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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

In order to try and narrow the notion of "judicial deference" it seems appropriate to start with the definition of "deference" by the Merriam Webster dictionary. According to it, we mean by deference the "affected or ingratiating regard for another's wishes", or the "respect and esteem due a superior or an elder". In what is now strictly relevant, both meanings emphasise the existence of a relationship of otherness informed by respect for the position or way of acting of another.

(A) Deference and assessment of evidence

Assuming, for merely explanatory purposes, the traditional consideration of the judgment – a typical, and in any event final decision that takes place after a trial – as a syllogism, it is important to distinguish the deference in the fixing of the facts from that regarding the determination of the law applicable to the case.

The legal system confers on judges the task of deciding on the facts at issue, for which they are granted a variable freedom of assessment of the evidence taken[1]. Thus, for the trial, the sentencing court is granted an apparently wide margin of assessment, since it is for it to "apprais[e] the evidence given during the trial in good conscience" (Art. 741 of the Criminal Procedure Act - CPA). The rules contained in the Law on Civil Procedure (LCP) are more precise. They are supplementary to all other judicial proceedings in the Spanish legal system, by express provision of Article 4 LCP.

a) In respect of the questioning of the procedural parties, statements that do not contradict other evidence and harm the reporting party are assumed to be certain; as for the rest, they are valued "according to the rules of sound criticism" (Art. 316 LCP)
b) Concerning documentary evidence, the LCP itself gives probative value to public documents, including foreign documents (Arts. 319 and 323 LCP), as well as to authenticated private documents, in particular e-documents (Art. 326 LCP).
c) Article 348 LEC states that "the Court shall evaluate expert opinions in accordance with the rules of sound criticism".
d) The same expression is used for the assessment of witness testimonies (Art. 376 LCP). In this case, however, the wide judicial discretion is tempered by the fact that the rules of sound criticism must be applied 'taking into account the reason they have given, the circumstances involved and, as appropriate, the objections formulated and the results of the evidence examined on these.

As can be seen, the Spanish procedural legislation ackowledges a broad discretion regarding the value of evidence other than that strictly documentary. Both in the case of strictly personal evidence (testimonies by parties and witnesses), as well as in the case of expert evidence, procedural law shows that the judge will assess them according to the "rules of sound criticism", although in the case of witnesses some nuances are introduced, as has been mentioned above.

Submitting expert evidence to the scrutiny of "critical health" affirms the judge's central position in setting facts and may help explain his or her role in assessing scientific evidence.

[1] In Spanish law, both the facts and certain sources of law may be the subject of evidence. "Facts that are related to the judicial protection intended to be obtained from the proceedings" shall be proved [Art. 281(1) LCP]. Exceptions to this rule include facts that "are absolutely of public and general knowledge" [Art. 281(4) LCP] and facts the parties fully agree with, except where the subject of the proceedings is outside the power of the litigants to decide, e.g. issues on marital status [Art. 281(3) LCP]. With regard to the sources of law, custom and foreign law shall be proved by the party who pleads them [Art. 281(2) LCP].

In relation to this, it is true, on the one hand, that the freedom of assessment is considerably tempered, but it is not less so that the distinguishing characteristic of 'the scientific side' is fallibility. Scientific evidence will hardly be conclusive for the fixing of the facts that matter in the process – uniquely, in criminal proceedings – but will provide keys to their proper fixation.

It is necessary to move away from the "mythification that many jurists have made of certain scientific evidence"[2], which comes almost to the point of making it – in particular, DNA testing – a legal test that does not admit rebuttal. Admittedly, if, in certain cases of expert opinion, the judge is in fact able to exercise his superordinate position of *peritus peritorum*, this does not seem feasible in the case of scientific or objective expertise. What is not to be translated, inexorably, into an absolute deference to the opinion of the expert who brings the scientific evidence.

- The "strong" deference, based on plausible epistemic reasons, would entail the risk of dispossessing the judge of the power to fix the facts relevant to the case, an essential task in the exercise of the jurisdictional power, as well as the possibility of the parties to challenge the expert's opinion. From the rigorous case-law analysis of the problems posed by scientific evidence, the combination of "non-deference and education" has been sustained, as premises "of a quality evidentiary decision, based on knowledge and not on pure trust in the expert"[3].
- One could also speak of a weak deference, which would avoid the risk of incurring a double deference. This would be the case if the expertise of the person who informs the judge becomes not only a right to intervene in the proceedings but also a reason for enjoying a reinforced presumption of success. A weak presumption relieves the judge of the burden of entering into discussions from within the scientific guidelines that inform the expert's contribution, but enables him to verify that the person who provides the scientific evidence indeed acts from the exercise of his or her professional expertise in the case. The general scientific capacity that enables the expert to intervene in the process (defined by their studies, professional experience, research activity) must be accompanied by the appropriate indications that that capacity has been

[2] In this regard, see Ana SÁNCHEZ RUBIO, *La prueba científica en la justicia penal*, Tirant lo Blanch, Valencia, 2019, p. 320, a rigorous monograph on this type of evidence.

[3] Marina GASCÓN ABELLÁN, "Conocimientos expertos y deferencia del juez (Apunte para la superación del problema", en *Doxa, Cuadernos de Filosofía del Derecho*, 39 (2016), p. 364.

used,[4]indications that may be subject to scrutiny by the parties, and whose proper assessment forms part of the "rules of sound criticism" that the judge must use when weighing the scientific evidence.

The possibility of reviewing the evidence of the facts under appeal depends on the legal configuration of the means of challenge.

- In the case of ordinary remedies – notably the appeal – their characteristic of being brought before a higher court and the absence of a cognitive limitation beyond that arising from the claims made by the parties and the causes of action, entails the logical possibility of reviewing the categorisation of the facts. Where the appeal is at issue, the limitations relate not to the possibility of reviewing the facts and their legal classification, but to the probatory means that may be used, in particular by requiring full respect for the principles of immediacy, contradiction and orality, from which the obligation to take evidence in the presence of the parties arises where evidence is not strictly documentary[5].
- When it comes to extraordinary remedies, the limitations are not based on a deferential attitude of respect for the assessment of facts made by the lower courts but on the definition that the procedural legislation makes of the means of challenge itself. The purpose of the extraordinary appeal par excellence, the cassation, is to unify the interpretation of the law and only marginally addresses strictly factual questions: in the

[4]In this regard, see T.R.S. ALLAN, "Human Rights and Judicial Review: A Critique of Due Deference", *Cambridge Law Journal*, vol. 65 (3) (2006), pp. 689 et seq., and Farrah AHMED and Adam PERRY, "Expertise, Deference, and Giving Reasons", *Oxford Student Legal Research Paper Series Paper* 09/2011 October 2011, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1941674.

[5] Constitutional case-law established since CCJ 167/2002, of 18 September (ECLI:ES:TC:2002:167), which reminds us that "where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, the European Court of Human Rights has understood that the appeal cannot be resolved without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence, so in such cases the "the appeal court's re-examination of the conviction at first instance ought to have comprised a full rehearing of the applicant and the complainant" (ECtHR judgments of 26 May 1988 – *Ekbatani v. Sweden*, § 32–; 29 October 1991 –*Helmers v. Sweden*, §§ 36, 37 and 39— 29 October 1991 –*Jan-Äke Andersson v. Sweden*, § 28— 29 October 1991 – *Fejde v. Sweden*, § 32). In this regard, the European Court of Human Rights has recently held in its judgment of 27 June 2000 –*Constantinescu v. Romania*, § 54 and 55, 58 and 59 – that "where an appellate court is called upon to examine a case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence, it cannot, as a matter of fair trial , properly determine those issues without a direct assessment of the evidence given in person by the accused – who claims that he has not committed the act alleged to constitute a criminal offence. In the instant case the Court notes that, having quashed the decision to acquit reached at first instance [...], the appellate court should have heard evidence from the applicant, having regard, in particular, to the fact that it was the first court to convict him in proceedings brought to determine a criminal charge against him." This case-law is reiterated in the Judgment of 25 June 2000 –*Tierce and Others v. San Marino*, § 94, 95 and 96 – in which it states that "it is clear that the mere absence of new facts is not sufficient to warrant departing from the principle that appeal hearings should be held in public in the presence of the accused; the most significant factor is the nature of the questions which the appellate court is to address" [Point of Law (PoL) 10, emphasis added].

appeal in cassation in civil matters, the evaluation of the evidence and the establishment of the facts can only make cassation possible when the problem that it raises constitutes "error of fact, patent and immediately verifiable from the proceedings themselves" [Art. 477(5) LCP] and, in criminal matters, for breach of form, when the deficiencies suffered by the disputed sentence materially affect the rights to effective judicial protection and the presumption of innocence [Arts. 851(1) and (2) CPA][6].

- In the case of an appeal for constitutional protection *(amparo appeal)* against judicial actions and judgments, Article 44(1)(b) of the Organic Law on the Constitutional Court (OLCC) is careful to establish that, regarding the facts that gave rise to the judicial proceedings in which the constitutional harm may have occurred, "in no case shall the Constitutional Court intervene". This is a legal limit to the Court's knowledge that is not applicable in any other case of *amparo* – regarding decisions, inactivity or a simple de facto procedure of the administration, or regarding acts without the force of law by parliaments – [Constitutional Court Judgment (CCJ) 2/1982, of 29 January, Point of Law (PoL 2, ECLI:ES:TC:1982:2)]. It is understood that "the prohibition on 'investigating' the facts concerns the technical and procedural meaning of this word, which refers to the attribution of jurisdiction. This is not a prohibition on investigating in the sense of researching or analysing the background, which may prove positive and even necessary to substantiate the judgment" (CCJ 46/1982 of 12 July, PoL 1; ECLI:ES:TC:1982:46).

Although these first rulings made the Constitutional Court a judicial body detached from the facts of the judicial proceedings in which the violation of the fundamental right is reported,

[6] Admittedly, the so-called extraordinary appeal for review mainly addresses the defects occurred in the establishment of the factual basis of the judgment. But it is also true that this means of challenge has a unique nature, which places the problems that may arise in the area of access to jurisdiction and not of access to the appeal (CCJ 69/2022, of 2 June, ECLI:ES:TC:2022:69, in whose Point of Law 3 we are reminded how "since CCJ 124/1984, of 18 December, PoL 6, this court has been stating that 'the appeal for review, seeking the annulment of a judgment which is final and consequently means a derogation from the preclusive principle of *res judicata*, a requirement of legal certainty, is by its very nature an extraordinary remedy, historically associated with the right of grace and subject to strict filing conditions. It cannot be denied that, as an extraordinary remedy, it deals with the same matters of Art. 24 of the Constitution. Its existence is essentially presented as an imperative of justice, configured by Art. 1(1) of the Constitution, together with freedom, equality and political pluralism, as one of the *higher values* advocated by the social and democratic State of Law in which Spain, by virtue thereof, is constituted. It is a requirement of justice, as understood by the constituent lawmakers, closely linked to human dignity and the presumption of innocence, since the factor by which it was neutralised in the judgment for which revision is requested is in turn annulled by subsequent data that restore it in its incolumity. It can be said that, given the assumptions required for its application, such an action, regardless of those already existing in the proceedings for the purpose of discovering the criminal truth and the achievement of the most appropriate judgment, is an inexcusable postulate of justice, since the circumstance that allows recourse to it implies a fact or means of proof that comes later on to show the error of the judgment. And the end of criminal proceedings, as a means of establishing the truth of the facts and their subsequent legal treatment, cannot lead to the preclusive effect of the conviction being prevailed'.").

there have been many other subsequent approximations that have placed the lack of investigation about the facts closer to the deference resulting from the institutional position and the constitutional functions that the ordinary judicial bodies carry out: "the appeal for *amparo* is not a new body reviewing the facts affirmed by the judicial bodies: with the exception of cases of unreasonable, arbitrary or unsupported factual descriptions in judicial proceedings, the assessment of the facts rests with the judges and courts in the exercise of their exclusive jurisdiction under Article 117(3) SC. Therefore, the jurisdiction of the Court is limited in this respect, being obliged to start from the facts as defined in the proceedings by means of the contested decisions" (CCJ 26/2018 of 5 March 2018 PoL 2; ECLI:ES:TC:2018:26). Strictly speaking, as those first decisions pointed out, Article 44(1)(b) OLCC does not prohibit the Court from becoming aware of the facts but to replace the judicial assessment with its own by reviewing the judgment of legality that the judges are responsible for and that the Constitutional Court is detached from. The possibility of "unreasonable factual descriptions" represents an alleged violation of the right to effective judicial protection and not a clause opening the constitutional court's jurisdiction to hear the facts.

(B) Deference and Determination of Law

From a very early date, the Spanish Constitutional Court had the opportunity to emphasise the role of the Constitution of 1978 as a meeting point away from all exclusivism. The Spanish Constitution of 29 December 1978 establishes a new legal system whose higher values are, as proclaimed in Art. 1(2) SC, "freedom, justice, equality and political pluralism". In line with this characterisation of the constitutional text not as a political program but as a framework of encounter and coexistence, the Court pointed out in judgment 11/1981, of 8 April (ECLI:ES:TC:1981:11):

> "[O]n one level it is necessary to situate political decisions and the political judgment that such decisions merit and on another different level lies the qualification of unconstitutionality, which should be made in the light of extremely rigorous legal criteria. The Constitution is a framework of coincidences sufficiently broad to provide room for political options of extremely different kinds. The work of interpreting the Constitution does not necessarily consist of closing the door on options or variants imposing one of them in an authoritarian manner. This conclusion should only be reached when the unanimous nature of the interpretation is imposed by the play of interpretive criteria. We wish to state that the political and government options are not

previously programmed once and for all, so that all that remains to be done in future is implement that previous programme (PoL 7)".

As a complement of this characterisation of the Constitution as "framework of coincidences sufficiently broad to provide room for political options of extremely different kinds", CCJ 194/1989 of 16 November 1989 (ECLI:ES:TC:1989:194) placed the position of the lawmakers and the Court itself in stark contrast: "The lawmakers are free within the limits established by the Constitution to choose the regulation of the right or legal institution that they deem more appropriate to their own political preferences. It is the Constitutional Court which cannot be carried away in this field" (PoL 2). The broad freedom of configuration granted to the lawmakers is consistent with their attribution of a power of action, of interpretation, of an initial text that employs a language with a singularly open texture (the classic expression of H.L.A. Hart). As a correlate of the above: this openness can only be abolished, reducing axiological diversity to a single fair interpretation in truly exceptional cases, since, as the words of our Constitutional Court show, the key to functional interpretation is not to establish the true meaning of the Constitution, but to judge the sustainability of the lawmakers' work[7]. In the words of the Constitutional Court of Spain, "far from evaluating its convenience, its effects, its quality or perfectibility, or its relation to other possible alternatives, we must only consider its constitutional framework when asked to do so (CCJ 55/1996, of 28 March, PoL 6 [ECLI:ES:TC:1996:55]). We should not forget that, as the Court itself pointed out in Judgment 4/1981, of 2 February, PoL 3 (ECLI:ES:TC:1981:4), "in a system of political pluralism (Art. 1 of the Constitution) the function of the Constitutional Court is to set the limits within which the different political options may legitimately arise, since, in general terms, it is clear that the existence of a single option is the negation of pluralism. Once this criterion is applied to the principle of autonomy of municipalities and provinces, it means that the function of the Court is to set limits whose failure to observe would constitute a negation of the principle of

[7] James B. THAYER, in his essential "The Origin and Scope of the American Doctrine of Constitutional Law, Harvard Law Review, vol. II (3) (1893), p. 150 (https://archive.org/details/jstor-1322284/page/n1/mode/2up), distinguishes those cases in which a judge must interpret a text in order to unravel its only possible meaning, from those in which it is not a matter of applying the text but of deciding whether "certain acts of another department, officer, or individual are legal or permissible", in which case *"the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not"* (the original text is in italics). In the most recent Spanish legal dogmatics, Pablo de LORA, "Justicia constitucional y deferencia al legislador", in Francisco J. LAPORTA (ed.), *Constitución: problemas filosóficos*, Center for Political and Constitutional Studies, Madrid, 2003, pp. 345 et seq., has defended what he calls a "weak constitutionalism", which we could also call "strong deference", in honour of Thayer's theses, claiming the central role of the lawmakers in the constitutional rule of law.

autonomy, but within which the various political options can move freely" [recently, CCJ 34/2023, of 18 April, PoL 5(h): ECLI:ES:TC:2023:34].

This case-law is synthesised in CCJ 191/2016, of 15 November, PoL 3(b) (ECLI:ES:TC:2016:191), where a legal reform of the collegial judicial governing body, the General Council of the Judiciary, was prosecuted. There the Court declares:

> [T]he control over the constitutionality of the laws that corresponds to this Court cannot be carried out without recognising and respecting the very wide margin or freedom of configuration that the lawmakers are entitled to in order to pursue their political options; options that, as we said earlier, are not previously programmed in the Constitution once and for all, as if the only thing that could be done in the future were to develop such a previous programme (...).
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> It is, therefore, a basic principle for the constitutional interpretation that lawmakers do not implement the Constitution, but create law freely within the framework that it offers (CCJ 209/1987 of 22 December, PoL 3). Its obvious corollary is that, in the trial of the law, this Court should not act as its own lawmaker (CCJs 19/1988, of 16 February, PoL 8, and 235/1999, of 20 December, PoL 13), constraining its freedom to dispose wherever the Constitution does not do so unequivocally.
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> [I]t can be said that the connection of the law to the Constitution is, here too, negative, excluding any constitutional violation, but not imposing a single configuration of the body [it was referring to the General Council of the Judiciary in this case], and terminated in all its extremes (CCJ 49/2008, of 9 April, PoL 16, on the Organic Law of the Constitutional Court).
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> It also follows – and this is the second consideration – that it is not possible to assess in law a legal reform of the General Council of the Judiciary on the basis of the provisions of the precisely amended legislation, since in everything that has not been predetermined by the Constitution, the lawmakers, regardless of the impeachment that their work may deserve, are free to return to their previous decisions. In no way can it be inferred from the Constitution, in other words, 'the prohibition of modifying the legislation relating to the government of the judiciary at the time and in the sense that the lawmakers understand more appropriate, and always with respect to the rules of material and formal content defined by the body of constitutionality' (CCJ 238/2012, of 13 December, PoL 8)".

(C) Institutional foundation of deference

Unlike where the fixing of the facts relevant to the proceedings is concerned, in determining the law, which includes the interpretation of the prosecution canon, the deference to the legislature does not result from an alleged epistemic primacy but from its institutional position. This institutional deference is not, of course, exhausted with the lawmakers, but, in what is now strictly relevant, it comprises all those who exercise a function directly and expressly assigned by the constituent power[8].

In the specific case of the legislation, the mitigating presumption of constitutionality attributed to the rules coming from the pre-constitutional order is highly significant: "even if it is affirmed that the promulgation of the Constitution has not broken the continuity of the pre-constitutional legal order except with respect to those rules that cannot be interpreted in accordance with the Constitution, it is no less true that the presumption of constitutionality must be qualified by the different object of these pre-constitutional laws" [CCJ 32/1981, of 28 July, PoL 6 (ECLI:ES:TC:1981:32)].

The minimum content of this presumption of constitutionality is specified in the resistance of the rule to its hypothetical challenge, in the following terms:

> "[T]here is no room for global challenges lacking a sufficiently developed reasoning, since this Court cannot proceed to a necessarily individual and substantive review of the constitutional adjustment since [...] the corresponding decision can only be made by examining the rules whose basic character is disputed one by one and not by formulating a global judgement on the Law. And [...] it is not enough for the appeal to confine itself to making statements of principle and of an abstract nature on a set of jurisdictional titles and then to conclude that the provisions in question do not respond to the case-law previously established, without any argumental link. "When the refinement of the legal system is at stake, it is the appellants' onus not only to open the

[8] The institutional deference to the other public authorities is constant regarding the functioning of the courts, a clear manifestation of respect for the respective sphere of jurisdiction. In this regard, we can use the enlightening words used by the Criminal Chamber of the Supreme Court in its judgment of 15 June 2023 (ECLI:ES:TS:2023:2822): "[W]e move with great doses of caution to respect a power that the Law grants primarily to the court of instance and that we must not assume. It is not a matter of deciding what penalty we would have imposed, but of finding that the penalty imposed by the Court is not illegal, it does not infringe the law. That is why it is *not unusual for us to validate the penalty imposed by remedying, if it is remediable, the motivating deficit; not necessarily because we think that that was the only concretisation adjusted to legality (which can never be affirmed in that ultimate stronghold of discretion), and certainly not because we come to the conviction that this was the penalty that seems to us to be the most weighted; but simply out of deference to that jurisdiction of the Court of First Instance*. A mere disagreement with the penalty is not a ground of appeal unless it can be said that it contradicts legality" (emphasis added).

way for the court to make a decision, but also to collaborate with the court's justice in a detailed assessment of the serious issues involved" [CCJ 43/1996, of 14 March, PoL 5 (ECLI:ES:TC:1996:43)].

Thus, the minimum content of the presumption of constitutionality preserves the law against generic or devoid challenges of any specific argument that conflicts with the constitutional framework. To that minimum content enhanced protection is added when the work of the "democratic lawmakers", who act under the legitimacy granted to them by the Constitution and within the framework predefined by the latter, is concerned.

The expression "democratic legislator" is used for the first time in CCJ 225/1998 of 25 November (ECLI:ES:TC:1998:225), a judgment dismissing an appeal of unconstitutionality raised in connection with a statutory reform (specifically, the challenge of a provision of Organic Law 4/1996 of 30 December 1996 amending the Statute of Autonomy of the Canary Islands, which affected the autonomous electoral system). Well, as has been advanced, when the work of the democratic lawmakers is concerned, the presumption of constitutionality is reinforced, requiring that the contradiction between the law and the Constitution be "clear and patent". In the words of CCJ 112/2006 of 5 April, PoL 19 (ECLI:ES:TC:2006:112): "Our powers in this field [referring to the constitutionality control of the law] must be administered with exquisite caution and total respect to the democratic lawmakers, so that *only when the contradiction between the law and some constitutional norm is clear and obvious we are given a negative judgment of constitutionality, which cannot be based on reasoning so vague that they are hardly apprehensible*" (emphasis added)[9].

In particular, the Constitutional Court has warned that "the control techniques of the arbitrariness of administrative action are not just simply applicable to the democratic lawmakers".

[9] CCJ 49/2008, of April 9 (ECLI:ES:TC:2008:49) is particularly deferential to the work of the democratic lawmakers. This decision is particularly significant since it was intended to solve the challenge of an amendment to the organic law regulating the Constitutional Court itself (amendment specified in Organic Law 6/2007 of 24 May 2007). After raising the question of the scope and intensity of the legislature's review in this case, two were the positions reflected in the judgment: on the one hand, the majority, anchored in the reinforced presumption of constitutionality of the work of the democratic lawmakers, referred to in the text; on the other hand, the one expressed by Judge Javier Delgado Barrio in his dissenting vote, who postulates a reinforced scrutiny: "Ido not believe that it is possible to classify laws into different categories in order to attribute to them a greater or lesser presumption of constitutionality and therefore a different intensity of control. But, if this different intensity were to be accepted, my conclusion would be exactly the opposite of the one stated in the Judgment: the control of the constitutionality of the OLCC must be particularly incisive and deep, banishing any hint of unconstitutionality in the Law that is to be the basis of the judgments on the constitutionality of all other rules and acts of public power with the force of law". In relation to this judgment, see Ignacio TORRES MURO, "La reforma de la Ley Orgánica del Tribunal Constitucional y del Reglamento del Senado, puesta a prueba (SSTC 49/2008, de 9 de abril, y 101/2008, de 24 de julio)". *Revista General de Derecho Constitucional*, no. 6 (2008), pp. 6 et seq.

[CCJ 45/2007 of 1 March, PoL 2 (ECLI:ES:TC:2007:45)]. It rejects the extension to constitutional control of the law of the techniques chosen by administrative guaranteeism. In CCJ 19/2012, of February 15, PoL 10 (ECLI:ES:TC:2012:19), the terms in which it is pertinent to judge the conformity of the work of the democratic lawmakers with the prohibition of arbitrariness [Article 9(3) SC]:

> "[W]hen examining a contested rule from the point of view of arbitrariness, our analysis must focus on verifying whether that provision introduces discrimination, since discrimination always entails arbitrariness, or if, although not establishing it, it lacks any rational explanation, which would also obviously mean arbitrariness, without it being relevant to carry out an in-depth analysis of all the possible reasons for the rule and of all its possible consequences [...]. Notwithstanding the above, it must be borne in mind that if the legislative power opts for a legal configuration of a certain matter or sector of the legal system, mere political discrepancy is not enough to brand the rule as arbitrary, confusing what is legitimate arbitrariness with caprice, inconsistency or incoherence that creates inequality or distortion in the legal effects".

The attribution of the rule to the democratic lawmakers also entails a plus in the possibilities of interpretation in accordance with the Constitution of the contested law[10]: "[I]n the case of the democratic legislature, the presumption of constitutionality occupies a prominent place in this trial, so that 'it is a reiterated case-law of this Constitutional Court that, in an abstract process such as the appeal of unconstitutionality, it is necessary to *exhaust all the possibilities of interpreting the provisions in accordance with the Constitution* and to declare only the repeal of those whose incompatibility with it is unquestionable because it is impossible to carry out such interpretation" (CCJ 101/2008 of 24 July, PoL 9, and case-law cited therein)" [CCJ 14/2015, PoL 5 (ECLI:ES:TC:2015:14)].

Needless to say, that presumption of constitutionality cannot include the normative products of the democratic lawmakers outside the Constitution itself. For instance, this has been the case with the Law of the Parliament of Catalonia 20/2017, of 8 September, called "of legal and foundational transience of the Republic". In this case, as noted by CCJ 124/2017, of 8 November, PoL 4(A)(b) (ECLI:ES:TC:2017:124), a rule that not only does not act within

[10] See Eduardo GARCÍA DE ENTERRÍA, *La Constitución como norma y el Tribunal Constitucional*, 1994 Ed., Civitas, Madrid, pp. 95 et seq.

constitutional limits, but consciously and voluntarily transgresses them in order to establish a new legal order, cannot rely on that presumption. Regardless of any other considerations, that task cannot benefit from a presumption that the Constitution legitimises its own dismantling:

> "The Law now under consideration attempts to be the foundational rule, on a transitional basis, of a legal system absolutely different from the current system relying on the Spanish Constitution and the Statute of Autonomy of Catalonia (SAC), and also, separated and independent from that one in force in Spain, by introducing an giving rise to an unequivocal continuum. This claim entails two relevant consequences, already mentioned in the CCJ 1142017[11], which should now be recalled.
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> Firstly, this 'Law does not claim for itself a presumption of constitutionality which generally accompanies any democratic legislative task (inter alia, CCJ 34/2013, of 14 February, PoL 9)', since the autonomous Parliament seeks to act, by issuing it, 'not as a body established by the SAC, a rule whose legal nature relies on the Constitution', but as the representative of the people of Catalonia, on whom sovereignty relies [Articles 2 and 29(1)]".

Returning to the central line of our reflections, that is, the affirmed difference between controlling the lawmakers and the administration, we should mention CCJ 107/1996, of 12 June (ECLI:ES:TC:1996:107), for two reasons. First, because it probably represents the most significant example of strong deference in the case-law of the Constitutional Court of Spain. Second, because this deference is built, paradoxically, by using a classic technique to control administrative arbitrariness.

An adequate understanding of this judgment requires starting from its immediate precedent, CCJ 179/1994, of 23 June (ECLI:ES:TC:1994:179), which solved the question of unconstitutionality – specific control – elevated mainly in relation to two core aspects of the regulations governing the official chambers of commerce, industry and navigation approved before the 1978 Constitution (Law of 1911 and Decree-Law of 1929): the mandatory affiliation to chambers with the consequent levy of the "chamber resource", a source of financing for these public corporations. The judgment – to which two dissenting opinions were expressed, one of which was signed by three judges – concluded that the Constitution, by proclaiming the

[11] CCJ 114/2017, of 17 October (ECLI:ES:TC:2017:114), upheld the appeal of unconstitutionality raised in respect of the Law of the Parliament of Catalonia 19/2017, of 6 September, called "referendum for self-determination",

fundamental right of association, and as the essential content of it the negative freedom of association, would have repealed that pre-constitutional legislation which required compulsory affiliation to the chambers.

In CCJ 107/1996 the subject-matter of the proceedings – also a matter of unconstitutionality – was constituted by Basic Law 3/1993, of 22 March, on the official chambers of commerce, industry and navigation; more specifically, by those provisions that provided for forced affiliation. On this occasion, the ruling was dismissed, thus confirming -in what is now strictly relevant- the constitutionality of a substantially identical regulation to the one annulled just two years earlier. Different, however, was the methodology used for its examination, which, on the basis of a scarcely affirmed consideration of the post-constitutional character of the law at issue – which was only fleetingly mentioned in PoL 10(C) – stemmed from the identification of a dialectical tension between "the general principle of freedom and the negative freedom of association, on the one hand" and "the constitutional legitimacy of the corporate administration", to which the performance of juridical-public functions is entrusted. This tension "cannot be resolved from one of its ends, but, on the contrary, and as we have been saying, based on a systematic and global interpretation of the constitutional provisions involved; in other words, it can only be resolved from the principle of unity of the Constitution (CCJs 113/1994 and 179/1994)" (PoL 9). In the following line it is pointed out that the Court "has developed a constitutional criterion [...] that complements the Constitution: compulsory membership of corporate bodies is justified, in what matters now, by the characteristics of the purposes of public interest pursued and from which the difficulty of obtaining such ends without recourse to that affiliation must at least result".

The criterion seems to lead to a judgment of proportionality, or at least of necessity. However, the judgment itself warns that it "does not confine itself to inquiring whether or not it is difficult for a certain activity or function to be carried out without compulsory affiliation, but, more deeply, imposes a study on whether it is difficult for the aims pursued, the intended effects to be achieved, to be achieved without compulsory affiliation' (CCJ 107/1996, PoL 9). We may conclude from the foregoing that "the assessment of the facts made by the legislature is thus subject to the Court's review"; a conclusion which is quite significant, since one of the traditional mechanisms for monitoring the exercise of the discretionary powers of the administration lies precisely in the control of the decisive facts as regulated elements.

In addition to the foregoing, the above judgment makes use of another technique to control administrative action: the handling of indeterminate legal concepts in order to find, as far as possible, a -single- just solution[12]:

> "[S]ince the difficulty in achieving certain ends is an indeterminate legal concept, the intensity of this control must be qualified by separating those cases in which it is manifestly clear that there is no difficulty in achieving certain effects without the need for compulsory affiliation - the zone of negative certainty of the indeterminate legal concept - and those in which such difficulty may give rise to doubt - the zone of uncertainty or penumbra of the concept -: whereas, in those cases, the Court is fully entitled to destroy the presumption of constitutionality inherent in the law, on the other hand, it must be borne in mind that the 'Constitutional Court cannot establish itself as an absolute judge of that *difficulty*, whose assessment, by the very nature of the matter, must give the legislature a broad discretion' (CCJs 113/1994 and 179/1994)".

It is precisely in applying that canon that the only reference contained in the judgment to the post-constitutional character of the law at issue is made, unlike the rules challenged in the proceedings decided by CCJ 179/1994. Reference made in the following terms: "Thus, the post-constitutional legislature, with an assessment of the socio-economic reality of the time and expressly contemplating the consequences of the 'integration of Spain into the European Community', has come to the conclusion that the tasks entrusted to the Chambers could not be carried out without a forced affiliation" (PoL 10).

By subjecting the law to the prosecution canon set out in PoL 9, the Court shows a generous deference to the legislature:

> "The legislature, in the Preamble of the challenged Law, has expressly stated that it is impossible for the functions attributed to the Chambers to be carried out effectively without compulsory affiliation, on the understanding that only with the subjective fullness that derives from it could the aims to whose effectiveness it aspires be obtained. And so this Court, after examining the aims of legal certainty pursued with the compilation of customs and commercial regulatory practices, or aims regarding efficiency in the administrative action, which are sought through the function of advice

[12] See Fernando SAINZ MORENO, *Conceptos jurídicos indeterminados y discrecionalidad administrativa*, Civitas, Madrid, 1976, and Eduardo GARCÍA DE ENTERRÍA, *La Constitución como norma*, op. cit., pp. 228, citing Ronald Dworkin.

and suggestion of reforms, or of promotion of foreign competitiveness with the Chamber Plan, finds no basis for concluding that, clearly, such aims could be easily achieved by a plurality of associations or by the Administration itself precisely in the same terms that are expected from Chambers within which interests, experiences and knowledge that encompass the whole circle of protagonists of an important sector of economic life coexist.

We are not, therefore, in the area of negative certainty of the indeterminate legal concept which is the difficulty and within which it is lawful for this Court to destroy the presumption of constitutionality of the law, but in the area of uncertainty or gloom, in which the legislature must be granted a 'broad discretion' (CCJ 113/1994)" (PoL 10).

It states that this way of prosecuting the work of the post-constitutional lawmakers was not exempt from criticism within the Constitutional Court itself. Thus, in the dissenting opinion made by four judges, the use of deference as a method of resolving doubts as to the validity of the legal rule is challenged:

"In the Judgment from which we dissent, what was previously or was intended to be a self-restriction of the Court, which did not, however, prevent the judgment of unconstitutionality then declared, becomes a sort of canon of constitutionality that is nothing more than the principle of deference towards the legislature, which determines an abdication of our own constitutional jurisdiction over the Law. The Constitutional Court - according to this case-law on 'deference' introduced here - will be relieved of its possible task of identifying *prima facie* the 'impossibility or difficulty' of carrying out the purposes and functions entrusted to the Chambers of Commerce without the need to restrict the (negative) freedom of association, since this judgement is simply left to the lawmakers and to their free discretion, which is thus converted into a constitutionally sufficient cause of justification for the restriction or sacrifice of the fundamental right of freedom affected. In short, a kind of *non liquet* on the part of the Court.

This case-law is, in our view, extremely dangerous and expansive if it is projected on other assumptions of economic or social legislation in which constitutionally guaranteed rights are affected. This Court has constitutionally entrusted the guarantee of the fundamental rights of citizens as one of its primary tasks. When any of these rights is affected by a law, regardless of the justification that the lawmakers wished to

give to it, the control by the Constitutional Court is inexcusable, because 'nothing that concerns the exercise by citizens of the rights that the Constitution grants them, can never be considered alien to this Court' (CCJ 26/1981, PoL 14).

In the present case, the case-law affirmed in the Judgment ultimately leaves to the free discretion of the Lawmakers the delimitation of the scope of exercise not only of a fundamental right such as freedom of association in its aspect of negative freedom (art. 22.1 C.E.), whose possibilities of restriction and even sacrifice by the Lawmakers are greatly expanded, but also of another equally sensitive right, which is the right to property, also constitutionally guaranteed against unjustified intrusions by the Lawmakers (Arts. 33 and 31 SC).

[…]

Apart from the core argument described above, the legal grounds of [the] Judgment do not contain an explanation, not even a brief one, of the purposes and functions of public interest of the Chambers of Commerce in the new Law of 1993 which, by comparison with their previous legal regime that stems from the Law of 1911 and subsequent complementary legislation, would allow, in the light of the case-law maintained by the Constitutional Court in this respect, the conclusion to be drawn that the 'new' functions and aims entrusted to these Corporations serve to justify constitutionally both the obligatory or compulsory affiliation to them, as well as the duty, in addition, to the obligation, by the law, of the Chambers of Commerce to be compulsory or compulsory, to reach the conclusion that the 'new' functions and purposes entrusted to these Corporations serve to constitutionally justify both the obligatory or compulsory affiliation to them, as well as the duty, in addition, to pay a real tax (the so-called 'chamber resource') which is imposed (with an applicability that is clearly excessive and disproportionate in relation to the interests whose pursuit and representation is entrusted to the Chambers) 'on natural or legal persons, national or foreign, exercising commercial, industrial or shipping activities on national territory'.

[…]

[T]he lack of argumentation in the Judgment -with the exception of the brief considerations dedicated in PoL 8(B), to the functions of the Chambers in relation to the promotion of foreign trade and professional training- regarding a comparative examination of the functions of the Chambers in the legislation prior to the current Law

> of 1993 challenged in these constitutional proceedings is simply explained by the fact that from this examination it can only be concluded that, from the constitutional perspective, there is no substantial difference whatsoever in the functions and purposes of the Chambers of the new Law with respect to those of the previous regime (already examined by the Court in CCJ 179/1994) that would allow the constitutionality of the compulsory affiliation to be based on them".

The length of the quotation is excused by the clarity and rigour of the presentation of the critical arguments with the thesis on which the judgment is based, as well as for the fact of highlighting the richness of the deliberation taken in this case within the Constitutional Court[13]. A deliberation that contradicted a strong deference, which opens a broad discretion granted to the freedom of the legislature, and a weak deference, which leads to the prosecution of the reasons put forward by the legislature without the institutional courtesy due to it being transformed into the justification of its rule.

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

According to the previous pages we can affirm that Spanish law participates in the general notion of *judicial deference*. So the deferential judge will be the one who resolves bearing in mind the plurality of the legal system: if the rules are *grounds for action* (practical reasons), in the well-known characterisation of Joseph RAZ[14], the deferential judge will be very interested in ascertaining and counterbalancing the possible claims of legitimacy concurrent in the case. It will attend to the reasons put forward by the lawmakers, as public power directly placed by the Constitution for the realisation of the fundamental determinations, either to give them a weighting sense (weak deference), or to recognise them an unconditioned authoritative pre-eminence (strong deference)[15]. For if the rules are grounds for action, they are also reasons for justifying the same action.

[13] Among the commentaries on this judgement, those by Joaquín TORNOS MAS, "La sentencia del Tribunal Constitucional 107/1996, de 12 de junio, relativa a las Cámaras de Comercio, Industria y Navegación", *Revista Jurídica de Catalunya*, no. 1 (1997), pp. 79 et seq., should now be highlighted, and Luis María CAZORLA PRIETO, "La constitucionalidad de la adscripción obligatoria a las cámaras de comercio, industria y navegación o el principio de la deferencia hacia el legislador (Comentario a la sentencia del Tribunal Constitucional 107/1996, de 12 de junio de 1996)", *Actualidad Jurídica Aranzadi*, no. 260 (year VI), 12 September 1996.

[14] Joseph RAZ, Razón práctica y normas, translated by Juan Ruiz Manero, Centro de Estudios Constitucionales, Madrid, 1991.

[15] Alison L. YOUNG, "In Defense of Due Deference", *The Modern Law Review* (2009) 72(4), pp. 554 et seq., echoes the distinction made by David Dyzenhaus between deference as respect and deference as submission.

In recent times, Pedro da SILVA MOREIRA has recalled to what extent the best defence of the judicial guarantee of the Constitution has been built from the awareness of the risks involved, in what has come to be called the "counter majority objection"[16]. Thus, Hans KELSEN, in his indispensable *La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)* of 1928, warned of the irrepressible extension of jurisdiction in the interpretation of supra-positive norms or principles:

> "[W]hen, as is sometimes the case, the Constitution itself refers to these principles and invokes the ideals of equity, justice, freedom, equality, morality, etc., without specifying at all the content of these formulas. If underneath these expressions lies nothing more than the usual political ideology with which every legal order tries to endow itself, the invocation of equity, freedom, equality, justice, morality, etc., only means, in the absence of a greater precision of these values, that the legislature and the law enforcement bodies are empowered to discretionally fill the space given to them by the Constitution and the law.
>
> The conceptions of justice, freedom, equality, morality, etc., differ in such a way that, if positive law does not enshrine any of them, any law rule can be justified by one of these competing conceptions. [...] These formulas generally lack great significance; they add nothing to the actual state of law.
>
> It is precisely in the field of constitutional law that the use of these formulas may be most at risk. Thus, the provisions of the Constitution that invite the legislature to conform to the values of justice, equity, equality, freedom, morality, etc., could be interpreted as guidelines regarding the content of laws. Evidently by mistake, since this would be the case only when the Constitution established a precise meaning, when it was the Constitution itself that provided these formulas with an objective criterion. [...] it would not be impossible for a constitutional court called to decide on the constitutionality of a law to nullify it by considering it unjust, with Justice being a constitutional principle that that same court is called upon to apply. The power of such a court would be unbearable. The conception of the justice of the majority of the judges of that court could be in complete contradiction with the conception of the majority of the population and, therefore, with that of the majority of Parliament that has voted on

[16] Pedro da SILVA MOREIRA, *Deferencia al legislador: la vinculación del juez a la ley en el Estado constitucional*, Centro de Estudios Políticos y Constitucionales, Madrid, 2019.

> the law. It is obvious that the Constitution did not intend, by using a word as vague and misleading as that of justice or any other similar word, to make the fate of any law voted by Parliament depend on the goodwill of a bench of judges composed in a more or less arbitrary manner, from the political point of view, such as the constitutional court. To avoid such a shift of power - which the Constitution does not want and which, politically, is completely counter-indicated - from Parliament to a body which is alien to it and which can become the representative of political forces diametrically different from those expressed in Parliament, the Constitution must, especially if it creates a Constitutional Court, refrain from such phraseology, and if it wishes to establish principles concerning the content of laws, formulate them as precisely as possible[17]".

It was precisely on the occasion of the review of a law in particularly sensitive matters and prone to these supra-positive assessments, such as abortion, that the Spanish Constitutional Court had to face considerable difficulties in carrying out its function.

Thus, CCJ 53/1985, of 11 April (ECLI:ES:TC:1985:53), prosecuted the constitutionality of an amendment of the Criminal Code that decriminalised abortion in certain cases (system of indications). The judgment declared the constitutionality of the core aspects of the contested law, but found it contrary to the Constitution in relation to guarantees in cases of therapeutic and eugenic abortion (PoL 12 of the judgment, to which the judgment expressly refers). It was precisely this what led to several concurring and dissenting opinions. All these opinions agree in criticising the judgment for overreaching the exercise of judicial power.

The reproaches can be grouped into two large blocks, even if a close connection is appreciated between the two.

On the one hand, it is worth mentioning the criticisms of the oblivion of the role and limits that the Constitutional Court has to play and respect as a "negative legislature". Thus, Judge Jerónimo Arozamena Sierra recalls that "what the Court is not permitted to do is to establish amendments or additions to the contested text or to establish or add other precepts". On the other hand, Judges Ángel Latorre Segura and Manuel Díez de Velasco understand that the Court would have assumed "the function of introducing amendments to the draft laws subjected to its opinion" (in this case, by means of a preliminary appeal of unconstitutionality, which perhaps led to the overreach criticised). "Such a function exceeds the already extensive remit which, not only the Constitution but also the OLCC assign to this Constitutional Court, whose

[17] Hans KELSEN, "La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)", *Révue du Droit Public et de la Science Politique en France et à l'Étranger*, April-June 1928, pp. 240 et seq.

actions cannot approximate to that of a "third Chamber" without causing a dangerous imbalance in our legal and political system by encroaching on powers which are the prerogative of legislature".

On the other hand, different judges questioned the very construction of the trial canon. For instance, Judge Francisco Tomás y Valiente began by recognising that "I have never been an enthusiast of the philosophy of values", and added that "perhaps this is why I do not share (and here my differences begin) the numerous axiological considerations included in findings 3, 4 and 5. Apart from the inaccuracies or unsteady terminology they contain and which would be too protracted and pointless to refer to here, I do not find a legal-constitutional point, a single pertinent one, to state as the statement effectively does, that human life 'is a higher value of the constitutional legal system' (point of law 3) or a 'fundamental value' (point of law 5) or a 'central value' (point of law 9). That the concept of person is the support and prius logico of all rights seems clear to me and I maintain as such herein. However, this statement does not authorise dangerous axiological hierarchical structuring, which, furthermore, has nothing to do with the text of the Constitution, where in fact in its Art. 1(1) it states that the highest values of the legal system are freedom, justice, equality and political pluralism: These and only these. In view of the abstract considerations on life as a value, it is a striking fact that the Judgment does not formulate any comments on the first of those values considered as higher by the Constitution, namely, Freedom. It is perhaps as a result of this omission, which I have not forgotten, that scant attention is paid to the rights of freedom of pregnant women."

Also, Judge Francisco Rubio Llorente said:

> "Interpreters of the Constitution cannot make a separate consideration from the precepts of the Constitution of the value or values which, in their opinion, are "enshrined" in such precepts, in order to subsequently deduce from them now, as pure abstractions, legislative obligations which are not supported by any particular constitutional text. This is not even a question of making value case-law but simply and smoothly supplanting legislature, or perhaps going even further and superseding constitutional power. The values which inspire a particular precept may server in the best of cases to interpret that precept, not to deduce from it obligations (nothing less than the legislature, representative of the people!) which the precept in some way imposes. Through this channel it is clear that the Constitutional Court contrasting the Laws with the abstract values that the Constitution effectively proclaims (which obviously do not include that of life, as life is something more than a mere 'legal value') invalidating any law on the

> grounds that it is incompatible with one's one sentiment of freedom, equality, justice or political pluralism. The regulatory planning of constitutionally enshrined values corresponds to the legislature not to the Judge".

In this same vein, Judge Luis Díez-Picazo stressed that "unconstitutionality as contradiction of a law with a Constitutional mandate should result from an immediate contrast between the two texts. It could be admitted that it follows an intermediate constructive regulation established by the interpreter. Conversely, an unlimited or too remote extension of the constructive rules deriving from the Constitution appear to me to be very difficult in order to claim unconstitutionality through contradiction of the law judged herein in with the last of the constructive deductions."

It is not surprising that in the recent CCJ 44/2023 of 9 May (ECLI:ES:TC:2023:44), dismissing the appeal of unconstitutionality filed against Organic Law 2/2010 of 3 March 2010, which introduced the system of deadlines for the voluntary termination of pregnancy, similar methodological problems have been raised again. In this case, three Judges (Enríquez Sancho, Arnaldo Alcubilla and Tolosa Tribiño) claim, in their dissenting opinion, that "the judgment from which we dissent does not limit itself to analysing whether the specific regulatory option set out by the legislator in the legal text subject to trial respects or exceeds the constitutional limits, but rather, exceeding the scope and limits of the control of constitutionality that corresponds to this Court, recognises a new fundamental right, which it identifies as "a woman's right to self-determination regarding the termination of pregnancy", anchored in Article 15 SC [in conjunction with Art. 1(1) SC and Art. 10(1) SC], from which follows the constitutional duty of the public authorities (in particular, the legislature) to guarantee its effectiveness, which is nothing more than a way of affirming the benefit nature of this new right constructed completely anew by the judgement. With this, under the pretext of the alleged "evolutionary interpretation" of the Constitution, a step further is taken than the aforementioned CCJ 198/2012, which at no time went so far as to deduce an alleged fundamental right of persons of the same sex to contract marriage from the constitutional text". They subsequently declare:

> "Let's remember once again that in our legal system, a fundamental right is a right created by the Constitution (a constitutional right) and therefore binding on all public authorities. In other words, a right which, by virtue of its definition in the Constitution, the supreme rule of the legal system, is imposed even on the legislature, and certainly

also on the supreme interpreter of the Constitution. Therefore, it is not for the Constitutional Court to rewrite the Constitution in order to create, discover or deduce new fundamental rights, replacing the permanent constituent power. Social realities may even lead to the recognition of new fundamental rights, but constitutional reform is foreseen for this purpose. When examining a law, the Constitutional Court must limit itself to examining whether the specific legislative option embodied in the contested law respects or contradicts the Constitution. Any other operation exceeds the scope and limits of the constitutional review of the Court. Moreover, it should be noted that when this Court reviews the constitutionality of laws and reaches the conclusion that the legislator has not violated the Constitution, its function is not to assess and declare that the law in question is "constitutional", but rather that it is "not unconstitutional'".

The review of the dissenting opinions expressed in these two judgments has no other purpose than to illustrate the existence within the Spanish Constitutional Court of a constant interest in the basis and limits of its judicial function.

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.)?*

For purely expository purposes, we can differentiate the normative limits to the activity of the Court and those derived from the exclusive use of the legal method.

- As has already been stated above, the judicial role played by the Constitutional Court entails the formulation of a judgment on the adequacy of the act of public authority with the constitutional rule that serves as a parameter of validity. In the case of the Spanish Constitutional Court, its jurisdiction extends essentially to the following cases:

  (a) Control of the constitutionality of the law through abstract control (appeal of unconstitutionality) or specific control (incidental question of unconstitutionality that can be raised by judicial bodies when they doubt the conformity with the Constitution of the rule with the force of law that they must apply to the case and on whose validity depends the final decision they are called upon to adopt).

(b) Protection of the fundamental rights of citizens through *amparo* appeals against acts, omissions or simple actions without legal warrant, judicial resolutions and acts without the force of law of the existing parliaments in Spain.

(c) Constitutional conflicts, which can be either positive (when both parties claim for themselves the ownership and exercise of jurisdiction, in a true *vindicatio potestatis)* or negative; conflicts of attributions between constitutional bodies (Government, General Council of the Judiciary, Congress and Senate) and conflicts of protection of local or regional autonomy.

The scenario is completed with the process of challenging provisions without the force of law and decisions of the Autonomous Communities, which completes the system of legality controls -*lato sensu*-[18] and the prior declaration on the constitutionality of international treaties.

- In all matters of its jurisdiction, the Constitutional Court is called upon to carry out a strict legal check, or to bring the rule, decision or act subject to examination to the enabling rule. In this respect, it is worth recalling that the Spanish Constitutional Court had the opportunity to warn early on that the controls of legality or normativity are specific controls, which can only be exercised within the scope of the assigned jurisdiction and which must safeguard the autonomy of the subject or subjects that issued the controversial rule or decision; on the contrary, the controls of opportunity, due to their generic and indeterminate nature, place the controlled subject "in a position of subordination or quasi-hierarchical dependence" with respect to the one that controls them [CCJ 4/1981, of 2 February, PoL 3 (ECLI:ES:TC:1981:4)].

Most recently, in CCJ 237/2012 of 13 December (ECLI:ES:TC:2012:237), concerning the modification of the National Hydrological Plan, the Court stated:

> "Once again we must emphasise that the canons to which we are to abide in the exercise of our jurisdictional function are not so lax as to allow an assessment in terms of political opportunity or technical goodness of the decisions submitted to us. Rather, we

[18] The Spanish Constitution refers separately to the control "by the Constitutional Court [of] the constitutionality" of autonomous provisions with the force of law [Art. 153 (a)], a control that is complemented by the generic provision of the appeal of unconstitutionality with respect to laws and regulatory provisions with the force of law [Art. 161(1)(a)], and to the control of "the provisions and decisions adopted by the Autonomous Communities" [Art. 161(2) SC]. The Organic Law has also conferred on the Constitutional Court the jurisdiction to judge the constitutionality of *acts* with the force or value of law, which allows for a legal control of both the declarations of states of emergency and any extensions that may be granted [in this regard, CCJ 148/2021, of 14 July, PoL 2 (ECLI:ES:TC:2021:2021)], and the authorisation that may be granted by the Senate for the application of measures of State coercion adopted under Article 155 SC [CCJ 89/2019, of 2 July, PoL 2 (b) (ECLI:ES:TC:2019:89)].

> are obliged to exercise control over those decisions that does not entail the supplanting of functions assigned to other bodies and which guarantees, at the same time, the proper balance of powers. In the case at hand, the service of this function requires that we adhere to an 'external control' of the rationality of the measures in question and not to a strict control of quality, perhaps of perfection, nor to a comparison between alternatives when all of them have a place, as is the case here, in the constitutional text" (PoL 12).

Thus, it is not a question of identifying areas that are insurmountable for constitutional jurisdiction, but rather the subjection of the Court's activity to the formulation of trials of strict legality, that is, the carrying out of an *external review* of the rationality of the contested decision from the perspective of the preservation of the order of distribution of powers [CCJ 63/2023, of 24 May (ECLI:ES:TC:2023:63)]. The use of a rationality canon represents a clear example of deference or polite respect for the functions performed by other public authorities, whose decisions are not of a precautionary nature, in need of confirmation by the Constitutional Court, but definitive when they are formulated within the scope of their respective powers.

The general application of an external control of rationality, which excludes the substitution of one's own judgement for that of others under the guise of an alleged epistemic superiority or in search of the constitutional optimum, represents the common form of constitutional judgment of the decisions of the public authorities.[19]. It is understood that this minimum does not exhaust the possibilities of constitutional scrutiny and does not exclude the formulation, where appropriate, of proportionality or weighting judgments between constitutional rights and values concurrent in the case.

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; if the subject-matter of the case involves changing social conditions and attitudes)?*

[19] The impossibility of requiring a "constitutional optimum" is not so much epistemic but institutional in nature, as can be seen from the following passage of CCO 186/2009 of 16 June (ECLI:ES:TC:2009:186A): "[I]t is not up to this Constitutional Court to establish what could be called the 'constitutional optimum' (CCJ 47/2005, of 3 March, PoL 10 *in fine*), 'because otherwise the judgement of validity that this Constitutional Court is called upon to make would be transformed into a judgement of perfection, a transformation that would affect the very essence of the Constitution, which is not a closed programme but an open text, a framework of coincidences broad enough to include different options within it' (CCJ 197/1996, 28 November, PoL 8)' (inter alia, CCJ 404/2006, of 8 November, PoL 2)" (PoL 3).

The polite respect shown by the Constitutional Court towards other public authorities responds to the scrupulous observance of the institutional framework in which one and the other carry out their functions and not to the incidence of extra-legal reasons or factual conditioning factors. When the legislature does not even empower the Court to review the decisions adopted by other bodies - as is the case with the establishment of the facts which are the object of the *amparo* process ex Art. 44(1)(b) OLCC, already mentioned - it is not even possible to speak of deference, but rather, more precisely, of an absence of jurisdiction.

In the question we are asked, factors of very different nature are listed. The culture and conditions of the country, as well as historical experiences, can be considered both explanatory reasons for the disputed norm, and even for the decision finally taken on its validity, as well as meta-legal elements that help to understand the evolution of certain legal institutions. But they cannot be used as reasons for not deciding or not exercising the jurisdictional power entrusted to the Court by the constituent power itself, in view of the prohibition of not deciding *(non liquet)* that governs contemporary legal systems[20].

The fundamental nature of the rights concerned in the proceedings is inherent to the cases in which the Court is called upon to resolve. In fact, the first of the requirements that an application for *amparo* must satisfy refers to the need for it to concern the possible infringement of one of the fundamental rights, that is, those proclaimed by the Constitution, "susceptible of constitutional protection" [Art. 41(1) OLCC], otherwise the application will be rejected out of hand [Art. 50(1)(a) OLCC]. Moreover, when it comes to the content of fundamental rights, lawmakers are not only limited in their powers by the need to respect their "essential content" [Art. 53(1) SC], but also, looking at the matter from another perspective, they are called upon to provide their reasons for determining the content of the right. In particular, when it comes *to legal configuration* rights. This is the case, notably, with entitlements to benefits, as is the case, for instance, with the right to effective judicial protection [CCJ 99/1985, of 30 September, PoL 4 (ECLI:ES:TC:1985:99)], or with the additional contents of freedom of association [CCJ 30/1992, of 18 March, PoL 4 (ECLI:ES:TC:1992:39)]. In these cases, in addition to the lawmakers' interpretation of the constitutional law, the interpretation made by the judges who critically applied the law is also important: "[F]aced with two divergent interpretations -and

[20] The courts must *always* respond to the claims brought before them in due time, otherwise the action for protection brought before them will not be satisfied. In the case of collegiate bodies, the procedural legislation establishes rules for the formation of the body's will in all cases, in particular by resolving cases of a tie, either by attributing a rejection of the appeal to the tie, or by recognising the vote of the body's president as the casting vote. This is what happens in the Spanish Constitutional Court because it is expressly provided for in Article 90(1) OLCC.

they are not the only possible ones-, regarding a guarantee created by the lawmakers in their task of configuring the fundamental right, the mission of this Constitutional Court is not to lean aprioristically towards the one that is more beneficial, without further ado, for the holder of the fundamental right, but, more correctly, to ascertain whether the interpretation carried out by the Judge or Court, in its function of protecting legitimate rights and interests [Art. 24(1) SC], sufficiently safeguards or not, in its substantial or basic content, the said legal guarantee. For this Court, the interpretation of the scope of rights carried out by the ordinary courts is not indifferent, particularly insofar as what is involved is the interpretation of legality" [CCJ 287/1994, 27 October, PoL 4 (ECLI:ES:TC:1994:287)]. The caution shown by the Constitutional Court when it comes to constitutional hermeneutics is a sign of its awareness of the difficulties involved in this task.[21]

In conclusion, it should be borne in mind that contemporary law is not limited to providing power with legitimacy through coercion, but also serves other promotional or directive functions. The Constitutional Court had to judge the constitutionality of various rules which, in accordance with the directive function of the law, sought to introduce profound changes in social habits and conduct in order to better serve constitutional values. This was the case in judgment 198/2012 of 6 November (ECLI:ES:TC:2012:198), which upheld the constitutionality of Law 13/2005 of 1 July introducing same-sex marriage; the judgment concluded that the extension of marriage was not contrary to the institutional guarantee of this figure set out in Article 32 of the Constitution. It was also the case of the aforementioned CCJ 19/2023, of 22 March (ECLI:ES:TC:2023:19), on euthanasia. In both cases, the Court - both in the operative part and in the separate, concurring and dissenting opinions - formulated judgments of constitutionality, of the conformity of the law in question with the Constitution, without entering into the tempestuous question of social attitudes, which it is not its task to assess.

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

[21] As Odo MARQUARD, *Adiós a los principios*, Institució Alfons el Magnànim, Valencia, 2000, p. 125, has pointed out, "hermeneutics is the art of extracting from a text something that is not contained within it". Particularly useful for the jurist who exercises his activity in a system with a rigid Constitution, difficult to amend but flexible in interpretation, is the consideration that "hermeneutics succeeds in transforming where change is not possible" (p. 133). Finally, the author also refers to the potential of a pluralising hermeneutics, which traces many possibilities of meaning (p. 146).

The presentation of the constitutional case-law with which the section containing this question opens highlights that the deference shown by the Constitutional Court throughout its history has always responded to institutional reasons. Both in the most significant case of strong deference (CCJ 107/1996, of 12 June, official chambers of commerce, industry and navigation) and in the numerous cases of weak deference, the polite respect shown towards the lawmakers is explained by the consideration of the constitutional order of distribution of powers.

In the case of the constitutional jurisdiction, precisely because it is responsible for carrying out an external control of the exercise of powers attributed to other bodies and not substituting them in carrying out assessments of opportunity or correctness, deference is not based on epistemic reasons but on strictly institutional ones. Since the *constitutional optimum* is not sought, it is not even possible to speak of the formulation of epistemic superiority judgements. In the words of the Court itself, referring to the core of the dogmatic part of our fundamental law, "the Constitution, and very particularly fundamental rights, inspire and encourage our entire system, right down to its last or most modest manifestations, without this implying, however, that this Court is called upon to impose the extent to which each and every interpretation of the so-called ordinary legality must be influenced by constitutional content. One thing is, in fact, the guarantee of fundamental rights, as entrusted to it, and another of the maximum irradiation of constitutional contents in the various cases of interpretation of legality (cf. CCJ 160/1997, PoL 4)" [CCJ 48/1998 of 2 March, PoL 3 (a) (ECLI:ES:TC:1998:48)].

It seems appropriate to recall the wording of the passage of judgment 160/1997 to which CCJ 48/1998 expressly refers, since it clearly defines the field of action of the Constitutional Court:

> "We should note [...] that when this Court, on countless occasions, declares that a given question of law is 'of ordinary legality' or a similar expression, with the ineluctable consequence of declaring it to be outside its own jurisdiction, and exclusively that of the ordinary Courts, it is not for that reason stripping that question of any consideration of constitutionality. On the contrary, the Constitution, and in particular fundamental rights, inspires and encourages our entire system, up to its last or most modest manifestations. However, this cannot imply that this Court is called upon to impose its criterion by determining, to the very end, the extent to which each and every interpretation of the so-called ordinary legality must be influenced by constitutional content. This would be tantamount to extending the scope of the 'constitutional guarantees' [Art. 123(1) SC] which marks the limit of our jurisdiction to the interpretation of the entire legal system.

> The consequence of all this is that this Court, in some cases, may come to understand that interpretations of ordinary legality different from those that were made in the case submitted for its consideration may perhaps have responded more fully to the values incorporated in the constitutional provisions and, in particular, to those relating to fundamental rights, which may lead it to feel distanced from the solution reached. But one thing is the guarantee of fundamental rights as entrusted to it and another, necessarily different, that of the maximum irradiation of constitutional contents in each and every case of interpretation of legality; the latter may not occur without this always implying the violation of a fundamental right" [CCJ 160/1997 of 2 October, PoL 4 (ECLI:ES:TC:1997:160)].

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

In order to answer this question, it is appropriate to begin by recalling the meaning of the expression "judicial error" in the Spanish legal system. A meaning that sets out precisely the judgment issued by the Administrative Chamber of the Supreme Court of 27 March 2018 (ECLI:ES:TS:2018:1178).

In this decision, handed down in an action for recognition of a judicial error, it is emphasised that the purpose of this procedure "is to determine whether the judicial decision that constitutes its object complies with the parameters of logic and reasonableness that are inexcusable in any judicial decision and responds to a hermeneutic or applicative criterion which, although it may be the subject of controversy, can be traced back to one of those recognised by the legal system. Therefore, *only that which ostensibly and unequivocally shows a disregard for the legal system, through the failure to apply the rule that must necessarily be observed in the case in question or through its arbitrary infringement, deserves to be strictly classified as a judicial error*" (PoL 7, emphasis added).

On the basis of that premise, the case-law is structured as follows:

- "In judicial error proceedings it is not a question of evaluating the mistake of a judicial decision but its maintenance within the limits of logic and reasonableness in the appreciation of the facts and the interpretation of the law, in such a way that only a crass, evident and unjustified error can give rise to the declaration of a judicial error..."
- "[T]he conditions for a judicial error to be considered as such are as follows: it must be patent, undoubted and indisputable..."
- "[I]t can only succeed when the possible lack of adequacy between what should have been decided and what was decided is so ostensible and clear that any person versed in

law could so appreciate it, without the possibility that it could be considered correct from any point of view that can be defended in law..."

- "It consists of a blatant disregard of the legal system and, therefore, a clear failure to apply the rule applicable to the case or an arbitrary violation of that rule..."
- "There is no judicial error when the court maintains a rational and explicable criterion within the rules of legal hermeneutics..."
- "A judicial error is reserved for decisions that are unjustifiable as a matter of law..."

Considering the question before us from the perspective provided by the figure of judicial error, we reach the same conclusion we previously stated: Since it is not appropriate to make judgements of epistemic superiority, the deference that the judge may show towards other public bodies that act in the exercise of the functions entrusted to them by the legal system always responds to a constitutional basis. The legislature is not only called upon to start the regulation of matters conferred upon it by the constituent; it is called upon to proceed to its definitive regulation. The eventual judgment of constitutionality is not an assumption of falsification of the legislative proposal but a genuine check of compliance of the secondary rule with the primary rule.

The Court can never rely on the obscurity of the rule which serves as a parameter of control in order to avoid the responsibility of prosecuting the subject matter of the proceedings. The *non liquet* is a denial of justice to the parties and a disregard for the role attributed to the Constitutional Court as "supreme interpreter of the Constitution" by Art. 1(1) of its organic law.

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

Again, it is pertinent to insist that the aforementioned assumptions of judicial deference respond to constitutional reasons, of distribution of powers. These reasons are reinforced, as has also been noted, when it is the democratic legislature the one that acts within the scope of the powers conferred by the Constitution.

When the act subject to control by the Constitutional Court emanates from the administration or the judiciary, institutions that cannot invoke first-degree democratic legitimacy, both the legislature and the Court itself have taken care to carry out a clear demarcation of the scope of intervention. As regards the former, it should be stressed that the Court cannot review the facts at issue in the proceedings, which means that it is not entitled to reconstruct the factual background or to examine it from the point of view of strict ordinary legality. With regard to

the second, the aforementioned distinction between the external control of the Constitutional Court with regard to the preservation of the essential content of fundamental rights, and the maximum irradiation of constitutional provisions, delimits the playing field of the different bodies called upon to materialise the real and effective protection of fundamental rights. Later on, reference will be made to the deference that the Constitutional Court may show towards instances endowed with second-degree democratic legitimation (the government) when it acts with powers immediately conferred by the constitutional text.

7. *"The more 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, courts because are unelected, and they lack the democratic mandate to decide questions of policy?*

As stated above, the Constitutional Court judges the constitutionality of legal provisions and acts (where appropriate, of omissions or simple actions without legal warrant, when the public authorities are constitutionally obliged to intervene or have done so in complete disregard of the legally established procedure), never of public policies. These public policies are embodied in rules, the conformity of which with the Constitution can be brought before the Court. But it is in no case for this Court to pronounce on the public policy in question, but rather to examine whether the specific provisions in which it has been enshrined fall within the sphere of powers held by the body that approved them.

Moreover, it is interesting to note that Chapter III of Title I of the Constitution sets out a series of "guiding principles of social and economic policy". In relation to these and in coherence with the provisions of Art. 53(3) SC, the Constitutional Court has recognised a greater freedom of configuration to the lawmakers [CCJ 116/1999, of 17 June (ECLI:ES:TC:1999:116), in relation to assisted reproduction techniques][22].

The need to stick to this area of action is all the more so since the Spanish democracy is not a *militant democracy*: "There is no room in our constitutional system for a model of 'militant democracy' [...], that is, a model in which no respect for, but positive adherence to the system and, first and foremost, to the Constitution, is imposed. The inexcusable premise of the existence of a normative core inaccessible to constitutional amendment procedures that, by its simple intangibility, could be set up as an autonomous parameter of legal correctness, so that

[22] In general, the Constitutional Court recognises broad freedom of configuration to the lawmakers where the constituent power has limited itself to defining the guiding principles of an institution. Inter alia, CCJ 45/1989, of 20 February (ECLI:ES:TC:1989:45), in relation to the tax system.

the mere attempt to affect it would render the conduct unlawful, even if it nevertheless scrupulously complied with the normative procedures" [CCJ 48/2003, of 12 March, PoL 7 (ECLI:ES:TC:2003:48)].

The absence of an unavailable core for the power of amendment does not in any way diminish the Court's tasks. On the contrary, in the examination of the rules in which the different political options are embodied, it is up to the Constitutional Court to delimit those cases in which the change requires an amendment of the fundamental text itself, the ultimate solution to the political problems that could derive from a possible negative judgment contrasting the enabling constitutional rule and the contested secondary rule.

It is not for the Constitutional Court to participate in the process of positive definition of public policies but exclusively to formulate a judgment – as "negative legislature" – on respect for constitutional limits. Thus, there is no doubt that the Court is obliged to respect and preserve the basis of the social and democratic rule of law founded by the Spanish Constitution itself [Art 1(1)]. Non-delegable legislation constitutes a reservation of procedure and of public and transparent deliberation of matters that concern the citizens as a whole.

In the words of the aforementioned CCJ 11/1981, of 8 April, PoL 7 (ECLI:ES:TC:1981:11), "on one level it is necessary to situate political decisions and the political judgment that such decisions merit and on another different level lies the qualification of unconstitutionality, which should be made in the light of extremely rigorous legal criteria. The Constitution is a framework of coincidences sufficiently broad to provide room for political options of extremely different kinds. The work of interpreting the Constitution does not necessarily consist of closing the door on options or variants imposing one of them in an authoritarian manner. This conclusion should only be reached when the unanimous nature of the interpretation is imposed by the play of interpretive criteria. We wish to state that the political and government options are not previously programmed once and for all, so that all that remains to be done in future is implement that previous programme."

8. *Does your Court accept a general principle of Deference in judging criminal philosophy and policies?*

In relation to the criminal assessment of proportionality, the Spanish Constitutional Court has issued case-law summarised in CCJ 127/2009 of 26 May (ECLI:ES:TC:2009:127). In this judgment, the constitutionality of the definition of the offence of minor coercion in cases of gender violence is examined when the passive subject of the offence is a woman and the active subject is a man, and provided that she has been his wife or a person linked by an analogous

relationship of affection, even without cohabitation. Finally, PoL 8 of this judgment declares that that proportionality review must start with the recognition "of the exclusive power of the lawmakers to configure the criminally protected rights, the criminally punishable conduct, the kind and amount of criminal sanctions, and the proportion between the conduct it seeks to prevent and the penalties with which it intends to achieve it", and that in this configuration, "which involves a *complex judgment of opportunity,* the lawmakers enjoy a wide margin of freedom, so that the judgment of this court must therefore be very cautious". It merely verifies that the criminal rule does not produce a manifestly useless waste of coercion that renders the rule arbitrary and undermines the elementary principles of justice inherent in the dignity of the person and the rule of law'. The proportionality of a penal reaction can be affirmed when the rule pursues 'the preservation of rights or interests that are neither constitutionally proscribed nor socially irrelevant', and when the penalty is 'instrumentally suitable for this pursuit', and necessary and proportionate in this sense. 'From a constitutional perspective, it will only be possible to classify the criminal rule or penalty as unnecessary when, in the light of logical reasoning, of uncontroversial empirical data and of the set of penalties that the lawmakers themselves have deemed necessary to achieve similar aims of protection, the manifest sufficiency of an alternative means which is less restrictive of rights for the equally effective achievement of the aims desired by the lawmakers is evident ...and the criminal rule or punishment can only be considered disproportionate when there is a patent and excessive or unreasonable imbalance between the punishment and the purpose of the rule, based on the constitutionally indisputable axiological guidelines and their implementation in the legislation' (CCJ 136/1999, of 20 July, PoL 23; also, CCJs 55/1996, of 28 March, PoLs 6 et seq; 161/1997, of 2 October, PoLs 9 et seq; CCOs 233/2004, of 7 June, PoL 3; 332/2005, of 13 September, PoL 4)"[23].

Of particular interest is CCJ 169/2021 of 6 October 2021 (ECLI:ES:TC:2021:2021). On this occasion it was not just the classification of criminal offences but, in particular, the introduction of a new penalty (reviewable permanent imprisonment), whose compliance with the constitutional prohibition of inhuman and degrading punishment (Art.15 SC) was in dispute.

[23] In CCJ 136/1999 of 20 July (ECLI:ES:TC:1999:136), the appeal for *amparo* made by the members of the national bureau of Herri Batasuna was upheld against the conviction imposed on them for the commission of an offence of collaboration with an armed gang; the ruling noted that an "unnecessary or excessive sacrifice of rights may occur either because a criminal reaction is unnecessary or because the amount or extent of the penalty is excessive in relation to the offence (disproportion in the strict sense)" (PoL 22). CCJ 55/1996, of 28 March (ECLI:ES:TC:1996:55) aimed at regulating criminal offences related to the right of conscientious objection to military service. CCJ 161/1997, of 2 October (ECLI:ES:TC:1997:161), aimed at regulating criminal offences related to the refusal to undergo an alcohol test.

In this respect, the judgment starts by identifying the scope of the jurisdiction attributed to the Constitutional Court and the parameters it must use in the exercise of this jurisdictional power:

> "The examination of the criminological justification of a penalty must start from an adequate consideration of the limitations presented by the function of abstract control of the law which falls to this court, limitations which we have emphasised in many previous pronouncements, when we point out that '[t]he processes of authentic criminalisation and decriminalisation, or of increase or reduction of penalties, respond to a series of circumstances which generally affect social sensitivity, in the face of certain behaviours that, when captured by the lawmakers at each historical moment, gives rise to a different reaction of the legal system, from the criminal perspective which is of interest to us here' (CCJ 129/1990, PoL 4), so that 'if in a democratic system the law is the *expression of the popular will*, as stated in the preamble of our Constitution (CCJ 108/1988, 26 July), whoever alleges the arbitrariness of a given law or legal provision is obliged to reason it in detail and offer evidence which in principle is convincing (CCJs 239/1992 of 17 December and 73/2000 of 14 March)' (CCJ 120/2000, of 10 May, PoL 3)" (PoL 6).

Further developing this idea, citing CCJ 55/1996, the 2021 judgment emphasises that '[t]he exercise of its competence to select the legal rights arising from a given model of social coexistence and the conduct that infringes them, as well as to determine the criminal penalties necessary for the preservation of that model, the legislature enjoys, within the limits established in the Constitution, a wide margin of freedom derived from its constitutional position and, ultimately, from its specific democratic legitimacy. It can therefore be affirmed not only that, as it cannot be otherwise in a social and democratic State governed by the rule of law, it is the exclusive responsibility of the lawmakers to design criminal policy, but also that, with the exception imposed by the aforementioned elementary guidelines that emanate from the Constitution, they are totally free to do so. Hence, in concrete terms, the relationship of proportion that a criminally typical behaviour must have with the sanction assigned to it will be the result of a complex judgment of opportunity by the legislature which, although it cannot disregard certain constitutional limits, these do not impose a precise and univocal solution."

As we have said repeatedly, the definition of such a public policy is not subject to prosecution by the Constitutional Court, since "[a]s we stated in CCJ 11/1981, 'on one level it is necessary to situate political decisions and the political judgment that such decisions merit and on another different level lies the qualification of unconstitutionality, which should be made in the light

of extremely rigorous legal criteria. The Constitution is a framework of coincidences sufficiently broad to provide room for political options of extremely different kinds. The work of interpreting the Constitution does not necessarily consist of closing the door on options or variants imposing one of them in an authoritarian manner.' (PoL 7). Therefore, far from evaluating its convenience, its effects, its quality or perfectibility, or its relation to other possible alternatives, we must only consider its constitutional framework when asked to do so. Hence, a hypothetical rejection of a questioned criminal rule affirms nothing more or less than its subjection to the Constitution, without implying, therefore, in any way, any other type of positive assessment of it".

Finally, the control of the constitutionality of the rules that specify this criminal policy is delimited by the recognition "of the exclusive power of the lawmakers to configure the criminally protected rights, the criminally punishable conduct, the kind and amount of criminal sanctions, and the proportion between the conduct it seeks to prevent and the penalties with which it intends to achieve it, and that in this configuration, which involves a complex judgment of opportunity, the lawmakers enjoy a wide margin of freedom, so that the judgment of this court must therefore be very cautious". (CCJ 169/2021, PoL 6).

9. *There may be narrow circumstances where the government can reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?*

The legal configuration of the constitutional processes existing in the Spanish legal system makes it particularly difficult to create a situation such as that described in the question. This does not mean that there is no example of judicial review of the exercise of the power to classify information in the interests of preserving national security.

This is the case of the judgment of the Plenum of the Administrative Chamber of the Supreme Court of 4 April 1997 (ECLI:ES:TS:1997:2389), which challenged the declaration as secrets of certain documents whose knowledge was relevant for the cleansing of criminal responsibilities. On that occasion the Supreme Court began by admitting "the objective existence of acts of political leadership of the Government in principle immune to judicial review of legality, although not to other reviews, such as those derived from political responsibility or the judicial treatment of compensation that may give rise" (PoL 7). In the Court's opinion, this admission did not prevent it from assuming this control "when the legislature has defined, by means of *judicially accessible concepts*, the limits or prerequisites to which these acts of political direction must be subject. In that case, the Courts must accept

the examination of the possible excesses or non-compliance with the prerequisites that the Government may have incurred in taking the decision". It is this idea of *judicially accessible concepts* that leads us to state that if we clearly established the link between the documents, their classification as secrets and the security of the State, there is no reason for us not to consider that it is also accessible for us to negatively determine the concurrence of elements that either completely eliminate the impact on that security or reduce it in terms that – by weighing the legal interests at stake – allow us to give precedence, where appropriate, to the constitutional right to effective judicial protection invoked by the appellants to request declassification"[24].

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?*

In the case-law of the Spanish Constitutional Court, we observe that the identification of areas where particularly strict control is applicable is made by reference to the case-law developed in this respect by the European Court of Human Rights. Suffice to review the following examples:

- In CCJ 136/1999, of 20 July (ECLI:ES:TC:1999:136), it recalls that, according to the Strasbourg Court's case-law, "interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court *(Castells v. Spain*, cited above, § 42 and *Incal*, § 46)" [PoL 24, also, CCJ 45/2022, of 23 March, PoL 13(3)(4)(B)(b) (ECLI:ES:TC:2022:45)].
- In CCJ 70/2021, of 18 March (ECLI:ES:TC:2021:70), it held that "the Strasbourg court carries out a particularly strict control when it comes to parliamentary minorities. It recognises that opinions contrary to the political system in question must always be protected, even when they seek its total transformation, but, it warns, always with democratic loyalty: 'It is of the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself' (ECtHR judgment [GC] *Freedom and Democracy Party (ÖZDEP) v. Turkey,* 8 December

[24] In relation to this judgment, Nuria GARRIDO CUENCA, "El episodio judicial de la desclasificación de los papeles del CESID: las sentencias del Tribunal Supremo de 4 de abril de 1997. Paradojas y paralogismos de un conflicto entre la función de gobierno y el derecho a la tutela judicial efectiva", Revista de Administración Pública, no. 143 (1997), pp. 229 et seq.

1999)" [PoL 3 (B)(a); in the same sense, see the same passage from CCJ 71/2021 of 18 March (ECLI:ES:TC:2021:71).

The cases in which the legislature makes use of the *categories suspected of being discriminatory* set forth in Article 14 SC are also subject to stricter scrutiny [CCJ 67/2022, of 2 June (ECLI:ES:TC:2022:67), PoL 2]:

> "The virtuality of Art. 14 SC is not exhausted [...] in the general clause of equality with which its content begins, but the constitutional provision goes on to refer to the prohibition of a series of specific grounds or reasons for discrimination. 'This express reference to those grounds or grounds of discrimination does not imply the establishment of a closed list of cases of discrimination (CCJ 75/1983 of 3 August, PoL 6), but does represent an explicit interdiction of certain historically entrenched differences which have placed, both by the action of the public authorities and by social practice, sectors of the population in positions, not only disadvantageous, but contrary to the dignity of the person recognised by Article 10(1) EC (CCJs 128/1987 of 16 July 1987, PoL 5. 166/1988 of 26 September, PoL 2; 145/1991 of 1 July, PoL 2). In this sense, the Constitutional Court, either in general terms regarding the list of grounds or reasons for discrimination expressly prohibited by Article 14 SC, or in particular terms, has declared the constitutional illegitimacy of differentiated treatment with respect to those that operate as determining factors or appear to be based only on the specific grounds or reasons for discrimination prohibited by the aforementioned provision.' (CCJ 200/2001, PoL 4). However, as the judgment cited above points out, "this Court has also admitted that the grounds of discrimination prohibited by that constitutional provision may be used exceptionally as a criterion of legal differentiation (in relation to sex, inter alia, CCJs 103/1983 of 22 November, PoL 6; 128/1987 of 26 July, PoL 7; 229/1992 of 14 December, PoL 2; 126/1997, of 3 July, PoL 8...), although in such cases the control canon is much stricter when assessing the legitimacy of the difference and the requirements of proportionality, as well as the burden of proving the justified character of the differentiation" [CCJ 67/2022 of 2 June (ECLI:ES:TC:2022:67), PoL 2].

Moreover, with regard to the judicial review of the so-called "legislative omissions", it seems appropriate to refer to the paper submitted by the Spanish Constitutional Court to the XIV

Conference of European Constitutional Courts, held in Vilnius in May 2008, both dedicated, paper and conference, to the problems of legislative omission in constitutional justice[25].

II. The decision-maker

In his study on the judicial guarantee of the Constitution published in 1928, Hans KELSEN included within the jurisdiction of the constitutional court not only formal laws but also other parliamentary acts which, without taking the form of laws, were necessary by constitutional provision (he expressly mentioned the budget). He added that the powers of constitutional jurisdiction should not be limited to the control of the constitutionality of laws, but they "should [also] be extended to regulations with the force of law, acts immediately subordinate to the Constitution and whose validity depends exclusively on their constitutionality.[26]" For the Austrian jurist, there would be an "intimate affinity" between the review of the constitutionality of laws and the legality of regulations, which would be based on consideration in both cases of general rules.

In his view, there would be two competing views that would postulate the competency of constitutional justice: "on the one hand, the pure notion of guaranteeing the Constitution, which would lead to including in its object the control of all acts immediately subject to the Constitution and only of them; on the other hand, the opposition between general acts and individual acts, which would lead to equating the control of laws and regulations"[27].

In the Spanish legal system, the acts of the public authorities enjoy a presumption of legitimacy, which must be rebutted by whoever challenges them: "acts or rules emanating from legitimate powers enjoy a presumption of legitimacy, which, although it can be challenged by anyone whose rights are violated by them (and in the case of laws, also by those entitled to bring an action of unconstitutionality), makes it necessary to consider the possibility of suspending their validity or enforceability as exceptional. This presumption is, moreover, all the stronger the more direct the connection of the organ with the will of the people is, and therefore reaches its

[25]See "The problems of legislative omission in constitutional jurisprudence (Vilna, 2008). Paper from the Constitution Court of Spain", written by Juan Luis REQUEJO PAGÉS, available at https://www.tribunalconstitucional.es/es/publicaciones/Publicaciones/Coedicion-TCEuropeos-II.pdf, both in Spanish (pp. 4 et seq.) and in English (pp. 39 et seq.).

[26]See Hans KELSEN, "La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)", *op. cit.*, p. 229.

[27] Hans KELSEN, *ibid*, p. 234.

highest degree in the case of the lawmakers, who are precisely the representatives of that will." [CCJ 66/1985, of 23 May (ECLI:ES:TC:1985;66), PoL 3].

The review of the legality of acts of public administrations, as well as the exercise of regulatory powers, corresponds in principle to the administrative judicial system. By express provision of the Constitution, this control is of a jurisdictional nature, since Art. 106(1) SC provides that "the courts" are the ones who "control the regulatory power and the legality of administrative action, as well as its compliance with the purposes that justify it". With specific reference to the control of particular territorial administrations -the autonomous administrations-, Art. 153 (c) SC provides that "the contentious-administrative jurisdiction" will control "the autonomous administration and its regulatory norms".

In development of these constitutional determinations, which incorporate an authentic institutional guarantee of a specialised jurisdictional system, the Organic Law of the Judiciary proclaims in Article 9(4) that the courts and tribunals of the contentious-administrative system:

> "[S]hall hear claims arising in respect of the action of the Public Authorities subject to Administrative Law, with the general provisions of lower rank than law and with Legislative Decrees in the terms established in Article 82(6) of the Constitution, pursuant to the terms of the Law of that jurisdiction. It shall also hear appeals against the inactivity of the Authorities and against their material actions which constitute action without legal warrant. Direct or indirect actions brought against the Tax Foral Rules of the General Bureaus of the Historical Territories of Álava, Guipúzcoa and Vizcaya, which shall correspond exclusively to the Constitutional Court, in the terms established by the fifth additional provision of its Organic Law, are excluded from their jurisdiction[28].

Thus, in Spanish law, the Constitutional Court is reserved exclusively for the control of certain *legislative provisions* with the rank or force of law approved by the Government (decree-laws), an exclusiveness that is denied when the delegated legislation (legislative decrees) is concerned. With regard to *acts* with legal value emanating from the Government (declaration of states of emergency), the guarantee of its judicial review passes through the monopoly recognised by the Constitutional Court, to which reference has already been made above. In

[28]Similarly, Article 1(1) of Law 29/1998 of 13 July 1998 regulating the contentious-administrative jurisdiction: "The Courts and Tribunals of the administrative system shall be aware of the claims which are made in relation to the performance of the public administrations subject to the Administrative Law, with the general provisions of a lower ranking to the Law and the Legislative Decrees when they exceed the limits of the delegation". The exclusion of the control of the foral tax rules appears in Art. 3 (d) of this same jurisdictional law.

the case of regulatory rules, their jurisdictional review is in principle attributed to the contentious-administrative system, with the Constitutional Court being able to exercise subsidiary jurisdiction by way of *amparo*, or alternatively if the regulation is the object of a constitutional conflict of powers that pits the State against an autonomous community or two autonomous community bodies against each other[29].

In the case of foral tax rules, Organic Law 1/2010, of 19 February, attributes to the Constitutional Court the non-exclusive jurisdiction - STC 118/2016, of 23 June (ECLI:ES:TC:2016:118), PoL 3 (d) - of directly challenging them and of preliminary rulings on their validity that may be raised by courts and tribunals. These are very unique rules because they are dictated in an area where there is an effective regulatory reserve in our territorial Constitution. This reserve is the result of the attribution of exclusive competences to the historical territories by Art. 37 of the Statute of Autonomy of the Basque Country. Thus, we find ourselves with general provisions for the direct development of constitutional provisions - here, of the territorial Constitution, made up of the 1978 Constitution and the 1979 Statute of Autonomy for the Basque Country - without there being any intermediary rule between the primary constitutional rule and the secondary regulatory fiscal rule[30].

Among the cases mentioned so far, it seems appropriate to briefly examine the deference shown by the Spanish Constitutional Court when judging the constitutionality of the rules with the

[29] The regulations referred to here are those issued by public administrations in the exercise of regulatory power, the exercise of which, in the case of the General State Administration, is entrusted directly to the national government by Art. 97 SC. Some passages in the Constitutional Court's case-law may lead to confusion about the nature of the so-called parliamentary regulations, which are not rules subordinate to the law but are a direct development of the Constitution or the corresponding Statute of Autonomy in the specific sphere of parliamentary life. This is the case of CCJ 188/1999, of 25 October, PoL 9 (ECLI:ES:TC:1999:188). The confusion is dispelled in CCJ 136/2011, of 13 September (ECLI:ES:TC:2011:136), PoL 6, where parliamentary regulations are characterised as *provisions with the force of law* and it is affirmed that they can integrate the constitutionality block in order to judge the validity of the law when they are interposed between the Constitution (or the Statute of Autonomy) and the specifically contested law in the process concerned: "Among these provisions [having the force of law] are those of parliamentary regulations, 'which in some cases may be considered as rules interposed between the Constitution and the laws and are therefore, in such cases, a condition of the constitutional validity of the latter.' (CCJ 227/2004, 29 November, PoL 2). Thus, although Art. 28(1) OLCC does not mention the parliamentary regulations among those rules whose infringement may lead to the unconstitutionality of the law, 'there is no doubt that, both because of the invulnerability of such procedural rules against the action of the legislature and, above all, because of the instrumental nature that these rules have with respect to one of the highest values of our legal system, that of political pluralism [Art. 1(1) SC], the non-observance of the provisions that regulate the legislative procedure could vitiate the law of unconstitutionality when that non-observance substantially alters the process of will formation within the Chambers' [CCJs 99/1987, of 11 June, PoL 1 (a); and 103/2008, of 11 September, PoL 5]. Regarding the control of the constitutionality of infra-legal norms, see, for example, Francisco CAAMAÑO, *El control de constitucionalidad de disposiciones reglamentarias*, Centro de Estudios Constitucionales, Madrid, 1994.

[30] A critique of the solution devised in Organic Law 1/2010, insofar as it involves attributing the status of law to the foral tax rules, thereby altering the system of jurisdictional competences for their control, in Luis María DIEZ PICAZO, "Notas sobre el blindaje de las normas forales fiscales", Indret 3/2010 (https://www.raco.cat/index.php/InDret/article/view/226147/307720).

rank or force of law most frequently approved by the national government and, to a lesser extent, by the regional governments: the decree laws[31].

Article 86 of the Spanish Constitution authorises the Government to issue regulations with the force of law – which must be validated by Congress within thirty days – "in case of extraordinary and urgent need". In controlling the exercise of this regulatory power, the Constitutional Court has developed a consolidated case-law on the control of an entitling premise - the extraordinary and urgent need - and of the connection of meaning between this premise and the measures adopted to address it.

The case-law on the entitling premise starts from CCJ 29/1982, of 31 May (ECLI:ES:TC:1982:29), which makes clear the already mentioned exclusion of control techniques from administrative discretion, also when the exercise of an emergency regulatory power is concerned. Specifically, in PoL 3 of this decision, it is proclaimed that "in the assessment of what is to be considered a case of extraordinary and urgent necessity, it is compulsory to defer to the purely political judgment of the bodies responsible for the political direction of the State", a deference that "cannot be an obstacle to also extending the examination of the enabling competence to the knowledge of the Constitutional Court, insofar as this is necessary to guarantee a use of the Decree-Law that is in accordance with the Constitution". More specifically, it is stated that the Court "may, in cases of abusive or arbitrary use, reject the definition by the political bodies of a given situation as a case of extraordinary and urgent need, of such a nature that it cannot be dealt with by the emergency legislative procedure. It is clear that the exercise of this power of control by the Court implies that the definition is explicit and reasoned and that there is a meaningful connection between the situation defined and the measures adopted in the Decree-Law". The relevant reasons for assessing the observance of the constitutional limits of this authorisation are those specifically put forward by the Government itself "in the preamble of the regulation, throughout the parliamentary debate on validation, and in the actual drafting" of the disputed regulation (PoL 4).

As can be seen, the Court recognises that the Government has a wide margin of intervention to identify the existence of the entitling premise - extraordinary and urgent need - which also has

[31] The Spanish Constitution entered into force on 29 December 1978. From 1 January 1979 until 31 December 2022, the central authorities of the State have issued a total of 2767 regulations with the force of law. The National Parliament (Cortes Generales) has passed a total of 1913 laws (1533 ordinary laws and 380 organic laws) and the Government has issued 754 regulations with the force of law (684 royal decrees and 70 royal legislative decrees). This means that 27.24 percent of the rules with the force of law passed in democracy have emanated directly from the Government, representing no less than 24.71 percent of the urgent rules approved by the Government. These percentages are significant to say the least.

the limitation of the control to an external review that avoids an "abusive or arbitrary use" of the decree law [CCJ 60/1986, of 20 May (ECLI:ES:TC:1986:60), PoL 3]. It is also important to note that the only valid reasons are those set out in the preamble to the decree-law, the debate on parliamentary validation and those contained in the drafting of the rule, "'since different reasons could never be offered or alter the reasons given at the time" [CCJ 182/1997 of 28 October (ECLI:ES:TC:1997:182), PoL 4].

The reasons for the use of this emergency legislation must refer both to the use of the authorisation contained in Art. 86 SC and to the specific circumstances of the case that justify dispensing with the ordinary parliamentary procedure, with the consequent lack of publicity in the debate, as well as to the specific measures agreed. [CCJ 137/2003, of July 3 (ECLI:ES:TC:2003:137), PoL 5]. With respect to these, the Constitutional Court is empowered to verify the existence of an appropriate relationship "between the defined situation that constitutes the entitling premise and the measures adopted in the Decree-Law (CCJ 29/1982, PoL 3), in such a way that the latter have a direct or congruent relationship with the situation that is to be addressed' (CCJ 182/1997, of 28 October, PoL 3)" [CCJ 196/2015 of 24 September 2015 (ECLI:ES:TC:2015:196), PoL 3 (b)]. The Court referred early on to the importance of this connection of meaning or relationship of appropriateness in its judgment 6/1983, of 4 February (ECLI:ES:TC:1983:6), PoL 5, stating that "although observance of the generic limits of Art. 86 of the Constitution may have existed and the Congress of Deputies may have approved the Decree-Law, *it will always have to be the appropriate regulatory response in accordance with the situation of need alleged as the entitling premise for the implementation of this source of Law"* (emphasis added)[32].

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

As has been noted, it is not for the Constitutional Court to make judgments of epistemic superiority. It is therefore inappropriate to establish a kind of scale of deference between public authorities.

[32] Both approaches critical of the practice of the decree law can be found in two not coincidentally overlapping title studies: Manuel ARAGÓN REYES, *Uso y abuso del decreto ley. Una propuesta de reforma constitucional*, Iustel Madrid, 2016 and Luis MARTÍN REBOLLO, "Uso y abuso del Decreto-ley (un análisis empírico), en *Revista Española de Derecho Administrativo*, núm. 174 (2015), pp. 23 et seq.

The Constitutional Court only tries in sole instance governmental acts or provisions when the government is acting under powers expressly conferred by the Constitution. The institutional basis of deference is fully operative here, given that the parameter of control must be sought in the constitutional bloc itself[33]. A hypothetical imputation of mediate unconstitutionality of the governmental act does not in itself exclude recourse to a weak deference, in the terms we have been dealing with, given that the reasons that the government or the administration may provide to support the constitutional legitimacy of its intervention deserve to be subjected to a judgment of rationality. Obviously, the measures specifically challenged may be subject to a proportionality test. In these cases, the measures will be subject to the usual test in which, having established the legitimacy of the aim pursued, their suitability to achieve that aim, their necessity in the absence of any other less incisive measure on the fundamental rights concerned, and their reasonableness or proportionality in the strict sense of the term, since they are more beneficial to the general interest than harmful to the right at stake, will be examined successively [CCJ 88/2023, of 18 July (ECLI:ES:TC:2023:88), PoL 5 (B)].

Having established the inescapable premise that all public authorities must exercise their powers within the constitutional framework and that the jurisdictional guarantee of the Constitution allows for the supervision of this adequacy, the Constitutional Court is called upon to ensure constitutional supremacy. Of course, that supremacy does not always lead to the subjection of the contested act to particularly intense scrutiny and, in particular, it is not for the Court to invade the space of fiduciary relations between powers and transform it into an area of strict judicial review.

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 Constitutional Court has been cautious in using the parliamentary background of the rules, in particular the Constitution itself. In this regard, it is worth mentioning the following cases:

- In two judgments of 1986, the Court refused to carry out the examination of that background where it was not relevant to rule on the constitutionality of the specifically

[33] Around the elusive figure of the constitutionality bloc, it is essential to read the opinions expressed by Louis FAVOREU and Francisco RUBIO LLORENTE in their monograph from the Spanish-French seminar that addressed the issue, *El bloque de la constitucionalidad*, Civitas, Madrid, 1991. More recently, Itziar GÓMEZ FERNÁNDEZ, "Redefinir el bloque de la constitucionalidad veinticinco años después", Estudios de Deusto 98, Vol. 54/1, Bilbao, January-June 2006, pp. 61 et seq., stressed the difficulties in characterising the bloc.

contested legal provision [CCJs 60/1986 of 20 May (ECLI:ES:TC:1986:60) and 108/1986, of 29 July (ECLI:ES:TC:1986:108)].

- In CCJ 128/1987, of 16 July (ECLI:ES:TC:1987:128) it was emphasised that "the express exclusion of discrimination on the basis of sex finds its specific reason, as it results from the same *parliamentary precedents of Art. 14 SC*, and is unanimously admitted by scientific doctrine, in the desire to put an end to the historical situation of inferiority in which, in social and legal life, the female population had been placed: a situation which, in the area of concern here, results in specific difficulties for women in accessing work and promoting at it" [PoL 5, emphasis added; in the same vein, CCJ 166/1988 of 26 September (ECLI:ES:TC:1988:166), PoL 2, or CCJ 17/2003, of 30 January (ECLI:ES:TC:2003:17), PoL 3].
- CCJ 227/1988, of 29 November (ECLI:ES:TC:1988:227), made use of the parliamentary precedents of Art. 132 SC to appraise the notion of natural public domain (PoLs 14 and 15).
- For its part, in CCJ 137/1989, of 20 July (ECLI:ES:TC:1989:137), PoL 3, it is stated that Art. 149(1)(3) SC, "a provision of perfectly meditated and unequivocal scope, as can be deduced from its parliamentary precedents", "has reserved exclusively to the central organs of the State the totality of the competencies regarding international relations". Similarly, CCJ 188/1989, of 16 November (ECLI:ES:TC:1989:188) makes use of the parliamentary precedents to conclude that the economic planning procedure of Art. 131(2) SC is only required in cases of joint or general planning.
- In CCJ 16/2003, of 30 January (ECLI:ES:TC:2003:16), parliamentary precedents are used to conclude the feasibility of a possible state reform of the economic and fiscal regime of the Canary Islands following an autonomous report.

Historical law has served to delimit the regional competence for the "conservation, modification and development" of civil law itself *ex* Article 149(1)(8) SC. The Constitutional Court has defined this *guarantee of civil forality* from the actual existence, in historical law, of the civil institution that is to be regulated in each case [inter alia, CCJ 88/1993, of 12 March (ECLI:ES:TC:1993:88)]. The same applies to the regional regime of the historical territories of the Basque Country [CCJ 76/1988 of 26 April 1988 (ECLI:ES:TC:1988:76)]. The aforementioned CCJ 227/1988 uses the Historical Water Law to approximate the current legal regime; the same does the CCJ 140/1990, of 20 September (ECLI:ES:TC:1990:140), with respect to the historical forality of Navarre regarding public service, without prejudice to stress

that the sole source of legitimacy of power must be sought in the decision of the constituent power embodied in the Spanish Constitution of 1978 [in this regard, see CCJ 118/2016, of 23 June (ECLI:ES:TC:2016:118), PoL 4: "the historical rights of the regional (foral) territories referred to in that first additional provision cannot be regarded as an autonomous title from which specific competences can be derived, since the provision itself establishes that the update shall be carried out within the framework of the Constitution and the Statutes of Autonomy"].

Especial attention to historical law was shown in CCJ 126/1997, of 3 July (ECLI:ES:TC:1997:126), in order to resolve the question of unconstitutionality raised regarding, among other provisions, Article 13 of the Detaching Law of 1820, Laws 8 and 9 of Title XVII of Book X of the Ninth Collection of the Laws of Spain of 1805, and Law 2 of Title XV of the Second Partida approved by King Alfonso X in the middle of the 13rd century, which established the preference of men over women in succession in the nobiliary titles.

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 been the decision maker?*

By presenting above the constitutional case-law on the justification of the concurrence of the entitling premise of extraordinary and urgent need that empowers the Government to dictate rules with the rank or force of law, it has realised the motivational burden that weighs on the Government and that is called to satisfy to avoid the misuse of this source of law. The standard examination canon is the reasonableness test of the external review which it is for the Court to carry out.

However, scrutiny is most intense when the issue brought to the Court's consideration concerns a conflict between fundamental rights and values of constitutional significance. This is the case, notably, when communicative freedoms (freedoms of expression and information) and the rights to honour and personal and family privacy collide. A recent judgment [CCJ 8/2022, 27 January (ECLI:ES:TC:2022:8), PoL 4] summarises the case-law in these terms:

> "This judgment, as set out in CCJ 93/2021 of 10 May, is not limited to assessing the argumental adequacy, reasonableness or sufficient grounds of the decisions at issue, having regard to the substantive nature of the fundamental rights alleged and the content of the *amparo* jurisdiction. In these cases, it must be insisted that 'the function of this court is not limited to making a simple external judgment of the decisions issued by ordinary judges and courts. Linked to the facts judicially declared proven [Art. 44(1)(b)

OLCC and CCJ 25/2019, of February 25, PoL 2(g)], we must apply the requirements arising from the Constitution to the facts from which those decisions are based in order to determine whether, in judging them, they have been respected or not, even if for this purpose it is necessary to use different criteria from those applied in the instance' (CCJ 93/2021, PoL 3, and case law cited therein)".

The realisation of stricter scrutiny is explained in these cases by the concurrence of constitutional reasons faced in the weighting of which the Constitutional Court has full cognition.

14. *Does your Court defer depend 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?*

When it comes to the preservation of fundamental rights, it should be recalled that the Constitutional Court has declared from its first judgments that "nothing which concerns the exercise by citizens of the rights conferred on them by the Constitution can ever be regarded as alien to this Court" [CCJ 26/1981, of 17 July (ECLI:ES:TC:1981:26), PoL 14]. Based on that premise, it should be noted that even in the most significant case of "strong deference" – CCJ 107/1996, already mentioned, on compulsory affiliation to the official chambers of commerce, industry and navigation – the recognition of a wide margin of decision to the legislature is not explained by the intensity or depth of the study on the adequacy of the rule dealt with in the Constitution, but by the existence of a broad discretion in the hands of the legislature, which, in any event, has moved within the area of uncertainty. Therefore, they are not the means – the study prior to the approval of the standard – but the result – the effectively approved standard – the object and reason for deciding: Object, because the dispute concerns the legal provision adopted by the legislature; reason, because it is for the Court to examine the absence of an insurmountable contradiction of the legal provision questioned with the Constitution. The obligation on the lawmakers not to violate the Constitution is not an obligation to the means but to the results.

15. *Does your Court analyse 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 Constitutional Court has been particularly attentive to the preservation of the rights of parliamentary minorities. This is demonstrated by its case-law on the material limits of the annual budget laws and the right to amend during the parliamentary processing of laws.

- In relation to the laws that approve the general budgets annually, both of the State and of the different autonomous communities, the Constitutional Court has differentiated (a) a necessary content, whether its own or the "essential core of the budget", "consisting of the forecast of revenue and the allocation of expenditure for a financial year, as well as the rules that directly develop and clarify the encrypted statements, that is, the budgetary allocations themselves. This content is essential because it forms the very identity of the budget, so it is not available to the lawmakers (CCJ 152/2014, PoL 3)" [CCJ 145/2022 of 15 November (ECLI:ES:TC:2022:145), PoL 2 (a)(ii)] and (b) a possible content that allows the incorporation of those matters that are directly related to income and expenditure into the budget laws and whose inclusion "is justified as a complement to the economic policy criteria for which that budget is the instrument, on the one hand, and on the other hand, that it is a necessary complement for the greater intelligence and for the better execution of the budget and, in general, of the government's economic policy" [CCJ 234/1999, of 16 December (ECLI:ES:TC:1999:234), PoL 4]. The same judgment explains the material limitation of budget laws as follows: "The inclusion in the annual Budget Law of matters in which these conditions are not met is contrary to the Constitution, for implying an illegitimate *restriction of the powers of the legislature, by diminishing its powers of review and amendment without constitutional basis* and for affecting the principle of legal certainty guaranteed by our Constitution [Art. 9(3) SC], that is to say, the certainty of the Law which requires that a law of constitutionally defined content, as is the General Budget Law, should not contain more provisions than those corresponding to its institutional function delimited by Art. 134(2) SC, due to the uncertainty that a regulation unrelated to that function may cause" (loc. cit., emphasis added). So the constitutionally legitimate content of budget laws is directly related to the limitation of constitutionally established powers of review, amendment and approval.
- With regard to the general limitation of the right to amend, case-law starts with CCJ 119/2011, of 5 July (ECLI:ES:TC:2011:119). On that occasion, the constitutionality of

an amendment of the criminal code introduced by way of amendment to an arbitration law was examined; having discussed the material correlation between the amendment and the amended object, the Court stated:

"Constitution [...] has no express rule concerning the material limits of the right of amendment in the Senate. Nor do Arts. 106 and 107 of the Senate Rules of Procedure, when regulating in a brief manner the procedure for the presentation of amendments in the legislative process in the Senate, include any provision of a material nature referring to the content of those amendments. This, however, does not imply that from the constitutional perspective the *general requirement of connection or homogeneity between the amendments and the texts to be amended* cannot be extracted.

The need for a certain substantive connection between the amendment and the amended text "derives, firstly, from the subsidiary nature of any amendment to the amended text. […]

In fact, amending, both conceptually and linguistically, implies the modification of something pre-existing, the object and nature of which has been determined beforehand; only that which has already been defined is amended. The amendment cannot be used as a mechanism to give life to a new reality, which must also be born of a new proposal. This, transferred to the legislative sphere, means that on the basis of a bill of law, the configuration of what is intended to be a new rule is carried out through its parliamentary discussion by the Chamber in the debate of totality as a decision of the representatives of the popular will to initiate the discussion of this initiative, which responds to certain assessments of those who can do so on their opportunity and on its general lines; having taken that first decision, it opens its parliamentary discussion to outline its specific content through the debate. Now it is indeed possible to introduce changes through the exercise of the right of amendment and by democratically legitimising the rule that is to be born first through public discussion and then through the vote or votes of the rule, according to its nature, as a manifestation of the general democratically configured will" (PoL 6).

Thus, in proceedings of unconstitutionality, the Court has ensured the preservation of the powers of the legislative chambers, which is as much as affirming the rights of minorities to expose their views. It goes without saying that through the appeal of *amparo* against acts

without the value of law by parliamentary chambers (Art. 42 OLCC), the Court can also hear the possible complaint of an illegitimate limitation of the rights of the representative function that corresponds to parliamentarians.

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?*

The original wording of the Organic Law of the Constitutional Court provided for the existence of a preliminary appeal of unconstitutionality against draft statutes of autonomy and organic laws. In the specific case of the statutes of autonomy, the subject-matter of the appeal was constituted, in what is now strictly relevant, by "the finaltext of the draft Statute to be submitted to a referendum in the territory of the respective Autonomous Community" [Article 79(1)(a) OLCC, in its first drafting]. This provision was repealed in 1985 by an organic law (Organic Law 4/1985 of 7 June 1985) which was the subject of a preliminary appeal of unconstitutionality dismissed by CCJ 66/1985, of 23 May (ECLI:ES:TC:1985:66). It should be noted that the *punctum dolens* of the repeal, as the applicants put forward, did not affect the statutes of autonomy that required ratification by referendum so much, but the non-delegable organic legislation for the development and regulation of fundamental rights, a non-delegation that could be conditioned, as the applicants say, by the repeal of this remedy. This claim was answered in the following terms by the Court:

> "The starting point of reasoning, the 'greater value' of fundamental rights, is certainly correct, but not the deduction that is constructed from it. The privileged place that in the general economy of our Constitution occupy the fundamental rights and public freedoms enshrined in it, is beyond doubt. The result is not only the unconstitutionality of all those acts of power, whatever their nature and rank, which harm them, but also the need, so often proclaimed by this Court, to interpret the Law in the manner most favourable to the maximisation of its content. However, it is not possible to deduce from this 'higher value' the 'implicit constitutional requirement' of an institution which, like that of the previous appeal, is not intended to ensure judicial protection for citizens who effectively feel that their fundamental rights have been injured, but to resolve in that jurisdiction the existing differences between constitutional bodies (or parts thereof) as regards the interpretation of constitutional provisions, thus extending, not against the Constitution, but beyond it, the scope of the appeal of unconstitutionality that it

instituted [Arts. 161(1)(a) and 162(1)(a)]. If, as we have stated (CCJ 42/1982, PoL 3) the constitutional enshrinement of a right is not enough to create non-existent remedies by itself, neither does 'the greater value' of fundamental rights as a whole allow us to consider implicit in the Constitution institutions of guarantee that it has not explicitly created" (PoL 2).

Subsequently, several appeals of unconstitutionality were raised before the Constitutional Court that challenged the amendment of different statutes of autonomy. Among them, the new Statute of Autonomy of Catalonia approved by Organic Law 6/2006, of 19 July 2006 should be mentioned, as it has been challenged in seven appeals of unconstitutionality[34].

Finally, Organic Law 12/2015, of 22 December, reintroduced the figure of the preliminary appeal, although limited to the draft organic laws approving autonomous statutes and their amendment. In the preamble to the Law, it is stated as an objective "to guarantee the, not always easy, balance between the special legitimacy that the Statutes of Autonomy have as the basic institutional rule of the Autonomous Communities, in whose approval the Autonomous Communities and the State intervene and, on occasions, the electoral body through referendum, and the respect of this text for the constitutional framework built around the Constitution as the fundamental rule of the State and of our legal system"[35].

[34] Those appeals were resolved by CCJs 31/2010 of 28 June (ECLI:ES:TC:2010:31), which partially upheld the appeal brought by more than fifty deputies of the Popular Party; 46/2010, of 8 September (ECLI:ES:TC:2010:46), which dismissed the appeal raised by the Government of Aragon; 47/2010 of 8 September (ECLI:ES:TC:2010:47), dismissing the appeal brought by the Government of the Balearic Islands; 48/2010 of 8 September (ECLI:ES:TC:2010:48), rejecting the appeal raised by the Government of the Valencian Community, although an interpretation of conformity was introduced; 49/2010, of 29 September (ECLI:ES:TC:2010:49), dismissing the one promoted by the Government of the Region of Murcia; 137/2010, of 16 December (ECLI:ES:TC:2010:137), rejecting the appeal promoted by the Ombudsman, but also with an interpretation of conformity, and 138/2010, of 16 December (ECLI:ES:TC:2010:138), rejecting the appeal filed by the Government of La Rioja.

[35] Early on, Fernando SANTAOLALLA LÓPEZ, "Problemas del recurso previo de inconstitucionalidad", *Revista de Derecho Político*, no. 18-19 (1983), p. 189, warned about the disadvantages of this procedural mechanism, which called into question the principle of majority rule. Subsequently, Pedro CRUZ VILLALÓN, "El control previo, a los veinte años de su suspensión", in *Fundamentos*, no. 4 (2006), p. 288 et seq., pointed to the convenience of integrating prior control with the power of amendment. Shortly before the reintroduction of the prior control of statutes of autonomy and amendment proposals, Javier TAJADURA TEJADA, "El control previo de constitucionalidad una propuesta de reforma constitucional", *El Cronista del Estado Social y Democrático de Derecho*, no. 43 (2014), pp. 56 et seq. reflected on the scope and limits of this way of controlling the constitutionality of acts emanating from Parliament.

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 answers given to the previous sixteen questions have sought to illustrate how the Spanish Constitutional Court has been acting in the definition and preservation of the fundamental rights enshrined in the Constitution. An example of "strong deference" is CCJ 107/1996, of 12 June, cited many times, concerning compulsory affiliation to the official chambers of commerce, industry and navigation and its controversial compatibility with the negative freedom of association. In view of the constitutionally legitimate aims pursued, the Constitutional Court understood that the lawmakers had acted in a manner not reprehensible regarding the uncertainty of the possible collision between compulsory affiliation and negative freedom of association.

The other cases, even those in which the contested decision has been subject to a proportionality review, would find a more appropriate classification as examples of weak deference, where courtesy is shown vis-à-vis the reasons put forward by the body responsible for the contested provision (as far as is now strictly relevant, the lawmakers, including the Government under this group when acting as an emergency lawmaker). However, this should not entail the refusal to review the rule or to prosecute its conformity with the Constitution. In these cases, the Court, when accepting the reasons of the author of the rule, does not act with "strong deference", but rather endorses those reasons and incorporates them, as *ratio decidendi*, into its body of case-law.

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?*

There have been occasions to point out the differences between the essential content of the fundamental right, an absolute limit to the freedom of configuration of the democratic lawmakers, and the effect of maximum irradiation of the contents of the fundamental right. If in the first case the scrutiny of the Constitutional Court must be particularly intense, in the second case the Court is called upon to ensure a content that, although imposed on the judicial bodies (Art. 5 of the Organic Law of the Judiciary), does not prevent further developments or interpretations more favourable to the full development of the constitutional rule.

With regard to the essential content, the following case-law was established in CCJ 11/1981 of 8 April (ECLI:ES:TC:1981:11), cited above:

> "In order to approach the idea of 'essential content' which in Art. 53 of the Constitution refers to all the fundamental rights and which may refer to any subjective rights, irrespective of whether or not they are constitutional, there are two possible courses of action. The first is to attempt to make use of what is generally called legal nature or the means of perceiving or configuring each right. According to this idea it will be necessary to establish a relation between the language used by normative provisions and what some authors term meta-language, or generalised ideas and convictions usually admitted among legal professionals, judges and in general, specialists in law. Often the *nomen* and scope of a subjective right exist prior to the moment when that right is regulated by specific lawmakers. The abstract classification of the law conceptually pre-dates the legislative moment and in this respect it is possible to speak of a *recognisability of this abstract type* in the specific regulation. Law specialists may respond if what lawmakers have regulated is or is not adjusted to what is generally understood by a right of this type. The essential content of a subjective right constitutes those faculties or possibilities of action necessary for the right to be recognisable as pertinent to the type described and without which it would no longer belong to this type, and it has to be included in another, thus denaturalising it, in a manner of speaking. All this refers to the historic moment in time when each case is addressed and the conditions inherent in democratic societies, in the case of constitutional rights.
>
> The second possible course of action for defining the essential content of a right consists in attempting to seek what a significant tradition has called *legally protected interests* as a nucleus and core of subjective rights. It is therefore possible to speak of the essential nature of the content of the right in order to refer to that part of the content of the right which is absolutely necessary for the legally protectable interests, which give rise to the right, to be real, concrete and effectively protected. In this way, the essential content is exceeded or is unknown, when the right is subject to restrictions which make it impracticable, and which hinder it beyond reasonable bounds or deprive it of the requisite protection.
>
> The two courses of action proposed in order to attempt to define what may be understood by 'essential content' of a subjective right are not alternative, nor yet unethical, in fact on the contrary they may be considered as complementary, so that

when required to determine the essential content of each specific right they may be used together to contrast the results achieved by either means." (PoL 8, emphasis added).

Recognisability or recognition of the right and preservation of legally protected interests as the core of the essential content. This being the case, it is difficult for the Constitutional Court to waive the exercise of its jurisdictional power and to renounce establishing both the pre-understanding of the law and the identity of those different legally protected interests. This does not mean that in the exercise of this function it does not weigh the reasons put forward by those public authorities – in particular, the Parliament – called by the Constitution itself from the definition of the right in question.

Answering the question about the existence of more important rights in the Spanish Constitution, it is enough to point out that the differences between constitutional rights have nothing to do with their importance, nor does there exist a distinct hierarchy of fundamental rights. These differences allude to the direct effectiveness of the rights of freedom, which do not require legislative intermediation, as is the case with the rights of provision, to the non-delegable legislation of organic law or ordinary law for the normative development of the right and, finally, to the mechanisms of procedural protection of the rights proclaimed in Arts. 14 to 29 (equality, personal, ideological, freedom of expression...), which incorporate the possibility of recourse to the Constitutional Court in *amparo*. The Constitution must be interpreted jointly and systematically to resolve apparent antinomies. Since there is no unavailable core for the power of amendment, it is idle to consider, also from this perspective, the already rejected hierarchy of constitutional rights.

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?*

Given that the constitutional provisions are characterised by a particularly open texture, an extreme already mentioned above, it is not possible to resort to aphorism *in claris non-fit interpretatio*. It will not be surprising that when the Constitutional Court has invoked this rule it has done so in the interpretation of legal norms. This has been the case of the contrast of state and regional rules where there is a manifest contradiction [CCJs 388/1993, of 23 December (ECLI:ES:TC:1993:388), and 31/2006, of 1 February (ECLI:ES:TC:2006:31)], the determination of the place and deadline for submitting candidates in electoral processes [CCJs 83/2003 of 5 May 2003 (ECLI:ES:TC:2003:83), and 26/2004 of 26 February

(ECLI:ES:TC:2004:26)], or the finding of the existence of provisions, in urban matters, "whose literality is clear and leaves no room for alternative interpretations" [CCJs 148/2012 of 5 July (ECLI:ES:TC:2012:128), PoL 10, and 76/2022 of 15 June (ECLI:ES:TC:2022:76), PoL 4].

The requirement of "quality of the law" refers to the need for possible limitations of freedoms to be accessible to the citizen, that is, in the words of CCJ 184/2003 of 23 October (ECLI:ES:TC:2003:184), PoL 3, "that the rules be precise, clear and detailed". Thus, if the canon *in claris non fit intepretatio* lays down a hermeneutic rule, the quality requirement of the law, as set out in the case-law of the European Court of Human Rights, is a guarantee of the rights of citizens.

The quality requirement of the law refers to the burden placed on the lawmakers to "make the greatest possible effort to ensure legal certainty or, in other words, the *reasonably well-founded expectation of the citizen in what the action of the power in application of law should be"* [CCJ 34/2010, of 19 July (ECLI:ES:TC:2010:34), PoL 5, emphasis added]. Therefore, where limitations to fundamental rights are concerned, it is necessary that the lawmakers not only define precisely the aim justifying intervention in the sphere of freedoms of individuals, but also that the regulation of intervention be made in such terms as to safeguard the predictability of the actions of the public authorities so that citizens can freely program their conduct [CCJ 145/2014, of 22 September (ECLI:ES:TC:2014:145), PoL 7].

The Constitutional Court has emphasised that the requirements of this principle operate with particular intensity in the criminal or sanctioning field [CCJs 219/2016 (ECLI:ES:TC:2016:219), and 220/2016 of 19 December (ECLI:ES:TC:2016:220), PoL 5(a) of both], that in others, where the regulatory requirement is not increased by comparison with the requirement arising from the principle of legal certainty in its subjective aspect (CCJ 135/2018, of 13 December (ECLI:ES:TC:2018:135), PoL 6)[36].

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

In the processes of constitutionality of laws, the Spanish Constitutional Court has hardly needed to deepen the requirement that restrictive measures of law pursue a constitutionally

[36] CCJ 273/2000, of 15 November (ECLI:ES:TC:2000:2000) distinguished for the first time the subjective and objective aspects of the principle of legal certainty, proclaimed by Article 9(3) SC. The certainty of the rule would be included on the objective side, and the certainty of the effects of its application by the public authorities on the subjective side (PoL 9). As can be seen, the delimitation of those contents overlaps, at least partially, with those included in the principle of quality of the law.

legitimate aim. Thus, it is sufficient to point out that in CCJ 60/2015, of 18 March (ECLI:ES:TC:2015:60), PoL 5, it has been stated that, in the case of tax measures establishing a different tax treatment, the lawmakers must provide not only the identification of the constitutionally legitimate aim but also the reasons justifying that difference in treatment.

In any case, the starting point must be sought in the need for any measure limiting fundamental rights to pursue, as an inexorable premise, the realisation or protection of a constitutionally legitimate aim or be aimed at "the protection or safeguarding of a constitutionally relevant good, for 'although this Court has stated that the Constitution does not prevent the State from protecting rights or legal interests at the cost of sacrificing others that are equally recognised and, therefore, that the lawmakers may impose limitations on the content of fundamental rights or their exercise, we have also specified that, in such cases, these limitations must be justified in the protection of other constitutional rights or interests' (CCJs 104/2000, of 13 April, PoL 8 and those cited therein) and, in addition, must be proportionate to the aim pursued (CCJs 11/1981, PoL 5, and 196/1987, PoL 6)' (CCJ 292/2000, PoL 15)." [CCJ 76/2019 of 22 May (ECLI:ES:TC:2019:76), PoL 5].

In *amparo* proceedings, the Constitutional Court has been more incisive in monitoring the concurrence of the constitutionally legitimate aim limiting the measure that restricts the right, requiring, first, that the judicial decision agreeing or ratifying it identifies the constitutionally legitimate aim pursued [CCJ 61/2001, of 6 February (ECLI:ES:TC:2001:61), PoL 4]. If there is no justification, there are grounds to invalidate the decision (CCJ 27/2008 of 11 February (ECLI:ES:TC:2008:27)).

In the area of pre-trial detention, the Constitutional Court has clearly defined the limits of judicial discretion by reducing the constitutionally legitimate aims that can be pursued by this measure to those relating to the prevention of the risk of absconding, the risk of reoffending or the proper administration of justice, as would be the case if the person under investigation were able to steal evidence or unlawfully impede the investigation [CCJ 128/1995, of 26 July (ECLI:ES:TC:1995:128)].

Por otro lado, se ha mostrado especialmente riguroso en la exigencia de identificación del fin constitucionalmente legítimo cuando se acuerda la intervención de conversaciones telefónicas [STC 49/1999, de 5 de abril (ECLI:ES:TC:1999:49), FJ 7] o la entrada en domicilio [STC 8/2000, de 17 de enero (ECLI:ES:TC:2000:8), FJ 4]. Cierto es que el rigor de la exigencia corre paralelo con la generosidad en la consideración de la concurrencia efectiva de ese fin

constitucionalmente legítimo desde el momento en que el Tribunal Constitucional ha concluir que la investigación de delitos reviste esta naturaleza [STC 104/2006, de 3 de abril (ECLI:ES:TC:2006:104), FJ 3]. En esta misma línea, la STC 207/1996, de 16 de diciembre (ECLI:ES:TC:1996:207), FJ 4 A), entendió que concurría un fin constitucionalmente legítimo en las intervenciones corporales (toma de muestras de cabellos) cuando se realizaban para el buen fin de la investigación. Así, tras reconocer que la Constitución Española no contempla la existencia de ningún fin constitucionalmente legítimo que permita limitar el derecho a la integridad física, como sí lo hace, por ejemplo, en el caso de la inviolabilidad domiciliaria, "el interés público propio de la investigación de un delito, y, más en concreto, la determinación de hechos relevantes para el proceso penal son, desde luego, causa legítima que puede justificar la realización de una intervención corporal, siempre y cuando dicha medida esté prevista por la ley". De igual modo, la toma de muestras de ADN se ha entendido que persigue un fin constitucionalmente legítimo porque así lo ha establecido el Tribunal Europeo de Derechos Humanos en su doctrina: "ya hemos dejado constancia de que el Tribunal Europeo de Derechos Humanos ha considerado legítima la práctica de estos análisis cuando está destinada a vincular a una persona determinada con un delito concreto que se sospecha que ha cometido (STEDH de 4 de diciembre de 2008, caso *S. y Marper c. el Reino Unido*, § 100)" [STC 199/2013 (ECLI:ES:TC:2013:199), de 5 de diciembre, FJ 8].

The identification of the constitutionally legitimate aim allows for a real and effective protection of the fundamental rights of prisoners in penitentiary institutions, since that aim must be identified in any measure of interception of the communications of inmates [CCJ 201/1997, of 25 November (ECLI:ES:TC:1997:201), PoL 7], as well as in measures that restrict the privacy of prisoners. This is the case of prison records, in relation to which the Court has declared, in CCJ 89/2006, of 27 March (ECLI:ES:TC:2006:89), PoL 3, that those records affect the right of inmates to privacy. While "it is not an absolute right, as is none of the fundamental rights, [and can] be upstaged against constitutionally relevant interests, [the requirement] that the cut that it is to experience is revealed to be necessary to achieve a constitutionally legitimate aim, proportionate to achieving it and, in any event, be respectful of the essential content of the law, [must] always be fulfilled".

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

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

As we have already pointed out above, the Spanish Constitutional Court submits the restrictive measures of fundamental rights to the "classical" proportionality review. Thus, as recalled in the aforementioned CCJ 88/2023, of 18 July (ECLI:ES:TC:2023:88), PoL 5(B), having established the constitutional legitimacy of the aim pursued, the following are subsequently examined: its suitability to achieve that purpose, its necessary character in the absence of another less sharp on the fundamental rights concerned and its reasonableness or proportionality in the strict sense because it derives more benefits in the general interest than damage to the committed right. Obviously, the application of that proportionality review means that the Court must make the measure at issue subject to an examination of compliance with each of the conditions governing it.

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?*

Based on the principle of the presumption of constitutionality of legislation, it is for those who maintain their unconstitutionality to provide the reasons on which their judgment of invalidity is based. From the perspective of the applicant, the Constitutional Court has spoken "of a genuine 'procedural burden of claiming and proving' that the applicant must provide not only in order to 'collaborate' with constitutional justice 'by means of a detailed analysis of the questions raised' (inter alia, CCJ 152/2017, of 21 December, PoL 1), but also to enable the parties to appear and exercise their right of defence (CCJ 118/1996, of 27 June, PoL 2, among others), a right which does not allow this court to 'reconstruct the claim or to satisfy the applicant's reasons *sua sponte*' (CCJ 65/2020, of 18 June, PoL 9, citing others)" [CCJ 34/2023 of 18 April (ECLI:ES:TC:2023:34), PoL 2 (c)]. However, having lifted that burden and accepted the possibility of formulating the constitutionality judgment, it is for the authority which issued the contested measure 'to provide the reasons which, on the basis of constitutional criteria of proportionality, explain that the right [...] must be limited" [CCJ 88/2023, of 18 July (ECLI:ES:TC:2023:88), PoL 4 (c)]. Consequently, the Constitutional Court cannot consider satisfied the burden placed on the person who complains of the unconstitutionality of a particular measure, giving the reasons that the applicant does not give, and it cannot provide *sua sponte* the reasons not provided by the authority responsible for the measure in question.

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

The first time that the expression "proportionality review" appears in the case-law of the Spanish Constitutional Court is in CCJ 104/1984, of 26 November (ECLI:ES:TC:1984:104), PoL 4. Since then the mention has been constant, reaching almost 300 decisions. It is important to note that on that first occasion the Court did not use the expression to refer to its own jurisdiction but to refer to the usual techniques of judicial protection of fundamental rights. This means that the Constitutional Court assumed, from the first years of its existence, that the proportionality test is an instrument capable of assessing the adequacy of the decision specifically at issue with the parameter of constitutionality in each applicable case.

Some of the cases in which the Constitutional Court has referred to the concurrence of a constitutionally legitimate purpose as an unavoidable premise of the proportionality review of rules and decisions have been described above. Earlier and more recent judgments have been mentioned therein, which means that the Court has been making use of this monitoring technique on the constitutionality of decisions of public authorities practically since its inception.

On the other hand, although it is true that the proportionality review allows to act with a greater degree of deference, it should be borne in mind that it makes it possible to monitor the very purposes of the measures, their suitability, necessity and proportionality in the strict sense. With regard to the control of purposes, it should be recalled that the work of the lawmakers is subject to an end only in negative terms, so that it cannot use the technique of controlling administrative discretion known as "misuse of power". However, to the extent that the Court can judge the constitutional legitimacy of the end, it is provided with another instrument for monitoring the constitutionality of the measure, including the parliamentary rule, which is subject to its scrutiny. In addition, the possibility of assessing alternative measures places the Constitutional Court in a complex position where it could run the risk of not making judgments towards the past (the very essence of the judicial power on the irrevocable determination of law in concrete terms) but of selecting alternatives (a more typical area of politics).

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?

Article 10(2) of the Spanish Constitution states that "the principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain". This constitutional openness to international and European human rights law[37] has favoured the incorporation of the case-law of the European Court of Human Rights into the canon of judgments used by the Constitutional Court. As it itself has stated, "this court has at all times been aware of the value that, by virtue of Art. 10(2) SC, must be recognised to the case-law of the European Court of Human Rights in its interpretation and protection of fundamental rights (inter alia, CCJ 35/1995, of 6 February, PoL 3)" [CCJ 119/2001, of 24 May (ECLI:ES:TC:2001:119), PoL 6; in a case in which the possibility that environmental noise in a private home could affect the rights to physical integrity and to privacy in the home, in connection with the right to health, was being elucidated].

From the outset, the Spanish Constitutional Court has been aware of the existence of many areas in which a certain discretion must be recognised to public authorities. Specifically, in CCJ 62/1982 of 15 October (ECLI:ES:TC:1982:62), it identified the concurrence of a double discretion: on the one hand, the "discretion which corresponds to the decision of the lawmakers for the fixing of sentences" (PoL 6) and, on the other hand, the discretion enjoyed by judges in the formulation of the proportionality judgment (PoL 5). It should be noted that that decision gave consideration to the principle of proportionality as an indeterminate legal concept, which allowed for a prudent balance between the recognition of a margin of intervention by judges and the possibility of monitoring that intervention from the constitutional perspective, given that those same judges, while exercising the *ius puniendi* of the State, act as guarantors of the fundamental rights of citizens [in CCJ 180/1999, of 11 October (ECLI:ES:TC:1999:180), the term used is "legislative legal concept" in relation to honour, a fundamental right recognised in Article 18 of the Spanish Constitution, in whose delimitation judges enjoy discretion in the case, subject to review by the Constitutional Court]. This duality is reflected, in relation to the limitations on communicative freedoms, among others, in CCJs 206/1990, of 17 December

[37] In this regard, it is necessary to quote Alejandro SAIZ Arnáiz's monograph, *La apertura constitucional al derecho internacional y europeo de los derechos humanos: el artículo 10.2 de la Constitución española*, Consejo General del Poder Judicial, Madrid, 1999.

(ECLI:ES:TC:1990:206); 127/1994 of 5 May (ECLI:ES:TC:1994:127) and 235/2007 of 7 November (ECLI:2007:235).

The Constitutional Court mentioned, although not as a *ratio decidendi*, the case-law of the European Court of Human Rights on the discretion of the national authorities in CCJ 198/2012 of 6 November (ECLI:ES:TC:2012:198), in relation to the regulation of same-sex marriage. As an argument *ex abundantia*, in CCJ 41/2013, of 14 February (ECLI:ES:TC:2013:41), it declared unconstitutional the requirement of having children in common for the benefit of a widow's pension, since it constitutes a situation of discriminatory and unfavourable treatment for same-sex couples.

In CCJ 140/2018, of 20 December (ECLI:ES:TC:2018:140), the Constitutional Court prosecuted the constitutionality of the regulation of universal justice contained in the Organic Law on the Judiciary. This judgment recalls that there is no single model for the universal extension of jurisdiction in the Council of Europe's human rights system, which is expressed mainly through the case-law of the European Court of Human Rights, which, assuming that the procedural guarantees set out in Article 6 ECHR would not make any sense if the right of access to courts were not previously protected; that is to say, the right of access to jurisdiction as an element inherent in the guarantees enshrined in Article 6 ECHR recognises that this is "a right which is devoid of an absolute nature and that it is subject to the limitations implicitly admitted in so far as it requires regulation on the part of States which enjoy a certain discretion in the development of such regulation [...] Such discretion cannot, on the other hand, lead to limitations restricting access to the jurisdiction of the individual in such a way that the right is affected in its essence" (PoL 5).

26. *Has the ECtHR condemned your State of the Deference given by your Court in a specific case, a Deference that you have made it an ineffective remedy?*

Spain has been convicted twice by the European Court of Human Rights in cases where the violation of the 1950 Convention was directly and immediately related to the action of the Constitutional Court: In its judgment of 23 June 1993, *Ruiz Mateos v. Spain*, the Strasbourg Court found that the applicant's right to a public trial with full guarantees had been infringed because the national procedural law had not allowed him to appear in the question of unconstitutionality raised in relation to a particular decree-law governing the expropriation of the group of undertakings of which he was the owner. In the judgment of 22 June 2023, *Lorenzo*

Bragado et al. v. Spain, the same right, proclaimed in the article of the 1950 Convention, was violated in relation to the inadmissibility of an *amparo* appeal filed in relation to the delay in the renewal of the General Council of the Judiciary.

As can be seen, none of these two cases corresponds to the assumptions referred to in the question.

IV. **Other peculiarities**

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

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

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

It is clear from the above statement that the Spanish Constitutional Court has shown from a very early stage its institutional courtesy both in the processes of unconstitutionality and in others that have as their immediate purpose the protection of the fundamental rights and public freedoms of citizens. With some significant exception [CCJ 107/1996, of 12 June (ECLI:ES:TC:1996:107), concerning compulsory affiliation to the official chambers of commerce, industry and navigation, an example of strong deference], the Court has been demonstrating what has come to be called *weak deference.* It weighs the reasons put forward by the author of the rule or decision, acting against them with the appropriate institutional respect, which does not imply the leaving of judicial power in the hands of the person responsible for issuing the provision or decision whose constitutionality is disputed in the case[38].

There are no statistical data that allow us to draw the evolutionary line of the deferential attitude shown by the Constitutional Court in its forty-two years of operation. However, it is possible to state, without risk of error, that this deference has no connection with the workload of the

[38] In the scientific doctrine, Víctor FERRERES COMELLA, *Justicia constitucional y democracia*, Centro de Estudios Políticos y Constitucionales, Madrid, 2012, 2nd edition, provides very solid reasons in favour of a weak deference such as that shown by the Spanish Constitutional Court and which provides incentives for the lawmakers to weigh in particular the constitutional framework in which they are called to perform their powers and functions.

Court. The response to the increase in the demand for constitutional justice has been sought in the procedural tools, particularly in the process of granting *amparo* appeals (Organic Law 6/2007, of 24 May, which introduced the motion to vacate proceedings as an ordinary remedy for possible violations of fundamental rights and objected to this procedure of admission with the requirement of special constitutional significance), and even in the search for alternative solutions to appeals of unconstitutionality regarding conflicts of power (Organic Law 1/2000, of 7 January, which extended the time limits to file appeals when it came to the negotiation of the territorial powers –between the State and the autonomous communities– in order to solve the conflict of powers). Note, however, that, at the same time, the lawmakers, making use of the power conferred on them by Article 161(1)(d) of the Spanish Constitution, has given the Court new powers to hear the conflict in defence of local autonomy (Organic Law 7/1999 of 21 April 1999), or the proceedings that may be impeded in relation to the fiscal rules approved by the Basque historical territories (Organic Law 1/2010 of 19 February 2010). Thus, the lawmakers' own assessment of the Court's workload does not seem conclusive, since the introduction of mechanisms to lighten it has usually been accompanied by the creation of new procedures and, therefore, by an increase in the demand for constitutional justice.

30. *Can your Court base its decisions on that reasons 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?*

According to Article 39(2) of its organic law, the Constitutional Court "may ground the declaration of unconstitutionality on the violation of any constitutional provision, regardless of whether it was invoked during the proceedings". A legal provision conferring on the Court powers to act *sua sponte* which must be in line with the provisions of article 84 of its organic law. According to this provision, the Court "may, at any time prior to delivering judgment, inform the parties to constitutional proceedings of the possible existence of other grounds, different from those invoked, of sufficient importance to warrant an appropriate ruling on admissibility and rejection and, when appropriate, on the granting or dismissal of the constitutional complaint". The first rule [Art. 39(2) OLCC] is established for unconstitutionality proceedings (appeal and question of unconstitutionality), while the scope of application of the second rule (Art. 84 OLCC) extends to all constitutional proceedings.

At least two problems arise from these legal provisions: the material limits of the change in the canon of prosecution and the possibility of dispensing the procedure to the parties in the proceedings of unconstitutionality, particularly in the case of questions of unconstitutionality.

Regarding the first one, it appears that the *ex officio* extension of the trial canon is intended to realise the principle of unity of the Constitution, the full content of[39]which must be taken into account by the applicants when initiating the proceedings, as well as, obviously, by the Court in resolving it. That said, it does not seem that the power conferred by Article 39(2) OLCC allows the Constitutional Court to declare the unconstitutionality –and, where appropriate, nullity– of legal provisions for reasons which are outside the very object of the process in which that power is used –i.e. violation of constitutional rules. For example, this possibility of extending the canon could not be used to declare a certain legal provision unconstitutional for material or substantive reasons where the positive conflict of jurisdiction has been processed as an appeal of unconstitutionality in accordance with the provisions of Article 67 OLCC. In that case, the parameter of validity of the legal rule would have to adhere to those provisions of the body of constitutionality that distribute competences between the State and the autonomous communities. The same applies to the internal question of unconstitutionality provided for in Article 75 quinque (6) OLCC, where the only defect to raise should be, in coherence with the regulation of the specific constitutional process, the violation of the principle of local autonomy.

With respect to the possibility of making use of the power of Art. 39(2) OLCC without starting the hearing of the parties (Art. 84 OLCC) in unconstitutionality proceedings, it is appropriate to begin by recalling the full applicability of the first of these provisions to the question of unconstitutionality, even though the order raised by the promoting judicial body -which does not have and cannot have the procedural status of party- delimits the object of the constitutional proceedings. This "does not mean that the power governed by Article 39(2) OLCC, included in a chapter common to unconstitutionality proceedings in which the questions of unconstitutionality are included, should not be exercised by the Court in cases where, with a *certain degree of initial certainty*, it can be seen that the rule at issue may incur unconstitutionality by breach of a constitutional provision other than that invoked by the questioning judicial body" (CCJ 113/1989 of 22 June, PoL 2). In the same vein, CCJ 295/2006,

[39] Javier JIMÉNEZ CAMPO, "Consideraciones sobre el control de la constitucionalidad de la ley en el Derecho español", in AA. VV., La jurisdicción constitucional en España: la Ley Orgánica del Tribunal Constitucional, 1979-1994 (Coloquio internacional. Madrid, 13-14 October 1994), Centro de Estudios Constitucionales, Madrid, 1995, p. 94.

of 11 October, PoL 5)" [CCJ 196/2014, of 4 December (ECLI:ES:TC:2014:196), PoL 5, emphasis added].

That reference to the *initial certainty* that must characterise the ground of unconstitutionality makes it possible to incardinate both legal rules, so that when it is found, already in the admission procedure, that the legal provision in question can – with a high degree of probability – incur a defect of unconstitutionality for a reason other than the alleged one and as long as that defect is related to the judicial process in which the question was raised, the Court may hear the parties involved, including those who were also in the ordinary judicial proceedings and have made use of the power conferred on them by Article 37(2) OLCC . Moreover, in unconstitutionality proceedings, the hearing will take place when the Court finds that there is a defect not alleged by the applicants, and not necessarily in the case of a mere divergence in the classification which does not affect the ground of unconstitutionality specifically raised[40].

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

According to Article 39(1) of its organic law, when the Constitutional Court annuls any legal provision "it shall also declare invalid [...] any other provisions of the same law, regulation or enactment having the force of law to which it must be extended by association or consequence". In what is now of interest, this legal provision presents three relevant notes: First, the power mentioned here can only be used in unconstitutionality proceedings and with respect to rules or acts with the force of law. Second, the extension of the effects of the judgment is, in any event, limited to the same law of which the provision specifically at issue forms part, without it being capable of reaching other legal texts, however intense the material connection that may be established between the legal provision at issue and those contained in the other legal texts. Finally, there must be an identity of reason (connection) or the provision to be annulled under Art. 39(1) OLCC must be entirely deprived of meaning (consequence). Thus, the applicants' situation is not the basis to extend the nullity to provisions that were not expressly challenged, or whose challenge was inadmissible; the basis is the fact of having the same defect of unconstitutionality[41].

[40] See Javier JIMÉNEZ CAMPO, *ibid*., pp. 94 et seq.
[41] In CCJ 365/2006, of 21 December (ECLI:ES:TC:2006:365), the Constitutional Court rejected the challenge of a large number of provisions of the Law on spatial planning and urban planning of Castilla-La Mancha, which were subsequently annulled by connection or consequence.

The judgment to be delivered in *amparo* proceedings must contain the provisions of Article 55(1) OLCC: (a) recognition of the fundamental right or freedom violated, (b) declaration of nullity of the decision, act or resolution that impeded the full exercise of protected rights and freedoms and (c) full restoration of the applicant's right or freedom "and adoption, where appropriate, of measures for its preservation". The Court has been wary of using this power; from CCJ 211/1989 of 19 December (ECLI:ES:TC:1989:211) on, it has made use of it to annul "the judicial proceedings that took place from the moment the defencelessness originated, declaring the nullity even of the final judgment that terminated the proceedings, *not because of its intrinsic content, but because it was the culmination of a flawed procedure"* (PoL 3; emphasis added). The same criterion has been maintained in respect of decisions prior to that in which the harm materialises, with the exception that, for practical reasons, this annulment does not imply a complete resumption of the proceedings where there is a decision to satisfy the fundamental right infringed in the least onerous way possible [CCJ 71/1991, of 8 April (ECLI:ES:TC:1991:71), on that occasion in employment matters, or CCJ 367/1993, of 13 December (ECLI:ES:TC:1993:367), in civil proceedings].

It should be noted that the "appropriate measures" for the preservation of the fundamental right referred to in Art. 55(1)(c) OLCC do not include, in accordance with the case-law of the Constitutional Court, reparation by means of the delivery of an economic equivalent. The refusal to grant compensation is based, from the outset, on the lack of jurisdiction of the Constitutional Court to determine the amount of compensation: "it is not for this Court to rule on damages" [inter alia, CCJ 87/1998, of 1 April (ECLI:ES:TC:1998:87), PoL 7][42]. This formula is also used in CCJ 87/2004, of 10 May (ECLI:ES:TC:2004:87), which nuances it by making express reference to the circumstances of the case: "the measures that... correspond to the re-establishment of the appellant's right, given the circumstances prevailing in the present case, must be the responsibility of the judicial bodies" (PoL 6; the proceedings were then taken back to the moment before the appeal judgment was handed down, which could be ruled, with full cognition, on all the factual and legal aspects of the proceedings). Of particular interest is

[42] Some authors -Germán FERNÁNDEZ FARRERES, *El recurso de amparo según la jurisprudencia constitucional*, Marcial Pons, Madrid, pp. 366 et seq., or Carmen CHINCHILLA MARÍN, comentario al artículo 58 en Juan Luis Requejo Pagés (coordinator), *Comentarios a la Ley Orgánica del Tribunal Constitucional*, Tribunal Constitucional/Boletín Oficial del Estado, Madrid, 2001, p. 927- have pointed to the birth of an alternative line of case-law, soon to wither away. With regard to undue delays, CCJ 36/1984, of 14 March (ECLI:ES:TC:1984:36), stated that "injuringthe right to a trial without undue delay creates, by mandate of the Constitution, a right to be compensated for the damages that such violation produces, when it cannot be otherwise remedied. The law may regulate the scope of that right and the procedure to enforce it, but its very existence stems from the Constitution and is to be declared by us" (PoL 4).

CCJ 144/2005 of 6 June (ECLI:ES:TC:2004:144), where, exceptionally, the possible claim for damages is connected with Article 55(1)(c) OLCC, in the following terms:

> "As we have pointed out on as many occasions as the issue has been brought before us, this Constitutional Court lacks jurisdiction to resolve, as if it were a new instance, petitions for recognition of compensation for damages, since a pronouncement of this type, aimed at obtaining restitution, compensation or reparation as a substitute, does not correspond to any of those that this Court can make when resolving appeals for *amparo*, as enumerated in Art. 55 OLCC (CCJ 37/1982, of 16 June, PoL 6), and as is also deduced from Art. 58 OLCC, which defers to the ordinary jurisdiction its declaration in a particular case whose raison d'être can be extended to the entire institution" (PoL 9).

Article 58 OLCC refers to the judicial bodies the knowledge of the claims for damages deducted in connection with the precautionary measures that may be taken by the Constitutional Court in *amparo* proceedings. The mention of the *raison d'être* alludes to the exception that Art. 58 OLCC represents with respect to the general rule that attributes jurisdiction to resolve this issue to the judicial body that has jurisdiction to resolve the main claims (e.g. Art. 742 LCP).