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

National Report: Republic of Moldova

Constitutional cultures vary and the courts' perceptions of their own role in a constitutional democracy affect the intensity of their scrutiny in fundamental rights cases. Many courts profess judicial deference.

Judicial deference is a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters which are perceived to be beyond their expertise or legitimacy to decide. The tool has been employed, most prominently, in human rights cases. This is due to their transcendent quality, capable of cutting across all substantive areas of public decision-making.

It is said that over-deferential attitude threatens the rule of law and separation of powers as much as excessive judicial activism does. The way judges exercise judicial deference is, therefore, a fundamental matter of constitutional principle that concerns the proper role of each branch of government in relation to significant questions of public policy.

The following questions aim to discover the differences in exercising judicial deference by European constitutional courts.

Questionnaire

for the national reports

I. Non-justiciable questions and deference intensities

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

By "judicial deference" is meant the existence of relevant reasons for all courts to show deference to the legislative power or to the executive power. For the Constitutional Court, judicial deference is seen as a constraint on constitutional judges in making a decision, in favor of the legislature or the executive. This form of deference falls under the concept of discretionary margin (see JCC no. 16 of 4 June 2018, § 66, regarding the prohibition of the transmission of television and radio programs with informative, informative-analytical, military and political content that are not produced in the member states of the European Union, in the United States of America, in Canada or in the states that have ratified the European Convention on cross-border television).

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 Constitutional Court of the Republic of Moldova shows deference in a number of political areas in which it recognized the legislator and the government a wide discretionary margin. For example, the Court mentioned in its jurisprudence that the establishment of state policies in the field of education and the determination of the criteria for the organization and operation of the education system is a prerogative of the legislator (see DCC no. 1 of 5 January 2018, § 29). the

State's margin of appreciation and its right to intervene in the education process is thus greater than in other fields and can be achieved through various regulatory instruments. The state has the right and the obligation to establish the ways, content and standards necessary to ensure the optimal realization of the right to education (DCC nr.7 din 4 July 2013, §§ 40-41).

At the same time, in the context of a application lodged by the People's Assembly of Gagauzia (Gagauz-Yeri), which concerned the issue of introducing in schools teaching in Gagauz language the subjects "Romanian language and literature" and "Romanian history", The Court mentioned that the promotion of the state language policy belongs to the competence of the Ministry of Education – the central specialized body in the field of education. Therefore, the Court declared inadmissible the criticisms of the author who claimed that the introduction of the subjects "Romanian language and literature" and "Romanian history" in schools teaching in Gagauz language is contrary to the right of the Gagauz people to study the state language, - the Moldovan language, and history Moldova (see DCC no. 21 of 10 December 2013, §§ 33-34).

In Judgment no. 29 22of November 2018, at § 55, the Court recognized the legislator a wide discretionary margin regarding the nature and extent of the measures to be taken in the field of social protection. The Court motivated this by the fact that the legislator is better placed than the Constitutional Court to carry out complex evaluations and assessments.

In other fields, *e.g.* conclusion of international treaties and the establishment of duties and taxes, although the Court recognizes a wide discretionary margin for the Parliament and the Government, it specified that this is not absolute. Thus, according to the Court's jurisprudence, the discretionary margin of the authorities when concluding international treaties is limited by national interests (see JCC no. 12 of 7 May 2020, § 96). At the same time, the Court is competent to verify the constitutionality of some rules regarding the imposition of the payment of taxes provided for by law, if the amount of these taxes is so high that the property right would be unjustifiably affected (see DCC no. 45 of 27 April 2023, § 25). Therefore, if the amount of the tax is reasonable, the very issue of its existence is a matter that belongs to the discretionary margin of the legislature, being excluded from the constitutionality control (see DCC no. 9 of 20 January 2022, § 25).

Moreover, in the Court’s opinion, the declared insufficiency of budgetary resources does not represent an objective and reasonable consideration for restricting the exercise of constitutional rights (see JCC no. 3 of 24 February 2022, § 49, regarding the amount of compensation for transport services granted to people with severe disabilities depending on the place of residence).

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

The Constitutional Court mentioned that, although it represents a jurisdictional body empowered to control the constitutionality of laws and to guarantee fundamental rights and freedoms, when it decides on a problem subject of an application, it does not do so in a vacuum,

detached being of social realities (JCC no. 29 of 22 November 2018, § 59, regarding the age and contribution period necessary for the establishment of the disability pension).

For example, being notified by a group of deputies with the control of the constitutionality of Law no. 3465 of September 1, 1989 regarding the functioning of the languages spoken on the territory of the Moldavian Soviet Socialist Republic, the Constitutional Court found the outdated and useless nature of this law. For this, it noted that the community in the Republic of Moldova lives in another state, a new one, governed by the rule of law, democratic and independent, in which the current rationales of the Law regarding the functioning of spoken languages no longer make sense. The Court noted, in the preamble of the Law, another proof of its outdated nature: the obligation to use the Russian language as the language of communication between the nations of the Union of Soviet Socialist Republics. The Union of Soviet Socialist Republics dissolved on 26 December 1991. Moreover, if the force of the law in question were accepted, this obligation would constitute another imposition of a conception in a paternalistic manner, atypical for the contemporary period (see JCC no. 17 of 4 June 2018, § 32 and § 35).

In another case, the Court showed deference for the linguistic rights of citizens belonging to ethnic minorities, declaring unconstitutional a law of the Parliament that gave the Russian language a privileged status in relation to other languages of ethnic minorities in the Republic of Moldova. In order to reach this conclusion, the Court referred, including to the data on the structure of the population by mother tongue obtained at the 2014 Census (see JCC no. 4 of 21 January 2021).

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

In the case-law of the Constitutional Court of the Republic of Moldova, there were situations in which the Court recognized that it did not have the necessary expertise and recognized the contested provisions as constitutional.

For example, in a case concerning the payment of the fixed fee to the administrator/liquidator and the compensation of the related expenses that are jointly and severally the responsibility of the debtor's management bodies, the Court observed that there are several legislative models for remuneration of the insolvency administrator that implies the existence of a liquidation fund. However, the Court noted that it does not possess the necessary expertise to accurately establish whether these practices will achieve the legitimate goals pursued more effectively than the contested measures and whether they will not affect other rights or interests, generating other consequences (see JCC no. 16 of June 2020, §§ 68-69).

In a number of cases that concerned the unconstitutional criticisms regarding the increase of the retirement age and the full contribution period, the Court held that, although the standard retirement age requirement leaves room for discussion as to the best solution, it is not within its competence to decide on this matter (see DCC no. 111 of 6 September 2022, § 24, regarding retirement age, length of service and early retirement for a long career; DCC no. 175 of 23 November 2021, § 25, relating to the contribution period carried out under special working conditions).

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

When examining the exceptions of unconstitutionality, the Constitutional Court is often called upon to clarify matters related to the interpretation and application of the law in a specific case. In these cases, the Court shows deference to the competence of common law courts which are better positioned to evaluate concrete situations (see DCC no. 104 of 19 July 2022, § 26, which concerned the banning of the parent from seeing his child).

For example, in a case that concerned the amendments made to the Law on Advocacy, the Court was called to verify the constitutionality of the exclusion of the possibility to obtain a lawyer's license based on the scientific title of doctor of law and based on seniority for judges and prosecutors because it represents an interference with the right to private life. Analyzing the relevant jurisprudence of the European Court, the Court mentioned that the finding a violation of the right to respect for private life by excluding the right to access the profession of lawyer based on the scientific title of doctor of law and on the basis of seniority for judges and prosecutors depends on a case-by-case analysis, an analysis that is concrete, not abstract. The Constitutional Court does not analyze concrete cases. It admitted that in some cases there could be applicable and violated the right in question; in others it might just be applicable, but not violated; in others the right would be no applicable and, therefore, not violated. It is up to the common law courts to assess whether, in a particular case, it is possible to talk about the application of the right to private life of an applicant for a license to practice the profession of lawyer and a violation of this right as a result of the refusal to receive him/her in profession, including through the retroactive application of the law (see DCC no. 155 of 22 November 2022, § 40). Thus, in order to avoid the risk of a judicial error, the Court showed deference in favor of a concrete examination by the courts of common law.

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

The institutional or democratic legitimacy of the decision-maker did not constitute an express reason for deference for the Constitutional Court.

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?

This standard is valid for the Constitutional Court of the Republic of Moldova, in so far as the legislator or the government has not clearly exceeded the limits of its discretionary margin. This Court review applies the test of less intrusive measures capable of achieving the aim as effectively, at the same or lower costs. However, there have been situations where the Court has declared a public policy unconstitutional simply because it does not pursue a legitimate goal (see JCC no. 3 of 24 February 2022, regarding the lack of any legitimate purpose of the differentiated amount of compensation for transport services granted to people with severe disabilities (based on the criterion of the place of residence)).

The Constitutional Court of the Republic of Moldova has both jurisprudence in which it has intervened in matters of vast public social policies (*e.g.* by JCC no. 5 of 25 February 2020, The Court declared unconstitutional the condition of the numerical criterion, the requirement of territorial representativeness of political parties in the process of registration as an excessive

and disproportionate measure in relation to the legitimate aim pursued), as well as case-law in which it showed deference for the option of the legislator or the government who acted within the limits of their discretionary margin (e.g. DCC no. 7 of 20 January 2022, regarding the Government's prerogative to regulate the transfer to private ownership of land sectors assigned within the limits of the law and occupied by houses, outbuildings and gardens; DCC no. 87 of 25 July 2023, regarding the Parliament's option to replace the basis for adjusting the pension according to changes in the financial rights of those in office with the pension indexation mechanism).

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

The general principle of deference when judging penal policies and philosophy is a principle accepted by the Constitutional Court of the Republic of Moldova.

In its jurisprudence, the Court emphasized that it cannot carry out a constitutional review regarding a crime from the perspective of the *ultima ratio* principle, analyzing the existence of alternative non-criminal measures. It is not in a position to develop empirical studies in this regard. There may be different opinions from a criminological point of view, but it is not the role of the Court to favor one of them to the detriment of the others. The criminal policy of the state represents a competence reserved to the Parliament (Article 72 para. (3) letter n) of the Constitution). In this regard, the Parliament enjoys a discretionary margin when developing the national criminal policy, in particular when it decides whether a conduct should be criminalized or if some facts should be criminally sanctioned. From the perspective of the principle of ult*ima ratio*, the Constitutional Court can intervene only when it performs, once referred, the test of the proportionality of the punishment limits (see DCC no. 159 of 24 November 2022, § 78-79, regarding the criticisms of unconstitutionality formulated on the crime of illicit enrichment; DCC no. 3 of 19 January 2023, § 22, regarding the regulation of criminal liability for slander).

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?**

Constitutional Court judges have the right of access to state secrets, and the secret nature of relevant information in a pending case cannot constitute a reason for the Government not to present it to the Court. There were no situations in which the Court showed deference for security reasons. On the contrary, the Court mentioned, in its jurisprudence, that the interests based on national security are not absolute and declared unconstitutional the provision that limited the competence of the courts to review the proportionality of individual administrative and normative acts related to the national security of the Republic of Moldova (see JCC no. 27 of 13 November 2020, regarding the foreigner's guarantees in case of expulsion). Moreover, the Court declared unconstitutional the provisions of Law no. 200 of 16 July 2010 on the regime of foreigners, which forbade communication to the foreigner of the reasons underlying the decision to declare him/her as an undesirable person. The Court noted that the need to protect state secrets and the legitimate interest of national security does not oppose the right of the person to know the summary of the reasons that served as the basis for declaring him/her as an undesirable person, in so far as it is compatible with maintaining the confidentiality of the obtained information (see JCC nr. 27 of 13 November 2020, § 84).

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 Constitutional Court of the Republic of Moldova has the competence to issue Addresses to the Parliament or the Government to draw their attention to the need to liquidate some gaps in the legislation due to the non-implementation of some provisions of the Constitution.

For example, through an Address attached to the Judgment no. 22 of 1 October 2018, The Court pointed out to the Parliament that the notion of "serious consequences" is found in several articles of the Criminal Code and suggested the modification of the criminal provisions in question, in accordance with the principle of the legality of criminalization. Being subsequently referred to verify the constitutionality of the same notion, but in the context of another crime, the Court noted the Parliament's omission to remedy these aspects that perpetuate a state of unconstitutionality, as well as the frequency of applications related to this problem. Finally, the Court declared unconstitutional the notion of "serious consequences", which was found in several articles of the Criminal Code, based on the reasons in Judgment no. 22 of 17 October 2018 and, through an Address, drew Parliament's attention to the need to bring the criminal rules in line with the reasoning set forth in the aforementioned judgment (see JCC nr. 24 din 17 October 2019).

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?

Whether it is an act of Parliament or the executive, the Court checks whether they have acted within the limits of their margin of appreciation. However, regarding an act of the Government that is adopted to organize the execution of laws, the Court must also check whether the Government has acted *ultra vires* (see JCC no. 6 of 28 February 2023, § 58, which concerned the calculation of the pension of seconded officials).

The degree of democratic accountability of the original decision maker is not a criterion of deference for the Constitutional Court of the Republic of Moldova.

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

In Judgment no. 14 of 27 April 2021, § 54, the Court held that its competence in the matter of the control of the constitutionality of the parliamentary procedure is limited, given the sovereign character of the Parliament in the matter of legislation and the judicial deference that must be shown by the Court towards the role of the Parliament as an autonomous legislator. In this matter, the Court can verify the constitutionality of a law from a procedural point of view only if, when adopting it, the Parliament affected any essential element of the legislative process, which expressly results from the Constitution or which can be clearly deduced from a constitutional principle.

The parliamentary level analysis is of relevance for the Constitutional Court's analysis of the compatibility with fundamental rights of the contested law, when the Court analyzes the legitimate purpose of the interference. In its case-law, the Court declared unconstitutional a provision that prohibited non-commercial organizations from operating as private providers of audiovisual media services, as it did not identify any legitimate purpose in the informative note and in the opinions presented by the authorities (see JCC no. 6 of 10 March 2022, § 40).

In another case, regarding the constitutionality of the prohibition of generally known symbols used in the context of actions of military aggression, war crimes or crimes against humanity, the Constitutional Court identified the legitimate purpose of the measure in question, referring to the informative note of the amendment by which it was introduced. According to this note, the use of such symbols indirectly promotes war, leads to the emergence of social tensions and inter-ethnic hatred. Thus, the Court admitted that the purposes mentioned in the informative note to the amendment by which the measure in question was introduced can serve to ensure national security and public order (see JCC no. 9 of 11 April 2023, §§ 75-76).

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 Constitutional Court of the Republic of Moldova checks whether the Parliament has justified its decision. This obligation of the Parliament results from the general constitutional obligation of the authorities to motivate their own decisions, which can be deduced from Article 54 of the Constitution and from the standards of European constitutionalism, dictated by the culture of justification, in which every exercise of power must be justified (see JCC no. 15 of 28 April 2021, § 42, regarding the control of the constitutionality of the Parliament Decision on the declaration of the state of emergency).

Moreover, the Constitutional Court analyzes whether the legislator objectively motivated its decision, whether there is a rational connection with the legitimate goals it pursues, whether it respected the condition of minimal interference and ensured a fair balance between the competing principles (see JCC no. 9 of 11 April 2023, which concerned the constitutional review of the prohibition of generally known symbols used in the context of actions of military aggression, war crimes or crimes against humanity).

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 Constitutional Court shows deference to the Parliament's role as an autonomous legislator. However, based on Article 54 of the Constitution and the standards of European constitutionalism, dictated by the culture of justification, in which every exercise of power must be justified, Parliament has the constitutional obligation to motivate its own decisions (see JCC no. 15 din 28 April 2021, § 42, regarding the control of the constitutionality of the Parliament Decision on the declaration of the state of emergency).

For example, in its jurisprudence, the Court declared unconstitutional a Decision of the Parliament declaring the state of emergency due to the lack of an objective justification regarding the need to institute the state of emergency. In concrete terms, the Court noted that

"in the informative note of the draft decision, which takes up one page ... no arguments are offered to justify including the duration of the state of emergency". At the same time, the Court held that "the informative note does not contain a motivation that reflects the standard of proportionality, for example, regarding the total prohibition of gatherings, public demonstrations and other mass actions (see JCC no. 15 of 28 April 2021, § 44 and § 46). Moreover, considering that on that date there was a referral to the Court regarding the finding of the circumstances justifying the dissolution of the Parliament, the authors of the draft Decision had to argue the greater weight of the purpose of establishing the state of emergency for a period of two months compared to the purpose of a possible dissolution of the Parliament. This argument should also refer to the insufficiency of other legal measures, compared to the measures that the state of emergency requires, to achieve the intended goal (see JCC no. 15 of 28 April 2021, § 48).

In another recent ruling, regarding the ban on running for elections, applied to persons associated with political parties declared unconstitutional – a measure that implied substantial limitations of the constitutional right to run for elections – the Court held that Parliament must provide compelling reasons when setting the duration of a ban, as well as when deciding to extend it. Parliament must justify to what extent the duration of the established ban is suitable to pursue its legitimate aims. However, the Court observed that the Parliament increased, without any justification, the duration of the ban from three to five years. Thus, the Court found that the legislator increased the duration of the contested ban in the absence of an objective justification (see JCC no. 16 of 3 October 2023, §§ 52- 53).

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

In Judgment no. 14 of 27 April 2021, which aimed to exclude several powers of the President of the Republic regarding the Intelligence and Security Service, the Constitutional Court held that, within the legislative procedures, the Parliament must provide MPs with the possibility to examine the content of the draft law through an exchange of opinions. The Court noted that this stage of the legislative process is necessary, because it gives the MPs the opportunity to understand the essence of the draft law proposed for examination and contributes to building the trust of the society that the law was widely discussed before its adoption (§ 57).

In this context, the Constitutional Court declared unconstitutional a number of acts adopted by the Parliament of the Republic of Moldova, as voted on in an accelerated regime, without ensuring the parliamentary opposition the opportunity to ask questions or speak on the subject under examination. The Court held that, even if the parliamentary procedures were accompanied by protests from the parliamentary opposition, this fact cannot justify the adoption of acts in a procedure without debates (see JCC no. 14 of 27 April 2021, § 62, which concerned the exclusion of several competences of the President of the Republic regarding the Intelligence and Security Service; JCC no. 21 of 27 July 2021, § 52, which concerned the procedure for changing the numerical and nominal composition of the Permanent Bureau of the Parliament; JCC no. 22 of 29 July 2021, § 49, which concerned the procedure for adopting a law for the repeal and modification of several normative acts).

In these cases, the Constitutional Court did not examine the content of the parliamentary debates, but the possibility for the parliamentary opposition to formulate questions and take the floor. The Court consulted the transcript of the plenary session of the Parliament and considered that in a very short period between the two readings of the draft laws (i.e. of a minute in JCC no. 14 of 27 April 2021, § 60, and three minutes in JCC no. 22 of 29 July 2021, § 48) the Mps from the parliamentary opposition did not have the opportunity to submit the contested Law to the debate.

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 authority to legislate, the existence of public consultations or public debates does not represent conclusive evidence for the democratic legitimacy of the decision. According to the jurisprudence of the Constitutional Court, the Fundamental Law establishes the procedural requirements of the legislative process applicable both at the stage of verifying the content of draft laws (e.g. the existence of parliamentary debates, the right to submit amendments, the right to ask questions, the right to speak etc.), as well as at the stage of verifying the fulfillment of the preliminary procedural conditions to be able to start the examination of the acts in question. For example, at the stage of verifying compliance with the preliminary procedural conditions to be able to start the examination of draft laws, Parliament must ascertain whether the draft in question was sent by one of the authorities authorized by Article 73 of the Constitution to submit legislative initiatives and whether, in the case of the Government, the decision approving the draft law entered into force, according to Article 102 para. (4) of the Constitution (see JCC no. 17 of 10 June 2021, §§ 53-54).

In this regard, the Court declared unconstitutional a Decision of the Parliament, adopted at the legislative initiative of the Government, because, when it was voted in the first reading, the Government Decision by which the draft in question was approved had not entered into force. Therefore, the Court held that during the examination of the draft law in the first reading, the Parliament voted on a non-existent act (see JCC no. 17 of 10 June 2021, § 57, regarding the change of the composition of the Superior Council of Magistracy).

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?

As a rule, the Constitutional Court, as the sole interpreter of the constitution, defines the scope of constitutional rights. As its judgment is a "judgment of laws" in the abstract, but not a "judgment of concrete cases", the Court cannot verify, according to its powers, the proportionality of how the contested provisions is applied, *i.e.* the proportionality of the interference to the concrete way, in the circumstances of a particular case (see JCC no. 3 of 14 January 2021, § 65, regarding access to personal information). For this reason, the government's definition of rights or its application to the facts at issue is not a relevant issue for the Court's analysis.

However, sometimes the Court shows deference to the definition regulated by the legislator through a law. For example, in its Judgment no. 29 of 22 November, 2018, the Court was called to verify whether the limitations imposed on the right to the disability pension by a law do not disproportionately affect Article 47 of the Constitution, which guarantees the right to social assistance and protection. In this sense, the Court mentioned that, at the legislative level, the constitutional provisions of Article 47 are developed by Law no. 156 of 14 October 1998 regarding the public pension system, which contains provisions regarding the categories of pensions and their conditions of exercise. The Court observed that section 3 of this Act regulates the scope of the right to disability pension (§ 53). Analyzing these provisions, the Court accepted that the imposition *per se* by the legislator of a retirement age and a contribution period is not unconstitutional (§ 55).

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?

Applicable rights do not affect the degree of deference. The Constitutional Court of the Republic of Moldova treats rights in an equally important manner and analyzes the interferences in their exercise just as rigorously. There is no hierarchy of rights in the analysis of the Constitutional Court. If the Court finds the existence of an interference with the applicable fundamental right, it will proceed with the analysis of its proportionality, applying the stages of the proportionality test.

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?

In its jurisprudence, the Constitutional Court established that the question of the quality of a law does not represent a question of constitutionality as long as a fundamental right is not affected. Thus, the Constitutional Court performs the test of the quality of the law only by reference to a fundamental right (see DCC no. 146 of 17 Decembre 2020, § 22, regarding the appointment of the debtor's representative in the insolvency process and his competence to contest the claims and preferential rights from the claim table; DCC no. 38 of 30 March 2021, § 17, which concerned the subsidiary liability of the members of the debtor's management bodies for the violation of the obligation to submit the application for initiation of the insolvency process).

However, if the Court finds the application of the right, it will continue its analysis regarding the quality of the law, applying the rules of interpretation. If the challenged text is drafted with sufficient precision, the rule *In claris non fit interpretatio* (clear texts must not be interpreted) must be taken into account here (see DCC no. 76 of 2 July 2020, § 28). In other words, the general nature of the formulation of a legal text lead to the general character of its application, without the need for distinctions that the respective text does not contain and does not follow (DCC no. 60 of 9 June 2020, § 31, regarding the incompatibility of the judge to successively judge the same civil case).

In other cases, the Court analyzes whether the meaning of the disputed term can be deduced from its ordinary meaning, *i.e.* by simple application of the rules of linguistic interpretation, starting from the usual meaning of the terms, taking into account the circumstances of the

concrete case (see DCC no. 99 of 10 August 2023, § 26, regarding the deprivation of the right to drive means of transport).

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

At this stage of the proportionality test, the Court must verify whether the purpose pursued by the interference can be subsumed under the legitimate purposes provided by Article 54 para. (2) of the Constitution. In order to identify the purpose of the interference, the Court can refer to the informative note of the contested law (see JCC no. 9 din 11 April 2023, § 75, on the constitutional review of the prohibition of generally known symbols used in the context of actions of military aggression, war crimes or crimes against humanity) or may infer this purpose based on the analysis of the contested provision (see JCC no. 14 of 8 August 2023, §§ 75-77, on the guarantees of the refusal to grant the right of access to state secrets). The Court's analysis at this stage is not very rigorous. As a rule, the Court "admits" that the interference aims to achieve a special purpose, which can be subsumed under a general legitimate purpose provided by Article 54 para. (2) of the Constitution (see JCC no. 20 of 3 November 2022, § 50, regarding the condition of typing the appeal request).

However, if the Court, analyzing the informative note to the draft law and opinions presented by the authorities, cannot identify any argument in support of the legitimacy of the interference, it will find the lack of a legitimate purpose and declare the challenged interference unconstitutional (see JCC no. 6 of 10 March 2022, §§ 36-41, which concerned the prohibition applied to non-commercial organizations to operate as private providers of audiovisual media services).

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 Constitutional Court applies the classic test of proportionality when examining the proportionality of interference with a fundamental right.

The Constitutional Court analyzes in all cases the opportunity and proportionality in the narrow sense of the contested interference (see JCC no. 22 of 6 August 2020, regarding the presentation of fiscal information to courts and criminal investigation bodies as evidence; JCC nr. 14 din 8 august 2023 regarding the presentation of fiscal information to courts and criminal investigation bodies as evidence). Often, the Court does not apply the second stage of the classical proportionality test, *i.e.* necessity.

However, there were cases in which the Court analyzed the necessary nature of the means used to achieve the aims pursued (see JCC no. 26 of 30 October 2018, regarding the mandatory vaccination for a child to be able to go to kindergarten or school, §§ 59-67; JCC no. 35 of 9 November 2021, §§ 184-191, in which the Court found that, although there are alternative less intrusive means to ensure the implementation of the Government's program of activity and the unblocking of the activities of the ministries within the Government, they are not able to ensure the achievement of the mentioned legitimate aims with the same efficiency as the measure of abolishing some public functions and creating other functions of public dignity and JCC no. 11 of 20 July 2023, in which the Court identified the existence of a less intrusive measure for employment in private security organizations, *i.e.* lack of criminal record, in relation to the contested measure, *i.e.* lack of a conviction for intentional crimes).

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

The Constitutional Court does not go through every applicable stage of the proportionality test. If the interference does not pass the opportunity stage (see JCC no. 14 of 21 July 2022, §53, in which the Court considered that the absolute ban on the recalculation of residential, communal and non-communal bills does not ensure a fair balance between the supplier's economic interests and the consumer's property right) or that of necessity (see JCC no. 5 of 14 February 2023, § 83, in which the Court found that the objective of the legislator to avoid situations of annulment of decisions due to the violation of insignificant rules of procedure can be achieved by limiting the judicial review to the serious procedural errors of the Evaluation Commission in the evaluation procedure, which affects the fairness of the evaluation procedure, without limiting the competence to examine procedural matters), the finding in this regard will be sufficient to declare it unconstitutional.

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?

There are cases where the Court does not expressly find that the contested measure satisfies one of the stages of the proportionality test, but only admits this possibility in order to move on to the next stage, thus strengthening its analysis. For example, in Judgment no. 6 of 10 April 2018, the Court could not affirm the lack of any rational connection with the legitimate goals pursued by the obligation to take the polygraph test for the position of president of the National Integrity Authority and continued to analyze the necessity and proportionality in the narrow sense of the interference. The Court also proceeds in this way when it finds that the established measure partially satisfies one of the stages of the proportionality test. For example, in Judgment no. 7 of 19 March 2019, the Court held that the contested measure partially fulfills the condition of the rational connection with the legitimate goals and continued to analyze the proportionality in the narrow sense of the interference.

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

Control of the proportionality of interference with a fundamental right is imposed by Article 54 of the Constitution. However, the areas in which the authorities have a wider or reduced discretion were later developed in the Court's jurisprudence, considering the jurisprudence of the European Court of Human Rights.

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

In its Judgment no. 16 of 4 June, 2018, referring to the case Animal Defenders International v. United Kingdon, 22 April 2013 [*GC*], the Constitutional Court outlined the concept of discretionary margin that it recognizes. Thus, the Court mentioned that the margin of appreciation also includes the relevant reasons for all courts regarding the need to show deference to the legislative power or to the executive power. Considering this form of deference, the Constitutional Court operates with the concept of margin of discretion, seen as

a constraint for constitutional judges in making a decision, in favor of the legislature or the executive (§ 66).

For example, in its Decision no. 5 of 14 January 2019, regarding voting abroad based on an identity card or expired identity documents, the Court verified whether the Parliament did not exceed its discretionary power granted by the Constitution in the matter of limiting the exercise of the right to vote of people abroad, exercised on the basis of documents other than a valid passport. In this regard, the Court analyzed whether the interference is provided for by law, whether it pursues one or more legitimate goals and whether it is not disproportionate (see DCC no. 5 of 14 January 2019, §§ 20 – 31).

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?

On 18 November 2008, the European Court of Human Rights issued its judgment in the case of *Tănase v. Republic of Moldova*, through which it found the violation of the plaintiff's right to be elected to the Parliament of the Republic of Moldova, through the adoption of Law no. 273 of December 7, 2007. The provisions of the law imposed restrictions on the occupation of public positions for persons who also held the citizenship of a state other than the Republic of Moldova. The Government of the Republic of Moldova requested the re-examination of the case by the Grand Chamber, citing the legitimate and democratic nature of the interference. While the proceedings were pending before the Grand Chamber, the Constitutional Court of the Republic of Moldova issued Judgment no. 9 of 26 May 2009, by which he declared unconstitutional the Law establishing the interference with the right of the plaintiff guaranteed by Article 3 Protocol no. 1 to the Convention. The Constitutional Court considered that by adopting the law in question, the legislator acted within the limits of its margin of appreciation, and the interference with the right to be elected was proportional to the aim pursued.

The findings of the Constitutional Court in this judgment were taken into account by the Grand Chamber in its analysis. However, on 27 April 2010, the Grand Chamber of the European Court found a violation of Article 3 Protocol no. 1 to the Convention (see *Tănase v. Republic of Moldov*a [MC], 27 April 2010). Later, on 11 December 2014, at the initiative of some judges of the Constitutional Court, the Constitutional Court revised its Judgment no. 9 of 26 May 2009 and declared unconstitutional the provisions of Law no. 273 of 7 December 2007 (see JCC no. 31 of 11 December 2014).

IV. Other peculiarities

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

The admissibility conditions for referral to the Constitutional Court quite often raise the question of deference. When analyzing the application of a fundamental right or article of the Constitution, the Court first establishes the state's margin of appreciation in the respective field. If the Court observes that the state acted within the limits of its margin of appreciation, then it will not find the application of the fundamental right or the article invoked by the author of the referral. For example, in its Decision no. 45 of April 27, 2023, which addressed criticisms of unconstitutionality based on property rights formulated regarding the wealth tax, The Court

noted that the legislator has a wide margin of appreciation in this area and checked whether by regulating this type of tax, the legislator acted within the limits of his margin of appreciation.

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

There are areas where the Court has become more differential, such as that of social protection (see DCC no. 108 of 6 September 2022, regarding the retirement age and length of service of judges retiring as of 1 July 2021; DCC no. 21 of 2 March 2023, regarding the recalculation of pensions previously established for military personnel and persons from the command body and from the troops of the internal affairs bodies).

In other areas, such as parliamentary procedures, the Court, on the contrary, has been more active (see answers to questions 13-15 above).

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

The overloaded agenda of the Constitutional Court or the small number of pending applications do not influence its analysis in concrete cases. The Court examines the cases before it with equal attention, without treating them as a deferential *de plano* to reduce its workload.

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?

According to articles 24 para. (2) of the Law on the Constitutional Court and 39 of the Constitutional Jurisdiction Code, the application submitted to the Constitutional Court must be reasoned. This condition is not fulfilled by simply referring a provision from the Constitution, which cannot be considered a criticism of unconstitutionality. In such situations, the Court rejects the application as inadmissible, specifying that the simple reference to a text from the Constitution, without explaining the alleged non-conformity with it of the contested legal provisions, it does not amount to an argument. If it proceeded to examine the merits of the application formulated in such a manner, the Constitutional Court would substitute itself for the author in invoking the arguments of unconstitutionality, which would be equivalent to an *ex officio* control (se JCC no. 20 of 3 November 2022, § 23, on the condition of typing the appeal request; JCC no. 12 of 6 April 2021, §§ 31 – 32, regarding the minimum wage amount).

However, the Court may classify the reasons advanced under a different constitutional provision from the one invoked by the author of the application. The Court is the master of characterization in matter of constitutionality control. The Court cannot be compelled, when examining the constitutionality of a legal text, to analyze the criticized provisions only through the lens of the constitutional norms invoked by the author, but is free to analyze them also in relation to the relevant constitutional provisions for resolving the referral, the arguments brought in this regard being important (see JCC no. 17 of 23 June 2020, § 58, in which the Court held the application of Article 20 of the Constitution (free access to justice), because its analysis concerned the appeal of the emergency measures ordered by the Executive; JCC no. 27 of 13 November 2020, §§ 18-19, in which the Court considered that the arguments of the author of the application make applicable and articles 19 (*the legal status of foreign citizens and stateless persons*) and 26 (*the right to defence*) of the Constitution; JCC no. 2 of 12 January 2021, § 24, in which the Court considered that articles 28 are also relevant in the case (intimate,

family and private life) and 47 (the right to social assistance and protection) of the Constitution).

For example, in Decision no. 190 of 23 December 2022, the Court observed that although the author of the exception of unconstitutionality invoked articles 23 (*the quality of the law*) and 127 (*property*) from the Constitution, in reality, he claims that the contested norm violates his property right. Therefore, the Court analyzed the criticisms of unconstitutionality by referring to articles 23, 46 (the right to private property and its protection) and 127 of the Constitution (DCC no. 190 of 23 December 2022, § 23).

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

According to Article 6 paras (2) and (3) of the Code of Constitutional Jurisdiction, the Constitutional Court is sovereign in the matter of constitutionality control and may extend its control to other normative acts whose constitutionality depends in whole or in part on the constitutionality of the disputed act. The Court proceeded in such a way in a number of judgments, namely: JCC no. 37 of 7 December 2021, § 23, in which the Court extended its scope to Article 17 paras (2)-(4) of the Law on the assessment of institutional integrity, because it had, for the most part, a content similar to the norm contested by the author of the referral, *i.e.* Article 343^8 of the Code of Civil Procedure; JCC no. 21 of 4 August 2020; § 35, in which the author challenged only Article 84 para (1) of the Insolvency Law, but the Court extended its scope regarding Article 84 para (2) of the Insolvency Law, which had a similar content to the one contested by the author of the application and which referred to a possible ban on leaving the place of residence without the permission of the insolvency court and regarding Article 84 para. (3) of the same law that had a logical connection with the first two norms subject to constitutionality control; JCC no. 6 of 10 March 2020, § 35, in which the Court extended its control regarding the provisions of point 8 of Annex no. 6 to Government Decision no. 1231 of 12 December 2018, as it coincided in content with the disputed provisions of Article 27 para. (5) from the Law on the unitary salary system in the budgetary sector and because they aim to implement the established norm).