Decision of the Constitutional Court of Ukraine No. 4-r (II)/2021 dated July 21, 2021);

– "legal certainty is interpreted as clarity and comprehensibility in the presentation of norms of legal acts, as a result of which every person has confidence in the reasonable stability of legal norms, predictability of situations and other legal consequences of the application of such norms" (paragraph 4.4.6 of the reasoning part of the Decision of the Constitutional Court of Ukraine No. 9-r(II)/2022 dated November 16, 2022);

– "the disputed provision of Law No. 113 should not only be available to participants in social relations, but also correspond to the principle of the rule of law, in particular such a component of this principle as legal certainty, which consists, among other things, in the clarity and comprehensibility of legal norms, the predictability of their content and possible consequences of the application or other form of implementation of these legal norms.

Ъ..Ъ**the disputed provision of Law No. 113 does not correspond to the constitutional principle of the rule of law in terms of the requirement of legal certainty, as a result of which this provision cannot be considered a "law" in a state based on the rule of law" (paragraph 4.1.4, paragraph 4.4.1 of the reasoning part of the Decision of the Constitutional Court of Ukraine No. 1-r(II)/2023 dated March 1, 2023);**

–„<...> the requirement of legal certainty as a constituent element of the "rule of law" refers to the quality of legal acts and their provisions, and not to the "predictability of situations and legal relations". –...–Legal certainty of any regulatory act (or its individual provision) cannot be achieved if the text of the act (its provision) is ambiguous (multiple).

Having examined the issue raised in the constitutional submission in this aspect, the Constitutional Court of Ukraine asserts that the provisions of Law No. 2662-VIII are clear and unambiguous, they are predictable in their consequences, and they are formulated with sufficient clarity and comprehensibility..." (paragraphs 5.4.1, 5.4.2 of the reasoning part of the Decision of the Constitutional Court of Ukraine No. 4-r/2022 dated December 27, 2022).

20. What is the intensity review of your Court in case of the legitimate aim test?

The intensity review of the Constitutional Court of Ukraine in case of the legitimate aim test depends on the issue raised before the Court. If the constitutionality of a legislative regulation is appealed to the Constitutional Court of Ukraine, the verification of the legitimate aim is mandatory.

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (i.e. suitability, necessity, and proportionality in the narrower sense)?

The Constitutional Court of Ukraine applies all the stages of the "classic" proportionality test.

22. Does your Court go through every applicable limb of the proportionality test?

Yes. The Constitutional Court of Ukraine goes through every applicable limb of the proportionality test.

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

There were no such cases in the jurisprudence of the Constitutional Court of Ukraine.

24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

No. The inception of proportionality review in our Court's case-law has not been concomitant with the rise of the judicial deference doctrine.

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

The principle of the rule of law is the basis for the consideration of cases in the Constitutional Court of Ukraine. Therefore, the jurisprudence of the ECtHR has shaped the Constitutional Court of Ukraine–s approach to deference. The ECtHR–s doctrine of margin of appreciation is the domestic equivalent of the margin of discretion that the Constitutional Court of Ukraine affords.

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

The ECtHR did not consider cases against Ukraine in the context of the use of discretion by the Constitutional Court of Ukraine, which led to violation of the human rights provided for in the Convention and had the effect of an ineffective remedy.

IV. Other peculiarities

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

The issue of deference has never arisen in human rights cases adjudicated by the Constitutional Court of Ukraine.

28. Has your Court have grown more deferential over time?

No, the Constitutional Court of Ukraine has not grown more deferential over time.

29. Does the deferential attitude depend on the case load of your Court?

No, the deferential attitude does not depend on the case load of the Constitutional Court of Ukraine.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

Yes, it is possible. The Constitutional Court of Ukraine is not limited when deliberating the case by the arguments of the subject of the appeal; among the principles of the Court's activity is the complete and comprehensive deliberation of the case (Article 2 of the Law of Ukraine "On the Constitutional Court of Ukraine").

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

The legislation does not provide for such a possibility. The Constitutional Court of Ukraine is the subject of a related initiative.

Конституційний Суд України

ВІДПОВІДІ

на питання Анкети для XIX Конгресу Конференції європейських конституційних судів за темою „Форми та межі суддівського самообмеження: приклад конституційних суддів"

I. Питання, які не підлягають судовому розгляду і інтенсивність самообмеження

1. Що означає „суддівське самообмеження" у вашій юрисдикції?

У юрисдикції Конституційного Суду України „суддівське самообмеження" означає ухвалення Судом рішення відмовитись від розгляду порушеного перед ним питання, яке формально ніби і належить до його повноважень, проте за змістом є несумісним з правовою природою Конституційного Суду України.

Конституційний Суд України вдається до самообмеження, коли реальним є ризик його втручання у сферу компетенції інших органів державної влади. Відмова через застосування Судом самообмеження відбувається на користь вирішення порушеного перед Судом питання іншим суб'єктом, зокрема іншим органом державної влади, як правило, політичним.

2. Чи існує спектр самообмеження для вашого суду? Чи існують „заборонені" сфери або встановлені зони юридичної непідзвітності чи питань, які не підлягають судовому розгляду для вашого Суду (наприклад, питання моральних відмінностей, політична чутливість, суспільна контроверсійність, розподіл обмежених ресурсів, значні фінансові наслідки для уряду тощо)?

Ні, не існує. Конституція України, Закон України „Про Конституційний Суд України", які визначають повноваження Конституційного Суду України, не встановлюють спектру самообмеження суду. Щоразу вирішуючи питання щодо відкриття конституційного провадження у справі, розглядаючи справу по суті, Суд може дійти висновку про необхідність вдатися до самообмеження та відмовитися від розгляду, враховуючи конкретні обставини справи. Здебільшого це стосується розгляду політичних питань.

Так, Конституційний Суд України зазначав, що вирішення політичних питань суперечить його призначенню як єдиного органу конституційної юрисдикції, оскільки будь-яка політична діяльність є несумісною з діяльністю як судів загальної юрисдикції, так і суддів Конституційного Суду України (абзац другий пункту 3 мотивувальної частини *Ухвали від 5 березня 1998 року* № 15-у/98). Верховна Рада України може приймати рішення політичного характеру для висловлення своєї позиції та оцінки тих чи інших подій, фактів, обставин; до юрисдикції Конституційного Суду України належить вирішення питань, які мають юридичний (а не політичний) характер (ухвали від 27 червня 2000 року № 2-уп/2000, *від 12 січня 2005 року № 2-у/2005, від 7 березня 2019 року № 8-у/2019, від 10 грудня 2019 року № 12-уп/2019)*.

Відмовляючи у відкритті конституційного провадження у справі за конституційним поданням 48 народних депутатів України щодо відповідності Конституції України приписів абзацу восьмого частини першої статті 73 Кодексу законів про працю України, що стосувалися встановлення 7 і 8 листопада – річниці Великої Жовтневої соціалістичної революції – святковими днями, Суд виходив з того, що „відповідно до пункту 7 частини другої статті 92 Конституції України виключно законами України встановлюються і державні свята. Встановлюючи державні свята, законодавець керується, насамперед, політичними міркуваннями, зокрема тими, які наведено у конституційному поданні народних депутатів України: необхідністю зміцнення громадянської злагоди на землі України, забезпечення політичної та ідеологічної багатоманітності тощо. Оцінка відповідності цих міркувань сучасному реальному стану суспільного життя в Україні – це питання політичне, а не юридичне" (*Ухвала від 5 березня 1998 року* № 15-у/98).

Відмовляючи у відкритті конституційного провадження у справі за конституційним поданням 47 народних депутатів України щодо відповідності Конституції України (конституційності) Постанови Верховної Ради України „Про підтримку звернення Президента України до Вселенського Патріарха Варфоломія про надання Томосу про автокефалію Православної Церкви в Україні", Суд зазначив, що питання, порушені у Постанові, мають виключно політичний характер та повинні бути вирішені в межах компетенції та політичної доцільності відповідних органів державної влади. В Ухвалі про відмову у відкритті конституційного провадження Суд зауважив, що Верховна Рада України може приймати рішення політичного характеру для висловлення своєї позиції та оцінки тих чи інших подій, фактів, обставин; приймаючи Постанову, Верховна Рада України засвідчила свою політичну позицію щодо підтримки звернення Президента України до Вселенського Патріарха **Варфоломія** про надання Томосу про автокефалію Православної Церкви в Україні (Ухвала Конституційного Суду України від 7 березня 2019 року № 8-у/2019).

3. Чи є чинники, які визначають, коли і як ваш суд повинен застосувати цей інструмент (наприклад, культура та умови вашої держави; історичний досвід у вашій державі; абсолютна або кваліфікована природа відповідних основоположних прав; предмет спору, що розглядається судом; чи предмет справи передбачає зміну соціальних умов і ставлень)?

Конституція України, Закон України „Про Конституційний Суд України", які визначають повноваження Конституційного Суду України, таких чинників не містять. Щоразу вирішуючи питання щодо відкриття конституційного провадження у справі, розглядаючи справу по суті, Суд може дійти висновку про необхідність вдатися до самообмеження та відмовитися від розгляду, враховуючи конкретні обставини справи. Здебільшого це стосується розгляду політичних питань.

4. Чи були ситуації, коли ваш суд проявляв самообмеження, оскільки він не мав інституційної компетенції чи досвіду?

Конституційний Суд України проявляв самообмеження у зв'язку з тим, що не мав інституційної компетенції, наприклад, у ситуаціях, коли мали місце законодавчі прогалини і для вирішення порушеної перед Судом проблеми необхідним було законодавче врегулювання певних правовідносин; коли необхідним було вироблення єдиної судової практики з певного спірного питання, що *є основоположною функцією Верховного Суду; коли порушені суб'єктом звернення до Конституційного Суду України питання стосувалися політичної і внутрішньоорганізаційної діяльності парламенту тощо*.

Так, зокрема, Суд зазначав, що:

– „забезпечення сталості та єдності судової практики є основоположною функцією Верховного Суду (частина перша статті 36 Закону України „Про судоустрій і статус суддів"), яку не може здійснювати інший орган державної влади, зокрема Конституційний Суд України" (абзац четвертий пункту восьмого мотивувальної частини Рішення від 22 червня 2022 року № 6-р(II)/2022);

– „Конституційний Суд України *—…— не має права втручатися* у *політичні та внутрішньоорганізаційні питання діяльності Верховної Ради України*, *вдосконалювати чинні нормативні акти*, *заповнюючи наявні* в *них прогалини*" (абзац третій пункту 7 мотивувальної частини Ухвали від 27 червня 2000 року № 2-уп/2000).

Ситуацій, коли Конституційний Суд України проявляв би самообмеження, оскільки не мав **досвіду**, не було.

5. Чи є випадки, коли ваш суд проявляв самообмеження через ризик судової помилки?

Конституційний Суд України є судом права, а не факту, він не переглядає судові рішення та не втручається у сферу компетенції судів щодо здійснення ними правосуддя.

У разі, якщо Конституційний Суд України доходить висновку, що суб'єкт звернення, стверджуючи про неконституційність закону, фактично порушує питання щодо правильності його застосування судами, він відмовляє у відкритті конституційного провадження у справі.

Так, Конституційний Суд України неодноразово наголошував, що правозастосовна діяльність, яка полягає в індивідуалізації правових норм щодо конкретних суб'єктів і конкретних випадків, тобто у встановленні фактичних обставин справи і підборі правових норм, які відповідають цим обставинам, є складовою правозастосування і не належить до повноважень Конституційного Суду України (ухвали Конституційного Суду України від 31 березня 2010 року № 15-у/2010, від 3 липня 2014 року № 73-у/2014, від 24 лютого 2016 року № 14-у/2016, від 6 червня 2018 року № 15-у(II)/2018, від 26 червня 2018 року № 23-у(II)/2018, **від** 07 **вересня** 2022 року № 5-уп(II)/2022).

За Законом України „Про Конституційний Суд України" (частина третя статті 89) якщо Суд, розглядаючи справу за конституційною скаргою, визнав закон України (його положення) таким, що відповідає Конституції України, але одночасно виявив, що суд застосував закон України (його положення), витлумачивши його у спосіб, що не відповідає Конституції України, то Конституційний Суд вказує на це у резолютивній частині рішення. На даний час зазначена норма Закону жодного разу не була застосована Судом.

6. Чи є випадки, коли ваш суд проявляв самообмеження, посилаючись на інституційну чи демократичну легітимність суб'єкта ухвалення рішення?

XII. Так, є. Наприклад, Конституційний Суд України закрив провадження у справі щодо конституційності Закону України„Про позбавлення В. Януковича звання Президента України" від 4 лютого 2015 року № 144–VIII у зв'язку з неналежністю до його повноважень питань, порушених у конституційному поданні, зазначивши таке:

XIII. „Верховна Рада України ухвалила Закон з огляду на події, які відбувалися в Україні під час Революції Гідності.

Велика палата Конституційного Суду України вважає, що зміст оспорюваного акта є вираженням політичної волі парламенту за виняткової для держави ситуації, що створилася у зв'язку з самоусуненням В. Януковича від виконання повноважень Президента України, встановлених Конституцією України, як глави держави.

Конституційний Суд України зазначав, що Верховна Рада України може приймати рішення політичного характеру для висловлення своєї позиції та оцінки тих чи інших подій, фактів, обставин; до юрисдикції Конституційного Суду України належить вирішення питань, які мають юридичний (а не політичний) характер (Ухвала Конституційного Суду України від 12 січня 2005 року № 2-у/2005, Ухвала Великої палати Конституційного Суду України від 7 березня 2019 року № 8-у/2019)" (абзаци четвертий – шостий пункту 3 Ухвали Великої палати Конституційного Суду України про закриття конституційного провадження у справі за конституційним поданням Президента України П. Порошенка щодо відповідності Конституції України (конституційності) Закону України „Про позбавлення В. Януковича звання Президента України" від 10 грудня 2019 року № 12-уп/2019).

7. „Чим більше законодавство стосується питань широкої соціальної політики, тим менш готовим буде суд до втручання„. Це дійсний стандарт для вашого суду? Чи поділяє ваш суд концепцію, що питання політики повинні вирішуватися демократичними процесами, оскільки суди не є обраними і їм бракує демократичного мандату вирішувати питання політики?

1) Так, стандарт дійсний, за умови, що не йдеться про порушення фундаментальних конституційних принципів, цінностей, прав і свобод людини.

2) Так, поділяє.

Наприклад, розглянувши справу за конституційним поданням 62 народних депутатів

України щодо відповідності Конституції України (конституційності) Указу Президента України „Про дострокове припинення повноважень Верховної Ради України та призначення позачергових виборів" Конституційний Суду України зазначив:

„…носієм суверенітету і єдиним джерелом влади в Україні є народ; народ здійснює владу безпосередньо і через органи державної влади та органи місцевого самоврядування (частина друга статті 5 Конституції України). Це засадниче положення конкретизується приписом статті 69 Конституції України про те, що народне волевиявлення здійснюється через вибори.

Таким чином, розв'язання конституційного конфлікту народом шляхом проведення позачергових виборів до Верховної Ради України відповідає вимогам частини другої статті 5 Конституції України" (абзаци чотирнадцятий, п'ятнадцятий *пункту 3 мотивувальної частини* Рішення від 20 червня 2019 року № 6-р/2019).

8. Чи приймає ваш суд загальний принцип самообмеження при розгляді карної філософії та політики?

Такої практики на даний час не має.

9. Можуть існувати вузькі обставини, коли уряд не може розкривати інформацію Суду, особливо в контексті національної безпеки, що включає спецслужби. Чи проявляв самообмеження ваш суд з міркувань національної безпеки?

Ні, не проявляв.

10. Враховуючи роль судів як охоронців Конституції, чи повинні вони втручатися в політику більш жорстко (застосовувати суворіший контроль), коли уряди пасивні у запровадженні реформ, що відповідають вимогам прав людини?

Ні, не повинні, оскільки у такому разі Конституційний Суд України перетвориться на політичний орган.

Разом з тим, Конституційний Суд України має можливість, і у відповідних випадках користується нею, зазначити у рішенні, висновку про необхідність врегулювання Верховною Радою України, Кабінетом Міністрів України певного питання.

Так, наприклад, у Рішенні від 1 березня 2023 року № 1-р(II)/2023 Конституційний Суд України, визнавши неконституційним пункт 6 розділу II „Прикінцеві і перехідні положення" Закону України „Про внесення змін до деяких законодавчих актів України щодо першочергових заходів із реформи органів прокуратури" від 19 вересня 2019 року № 113-IX, вчергове наголосив на потребі забезпечення державою дієвості припису частини третьої статті 152 Конституції України, за яким матеріальну чи моральну шкоду, завдану фізичним або юридичним особам актами і діями, що визнані неконституційними, держава відшкодовує в установленому законом порядку.

Крім того, відповідно до статті 97 Закону України „Про Конституційний Суд України" Суд у рішенні, висновку може встановити порядок і строки їх виконання, а також зобов'язати відповідні державні органи забезпечити контроль за виконанням рішення, додержанням висновку, та вимагати від відповідних органів письмове підтвердження виконання рішення, додержання висновку.

II. Суб'єкт, що ухвалює рішення

11. Чи виявляє ваш суд більше самообмеження до актів парламенту, ніж до рішень виконавчої влади? Чи самообмежується ваш суд при розгляді справи залежно від ступеня демократичної підзвітності суб'єкта ухвалення початкового рішення?/

Виходячи з практики Суду частіше він проявляв самообмеження щодо актів парламенту. Проте це не стільки пов'язано з питанням демократичної підзвітності суб'єкта ухвалення

початкового (оскаржуваного) рішення, скільки з тим, що частіше до Конституційного Суду України оскаржуються щодо конституційності акти саме парламенту.

12. Яку вагу ваш суд надає законодавчій історії? Яку юридичну релевантність, якщо така є, повинен мати парламентський розгляд для судової оцінки сумісності з правами людини?

Конституційний Суд України надає значної ваги законодавчій історії оскаржуваного акта, особливо коли це стосується прав і свобод людини і громадянина, їх обмеження (від вивчення мети пропонованого законопроєкту до питання дотримання встановленої Конституцією України процедури їх розгляду, ухвалення або набрання ними чинності). Це стосується як звичайних законів, так і законів про внесення змін до Конституції України.

Так, наприклад, за Конституцією України законопроект про внесення змін до Конституції України розглядається Верховною Радою України за наявності висновку Конституційного Суду України щодо відповідності законопроекту вимогам статей 157 і 158 цієї Конституції (стаття 159); Конституція України не може бути змінена, якщо зміни передбачають, зокрема, скасування чи обмеження прав і свобод людини і громадянина (частина перша статті 157).

У Рішенні від 01 листопада 2022 року № 2-р/2022 Конституційний Суд України, підтверджуючи наявність у нього повноваження здійснювати не лише передувальний *(a priori)*, але і подальший *(a posteriori)* конституційний контроль поправок до Конституції України (після набрання ними чинності), наголосив, що відсутність судового контролю за процедурою розгляду та ухвалення відповідних законів, що її визначено приписами розділу XIII Конституції України, може мати наслідком обмеження чи скасування прав і свобод людини і громадянина, ліквідацію незалежності чи порушення територіальної цілісності або зміну конституційного ладу у спосіб, не передбачений Конституцією України (див. підпункт 2.4 пункту 2 мотивувальної частини).

13. Чи перевіряє ваш суд, чи особа, яка ухвалила рішення, обґрунтувала його, чи це рішення є таким, яке суд ухвалив би, якби він сам був тим, хто ухвалював рішення?

Конституційний Суд України перевіряє обґрунтованість законодавчого регулювання у разі запровадження обмежень щодо реалізації конституційних прав і свобод.

Так, згідно з юридичною позицією Конституційного Суду України обмеження щодо реалізації конституційних прав і свобод не можуть бути свавільними та несправедливими, вони мають встановлюватися виключно Конституцією і законами України, переслідувати легітимну мету, бути обумовленими суспільною необхідністю досягнення цієї мети, пропорційними та обґрунтованими, у разі обмеження конституційного права або свободи законодавець зобов'язаний запровадити таке правове регулювання, яке дасть можливість оптимально досягти легітимної мети з мінімальним втручанням у реалізацію цього права або свободи і не порушувати сутнісний зміст такого права (абзац третій підпункту 2.1 пункту 2 мотивувальної частини Рішення від 1 червня 2016 року № 2-рп/2016).

Конституційний Суд України також зазначив, що під правомірним обмеженням конституційних прав і свобод людини і громадянина слід розуміти передбачену Конституцією України можливість втручання держави за допомогою юридичних засобів у зміст та обсяг конституційних прав і свобод людини і громадянина, яке відповідає вимогам верховенства права, потрібності, доцільності та пропорційності у демократичному суспільстві; метою такого обмеження є охорона основоположних цінностей у суспільстві, до яких належать, зокрема, життя, свобода та гідність людини, здоров'я і моральність населення, національна безпека, громадський порядок (абзац другий пункту 6 мотивувальної частини Рішення від 12 липня 2019 року № 5-р(I)/2019).

14.Чи виявляє ваш суд самообмеження при розгляді справи залежно від того, наскільки рішенню чи заходу передувало ретельне вивчення питання сумісності з основоположними правами? Наскільки глибоким має бути законодавче вивчення, наприклад,

перш ніж ваш суд, зрештою, надасть йому ваги?

Ні, не виявляє. Коли йдеться про можливе порушення основоположних прав, Конституційний Суд України не вважає за можливе відмовити у розгляді справи.

15. Чи аналізує ваш суд, чи були протилежні погляди повністю представлені в парламентських дебатах під час ухвалення рішення? Чи достатньо широкого обговорення по суті законодавства або чи необхідно більше зосередитися на наслідках для прав?

Залежить від фабули справи. Конституційний Суд України може застосувати різні підходи. У разі, якщо розглядається питання щодо порушення встановленої Конституцією України процедури розгляду, ухвалення або набрання чинності законами, іншими актами, Суд може проаналізувати, чи були протилежні погляди повністю представлені в парламентських дебатах під час ухвалення рішення. Разом з тим, можуть бути випадки, коли важливо дослідити саме зміст ухваленого акта. За таких умов Суд більше акцентує на тому, якими є наслідки для прав.

Так, у Рішенні від 01 листопада 2022 року № 2-р/2022 Конституційний Суд України наголосив, що, здійснюючи конституційний контроль за дотриманням конституційної процедури розгляду, ухвалення або набрання чинності законами України відповідно до частини першої статті 152 Основного Закону України, він перевіряє не тільки дотримання формальних процедур, передбачених у Конституції України. Перевірці також підлягає додержання парламентом як представницьким органом народу своєї демократичної сутності, зокрема зваженість, послідовність та обґрунтованість процесу обговорення рішень, які він ухвалює, реальна можливість народних депутатів України здійснити свої права в цьому процесі (абзац шостий підпункту 5.2 пункту 5 мотивувальної частини).

У Рішенні від 28 лютого 2018 року № 2-р/2018 Конституційний Суд України, визнаючи неконституційним оспорюваний закон в цілому у зв'язку з порушенням процедури його розгляду та ухвалення, зазначив таке: „суб'єкт права на конституційне подання обґрунтовує неконституційність Закону не тільки порушенням конституційної процедури його розгляду та ухвалення, а й невідповідністю Конституції України змісту Закону. Однак дотримання встановленої Конституцією України процедури розгляду, ухвалення та набрання чинності законами є однією з умов легітимності законодавчого процесу, у випадку її порушення конституційному контролю підлягає не зміст закону, а встановлена Конституцією України процедура його розгляду та ухвалення" (пункт 5 мотивувальної частини).

16. Чи є той факт, що рішення ухвалено законодавчим органом або було ухвалено після громадських консультацій чи публічного обговорення, переконливим доказом демократичної легітимності рішення?

В цілому так, але необхідно враховувати конкретні обставини справи. Так, наприклад, при ухваленні рішення законодавчим органом може бути порушено конституційну процедуру.

На даний момент релевантної практики Конституційного Суду України з цих питань немає.

III. Обсяг прав, законність і пропорційність

17. Чи ваш суд коли-небудь виявляв самообмеження на етапі визначення прав, надаючи ваги визначенню права урядом або застосуванню ним цього визначення до фактів?

Ні, не виявляв.

18. Чи впливає природа застосовуваних основоположних прав на ступінь самообмеження? Чи вважає ваш суд деякі права або аспекти прав більш важливими, а отже,

такими, що заслуговують більш ретельного вивчення, ніж інші?

Ні, не впливає.

Ні, не вважає.

19. Чи є у вас шкала чіткості, коли ви перевіряєте конституційність закону? Як ви вирішуєте, наскільки чітким є закон? Коли ви застосовуєте канон In claris non fit interpretatio?

Питання щодо чіткості закону, зокрема, і щодо застосування канону *In claris non fit interpretation* вирішується Судом залежно від обставин справи, що розглядається, та відповідного законодавчого регулювання. „Чіткість закону" Суд розуміє та вимірює через зв'язок із верховенством права. Так, за юридичними позиціями Суду:

„принцип правової визначеності вимагає чіткості, зрозумілості й однозначності правових норм, зокрема їх передбачуваності (прогнозованості) та стабільності" *(абзац шостий пункту 2.1 мотивувальної частини Рішення від 20 грудня 2017 року № 2-р/2017)*;

– „доступність учасникам суспільних відносин акта права для ознайомлення не гарантує доступності його змісту, якщо припис такого акта викладений неякісно, зокрема нечітко або суперечливо" (абзац перший підпункту 4.2 пункту 4 мотивувальної частини Рішення Конституційного Суду України у від 21 липня 2021 року № 4-р(II)/2021).

– „ю**ридична визначеність тлумачиться як чіткість та зрозумілість у викладенні норм актів права, унаслідок чого кожна особа має впевненість у розумній стабільності норм права, передбачності ситуацій та інших юридичних наслідків застосування таких норм"** (абзац шостий підпункту 4.4 пункту 4 мотивувальної частини Рішення Конституційного Суду України від 16 листопада 2022 року № 9-р(II)/2022);

– „оспорюваний припис Закону № 113 мав не лише бути доступним для учасників суспільних відносин, а також відповідати принципові верховенства права (правовладдя), зокрема такому складнику цього принципу, як юридична визначеність, що полягає, з-поміж іншого, в чіткості та зрозумілості норм права, передбачності їх змісту та можливих наслідків застосування або іншої форми реалізації цих норм права.

Ь…Ь оспорюваний припис Закону № 113 **не відповідає конституційному принципові верховенства права в аспекті вимоги юридичної визначеності, унаслідок чого цей припис не можна вважати „правом" у державі, керованій верховенством права (правовладдям)"** (абзац четвертий підпункту 4.1, абзац перший підпункту 4.4 пункту 4 мотивувальної частини Рішення Конституційного Суду України ***від 1 березня 2023 року № 1-р(II)/2023);***

– „<…> вимога юридичної визначеності як складовий елемент „верховенства права" стосується якості актів права та їх приписів, а не „передбачуваності ситуацій та правовідносин". –…–Юридичної визначеності будь-якого нормативного акта (або його окремого припису) неможливо досягти, якщо текст акта (його припису) є двозначним (багатозначним).

Дослідивши порушене в конституційному поданні питання в цьому аспекті, Конституційний Суд України стверджує, що приписи Закону № 2662–VIII є чіткими й однозначними, вони є передбачними за своїми наслідками, їх сформульовано з достатньою чіткістю та зрозумілістю…" (абзаци перший, другий підпункту 5.4 пункту 5 мотивувальної частини Рішення Конституційного Суду України від 27 грудня 2022 року № 4-р/2022).

20. Якою є інтенсивність контролю вашого суду у випадку перевірки законної цілі?

Залежить від порушеного перед Судом питання. Якщо до Конституційного Суду України оскаржується законодавче регулювання щодо його конституційності, перевірка законної цілі здійснюється обов'язково.

21. Який тест пропорційності застосовує ваш суд? Чи застосовує ваш суд усі етапи „класичного" тесту пропорційності (тобто доречність, необхідність та пропорційність у вужчому сенсі)?

Конституційний Суд України застосовує усі етапи „класичного" тесту пропорційності.

22. Чи застосовує ваш суд усі наявні аспекти перевірки пропорційності?

Так, застосовує.

23. Чи є випадки, коли ваш суд визнає, що оскаржуваний захід задовольняє один або більше етапів перевірки на пропорційність, навіть якщо, на перший погляд, немає достатніх доказів, щоб показати це?

Таких випадків у практиці Конституційного Суду України не було.

24. Чи запровадження контролю пропорційності у практиці вашого суду супроводжувалося (співпадало) з розвитком доктрини самообмеження?

Ні, не співпадало.

25. Чи судова практика ЄСПЛ сформувала підхід вашого Суду до самообмеження? Чи доктрина ЄСПЛ про простір для роздумів є співставною з національним еквівалентом простору для роздумів, що його застосовує ваш суд? Якщо ні, то як часто міркування щодо простору для роздумів ЄСПЛ збігаються з міркуваннями щодо самообмеження вашого Суду в подібних справах?

Принцип правовладдя є основою для розгляду справ у Конституційному Суді України. Тому практика ЄСПЛ сформувала підхід Конституційного Суду України до самообмеження. Доктрина ЄСПЛ щодо простору для обдування є національним відповідником свободи розсуду, якою наділений Конституційний Суд України.

26. Чи засуджував ЄСПЛ вашу державу через самообмеження, виявлене вашим судом у конкретній справі, що зробило її неефективним засобом правового захисту?

ЄСПЛ не розглядав справи проти України в контексті використання Конституційним Судом України дискреційних повноважень, які спричинили порушення людських прав, що їх передбачено Конвенцією, та мали наслідком застосування неефективного засобу юридичного захисту.

IV. Інші особливості

27. Як часто питання самообмеження виникає у справах про людські права, які розглядаються вашим Судом?

Суд не ухвалював рішень про самообмеження у справах про людські права.

28. Чи став ваш суд проявляти більше самообмеження з часом?

Ні, не став.

29. Чи залежить самообмеження від завантаженості справ у вашому суді?

Ні, не залежить.

30. Чи може ваш суд обґрунтовувати свої рішення на підставах, які не були представлені сторонами? Чи може Суд перекваліфікувати мотиви, висунуті відповідно до іншого конституційного положення, ніж те, на яке посилається заявник?

Так, може, Конституційний Суд України не обмежений при розгляді справи доводами суб'єкта звернення; серед засад діяльності Суду – повнота і всебічність розгляду справи (стаття 2 Закону України „Про Конституційний Суд України").

31. Чи може ваш суд поширити свій контроль конституційності на інше правове положення, яке не оскаржувалося, але має зв'язок із ситуацією заявника?

Законодавство не передбачає такої можливості. Конституційний Суд України є суб'єктом зв'язаної ініціативи.