XIXth Congress of the Conference of European Constitutional Courts

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[1] 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.

[1] *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*

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 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.[2]

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 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[3].

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

[2] *See decision no. 36, dated 04.11.2021 of the Constitutional Court of Albania.*
[3] *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.*

value) might be considered as reasonable, in the context of social, economic and political factors that influence the decision-making process of the lawmaker.[4]

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.[5]

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 proceedings.[6]

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.[7]

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[4] *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.*

[5] *See decision no. 33, dated 14.11.2022 of the Constitutional Court of Albania.*

[6] *See decision of the ECtHR Bochan v. Ukraine (n.2), no. 22251/08, dated 05.02.2015, §§ 61 and 62*

[7] *See decision no. 30, dated 29.05.2023 of the Constitutional Court of Albania.*

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.[8]

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.[9]

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.[10]

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*

[8] *See decision no. 1, dated 07.01.2005 of the Constitutional Court of Albania.*
[9] *See decision no. 34, dated 28.05.2012 of the Constitutional Court of Albania.*
[10] *See decisions no. 9, dated 26.02.2007 of the Constitutional Court of Albania.*

concrete conditions and various political, historical, social, cultural, traditional factors, which are very decisive [...].[11]

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.[12]

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.[13] 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).[14]

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.[15] 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

[11] *See decisions no. 32, dated 21.06.2010; no. 1, dated 07.01.2005 of the Constitutional Court of Albania.*
[12] *See decision no. 47, dated 26.07.2012 of the Constitutional Court of Albania.*
[13] *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.*
[14] *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.*
[15] These rules can be found now in the new law no.10/2023, dated 02.02.2023 "On the classified information".

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 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.[16]

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.[17]

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.[18]

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

[16] *See decision no. 42 dated 27.12.2022 of the Constitutional Court of Albania.*
[17] *See decision no. 25, dated 10.05.2021 of the Constitutional Court of Albania.*
[18] *See decision no. 5, dated 22.02.2022 of the Constitutional Court of Albania.*

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.[19]
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.
More specifically, in its practice, the Court has been set into motion to review the constitutionality of laws[20], decisions of the Government[21], the Municipal Council[22], orders of ministers[23], 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).*[24] 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

[20] *See decision no. 32, dated 30.05.2023 of the Constitutional Court of Albania.*
[21] *See decision no. 4, dated 15.02.2021 of the Constitutional Court of Albania.*
[22] *See decision no. 29, dated 02.07.2021 of the Constitutional Court of Albania.*
[23] *See decision no. 11, dated 09.03.2021 of the Constitutional Court of Albania.*
[24] *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.*

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.[25]

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.[26]

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 to know the intention of the lawmaker and the employed legislative techniques.[27]

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.[28]

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.[29]

[25] *See decision no. 8 dated 22.02.2023 of the Constitutional Court of Albania.*
[26] *See decision no. 21 dated 18.04.2023 of the Constitutional Court of Albania.*
[27] *See decision no. 32, dated 30.05.2023 of the Constitutional Court of Albania.*
[28] *See decision no. 37 dated 01.12.2022 of the Constitutional Court of Albania.*
[29] *See decision no. 9 dated 26.02.2016 of the Constitutional Court of Albania.*

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, 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.[30]

[30] *See decision no. 7 dated 24.02.2016 of the Constitutional Court of Albania.*

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.[31]

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.[32]

While, in another case, when the Court was set into motion to review the compatibility with

[31] *See decision no. 35, dated 15.06.2023 of the Constitutional Court of Albania.*
[32] *See decision no. 64, dated 23.09.2015 of the Constitutional Court of Albania.*

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 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.[33]

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.[34]

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,

[33] *See decision no. 19, dated 15.04.2015 of the Constitutional Court of Albania.*
[34] *See decision no. 20, dated 20.04.2021 of the Constitutional Court of Albania.*

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.[35]

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 determined 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.[36] 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.[37] The degree of clarity is more

[35] *See decision no. 30, dated 05.07.2021 of the Constitutional Court of Albania.*
[36] *See decision no. 65, dated 10.12.1999 of the Constitutional Court of Albania.*
[37] *See decision no. 9, dated 26.02.2007 of the Constitutional Court of Albania.*

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.[38]
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.[39]

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 incompatible 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.[40]

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.

[38] *See decisions no. 39, dated 15.12.2022; no. 24, dated 04.05.2021 of the Constitutional Court of Albania.*
[39] *See decision no. 36, dated 15.10.2007 of the Constitutional Court of Albania.*
[40] *See decision no. 32, dated 30.05.2023 of the Constitutional Court of Albania.*

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.[41] 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..[42]

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.[43]

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?

There are no cases, as the Constitutional Court examines cumulatively all the criteria of proportionality test (*see answer to question no. 21 – above*).

[41] *See decision no. 20, dated 20.04.2021 of the Constitutional Court of Albania.*
[42] *See decision no. 37, dated 01.12.2022 of the Constitutional Court of Albania.*
[43] *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.*

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.[44]

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.

[44] *See decisions no. 33, dated 14.11.2022; no. 20, dated 01.06.2011 of the Constitutional Court.*

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 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.[45] 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?

[45] *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.*

Constitutional Court, on the basis of Article 48 of its organic law (no. 8577/2000[46]), 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.[47]

[46] *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*."

[47] *See decision no. 65, dated 10.12.1999 of the Constitutional Court of Albania.*