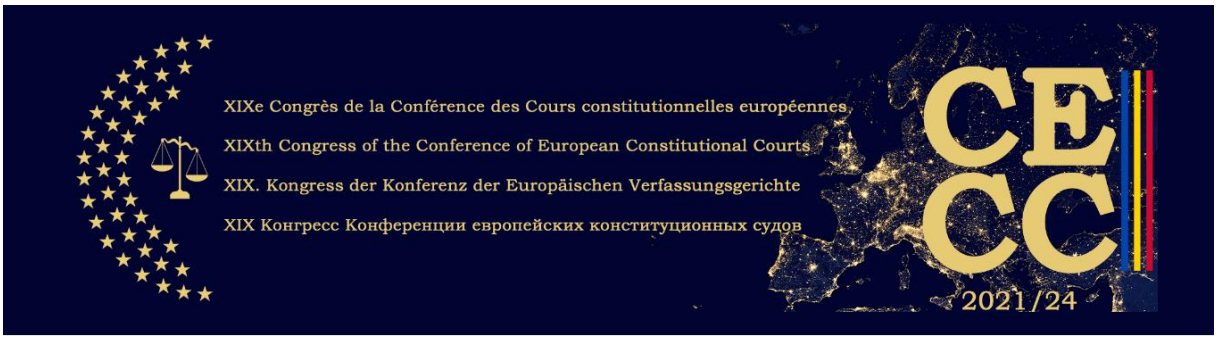

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REPUBLIC OF CROATIA / REPUBLIQUE DE CROATIE /
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The Constitutional Court of the Republic of Croatia /
La Cour Constitutionnelle de la République de Croatie /
Das Verfassungsgericht der Republik Kroatien /
Ustavni sud Republike Hrvatske

English / Anglais / Englisch / Engleski

REPUBLIC OF CROATIA
CONSTITUTIONAL COURT

ANSWERS TO THE QUESTIONNAIRE FOR THE XIXth CONGRESS OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS

(Chișinău, 21 - 24 May 2024)

Subject:

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

Zagreb, January 2024

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Main abbreviations and acronyms

ECtHR – European Court of Human Rights in Strasbourg
ECJ – Court of Justice of the European Union
EU – European Union
CACC - Constitutional Act on the Constitutional Court
Convention – European Convention on Human Right and Fundamental Freedoms
Constitution – Constitution of the Republic of Croatia
Court – Constitutional Court of the Republic of Croatia
Supreme Court – Supreme Court of the Republic of Croatia

I. Non-justiciable questions and deference intensities

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

The doctrine of judicial deference *stricto sensu* does not formally apply in Croatian constitutional law. Rather, the scope of action of the Constitutional Court of the Republic of Croatia (the Court) is based on its jurisdiction as defined by the Constitution of Croatia. This in turn means that the Court can hear on the merits only those acts of the legislative and the executive branches of power or ordinary courts that fall within its specific jurisdiction and raise constitutional issues, in which case it exercises its own independent judgment on these matters. In addition to its formally defined jurisdiction, the Court is also guided by the constitutional values enshrined in Article 3 of the Constitution, which allow it to abandon a formal approach in interpreting the Constitution and laws and consequently to move from the realm of the "negative legislator" to that of the "positive legislator"[1].

As for the legislative branch of power, according to the first indent of Article 2(4) of the Croatian Constitution, it enjoys a wide political margin of appreciation in regulating economic, political and social relations, whereby it has been originally limited by and has dealt with core constitutional substantive[2] and procedural[3] requirements. However, since the entry into force of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) in respect of Croatia, the scope of this margin has continued to vary in individual cases depending on the importance of the interests at stake[4] and the application of the proportionality test[5]. Should the legislator or other decision-maker fail to take these considerations into account, the Court may intervene to invalidate political choices through its legal assessments and, where appropriate, override them with its own value judgments on the reasonedness of a law or other regulation[6].

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[1] Arlović, M., *Međuodnos između pozitivnog i negativnog zakonodavca u Republici Hrvatskoj*, [Mutual Relationship between the Positive and the Negative Legislator in the Republic Croatia], Journal of Law and Social Sciences of the Law Faculty of the University J.J. Strossmayer in Osijek, Vol. 34, nos. 3-4, 2015, p. 246. See also Omejec, J., *O potrebnim promjenama u strukturi hrvatskog ustavnog sudovanja* (prilog reformi ustavnog sudovanja) [On Necessary Changes in the Structure of the Croatian Constitutional Judiciary (a contribution to the constitutional judiciary reform), Journal "Hrvatsko ustavno sudovanje" [Croatian Constitutional Judiciary] of the Croatian Academy of Sciences and Arts, 2009, p. 31.

[2] Such as "classical" fundamental rights, i.e. constitutional rights, freedoms and values, like the rule of law (decision no. U-I-659/1994 of 15 March 2000 and decision no. U-I-722/2009 of 6 April 2011), democratic multi-party political system (decision no. U-I-1203/1999 of 3 February 2000), the right to a legal remedy (decision no. U-I-248/1994of 13 November 1996), the right to work and the right freely to choose and practice an occupation.

[3] Type of procedure, required majority for adoption of a law, etc.

[4] ECtHR case *Ivinović v. Croatia*, no. 13006/13, judgment of 18 September 2014, § 37.

[5] In decision no. U-I-1156/1999 of 26 January 2000 the Court, modelling its approach patently after the ECtHR case-law and relying on the *argumentum a fortiori*, had applied this principle before it was formally incorporated into the Constitution in 2000 (see Barić, S., *The Transformative Role of the Constitutional Court of the Republic of Croatia: From the ex-Yu to the EU*, Analitika - Centre for Social research, Working Paper 6/2016, p. 16) by stating that although "the Constitution explicitly requires the implementation of the principle of proportionality (the proportionality test) under in exceptional circumstances, [...] this principle should be even more so valid under 'ordinary circumstances' in the country".

[6] Burazin L., Gardašević Đ. and Krešić M., *Constitutionalization of the Croatian Legal Order*, Collected Papers of Zagreb Faculty of Law, p. 246.

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.)?

The Court will delve neither into resolving moral controversies[7] and social, economic[8] and political issues contained in a piece of legislation, nor into examining (the quality of) the chosen legislative model, its structure or purposefulness, thus maintaining its neutrality in relation to these matters[9]. Instead, it will assess whether the legislator has respected core constitutional principles such as equality and equity in making a political decision [10], has pursued legitimate aim(s), has carried out the proportionality test, i.e. has struck a balance between the competing/conflicting fundamental rights and thus fulfilled its role in protecting human rights,[11] and whether there is an objective and reasonable justification for that decision and aims[12].

Furthermore, the Court lacks jurisdiction for defining the general interest underlying a specific measure. Rather, the Court assesses whether the general interest, as defined by other branches of power, concords with constitutional values[13]. The more sensitive the social, economic and political issues at stake, the greater the legislator's margin of appreciation with regard to the measure to be taken[14].

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[7] In decision no. U-I-60/1991 et al. of 21 February 2017 which concerned the constitutional review of the Act on Health Measures on the Exercise of the Right to the Freedom of Decision-Making on Giving Birth the Court explicitly stated that it had no jurisdiction to resolve the question of "when life begins", which was at the heart of the moral dispute between the pro-life and pro-choice "camps" involved in the matter (§§ 41 and 45.1). Be that as it may, in such cases, where there is little or no common ground between the member states of the Council of Europe, the State is granted a broad margin of appreciation (ECtHR cases *A, B and C v. Ireland* [GC], no. 25579/05, judgment of 16 December 2010, § 233, and *X, Y and Z v. United Kingdom* [GC], no. 21830/93, judgment of 22 April 1997, § 44).

[8] Including, in particular, assessing economic strength of the State (decision no. U-I-673/1996 et al. of 21 April 1999, § 2/6).

[9] Decision no. U-I-3685/2015 et al. of 4 April 2017, § 33.3; as opposed to the Constitution itself which is not (value-)neutral (decision no. U-VIIR-4640/2014 of 12 August 2014, § 10.1).

[10] Also in tax matters, in which the legislator generally enjoys wider discretionary powers (ruling nos. U-I-2012/2007 and U-I-2013/2007 of 17 June 2009).

[11] "[I]n light of the dynamic interpretation of the Constitution in accordance with European legal standards" (decision nos. U-I-3941/2015 of 18 April 2023 et al., § 24, and decision no. U-I-448/2009 of 19 July 2012, § 14.).

[12] Decisions nos. U-I-6690/2021 and U-I-7062/2021 of 12 April 2022, § 12, and U-I-4019/2019 of 4 May 2021, § 23.

[13] Decision nos. U-I-1694/2017 et al. of 2 May 2018 in which the Court held more specifically that its task "is limited to examining whether the restriction of individual rights and freedoms imposed by the legislator by virtue of its particular economic policy measure is excessive" (§ 29.7).

[14] Decision no. U-I-242/2023 et al. of 23 May 2023, §§ 31 and 31.1. This corresponds to the well-established ECtHR's case-law according to which:

> "178. A certain margin of appreciation is, in principle, afforded to domestic authorities as regards that assessment; its breadth depends on a number of factors dictated by the particular case. The margin will tend to be relatively narrow where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will also be restricted. Where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as

Conversely, the Court will not refrain from dealing with any legal issues over which it has jurisdiction, no matter how controversial such an issue may be. This is perhaps best illustrated by the fate of a former Prime Minister who has was tried and convicted on several charges. Indeed, in relation to one of these charges, the Court declared that the recently introduced constitutional non-application of the statute of limitations to the criminal offence of so-called war profiteering only applies *pro futuro*, i.e. on the condition that such offence has not already become time-barred on the date of the adoption of this constitutional provision[15]. By doing so,[16] the Court suffered a considerable setback from the general public, which took a negative attitude towards it, although it thereby upheld the principles of legal certainty, the prohibition of retroactive prosecution of statute-barred criminal offences and the determinability and foreseeability of criminal offences and penal sanctions.

In certain cases the Court may indicate that there is an alternative to the approach chosen by the legislator[17].

Regarding the allocation of scarce resources, the Court, when reviewing the constitutionality of the Special Tax on Salaries, Pensions and Other Receipts Act,[18] concurred with the Government's assessment that "in the conditions of the economic crisis [which lead to the shortfall in state revenues] it was necessary to act on state revenues in order to fulfil all current obligations of the state and to ensure the unhindered performance of all government functions and tasks and the functioning of all government services, so as to adhere to the above provisions of the Constitution and protect the interests of the Republic of Croatia. It was necessary to achieve the above goal in the shortest possible time, taking special care, inter alia, of any additional expenditure that would slow down, reduce or prolong, i.e. prevent the fulfilment of this goal".

One of the few limits that the Court places on the legislator's margin of appreciation of the is the prohibition of adverse effect on the very essence of a right guaranteed by the Constitution[19].

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to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider [...].

179. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is ‚manifestly without reasonable foundation' [...]." (case *Pojatina v. Croatia*, no. 18568/12, judgment of 9 February 2012, § 76.).

[15] Decision no. U-III-4149/2014 of 24 July 2015, §§ 123-124 and 142-160.

[16] I.e., by stepping in instead of the Supreme Court and the Zagreb County Court both of which had failed to address applicant's complaint raised regarding the statute of limitations and, consequently, to ascertain as to whether the offense in question had been statute-barred.

[17] In respect of modelling of constituencies (ruling no. U-I-4780/2014 of 24 September 2015, § 44).

[18] Decision no. U-IP-3820/2009 of 17 November 2009.

[19] Decision nos. U-I-988/1998 et al. of 17 March 2010, in which the Court characterised the right to pension as a property right within the meaning of Article 1 of Protocol 1 to the Convention (§ 14.3), and ruling no. U-I-949/1995 of 23 November 2005, in which it concluded that various limitations of the right of access to a court may undermine the very essence of that right (§ 4).

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

Regarding the historical experience of deference, prior to the constitutional amendments in 2000, Article 101(1) of the Constitution gave the President of the Republic, as the head of the executive branch of power, a discretions to determine the existence of a state of war or an imminent threat to the independence and unity of the Republic and to issue legislative decrees accordingly.[20] In fact, Croatia had a presidential system at that time and was in midst of the Homeland War. These circumstances required that the executive branch, i.e. the President of the Republic as its head, had the authority to swiftly respond to emergencies without having to refer the matter to the legislature first[21].

With the emergence of the disease caused by the Coronavirus (COVID-19), the state of emergency came back into the spotlight. To that effect the Court maintained[22] that it is exclusively within the competence of the Parliament to decide whether to adopt certain measures to combat pandemic/epidemic of the COVID-19 disease in accordance with Article 16 or Article 17[23] of the Constitution. In line with its settled case-law, the Court preserved its authority to review whether the restrictions on constitutional rights imposed by such measures conform to the Constitution, irrespective of which of the two aforementioned articles of the Constitution serves as their legal basis.

It might be generally argued that, if required, the Court will conduct the proportionality test of restriction(s) of both qualified rights and non-qualified rights that are subject to certain exceptions, i.e. of their distinct aspects, whereas this is not the case for absolute rights.

Changes in social conditions may be a trigger for the Court to review legislation *proprio motu*. This was the case with demographic trends, which had led to different weight been given to votes in different parts of the State, thus undermining the guarantee of equal and

[20] Ruling no. U-I-179/1991 et al. of 24 June 1992. The Court held, *inter alia*, there was no constitutional requirement that the emergency be declared prior to the adoption of such acts. Nevertheless, there is a doctrinal argument to the contrary, namely that there was no grounds for deference since no state of emergency had ever been officially declared (Barić, *ibid.*, p. 13).

[21] After the end of the Homeland War and the introduction of the semi-presidential system, the said discretion was restricted to a certain extent by an amendment to Article 101 of the Constitution in 2000. Since then presidential decree-laws must be adopted within the limits set forth by the Parliament or co-signed by the Government depending on the particular emergency. The initial degree of deference of the Court can also be inferred from the submission that initially "the [...] Court was required to show restraint vis-à-vis the ruling politics and its actors" which "role was intended for it by the 1990 Constitution and the 1991 Constitutional Act on the Constitutional Court [(CACC)] which did not even specify the procedure for the election of judges" despite of which "the first composition of the Court was made up of distinguished and experienced judges and university professors" (Ravlić, S., *Ustavni sud i judicijalizacija politike u Hrvatskoj* [Constitutional Court and Judicialisation of Politics in Croatia] in "25 Years of Croatian Independence - How to Proceed Further?", Centre for Democracy and Law Miko Tripalo, 2017, pp. 71-72).

[22] Ruling nos. U-I-1372/2020 et al. of 14 September 2020, § 28.

[23] Which is triggered in a state of emergency and therefore requires a larger parliamentary majority for the adoption of measures, because restrictions on rights and freedoms may be based on standards that are lower than those adopted under Article 16 of the Constitution, and in no case may these restrictions apply to provisions of the Constitution that guarantee absolute human rights and freedoms.

universal suffrage enshrined in Article 45 of the Constitution. This occurrence prompted the Court to repeal the Act on Constituencies for the Election of Members of the House of Representatives of the Croatian National Parliament[24].

In regards to the margin of appreciation of ordinary courts and other national authorities the Court resorts to partial deference, which means that it does not substitute its own judgment for that of these authorities in a given case, since the latter are better placed to assess local needs and conditions due to their direct and constant contact with the parties and local communities[25]. In doing so, they are nevertheless obliged to respect constitutional and Convention rights, for the interpretation and application of which the Court remains the ultimate authority at national level. The Court also respects independence conferred to these bodies[26]. In any event, there must be compelling reasons for the Court to make the substitution in question, which would in effect refute the assumption that, in the event of a clash between two protected private interests, the balancing of the competing Convention rights has been exercised in accordance with the criteria laid down in the ECtHR's case law[27].

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

The most prominent constellation in which the Court has deferred due to its lack of competence is the review of the subject-matter of treaties[28]. Namely, in the case of treaties, the role of the Court is limited to assessing the formal constitutionality of the laws on the basis of which these treaties were enacted. Furthermore, the Court lacks jurisdiction to decide on matters that are more peripheral in respect to it its core function of reviewing the constitutionality, such as the review of general acts of local and regional self-government[29], the Rules of Procedure of the Supreme Court[30], the elections of members of local committees' councils[31], etc.

[24] Decision nos. U-I-4089/2020 et al. of 7 December 2023, § 45.

[25] Decision no. U-III-2000/2021 of 14 September 2023, § 27. This can be subsumed under normative or merits reasons to defer (Arnardóttir, O. M., *Rethinking the Two Margins of Appreciation*, European Constitutional Law Review, Cambridge University Press, 2016, p. 47, and in the same fashion case *Blečić v. Croatia*, no. 59532/00, judgment of 29 July 2004, § 63, where the ECtHR found that "[the Constitutional C]ourt [had] deferred to the Supreme Court's findings, when ruling that the latter's decision did not constitute a violation of the applicant's constitutional rights".

[26] So called systemic or non-merits reasons to defer (decision no. U-III-1662/2023, of 28 March 2023, § 13).

[27] Decision no. U-III-2602/2019 of 26 October 2021, § 29, and ECtHR cases *Axel Springer AG v. Germany*, no. 39954/08, judgment of 7 February 2021, § 88, and *Von Hannover v. Germany* (No. 2), nos. 40660/08 and 60641/08, judgment of 7 February 2012, § 107.

[28] Rulings nos. U-I-825/2001 of 14 January 2004, no. U-I-1583/2000 and U-I-559/2001 of 24 March 2010, and no. U-I-6738/2010 of 11 June 2013. Nevertheless, it has indirectly derived its jurisdiction to review the conformity of statutes with treaties since the incompatibility of the former with provisions of international law constitutes a violation of the rule of law enshrined in Article 3 of the Constitution (decisions nos. U-I-920/1995, U-I-950/1996, U-I-262/1998 and U-I-322/1998 of 15 July 1998 and no. U-I-745/1999 of 8 November 2000).

[29] Ruling no. U-II-5157/2005 of 5 March 2012, whereby the exception thereto represent statutes of those territorial units (§ 3).

[30] Decision no. U-I-6950/2021 of 12 April 2022, § 16.

[31] Decision no. U-VIIA-921/2002 of 30 April 2002.

As for deference due to the lack of expertise, there should generally be no such cases, also due to the fact that the Court can request and rely on expertise of experts specialized in the respective fields. However, in cases of emergency in where there is a general lack or scarcity of expert knowledge combined with time pressure, the decision-maker may be afforded a larger margin of appreciation correlating to a higher level of deference[32].

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

Taking into account the second limb of the previous answer given as to deference due to the lack of expertise as well as the principle *iura novit curia*, there cannot be any cases in which the Court deferred because there was a risk of judicial error. This is all the more true since the Court relies, as required, on the case-law of other reputable constitutional courts such as the German, Austrian and Hungarian[33].

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

The best example of a case in which the Court deferred invoking democratic legitimacy of the decision-maker(s) is the one in which it decided[34] on the petition of an association of citizens that challenged the decision of the Ministry of Justice and Public Administration to deny that association's request to participate in the procedure to verify the number and authenticity of signatures given for the proposed referendum[35]. The Court argued that Parliament not only had the authority to verify the number and authenticity of the signatures (and consequently to authorise the competent ministry to run those checks), but also the duty to do so and that a construction to the contrary would amount to denying the Parliament its democratic legitimacy.

[32] See the concurring opinion of judges Šeparović (President of the Court) and Mlinarić in case no. U-II-7149/2021 et al. of 15 February 2022, § 6.

[33] Thus, in decision nos. U-I-763/2009 et al. of 30 March 2011, the Court adopted legal determination of the term "dignity" given by the German Federal Constitutional Court (*Bundesverfassungsgericht* (BVerfG)), whereas in decision nos. U-IP-3820/2009 et al. of 17 November 2009 it stated that BVerfG's settled case-law was applicable in the Croatian constitutional order due to "comparable constitutional foundations" and referred to BVerfG's guidelines to be applied for achieving the equality of burdens in tax matters. Stateside courts' teachings may be valuable comparisonwise for answering this question. Namely, according to Chief Justice Marshall in *Cohens v. Virginia* (19 U.S. (6 Wheat.) 264, 404, (1821)): "The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us".

[34] Decision no. U-VIIR-3260/2018 of 18 December 2018, § 9.6.

[35] The referendum was aimed at cancelling the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.

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

When it comes to economic and social policy measures, the legislator has relatively wide discretionary authority, so that the Court generally respects the choice of legislative policy in this area[36], as already stated more generally in the answer to question 2. However, in a more specific context of labour matters, the Court has stated that in seeking a fair balance between the interest of workers and employers, which includes sensitive social, economic and political issues, the legislator generally enjoys a broader margin of appreciation in the choice of measures to regulate freedom of association into unions and the protection of the interests of their members[37].

The courts may not call into question discretionary powers of other branches of power when implementing policies as long as these conform to the law[38]. This in turn does not mean that, although the courts in States with codified law are not to decide on matters of policy[39], they do not have a certain leeway to interpret the relevant legislation[40].

Nonetheless, it might be generally onerous to give a clear-cut answer as to whether the courts should be the ones to (also) decide questions of policy since "[as per observation of Justice Traynor of the California Supreme Court] '[w]e should not be misled by the cliché that policy is a matter for the legislature and not for the courts. There is always an area not covered by legislation in which the courts must revise old rules or formulate new ones, and in that process policy is often an appropriate and even a basic consideration'. Even in an area regulated in detail by legislation, policy may be a factor in the court's decisional process; although the policy ascertained and applied may be that which is deemed to have been the legislature's, rather than the court's, conception of the wisest rule. [...] Policy, in the sense of the motivating equitable and practical reasons behind the development of legal principles, plays a constant although usually imperceptible role in the decisional process. Policy, in the sense that justice is the aim and intent of all legal system and procedures, is the spirit vitalizing the letters of the law[41] [...] The fundamental purpose of all legal systems of Western civilization is to provide just determinations for the practical disputes of mankind. [...] To attempt to understand or explain or apply law without reference to this underlying consideration is to miss the essence of legal systems and the judicial process. Although statutes and precedents are indeed the body of the law, 'policy'-or justice- is its soul"[42]. In

[36] Decision nos. U-I-2665/2009 and U-I-3118/2011 of 30 January 2014, § 10.

[37] Decision no. U-I-242/2023 of 23 May 2023, § 31.

[38] Judgment of the Supreme Court no. I Kž-Us-76/2020-15 of 7 July 2021, § 49, cited in the decision of the Court no. U-III-6870/2021 of 18 April 2023, § 169, by which the constitutional complaint filed against that judgment was dismissed.

[39] Such as e.g. organisation of justice system (see decision no. U-III-5684/2013 of 11 May 2017, § 16, and ECtHR cases *Coëme and others v. Belgium,* nos. 32492/96 et al., judgment of 22 June 2000, § 98).

[40] Decision nos. U-I-3941/2015 et al. of 18 April 2023, § 22.

[41] Tate, A. Jr., *"Policy" in Judicial Decisions*, Louisiana Law Review, Vol. 20, 1959, pp. 65-67.

[42] *Ibid*. 74-75. This final conclusion was preceded by a description of a case before Louisiana Court of Appeal, First Circuit, which served as "a rough illustration of a policy-predicated result influencing the legal

light of these considerations, one would *a fortiori* have a hard time blackballing the courts as lacking the democratic mandate to decide questions of policy, where they are an organ which has been "established in accordance with the will of the legislature"[43] and as such would have "the legitimacy required in a democratic society to hear the cases of individuals"[44].

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

The Court generally defers in regards of reviewing penal policies. Most notably, in its decision U-I-448/2009 et al. of 19 July 2012,[45] it stated as follows:

> "[...] The policy is decided upon by the Croatian Parliament and the Government of the Republic of Croatia, in accordance with their competences, and not by the Constitutional Court. In other words, the legislator independently and freely, within the framework of the Constitution, selects and regulates a normative framework or a legislative model of criminal procedure or substantive law with a view to protecting individual, social and national property from criminal offences depending on the objectives of the criminal policy.
>
> The freedom to choose a normative framework or a legislative model for criminal procedure is based on the legislator's authority to regulate in the appropriate manner the organisation and competence of the police and law enforcement bodies and criminal courts, and their mutual relations.
>
> The Constitutional Court does not have the authority to influence the issues of state criminal policy, including the normative framework or the legislative model of criminal procedure as its legal form. The choice is under the exclusive competence of the legislator in accordance with the Constitution."

However, this discretionary power is limited by the requirements laid down in the Constitution, notably the requirements stemming from the rule of law and the protection of certain other constitutional assets and values[46], as well as by the Convention in respect of the protection of human rights[47].

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

Pursuant to Article 25 of the CACC everyone is obliged to submit to the Court, at its request, the documents and information necessary for the conduct of the proceedings. This

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characterizations to be applied to decision of the case [under Louisiana civil law modelled after French civil law]" (*ibid*., pp. 72-74).

[43] ECtHR case *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, judgment of 2 October 2018, § 138.

[44] *Loc. cit.*

[45] In which it reviewed the constitutionality of the Criminal Procedure Act (CPA).

[46] Such as legal certainty of the objective legal order, accessibility, predictability and legal certainty of criminal-law norms, respect for the rights of accused person and the victim as well as procedural equality of the parties in criminal proceedings (*ibid.*, § 10, and decision no. U-I-3843/2007, § 14).

[47] Report no. U-X-5464/2012 of 12 June 2014, in particular § 12.3.

provision is binding and as such it leaves no room for exceptions. It follows that the government cannot deny disclosure of any information to the Court, not even on the grounds of national security.

Still, the Court has rarely invoked this provision to that end, seeing that constitutional complaints make up for the majority of the caseload involving national security issues (with cases involving the right of foreigners to enter and reside on Croatian territory being the most common) and that, in connection with the latter, ordinary (administrative) courts are also authorised to seek and obtain classified data. Instead, in such proceedings the Court sanctioned findings of ordinary courts on the content of security screenings based on national security considerations[48] and has limited itself to examining whether those courts adhered to the settled case-law and views of principle it has set in respect of proportionality of the limitations of procedural guarantees to the adversarial procedure and the right to a reasoned court decision for the purposes of pursuing the legitimate aim of national security protection.

In the same context (rights of foreigners to enter and reside in the territory of EU Member States) the Court has refrained from defining the term "national security" and the related term "public order"[49] when examining the legitimate aim of the Act on Aliens, as these two concepts are to be construed in line with the meaning attributed to them by the Court of Justice of the European Union (ECJ) in order to preserve their uniform interpretation throughout the EU, i.e. its Member States.

As regards national security concerns in the context of the right to freedom of expression in conjunction with the right of access to information, the Court verifies justification of the interference with these rights including the legitimacy of its purpose, proportionality and necessity in a free and democratic society[50]. In doing so, the Court has so far deferred to the underlying findings of the ONSC as to whether disclosure of the classified data might undermine the values listed in Article 6 of the Data Secrecy Act[51].

In constitutional and statutory review cases, the Court also invoked national security grounds when limiting the Government's margin of appreciation. Namely, it argued that a narrowed down construction of Government's powers when assessing the onset or imminence of an energy crisis was not necessary because it might prevent the Government from making timely decisions in order to address such a crisis[52].

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?

The Court has two principal instruments at its disposal to deal with Government and legislature being passive when their action is called for, namely, (a) monitoring of the pursuance of constitutionality and legality on the basis of Article 125 of the Constitution in

[48] Carried out by the Office of the National Security Council (ONSC).

[49] Decision no. U-I-1007/2012 et al. of 24 June 2020, § 16.

[50] Decision U-III-4572/2018 of 10 March 2020, § 6.2.

[51] Namely, the independence, integrity and security of Croatia, its foreign relations, defence capability and the intelligence security system, public security, the foundations of its economic and financial system, as well as scientific discoveries, inventions and technologies of great importance for the national security of the State.

[52] Decision no. U-II-3321/2023 of 14 November 2023, § 11.

conjunction with Article 104 of the CACC and reporting to the Parliament on noted instances of unconstitutionality or illegality, and (b) *ex officio* initiation of constitutional and statutory review of regulations foreseen in Article 38(2) of the CACC as an extension of the instrument described under (a).

The Court resorted to these instruments, first of which is only authoritative, on a number of occasions, most notably in the cases of:

- the Courts Act, which the Court found not to fully guarantee an effective right to a trial within a reasonable time, albeit this finding was preceded by its inference that a more stringent scrutiny might be achieved only in the context of a specific constitutional complaint[53],

- the Act on Constituencies for the Election of Members of the House of Representatives of the Croatian Parliament[54], and

- the Agriculture Act and several regulations on implementation of certain measures for rural development, where the Court established the lack of legal protection against decisions of the Paying Agency for Agriculture, Fisheries and Rural Development**,** both on the legislative and case-law level[55].

In addition to the instruments mentioned before, the Court has also used other types of proceedings to prompt the legislator and the local self-government to introduce rights-related reforms. For example, while reviewing a petition for a referendum[56] to amend the Constitutional Act on the Rights of National Minorities (CARNM), the Court[57] ordered the Vukovar City Council to, *inter alia*, explicitly provide for and regulate in the City's Statute (i) individual rights of members of national minorities to official use of their language and script and (ii) the public-law obligations of the state and public authorities stemming from the Act on the Official Use of the Language and Script of National Minorities, so as not to undermine the very essence of these rights. The Court also obliged the Parliament to adopt amendments to the CARNM that provide a mechanism for dealing with failure/obstruction of local self-government's representative bodies in implementing (the obligations under) this Act.

In another case, the Court obliged the Parliament to modernise the so-called "abortion law" within a certain period of time by prescribing educational and preventive measures to warrant an exceptional character of abortion[58].

Moreover, while reviewing the constitutionality and legality of the Decision on Introducing, Monitoring and Evaluating the Implementation of the Health Education Curriculum in Primary and Secondary Schools the Court expressed its understanding of the best interests of a child and what course of action is to be taken in order to implement educational programmes that should enable the development of each child's personality in his or her best interests. It also provided guidance to the Ministry of Science, Education and Sport

[53] Report no. U-X-4090/2020 of 23 February 2021.

[54] For further details see the reply provided under Question 3 above.

[55] Decisions no. U-I-4220/2020 of 20 October 2020, §§ 12 and 13, no. U-II-359/2015 and U-II-912/2017 of 20 December 2020, §§ 22 and 23, as well as no U-II-2466/2015 of 20 December 2020, §§ 21 and 22.

[56] Petitions for popular vote underlie a stricter scrutiny than legislation (decision no. U-VIIR-1159/2015 of 8 April 2015, § 13.2).

[57] Decision no. U-VIIR-4640/2014 of 12 August 2014, § 32.

[58] Ruling no. U-I-60/1991 et al. of 21 February 2017, point II of the operative part and § 50.

on the procedural and substantive regulation of the acceptable framework for the adoption of a new decision that should pursue the indicated substantive objectives[59].

Finally, in the context of constitutional complaint proceedings the Court ordered the Government to adapt, within appropriate time not exceeding five years, the capacities of Zagreb Prison to the requirements of the accommodation of persons deprived of their liberty taking into account the standards of the Council of Europe and the case-law of the ECtHR[60]. It has done so after finding violations of the prohibition of inhuman or degrading treatment under Articles 23 and 25 of the Constitution and Article 3 of the Convention.

II. The decision-maker

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

There is no rule of thumb for the level of deference that would depend on whether an act of the Parliament or a decision of the executive power is in issue. In other words, review of decisions adopted by both the legislative and the executive branch is generally based on the same standards, under condition that the former has provided the latter with sufficient basis for interfering with fundamental rights and freedoms. The Court has consistently held that legislator's wide margin of appreciation afforded to it in deciding on public policy goes hand in hand with its responsibility for the purposefulness of the prescribed statutory measures[61].

However, past health and energy crises have shown that decisions to be adopted in order to deal with such crises are not inherent to the legislature, but to the executive branch, as the rapid response is required and only a few experts can provide the necessary expertise[62].

The scope of the Court's jurisdiction to review subordinate legislation was narrowed down to some extent with the introduction of the new Administrative Disputes Act in 2012. Namely, this Act conferred on the High Administrative Court the competence to review the legality of general acts of, *inter alia*, legal persons vested with public powers and legal persons providing public services, i.e. general acts of part of the executive branch.

The Court was also willing to accept the executive's previous experience in combating the COVID-19 disease to justify the necessity of the impugned decision for the pursuit of its aim[63].

[59] Decision no. U-II-1118/2013 of 22 May 2013. See also Arlović, M., *Ustavnopravni okvir ustavnosudskog aktivizma u Republici Hrvatskoj*, [Constitutional-law Framework of Constitutional Court Activism in the Republic of Croatia], Collected Papers of International Conference "Constitutional Court between Negative Legislator and Positive Activism", Sarajevo, 2014, p. 204 and fn. 93.

[60] Decision nos. U-III-4182/2008 and U-III-678/2009 of 17 March 2009, point IV of the operative part and § 23.

[61] Ruling no. U-I-1634/2023 of 19 December 2023, § 10.2.

[62] Decision no. U-II-7149/2021 of 15 February 2022, § 39.2.

[63] Decision no. U-II-5571/2021 et al. of 21 December 2021, § 14.

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?

When reviewing the constitutionality of laws, the Court takes the legislative history into account[64]. It does so in order to scrutinise legitimacy of the aim pursued by a particular measure, its justification and its proportionality with regard to human rights. In particular, in its decision no. U-I-2826/2023 of 11 July 2023 (§ 13) the Court gave weight to a major opposition party's amendment to the law under review by pointing out the possibility to the effect that, as opposed to other irregularities indicating a nomotechnical error, the rejection of that amendment may be exhibitive of legislator's intention to have certain type of judicial officials[65] barred from running for judicial office in the first instance thus transgressing the right to equal access to any workplace and any office enshrined in Article 54(2) of the Constitution.

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

The Court checks a decision for the degree of justification, in particular with regard to objective pursued, i.e. whether sufficient and relevant reasons have been given. This applies all the more in case of the emergency procedure for the adoption of statutes[66]. In particular the Court verifies whether the decision-maker has reasonably and objectively justified a decision, especially when some members of similar or identical groups are treated differently in similar situations[67] and when a limitation of rights and freedoms is at stake.

The verification whether the decision is one that the Court would have reached had it been a decision-maker itself would require the Court to give its value judgments eventually replacing political choice made by the decision-maker, thus transforming itself into a "positive legislator"[68], although the Court would not venture to hypothesize about it being the decision-maker itself.

[64] In so doing it relies on *travaux préparatoires* of the Parliament, including, *inter alia*, audio records from parliamentary debates, both Government's and opposition's amendments to statutes and reports of the parliamentary committees.

[65] That is, state attorneys.

[66] Decision nos. U-I-4537/2013 and U-I-4686/2013 of 21 April 2015, § 11, where the Court stated it would not be satisfied with attempts of the Government to justify the decision subsequently in the judicial review procedure.

[67] One of the permissible, i.e. objective and reasonable reasons in respect thereto was found to be "redressing of existing inequalities", (decision nos. U-I-2665/2009 and U-I-3118/2011 of 30 January 2014, § 10).

[68] See fn. 1 above.

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

The Court may exercise its jurisdiction as to the compatibility of a decision or a measure with fundamental rights regardless of how thoroughly it was inquired into in the procedure leading to its adoption. Still, in matters covered by the scope of EU law the Court is known to have deferred to the views and arguments advocated by the ECJ on the compatibility of national legislation with fundamental freedoms[69].

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?

It is generally beyond Court's purview to analyse the content of a parliamentary debate from the point of view whether the opposing positions were fully represented or whether the focus was on the general merits or implications for rights. Rather, in constitutional review proceedings it examines if the aim pursued by the legislator is justified and, to this end, takes note of the elements of the legislative procedure (legislative history) that lead up to the adoption of a particular law.

Nevertheless, the Court did observe an alarming tendency of an increasing number of laws to be adopted in emergency procedure. Indeed, the Court found that this could undermine the very essence of parliamentarianism, i.e. standards inherent to democratic procedure, in particular the requirement of a broad public debate[70]. Therefore, the adoption of laws by emergency procedure should be an exception and must be justified by specific and conclusive reasons. It does not appear that in doing so the Court has made a distinction between the general merits and the implication for rights.

One of the most illustrative recent cases in this respect[71] is the one in which the Court, relying on the ECtHR's case-law[72], in the context of the review of the constitutionality, repealed the institute of the "authentic interpretation of laws" vested with the Parliament[73] which had admittedly been applied rather rarely until then. The Court found that such interpretations did not meet the requirements of the rule of law, the separation of powers, the autonomy and independence of the judicial branch of power as well as the protection of the right to a fair trial because they were adopted in a "reduced" parliamentary procedure, lacked required procedural safeguards for all political actors, were located in the part of the

[69] Decision nos. U-I-3678/2017 et al. of 3 November 2020.

[70] Decision no. U-I-3685/2015 et al. of 4 April 2017, § 11.10, and report no. U-X-99/2013 of 23 January 2013, § 6. In addition, failure to adhere to EU law procedural requirements, such as consultation with the European Central Bank under Council Decision 98/415/EC, may also be regarded as a violation of democratic procedure from the constitutional-law aspect (decision no. U-I-3685/2015, § 24.4).

[71] Decision no. U-I-4957/2015 11 July 2023.

[72] Cases *Stran Greek Refineries and Stratis Andreadis v. Greece*, no. 13427/87, judgment of 9 December 1994, and *Cicero and others v. Italy*, no. 29483/11, judgment of 30 January 2000.

[73] And incorporated into its Rules of Procedure having the force of law.

Parliament's Rules of Procedure that provides for the adoption of its (internal) acts and not laws, and that the Parliament consequently intervened through this institute (retroactively) in pending court proceedings dealing with the law in question.

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

In proceedings on the constitutionality of a referendum question[74] the Court outlined the general characteristics of the legislative procedure to be followed, namely that it is the one "characterised by an uninterrupted process of alignment and adjustment of the wording of the draft law, which includes a working group of experts as the competent authority for the project, guidelines of the specialised ministry, an interdepartmental exchange of positions on the draft law, discussions in Government bodies, examination by the Legislation Office, public debates and discussions in competent and interested committees of the Croatian Parliament, and a multi-party parliamentary debate"[75].

The Court furthermore noted that laws enacted in procedures which are not in line with the parliamentary spirit do not fulfil the confidence of citizens and at the same time undermine their confidence in democratic institutions. The Court further stated that in Croatia, the procedures for adopting laws must respect the standards inherent to democratic procedures, especially those of a broad public debate, as well as the parliamentary spirit expressed in the constitutional assumptions regarding Croatia as a democratic multi-party State in which the Parliament is the representative body of the citizens and is entitled to exercise legislative power[76].

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 Court deferred to the Minister of Health's declaration of the state of epidemic of the COVID-19 disease[77], which in turn relied on the World Health Organisation's declaration of the state of the pandemic of that same disease. Although this national declaration itself did not contain any definition of rights or applied it to the facts, it did serve as the basis for the ensuing (alleged) interference by the executive branch with various rights, such as the right to freedom of assembly, the right to respect for private and family life, the right to health care, etc.

[74] The so-called preventive or *a priori* constitutional review which requires a stricter scrutiny of the constitutionality than the so-called repressive or *a posteriori* constitutional review precisely because of the lack of such a parliamentary procedure (decision no. U-VIIR-1158/2015 of 21 April 2015, § 24.2).

[75] *Loc. cit.*

[76] Report no. U-X-99/2013 of 23 January 2013, §§ 6 and 7.

[77] Ruling no. U-II-1800/2021 of 8 June 2021.

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?

The degree of deference might hinge on whether absolute or qualified rights are involved. Moreover, as it appears from the answer to the next question, the scrutiny should be stricter in criminal-law cases, where greater demands are made on the clarity and precision of legal norms. In certain instances restrictions of one aspect of rights garner a more reserved approach while being examined than the other, such as the passive aspect of the rights guaranteed by Article 3 of Protocol No. 1 to the Convention (the right to stand as a candidate for election) compared to the active aspect (the right to vote)[78].

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?

Clarity and precision of a legal norm is in general terms mandated by the principle of legal certainty as a corollary of the rule of law enshrined in Article 3 of the Constitution. Clarity and precision are intended to prevent arbitrariness in the interpretation and application of the law, i.e. to eliminate uncertainty of addressees in respect of the final effect of a statutory provision directly applicable to them and thereby enable them to comply with the legitimately foreseeable effects of the application of the law in a particular case. Only a law that meets these requirements shall be deemed to exhibit the "quality of the law". This requires the Court to look beyond the mere form and to conduct its review with regard to the realities created by the introduction of the relevant norm or statute[79].

A higher standard as to the specificity and precision of law is warranted in criminal law in which, due to the intensity of limitations of human rights and fundamental freedoms, the principle of legality set forth in Article 31(1) of the Constitution comprises four distinct requirements - a written legal norm (*lex scripta*), prohibition of analogy (*lex stricta*), precise legal classification of criminal offences (*lex certa*) and the prohibition of the retroactive effect (*lex praevia*)[80]. The requirement of the "quality of the law" also means that in case of an insufficiently clear provision serving as the legal basis for an offence there must be an interpretation capable of clarifying the meaning of such a provision and resulting from a consistent practice (case-law) of the domestic authorities[81].

[78] Decision no. U-I-1397/2015 of 24 September 2015, § 40, and ECtHR case *Cernea v. Romania*, no. 43609/10, judgment of 27 February 2018, § 37.

[79] Decision no. U-I-448/2009 of 19 July 2012, § 72.1.

[80] Decision no. U-I-722/2009 of 6 April 2011, § 5.1.

[81] ECtHR case *Žaja v. Croatia*, no. 37462/09, judgment of 4 October 2016, § 103.

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

First and foremost, the Court checks for the very existence of statute's legitimate aim(s)[82]. Thereafter the Court will verify the clarity of the aim in question failing of which might adversely affect the principle of legal certainty and thus on the rule of law[83]. If the Court finds that the proclaimed legitimate aim is not clear, it can intervene, *inter alia*, by instructing the legislator on how to complement such an unclearly defined aim[84]. National legislation enacted to implement the EU legislation is deemed to pursue a legitimate aim[85].

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)?

The exact scope of the test of proportionality depends on the type of procedure and the fundamental rights and freedoms at stake[86] before the Court.

In the context of constitutional review, the Court therefore primarily verifies compliance with the "general" principle of proportionality laid down in Article 16(2) of the Constitution, i.e. whether a legitimate aim of a law was pursued in the public/general interest for its adoption and, if so, whether this aim was necessary, appropriate and proportionate *stricto sensu* so as not to place excessive burden on the addressees of the law[87].

As for constitutional complaints, the application of the principle of proportionality is essentially the same and corresponds to that of the ECtHR, which includes these steps: existence of a legitimate aim provided for by the law, adequacy/suitability, necessity and proportionality *stricto sensu*. However, in such proceedings, the Court applies the test of proportionality only in the alternative (if the state of the proceedings allows it), because, in accordance with the principle of subsidiarity, it is primarily the ordinary courts that are called upon to carry out this test.

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

[82] It is what the Court calls "the test of basic legitimacy of the legislative aim" (decision no. U-I-2826/2023 of 11 July 2023, § 13).

[83] Decision nos. U-I-448/2009 et al. of 19 July 2012, §§ 225 and 225.1. Remarkably, on the Europe-wide level the increased intensity of scrutiny by the ECtHR in terms of the legitimate aim test is selective, i.e. not applied to all states, but seems rather concentrated on certain Southern and Eastern European States, due to significant differences in the ratio of legitimate aim violations to all violations (decided against the state) after 2010 between Northern and Western States, on the one hand, and Southern and Eastern States, on the other (see Orcan, N. U., *Legitimate Aims, Illegitimate Aims and the E.Ct.H.R.: Changing Attitudes and Selective Strictness*, University of Bologna Law Review, Vol. 7, 2022, pp. 10 and 11).

[84] Decision nos. U-I-448/2009 et al. of 19 July 2012, § 225.1.

[85] Decision no. U-I-1007/2012 of 26 June 2020, et al., § 15.

[86] It is mostly not applied in cases such as the prohibition of torture or inhumane or degrading treatment or punishment set forth in Article 17(3) of the Constitution and Article 3 of the Convention (see Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 5th ed., p. 12), exception being e.g. conditions of detention.

[87] Decisions nos. U-I-3685/2015 et al. of 4 April 2017, § 27, and nos. U-I-1694/2017 et al. of 2 May 2018, § 30.

The Court regularly applies all limbs of the proportionality test when it comes to the restriction(s) of right(s) – the existence of a legitimate aim in public/general interest (provided for by the law), its necessity, appropriateness/suitability and proportionality in the strict sense, i.e. the question of whether an excessive burden has been imposed on the addressees of a measure.

However, the Court does not scrutinize necessity and proportionality of statutory measures of a general nature which further serve as the basis for the adoption of particular decisions/measures by an authorised person or body, which in turn may be the subject of a separate constitutional proceedings[88]. Moreover, the proportionality test to be applied in case of Article 16 of the Constitution appears to be stricter than the one in respect of Article 17 thereof[89]. Finally, in the field of criminal law the scope of the proportionality test to be applied in a particular case may vary[90].

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

In the case *Dragojević v. Croatia*[91] the ECtHR noted that "every individual under the jurisdiction of the Croatian authorities, when relying on provisions of the relevant domestic law[[92]], should be confident that the powers of secret surveillance will be subjected to prior judicial scrutiny and carried out only on the basis of a detailed judicial order properly stipulating the necessity and proportionality of any such measure". Thereafter that court went on to conclude that "although [issuing of four secret surveillance orders by the investigating judge in respect of the applicant without any actual details having been provided based on the specific facts of the case and particular circumstances indicating a probable cause to believe that the offences in issue had been committed and that the investigation could not be conducted by other, less intrusive, means] apparently conflicted with the requirements of the relevant domestic law and the [...]cited case-law[93] of the Constitutional Court [...], it appears to have been to have been approved through the practice of the Supreme Court and later endorsed by the Constitutional Court" and that the approach under which "a lack of reasons in the secret surveillance orders, contrary to Article 182 § 1 of the [CCP], could be compensated by retrospective specific reasons with regard to the relevant questions at a later stage of the

[88] Ruling nos. U-I-1372/2020 et al. of 14 September 2020, § 29.1.

[89] Decision and ruling no. U-II-7149/2021 of 15 February 2022, § 39.2.

[90] Depending, for example, on the type of detention involved (decision no. U-III-1157/2015 of 23 March 2015, § 28, and ECtHR case *James, Wells and Lee v. United Kingdom*, nos. 25119/09, 57715/09 and 57877/09, judgment of 18 September 2012, § 195.).

[91] No. 68955/11, judgment of 15 January 2015, §§ 92 and 96.

[92] According to which the investigating judge's order authorising the use of secret surveillance must be in written form and must contain a statement of reasons specifying: information concerning the person in respect of whom the measures are carried out, relevant circumstances justifying the need for secret surveillance measures, the time-limits in which the measures can be carried out – which must be proportionate to the legitimate aim pursued – and the scope of the measures (Article 182(1) of the CPA (Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 143/2002 and 62/2003)).

[93] Decision no. U-III-4286/2007 of 10 December 2007, and decision no. U-III-857/2008 of 1 October 2008.

proceedings by the court being requested to exclude the evidence thus obtained from the case file [...] appears to be accepted by the Constitutional Court, which, in its decision no. U-III-2781/2010 of 9 January 2014, [had] held that if the secret surveillance orders did not contain reasons, under certain conditions reasons could be stated in the first-instance judgment or the decision concerning the request for exclusion of unlawfully obtained evidence [...]". Therefore, this inference of the ECtHR could be construed as though the Court have been found not to require at the material time that the necessity and proportionality of such measures be stipulated already in the reasons of surveillance measures.

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

It may well be argued that judicial deference actually preceded the proportionality review. Indeed, as mentioned above, the Court already exhibited deference in its early decisions[94].

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 the deference of your Court in similar cases?

Seeing that "[t]he domestic margin of appreciation [...] goes hand in hand with European supervision"[95], the influence of the ECtHR's jurisprudence on the Court's approach to deference gained momentum over the last two decades both in cases involving the review of constitutionality and in cases initiated by constitutional complaints. To that end, one must also bear in mind that "although the margin of appreciation is usually considered to be a functional methodology of deference applicable to the relationship between the domestic and international jurisdictions it is, at its core, a hybrid or variation of classical institutional norms of constitutional deference afforded by national courts towards other branches of government, in particular the legislature"[96].

Generally speaking, domestic margin of appreciation is the corollary of the principle of subsidiarity, now anchored in Protocol 15 to the Convention, and may be affected by the degree of common ground between the member States of the Council of Europe as well as by the consensus reflected in the specialised international instruments[97]. Likewise, the breadth of margin of appreciation is contingent on the proximity of that right's aspect to its kernel and on

[94] Compare answers to questions 2 and 3 as well as fns. 5 and 20 above.

[95] ECtHR case *Krušković v. Croatia*, 46185/08, judgment of 21 June 2011, § 29.

[96] Spano R., *The Future of the European Court of Human Rights - Subsidiarity, Process-Based Review and the Rule of Law*, Human Rights Law Review, Vol. 18, Issue 3, September 2018, p. 490.

[97] Case *Demir and Baykara v. Turkey* [GC], no. 34503/97, judgment of 12 November 2008, § 85.

its absolute or qualified character[98]. However, since the ECtHR may autonomously interpret the Convention and its concepts, divergence may arise in this respect[99].

Moreover, the Court invoked ECtHR's case-law[100] in arriving to the conclusion that the margin of appreciation happens to be narrower if an impugned legislative measure interferes with the very essence of the rights protected by the Constitution and the Convention[101].

As for constitutional complaints proceedings, the understanding of the Convention as the "subconstitutional" or "quasi-constitutional" instrument, which is directly applicable, has enabled individuals to invoke, by means of constitutional complaints, violations of the provisions of the Convention[102]. As a result, the Court's margin of appreciation largely overlaps with that of the ECtHR. For example, in cases involving the deprivation of legal capacity, the Court[103] concurs with the ECtHR that this is a measure that should only be taken in exceptional cases, i.e. as a measure of last resort.

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

In case *Project-Trade d.o.o. v. Croatia*[104] the ECtHR found that the impugned Government decision on restructuring and recovery of a commercial bank had never been subject to judicial review[105] to the extent required by Article 6 § 1 of the Convention. Consequently, it held that "inability to effectively challenge the [said decision] before the courts was in breach of the applicant company's right of access to court"[106]. In reaching this conclusion, the ECtHR recalled that the Court had discontinued proceedings for abstract constitutional review of that decision[107] and subsequently quashed several lower courts judgments that had established unconstitutionality of that decision, thereby declaring in fact "the remedy used by the applicant company [as] lack[ing] any prospects of success and [...] therefore ineffective".

IV. Other peculiarities

[98] Case *Muhammad and Muhammad v. Romania*, no. 80982/12, § 12. See also Spano, *ibid.*, p. 484.

[99] ECtHR case *Micallef v. Malta*, no. 17056/06, judgment of 15 October 2009, § 48.

[100] Cases *National Union of Rail, Maritime and Transport Workers v. United Kingdom*, no. 31045/10, judgment of 8 April 2004, §§ 86 and 87, and *Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, judgment of 11 January 2006, § 58.

[101] In particular, decision U-I-242/2023 of 23 May 2023 which deals with the right to freedom of association.

[102] Bearing in mind that contrariety to the provisions of the Convention and its Protocols entails violation of the provisions of the Constitution (decision no. U-I-745/1999 of 8 November 2000, § 8) and that ECtHR's case-law is an integral part of the Convention system (ECtHR case no. 51166/10, *Habulinec and Filipović v. Croatia*, judgment of 4 June 2013, § 30).

[103] Decision and ruling nos. U-I-3941/2015 et al. of 18 April 2023, § 69.3, U-III-1380/2014 of 20 May 2015, § 12, U-III-4536/2012 of 14 January 2016, § 8, and U-III-4928/2020 of 18 March 2021, § 11.1.

[104] Case no. 1920/14, judgment of 19 November 2020.

[105] Admittedly, by a court of full jurisdiction (as per ECtHR), which is not the case with the Court.

[106] *Ibid*., § 73.

[107] Due to repealing of its legal basis, namely, the Recovery and Restructuring of Banks Act of 1994.

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

In a substantial number of cases involving constitutional complaints[108] the Court has dismissed the complaints as manifestly ill-founded, i.e. without examining the merits of the case in question.

28. Has your Court grown more deferential over time?

The tendency appears to be quite the opposite - the Court has gradually grown less deferential as was already observed in the answer under question 1. This is mainly due to the stringent requirements set by the Convention and the ECtHR's case-law. A similar trend has also developed at the "internal" level, i.e. in respect of the procedure before the Court where it has had to fill in the gaps created by scarce regulation so as to defer to provisions of the respective procedural law, such as civil, criminal and administrative procedure or even to create new rules for its procedure[109].

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

In general, the caseload is not the reason for the Court to show deference. However, the Court has indicated at one point that the increasing number of cases, especially constitutional complaints, is interfering with its ability to administer justice, and in particular to exercise the core jurisdiction conferred onto it in the form of constitutional and statutory review[110].

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

Pursuant to Article 71(1) of the CACC, the Court examines only the objections raised in the constitutional complaint. This has been interpreted in its case-law as meaning that the Court is bound by the facts presented in the constitutional complaint, but not by their legal qualification. Therefore, the Court may base its legal assessment of the objections on a

[108] Around 45 % on annual average of decided cases over the course of the last eight years.

[109] Ruling no. U-I-252/1995 of 16 May 1995. The legal basis for so doing represents Article 34 of the CACC pursuant to which provisions of other procedural laws are to be sensibly applied. On a different note the Austrian Constitutional Court Act (*Verfassungsgerichtshofgesetz* (VfGG)) defers in its Article 35(1) explicitly to the Austrian Civil Procedure Act (*Zivilprozessordnung*) for all procedural questions not governed by the VfGG (see Hinghofer-Szalkay, S. G., *The Austrian Constitutional Court: Kelsen's Creation and Federalism's Contribution?* in "Les juridictions constitutionnelles suprêmes dans les États fédéraux : créatures et créateurs de fédéralisme", Journal of the University of Liège, Vol. 17, 2017, p. 5.).

[110] Report no. U-X-835/2005 of 24 February 2005, § 2. The legislator heeded the Court's warning and, in the same year, relieved it of the workload to some extent by reorganising the procedure for the protection of the right to a trial within reasonable time, which made a substantial part of constitutional complaints. Be that as it may, there have been certain tendencies to interpret the Court's rejection of petitions for constitutional and statutory review on grounds that a statute or other regulation whose review was sought ceased to be in force as its *de facto* deference attributed to the timing related to certain events such as elections.

different provision of the Constitution and/or the Convention than the one invoked by the complainant[111]. This approach is in line with the well-established case-law of the ECtHR[112].

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

The Court may extend the constitutional review of its own motion to other legal provisions that have not been contested before it. However, in the so-called abstract constitutional review, the particular situation of the applicant is not relevant.

As for constitutional complaints (so-called specific constitutional review), it follows from the answer to the previous question that the Court is not bound by legal characterisation of the objections raised by the applicant in the constitutional complaint. As a result, the Court can also subsume such objections under other provisions of the Constitution and/or the Convention[113].

[111] Decisions nos. U-III-3123/2010 and U-III-3124/2010 of 8 December 2016, § 5, U-III-3697/2011 of 13 November 2013, § 6, and U-IIIBi-570/2023 of 29 June 2023, § 18.

[112] See, *inter alia*, ECtHR case no. 29889/04, *Vanjak v. Croatia*, judgment of 14 January 2010, § 25.

[113] See fn. 102.