

CONSTITUTIONAL COURTS VERSUS PARLIAMENTS DURING PANDEMIC (AND BEYOND)¹

Szentgáli-Tóth Boldizsár²

Institute for Legal Studies, Budapest

Nora Bán-Forgács³

Institute for Legal Studies, Budapest

Milton Friedman University, Budapest

Abstract: *National parliaments are the representatives of popular sovereignty. Any restrictions on parliamentary rights have a direct impact on separation of powers and rule of law. This article elaborates on some of the landmark decisions worldwide of the constitutional courts vis a vis national parliaments during epidemic restrictions.*

Key words: *pandemic, Covid-19, national parliaments, separation of powers, assembly*

1. INTRODUCTION

The greatest human pandemic of the 21st century forced national parliaments to face an unprecedented legislative challenge. A series of restrictions have threatened the democratic functioning of the representative bodies: the principle of equal mandate, democratic, accountable and transparent decision-making. This paper will attempt to present some typical type of cases emerging from the extraordinary situation. The paper however will not address other shortcomings in democratic decision-making in modern representative democracies, nor will it make any findings as to whether the resulting restrictions have deviated from the general system of democratic decision-making in liberal and illiberal regimes. Cases presented in this paper are referring to Germany, Croatia, Spain and some references are given to France.

¹ This chapter is written under project support no: 05016764 "The responsiveness of the legal system in the post-COVID society: risks and opportunities (Hungarian Academy of Sciences research grant on post-COVID phenomena)". This project is also supported by the Hungarian National Research Fund (NKFIH no 138366).

² Senior Research fellow Institute for Legal Studies at CSS, Hungarian Research Network (Hun-Ren).

³ Associate Professor, Milton Friedman University, Budapest. Research fellow: Institute for Legal Studies at CSS, Hungarian Research Network (Hun-Ren).

2. LIMITED PARLIAMENT

The first elaborated case comes from Croatia. In Autumn 2020 the Croatian Constitutional Court reviewed an amendment to the Croatian Parliamentary House Rules that reduced the size of Parliament to limit the risk of infection. Accordingly, only the leaders of the parliamentary groups were allowed to be present during the parliamentary sessions and, in addition, a maximum of one quarter of the members were allowed to be present in the chamber at any given time, following a fixed distribution mechanism. The new rules introduced did not allow online sessions for those in absence, but did allow electronic voting for absent members of the parliament (MPs). Moreover, the contested regulation set a time limit of five minutes for speeches, which was increased up to 10 minutes for the leaders of political groups.

Similar restrictions were also introduced during the pandemic in other countries around the world capping the maximum number of MPs on parliamentary sessions, but, the only country, which this measure was referred to (and indeed litigated by) the Constitutional Court, was Croatia, following a motion by 35 Croatian MPs.

In its reasoning, the Croatian Constitutional Court pointed out that less restrictive alternatives could have been available to ensure the legislature functioning during the worst of the epidemic, but the Court stated: The Croatian Parliament had failed to explore them. According to the Constitutional Court, at the very least, telecommunications should have ensured that all members of the Croatian Parliament (MPs) were able to attend meetings at all times. The Court noted that failure to do so, also violated the principle of equality of parliamentary mandates, because some MPs were still able to participate in the work of the Croatian Parliament in person, to follow speeches and to contribute to the debate whereas others were excluded from the debate. By contrast, some MPs with an equal mandate were not only allowed to participate in debates, but were also unable to follow the sessions on-line. They could only exercise their right to vote, but they could not base their votes on deliberation in Parliament. Finally, the Croatian Constitutional Court indicated that, as a result of the amendment to the rules of the House, the number of MPs who were present in person in the Parliamentary session had fallen below the threshold of the quorum laid down by the general Croatian Parliamentary House Rules and, in fact, the total number of MPs in present would not have legally been sufficient to adopt even the agenda for any sessions, not to mention to make substantial decisions during sessions. In the light of these constitutional dilemmas and anomalies, the Croatian Constitutional Court found the amendment to the House Rules to be unconstitutional.

3. CHANGING THE RULES OF THE HOUSE DURING PANDEMIC

Somewhat related to the Croatian case discussed above, the French Constitutional Council's decision of April 2021 reflected on how to amend the House rules to the emergency period.⁴

⁴ Constitutional Council of France, 1 April 2021, 2021-814 DC. www.conseil-constitutionnel.fr/decision/2021/2021814DC.htm

The French Constitutional Council is primarily a court for preliminary review focusing on the constitutionality of certain legal norms before they enter into force. The constitutional review is a prerequisite for the amendment of the Rules of the French National Assembly and therefore the amendments were referred to the Constitutional Council before entering into force in spring 2021.⁵ The purpose of the amendment to the Assembly House Rules was to allow for appropriate adaptation to the rapidly changing public health situation by making Parliamentary operations more flexible.

New provision in the amendment to the Assembly House Rules enabled the Assembly House Committee, in the light of exceptional circumstances, to adopt rules temporarily affecting the functioning of the National Assembly, its sessions and voting, both in plenary sessions and in committee meetings, provided that the public health situation substantially affected the work of the French Assembly, its conditions of participation, sessions and voting.⁶ The House Committee could decide for online sessions, but in doing so, it was obliged to take into account the number of political groups in Parliament.

The Constitutional Council noted that the French House Committee enjoyed absolute freedom in deciding for the extraordinary measures adopted by the Parliament but the constitutionality of the amendments ought to be (constitutionally) reviewed by the French Constitutional Council before they enter into force, in accordance with the general rules governing all parliamentary procedures.⁷

The French Constitutional Council considered that, although the amendment rendered only an exemplary list of on-line communication channel to use, it did not in fact provide any real guidance to the House Committee on establishing an operating procedure, thus essentially conferring discretionary powers on that body. The Council highlighted that the amendment (decision of the National Assembly) did not even contain an obligation to respect the fundamental principles of parliamentary law, without further notice one could even question the personal nature of parliamentary votes and the integrity of parliamentary work. The Constitutional Council considered this to be unacceptable and therefore considered the amendment to be contrary to the French Constitution. The Constitutional Council stressed that the legislature has the right to adapt its rules of procedure to changed circumstances during special periods of legal order, even temporarily derogating from certain generally applicable principles of parliamentary law. Such derogations, however, need to be defined with sufficient precision: a general power of derogation makes the framework for parliamentary work too vague. The amendments must respect the rule of law, the powers granted to individual MPs holding an office or parliamentary bodies that are in charge must be sufficiently specific and, at the same time, limited.⁸

⁵ Constitutional Council of France, 1 April 2021, 2021-814 DC. 2-3. www.conseil-constitutionnel.fr/decision/2021/2021814DC.htm

⁶ Constitutional Council of France, 1 April 2021, 2021-814 DC. 4. www.conseil-constitutionnel.fr/decision/2021/2021814DC.htm

⁷ Constitutional Council of France, 1 April 2021, 2021-814 DC. 5. www.conseil-constitutionnel.fr/decision/2021/2021814DC.htm

⁸ Constitutional Council of France, 1 April 2021, 2021-814 DC. 6-7. www.conseil-constitutionnel.fr/decision/2021/2021814DC.htm

4. EXTENSION OF PARLIAMENTARY DEADLINES

In Spain, a total suspension of parliamentary work took place in March 2020, during the first wave of the pandemic, when the Spanish House Committee decided on 13 March to suspend all parliamentary referrals. The suspension of parliamentary deadlines was finally lifted by the Spanish House Committee on 19 April, allowing the measure to be in force for just under a month.

The Spanish Constitutional Court issued its decision in October 2021, after a significant delay, following the petition of more than 50 members of the Spanish Parliament.⁹ The Constitutional Court upheld the petitioners' claims.¹⁰

The Spanish Constitutional Court pointed out that the rights of Members of Parliament cannot be discharged even in a special legal order, since their function is to ensure the continuous control of the executive, which is more necessary than ever in a special legal order. In such extraordinary situations, the Government's room for manoeuvre is increased and unusual restrictions on fundamental rights may be imposed, making parliamentary scrutiny of Government action essential. It is irrelevant that the quasi-suspension of Parliament's activities lasted only a little more than a month in total, since such a major restriction is not justified by public health concerns, particularly given that the Spanish House Committee failed to consider less restrictive alternatives, in particular virtual or hybrid sittings.¹¹

5. ACCESS TO PARLIAMENT BUILDING, THE CASE OF GERMANY

The German Constitutional Court received complaints against the Bundestag January 2022 rules, that made it more difficult for members of the Parliament (German MPs) to enter the Parliament building. In the light of the spread of the Omicron variant of coronavirus, the Bundestag decided to make full participation in Parliamentary work conditional on at least two vaccinations against Covid-19, or a negative Covid-19 test within 72 hours or a proven case of the disease.

German Members of Parliament who did not meet these criteria faced restrictions: they were only allowed to sit in designated seats in the Parliament's plenary sessions and committee meetings, usually in the gallery, and had to keep at least 1.5 meter distance from each other. In practice, this meant that these members of the Parliament were not allowed to enter the smaller committee rooms, which had no gallery, but even if they could assemble in a committee room which had a gallery, they were in a much more disadvantaged position vis-à-vis their colleagues, as there were no tables or microphones in the gallery.¹² The constitutionality of the restrictions imposed for a

⁹ In Spain we can note that the Constitutional Court also reviewed the constitutionality of public health measures that have already been lifted or repealed. See: Spain Constitutional Court, 2 June 2022, N° 52/2022; Spain Constitutional Court, 27 October 2021, N° 183/2021; Spain Constitutional Court, 14 July 2021, N° 148/2021. See also: www.covid19litigation.org/case-index/spain-constitutional-court-recurso-de-amparo-2109-2020-2021-10-05

¹⁰ Spain Constitutional Court, 5 October 2021, Recurso de amparo 2109-2020

¹¹ "SENTENCIA 168/2021, de 5 de octubre" [hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/26819#complete_resolucion%20%E2%80%8E](https://www.tribunalconstitucional.es/HJ/es/Resolucion/Show/26819#complete_resolucion%20%E2%80%8E)

¹² Germany, Federal Constitutional Court, 8 March, 2022. BVerfG, Beschluss des Zweiten Senats vom 08. März 2022 - 2 BvE 1/22 -, Rn. 1-66, https://www.bverfg.de/e/es20220308_2bve000122.html

period of one and a half months was considered by the complainants as a violation of the equality of parliamentarians and a violation of the constitutional rights of the parliamentary opposition.

Finally, the German Federal Constitutional Court rejected the complainants' application for interim measures, considering that the extent of the harm suffered by members of the Parliament did not justify such an intervention.¹³ The restrictions imposed were interim in nature, and applied equally to government and opposition. In addition, the public health argument behind the provisions was, in the Constitutional Court's view, an adequate justification for the adoption of the contested measures.¹⁴

6. OTHER FORMS OF OBSTRUCTION OF MEMBERS OF THE PARLIAMENT DURING COVID-19

Another example of public health restrictions hampering the work of parliamentarians came also from Germany. The case reached the German Constitutional Court in 2021.¹⁵ In December 2021, the city of Berlin, a city with provincial status, adopted a regulation under which only persons who have been vaccinated against Covid-19 or have a tested and documented case of the disease may use any accommodation in the territory of the city of Berlin.¹⁶ This provision applied to parliamentarians in the same way as ordinary citizens. Many German MPs felt however, that the restriction made it impossible for them to participate effectively in parliamentary work. They complained that the measures prevented them from using accommodation in Berlin and, as parliamentary sessions often start at 9 a.m., and the distance between their homes and Berlin prevents them from commuting, they were forced to miss a significant part of the sitting. They also argued that the contested legislation prevented them, among other things, from taking part in the election of the German Chancellor and therefore the restrictions prevented them from exercising their full rights as Members of Parliament.¹⁷

The German Constitutional Court considered that the petition did not meet the requirements for a constitutional complaint and did not provide convincing grounds for an interim measure.¹⁸ Moreover, the allegations that the rights of Members of Parliament had been infringed were

13 Germany, Federal Constitutional Court, 8 March, 2022. BVerfG, Beschluss des Zweiten Senats vom 08. März 2022-2 BvE 1/22 -, Rn. 1-66, https://www.bverfg.de/es20220308_2bve000122.html

14 Among other public health restrictions, similar measures were also considered by the Supreme Court of Malawi which, like the German court, refused to consider the merits of the case. www.malawilii.org/mw/judgment/high-court-general-division/2022/10. www.covid19litigation.org/case-index/malawi-high-court-malawi-2022-mwhc-10-2022-01-13

15 Germany, Federal Constitutional Court, 6 December 2021, No. 2 BvR 2164/21, <https://www.covid19litigation.org/case-index/germany-federal-constitutional-court-no-2-bvr-216421-2021-12-06>

16 Germany, Federal Constitutional Court, 6 December 2021, No. 2 BvR 2164/21, <https://www.covid19litigation.org/case-index/germany-federal-constitutional-court-no-2-bvr-216421-2021-12-06>

17 Germany, Federal Constitutional Court, 6 December 2021, No. 2 BvR 2164/21, <https://www.covid19litigation.org/case-index/germany-federal-constitutional-court-no-2-bvr-216421-2021-12-06>

18 Germany, Federal Constitutional Court, 6 December 2021, No. 2 BvR 2164/21, <https://www.covid19litigation.org/case-index/germany-federal-constitutional-court-no-2-bvr-216421-2021-12-06>

unfounded, since the measures were of a general nature and did not target Members of Parliament at all, so that the effect on them could at most be indirect.¹⁹

7. PARLIAMENTARIANS WHO SPREAD FALSE INFORMATION

Finally, our paper tackles an exotic example. On 14 March 2021, Kuwait's Constitutional Court expelled a leader of the opposition from Parliament on the ground that he had given false information related to the pandemic during Kuwait Parliamentary sessions. The MP from Kuwait was also charged for insulting a member of the royal family, who later became the Emir of Kuwait, for which he was convicted by the Kuwait criminal court.²⁰

Parliaments in Arab monarchies in the Middle East usually play a subordinate role to the executive, and although the situation in Kuwait is somewhat less restrictive than in neighbouring countries, this Constitutional Court case shows that the executive and the regular (criminal) courts have a much wider margin of manoeuvre vis-à-vis the national Parliament than in any European country.²¹ Typically, at the time of the Constitutional Court's decision, Parliament was in recess, having been adjourned for a month by the Emir.²²

8. CONCLUSION

Under popular sovereignty, parliamentarians are the will of the people, and their job is to enforce the will of the electorate, so any move that makes this task difficult or impossible can only be defended on the basis of very strong arguments. In the abovementioned cases from Germany, Spain, France and Croatia we demonstrated that the balancing of fundamental values and rights of constitutionalism with the compelling public health context is extremely difficult. Even the argument referring to the general conditions of public health as a justification for restrictions are held different in each examined country.

Our research shows that constitutional dilemmas in the area of parliamentary law have relatively rarely reached the constitutional/higher courts during the pandemic period. Cases examining the constitutionality of certain restrictions on fundamental rights were more common, while organisational issues and aspects of the separation of powers were less prominent. Some questions of parliamentary law are necessary to ensure the democratic functioning of the country. However, constitutional courts have generally limited jurisdiction on internal parliamentary rules, mainly

¹⁹ Germany, Federal Constitutional Court, 6 December 2021, No. 2 BvR 2164/21, <https://www.covid19litigation.org/case-index/germany-federal-constitutional-court-no-2-bvr-216421-2021-12-06>

²⁰ apnews.com/article/legislature-dubai-cabinets-united-arab-emirates-persian-gulf-tensions-99a109be4e-a0e1a13d39cda9a3c10cfa

²¹ the arabweekly.com/court-order-expel-kuwaiti-mp-confuses-political-scene

²² www.kuwaittimes.com/amir-suspends-national-assembly-for-one-month-from-feb-18-2021/

due to parliaments' procedural autonomy.²³ It may be noted that in the period of the special legal order, the most frequent cases before the Constitutional Court were those concerning measures to prevent the participation of parliamentarians.

LITERATURE:

1. SZABÓ, Zsolt, "Judicial Control of Parliamentary Procedure: Theoretical Framework Analyses", In: *Constitutional Review*, (Vol. 9. No. 1. 2023) 1-17.
2. SZABÓ, Zsolt "The European Court of Human Rights and Parliamentary Procedures", In: Malina, Novkirishka-Stoyanova; Martin, Belov; Dilyan, Nanchev (ed.) *Human Rights - 70 years since the adoption of the Universal Declaration of Human Rights*, (Sofia; St. Kliment Ohridski University Press, 2019) 455., 397-407.

CASES:

1. Constitutional Council of France, 1 April 2021, 2021-814 DC. www.conseil-constitutionnel.fr/decision/2021/2021814DC.htm
2. Germany, Federal Constitutional Court, 6 December 2021, No. 2 BvR 2164/21, <https://www.covid19litigation.org/case-index/germany-federal-constitutional-court-no-2-bvr-216421-2021-12-06>
3. Germany, Federal Constitutional Court, 8 March, 2022. BVerfG, Beschluss des Zweiten Senats vom 08. März 2022 - 2 BvE 1/22 -, Rn. 1-66, https://www.bverfg.de/e/es20220308_2bve000122.html
4. Spain Constitutional Court, 2 June 2022, N° 52/2022.
5. Spain Constitutional Court, 27 October 2021, N° 183/2021; Spain Constitutional Court, 14 July 2021, N° 148/2021
6. Spain Constitutional Court, 5 October 2021, Recurso de amparo 2109-2020
7. Links:
8. "Constitutional Council of France, 1 April 2021, 2021-814 DC. 6-7.", www.conseil-constitutionnel.fr/decision/2021/2021814DC.htm
9. "Spain, Constitutional Court, 5 October 2021, Recurso de amparo 2109-2020", <https://www.covid19litigation.org/case-index/spain-constitutional-court-recurso-de-amparo-2109-2020-2021-10-05>
10. "BVerfG, Beschluss des Zweiten Senats vom 08. März 2022 - 2 BvE 1/22 -, Rn. 1-66", https://www.bverfg.de/e/es20220308_2bve000122.html

²³ Constitutional courts generally apply the constitution, and not the house rules, notwithstanding that many jurisdictions explicitly provide for the constitutional review of internal parliamentary rules, if their breach directly touches on a constitutional provision. For a detailed analysis see Zsolt SZABÓ: "Judicial Control of Parliamentary Procedure: Theoretical Framework Analyses", In: *Constitutional Review*, (Vol. 9. No. 1. 2023) 1-17., Zsolt SZABÓ, "The European Court of Human Rights and Parliamentary Procedures", In: Malina, Novkirishka-Stoyanova; Martin, Belov; Dilyan, Nanchev (ed.) *Human Rights - 70 years since the adoption of the Universal Declaration of Human Rights*, (Sofia; St. Kliment Ohridski University Press, 2019) 455., 397-407.,

11. "BVerfG, Beschluss der 1. Kammer des Zweiten Senats vom 06. Dezember 2021 - 2 BvR 2164/21 -, Rn. 1-35," https://www.bverfg.de/e/rk20211206_2bvr216421.html
12. "Nyirenda and CDEDI V.Ministry of Health and Others (Judicial Review Cause 66 of 2021) [2022] MWHC 10 (13 January 2022)", <https://malawilii.org/akn/mw/judgment/mwhc/2022/10/eng@2022-01-13>
13. "Ungeimpfte AfD-Abgeordnete scheitern vor BVerfG", <https://www.lto.de/recht/nachrichten/n/bverfg-2bvr2164-21-verfassungsbeschwerde-afd-2g-hotels-berlin-unzulaessig/>
14. "Kuwait court expels harsh government critic from parliament", <https://apnews.com/article/legislature-dubai-cabinets-united-arab-emirates-persian-gulf-tensions-99a109be4ea0e1a13d39cda9a3c10cfa>
15. "Court order to expel Kuwaiti MP confuses political scene", <https://the arabweekly.com/court-order-expel-kuwaiti-mp-confuses-political-scene>
16. "Amir suspends National Assembly for one month from Feb 18, 2021", <https://kuwaittimes.com/amir-suspends-national-assembly-for-one-month-from-feb-18-2021/>

УСТАВНИ СУДОВИ ПРОТИВ ПАРЛАМЕНТА У ВРИЈЕМЕ ПАНДЕМИЈЕ (И ШИРЕ)

Болдижар Сентгали Тут²⁴

Нора Бан Форгач²⁵

Институт за правне студије, Будимпешта

Апстракт: Национални парламенти су представници народног суверенитета. Свако ограничење парламентарних права има директан утицај на подјелу власти и владавину права. Овај чланак елаборира неке од значајних одлука уставних судова широм света у односу на националне парламенте током епидемијских ограничења.

Кључне ријечи: пандемија, Ковид-19, национални парламенти, подела власти, скупштина

²⁴ Виши истраживач на Институту за друштвене студије, Будимпешта

²⁵ Истраживач на Институту за правне и друштвене студије у Будимпешти и ванредни професор на Милтон Фридман Универзитету у Будимпешти

