Constitutional Court of the Czech Republic

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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.

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).

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.

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.
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).

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.
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.

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.

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 criminalisation 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.[1]

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.[2]

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).[3]

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

[1] 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

[2] Ibid, p. 127.

[3] Ibid, pp. 111–112.

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.[4] 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.[5]

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).

[4] 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

[5] 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. 113

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.[6]

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.[7]

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). [8]

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[6] Kindlová, M.: *Sebeomezení Ústavního soudu, státní občanství a bezpečnost státu* [Self-restraint of the Constitutional Court, citizenship and State security], pp. 164–165

[7] 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

[8] Ibid, pp. 821–822.

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 legal 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.[9]

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).[10] 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.[11]

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

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[9] Filip, J., Holländer, P., Šimíček, V.: *Zákon o Ústavním soudu, komentář*, 2. vydání, 2007 [Constitutional Court Act, Commentary, 2nd edition, 2007] p. 399

[10] 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

[11] 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

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).

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.[12] 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).[13]

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

[12] 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
[13] e.g. in judgments file No Pl. ÚS 55/10 and file No Pl. ÚS 53/10 concerning legislative emergency; ibid. p. 69

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 the legislative process, or any previous process, has ignored the human rights dimension of an issue, deference can hardly be an option.[14]
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).*"

[14] 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

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.

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.[15] 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.[16]

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 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] 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.)

[16] 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

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 concept – 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")[17] may be restricted only in favour of constitutionally protected (approved) values.[18] 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,...*".[19] 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 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;[20] or (2) implicitly included in the

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[17] 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.

[18] Černívek, Zdeněk. *Legitimita, proporcionalita a doktrína vyloučených důvodů* [Legitimacy, proportionality and the excluded grounds doctrine]. Právník [Lawyer, journal] 7/2021.

[19] Judgment of the Constitutional Court of 15 September 2009, file No Pl. ÚS 18/07.

[20] 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.

appropriateness criterion of the three-step proportionality test;[21] or (3) the initial (special) step of the proportionality test, in which case we will talk about the four-step proportionality test[22].

The latter can be seen in one of the latest judgments of the Constitutional Court from April 2023[23]. 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.[24] 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 of such exercise (possible abuse of the law) in the subsequent steps of the review, especially under the proportionality criterion.[25]

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[26] or the right of a journalist to confidentiality of his source from the right to freedom of expression[27]. 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

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[21] 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.
[22] 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.
[23] Judgment of the Constitutional Court of 11 April 2023, file No Pl. ÚS 92/20.
[24] Dissenting opinion of Justice Ludvík David in judgment of the Constitutional Court of 20 February 2018, file No Pl. ÚS 6/17.
[25] Judgment of the Constitutional Court of 1 June 2005, file No IV. ÚS 8/05.
[26] Judgment of the Constitutional Court of 28 February 2006, file No Pl. ÚS 20/05.
[27] Judgment of the Constitutional Court of 27 September 2005, file No I. ÚS 394/04.

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[28] 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*"[29]. 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.

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.[30]

[28] Judgment of the Constitutional Court of 1 October 2019, file No Pl. ÚS 5/19.
[29] 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.
[30] Červínek, Zdeněk. *Metoda proporcionality v praxi Ústavního soudu* [The proportionality method in the practice of the Constitutional Court]. Praha Leges, 2021.

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.[31]

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.[32] 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.[33] 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.

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.[34]

22.

[31] Alexy, R.: *Theory of Constitutional Rights*, Oxford 2002. Judgment of the Constitutional Court of 2 April 2013, file No Pl. ÚS 6/13.
[32] Judgment of the Constitutional Court of 12 October 1994, file No Pl. ÚS 4/94.
[33] Judgment of the Constitutional Court of 16 October 2007, file No Pl. ÚS 78/06.
[34] Judgment of the Constitutional Court of 18 August 2004, file No Pl. ÚS 7/03.

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.[35]

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.[36] 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.[37]

23.
No.

24.
The Constitutional Court referred to the proportionality method for the first time in a landmark ruling from 1994,[38] 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.[39] 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

[35] See e.g. judgment of the Constitutional Court of 1 March 2007, file No Pl. ÚS 8/06.
[36] Judgment of the Constitutional Court of 12 October 1994, file No Pl. ÚS 4/94.
[37] Judgment of the Constitutional Court of 13 August 2002, file No Pl. ÚS 3/02.
[38] Judgment of the Constitutional Court of 12 April 1994, file No Pl. ÚS 43/93.
[39] Judgment of the Constitutional Court of 12 October 1994, file No Pl. ÚS 4/94.

(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

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.