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"?

There is no concept of judicial deference that has been construed or defined in an unambiguous manner. In the field of constitutional review, judicial deference is generally understood to mean the court's deliberate avoidance of interference in the legislature's freedom of choice in those matters in which the Constitution leaves the legislature (political) discretion – i.e. the freedom to make choices, none of which is in conflict with the Constitution. Judicial deference is associated with the constitutional principle of the separation of powers.

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

Yes, the Supreme Court has found that the extent of judicial review in the context of constitutional review may vary in scope or depth, depending on the field. For example, in the case of restrictions of fundamental social rights (fundamental right to positive actions by the state), judicial review is more limited than in the case of restrictions of the fundamental right to freedom. At the same time, the Supreme Court has not completely excluded any area of legislative drafting from judicial review (creating so-called inviolable areas).

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

The scope of deference depends primarily on the area in which the judicial review is carried out. Deference is wider in scope in areas where the Constitution leaves the legislature a wider margin of discretion (in particular in matters relating to fundamental social rights and the general right to equality).

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

Insufficient factual knowledge can affect decision-making in more complex cases. This may pose a problem, in particular, in the second stage of the proportionality test (necessity), where the Court may not have sufficient factual knowledge to assess whether there are alternative measures to achieve the legislature's objectives. The Court sometimes has to act in a situation where none of the parties to the proceedings is interested in proposing alternatives. It may also render the resolution of a case difficult (and therefore lead to judicial deference) if the impact of a disputed provision has to be predicted. There have been cases such as the ones described above in the case law of the Supreme Court.

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

The circumstances indicated in the previous point (lack of information concerning alternatives, difficulty in predicting the future) can, among other things, create a risk of errors.

6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

There have been cases where the Court has found that the legislature has a number of options, none of which would be in conflict with the Constitution, leaving the decision to the legislature as the branch of power legitimised by the people.

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

The Supreme Court has said that the legislature has extensive discretionary powers in guaranteeing social rights and the courts cannot start making social policy decisions instead of the legislator. The precise scope of fundamental social rights also depends on the economic situation of the country. At the same time, choices based on the state's social policy considerations must not result in a situation where limited resources are distributed in violation of the fundamental right to equality under subsection 12 (1) of the Constitution.

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

The Supreme Court has said that the legislature has exclusive competence to impose penal sanctions and that the legislature has a wide margin of discretion in defining the punishment corresponding to an offence (sentence limits). The scale of penalties depends on the values held by society, and it is the legislative power that is competent to express them. It also allows the Parliament to shape the national penal policy and influence criminal behaviour. It follows from the principle of the separation of powers that the courts cannot start to shape the system of sanctions instead of the legislature, taking abstract penal policy objectives as the basis. However, the legislature's wide discretion does not exclude the competence of the courts to assess the compliance of a rule of penal law, including a sanction, with the Constitution (section 152 of the Constitution).

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

No, at least no court judgement has been made on such grounds. It is not known whether security considerations have been a hidden reason for opting for one solution or the other.

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

Reforms are carried out through legislative drafting, just like the operations of the state in stable times. The protection of fundamental rights should neither be stronger nor weaker in the course of reforms, but reforms may render it necessary to pay heightened attention to the protection of fundamental rights.

II. The decision-maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

It cannot be said that the Supreme Court clearly applies more intensive scrutiny in the case of regulations than in the case of laws. The intensity of scrutiny does not directly depend on the legitimacy of the issuer of the legislation. However, there is a different control scheme for laws and regulations (e.g. inspecting whether the limits of authorisation are adhered to). When reviewing administrative acts, the Supreme Court, as a higher administrative court, also proceeds from the margin of discretion of the administrative authority, which it does not interfere with.

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

The positions taken in the course of the process of drafting laws are considered as part of the historical interpretation of legislation. Debates held in Parliament and explanatory memoranda of draft laws are examined, in particular, to determine the purpose of the law.

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

The Court examines the justifications given by the legislature upon issuing legislation. The Court does not place itself in the role of a political decision-maker, but when assessing the constitutionality of a provision, it may also take into account considerations and objectives which may also be objectively relevant, although not clearly apparent in the materials concerning the compilation of the draft.

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

The Court will take into consideration all the justifications put forward by the legislature, but will not be bound by them and may also use any other reasons and arguments it considers appropriate. The depth of the legislature's analysis in itself is not an argument that determines whether or in which manner the Court will take the legislature's views into consideration. In some cases, the Supreme Court has emphasised, *inter alia*, the thoroughness of the analysis carried out by the legislature when confirming the constitutionality of a provision.

15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

The assessment of the constitutionality of a provision is not directly linked to the depth of the legislature's analysis or the extent or nature of the debate in Parliament.

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

In the case of laws adopted by the legislature, decisions are presumed to be legitimate (if the formal requirements of the legislative process have been met). In Estonia, the public is not generally involved in parliamentary proceedings in a manner that would allow to draw conclusions regarding the legitimacy of a decision.

III. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

The Supreme Court has not limited itself to one possible interpretation of a provision merely because the government has interpreted or applied that provision in a certain way.

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

Yes, in order to assess the substantive constitutionality of infringements of various fundamental rights, the Supreme Court applies different control schemes, which also means that the intensity of scrutiny varies.

In the case of infringements of the fundamental right to freedom, there must be a legitimate objective for the infringement to be substantively lawful, and the infringement must be proportionate to that objective, i.e. suitable, necessary and proportional (so-called strict constitutional review).

In the event of a breach of the general fundamental right to equality, the level of scrutiny is lower and the Supreme Court applies the test of reasonable and relevant cause. State aid in cases of deprivation (social protection) is insufficient if the discrepancy between what is established by the legislature and what is required by the Constitution is obvious.

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

The Supreme Court is of the opinion that legal clarity means that legislation must be sufficiently clear and understandable so that everyone can reasonably foresee the state's activities and adjust their activities accordingly.

The degree of clarity required for all provisions by the Constitution is not the same. Provisions that allow the restriction of a person's rights and the imposition of obligations on them must be clearer and more precise.

The person must be able to reasonably foresee – where necessary, with appropriate advice – the consequences of a particular activity, taking into consideration the circumstances. These consequences do not have to be foreseeable with absolute certainty.

Based on the principle of democracy, the grammatical interpretation argument carries more weight, i.e. if the wording of the provision is clear, it must be followed.

20. What is the intensity review of your Court in case of the legitimate aim test?

There are no different degrees of intensity in identifying a legitimate aim. If the issuer of the provision has not expressed its aim, the Court will find it out on its own (the Court will not infer that there was no aim or it was not legitimate). The Court has also mostly considered aims to be legitimate, as they can usually be linked to a more general constitutional principle. In a situation where the Court itself identifies the aim, it would also be difficult to then find that it is not legitimate.

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

Yes, the Supreme Court applies a three-stage (suitable, necessary and proportional) control scheme when carrying out a proportionality test concerning the fundamental right to freedom.

22. Does your Court go through every applicable limb of the proportionality test?

The Supreme Court examines proportionality at all stages of the review. If a restriction is found to be disproportionate at any stage of the review, the Court will declare the provision unconstitutional without further review.

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

Providing evidence in the proportionality test is a complex matter, since in the case of suitability and necessity, proof of the circumstances precluding them should rather be provided (suitability must be presumed unless it is demonstrated that the measure does not achieve the objective; in order to rule out necessity, the existence of alternative measures must be proved), while the assessment of proportionality is largely a matter of judgement. The Court uses verifiable facts and evidence as much as possible in decision-making, but in many cases the decision may not be based on clearly verifiable facts.

24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

It is difficult to assess, as constitutional review is a relatively young field in Estonia and the proportionality test has been used since its early days (there is no previous case law to compare it with).

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

As the Estonian system of constitutional review is young, the case law of the ECtHR, including in the aspect of judicial deference, has had a significant impact on the Estonian case law. Although it may not be directly apparent from the motivation for decisions, the Court will often take into consideration the possible solution of the dispute before the ECtHR when making a decision, and in most cases the Court's assessment of the 'margin of discretion' overlaps with the potential assessment of the ECtHR.

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

Yes, a dispute about the internet ban for prisoners could be highlighted as such a case. In this case, the ECtHR criticised Estonia for not sufficiently substantiating the Supreme Court's decision (in particular, the legitimate aims of the ban, i.e. the risks that could be posed by allowing prisoners to have access to the internet). This suggests that, in the ECtHR's view, the Estonian court had limited itself too much by accepting, without further justification, the explanations of the legislative and executive powers as to the aims and justification of the internet ban.

IV. Other peculiarities

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

No issues of that kind have arisen in constitutional review cases.

28. Has your Court have grown more deferential over time?

It cannot be said that the level of scrutiny has decreased over time; it is rather the opposite.

29. Does the deferential attitude depend on the case load of your Court?

There is no noticeable connection between the number of cases and judicial deference, although of course it cannot be excluded that excessive workload may affect the quality of the Court's work.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

Yes, the Court can also find objectives and other justifications on its own. Yes, the Court is not bound by the specific constitutional provision invoked by the applicant.

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

Yes, the Court is bound by the application for constitutional review submitted to it, but, in the proceedings of a specific review of a legal provision (i.e. in the case of constitutional review initiated by courts), it is not bound by provisions with respect to which a constitutional review has been requested. In addition to the provisions indicated in the application, the Supreme Court may, for example, extend the review to provisions laid down in the same or another legal act which are so closely related to the disputed provision that their continued validity would lead to legal uncertainty.

In the proceedings of an abstract review of a legal provision (at the request of the President or the Chancellor of Justice), the Court is bound by the provisions disputed in the application and cannot change the subject matter of the application.