

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”?

The *Hoge Raad* is a Supreme Court with, amongst others, constitutional tasks. The Dutch Constitution charges the *Hoge Raad* with cassation of judgments for breaches of law, in the cases and within the limits provided by law. Also violation of international treaties which are valid in the Netherlands, government policies, and laws and policies from provinces and municipalities could lead to an appeal in cassation. Furthermore, the *Hoge Raad* reviews whether the previous court followed the right procedures and whether the disputed judgment is sufficiently substantiated.

The *Hoge Raad* may examine, in a case which is brought before it, whether a legal provision is in conformity with law of a higher order. A concept of “judicial deference” has no autonomous meaning within the law of the Netherlands. The case-law of the *Hoge Raad* includes various judgments in cases in which the duty to provide effective legal protection to the people encounters the primacy of the legislator to weigh up general interests. In 2021, the Venice Commission implicitly told Dutch courts that a general deferential attitude of a court towards Parliament should not be an end in itself, in so far as this is potentially detrimental to the courts' (constitutional) review functions (European Commission for Democracy through Law (Venice Commission), The Netherlands, Opinion on the legal

protection of citizens, adopted 15-16 October 2021 (Childcare Allowance Case), paragraph 101).

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

Please refer to our answer on question 1.

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

Please refer to our answer on question 1.

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

In several judgments the *Hoge Raad* ruled that it was up to the legislator to choose between different options for the further development of the law or to choose the way in which legal protection should be provided. We will provide two examples.

In a tax case, the *Hoge Raad* ruled (judgment of 14 June 2019, ECLI:NL:HR:2019:816) that the taxation of a so-called fixed return on savings and investment – which could deviate from the actual return on such assets – violated Article 1 Protocol 1 ECHR and Article 14 ECHR. Since several solutions for providing legal protection were conceivable, the *Hoge Raad* left the choice to the legislator.

In a social security case (judgment of 8 December 2017, ECLI:NL:HR:2017:3081), the applicant alleged to need medical care as a consequence of her physical disability. When she started living together with a person who also took charge of her medical care, Dutch authorities decided, on the basis of a certain legal provision, that they were a joint household, as a consequence of which the welfare benefit which the applicant received was terminated. The court of appeal ruled that this decision violated the prohibition of discrimination of Article 14 ECHR, since, in short, in the event the care was provided by a relative of the applicant and the relative and the applicant would live together, the welfare benefit would have been continued. The *Hoge Raad* ruled that the applicable legal provision violated the prohibition of discrimination and that it was up to the legislator to decide in which way the existing justice deficit should be remedied.

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

Not applicable.

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

Please refer to our answer on question 4.

7. “The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene”. Is this a valid standard for your Court? Does your Court share the

conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

Please refer to our answers regarding questions 1 and 4.

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

Not applicable.

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

Procedural rules in the Netherlands enable Dutch courts to oblige a party to reveal information and to decide whether a refusal of a party to do so, is (wholly or partly) justified. These rules also concern cases in which information of national security services is involved.

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

Not applicable.

II. The decision-maker

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

Not applicable.

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

In the Netherlands, legal provisions are interpreted by courts on the basis of, in the essence, their wording, parliamentary documents during the drafting of the law, jurisprudence and academic research results.

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

Not applicable.

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How

deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

Not applicable.

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

Not applicable.

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

Not applicable.

III. Rights' scope, legality and proportionality

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

Not applicable.

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

Not applicable.

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

Not applicable.

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

In the Netherlands, the ECHR is directly applicable law and is also constitutional law. The case-law of the ECtHR is applied.

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

Please refer to our answer on question 20.

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

Please refer to our answer on question 20.

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

Please refer to our answer on question 20.

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

Please refer to our answer on question 20.

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

Please refer to our answer on question 20.

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

Not applicable, as there is no autonomous concept of deference in the Netherlands.

IV. Other peculiarities

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

Not applicable.

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

Not applicable.

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

Not applicable.

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

The Dutch Constitution, more specific article 121 (and also Dutch procedural laws), obliges the court to give reasons for its decision. The Constitution does not provide further provisions on this topic. The procedural laws in civil, criminal and tax law also provide rules for the reasoning of a judgment. As far as the possibilities to use arguments inside or outside the scope of the allegations of the parties are concerned, these fields of law distinguish between questions of fact and questions of law. The nature of the jurisdiction also makes a difference. Therefore, this question cannot be answered in general terms, other than that, in general, judgments must be verifiable for the parties involved in a case, as well as for third parties.

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

Not applicable.