XIXth Congress of the Conference of European Constitutional Courts

SLOVAKIA – NATIONAL REPORT

I. NON-JUSTICIABLE QUESTIONS AND DEFERENCE INTENSITIES

1. In your jurisdictions, what is meant by "judicial deference"?

There is no agreed-upon definition of judicial deference either in the case-law of our Court or among legal scholars. The subject has not enjoyed much interest among legal scholars.

A recapitulation of the most relevant powers of the Constitutional Court is needed here.

The most fundamental task of the Slovak Constitutional Court (Art. 125 of the Constitution) is to review the constitutional and international (mainly human rights treaties) compatibility of legislation (the laws of the Parliament) and other regulations (normative acts of the Government and ministries and other central state administration authorities). In the latter case, the Court also reviews their legality. The legislation review may be completely abstract, i.e. unconnected to any particular case, and thus initiated by the President of the Republic, at least 30 MPs, the Prosecutor General, and in some cases the Ombudsperson or the Judicial Council. Or it may arise out of a specific case and be initiated by a court.

Another major task of the Constitutional Court, representing about 90 % of its caseload, is to review individual decisions, inactions and measures by any other public power (but usually courts and most often the Supreme Court) for human rights violations, but in this case the Court only has jurisdiction as a last resort, i.e. if no other court has jurisdiction (Art. 127 of the Constitution). These cases, submitted by individuals, so far cannot give rise to legislation review, but that is to change when the last part of an important 2020 constitutional amendment enters into force in 2025.

The Court also conducts preventive review of constitutionality of referendum questions if asked to do so by the President of the Republic before they call the referendum (Art. 125b of the Constitution). This is because the Constitution prohibits conducting referendums on certain matters.

The Court also reviews the constitutionality of declarations and prolongations of exceptional constitutional regimes (Art. 129 par. 6 of the Constitution). The Court settles disputes of public authorities regarding the correct interpretation of the Constitution. The Court's interpretation is generally binding (Art. 128 of the Constitution). The Court reviews the regularity of electoral and referendum process at the national level (Art. 129 par. 2 and 3 of the Constitution).

The main point to be made here is that, unlike judicial review in common law countries, where the judicial deference doctrine comes from, Slovakia has a constitutional court set up by the framers specifically to check on legislative and executive powers and invalidate their unconstitutional acts. This in itself makes deferential approaches much less likely. On the other hand, the Court's powers are precisely defined in the Constitution and then in more detail in

Law no. 314/2018 on the Constitutional Court of the Slovak Republic. This means that the Court may not decide any dispute that arrives but it must have the explicit power to do so. If a request arrives at the Court that the Court does not have the power to decide at all, the Court must refuse to decide the issue.

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

There is no real spectrum of deference, no scale which would be part of established case law. If a deferential approach does happen, it happens on a case-by-case basis (see Q6, Q8 and Q11).

There are likewise no no-go zones, every law may be reviewed in proceedings under Article 125 of the Constitution. Controversial cases may nonetheless take longer to decide. The best illustration of this is the judgment on abortions (**PL. ÚS 12/01**), which took almost seven years to decide but was ultimately decided, even if the Court was very divided on this issue. The Court's majority finally upheld a law which allowed abortion on demand in the first 12 weeks of pregnancy. This after all does not seem to be a case of deference since balancing was conducted between the constitutional precept of protecting unborn life and the constitution rights of the woman to privacy and physical integrity.

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)?**

No such factors can be clearly inferred from the case law. The Court does tend profess the Parliament's greater margin of appreciation in some areas, such as criminal policy (see Q8), taxes and similar contributions (PL. ÚS 5/2012, PL. ÚS 9/2014, PL. ÚS 2/2020. PL. ÚS 38/2015), large-scale reforms (see Q26), elections (see Q6), legislative procedure (see Q11 and PL. ÚS 6/2017).

But then it seems that individual cases are resolved on an ad hoc basis. A good illustration is criminal policy, where the Court tends to repeat that the legislator enjoys a wide margin of appreciation. But if we compare the three strikes case and the penalty aggravation case, the Court was very deferential in the former and not so in the latter, even if both cases concerned disproportionately severe penalties (see Q8).

Sometimes the Court accepts the Parliament's greater margin of appreciation but invalidates the challenged legislation anyway. An illustration is the case concerning minimal salaries of nurses (**PL. ÚS 13/2012**). As a result of a general strike of nurses in 2011, the Parliament passed a law regulating the minimal salary classes for nurses, effectively forcing the employers (hospitals and ambulances) to increase their salaries, as these minimal salaries were higher than most of their current salaries and definitely higher than the general minimal wage. The law was

then contested by the (acting) Prosecutor General and the Court found violation of the property rights of employers, as those were to be disproportionately burdened by the increase.

"Aware of the complexity of the health sector and the wide discretion of the legislature and its own expert and democratic limits, the Constitutional Court cannot, however, fail to see the scale and temporal context of the increase in costs for health care providers. The documents submitted by the petitioners, admittedly, but which can be considered credible, show that the providers were supposed to increase the nurses' wages significantly within two months. For example, for small practices with one doctor and one senior nurse, this can create significant economic problems with considerations about the viability of continuing to be in business. What is of utmost importance in this assessment is that this is not a classic market environment where the provider can compensate for increased costs by increasing the price. The impugned law may thus have a disincentive effect for some providers, with consequences for nurses' employment. The Chamber's arguments can be countered both by the fact that Article 20 of the Constitution also protects enterprise, wider property freedom and by the particularity of the (non-)market environment of the healthcare sector.

...

In addition, it can be noted that even if the Constitutional Court states in its decision that the contested regulation is unconstitutional, it remains true that the executive and, indirectly, the legislature are much better equipped to assess the economic possibilities in the health care sector and to implement related operational and conceptual changes, including statutory changes. They bear both political and constitutional responsibility for this. ... In this regard, it should be noted that the Constitutional Court does not consider the substance, the very idea of the impugned law to be unconstitutional, but the combination of the specific economic pressure and time pressure that the current model of healthcare exerts on some providers."

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

On the contrary, there is, in fact, at least one case where the Court granted itself powers that it did not explicitly have under the Constitution (**PL. ÚS 21/2014**). The Court declared parts of the Constitution regulating judicial vetting procedures unconstitutional for violating core constitutional principles held to be implicitly unamendable.

In 2014, the National Council passed a constitutional amendment and an implementing law that introduced a mandatory vetting procedure for both serving judges and candidates for judicial office.

Pursuant to the amendments, the National Security Authority was to collect data necessary for assessing the integrity of the serving judges or judicial candidates. It was to gather such information in cooperation with the Police Force, Military Intelligence and the Slovak Information Service. The information was then to be submitted to the Judicial Council, which was then to decide whether the judge or judicial candidate was suitable for public office. Should the verdict be negative, the judicial candidate would not become a judge and the serving judge would lose their office. The decision could be appealed to the Constitutional Court.

The President of the Judicial Council challenged the amendments before the Constitutional Court. She did so, arguing that they violated the principles of non-retroactivity, judicial independence and legal certainty. As the petitioner sought the invalidation of not only the implementing law but also of the constitutional amendment, the Court had to address the question of whether such a review of the constitutional amendment was necessary and even possible.

In respect of the necessity of taking this course of action, the Court observed that by limiting its review to the ordinary legislation and if it only annulled the implementing law, it would create a situation in which the legislature would find itself with a constitutional obligation it would be unable to implement. Thus, with the implementing law annulled, the legislature would have to harmonise the annulled law with the Constitution within six months. However, the Constitution would still contain an obligation requiring the legislature to pass legislation implementing the constitutional provisions requiring the implementation of a vetting procedure. This, however, was precisely the position that the Constitutional Court found to be unconstitutional. This would create a paradoxical situation for the legislature, making it impossible for it to comply with the Constitution.

It was therefore necessary to consider the possibility of reviewing a constitutional amendment. The Court conducted extensive comparative, historical and theoretical research in order to answer several crucial questions. In so doing it considered a significant number of theoretical legal scholars, comparative researchers and foreign constitutional case-law.

It was established that even constitutional provisions must be in line with the substantive core of the Constitution. However, it remained unclear whether the Constitutional Court had the power to review those constitutional provisions. The fundamental role of the Constitutional Court is the protection of constitutionality. This constitutional mandate is universal in that it applies to all of the legal relationships subject to constitutional regulation. The existence of any areas of the Constitution deprived of this protection would entail the denial of the substantive rule of law. Article 124 of the Constitution establishes the Constitutional Court as the universal guardian of constitutionality in Slovakia. Therefore, when the Constitution assigns to the Constitutional Court the power to review the constitutionality of "laws", this must be interpreted in an extensive manner. It must therefore also include the power to review constitutional laws in so far as their compliance with the substantive core is concerned. The nature of the state as democratic and governed by the rule of law must be granted protection, even against unconstitutional constitutional laws.

Drawing on its previous conclusions, the Court proceeded to identify the elements of the substantive core of the Constitution. It referred to one of its previous decisions, PL. ÚS 7/2017, which concerned the repeal of amnesties issued during the Mečiar administration (although that might sound very activist, it was in fact the Parliament that amended the Constitution and granted itself the power to repeal amnesties clearly incompatible with the democratic rule of law and this resolution must then be double-checked by the Constitutional Court). In that decision, the Court recapitulated the principles of rule of law identified in its previous case-law, noting that the list was not exhaustive, and reiterated that those principles together formed the implicit substantive core of the Slovak Constitution. They included the principles of separation of powers, judicial independence, legal certainty and non-retroactivity.

The Court conceded that judicial independence is not limitless and self-serving and that certain types of interference with it are permissible. However, any such interference would violate judicial independence and separation of powers if it was so severe that it undermined the proper administration of justice.

The Court noted that systematic background checks of active judges, which might result in the risk that they lost their judicial office was only permissible immediately after the fall of an authoritarian regime and during the transition to democracy. In the Slovak context, this meant that they were permissible shortly after November 1989 but were certainly not permissible in 2014. A variety of standard legal means were noted as existing at the present time that protected the public against judges who lacked integrity and failed to act with a proper regard for justice. Such judges could, for instance, be held accountable according to the law in criminal, civil and disciplinary proceedings. The Court accepted that the competent authorities had so far failed to put into action an effective working system for monitoring judges' behaviour and holding them accountable. This, however, could not justify the use of full-scale vetting procedures, such as the ones proposed in the challenged regulation.

With regard to judicial candidates, the Court did not object to the idea of conducting integrity assessments as part of the selection process. Unlike active judges, for whom such procedures would constitute an unexpected and retroactive interference with their independence and might entail the risk to their continuing in office, for judicial candidates this would be just another requirement they had to fulfil and of which they had been notified in advance.

The principal problem of the constitutional amendment challenged in this case, however, lay in the way the vetting procedure was carried out. The background checks were conducted by the National Security Authority, a de facto secret service body, in cooperation with the Police Force, Military Intelligence and Slovak Information Service. The process lacked constitutional guarantees of fair trial, and it was carried out by means which included invasive, secretive methods typical of secret services' modus operandi. The file containing such information as was gathered was then submitted to the Judicial Council, which then had to decide whether the judge or judicial candidate was suitable for that office. The problem with this was that the Judicial Council had no real way of verifying whether the information submitted was true, complete and objective. It also meant that appellate review by the Constitutional Court was merely illusory as it was equally not in a position to verify the information submitted by the secret service.

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

No such cases are known.

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

Yes. One such example is case no. **PL ÚS 26/2019**, where the Court reviewed a provision prohibiting the publication of electoral opinion polls in the 50 days before the elections. The contested ban was introduced a few months before the upcoming 2020 parliamentary elections by the outgoing ruling majority and prolonged a pre-existing 14-day ban introduced in 2014.

Both the 50-day ban and the 14-day ban were challenged by the President of the Republic (it should be noted here that Section 91 par. 3 of the Law on the Constitutional Court expressly allows the Court to strike down even provisions supplanted by the contested provision).

While the Court did conduct a classic proportionality test in relation to the 50-day ban and found it to violate the freedom of speech, it deferred with regard to the 14-day ban, essentially stating that the Parliament was better suited to decide the matter. One judge went even so far in his concurring opinion as to call the pre-election opinion poll ban an element of the parliamentary *forum internum*.

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?**

It is impossible to generalise like that. However, there have been cases where the majority of the Court proved to be reluctant to strike down contested legislation that was part of a large-scale reform.

One such example is case no. **PL ÚS 38/03**, where the Court had to review several provisions of a major 2003 healthcare reform introducing small additional fees for "services connected with healthcare provision", most notoriously the fee of 20 SKK during most visits at the doctor's office corresponding to about two euros in today's money. Those fees were challenged because Article 40 of the Constitution says that "the citizens shall have the right to free healthcare and medical equipment for disabilities on the basis of medical insurance under the terms to be laid down by a law". The government tried to circumvent this constitutional precept by redefining what constituted "healthcare" and introducing a new legal term "services connected with healthcare provision", with some categories of people exempt from those fees (mainly due to their financial and other situation).

The Court's argumentation for upholding the reform was basically threefold:

No healthcare is ever truly free of charge. Even if the state chose not to set up any public healthcare insurance and cover the healthcare expenses of everyone directly from the national budget, that too would need to be paid by the people with their taxes. The word "free" in Article 40 of the Constitution must not therefore be understood too literally.

The small fees did not constitute excessive burden on the citizens, with some categories of people who might not be able to afford even those small fees exempt from them.

The government tried to prevent the collapse of the entire healthcare system, which was in acute need of additional financing, and had basically two options: *"to specify the extent of healthcare by defining the concept of healthcare in a new way that respects the substance, meaning and purpose of Art. 40 of the Constitution, or to ensure that there are sufficient resources to provide for the 'unchanged' extent and nature of the healthcare provided under the health insurance scheme by mechanically increasing insurance contributions on the basis of simple 'calculations' in order to ensure that there is sufficient revenue to cover the*

expenditure incurred, either by increasing the percentage of the premium or by adding a certain absolute amount to the premium, without thereby raising doubts as to the compatibility of such an arrangement with the Constitution."

Two judges dissented and maintained that free healthcare simply meant free healthcare and such extra fees had to be considered unconstitutional.

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

The Court accepts the general principle that the legislator enjoys a wide margin of appreciation in penal policies, first articulated in decision no. **PL. ÚS 6/09**. This constitutionality review case initiated by a criminal court concerned two provisions of the Criminal Code: one introducing the so-called three strikes rule, which made it obligatory for courts to impose life sentences (save exceptional circumstances warranting mitigating the punishment to 25 years) on repeated offenders who were being convicted of one of the listed felonies for the third time; another one precluding early release in such cases.

The Court started on a rather deferential note: *"The field of criminal law has traditionally belonged to the sovereign competence of States. This fact is reflected in the considerable degree of discretion the legislature has in choosing specific criminal policies. The Constitution, the Convention, as well as other sources of international law, in particular international human rights treaties, treaties by which States have assumed an obligation to criminalise certain acts or omissions or, conversely, an obligation to refrain from criminalising certain acts or omissions, treaties relating to international (inter-State) cooperation (assistance) in criminal matters, and, finally, in specific areas, European Union law, define the scope and limits within which the 'traditional right of the State' to punish may be exercised. However, this space is rather wide due to the different approaches to criminal law (criminal policy), which correspond to the legal, cultural and social conditions or traditions of the individual States.*

...

The establishment of a system of criminal sanctions, the conditions for their imposition and enforcement or setting the limits of criminal penalties is a matter for the States, or, to put it another way, the legislature. The limiting provision in this respect is, in particular, Article 3 of the Convention prohibiting torture and inhuman or degrading treatment or punishment. Similar protection is also guaranteed by the Constitution through Article 16(2)."

The principle of proportionality of punishment was only marginally mentioned.

The legislator changed the law in the course of the proceedings, repealing the provision precluding early release and modifying the three strikes provision so that the life sentence was only mandatory if absolutely necessary for public safety and 25 years should be applied as a rule instead, with exceptional circumstances allowing courts to mitigate the sentence down to 20 years. The Constitutional Court thus found the life sentence to be no longer mandatory save as a last resort and noted that courts now had wide margin of appreciation in whether to impose a life sentence, thus rejecting the challenge.

It added: *"From the point of view of the severity of the punishment, i.e. the proportionality (in the narrower sense) of the legal means chosen, especially in some, although based on the previous judicial practice rather isolated cases, the legal regulation under consideration may appear to be on the edge of constitutionality. The Constitutional Court, having considered all the constitutional aspects, taking into account the sovereign power of the legislator to determine the limits of penal policy, and at the same time guided by the principle of self-restraint, nevertheless concluded, that Section 47(2) of the Criminal Code does not interfere with the recognised and, in the present case relevant constitutional principles arising in particular from Article 1(1) and other related Articles of the Constitution to such an extent as to make it possible to conclude that the penalties resulting therefrom constitute cruel and inhuman punishments and, consequently, that the contested provision would be incompatible with Article 16(2) of the Constitution and Article 3 of the Convention."*

Several dissenting judges contested the fact that the list of crimes that trigger the three strikes rule in the case of repeated recidivism included several that could hardly justify the imposition of a prison sentence of no less than 20 years. They mainly mention robbery, in which case even the most basic form of it (such as a minor street robbery resulting in the loss of a small amount of money), if committed for the third time, could send someone for at the very least 20 years to prison.

The Constitutional Court was no longer deferent two years later in a landmark case (**PL. ÚS 106/2011**) concerning the penalty aggravation mechanism for offenders having committed multiple offences. The challenged provision stated that if the offender committed at least two offences through two separate actions, the applicable penalty would be the more severe one of the two, the penalty minimum there should be increased by a third and a sentence imposed in the upper half of the resulting interval. The Court struck down the provision due to the fact that it could often result in the imposition of disproportionately strict penalties, declaring it inconsistent with the principle of proportionality inferred from Article 1(1) of the Constitution.

"Within these limits, the legislator has a wide margin of discretion in determining the type of penalties, their quantum, guidelines and methods of their imposition. Neither the Constitution nor international sources of law prescribe a coherent concept of penal policy for the legislator. It is therefore at the discretion of the legislator to determine the extent to which the various forms of protection of society by means of criminal law are applied, i.e. to decide how much emphasis to place on punitive elements versus individual prevention or general prevention elements. However, the Constitutional Court has already pointed out in the preceding parts of its reasoning that the legislator's discretion is not without limits and must not suffer from arbitrariness.

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Particularly in relation to the legal regulation of punishment as a legal consequence of a criminal offence, it is true that it is not sufficient to comply with the nulla poena sine lege requirement, but it is essential that the types of punishments, the conditions for their imposition, be regulated by law, and the conditions of their enforcement fully respect, in particular, the fundamental human right not to be subjected to torture or to inhuman or degrading treatment

or punishment, as well as the right to have a punishment proportionate to the offence for which it is imposed."

Neither did the Constitutional Court prove to be deferent when reviewing provisions of the Criminal Code criminalising certain types of hate speech (case no. **PL. ÚS 5/2017**). The applicants here contested the fact that criminal-law provisions introduced in a 2016 anti-extremist amending law criminalised not only hate speech directed against people of a different race, ethnicity, nationality and religion, but also against "another group of persons". They argued that this last phrase was too vague and violated the *nullum crimen sine lege* principle and freedom of expression. The applicants further contested the introduction of "political opinions" among the categories protected against hate speech in two of the contested provisions, claiming a violation of the freedom of expression.

The Court agreed and struck down the contested provisions. In order to satisfy the *nullum crimen sine lege* principle, it is insufficient that the definitions of crimes be included in a law passed by the parliament, as the principle also implies certain standards with regard to the quality of the legal definitions. With regard to the "another group of persons", the applicants objected that it was overly vague and that a fifth characteristic could not be induced from the four preceding ones (race, ethnicity, nationality and religion).

The Court first stated that the "another group of persons" formulation could theoretically be constitutionally acceptable, provided that courts and other state authorities active in criminal proceedings could be expected to interpret it in conformity with the Constitution. However, given the present state of affairs with regard to the interpretation methods used by those bodies, the Court concluded that, for the time being, the contested formulation could not be maintained. The Court argued that it could not disregard the way the law is interpreted in practice, stating that prosecution authorities needed clear rules regarding these types of crimes. In addition, it is the duty of the legislative and executive branches to monitor pressing social issues. They should take responsibility for regulating explicitly the characteristics of protected groups and for making sure that the definitions of different types of hate speech crimes are consistent with one another, as well as with the protection guaranteed by and definitions contained in the Minor Offences Act. If one of the legislator's main intentions in criminalising these types of conduct is to condemn hatred against different groups of people, then these groups are certainly worthy of being explicitly mentioned in the definition of the crimes in question. Furthermore, comparative law shows that hate speech crime definitions tend to contain the disturbance of public order and violence as constitutive elements. Since these elements are absent from Sections 421.1 and 422.1, the contested clauses must be interpreted all the more restrictively.

Freedom of speech cannot be restricted so vaguely, the definitions of the corresponding crimes cannot be so open, the government must have proper constitutional justification for restricting free speech, and citizens' duties must be clearly defined. It follows, therefore, that the contested clauses of Sections 421.1 and 422.1 violate the constitutional requirement of legality (the nullum crimen sine lege principle), freedom of speech and the rule of law.

With regard to the "political opinions" criterion, the Court stressed that an individual's political opinions are normally protected from persecution by the government or entities affiliated with it. The Court warned that it could be precisely the government or its affiliated entities which

might be tempted to use these Criminal Code provisions against the opposition, especially since there appear to be still tendencies that encourage and exploit social conflicts.

Furthermore, the provisions in question do not require the disturbance of public order as a constitutive element and Section 424.1 does not even contain any element of violence in its definition. Therefore, even non-violent and non-disturbing political debate could face the risk of criminalisation. The contested formulations could thus discourage political discussion.

The Court finally added that the entire 2016 amendment was incoherent and it was difficult to find a unifying purpose in it. For these reasons, it was concluded that the contested provisions failed to meet the legality requirement.

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?**

The Court's most recent judgment in this area is from March 2023 (**PL. ÚS 15/2020**) and the decision shows no signs of deference. The Court invalidated three provisions of the Asylum Act, of which only two were actually challenged by the Supreme Court, the third was invalidated *ultra petitum*, as the Court saw a connection to the other two and all three violated the same reference norms. Under the challenged provisions, applications for (the award or prolongation of) supplementary protection had to be rejected if the secret services informed the Interior Ministry (competent to decide on the application) that the applicant posed threat to national security. The reasons for conclusion were kept secret from the applicant and from the competent employee of the Ministry handling the application. The Court conducted the classic proportionality test and the challenged provisions failed the necessity test:

"A less invasive alternative to the complete non-disclosure of the reasons for which the Slovak Information Service or the Military Intelligence Service issued the negative opinion in question could be the possibility to get informed about the reasons to the extent strictly necessary. This possibility should include both the applicant concerned and the ministry which decides on the granting of subsidiary protection in the asylum procedure. This would enable the applicant, knowing at least the key reasons why the Slovak Information Service or the Military Intelligence Service disagreed with the granting of subsidiary protection, to assess whether it is useful for him or her to apply to the administrative court under Section 21(2) of the Asylum Act at all. The fundamental right to judicial protection in the administrative justice system presupposes not only formal access to judicial protection for the person being examined, but also such access as will constitute an effective means of attempting to protect the individual interests of such a person. That effectiveness depends on a number of factors, but above all on the right of the person concerned to defend his or her interests in the best possible conditions, which, in the context of the law under consideration, means that the person concerned is able to require the competent authority to communicate at least the main reasons for its decision and thus to assess, with knowledge of the matter, whether it is useful for him or her to bring an appropriate action before the courts. The competent court can ensure effective protection of the rights and legally protected interests of the person concerned only if the lawfulness of the grounds of the contested decision is the subject of its review. Only in this way can arbitrariness or other constitutionally unacceptable practice in the pursuit of the purpose of the law on the

protection of classified information in relation to the person subject to review be ruled out from the point of view of the person concerned. …

In order to preserve the constitutionality of Section 19a(10), the relevant facts should also be disclosed to the applicant to the extent necessary through the opinion of the Slovak Information Service or the Military Intelligence Service, i.e. at least the substance of the reasons relating to public security which form the basis of the decisions under the contested legislation, in a manner which takes into account the necessary confidentiality of the intelligence and operational information (cf. PL. ÚS 8/2016, paragraph 112). Thus, the opinion of the Slovak Information Service and the Military Intelligence Service could no longer contain only a mere agreement or disagreement with the granting of subsidiary protection. This would ensure that the applicant would have the opportunity to comment on the evidence carried out which led to the negative opinion of the intelligence services concerning the threat to the security of the Slovak Republic. Such a measure would ensure the protection of some classified information and at the same time would fulfil the necessary framework for the exercise of the rights guaranteed by the Constitution. It would enable the persons concerned to defend their interests under substantially better conditions than the contested legislation allows.

Of course, in the outlined procedure of getting informed about the facts necessary for the guarantee of the constitutional Article 46(1) and (2), it cannot be completely excluded that in certain circumstances the level of security of the Slovak Republic will actually be threatened or at least reduced. However, the restriction of a fundamental right cannot pursue the maximisation of one constitutional value at the total expense of another relevant constitutional value. In other words, a statutory restriction cannot deprive a constitutional right of its essential meaning, as expressed in the first sentence of Article 13(4) of the Constitution."

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?

This particular question has not been explicitly addressed in the Court's case law. It merits repeating, however, that the Constitutional Court has been established by the framers precisely with the mission of reviewing the constitutionality (and conventionality) of legislation and other regulations and invalidating laws (provisions) found to be unconstitutional.

If the question is to be read as aiming at constitutionality review of legislative inaction, this is a controversial topic and the Court has not gone this far yet. This is partly due to how the effects of the Court's decisions are regulated in the Constitution (as per Article 125 par. 3, the challenged provision loses effect following the official publication of the Court's judgment declaring its unconstitutionality). There is, however, a case pending where the petitioners ask the Court to declare the unconstitutionality of legislative inaction in the area of same-sex couples' rights, namely the non-existence of registered partnerships.

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?

The Court respects the Parliament's greater margin of appreciation in the latter's internal matters, such as its rules of procedure and legislative procedure (see in that regard the landmark case no. **PL. ÚS 13/2022**), as well as with regard to interferences with socio-economic rights (see Q21 for why this is the case) and some other matters (see Q3). When it comes to (other) human rights violations, however, there is no greater deference with regard to the Parliament and the challenged law (measure) must satisfy all the steps in the proportionality test.

In Slovakia it is the Government that is constitutionally authorised to declare a state of emergency in the case of natural disasters and other similar events, this then allowing it to restrict human rights, which would otherwise only be possible by a law passed by the Parliament. Between September 2020 and spring 2021 the Government declared and prolonged the state of emergency several times and two such resolutions were challenged before the Court. In both cases (**PL. ÚS 22/2020**, **PL. ÚS 2/2021**) the Court proved to be rather deferential towards the Government, but this was most likely caused by the exceptional and unforeseen situation which was the Covid-19 pandemic.

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

Parliamentary consideration has no relevance for the judicial assessment of human rights compatibility (see also Q13).

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?

Yes, a verification of this kind is certainly involved in human rights cases in examining the challenged provision (legal act) as part of the legitimate aim test. The Court verifies whether the decision-maker has justified the decision by a legitimate aim. This, however, is not a question of deference. In other words, the Court will not defer to the decision-maker if the challenged measure pursues a legitimate aim, the existence of a legitimate aim is merely a first pre-condition for the measure to be constitutional (see Q20).

However, the Court does not verify whether it would itself have reached the same decision as the Court does not require the decision to be the best possible one, it only verifies that the decision stays within the limits of the Constitution.

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 does not defer in such cases (see Q13).

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 unless the Court is asked to invalidate a law due to violations of the legislative procedure rules (see in this regard the recent landmark case PL. ÚS 13/2022, where the Court invalidated a law on procedural grounds for the first time in history). But that is a different matter.

The Court traditionally examines the explanatory memorandum or even the parliamentary debate only in order to the extract the legitimate aim pursued, but then carries on with subsequent steps of the proportionality test. It is thus not a question of deterrence, but rather the Parliament must first meet the condition of pursuing a legitimate aim and if it does not, the challenged piece of legislation must be declared unconstitutional (see Q20).

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?

No, see the answers to the questions above (mainly Q13).

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?

No, the Court does not give weight to how governmental authorities define human/constitutional rights. In fact, the Constitutional Court is the final arbiter of what the constitutional meaning of individual human rights guaranteed therein is. This is also showcased by the fact that Article 128 of the Constitution entrusts the Court with giving binding interpretation of the Constitution and other constitutional laws. In other words, there is a specific type of proceedings on deciding what the constitutional provisions, including those on human rights, actually mean and the Court is the final and supreme arbiter.

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?

Our Constitution gives the legislator a greater margin of appreciation when restricting second- and third-generation rights. See Q21.

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 Constitutional Court has so far not developed any scale of clarity in its case law or precise criteria of assessing the clarity of challenged legislation.

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

The Court seems to be growing stricter at least in some cases. In case no. **PL. ÚS 14/2018** the challenged legislation restricted access to the mineral oil market for the purposes of preventing tax evasion and protecting the environment. While this was accepted by the Court as legitimate in general, the Court required a more specific attestation:

"61. In general, the public interest as defined by the defendant and the intervener (prevention of tax evasion and protection of the environment) can be accepted as relevant to justify the restriction of a fundamental right and freedom. Restrictions imposed by the legislator on the parameters of volume and asset security for commercial activities could be considered compatible with the principle of proportionality only if they could be justified by a legitimate aim protecting a specific public interest. However, no specific reasons of this nature were given in the course of the proceedings by the National Council or the Ministry of Justice in this respect, nor do they emerge from the relevant documents relating to the legislative process (the explanatory memorandum and the transcript of the debate of the 21st session of the National Council in connection with the discussion and approval of the contested law on 10 and 11 October 2017). The record of the debate of the National Council in connection with the discussion and approval of the contested law shows that even the then Minister of Finance of the Slovak Republic could not convincingly defend this legislation.

…

64. The Constitutional Court reiterates that in order to prove whether a legitimate aim is real or merely pretended, it is not sufficient, taking into account the circumstances of the particular case, to merely assert the existence of a legitimate aim, but it is also necessary to prove it in a proper manner in the abstract constitutional review to such an extent that no reasonable doubts arise as to its existence in concreto. The result of that attestation must provide the Constitutional Court with a sufficient guarantee for a finding that the legitimate aim appears to be extremely (highly) probable in the light of all the circumstances, and not as merely pretended (fictitious).

65. The degree of proof of a legitimate aim may vary from case to case and, taking into account the nature of the case, it is not always sufficient to merely state a legitimate aim and explain it verbally by means of abstract constitutional argumentation. Sometimes the nature and background of the case requires corroboration on the basis of facts and supporting evidence. This is particularly so in situations where legislation is introduced based on purely factual arguments and reasons arising from certain empirical knowledge, which cannot be regarded as generally known or known to the Constitutional Court from its own decision-making. In addition, it should be noted that it is not excluded that in some cases, depending on the nature of the case, a legitimate aim may be identified a priori and ex cathedra, i.e. without the need for a more in-depth assessment on the basis of empirical evidence supporting its actual existence.

66. Although the legislation does not explicitly provide how the Constitutional Court is to ascertain the factual basis justifying the legitimate aim, it follows from the logic of the case that a purely textualist argument of the legislator or the party to the proceedings will not suffice in all circumstances. Otherwise, any legislative change would be defensible simply on the basis of an assertion that might not actually be true in practice. Such an approach would lead to the unacceptable conclusion that the legitimate aim would be present whenever the legislator or a party to the proceedings before the Constitutional Court says so, thereby rendering the first step of the proportionality test meaningless."

A similar approach has been used in another recent judgment from late 2021 (**PL. ÚS 25/2019**). A group of MPs challenged the provisions of a law regulating the use of electronic cash register. The basis of the challenge was the claim that the law required entrepreneurs to collect and send to the central register of the financial administration a substantial amount of data relating to both entrepreneurs themselves and buyers. The gathering of certain types of data was found not be covered by any legitimate aim, because the Court required a precise explanation of the purpose for data collection.

"Even after months, the legislator and the Financial Administration could not adequately articulate the reason for collecting this data. The only thing they communicated to the Constitutional Court are abstract plans that have not yet been implemented or even finalized. In relation to buyers who are entrepreneurs, the statements emphasize the future client zone. According to their statements, if the VAT number were to be used as data in the future, every entrepreneur could have certain advantages when proving their expenses in the tax system. However, currently the data is not limited to the entrepreneur's VAT number, it is not mandatory or clearly favoured, and such a client zone does not exist.

The lack of a specific legitimate purpose is even more apparent with non-entrepreneurial buyers. Even here, the Financial Administration could not sufficiently articulate any specific purpose in the context of data collection that would justify this collection. One of the documents, which internally presents e-cash register, briefly mentions block lottery or complaints procedure as ways of using data. However, the lottery is implemented differently today, as the verification of cash blocks requires the initiative of the customer. It is therefore obvious that any data on the purchasing non-entrepreneur are introduced in the system completely unnecessarily.

Currently, there is no specific legitimate purpose for which the state would collect a unique buyer identifier in the context of e-cash register. The only thing that the Constitutional Court noticed in the statements are the already mentioned plans for the future. In its previous jurisprudence, the Constitutional Court has already clearly said that it is not possible for the state to justify data collection only with future plans (PL. ÚS 13/2020, also BVerfG, file no. 1 BvR 1550/03, point 97).

However, legislation can also be uncertain in the formulation of its specific legitimate purpose. Legislation can be specific about what is to be collected and how, but it can also obscure the reasons for doing so. This is precisely the case with the buyer's unique identifier, because such a provision does not pursue a specific aim. The specific purpose for which the data in question is collected must be clear already from the legislative process. Without a clear plan in the

legislative process for what the data is to be used for, it is not possible to talk about a specific legitimate purpose of their processing. The legislator can already do so today in its explanatory report or directly in the normative text. If the Constitutional Court were to accept such "vague" provisions in the legal order, any collection and use of data could be easily justified if there is at least some conceivable future goal that can be completed ex post at will. If the state needs specific data from its citizens, it must first of all be able to explain for what specific purpose it needs it. It is not enough to state that he may need them one day."

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

The Court applies two different tests depending on the human right referred to. It generally tends to apply the classic (or full) proportionality test to the classic liberal rights and a less strict test to socio-economic rights. Art. 51 of the Constitution stipulates that the latter category of rights may only be invoked within the limits of the legislation implementing them, whereas no such restriction applies to the classic liberal rights.

While the Court first outlined the proportionality test's components in 2001 (PL. ÚS 3/00), it was only truly defined and used in the 2011 case concerning health insurance companies' profit (**PL. ÚS 3/09**):

"The proportionality test is classically based on three successive steps (stages). The first step is the assessment of the contested regulation from the point of view of suitability (Geeignetheit) or the existence of a sufficiently important objective (test of legitimate aim/effect) and the rational link between the relevant (contested) legal norm and the objective (purpose) of the regulation. The second step is the assessment of the contested legislation by applying the criteria of necessity, indispensability or the use of the least drastic or least restrictive means (Erforderlichkeit, test of necessity, test of subsidiarity, sufficiently important objective). Finally, the third step is the proportionality test in the strict sense (Angemessenheit, test of proportionality in the strict sense, proportionate effect), i.e. in particular from the point of view of its proportionality in relation to the intended objective (m. m. PL. ÚS 23/06)."

In case no. **PL. ÚS 10/2013** concerning compulsory childhood vaccination, the Constitutional Court even used Robert Alexy's Weight Formula in the last step of the proportionality test and concluded that it was evident that both of the colliding values (public health protection v. privacy) could not be satisfied concurrently, and for that reason the Constitutional Court had to employ the Weight Formula in order to decide which value should be satisfied. The Court concluded that the intensity of interference with the right to respect for private life was moderate or serious (vaccination could have detrimental side effects, but it would not be applied in cases of contraindications and there were legal instruments to seek damages if any side effects happened to occur), whereas the satisfaction of the principle of protection of public health had a serious weight' (if compulsory vaccination were to be abolished, there would be no other means to control infectious diseases). It followed that the principle of protection of public health must be preferred to the principle of protection of the right to respect private life.

The Court uses a modified, less strict version of the proportionality test when examining claimed violations of socio-economic rights. This was recently summarised in case no.

PL. ÚS 14/2018, where legislative measures limiting access to mineral oil market were found to be unconstitutional for failing the legitimate aim test.

The Court then went on to describe this modified proportionality test, which it also refers to as reasonableness test (inspired by the methodology of the Constitutional Court of the Czech Republic):

"40. The proportionality test carried out in the context of the constitutional review of the contested legislation is based on three successive steps. The first step involves, first, a test of a sufficiently important objective not excluded by the Constitution, and the test of a rational connection between the impugned legislation and the and the objective (purpose) pursued by the challenged regulation, i.e. the test of suitability. The second step is establishing the criterion of necessity or the use of the least drastic or least restrictive measures, i.e. the least drastic means of achieving the objective pursued by the contested legislation. Finally, the third step is the criterion of proportionality in the narrower sense of the term, the content of which consists of a comparison of the degree of interference with constitutionally protected values caused by the application of the contested legislation (e.g. PL. ÚS 11/2013, PL. ÚS 3/09, m. m. PL. ÚS 19/09, m. m. PL. ÚS 23/06).

41. The proportionality test outlined above is a test designed for the first generation of human rights (civil and political rights). For the examination of the second generation of human rights (economic, social and cultural rights), which also includes the fundamental right to conduct a business under Article 35(1) of the Constitution, a modified proportionality test is applied (PL. ÚS 12/2014, PL. ÚS 14/2014, PL. ÚS 16/2018). It is excluded that the methodology of the inquiry into economic, social and cultural rights should be identical to the methodology of the inquiry used in relation to civil and political rights. The proportionality test is, based on the nature of economic, social and cultural rights, too 'strict', as it significantly restricts the legislator in adopting legislation aimed at regulating this area of social relations (PL. ÚS 14/2014, PL. ÚS 16/2018, similarly Constitutional Court of the Czech Republic in case No. Pl. ÚS 1/08).

42. The Constitutional Court has already stated in its previous decisions that economic, social and cultural rights are second-generation rights, the form and content of which depend to a significant extent on economic possibilities of the state (PL. ÚS 19/08, PL. ÚS 8/2014, PL. ÚS 16/2018). Economic, social and cultural rights may be invoked only within the limits of the laws which implement them (Article 51(1) of the Constitution), i.e. only to the extent deducible from the cited constitutional reservation, through which the Constitution undoubtedly grants the legislator greater leeway (in comparison to other groups of fundamental rights and freedoms) for the purpose of determining the extent, quality and conditions under which they are guaranteed. This opens up a wide margin for the legislator to choose a wide variety of solutions. However, the Constitutional Court has already opined that the margin of discretion granted by the Constitution to the legislator in the adoption of these laws cannot be understood as absolute; its limits must be sought above all in constitutional principles and in the requirement to protect other values on which the Constitution is based and which it protects. These fundamental rights, by their very nature, while they call for regulation by the State (which will fulfil their content), the State must not interfere with the very essence of these rights or affect other rights enshrined in the Constitution and international treaties on human rights

and fundamental freedoms by which the Slovak Republic is bound (PL. ÚS 11/2013, PL. ÚS 8/2014).

43. Legislation restricting economic, social and cultural rights need not be strictly proportionate to the aim pursued, i.e. it does not have to be necessary in a democratic society, as is the case with legislation restricting civil and political rights. In the case of economic, social and cultural rights, such legislation will pass the test of proportionality, if it can be found to pursue a legitimate aim and does so in a way that can be conceived of as a reasonable means of achieving it, even though it may not be the best, most appropriate, most effective or wisest measure. The requirement of reasonableness (proportionality) in restricting economic, social and cultural rights does not impose on the legislator demands comparable to those imposed in restricting civil and political rights. For the legislator, it brings an increase in the margin of discretion in the legal regulation of the mechanisms by which it grants economic, social and cultural rights a specific content (PL. ÚS 1/2012, PL. ÚS 14/2014, PL. ÚS 16/2018).

...

56. The proportionality test, as well as its modified version (the reasonableness test), must first of all address the question whether the contested legal norm respects the essence of the fundamental right and pursues a legitimate aim. The content of the first step (stage) of the proportionality test is, first of all, the assessment of the legal norm in question in terms of the existence of a legitimate aim, since a restriction of a fundamental right which is arbitrary is constitutionally impermissible. The legal norm must be directed towards the fulfilment of a purpose which is sufficiently important to justify (justify) the restriction of a fundamental right or freedom."

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

If the case at hand concerns one of the first-generation rights, generally speaking, yes. That notwithstanding the fact that the Court has been accused by some constitutional scholars of inconsistencies in the application of the proportionality test, such as sometimes conflating two steps into one.[1]

If the case at hand concerns one of the socio-economic rights, the Court applies a modified, less strict test (see Q21).

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?

No such cases are known.

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

[1] TOMÁŠ ĽALÍK: Test proporcionality a ústavný súd: vzostupy a pády, in: Justičná revue, 74, 2022, č. 12, p. 1400 – 1424.

There does not seem to be any connection between the two. While the Court does mention in numerous decisions that it should be practising self-restraint, one can hardly speak of a "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?

In general, the Constitutional Court has been greatly influenced by the case law of the European Court of Human Rights. The Court has been reiterating for decades that the Constitution should also be interpreted through the prism of human rights treaties (PL. ÚS 5/93, PL. ÚS 15/98, PL. ÚS 17/00, PL. ÚS 10/2014, PL. ÚS 24/2014), where the Strasbourg case law is of utmost relevance. The constitutional provisions on fundamental rights are commonly interpreted with reference to the ECHR case law (II. ÚS 55/98, PL. ÚS 10/2010, PL. ÚS 24/2014).

Sometimes, however, the Court does not hesitate to grant a higher standard of rights under the Constitution than is required by the ECHR. This is because the ECHR constitutes merely a minimal standard and the Contracting States are free to provide their citizens with more rights. A good example is the judgment on the penalty aggravation mechanism (see Q8):

"In relation to the question of the jurisprudence of the Strasbourg rights protection authorities regarding (not only) criminal sanctions and the adequacy of punishments, it is necessary to emphasize here that the convention and subsequently the jurisprudence of the Strasbourg rights protection authorities do not establish the maximum possible guarantees of human rights protection, but only a minimum standard protection of human rights. The Constitutional Court is thus bound by the jurisprudence of the Strasbourg rights protection bodies only in the sense that the protection of human rights provided by it must meet this minimum standard. The jurisprudence of the Strasbourg rights protection bodies cannot therefore be an obstacle to the constitutional court providing the protection of human rights with higher guarantees than those resulting from the jurisprudence of the Strasbourg rights protection bodies."

So while the Strasbourg Court has so far never found violation of the ECHR due to grossly disproportionate punishments and continues to give the States the so-called greater margin of appreciation in this area, this Court – while accepting the greater margin of appreciation in criminal policy cases as stated in the ECtHR case law – did find a constitutional violation on the same grounds, thus granting a higher level of protection than currently exists under the ECHR.

Fully answering the question regarding how often this Court's and the Strasbourg Court's approaches differ or overlap would amount to a proper dissertation thesis requiring profound and prolonged scientific study, which places it outside of the scope of the present questionnaire. See Q26 for an example of one such difference.

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, in **Urbárska obec Trenčianske Biskupice v. Slovakia**,[2] the ECtHR found violation of Art. 1 par. 1 of the Additional Protocol, where the Constitutional Court had adopted a rather deferential approach in reviewing a law regulating land ownership in the context of consolidation of ownership and use of agricultural land after Slovakia's transition to a democratic society and market-oriented economy. The background situation is well summarised in the Strasbourg judgment:

"Under the communist regime in Czechoslovakia owners of land were in most cases obliged to put their land at the disposal of State-owned or cooperative farms. They formally remained owners of the land but in practice had no possibility of availing themselves of the property.

Some of the land in question was, for various reasons, not cultivated by the farms. It was the State policy to promote the use of such land for gardening. For that purpose allotment gardens (záhradkové osady) were established, mainly in the vicinity of urban agglomerations. Individual plots of land were put at the disposal of persons belonging to the Slovakian Union of Allotment and Leisure Gardeners (Slovenský zväz záhradkárov), who were allowed to cultivate the land as a pastime activity for their individual needs.

In the context of Czechoslovakia's transition to a market-oriented economy following the fall of the communist regime, Parliament adopted the Land Ownership Act 1991, the purpose of which was to mitigate certain wrongs and to improve the care of agricultural and forest land.

Under the Land Ownership Act 1991 the plots of land on which allotment gardens had been established were not to be restored in natura to the original owner where ownership of the land had passed from the original owners to the State or a legal person. In such cases the original owners were entitled to compensation in kind or in pecuniary form. In this category of cases the legislator gave precedence to legal certainty for the existing users of the property, as the use of land for gardening was considered to be of greater public interest than restoring the land in natura to its original owners.

In the second category of cases, where the original owners maintained their ownership rights, albeit in name only (nuda proprietas), the Land Ownership Act 1991 established conditions enabling the owners to enjoy their property rights to a greater extent. In particular, it provided for the land to be let to the existing users, with a notice period expiring on the date when the temporary right to use the land came to an end. The tenants were, however, entitled to have the lease extended by ten years unless an agreement to the contrary was reached between the parties. The landowners were also entitled to request, within three years of the coming into effect of the 1991 Act, the exchange of their property for a different plot of land owned by the State.

The above approach, permitting the owners to recover full possession of their land after the expiry of the ten years for which the tenants had the right to have the lease extended, was modified with the adoption of Act 64/1997. As a result, owners have only a limited possibility of terminating the lease, mainly on the grounds of the tenants' failure to comply with their obligations. The position of the tenants has been strengthened in that they are entitled to

[2] CASE OF URBÁRSKA OBEC TRENČIANSKE BISKUPICE v. SLOVAKIA, Application no. 74258/01, Judgment of 27 November 2007.

acquire ownership of the land they use for gardening. As to the owners, Act 64/1997 gives them the right to obtain either a different plot of land or pecuniary compensation.

In introducing Act 64/1997 the legislator abandoned the philosophy of giving general priority to the rights of the owners of plots of land on allotment sites and took the position that it was in the general interest that the rights of persons who had been using the land for gardening should prevail."

Thirty-five members of Parliament and the Prosecutor General brought proceedings before the Constitutional Court claiming that several provisions of Act 64/1997 were contrary to the Constitution and Article 1 of Protocol No. 1. In particular, the members of Parliament relied on the ECtHR's case-law, arguing that there existed no genuine public interest in the interference with the landowners' rights and that the compensation which the landowners were to receive under the relevant provisions of Act 64/1997 was not appropriate.

On 30 May 2001 the Constitutional Court concluded (PL. ÚS 17/00) that section 17(3) of Act 64/1997 was contrary to, inter alia, the constitutional protection of ownership rights. It dismissed the remainder of the submissions.

The Constitutional Court noted that the regulation of relations in respect of land used for gardening in allotments mainly concerned, as in the case of restitution laws, the undoing or mitigation of the wrongs which had occurred in the past when the principle of the rule of law had not been respected. The legislator had a certain margin of appreciation when deciding on the relevant issues, provided the constitutional guarantees were upheld.

With regard to the compulsory letting of the land to the gardeners under section 3 of Act 64/1997, it was merely a temporary measure pending the transfer of its ownership to the gardeners in accordance with the provision of that Act. It pursued the aim of providing the users with legal certainty and of ensuring optimal use of the land in question with due regard to the requirements of the landscape and the environment. It was as such in the public interest. The measure was limited in duration and it was not disproportionate as it filled the gap which arose following the quashing of section 22(3) of the Land Ownership Act 1991. Parliament, by obliging the owners to let the land to the gardeners, had not overstepped its margin of appreciation and had struck a fair balance between the general interest and the protection of individuals' rights. Section 3 was therefore not contrary to Article 1 of Protocol No. 1 to the Convention or its constitutional equivalent.

As to the argument that the rent payable under section 4 of Act 64/1997 was disproportionately low, the Constitutional Court held that Article 1 of Protocol No. 1 imposed on the Contracting Parties to the Convention no specific obligations as regards compensation for the use of property in the general interest. There was no appearance that the relevant provision was unconstitutional.

The plaintiffs also argued that the transfer of ownership of the land to the gardeners under sections 7 et seq. of Act 64/1997 was not in the general interest as it restricted the rights of the owners to the benefit of a different group of individuals without any relevant justification.

In the Constitutional Court's view, that transfer of ownership was to be seen in the broader context of land consolidation, the purpose of which was set out in section 19 of the Land Ownership Act 1991 and in section 2(a) of the Land Consolidation Act 1991. Consolidation pursued the aim of setting up integrated land entities in accordance with the needs of individual owners, with their consent, and with due regard to general requirements as regards the creation of the landscape, the environment and investment development. Land consolidation was also justified with a view to adjusting the existing relations between owners and users and eliminating any obstacles which had arisen as a result of past developments. Sections 7 et seq. of Act 64/1997 in no way affected the above general interest in land consolidation.

The plaintiffs further alleged that the compensation for land under section 11 of Act 64/1997 was inappropriate as it was substantially lower than the market value of the land.

The Constitutional Court noted that the owners had the choice between alternative plots of land and financial compensation. The gardeners could not be held liable and they should not be penalised for the fact that the owners had been deprived of the possibility of enjoying their property under a regime which had disregarded democratic principles. Furthermore, the users, by cultivating the land, had substantially increased its value. The Constitutional Court therefore accepted as just the relevant provisions under which compensation to the owners should be based on the value of the property at the time when the gardeners had started using it. The compensation under Act 64/1997 was therefore appropriate and compatible with the requirements of Article 1 of Protocol No. 1.

Finally, the Constitutional Court found that section 17(3) of Act 64/1997 was unconstitutional as there was no justifiable public interest in transferring ownership of land to the State in cases where the user had failed to pay the amount due.

In a separate opinion three judges stated that the compulsory letting under section 3 of Act 64/1997 was unconstitutional and that the compensation payable under section 11 was not appropriate as it was based on the value of the property at the time when the gardeners had acquired the right to use the land.

The dissenting judges expressed the view that the parties to proceedings under Act 64/1997 were in an unequal position. In particular, the applicable law did not permit the administrative authorities or courts called upon to review their decisions to balance the interests of the persons involved, assess whether the transfer of ownership was justified in the particular circumstances of the case or examine the question whether the compensation provided to the owner was appropriate.

In the particular case under consideration before the European Court of Human Rights, the ownership of the land of the applicant association was transferred to the tenants and the applicant association was given an alternative plot of land of a much lesser development potential and of a fraction of market value, in addition to first being compulsorily let to the tenants for a decade for a rent which was, again, grossly disproportionate. The Strasbourg Court, given this gross disproportionality to the aim pursued, held that there had been violation of Article 1 of Protocol no. 1.

IV. OTHER PECULIARITIES

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

Human rights violation claims are most often found in constitutional complaint cases, which comprise about 90 % of the total caseload. In Slovakia, a constitutional complaint may only be filed against individual decisions or inaction or measures in individual cases, not against legislation. This means that the Constitutional Court mainly reviews decisions of other courts, occasionally those of prosecutors and administrative authorities, but for the time being at least, the Court may not review the legal rules on which those decisions are based in the first place. This is unlike in many other countries.

28. Has your Court grown more deferential over time?

There is no discernible trend of the Court becoming either less or more deferential.

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

There are no indications that this would be the case.

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?

Under § 45 of the Law on the Constitutional Court, the Court is bound by the reasons and purview of the motion for commencement of proceedings.

However, the Court provided a different interpretation in some cases in the past. In an abstract legislation review case no. PL. ÚS 14/2014, the Court stated the following:

"What has been stated in paragraph 50 above is related to the question of the extent to which the Constitutional Court is bound by the petition in the procedure for abstract review of norms. In this context, it is necessary to distinguish between being bound by the prayer for relief, which the Constitutional Court has repeatedly confirmed in its decision-making (e.g. by the opinion that the Constitutional Court could not consider reference norms other than those identified in the prayer for relief, being bound by the prayer for relief), and being bound by the reasoning or argumentation, by which the Constitutional Court does not feel itself bound. Therefore, with regard to the argumentation of the petition (its scope and content), it should be confirmed that the Constitutional Court may also take into account arguments other than those put forward by the petitioners in the proceedings for abstract review of the norms."

On the other hand, in constitutional complaint proceedings, the Court did not find itself bound by the referred human rights (I. ÚS 41/2015):

"The Constitutional Court as the supreme authority for the protection of constitutionality is bound in its decision not only by the petition (complaint) but also by its factual grounds in the sense of the "iura novit curia" principle, so it can be said that it is authorised to also examine violations of other fundamental rights and freedoms guaranteed by the Constitution than those referred to by the complainant in her complaint."

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, § 89 of the Law on the Constitutional Court expressly allows that.