XIXth Congress of the Conference of European Constitutional Courts

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

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

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

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

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

Questionnaire

for the national reports

I. Non-justiciable questions and deference intensities

1. In your jurisdictions, what is meant by "judicial deference"?
2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?
3. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?
4. Are there situations when your Court deferred because it had no institutional competence or expertise?
5. Are there cases where your Court deferred because there was a risk of judicial error?
6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?
7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because

courts are unelected and they lack the democratic mandate to decide questions of policy?

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?
9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?
10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

II. The decision-maker

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

III. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?
18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?
19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?
20. What is the intensity review of your Court in case of the legitimate aim test?

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?
22. Does your Court go through every applicable limb of the proportionality test?
23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?
24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?
25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?
26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

IV. Other peculiarities

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?
28. Has your Court have grown more deferential over time?
29. Does the deferential attitude depend on the case load of your Court?
30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?
31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?