

WHEN THE GOVERNMENT TAKES THE INITIATIVE: GOVERNMENTS AND PARLIAMENTS UNDER PRESSURE DURING CORONAVIRUS CRISIS¹

Nora Ban-Forgacs,² Boldizsar Szentgali-Toth,³ Emese Szilagyi⁴

Abstract: this article focuses on the relationship of the legislative body to constitutional courts' scrutiny during coronavirus crisis. The first part of the paper elaborates on the foundations of a new data base targeting to collect and organise all important constitutional court decisions during Covid-19 crisis. The second part of the paper highlights some of the most important constitutional law cases emerging from the crisis related to national parliaments.

Keywords: Covid-19; pandemics; crisis;parliaments;data-base

Introduction

This paper was inspired by a Hungarian research project to systematise and organise the constitutional case law related to the Covid-19 pandemic into a global, English-language, freely accessible database. The database gathered and revealed a number of Constitutional and Supreme Court decisions affecting the functioning of legislative bodies worldwide.

Our claim in this article is that the links between constitutional review and the functioning of parliaments in special legal order period are still a

¹ This paper 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 Research fellow Institute for Legal Studies at CSS, Hungarian Research Network (Hun-Ren). Associate Professor, Milton Friedman University, Budapest.

³ Senior Research fellow Institute for Legal Studies at CSS, Hungarian Research Network (Hun-Ren)

⁴ Junior Research fellow Institute for Legal Studies at CSS, Hungarian Research Network (Hun-Ren)

subject to examine, the exceptional circumstances have had a major impact on the daily life of national parliaments. Concerns have been raised about the way in which parliamentary sessions are held during pandemics, the effectiveness of the work of parliamentarians during Covid-19, the difficulties in maintaining the equality of mandates under special orders, ultimately, concerns were raised about the principle of popular representation.

In the first part of the paper, we will describe the aim of the database, the methodological background of its development, and the practical aspects of its development. We will then present, through some typical cases, the case law that we identified important regarding parliaments versus constitutional courts.

Contribution to scholarship: purpose and role of the English database

In the framework of this research project, we create a global database. The novelty of this database is that it focuses on the study of constitutional review practices in different countries during Covid-19. The database will thus provide a user-friendly, quick-search platform in English.

Other constitutional databases were created in different countries after the pandemic outbreak that focused on the collection of Covid-19-related decrees and laws⁵; or relevant court case law⁶; or parliamentary responses⁷ to Covid-19; or the impact of Covid-19 on access to justice⁸; or restrictions on freedom of expression during pandemics⁹.

Our concept differs from existing collections since it is specified to *constitutional review/judicial review* during pandemics.¹⁰ This new data base is created in the hope that it will further contribute to systematising, describing and promoting further research activities on constitutional review related researches. On the other hand, there may also be tangible

⁵ covidlawlab.org/

⁶ www.covid19litigation.org/

⁷ www.ipu.org/parliaments-in-time-pandemic

⁸ globalaccesstojustice.com/global-access-to-justice/

⁹ features.hrw.org/features/features/covid/index.html?#censorship

¹⁰ The legal scholarship on epidemics and constitutionalism is extremely rich. See for example: [SZENTE –GÁRDOS-OROSZ: Using Emergency Powers in Hungary: Against the Pandemic and/or Democracy?](#) In: Matthias, C Kettemann; Konrad, Lachmayer (szerk.) [Pandemocracy in Europe : Power, Parliaments and People in Times of COVID-19](#), Oxford, Hart Publishing (2022) 372 p. pp. 155-178. , 24 p.

benefits in systematically bringing together scattered law-related information: this may also contribute to the development of a more resilient constitutional framework that can help to bridge similar (extraordinary) periods in the future.

Methodological basics: definition of constitutional review, geographical coverage of data collected

The comparability of the data received is only guaranteed if all constitutional regimes have been approached with a similar methodological background. Therefore a stern methodological background has paramount significance.

In the initial phase of the research, it was necessary to clarify the *concept* of *constitutional review*. Since there is considerable variation between countries in their judicial system even if the primary function of constitutional review remains generally the same: "to enforce the constitution against the ambitions of the various branches of power or even of individuals".¹¹

Technically, in our view, constitutional review is a subcategory of judicial review¹², which includes the review of the conformity of a legal act or administrative measure with the Constitution. In the legal scholarship literature, however, these terms - judicial review and constitutional review - are often used interchangeably. To clarify this concept, we have drawn on the research of Versteeg and Ginsburg, who define constitutional review as "the formal power of a national court or other judicial forum with nationwide jurisdiction to set aside legislation on the grounds of incompatibility with the national constitution".¹³

The difficulty, however, that the data-base project primary focuses on *constitutional adjudication*¹⁴ and could only partially rely on the concept

¹¹ BARROSO, Luís Roberto: Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies, *American Journal of Comparative Law* 2019/67. 109.

¹² "Judicial review" is a broad concept that includes other functions of the courts besides reviewing legislation and administrative acts.

¹³ GINSBURG–VERSTEEG: Why Do Countries Adopt Constitutional Review?" *Journal of Law, Economics, and Organization* 587 2014/30. 14.

¹⁴ In the constitutional law literature, there are various terms to capture the essence of constitutional review, such as "constitutional review", "judicial review" or "constitutional adjudication". For more on this, see MAVČIČ, Arne Marjan (ed.): *Constitutional review systems around the world* (Vandeplas Publishing 2018) 5-32.

of by Versteeg and Ginsburg's definition on constitutional review. According to Nora Ban-Forgacs a constitutional decision is based on the text of the Constitution. Accordingly, the key concept is "constitutional decision". Constitutional decision is made when in a constitutional dispute, i.e. in a law dispute, at least at least one of the parties relies on the text of the Constitution (typically the fundamental rights provision of the Constitution, but not limited to those provisions) and the case is referred to a competent legal body (typically to the Constitutional Court, but can be the Supreme Court or ordinary courts) for a decision to resolve the case that are based on legal (and not moral, etc) arguments.¹⁵

For the purpose of the database we chose an alternative definition. Accordingly, constitutional review is the *formal power of a country's constitutional or supreme court to review the conformity of a law or judicial decision with the national constitution*.

Unlike Ban-Forgacs's definition above, and in line with Ginsburg and Versteeg's conceptual approach, our definition in this paper is *formal*. This means that we consider in the database only those countries where the power of review is explicitly found in the text of the constitution, or at least in a constitutional norm.

Finally, for the purpose of the database it is important to underline that only the highest judicial body with the power of constitutional review in each country is taken into account. Accordingly, for countries where constitutional review is decentralised and lower courts are also empowered to review constitutionality (e.g. Finland, Greece, Norway and Sweden), only cases that have reached the *highest competent court* are included in the database. For the same reasons, the database will not include decisions of the constitutional courts of the member states of federal countries.¹⁶

¹⁵ BAN-FORGACS, Nora: A rendszerváltás és az adatvédelmi ombudsman Magyarországon: az adatvédelmi ombudsman alapjog-értelmezése. L'Harmattan, Budapest, 2022.p. 64.

¹⁶ The list of constitutional courts compiled by the Venice Commission has been a great help in selecting the most competent judiciary in each country. www.venice.coe.int/webforms/courts/

However, for some countries (e.g. Finland), the list includes two higher judicial forums, so this compilation is not automatically followed. To preserve the feasibility of the project, only one court from each country is selected.

Similar to Ginsburg and Versteeg's research,¹⁷ our data on constitutional review is taken from the *Comparative Constitutions Project* (CCP).¹⁸ The CCP collected data on constitutional review through a questionnaire. For the purpose of this research, the most important question of the CCP questionnaire is: "To whom does the constitution assign the responsibility of interpreting the constitution?"¹⁹

The wide geographical coverage of the database means that it can make a significant contribution to meaningful comparative assessments. A further advantage of such a broad geographical coverage is that it can provide a meaningful contribution to a deeper understanding of issues such as: the scope of constitutional review in special legal orders; the limitability of fundamental rights in such periods; factors influencing the activities of constitutional courts; the constitutionally permissible scope of state interventions; and the migration of constitutional ideas in relation to special legal orders. Overall, the database will allow general conclusions to be drawn from the constitutional reflections of different legal cultures. Based on the above, the total number of countries included in the database is 179, the countries excluded from the collection phase of the research project are Cambodia, China (People's Republic of), Cuba, Eritrea, Eswatini, Democratic People's Republic of Korea, Laos, Palau, Qatar, Saudi Arabia, Switzerland, Trinidad and Tobago and Vietnam.

The process of creating a database

Following a description of the methodological background, the next landmark was related to the technical development of the database.²⁰

¹⁷ GINSBURG –VERSTEEG: Why Do Countries Adopt Constitutional Review?. In: Journal of Law, Economics, and Organization 587 2014/30. 14.

24.

¹⁸ www.constituteproject.org

¹⁹ ELKINS, Zachary – GINSBURG, Tom – MELTON, James: The Comparative Constitutions Project : A Cross-National Historical Dataset of Written Constitutions" (*Researchgate*, January 2008)

[www.researchgate.net/publication/265478356_The_Comparative_Constitutions_Project_A_Cross-](http://www.researchgate.net/publication/265478356_The_Comparative_Constitutions_Project_A_Cross-National_Historical_Dataset_of_Written_Constitutions)

[National_Historical_Dataset_of_Written_Constitutions](http://www.researchgate.net/publication/265478356_The_Comparative_Constitutions_Project_A_Cross-National_Historical_Dataset_of_Written_Constitutions)www.researchgate.net/publication/265478356_The_Comparative_Constitutions_Project_A_Cross-National_Historical_Dataset_of_Written_Constitutions.

²⁰ Other databases of a constitutional law nature have served as a source of inspiration for the development of the database's formal and content parameters. Examples

Court decisions are physically uploaded and systemised that are issued by the constitutional or supreme court of different countries.²¹

Grouping the information

Two main strands of relevant case law have been identified, with a number of sub-categories within these. First category of cases is related to the *constitutional framework of a public health emergency*: such as the separation of powers during a special legal order; the division of powers between constitutional actors; and the functioning of constitutional organs (online court hearings and parliamentary sessions). The other category of cases involve *the constitutionality of certain fundamental rights restrictions* imposed by exceptional circumstances. In total, more than 800 cases from around 95 countries have been collected so far, but the work of collecting data and contacting potential data providers is ongoing and we expect the number of cases to continue to grow significantly.

Constitutional review and parliaments during pandemic

A significant group of cases are related to parliaments during Covid-19. These cases are related to separation of powers and democratic requirements of state of emergency but are not strongly related to fundamental rights restrictions. In the database so far we collected (up until now) five cases related to constitutional review and parliaments during pandemic. There is one case from Croatia,²² two cases from

include Lex Atlas; International Press Institute; Human Rights Watch; Covid-19 Litigation; Global Overview of Covid-19 Impacts on Elections.

²¹ Constitutional Court decisions taken after 1 March 2020 may be included in the database, as far as they are related to the constitutional dilemmas generated by the pandemic.

²² Croatia, Constitutional Court of the Republic of Croatia, 20 October 2020, No. U-I-4208/2020. www.covid19litigation.org/case-index/croatia-constitutional-court-republic-croatia-no-u-i-42082020-2020-10-20

Germany,²³ one case from France²⁴, one from Spain²⁵ and one from Kuwait.²⁶ For the purpose of this paper we would like to introduce two cases from France and Spain.

France: changing the rules of the House during a pandemic

The French Constitutional Council's decision of April 2021 reflected on how to amend the House rules of the National Assembly to the emergency period.²⁷

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 House Rules of the French National Assembly and therefore the amendments related to Covid-19 were referred to the Constitutional Council before entering into force in spring 2021.²⁸ The justification for 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 to alter from the general House Rules, 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

²³ Bundesverfassungsgericht Beschluss vom 08. März 2022 - 2 BvE 1/22. www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2022/03/es20220308_2bve000122.html; ²³ Bundesverfassungsgericht, Beschluss vom 06. Dezember 2021 - 2 BvR 2164/21. https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/12/rk20211206_2bvr216421.html

²⁴ Constitutional Council of France, 1 April 2021, 2021-814 DC. www.conseil-constitutionnel.fr/decision/2021/2021814DC.htm

²⁵ Spain Constitutional Court, 5 October 2021, Recurso de amparo 2109-2020. www.covid19litigation.org/case-index/spain-constitutional-court-recurso-de-amparo-2109-2020-2021-10-05

²⁶ the arab weekly.com/court-order-expel-kuwaiti-mp-confuses-political-scene

²⁷ Constitutional Council of France, 1 April 2021, 2021-814 DC. www.conseil-constitutionnel.fr/decision/2021/2021814DC.htm

²⁸ Constitutional Council of France, 1 April 2021, 2021-814 DC. 2-3. www.conseil-constitutionnel.fr/decision/2021/2021814DC.htm

French Assembly, its conditions of participation, sessions and voting.²⁹ 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 French Constitutional Council considered that, the amendment rendered only an exemplificative list of on-line communication channels to use, it did not in fact provide any real guidance to the House Committee on establishing an operating procedure, thus essentially provided discretionary powers to that body. The Council highlighted that the amendments to the House Rules (by the form of a formal 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.³⁰

Extension of parliamentary deadlines

In Spain, a total suspension of parliamentary work took place in March 2020, the Spanish House Committee decided on 13 March to suspend all parliamentary referrals. Later, the suspension of parliamentary deadlines was finally lifted by the Spanish House Committee on 19 April, letting 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

²⁹ Constitutional Council of France, 1 April 2021, 2021-814 DC. 4. www.conseil-constitutionnel.fr/decision/2021/2021814DC.htm

³⁰ Constitutional Council of France, 1 April 2021, 2021-814 DC. 6-7. www.conseil-constitutionnel.fr/decision/2021/2021814DC.htm

of the Spanish parliament.³¹ The Constitutional Court upheld the petitioners' claims.³²

The Spanish Constitutional Court has 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.³³

Conclusion

In the first part of the paper we introduced our new data base related to Covid-19 and constitutional review. We elaborated on the main methodological problems of the data base in details. The paper was trying to give a definition for constitutional review to deal with.

In the second part of the paper we provided landmark decisions for the conflict of national parliaments and constitutional courts. Our research shows that constitutional dilemmas in the area of parliamentary law have relatively rarely reached the constitutional/higher courts during the pandemic period. As the paper described above, almost 1000 cases have been examined and only a few is related to national parliaments. Although, the significance of these few cases are beyond doubt. Parliamentary laws

³¹ 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

³² Spain Constitutional Court, 5 October 2021, Recurso de amparo 2109-2020. hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/26819#complete_resolucion%20%E2%80%8E

³³ Spain Constitutional Court, 5 October 2021, Recurso de amparo 2109-2020. hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/26819#complete_resolucion%20%E2%80%8E

are necessary to ensure the democratic functioning of the country. However, constitutional courts – by their nature - have generally limited jurisdiction on internal parliamentary rules, mainly due to parliaments' procedural autonomy.³⁴ 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.

Bibliography

1. BAN-FORGACS, Nora A rendszerváltás és az adatvédelmi ombudsman Magyarországon: az adatvédelmi ombudsman alapjog-értelmezése. Budapest: L 'Harmattan, 2022.p. 64. ISBN: 9789634149422
2. BARROSO, Luís Roberto: Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies. In: American Journal of Comparative Law, 2019/67. 109.
3. ELKINS, Zachary - GINGINSBURG, Tom - MELTON, James: The Comparative Constitutions Project : A Cross-National Historical Dataset of Written Constitutions. In: Researchgate, January 2008.
4. GINSBURG, Tom - VERSTEEG, Mila: Why Do Countries Adopt Constitutional Review?. In: Journal of Law, Economics, and Organization 587 2014/30. 14.
5. GROGAN, Joelle: Power, Law and the COVID-19 Pandemic - Part II: Preparing for Future Emergencies. In: VerfBlog, [verfassungsblog.de/power-law-and-the-covid-19-pandemic-part-ii](https://verfblog.de/power-law-and-the-covid-19-pandemic-part-ii)
6. MAVCIC, Arne Marjan (ed.): Constitutional review systems around the world. Vandeplas Publishing, 2018. 5-32.
7. SZENTE, Zoltán; GÁRDOS-OROSZ, Fruzsina: Using Emergency Powers in Hungary: Against the Pandemic and/or Democracy?In:

³⁴ 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 detailes analysis see Zsolt SZABÓ: Judicial Control of Parliamentary Procedure: Theoretical Framework Analyses, In: Constitutional Review, Vol. 9. No. 1. (2023) pp. 1-17., 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 p., pp. 397-407.,

Pandemocracy in Europe : Power, Parliaments and People in Times of COVID-19, Oxford: Hart Publishing, 2022. 372 p. pp. 155-178. , 24 p.

Links:

1. covidlawlab.org/
2. www.covid19litigation.org/
3. www.ipu.org/parliaments-in-time-pandemic
4. globalaccesstojustice.com/global-access-to-justice/
5. features.hrw.org/features/features/covid/index.html?#censorship
6. covid-and-constitutionalism.tk.hu/en
7. https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/12/rk20211206_2bvr216421.html
8. www.conseil-constitutionnel.fr/decision/
hj.tribunalconstitucional.es/HJ/es/Resolucion

Contact data

Nora Ban-Forgacs: Ph.D.
Research fellow
ban-forgacs.nora@tk.hu

Boldizsar Szentgali-Tóth: Ph.D.
Senior Research fellow
totboldi@gmail.com

Emese Szilagyi
Junior Research fellow
szilagyi.emese@tk.hu
Institute for Legal Studies at CSS, Hungarian Research Network Hun-Ren