THE EUROPEAN COURT OF HUMAN RIGHTS AND PARLIAMENTARY PROCEDURES

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Parliamentary procedures are undoubtedly part of (national) parliamentary sovereignty. However, courts, including the ECtHR, are recently getting increasingly involved in assessing parliamentary rules and procedures, especially if domestic mechanisms do not provide remedy and protection for citizens' rights in parliamentary decisions. The latest case-law of the ECtHR shows on one hand, that the right to effective remedy encompasses parliamentary decisions, and on the other hand, parliamentary proceedings do matter when the Court assesses domestic legislation which collide with human rights. This paper argues that a regular, external House-Rules-Court should be established in countries, where the Speaker does not enjoy full respect and neutrality as in the UK. The German constitutional court can be a good example for that.

***Keywords**: parliamentary sovereignty, parliamentary procedure, judicial review, democratic debate, rules of procedure*

1. Introduction

Parliamentary functions and procedures are at the heart of national sovereignty. The general canon declares that no domestic or international instance may ever intervene in determining whether a decision of parliament is lawful or not. However, in times of constitutional dialogues and legal harmonization, it seems that common principles (like 'democratic debate', mentioned in more ECtHR-judgements discussed below) emerge even in the field of parliamentary functions. These need common understanding, and a common legal framework. This paper, focusing on the case-law of the ECtHR, argues that in order to safeguard democracy and rule of law, courts tend to and should be guarantors of the principles of parliamentary procedures if other remedy is not available. If domestic forums are not effective, the ECtHR will provide remedy if it deems necessary.

2. Theoretical framework and international models of possible remedies against parliamentary decisions

A parliament is a legal body and a political institution at the same time: the place of democratic and fair decision-making and a partisan forum for debating political issues. It must, therefore, equally provide for an orderly set of procedures,

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equipped with (sometimes rigid) legal safeguards, and allow for flexibility for the political actors presenting their alternative opinions in a flexible way in the same time. It is nowadays common for parliaments to have internal rules (rules of procedure) created by themselves, which normally ensure the satisfactory operation of these two, often conflicting functions. Parliaments should work effectively, setting and implementing their agendas, but members' and parliamentary minorities rights should be respected as well.

It is obviously not enough to have rules to be followed. Courts are also needed to be forums where those, who do not act accordingly, may be sued. The answer to the question, which court has jurisdiction (and are there such courts at all) varies country by country. Parliamentary sovereignty, at least in the UK, does not allow external actors to intervene. The strong and independent position of the Speaker is an ultimate forum to settle procedural debates within the House. External review is possible in Germany, where the sovereignty of the constitution (or of the constitutional court) prevails over that of the parliament. Some scholars describe the same difference when conceptualizing parliamentary sovereignty as opposite of judicial supremacy[1]. Tensions between legislative autonomy and the judicial duty to enforce constitutional requirements more frequently occur, and these tensions are often settled by (constitutional) courts, i.e. extra-parliamentary organs. In some countries, as part of judicial review of legislation, the breach of the rules of legislative procedure may lead to repealing the statute by the constitutional court (this is the case in Hungary, but not for example, the Czech Republic).

Even if courts have competence to judge parliamentary decisions, the 'first instance' guardian of the house rules is normally the Speaker, who also has disciplinary powers, often based purely on customary rules. Countries of parliamentary sovereignty do not have an external, 'second instance' forum at all. In other countries, a kind of external control is possible: major legal disputes on breaching house rules may also be resolved by (constitutional) courts. There are conflicting principles to be reconciled. In particular, the external oversight may harm the parliamentary autonomy, the internal oversight may end up in a partisan decision. Different jurisdictions have different solutions to settle debates between constitutional bodies. The possible remedies if parliamentary procedures are not respected are the follows:

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[1] Lazarus, Liora, Natasha Simonsen. Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference. – In: Murray, Hunt (ed.). Parliament and Human Rights: Redressing the Democratic Deficit. Oxford: Oxford Univ.Press, 2014.

Remedies in parliamentary law	For external actors (citizens)	For internal actors (MP, factions)
at an external forum	I	II
at an internal forum	III	IV

The table shows the possible distinctions which can be made between an external remedy that is available against parliamentary acts, and an internal (inter-parliamentary) remedy. Another distinction can be made between legal remedies available to external persons (citizens) and parliamentarians, since parliamentary acts may affect also non-parliamentarians (if, for example, the committee report makes unlawful statements on citizens), but they may only affect matters within the parliament as well (such as the rejection of an interpellation).

We do not address in this essay the relationship between the external body's legal remedy and the immunity of Members (cel III.), but just note that, in theory, citizens, harmed by MPs, could turn to the competent parliamentary committee or plenary which decide on the immunity. This could function as a quasi-remedy, the MP could apoligize the affected citizen in the House before the decision. Currently, this is not possible, but it could be a possible field of parliamentary reform.

In the UK, the home of parliamentary sovereignty, the powers of Parliament are unlimited. There is, however, no relevant constitutional or statutory legislation in UK parliamentary law about remedies in procedural disputes between parliamentary actors. Also in the absence of applicable law, the courts have no jurisdiction either in disputes between parliamentarians and non-parliamentarians. (Thus, the potential of cells I and II of the above table falls). It is part of the parliamentary sovereignty that Parliament alone is entitled to "retaliate" grievances by a contempt of Parliament, using its own internal rules (Standing Orders). In such cases, the plenary will decide on the submission of the competent committee[2]. This is based on the short provision of article 9[3] of the Bill of Rights of 1689, which declares the sovereignty of Parliament - although there is a recurrent idea to place the contempt of parliament on a statutory basis and thus open the jurisdiction of the courts[4].

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[2] Currently the *Select Committee for Standards and Privileges*, previously the *Committe for Privileges.*

[3] „That the freedom of speech and debates or the proceedings of Parliament ought not to be impeached or questioned in any court or place out of Parliament."

[4] See the public consultation by the UK Government in 2012 on Parliamentary Privilege', available *www.gov.uk/government/uploads/system/uploads/attachment_data/file/79390/consultation.pdf*

At present, however, the parliamentary committee and the plenary have the competence to "punish" for example a witness who does not appear before a committee of inquiry, and against these decisions no further remedies are available. However, such cases are normally closed without serious consequences - perhaps with an apology. Parliament applies its criminal powers in practice with considerable self-restraint. This means that in the UK, only cell III of the table is available for external actors, and only internal parliamentary forums are available for disputes on parliamentary procedure.

Not far from the UK, yet in a significantly different legal environment, a recent case gained attention with a very different conclusion. In *Kerins v McGuinness & Ors*, the Irish Supreme Court ruled that "the privileges and immunities of the Oireachtas, while extensive, do not provide an absolute barrier in all circumstances to the bringing of proceedings concerning the actions of a committee of the Houses of the Oireachtas"[5]. The case came about in 2014: Angela Kerins, chief executive of the Rehab charity was asked before the Public Accounts Committee of the Irish Parliament, the Oireachtas. During the session, she was attacked by the MPs, asking significant questions without advance notice, for example.

The Court stated that the primary role of providing a remedy where a citizen is affected by unlawful parliamentary action, lies with the Houses themselves. The jurisdiction of a court to intervene can only arise where there has been a significant and unremedied unlawful action on the part of a committee. The Court also stated that the PAC was acting outside its terms of reference when it dealt with Ms Kerins on different issues as the invitation predicted. The decision falls into the remit of cell I: external (judicial) remedy for an external (non-parliamentary) person. Ireland, a country of codified constitution does not place parliamentary sovereignty in the focal point of constitutionalism.

Another example (this time for cel II.) is from a commonwealth country: in the last years, the South African Constitutional Court gradually departed from its original norm of non-intervention in legislative procedures. It has increasingly engaged in oversight of various types of legislative procedures, including the law-making process itself, and internal rules and mechanisms of parliament, especially that of parliamentary oversight.[6] In United Democratic Movement v. Speaker of the National Assembly, decided in June 2017, the Court set aside the Speaker's rul-

[5] Kerins v McGuinness & Ors, [2019] IESC 11.

[6] Gardbaum, St. Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa (February 19, 2019). Forthcoming, Constitutional Court Review IX (2019); UCLA School of Law, Public Law Research Paper № 19-08.

ing that she had no power to call for a secret ballot on a motion of no-confidence in the President. The Court held that such a decision must be supported „by a proper and rational basis and made to facilitate the effectiveness of parliamentary accountability mechanisms", which, as it held, was not the case.

In Germany, a continental and civil law country, there is a similar, separate procedure at an external forum, the Federal Constitutional Court (Bundesverfassungsgericht, BVG) to settle parliamentary procedural disputes. The BVG, in the framework of a dispute procedure between constitutional bodies (Organstreitverfahren, OSV[7]), interprets the Basic Law to investigate if there is a violation of a constitutional rule[8]. The peculiarity of the regulation is that it can be initiated not only by constitutional bodies, but also by any public law subject possessing constitutional rights.

The petitioner must prove that his rights, or the rights of the body to which he belongs, have been violated or directly threatened by the other body. A 'part of body' (organteil – eg. a group of MPs) is deemed empowered with own rights, if it can enforce it without the intention or permission of the body as a whole (eg. the parliament). Based on the above, the president of the Bundestag, any representative, the Ältestenrat (the political coordinative committee consisting of party group presidents), any standing committee, faction, but even "qualified minorities", i.e. one-third, one-quarter and one-tenth of the Members may be legitimate parties[9]. In practice, the procedure has so far been pursued for three main purposes: the protection of parliamentary opposition rights, the protection of Parliament's rights vis-à-vis the government (mainly in foreign and security policy) and the rights and equality of political parties.

The OSV is primarily a constitutional interpretation procedure: BVG does not decide on the dispute itself, but interprets the text of the Constitution with regard to the rights and obligations of the bodies involved. Yet, it does not stop here, but either accepts the application or rejects it based on the result of the

[7] The OSV is based on Article 93 (1) 1. point of the German Basic Law, according to which the BVG decides "in the case of a dispute concerning the interpretation of the Basic Law, the extent of the rights and obligations of a supreme federal body or other stakeholders, if the bodies and interested parties have their own rights under this Basic Law or the rules of a supreme federal body." Further rules are contained in sections 63–67 of the Federal Constitutional Court Act (BVerfG): the petitioner (Antragsteller) and the opposing party (Antragsgegner) cover not only the Federal President, the Parliament (both the Federal Assembly and the Federal Council), the Government, but any 'parts of these bodies empowered with own rights by the constitution, and the rules of procedure of the Federal Assembly and Federal Council'.

[8] Grote, R. Der Verfassungsorganstreit: Entwicklung, Grundlagen, Erscheinungsformen. Tübingen: Mohr Siebeck, 2010, p. 2.

[9] Grote, R. Op. cit., p. 112.

interpretation. BVG is bound to the application, reflecting on it, and finalizing the conflict remains with the disputing parties. Thus, the German legislator consciously decided to keep BVG out of political conflicts that could not be solved by legal means[10]. In practice, the number of OSVs between 1951 and 2015 was close to one hundred and fifty, about 80 of which were closed by a substantive decision of the Second Senate, the others were either rejected or withdrawn. Thus, the OSV is proved to be an effective procedure.

Finally, a look at the Hungarian situation provides with us an example from Central and Eastern Europe. In these countries, parliament and its leading organs are partisan bodies, it is therefore ineffective for any internal parliamentary body to appeal in the case of parliamentary decisions, impartial decisions are not expected (cell IV is therefore a discard solution). It is best to have a forum, which may be referred to as the 'house-rules-court', out of Parliament, like in Germany. The problem is that such forum currently does not exist in Hungary[11]. The Constitutional Court of Hungary has already expressed[12] its concern in this regard multiple times. In 2003, the Court stated that the lack of remedy against a report of a committee of inquiry "violate the rights of individuals or their legitimate interests"[13].

However, the practice of the Court is inconsistent: in another decision, contrary the other decision one year earlier, did not consider that part of the constitutional complaint as legitimate for substantive examination, which aimed at stating the ommission of creating a court forum against the Parliament. The Court therefore, does not require legal remedies against parliamentary decisions (like disciplinary decisions) in its current case-law: "Since the disciplinary decisions of the Parliament - the constitutional basis of which is created by Article 5 (7) of the Fundamental Law - are not considered neither to be judicial, nor administrative decision, lack of legal remedy against such decisions does not in itself result in an anti-constitutional situation"[14]. General court remedies are also excluded in Hungary, since so far, the doctrine of the "inability" of Parliament to be sued at courts is strictly held[15] (no one can sue Parliament in civil or penal procedure at court).

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[10] Grote, R. Op. cit., p. 91.

[11] For a detailed explanation of the problem, *see* Csaba Erdös: Parliameni autonómia [Parliamentary Autonomy]. Budapest: Gondolat, 2016.

[12] Decision 32/D/2004.

[13] Decision of the Hungarian Constitutional Court 50/2003 (XI. 5)

[14] 3206/2013. (XI. 18) CC, [39].

[15] Smuk, P. Egy kétharmados kormány ellenzékének jogai. – In: *Jog*-Állam-*Politika*, 2011, különszám (*Symposium iubilaei facultatis iurinensis*). p. 25.

3. The ECtHR and parliamentary procedures

From the international overview we can draw the conclusion that in continental, and even in some commonwealth jurisdictions, there is a legitimate claim of courts to judge whether parliamentary procedures are lawful (constitutional, fair, etc.). The only country, where parliament's privilege to be its (and its members') own judge is untouched, is the UK. It is not possible there to call a court in cases of grievances caused by the Parliament or MPs to citizens. But in the UK, the respected and independent position of the Speaker guarantee the fair judgement. Either way, parliamentary decisions, even on internal procedural matters, need to be provided with effective remedy. This is what also the ECtHR case law tells us.

Nevertheless, the ECtHR takes national specificities on parliamentary procedure into account when using its margin of appreciation. In the case *A v. the United Kingdom* (35373/97), the Court stated the violation neither of the right to privacy nor of the right to remedy on the basis of a parliamentary speech of an MP who used comments that were offensive to an individual, who was subsequently harassed due to the speech. The Court ruled notwithstanding that no effective remedy was available to the complainant, merely the possibility of press redress following the publication of the offensive statement in the press.

More recently the Court in *Karácsony and others* (42461/13) found Article 13 of the ECHR (right to effective remedy), to be applied in the domain of parliamentary law[16]. The ECtHR stated that there are no parliamentary remedies available for members against rulings of the President of the House. The solution under cell I could be the judicial review of parliamentary acts for the purpose of legal protection of third parties (citizens). The Grand Chamber held that while parliamentarians can be required to adhere to parliamentary rules of conduct, imposing a fine for breach of these rules without a hearing violates their rights.

The case came about after two members of the Hungarian parliament showed their opposition to new laws on tobacco and the distribution of agricultural and forestry lands by waving banners and placards (naming the ruling party and reading „You steal, you cheat, and you lie"). Two weeks later parliament adopted a proposal by the Speaker to fine Karácsony 170 Euros and Szilágyi 600 Euros for their conduct, which was considered gravely offensive to parliamentary order under the 2012 Parliament Act. They were each fined without being given a chance

[16] Judgment on the application of the Convention to parliamentary law is not general, see Zoltán Szente for critical reasoning: Emberi jogok a képviselői jogok? – In: *Állam- és Jogtudomány*, 2015, № 2, 74–90.

to defend their conduct. At the ECtHR they claimed that the decisions to fine them violated their right to freedom of expression and their right to an effective remedy. The UK government intervened in the case and argued that parliaments should be allowed to regulate their own conduct. It stated that similar conduct in the House of Commons would be considered to be gravely disruptive and inappropriate, and if persisted MPs could be temporarily suspended.

The Court specifically referred to its decision in *Castells v. Spain* (11798/85), in which it had held that "interferences with the freedom of expression of an opposition member of parliament call for the closest scrutiny on the part of the Court." It also emphasized that "parliamentary autonomy should not be abused for the purpose of suppressing the freedom of expression of MPs, which lies at the heart of political debate in a democracy."

The Court emphasized also that the fines had been imposed for the manner in which the members of parliament had chosen to express themselves, and not the substance of what they had said. Their conduct had disrupted parliamentary proceedings and violated parliamentary rules of conduct. The Court held that the imposition of sanctions to regulate parliamentary conduct was within the Hungarian parliament's margin of appreciation; the placement of placards and banners and the use of a megaphone during the sessions had disrupted parliamentary order.

The Court, however, scrutinized the fairness of the proceedings leading to the imposition of the fines. As opposed to immediate sanctions, such as denial of the right to speak and exclusion from a session, the Court viewed the fines imposed on the members in the present case as *ex post facto* disciplinary measures. According to the Court, the procedural safeguards available with respect to such *ex post facto* sanctions "should include, as a minimum, the right for the MP concerned to be heard in a parliamentary procedure before a sanction is imposed".

Hungary lost the case, but in the meantime, the Hungarian parliament changed the procedural rules according to the requirements of the ECtHR. According to the new law, the decision to fine an MP is made by the committee comprising the heads of political parties and the President of the Parliament, or – if there is no unanimity – by the President of the Parliament himself. The MP concerned can request at the Committee of Privileges to be heard and to cancel the decision. The Committee is composed by equal number of government and opposition MPs. At equal number of votes the request should be considered rejected, and the plenary has the final say. Since this reform, the plenary confirmed the speaker's decision in all cases – there was not a single case where the decision was changed upon request of the PMs concerned.

As seen above, in the current Hungarian parliamentary law, only the internal control forum exists, still in its very basic form. In the area of parliamentary discipline, a kind of remedy has been in force since the Karácsony-decision of the ECtHR, and similar remedies can be used against the refusal[17] of the parliamentary documents by the President of the Parliament: MPs may apply first to a committee and then to the Plenary. The external control is completely missing. One could argue that the normative control of laws by CC is also a kind if remedy, but not a matter for the present investigation, since the adoption of laws is not considered an internal parliamentary act. In the light of the Karácsony-decision, even if the establishment of an external court is not a coercive factor (an internal parliamentary forum may also be effective as ECtHR practice tells), a control forum of any instance is strictly required by the ECtHR.

It should also be noted that, as the ECtHR has also stated in its judgment[18] in Karácsony, that the judicial control over the House Rules cannot, in itself, be regarded as an adequate remedy in parliamentary legal disputes, if case-by-case remedy of individual acts is not available. It is not for a real House-Rules-Court to challenge the rules, but to check their application. Although the Hungarian Constitutional Court has normative control over the House Rules, it cannot control parliamentary decisions resulting from its application. The Constitutional Court has always emphasized parliamentary autonomy: "the Parliament has a high degree of freedom in the drafting of the provisions of the Rules of Procedure. Its autonomy of self-regulation is a power protected by the Fundamental Law, in which the Constitutional Court can intervene only in very serious cases, in case of direct violation of the Constitution"[19]. In recent years, there have been several constitutional complaints against a parliamentary decision. The petitioner has challenged the legislative provision which provided the basis for a parliamentary decision - without success[20]. Therefore, this cannot be regarded as an effective remedy, for

[17] Between May 2014 and October 2017, the President of the Hungarian National Assembly rejected 60 written questions, 2 interpellations, 4 bills and a proposal for a resolution, the questions being the lack of competence of the interviewee, the bills against the prejudice of the authority of the Parliament. The petitioner called for the opinion of the committee responsible for the interpretation of the provisions of the Rules of Procedure (T/4151, T/15071). For more information on the institution of refusal and its previous practice, *see* Pintér, P. Z. Szabó. Visszautasított képviselői indítványok az Országgyűlésben – sérti-e az Országgyűlés tekintélyét a humor? [Rejected motions in the Hungarian Parliament: may humour offend the dignity of the House?]. – In: *Parlamenti Szemle,* 2014, 4, 37–43.

[18] See paragraph 164 of the judgment.

[19] 3206/2013. (XI. 18.) decision, [28].

[20] See 3206/2013. (XI. 18.) and 3207/2013. (XI. 18.) decisions.

the reason that such a motion can only be made within a certain period of time.

It may seem that – in the lack of any House-Rules-Court - the ECtHR may become the strongest control body of the national parliaments. Several complaints concerning parliamentary law were admitted by ECtHR so far. The Court will probably continue to influence the operation of the national parliaments in the future[21].

From the problem of remedies against parliamentary decisions, let us turn our attention to the general attitude of courts, ie. the ECtHR towards assessing parliamentary procedure. When assessing the limitation of human rights by legislation, the degree of 'democratic debate' during the legislative procedure serves increasingly as an argument. Recently, from 2005 onwards, the ECtHR got increasingly interested in assessing parliamentary procedures concerned by the disputes upon Art. 8–11 of the Convention. In determining whether the limitation concerned was appropriate, the Court examined how "deep and thorough the parliamentary debate" was, how it corresponded to a "pressing social need", whether "substantive arguments" were developed in the course of the legislation or "considerable parliamentary scrutiny", or a "meaningful engagement with the views of minority rights bearers" take place[22].

In *Animal Defenders v. UK* (48876/08), the Court analyzed the legislative history of the prohibition on political advertising on broadcast television in detail. It examined the number of bodies involved in the parliamentary debate, the level of examination by parliamentary organs, and the cross-party, bipartisan support at the final vote. Of course, the margin of appreciation is wide: in contrast to judicial procedures, there are no clear standards in parliamentary procedures. In *Hirst v. United Kingdom*, the Court observed that there was "no evidence that Parliament had ever sought to weigh the competing interests or assess" the questioned legislation, which was about a blanket ban on the right of a convicted prisoner to vote. Furthermore, there was "no substantive debate" in Parliament.

However, this practice of the ECtHR is controversial, since there are no clear standards on what a "democratic" or "substantive" debate means. Not only the common concepts, also the common understanding of this kind of competence of the ECtHR is missing. A dissenting opinion in *Hirst* claimed that "it is not

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[21] Csaba, E. Hungarian Parliamentary Law under the Control of the Strasbourg Court; Legal studies on the contemporary Hungarian legal system. Győr: Széchenyi István University, 2014

[22] For the details of the cases *see* Matthew Saul: The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments – In: *Human Rights Law Review*, 2015, 15, 745–774

for the Court to prescribe the way in which national legislatures carry out their legislative functions". Evaluating national parliamentary procedures by the ECHR undoubtedly collide with parliamentary sovereignty.

4. Conclusions

In our view, due to the partisan nature of all parliamentary bodies, no internal House-Rules-Court can be created within parliament in Hungary or in other continental countries. If sovereignty of Parliament is not unlimited, constitutional courts are suitable for acting as House-Rules-Court in a German-type dispute settlement procedure between constitutional bodies, if the constitutional and legislative environment is appropriate for this. The advantage of this would be to provide remedy against the decisions of the parliament which are not of legislative nature.

If jurisdictions do not establish an effective House-Rules-Court of their own (as the constitutional courts would undoubtedly accept as such), the ECtHR may be acting as such. This approach, while going slightly against parliamentary sovereignty and its autonomous procedures, can protect human rights and common principles of parliamentary law like democratic debate. In our view, some kind of control over parliamentary procedures is inevitable, but it preferably should remain within the scope of national sovereignty. This is why an impartial House-Rules-Court should be created, possibly at the constitutional court.

The ECtHR, from 2005 onwards, gathered evidence from national parliamentary debates already for more than 30 judgements. Yet, this approach is far from being consensual; its decisions concerning parliamentary procedures are unclear, their concepts need further substantiation. It is still a question, whether this judicial activity may tend to the evolution of a "common parliamentary law" of the nations, applying common standards, using common concepts.