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INTERNATIONAL JOURNAL OF PARLIAMENTARY STUDIES
XX (2022) 1–12

INTERNATIONAL JOURNAL OF PARLIAMENTARY STUDIES

Forum Article

Parliament v. Courts: Who has the Final Word?

Conference on the justiciability of parliamentary procedures hosted by Ludovika – University of Public Service, Faculty of Public Governance and International Studies (online), 29 November 2021

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Abstract

Ludovika – University of Public Service, Faculty of Public Governance and International Studies organized an international online conference on 29 November 2021 on the justiciability of parliamentary procedures. As part of the conference, four presentations were given, focusing on the issue of legal remedies against parliamentary proceedings and the lack thereof. In this context, the speakers reflected on the question of whether the justiciability of parliamentary procedures is a threat to the rule of law or a necessary element of it, and on the question of how a constitutional court can become an arbitrator in political conflicts and how does it shape the constitutional concept of parliamentarism. The presentations provided a comprehensive overview of the Hungarian, Austrian, Italian, and Czech practices. The conference was moderated by Zsolt Szabó, Senior Research Fellow at the Ludovika – University of Public Service and the Editor-in-Chief of the International Journal of Parliamentary Studies.

 | DOI:10.1163/26668912-BJA10032

Keywords

parliamentarism – House Rules – justiciability of parliamentary procedures – legal remedy – Constitutional Court

On 29 November 2021, the Faculty of Public Governance and International Studies of Ludovika – University of Public Service organized an international conference entitled *"Parliament v. Courts: who has the final word?"* on the subject of the justiciability of parliamentary proceedings. Four presentations were given at the event, focusing on the right to take legal remedies against parliamentary acts and the lack thereof. The speakers addressed whether the justiciability of parliamentary proceedings is a threat to the rule of law or a necessary element of it and how a constitutional court can become an arbiter of political conflicts and thereby shape the constitutional concept of parliamentarianism. The presentations provided a comprehensive overview of Hungarian, Austrian, Italian and Czech practices in this regard.

The conference was opened by Zsolt Szabó, Senior Research Fellow at the Ludovika – University of Public Service and Editor-in-Chief of the International Journal of Parliamentary Studies. He delivered an insightful lecture entitled *"Justiciability of parliamentary procedures – necessity or threat to rule of law?"*, in which he highlighted the importance of house rules in parliaments and the problem of the lack of legal remedies against parliamentary acts.

In his presentation, he pointed out that, despite the public's tendency to regard the house rules as insignificant because of their comprehensiveness and complexity, these rules contain important provisions and set out an institutional framework that can influence policy outcomes. On the other hand, there is a need for fair procedures because in a constitutional democracy the principle of equality of arms is a general principle of judicial proceedings and a principle that applies to other proceedings, including parliamentary acts.

The lecture highlighted two usually concurring but sometimes conflicting principles. While the sovereignty of the parliament guarantees the right of parliaments to determine their own procedures – including organizational and structural issues, rules of procedure, the agenda of sessions and schedule for sitting, the scope of disciplinary measures, protection against external influences, etc. – the sovereignty of the constitution, as the principal source of law – as declared in Article XXVIII section (7) of the Fundamental Law – guarantees the possibility of legal remedy against unlawful acts and requires the protection of fundamental rights in respect of all state decisions.

The sovereignty of parliament and the sovereignty of the constitution can come into conflict, but they can also be the basis of a state's common law. For example, the UK Parliament is based on the sovereignty of Parliament, while the systems in many continental countries are based on the sovereignty of the constitution. When considering what might represent a model country for parliamentary sovereignty, the speaker cited Article 9 of the *Bill of Rights* from 1689, which states, as the most crucial parliamentary privilege, that freedom of speech and parliamentary debate or proceedings may not be challenged or questioned before any court or outside Parliament. Similar rules can be found in Article I section (5) of the US Constitution, which states that "[*e*]*ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.*" Similarly, the German Constitution states that Parliament itself shall lay down the rules of procedure. Article 40 section (1) of the *Grundgesetz* declares that the Bundestag should adopt its own rules of procedure while Article 52 Section (3) rules similarly for the Bundesrat.

Concerning parliamentary legal remedies, Dr. Szabó distinguished in principle between, on the one hand, remedies within parliament and remedies against parliamentary acts by an external body and, on the other hand, remedies available to MPs and external entities. A positive example of to the application of such remedies can be found in the Irish Supreme Court decision in *Kerins v McGuinness & Ors*. As the Chief Executive of a private charitable organization, Angela Kerins was invited to attend a meeting of the Public Accounts Committee (PAC) – a standing committee of the Irish Parliament – to give evidence voluntarily about the expenditure of public funds. During the appearance, which lasted more than seven hours, many of the questions she was asked harmed her reputation both personally and professionally, so Kerins brought proceedings to the High Court against the Commission, claiming that the PAC had exceeded its powers during her appearance. The High Court rejected her claim, holding that the constitutional immunity of MPs in respect of utterances made in Parliament prevented any judicial intervention. The Irish Supreme Court subsequently overturned the High Court's ruling and held that the Constitution does not raise an absolute barrier to bringing a case against a committee, where the committee acts unlawfully. The Supreme Court held that the PAC had acted beyond the terms of the invitation issued to Kerins, and hence the PAC was acting *ultra vires* (beyond their powers).

Another positive example highlighted in the presentation was the changes in the South African Constitutional Court (CC) in recent years, as explored in Stephen Gardbaum's paper "*Pushing the Boundaries: Judicial Review of*

Legislative Procedures in South Africa". The article concludes that the South African CC has dramatically broken with the general resistance shared by most courts globally to reviewing the legislative processes, parliamentary procedures, outcomes, and political accountability of the executive. The presentation described how Gardbaum argues that the South African CC's actions along these lines are far from violating the separation of powers. The problems that arise require novel remedies such as those applied by the CC of South Africa.

Finally, the lecture focused on the specificities of the Hungarian Constitutional Court (HCC), noting that the problem of the lack of parliamentary legal remedies and the weakness of the control mechanism has been raised on several occasions in our constitutional practice. In the early 2000s, the HCC ruled that parliamentary committees of inquiry are based on the voluntary cooperation of the parties concerned. More than ten years later, to implement this principle, the right to initiate inquiries was constructed so that – in a break with the previous legislation – one-fifth of the MPs can no longer demand but only propose the establishment of a committee of inquiry. The legislator also declared an obligation to cooperate with the committee of inquiry. In the context of the very beginnings of the domestic internal control mechanism, the presentation highlighted the area of penal law and its the remedy against the rejection of parliamentary papers by the Speaker.

Christoph Konrath, Head of the Department for Parliamentary Science Policy Activities of the Legal, Legislative and Scientific Service of the Austrian Parliamentary Directorate, delivered a presentation entitled *"An impartial arbitrator? – The new relations between the Austrian Constitutional Court and the Parliament".* This talk discussed how the CC is reshaping the perception of parliamentarianism in Austria and how conflicts between the Parliament and other state authorities can be resolved. In the context of the latter, he outlined the new powers of the Austrian CC, introduced in 2014, to adjudicate on conflicts with commissions of inquiry, conflicts within the Parliament (intra-parliamentary), and between the Parliament and other state bodies (inter-parliamentary). The presentation included a brief overview of the CC's self-interpretation, examined how the CC decided cases involving the Parliament before and after introducing its new role, and described how the CC's new competence was established and compared with its German counterpart.

From a historical perspective, the lecture pointed out that – even though it rarely assumed a prominent role in practice – the possibility of resolving political conflicts as a means of resolving disputes between regions or possibly federal entities has been present in the Austrian CC practice from the very beginning, since the end of the 19th century. The reconstitution of the CC in

1945 was in line with the earlier constitutional reform of 1929, and the main features of the CC developed in the following decades. The constitutional judges developed a particular self-understanding and coherence in their practice, among other features. They focused on legal arguments and communicated consistently in their decisions. The presentation underlined that, although the political affiliation of constitutional judges may remain, it did not influence their decision-making. As a result, there have been many debates in Austria about the fact that the CC members did not follow the line of the political party that nominated them. The CC unanimously rejected a proposal to introduce dissenting opinions to settle these disputes, and in 2021 another attempt was made to introduce that measure as a means of promoting transparency, but the CC voted against it again. The presentation also discussed how the CC had developed its particular jurisprudence. It typically favours concise reasoning, avoids citing scientific publications, and thus launches into dogmatic debates. On this basis, the presentation concluded that the CC wishes to be regarded as a real court and not as a high-level expert body.

Dr. Konrath's presentation identified four essential features in the shaping of parliamentarism:

1. The right to vote: the Federal Constitution states that the National Council shall be elected according to the principles of proportional representation but only outlines the rules of distribution in general terms. In contrast, the CC has developed a complex doctrine of proportional representation to ensure the stability of representative bodies at all levels of government. For example, it has ruled that the relatively high electoral threshold for provincial parliaments is constitutional. It has also taken a position in favour of strong political parties. At the same time, it has also reached essential decisions on the rights and status of parliamentarians vis-à-vis their party group.
2. Parliamentary powers: the presentation noted that, in a decision of the CC from as early as 1932, it ruled that all parliamentary powers must rest on a clearly defined constitutional basis, i.e. the Parliament cannot introduce any right of control or participation without a constitutional basis. On the other hand, it also ruled that the government is accountable only for its past actions and decisions. The Parliament cannot interfere in ongoing decision-making procedures, as this could violate the separation of powers.
3. Parliamentary procedures: until 2014, it was not possible to request a decision on intra-parliamentary conflicts and procedural issues, but irregularities in the House Rules were increasingly being brought before the CC, usually by members of opposition parties who had voted against

the law under review. The presentation pointed out that this practice is consistent with the theoretical justification of the principle of judicial review, specifically that the CC monitors the implementation of the Constitution. Accordingly, the CC has been reviewing legislative procedures since 2001 while at the same time setting clear limits on their justiciability. The CC examines only those aspects of legislative procedures regulated by the Constitution and only considers parliamentary procedures. On this basis, a bill is only declared unconstitutional if the process of the vote has been seriously violated.

4. Cases dismissed by the CC in case of lack of competence: These cases fall exclusively within the competence of the legislative authority, and are essentially conflicts within the parliament or between the parliament and other public institutions or third parties. The presentation highlighted that, when judging these cases, the CC typically finds that the CC does not have competence and declares that the case's decision is a legislative issue and therefore cannot be decided by the CC.

The presentation also addressed the issue of parliamentary committees of inquiry. In this context it was noted that, until 2006, committees of inquiry were rare in the Austrian Parliament and could only be established based on majority decisions. Typically, this occurred in cases where the pressure of public opinion had reached such a level that the governing parties had no option but to comply with public demands. In addition, the presentation highlighted the problem that, at that time, Parliament and the committee chairs did not exercise "interpretation" of the Constitution and the rules of procedure, i.e. they applied the provisions of the Constitution and the rules of procedure, but rarely explained and justified how they did so. Overall, it became clear that the House Rules lacked the instruments of legal remedy and the mechanisms for conducting parliamentary inquiries efficiently and predictably, under the rule of law and based on fair trial principles. As a result, new powers were conferred on the CC, together with the introduction of the possibility for a quarter of the members of the National Council to request the establishment of a committee of inquiry and the establishment of a comprehensive set of rules of procedure for committees of inquiry.

The presentation then outlined the four new types of procedures introduced in 2014, which focus on:

a. conflicts over the question of whether the establishment of a committee of inquiry is admissible;
b. conflicts over the question of whether the scope of the Rules of Procedure Committee's basic order to hear evidence is sufficient;

c. conflicts over the existence of an objective connection between a demand for further evidence or a demand to summon a witness and the subject matter of the committee of inquiry's investigation;
d. competences relating to conflicts between Parliament and other state organs (inter-organ conflicts).

The rules established in the procedures ensure that the CC only answers the constitutional question that the parties have not been able to resolve and does not rule on the conflict directly. Thus the CC has developed a strict reasoning method to formulate constitutional and procedural norms.

In conclusion, the presentation highlighted the role of the Austrian CC as a guarantee of the political process. Its task is to ensure the basic rules of the political process and to prevent potential abuses.

Enrico Albanesi, Associate Professor of Constitutional Law at the University of Genoa, also an Associate Research Fellow at the Sir William Dale Centre for Legal Studies, Institute of Advanced Legal Studies, University of London, delivered a presentation entitled *"Judicial review of parliamentary proceedings in Italy: justiciability of 'manifest' violations of the Constitution only"* which discussed the characteristics of the Italian bicameral system and how cumbersome procedures affect the Italian legislative process. His presentation reflected on the boundaries between the independence of Parliament and the prerogatives of its members, scrutiny by committees, scrutiny by the opposition, and compliance with the quality requirements of the legislation. The question of the justiciability of parliamentary proceedings was examined through various CC decisions.

The presentation critically analysed the symmetrical or "perfect bicameral system" in Italy, pointing out that, although the system had been originally designed to give the Parliament a key role in the legislative process, it has now proved to be largely ineffective at this, making the legislative process cumbersome and slow and failing to ensure adequate representation of the regions in Parliament. The presentation also highlighted the implications of the 2018 Italian parliamentary elections. After a hectic period which saw amendments to the electoral law, the 2018 elections were held under a new, untested mixed electoral system, in which the overall impact of the majority component was significantly reduced compared to previous systems, making it increasingly likely that the elections would result in a hung parliament without a clear winner and that the Italian political system would become fragmented.

After introducing the conceptual framework, the presentation examined the Italian CC decision no. 17/2019 from four perspectives. In the case on which the decision was based, a group of senators objected to using a procedural

mechanism in the Senate whereby the government amended draft budgetary legislation by a block amendment and associated its approval with a confidence vote, thereby preventing amendments from being tabled.

Based on the parliamentary rules and the practice of each House, the presentation highlighted the way that Italian practice recognizes the possibility of internal remedies. This is also confirmed by the reason for the decision in point 3.5, in which the CC stated that *"jurisdictional disputes between branches of state cannot concern disputes relating exclusively to violations or the incorrect application of parliamentary regulations and the practices of each House."* It further emphasized that *"the prerogatives asserted by the members of the Houses are protected within the Houses"* so that voting arrangements within the Houses cannot be subject to review by external bodies (specifically the criminal justice authorities) as these arrangements are governed solely by parliamentary rules. In point 4.3 of the reason for the decision, the CC also stated that "*it is necessary to counteract any practices that result in a gradual departure from constitutional principles, resulting in a gradual yet inexorable violation of the manner in which legislative powers are exercised, which must be respected in order to ensure that legislation enacted by Parliament does not lose sight of its role as a moment for the public and democratic conciliation of the different principles and interests in play."*

Turning to the topic of jurisdictional conflict, the presentation highlighted that parliamentary regulations are not considered to be primary law, which should be subject to judicial review because of Parliament's autonomy. This is confirmed by points 4.5 and 5 of the reason for decision no. 17/2019, in which the CC stated that the prerequisite of justiciability was not met in the case under examination since it was not clear that the legislative procedure had been abused in such a way as to result in a manifest infringement of the constitutional prerogatives of the MPs, which meant that there was no dispute as to jurisdiction.

The presentation examined how MPs are institutions of state power since they are able to initiate jurisdictional litigation. The presentation cited point 3.3 of the decision's reasoning in this context. The CC stated that the Italian Constitution "*identifies a range of prerogatives vested in the individual members of Parliament, which are different and distinct from those vested in them as members of the House, which – by contrast – it falls to each House to uphold."* These include, in general terms, the right to exercise a free parliamentary mandate, the right to take part in debates and resolutions, the right to express opinions and to vote, the right of initiative, and the right to table amendments.

Finally, the presentation addressed the "manifest" violation of the Constitution, highlighting point 3.5 of the reason for decision no. 17/2019,

according to which due respect for the autonomy of the Parliament requires that intervention by the CC is strictly limited to those violations that result in a manifest violation of the constitutional prerogatives of the MPs and that such violations must be identifiable already during the preliminary consideration.

Regarding this point, Professor Albanesi argued that the case presented – decision no. 17/2019 of the CC – represents a further step backward for the autonomy of the Parliament in two respects since, on the one hand, the Italian CC establishes no criteria defining what is meant by "manifest" violations, while on the other hand, these practices allow too much tolerance of the political background.

Robert Zbiral, Associate Professor at the Department of Constitutional Law and Political Science at Masaryk University in Brno, also a Law Clerk at the Czech Constitutional Court, made a presentation entitled *"Majority may have its way – unless it may not – review of parliamentary proceedings by Czech Constitutional Court"* outlining the structure of the Czech Parliament and the Czech CC, the sources of law applicable to legislation, and the framework for constitutional review in the field of legislation. Finally, he traced the evolution of the practice of the Czech CC and discussed the difficulty of finding the right balance between respect for parliamentary autonomy and the need to ensure the correctness of the legislative process.

Describing the Czech Republic as a classical parliamentary democracy with a bicameral parliament, the presentation noted that while the Chamber of Deputies is the centre of legislative power, its composition is generally fragmented. It has an autonomous position vis-à-vis the government, both formally and materially. The speaker identified the problem of what he characterised as an "*improvised parliamentary culture*", i.e. the legislative process is not sufficiently streamlined, and the role of individual members is too strong. Furthermore, the weakness of the legislative powers of the Senate prevents it from imposing its will on the Assembly. The Senate follows a more consensual procedural style, which is rarely challenged in the CC. Like the German model, the Czech CC occupies a strong position in the constitutional system, with the competence to review both the abstract and concrete constitutionality of laws (statutes).

The presentation then turned to the sources of the rules on legislation, underlining that the Czech Constitution is relatively weak in this regard and only contains direct provisions on the most basic rules. In contrast, its general clauses declare that the Czech Republic is a democratic state that respects the rule of law and that majority decisions must respect the protection of minorities. The presentation noted that the areas covered by the rules of procedure of each chamber include the framework for constitutional review in the field

of legislation, the formal aspects of legislation, the rules for drafting legislation and various procedural issues i.e. how laws are negotiated and adopted (*Gute Gesetzgebung*). In summary, the rules on legislative flexibility, the existence of autonomous chambers, the easy access to review powers and the strong powers of the Czech CC provide for a wide range of possibilities for the judicial review of procedural issues.

The presentation provided a historical perspective and presented the practice of the CC over four periods. It described how the CC had initially been characterized by only limited intervention, which may have been due to the less contentious law-making in the Parliament at the time. The first intervention into parliamentary rules took place in 1997, in a dispute between the Chamber and the Speaker over the nature of time limits. The CC stated that the separation of legislative powers should be interpreted in a prejudicial way to the Chamber.[1] Between 2002 and 2003, a so-called *"strict approach"* was introduced, in which the CC stated that in cases where a draft law combines several laws requiring different procedures, the strictest procedure should be applied.[2] In another case, the CC ruled that the vote of the Chamber cannot be revoked, thus protecting the effective majority. The CC also stated that, under the law and the constitution, only procedurally correct decisions could be taken, thus ensuring the obligation to review the transparency of the legislative process.[3] Later, the CC took a softer approach, stating that technical amendments to a draft law are possible even after the adoption of the law by the Parliament. It also specified that only the constitutionally defined rules of the legislative process can be mandatory criteria for judicial review by the CC.[4]

In the subsequent period from 2005–2010, the CC created a complex and detailed draft of the "ideal" legislative process, and as a result, declared unconstitutional any amendments to a bill that are not otherwise related to the bill and which were submitted in the second reading of a bill, as they could reduce the transparency of the final law and allow a kind of disguised attempt to introduce an entirely new bill.[5] However, later in the same period, the CC took a less activist position and found several so-called *"omnibus bills"* to be constitutional, stating that it is not the CC's role to review parliamentary culture.[6] It has also indicated that it is necessary to balance the formal and procedural aspects of the review with legal certainty. As a result, in many

1 PL. ÚS 22/1997.
2 PL. ÚS 21/2001.
3 PL. ÚS 5/2002.
4 PL. ÚS 23/2004.
5 PL. ÚS 77/2006.
6 PL. ÚS 24/2007.

cases where the CC has found the procedure unconstitutional, it has continued to keep the law in force.[7]

Between 2010 and 2014, the CC tried again to regularize parliamentary practice. In its judicial review of the use of the legislative emergency procedure, it annulled two laws where emergency procedures had been used to limit the voice of the opposition. The CC emphasized that legislation should essentially be understood as a trade-off between MPs to find a compromise that appeals to an initially fragmented society.[8] In parallel, in another decision, the CC set a limit on this by stating that the opposition must defend its rights in time. The adoption of the bill under consideration, which was subject to an emergency procedure, was problematic, but the CC did not examine the issue as the petition had been received too late.[9] Similarly, in a subsequent case, the opposition objected to the procedure followed while adopting a bill on the restitution of church property. Although the procedural rules had been pushed to the limit, the CC found that the minority opinion had been heard. It stated that while the CC condemns the moral degradation of the legislative process caused by the behaviour of the MPs, it cannot act as a moral arbiter or judge of political representation and cannot annul a law simply because one group of MPs does not respect another.[10]

Finally, in the fourth period identified in the presentation, the CC is currently characterized by an attitude which holds that "the CC should do nothing, even if it sees something". Consequently, there is a strong regression in the CC's practice of some of the doctrines developed in previous periods. Although previously considered unconstitutional, complex amendments are now again accepted as constitutional.[11] In several cases where a procedural violation has occurred, the CC has concluded that the procedure was not unconstitutional after all. In addition, it has been argued that annulment by the CC is only possible where a norm in the Constitution has been violated or where the unlawful procedure has infringed certain constitutional rights, principles, or values.[12] As a result, since 2013, no law has been annulled by the Czech CC due to it violating procedural rules.

The presenter went on to explain why it is difficult to choose between respecting parliamentary autonomy and seeking fairness in the legislative process. As the Speaker demonstrated in the historical overview, one of the

7 PL. ÚS 56/2005.
8 PL. ÚS 53/2010. and PL. ÚS 55/2010.
9 PL. ÚS 17/2011.
10 PL. ÚS 10/2013.
11 PL. ÚS 21/2014.
12 PL. ÚS 26/2016.

main reasons for this is the CC's persistent inconsistency. Not only does the practice of the CC vary from one period to another, but in many cases, it is not consistent in its decisions within one period, taking sometimes a stricter and sometimes a more permissive position. The presenter indicated that he could find no factors to justify these rapid changes of opinion. Neither is it helpful to understand the CC's related practice to clarify the measure of the review.

In conclusion, Professor Zbiral recalled the main principles of the Czech Constitution stated at the beginning of the lecture, stressing that this excessive discretionary power threatened the rule of law. Furthermore, the Speaker noted that otherwise unlawful laws, which according to the CC are constitutional, not only do not remedy the existing problems but create increasingly problematic situations. The ambiguous effect of annulment for procedural errors also raises the question of whether a law adopted in such a way even exists and what effects this (un)law has or could have.

Overall, the conference provided a high quality and valuable set of presentations to the attendees. Presentations at the conference were outstanding in that several critical points of the justiciability of parliamentary procedures were discussed and compared in an international context. The conference concluded with a discussion panel to launch further exploratory research and identify new possible research directions.

AUTHOR QUERIES

NO QUERIES