

THE ROLE OF PARLIAMENTARY AUTONOMY IN CONSTITUTIONAL REVIEW

Jan Wintr,* Jan Chmel,** Daniel Askari***

Abstract: *The article deals with the principle of parliamentary autonomy and the role it plays in decisions of courts carrying out constitutional review. The principles and interests competing with parliamentary autonomy are categorized and analysed against the backdrop of relevant case-law, offering a wide scale of approaches used by courts around the world. Three groups of competing interests are analysed separately: (i) public control of parliaments, (ii) the principle of representation and (iii) the rights of parliamentary opposition and individual members of parliament. Within the analysis, examples of good practice as well as those of unpersuasive approaches are offered. Subsequently, the article offers general doctrinal principles, the observance of which would help ensure that courts do not overreach in regulating parliamentary internal affairs, thus triggering unwanted consequences.*

Keywords: *parliamentary autonomy, parliamentary procedure, judicial review, parliamentary opposition*

I. INTRODUCTION

The principle of parliamentary autonomy is universally recognized, in one form or another, in all democracies, historically shielding parliamentary affairs from other branches of power and outer influences. Constitutional review conducted by the judiciary is, on the other hand, a relatively modern concept, by its very nature alien to parliamentary autonomy. With the processes of global spread of judicial review¹ and judicialization of politics,² challenges to the principle of parliamentary autonomy have been only natural. For one, some courts carrying out constitutional review deem it necessary to also review related questions of parliamentary procedure, and thus interfere with internal matters of parliament; this trend has been noticeable in many countries in the last years and decades.³ Courts also encounter questions related to parliamentary autonomy when deciding cases related to human rights protections. In many countries, disputes arising from complicated

* Associate Professor JUDr. Jan Wintr PhD, Department of Legal Theory and Legal Doctrine of the Charles University, Faculty of Law, Prague, Czech Republic

** Mgr. Jan Chmel, Department of Legal Theory and Legal Doctrine of the Charles University, Prague, Czech Republic

*** Mgr. Daniel Askari MA, Department of Constitutional Law of the Charles University, Prague, Czech Republic
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¹ GINSBURG, T., VERSTEEG, M. Why Do Countries Adopt Constitutional Review. *Journal of Law, Economics, and Organization*. 2014, Vol. 30, No. 3, pp. 587–622.

² HIRSCHL, R. Judicialization of Politics. In: K. Whittington – D. Kelemen – G. Caldeira (eds.). *The Oxford Handbook of Law and Politics*. Oxford: Oxford University Press, 2008, p. 119; GAR YEIN, N. G. Judicialization and the End to Parliamentary Sovereignty: Shifting Paradigms in the Protection of the Rule of Law and Human Rights: UK, France and the Netherlands. *Global Journal of Comparative Law*. 2014, Vol. 3, No. 1, pp. 50–96.

³ BAR-SIMAN-TOV, I. Semiprocedural Judicial Review. *Legisprudence*. 2012, Vol. 6, No. 3, pp. 271–300; BAR-SIMAN-TOV, I. The Role of Courts in Improving the Legislative Process. *The Theory and Practice of Legislation*. 2015, Vol. 3, No. 3, pp. 295–313; NAHOT, S. Judicial Review of the Legislative Process. *Israel Law Review*. 2006, Vol. 39, No. 2, pp. 182–247; FRICKEY, P. P., SMITH, S. S. Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique. *Yale Law Journal*. 2002, Vol. 111, pp. 1707–1756.

legal processes related to European integration have also forced courts to consider interfering with parliamentary procedure.

While parliamentary autonomy, originating in its purest form in the English concept of parliamentary sovereignty, requires that parliamentary bodies have, to a certain degree, unchecked authority to decide on their internal affairs, modern constitutions require that unconstitutional statutes be judicially struck down and individuals claiming breach of their rights have access to an effective remedy before an impartial authority, usually a court. Contemporary liberal democracies cannot abandon any of those interests as the first represents an important attribute of division of powers, protecting the legislature from unwanted external influences, and the latter has become an unimpeachable constitutional value. This is a critical look at the different judicial approaches to conflicts of parliamentary autonomy with those other interests, and the effects thereof.

This article attempts to analyze and categorize the values supporting parliamentary autonomy as well as those standing in opposition to it, doing so against the backdrop of case law of mostly constitutional courts in the geographical area of Central and Eastern Europe. Included within the scope of the selected case law are post-communist countries of Central and Eastern Europe which broadly share a common model of judicial constitutional review,⁴ Austria, historically important to those countries which used to be parts of the Austrian Empire, and Germany, whose powerful Federal Constitutional Court has dealt with cases related to parliamentary autonomy with greater frequency and hawkishness than any other European court, and whose case law therefore serves as inspiration to constitutional courts across Central and Eastern Europe. Furthermore, the European Court of Human Rights and Court of Justice of the European Union are also included because the context of their case law greatly influences the states of Central and Eastern Europe, and thus cannot be ignored.

First, the concept of parliamentary autonomy and its importance in modern constitutional states is discussed. Subsequently, three groups of competing interests are identified, specifically public control of parliaments (chapter 3), the principle of representation (chapter 4) and the rights of parliamentary opposition and individual MPs (chapter 5). The case law analysis shows that those groups of interests actually play specific roles in the judicial decision-making and discusses the different types of arguments used by courts struggling to strike the right balance between allowing for internal parliamentary affairs to be conducted without excessive judicial oversight and not resigning on their constitutional duties. Based on the real-world examples of those struggles, the article answers its main question: how should Central and Eastern European courts approach the principle of parliamentary autonomy in contemporary constitutional review and what underlining guidelines would help them to tackle such cases without creating unwanted constitutional imbalances.

⁴ SADURSKI, W. Judicial Review in Central and Eastern Europe: Rationales or Rationalizations. *Israel Law Review*. 2009, Vol. 42, Issue 3, pp. 502–507.

II. PARLIAMENTARY AUTONOMY, ITS SUPPORTING AND OPPOSING PRINCIPLES

Although parliaments are central law-making bodies, in the common law area even considered to be sovereign, both the content of the laws they enact and the legislative procedure itself are nowadays governed by law. Legislating in every single parliament is regulated by rules of legislative procedure and both the content and the procedure are bound by constitutional limits. Nevertheless, the law governing actions of parliament is peculiar in one respect: unlike most law, it is usually not directly enforceable by the judiciary.

The reason for this lies in the long-established principle of parliamentary autonomy, which was in its basic form already expressed in the Bill of Rights of 1689 in England, providing that “*the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament*”.⁵ In its most clear form this principle ensures that parliament is free to regulate its internal affairs and that all parliamentary procedures remain within the scope of exclusively internal parliamentary matters.⁶ One of the important aspects of parliamentary autonomy lies in the fact that parliaments are not subordinate to executive power in any way.⁷ However, a second aspect is also present, specifically that parliaments are partly free to follow their own regulations⁸ and also that to a certain degree, they are free from judicial oversight since many of parliaments’ internal procedures and decisions cannot be reviewed by courts.⁹ Breaches of the rules of parliamentary procedure thus can usually only lead to political sanctions, not legal ones. To be more specific, according to the principle of parliamentary autonomy, it is up to the parliamentary majority to make determinations such as whom it will elect as parliamentary functionaries, when and how bills will be discussed and voted on etc. Furthermore, disciplinary authority of the speaker over MPs and parliamentary immunities which shield members of parliaments from prosecution can also be considered an aspect of parliamentary autonomy.¹⁰

Let us look at the general role assigned to parliamentary autonomy by different courts. First of all, parliamentary autonomy is widely acknowledged by high courts in the area analyzed – this is also why the ECtHR calls it a “well established constitutional principle”

⁵ FASONE, C. Legislatures as Hostages of Obstructionism: Political Constitutionalism and the Due Process of Lawmaking. *Review of Constitutional Studies*. 2016, Vol. 21, No. 1, pp. 63–84.

⁶ McLACHLIN, B. Reflections on the Autonomy of Parliament. *Canadian Parliamentary Review*. 2004, Vol. 27, No. 1, pp. 4–7; VERMUELE, A. The Constitutional Law of Congressional Procedure. *The University of Chicago Law Review*. 2004, Vol. 71, No. 2, pp. 361–437.

⁷ OLSON, M., ILONSZKI, G. Two Decades of Divergent Post-Communist Parliamentary Development. In: M. Olson – G. Ilonszki (eds.). *Post-Communist Parliaments: Change and Stability in the Second Decade*. Routledge, 2011, pp. 119–140; NIJZINK, L., MOZAFFAR, S. Parliaments and the enhancement of democracy on the African continent: An analysis of institutional capacity and public perceptions. *The Journal of Legislative studies*. 2006, Vol. 12, No. 3-4, pp. 311–335.

⁸ BEETHAM, D. *Parliament and democracy in the twenty-first century: a guide to good practice*. Inter-Parliamentary Union, 2007, p. 118.

⁹ McLACHLIN, B. *Reflections on the Autonomy of Parliament*. pp. 4–7. See also case law of the Slovak Constitutional Court which, when reviewing decisions of parliamentary bodies, distinguishes whether the decision is directed inside or outside of the parliament – 13 December 2013, Case II. ÚS 576/2012-141.

¹⁰ See for example Czech Constitutional Court 16 June 2015, Case I. ÚS 3018/14; and 13 January 2015, Case Pl.ÚS 17/14.

in the case of *Karácsony and Others v. Hungary*.¹¹ The German Federal Constitutional Court provided its own very detailed definition of parliamentary autonomy in its famous judgment from 2012, dealing with the European Stability Mechanism. Here, the Court concluded that Bundestag was in breach of the German Basic Law when it delegated its oversight powers over the ESM's expenses to a nine-member subcommittee of the Budget Committee. However, the Court also discussed its general approach to parliamentary autonomy. In respect of the scope of parliamentary autonomy as well as its reasons, the Court concluded that parliament has constitutional authority *"to provide for its internal affairs autonomously within the constitutional order and to organize itself in such a way that it can properly perform its duties"* which it can exercise with *"a broad latitude"*.¹²

Similarly, the Czech Constitutional court stated in its judgement from 2011 concerning the use of state of legislative emergency by the Czech Parliament, that the *"rules of the legislative process are contained in various sources of the (parliamentary) law, which include in particular the Constitution of the Czech Republic and statutory rules of procedure of both parliamentary chambers [...]. The [...] sources of parliamentary law are the expression of autonomy of Parliament, or its chambers, consisting of self-regulation of parliamentary procedures, which is necessary to a certain extent, since the Constitution of the Czech Republic naturally regulates the rules for legislative process (the operation and roles of both chambers of Parliament, their basic organizational structure, quorum, and the majorities necessary for individual types of resolutions, parliamentary immunity, the basic rules for the course of sessions of both chambers and so on) merely in a general manner, and anticipates adoption of more detailed rules for the legislative process in the form of acts on rules of procedure of the individual chambers of Parliament."*¹³

As a third example, the Constitutional Court of the Republic of Moldova in its decision from 2013 concerning the power of parliament to create an office of interim Speaker of the Parliament stated that *"[t]he Parliament enjoys autonomy in establishing juridical norms governing its organization and functioning. In this context, the Court held that the parliamentary regulatory autonomy cannot be absolutized, as the supremacy of the Constitution represents a general binding principle, including for the law-making authority, which cannot pass legislative acts and approve regulations on parliamentary procedure contrary to principles and dispositions of the Constitution."*¹⁴

Three main doctrinal sources of the principle of parliamentary autonomy emerge from the case law analyzed below.¹⁵ First, it is the division of powers:¹⁶ parliamentary autonomy

¹¹ See ECtHR, Appl.nos. 42461/13 and 44357/13, *Karácsony and Others v Hungary*, judgment of 17 May 2016.

¹² Federal Constitutional Court 28 February 2012, BVerfGE 130, 318, *Stabilisierungsmechanismusgesetz*, para. 114-124.

¹³ See Czech Constitutional Court 1 March 2011, Case Pl. ÚS 55/10, English translation In: *Ústavní soud* [online]. 2015 [2019-01-15]. Available at: <<https://goo.gl/5cqoTA>>.

¹⁴ Constitutional Court of the Republic of Moldova 21 May 2013, Case No. 12/2013. In: *Constitutional Court of the Republic of Moldova* [online]. 21. 5. 2013 [2021-01-31]. Available at: <<https://goo.gl/PXGgzc>>.

¹⁵ The sources mentioned are mainly applicable to liberal democracies. In other types of political system, the principled reasons for respecting the autonomy of parliament are less persuasive.

¹⁶ An interesting example of this, found outside of the analyzed area of Central and Eastern Europe, is The Constitutional Court of South Africa which links the principle of parliamentary autonomy mainly to separation of powers; Constitutional Court of South Africa 17 August 2006, Case CCT 12/05, *Doctors for Life Int'l v the Speaker of the Nat'l Assembly & Others*.

is one of the principles that keep the constitutional system in balance and prevent both the courts and the executive from abuse of power. Just as parliaments are forbidden to interfere with judicial decision making, the courts cannot, by interpreting rules of parliamentary procedure, bind the parliaments with their own views of how the parliament ought to act when it comes to its internal affairs. Second source of parliamentary autonomy can be found in the respect for principles of majoritarian democracy: unlike judges, members of parliaments are democratically elected, and they are legitimated to exercise their law-making powers in any manner chosen by their majority. The third source is more pragmatic: parliamentary autonomy is necessary for achieving work efficiency in parliaments. Parliaments need sufficient free space to be able to perform their functions. Since parliaments represent arenas of conflicting interests, unlimited judicial oversight over parliamentary procedures might paralyze these procedures, as the opposition would be able to challenge every procedural step of the political majority before courts.

A common basis for limiting parliamentary autonomy by judicial review of the parliamentary procedure all around the world can be summarized in a simple way: parliamentary autonomy ends where the constitution begins. However, in dealing with specifics, it gets much more complicated for the judiciary. Judicial review of parliamentary procedure usually occurs in cases when parliamentary autonomy and its underlying values (division of powers, majoritarian principle and efficiency) collide with other constitutional principles and values. However, parliamentary autonomy itself can be considered a constitutional value, capable of outweighing the other interests. Along the principles supporting parliamentary autonomy, the case law analysis offered below shows that constitutional limits of parliamentary autonomy, as interpreted by courts, stem from the need for protection of 1) public control of parliaments, 2) principle of representation or 3) the rights of parliamentary opposition and individual members of parliament. Each of the following chapters discusses one of these protected values. It is also shown that when parliamentary autonomy finds itself in conflict with one of the competing constitutional values, it is also supported by one of its own underlying values.

III. PUBLIC CONTROL OF PARLIAMENTS

The first category of reasons for limiting parliamentary autonomy is the need for public control of parliamentary activities. It is a shared principle within liberal democracies that parliamentary proceedings and voting in parliament are public as a rule and thus can be subject to public control. Public control of the exercise of state power (for example via freedom of information instruments) is a generally important constitutional value in democracies. When it comes to parliaments, the need for public control is even stronger. The publicity of parliament's actions not only belongs to basic democratic standards because of the fact that members of parliament represent the people¹⁷ but it is also a necessary prerequisite for parliament's ability to perform one of its basic functions, which is

¹⁷ LORD, C. The European Parliament: a working parliament without a public? *The Journal of Legislative Studies*. 2018, Vol. 24, No. 1, pp. 34–50.

justification of the enacted laws through a public discussion of elected representatives at the stage of parliamentary plenary session.¹⁸

However, it can sometimes be in the interest of the parliamentary majority to limit such public control over its actions. As the cases mentioned below show, parliaments are capable of coming up with a wide variety of ways to do so. It is generally up to the parliament to determine its house rules and the rules of its proceeding. But if those rules or any parliamentary practice interfere with the principle of publicity, courts often deem it necessary to intervene. The judiciary thus tends to consider the principle of publicity to be such an important constitutional requirement that cannot be evaded even by decision of an autonomous parliament. In our opinion, limits of parliamentary autonomy stemming from the principle of public control and the judicial decisions protecting those limits are quite unproblematic. Publicity as well as public control of parliamentary actions are key principles tied to the purpose of parliamentarism itself and there is a pressing need to safeguard them even from parliaments themselves. This cannot be done without limiting parliamentary autonomy.

A relatively straightforward example of this principle being used is the Croatian Constitutional Court's 2004 judgment which repealed the decision of the Croatian parliament enabling it to decide that a sitting or part of a sitting shall be held without presence of the public.¹⁹ However, even individual members of the public attending sessions of parliament may enjoy constitutional protection that override the principle of parliamentary autonomy. The Austrian Constitutional Court, for example, held in 2015 that while parliamentary police were right to stop a member of the public from shouting from the gallery and throwing leaflets at MPs, as soon as the disorderly conduct was stopped, it was overly harsh to sanction the person further. Thus, it was unconstitutional for him to be fined for his conduct because his removal from the proceedings had been the mildest sufficient tool of protecting parliamentary business from disruption.²⁰

The publicity of votes is a separate issue. As a general rule, parliamentary votes should be public so that people know how their individual representants voted. In Germany, this has been the basis of doctrinal criticism of secret votes in the Bundestag, including the vote of the Federal Chancellor. As S. Roßner argues, secret voting in Parliament must be deemed unconstitutional²¹ because it is incompatible not only with the principles of publicity and public control of parliament,²² but also with the principle of free exercise of an MP's office, which encompasses the relationship between the MP and his or her constituents.²³ Nevertheless, the Federal Constitutional Court has so far not dealt with the

¹⁸ RUMMENS, S. Staging Deliberation: The Role of Representative Institutions in the Deliberative Democratic Process. *The Journal of Political Philosophy*. 2012, Vol. 20, No. 1, pp. 23–44 elaborating in detail on the 'political stage' in connection with the need for visibility of representative politics.

¹⁹ Croatian Constitutional Court 11th February 2004, Case U-II-1744/2001. In: *The Constitutional Court of the Republic of Croatia* [online]. 11. 2. 2004 [2021-01-31]. Available at: <<https://goo.gl/u1Pco1>>.

²⁰ Austrian Constitutional Court 30 June 2015, Case E 1054/2014 - 22.

²¹ ROßNER, S. Verfahren der Mehrheitsbestimmung: Wahl- und Abstimmungsverfahren. In: M. Morlok – U. Schliesky – D. Wiefelspütz (eds.). *Parlamentsrecht*. Nomos, 2016, p. 1298.

²² *Ibid.*, p. 1296.

²³ *Ibid.*, p. 1294.

issue of secret votes and the Bundestag continues to enforce them. In fact, the Bundestag President used his new power to fine MPs²⁴ for the very first time in March 2018 when an MP took a picture of his ballot in the ballot box during the vote of the Federal Chancellor.

The Constitutional Court of the Republic of Moldova, however, has addressed secret votes: in its 2015 decision, the Court stated, while reviewing a decision which lifted parliamentary immunity of one of the Moldovan MPs, that *“the constitutional principle of transparency of parliamentary work implies the right of access to information to any citizen regarding the activity of all the Members of Parliament. Hence, it is necessary to prove transparency in parliamentary activity, including in relation to the votes expressed by every MP separately.”*²⁵

However, it should be noted that some constitutions explicitly require secret ballot for specific votes to protect the free will of MPs. Thus, it can exceptionally happen that constitutional courts interfere with parliamentary autonomy to protect such a constitutionally mandated secret ballot: one example can be found in a rather strict decision of the Slovak Constitutional court from 2011 which declared null and void the vote of General prosecutor by the Slovak parliament after finding out that although the Constitution required a vote by secret ballot, some MPs published their votes via photographs of their voting tickets.²⁶ In this case, the Slovak Constitutional Court preferred the protection of free will of MPs to public control of parliaments and mainly to parliamentary autonomy.

The Slovak case is also important for another reason. While obviously infringing upon parliamentary autonomy in quite a serious manner, the decision completely omits any reference to this principle. It seems therefore likely that the Court did not properly weigh this important principle against the others involved. The lack of persuasiveness of such a decision is especially stark in contrast to established case law of the same court, in which it explicitly takes parliamentary autonomy into account and concludes that parliament is entitled to a certain level of fallibility.²⁷ In its arbitrariness, the Slovak Constitutional Court unfortunately served as an example of unpredictable, and thus destabilizing inter-venor into parliamentary autonomy.

Other elements of parliamentary procedures can be subject to constitutional requirement of publicity and transparency as well. This can mean not only limitations to parliamentary autonomy but possibly also to the efficiency of parliamentary procedures. For this reason, the Court of Justice of the European Union repeatedly dealt with cases concerning the right of EU citizens to access to documents drawn up or received in the course of legislative procedure:²⁸ for example in 2015, European Parliament refused to grant access to parts of documents drafted during so called triologies (a part of EU legislative procedure consisting of informal tripartite meetings of representatives of Parliament, the Coun-

²⁴ Ordnungsgeld according to § 35 of the Rules of Procedure of the German Bundestag (Geschäftsordnung des Deutschen Bundestages).

²⁵ The Constitutional Court of the Republic of Moldova, 17 November 2015, Case 39a/2015. In: *The Constitutional Court of the Republic of Moldova* [online]. 17. 11. 2015 [2021-01-31]. Available at: <<https://goo.gl/8vxchC>>.

²⁶ Slovak Constitutional Court 20 April 2011, Case I. ÚS 76/2011-198.

²⁷ Slovak Constitutional Court 17 September 2014, Case PL. ÚS 11/2012.

²⁸ The right is guaranteed by Art 2.4 and Art 12.2 of the regulation No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents.

cil and the Commission) arguing that full disclosure of the documents would seriously undermine the decision-making process: it would among other things significantly influence conduct of the parties of the dialogue, increase public pressure on the relevant actors and diminish the principle that “nothing is agreed until everything is agreed”.

However, in its judgment from 2018,²⁹ the General Court concluded that Parliament is obliged to grant access to the relevant documents created during dialogues. The court emphasized that the principles of publicity and transparency are inherent to the EU legislative process, they contribute to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act and they are a precondition for the effective exercise of democratic rights of citizens. Further examples of the CJEU supporting the right of citizens to access to legislative documents include a 2013 case when the Court of Justice stated that Council has to provide information concerning amendments put forward by Member States as well as re-drafting during the legislative procedure,³⁰ and a 2008 case where the Court concluded that Council has to disclose the opinions of the its legal service relating to legislative processes.³¹

Similar case law of the German Federal Administrative Court, according to which analyses provided to the Bundestag by its research capacities must be public,³² has been subject of doctrinal criticism. It is considered judicial overreach into the process of creation of political will which results in MPs’ diminished interest in research analyses and therefore in lower quality of Bundestag’s decisions.³³

However, the willingness to interfere with parliamentary autonomy in order to protect public consultations on proposed legislation is not shared by all constitutional courts. For example, the Slovak Constitutional Court has repeatedly come to the conclusion that there are no constitutional requirements concerning the consultation procedure. Thus, violations of rules of this procedure do not constitute violations of the Slovak constitution.³⁴ The Court in its case law on this topic stresses the importance of parliamentary autonomy: *“The Constitutional Court chos es a cautious approach to reviewing legislative processes, having in mind the principle of minimalization of judicial interferences into the powers of other state bodies. This specifically applies to those areas which allow for a certain scope of political consideration of the National Council [the parliament of Slovakia]. In these areas, the Court limits its review to the so-called rationality test. To allow for a wide margin of appreciation of the parliament necessarily includes the acceptance of a certain level of its fallibility. Thus, parliament is entitled to errors in assessing the causes and consequences of specific situations and to subsequent erroneous decisions.”*³⁵

²⁹ CJEU General Court 22 March 2018, Case T-540/15, *Capitani v. Parliament*.

³⁰ CJEU 17 October 2013, Case C 280/11, *Council v. Access Info Europe*.

³¹ CJEU 1 July 2008, Cases C-39/05 and C-52/05, *Sweden and Turco v. Council*.

³² German Federal Supreme Administrative Court 25 June 2015, BVerwGE 152, 241.

³³ RISSE, H. Rechtsprechung und Parlamentsfreiheit – Versuch einer Vermessung der geschützten parlamentarischen Gestaltungs- und Entscheidungsräume. *Juristenzeitung*. 2018, Vol. 73, No. 2, pp. 71–79.

³⁴ Slovak Constitutional Court 22 November 2012, Case II. ÚS 514/2012-23; 4 November 2015, Case Pl. ÚS 14/2014-72; 17 September 2014, Case Pl. ÚS 11/2012; and 22 June 2016, Case Pl. ÚS 17/2014.

³⁵ Slovak Constitutional Court 17 September 2014, Case Pl. ÚS 11/2012.

Transparency of parliamentary decision making is also an important element of the Czech Constitutional Court's reasoning behind the ban on so called wild riders, i.e. amendments to bills dealing with other issues than the original bill. According to the Court, such an amendment must be considered a separate bill, merely disguised as an amendment. To allow such an amendment would mean 'to breach division of power with consequences for the principles of drafting orderly, clear and predictable law which the Constitutional Court considers attributes of a democratic state adhering to rule of law. Further, such amendments bypass rules of legislative initiative set forth in Art 41 of the Constitution and breach the government's right to comment on any bill according to Art 44 of the Constitution.'³⁶

A similar approach has been later chosen by the German Federal Constitutional Court which also decided to interfere with lasting parliamentary conventions when it decided that The Joint Committee resolving disputes between the Bundestag and the Bundesrat cannot agree on a final text of the proposed legislation, which had not previously been subject to Bundestag proceedings. This was found to be unconstitutional because The Joint Committee does not have the power to initiate new legislation. According to the Court, 'should The Joint Committee have power to diverge from the previously agreed text of the bill as well as its preceding proposal, the constitutional requirement for a link between the public debate in Parliament and later agreement between the constitutional bodies taking part in the legislative process would be abandoned at the expense of the public's ability to follow the process.'³⁷ This is one of the Court's decisions criticized by H. Rosse and other German scholars who point out that excessively strict insistence on those principles significantly limits room for flexible political negotiations.³⁸

Probably the most significant conflict between the accepted ways of conducting parliamentary business and growing judicial requirements arises in relation to the need to provide reasons for adopted legislation. This was one of the elements of the 2005 ECtHR Grand Chamber's decision in *Hirst v United Kingdom* (No 2) where the lack of reasons and sufficient parliamentary debate played a decisive role in the Court's finding that a UK statute was in breach of the Convention. The Court noted: 'As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. [...] It may be said that, by voting the way they did to exempt unconvicted prisoners from the restriction on voting, Parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners. Nonetheless, it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote.'³⁹

³⁶ Czech Constitutional Court 15 February 2007, Case Pl. ÚS 77/06, para. 71.

³⁷ German Federal Constitutional Court 8 December 2009, BVerfGE 125, 104, § 72. See also BUMKE, Ch.; VOßKUHL, A. *Casebook Verfassungsrecht*. Mohr Siebeck, 2015, pp. 574–576.

³⁸ RISSE, H. *Rechtsprechung und Parlamentsfreiheit – Versuch einer Vermessung der geschützten parlamentarischen Gestaltungs- und Entscheidungsräume*. pp. 73–74.

³⁹ ECtHR, Appl.no. 74025/01, *Hirst v United Kingdom* (No. 2), judgment of 6 October 2005, para. 79.

In German doctrine, this issue has been pointed out by P. Dann in 2010.⁴⁰ He shows, using numerous examples from the German Federal Constitutional Court's recent case law, including decisions in the cases of Penderpauschale (BVerfGE 122, 210), Rauchverbot (BVerfGE 121, 317) and Hartz IV (BVerfGE 125, 175), that the Court mounts requirements of legislative technical rationality, rather than democratic legitimacy, which are very difficult for the Parliament to fulfil. Clearly, legislation should be the result of political compromise rather than a search for the best technocratic solution to a problem.⁴¹ The German Basic Law does not contain a requirement of rationality⁴² which means that the Constitutional Court does not protect constitutional principles, but instead complicates the democratic search for political solutions. The most famous of the aforementioned decisions, Hartz IV, goes so far as to require that the Parliament, when determining the level of minimal funds required for a person's dignified survival (a constitutional right in Germany), 'base its decision upon an assessment of all living costs necessary for a person's survival as determined in a transparent, competent, realistic and reviewable process on the basis of reliable figures'.⁴³

This decision obviously⁴⁴ served as inspiration for the Czech Constitutional Court which, in its 2010 decision, voided the legislative provisions, according to which pensions were calculated, due to their supposed discrimination of high earners. The Court engaged in a rather unpersuasive argument when it reached the conclusion that the voided legislation 'lacked a link between the set purpose (equalization of pensions paid based on the Pension Insurance Act and differentiation of pensions paid out within the auxiliary pension insurance system) and the chosen legislative instrument (modification of the premium rates and the maximum assessment basis)'.⁴⁵ In this argument, the Court was referring to the reasons given for one of the related statutes.⁴⁶

Yet another example from German case law are the recent decisions of the Second Section of the Federal Constitutional Court dealing with public officials' pay, creating for Parliament the procedural obligation to supply reasons (prozedurale Begründungspflicht). Thus, Parliament is not obliged to pass reasonable legislation, but rather to actually produce written reasoning for it.⁴⁷

Constitutions usually do not require that statutes or bills include reasons for their passage. This obligation, if it exists at all, is usually set forth in the parliamentary rules of pro-

⁴⁰ DANN, P. Verfassungsrechtliche Kontrolle gesetzgeberischer Rationalität. *Der Staat*. 2010, Vol. 49, No. 4, pp. 630–646.

⁴¹ *Ibid.*, p. 640.

⁴² *Ibid.*, p. 644.

⁴³ Federal Constitutional Court 9 February 2010, BVerfGE 125, 175, *Hartz IV*.

⁴⁴ The *Hartz IV* case is explicitly referenced; Czech Constitutional Court 23 March 2010, Pl. ÚS 8/07, para. 95.

⁴⁵ *Ibid.*, para. 86.

⁴⁶ WINTR, J. Nález Ústavního soudu o důchodovém systému: Quo vadis, sociálněprávní judikatura Ústavního soudu? [Decision of The Constitutional Court on the Pensions System: Where Is the Constitutional Court Case Law on Social Rights Headed?]. *Jurisprudence*. 2010, Vol. 19, No. 5, pp. 30–38; ZÁMEČNÍKOVÁ, M. *Vady zákonodárného procesu a zákonodárství vůbec*. [Deficiencies of the Legislative Process and of Legislating Generally]. Prague: Charles University, The Faculty of Law, Právnická fakulta, 2017.

⁴⁷ RISSE, H. *Rechtssprechung und Parlamentsfreiheit – Versuch einer Vermessung der geschützten parlamentarischen Gestaltungs- und Entscheidungsräume*. p. 74.

cedure. Thus, the power to decide which bills can be debated and voted on falls within the scope of parliamentary autonomy. Even a statute which lacks formal reasoning altogether is formally constitutionally sound as long as it has been passed through the proper procedure by the required majority. The ever-growing judicial requirements on formal reasonings to legislation therefore pose unreasonable infringements into parliamentary autonomy.

IV. THE PRINCIPLE OF REPRESENTATION

The principle of representation is another key aspect of parliamentarism which limits parliamentary autonomy, and which is often protected by the courts even from parliaments themselves. Parliaments and their members represent all people, which is their basic function in representative democracy. Parliaments cannot resign on fulfilling this function and they also cannot set up their internal processes in a way that weakens or distorts the representation of people.

This principle has led the German Federal Constitutional Court to conclude in its decision Pofalla II that parliamentary immunity protects MPs as representatives of the entire people. According to the Court, “*immunity finds its justification today mainly in the principle of representation. [...] Should the work of an individual MP be obstructed, not only would the majority relations set by the people be changed but the MP subject to criminal prosecution might also be prevented from supplying his or her expertise, experience and convictions as well as representing the interests of his or her constituents in the parliamentary work. That would impair the parliamentary decision-making process which aims at balancing existing societal differences.*”⁴⁸

The principle of representation has also been a part of the German Constitutional Court’s reasoning in decisions regarding the representation of parliamentary political groups as well as informal groups of MPs and single MPs in Bundestag bodies. According to the Court, the principle leads to the conclusion that a committee must mirror the composition of the entire chamber. Therefore, an independent MP who does not represent any political group must not have the right to vote in a committee in order not to distort the desired representation of the entire chamber.⁴⁹ In a controversial decision with strong dissents from judges Mahrenholz and Böckenförde, the Court accepted that where it is reasonable, a parliamentary body may be so small as to exclude a certain political group (in this case the Green Party, newly in Parliament at the time, was being excluded from an intelligence committee).⁵⁰ However, if a political party with Bundestag MPs is not large enough to have a parliamentary group of its own, it must be part of committees anyway due to the principle of mirroring representation of the entire chamber.⁵¹

It follows that the German Federal Constitutional Court interferes very strongly with parliamentary autonomy. It is worth noting that in many parliaments, for example in

⁴⁸ German Federal Constitutional Court 17 December 2001, BVerfGE 104, 310, *Pofalla II*.

⁴⁹ German Federal Constitutional Court 13 June 1989, BVerfGE 80, 188.

⁵⁰ German Federal Constitutional Court 14 January 1986, BVerfGE 70, 324.

⁵¹ German Federal Constitutional Court 16 July 1991, BVerfGE 84, 304.

Poland⁵² and Slovakia,⁵³ there is no legal requirement of MPs being proportionally represented in committees. However, in this case, the German Court's approach is well reasoned and clearly supported by important democratic values; therefore, its strictness is justifiable.

Other German judicial decisions deal with a different, yet related topic – to what extent can actual decision-making powers be delegated to parliamentary committees and similar bodies. In the most important of such cases, the Federal Constitutional Court found it was unconstitutional for a nine-member subcommittee of the Bundestag Finance Committee to make final decisions regarding oversight of expenditures of the European Stability Mechanism. One of the reasons for this conclusion was the lack of adequate representation of the entire chamber in the subcommittee. The Court discussed the principle of representation in detail:

“The principle of representative democracy [...] guarantees every Member of Parliament not only freedom in the exercise of his or her mandate, but also equal status as a representative of the entire people. Ultimately, this principle is based on the principle of electoral equality [...]. The two special principles of equality, with regard to the principle of representative democracy which they embody, stand in an indissoluble reciprocal relationship in which each determines the other [...]. Organizational measures of the German Bundestag which by reason of the extent of the powers delegated or by reason of the area affected by the transfer encroach particularly strongly on the fundamentally equal status rights of all members are therefore subject to strict constitutional-court supervision [...]. This applies in particular to the delegation of powers to decide for independent exercise, taking the place of the plenary session, to subsidiary bodies of the German Bundestag.”⁵⁴

Additionally, the principle of publicity also played a role in this German decision. Therefore, it also falls into the abovementioned group of interferences with parliamentary autonomy based on the need for public control of parliamentary activities.

As those examples show, courts do not apply the principle of representation as an absolute rule, but usually balance it against other competing principles, mainly the principle of parliamentary autonomy. Results of such balancing can be controversial, as the German Federal Constitutional Court showed in its decision from 2012, which confirmed constitutional compliance of a problematic procedure of election of constitutional judges only by a Bundestag committee, instead of the entire chamber. Although the case seems very similar to the ESM case (BVerfGE 130, 318), this time the Court concluded the transfer of the choice of judge to the committee did not violate the representative function of the Bundestag since such transfer pursues a legitimate aim of consolidating the reputation of the Court and confidence in its independence. Here, the Court reasoned as follows:

“The exclusion of MPs who are not members of the non-public committee from the decision-making process can only be allowed to protect other constitutional values while strictly applying the proportionality principle. There must be a very special reason present

⁵² Art 20 of the Polish Sejm Rules of Procedure (Regulamin Sejmu).

⁵³ In Slovakia, only §§ 8, 58a and 60 of the Rules of Procedure (statute no. 350/1996 Z.z.) require proportional representation in specified committees, not generally.

⁵⁴ German Federal Constitutional Court 28 February 2012, BVerfGE 130, 318.

in order to outweigh the principle of equality of MPs. ... The delegation of election of constitutional judges to a closed committee, whose members are obliged to maintain confidentiality ..., finds its justification in the clear will of the lawmaker to protect the Court's image and the trust in its independence, thus ensuring its ability to function properly.⁵⁵

On the one hand, the cited decision shows the possibility of balancing the principle of representation against other legitimate aims, constitutional values or principles. On the other hand, the Court did not reason the balancing in adequate detail and completely omitted the principle of parliamentary autonomy from the balancing, although this principle might have provided stronger support for the Court's decision. The decision was rightly criticized by German doctrine⁵⁶ and in 2015 the procedure of electing constitutional judges was changed so that the judges are elected by the entire chamber without debate on proposal of the committee who previously elected the judges.⁵⁷

The last domain of parliamentary autonomy identified in the analyzed case law, which can interfere with the principle of representation, is the control of Parliament over attendance of individual MPs at its sessions. The Federal Constitutional Court of Germany touched on this topic long ago in 1975⁵⁸ when it reviewed § 49 of the Bundestag Rules of Procedure. According to this provision, the quorum of Bundestag (Bundestag has a quorum if more than half of its members are present in the plenary hall) is considered reached even if in fact fewer MPs are present, unless the quorum is challenged by a parliamentary group or at least 5 % of MPs. In this case, the Court found that the need for accurate representation of the people by all MPs is outweighed by the Parliament's autonomous right to regulate its affairs. It pointed out that the bulk of parliamentary work does not take place at the plenary session anyway and that in most cases there is no necessity for all MPs to attend the plenary session as there is broad consensus on many of the votes that take place there. Furthermore, all MPs remain free to attend the plenary session whenever they decide to.

Some courts apply the principle of representation in a much stricter manner than the German Federal Constitutional Court and elevate attendance control in parliament to a constitutional requirement. The Lithuanian Constitutional Court did so in its 2016 decision, which can arguably be considered one of the strongest judicial interferences with parliamentary autonomy altogether. The Court ruled there was a constitutional requirement that the remuneration of MPs, who continuously fail to attend, be reduced. The Court thus annulled a provision of the Statute of the Seimas of the Republic of Lithuania which limited the reduction of MPs' remuneration to one third at maximum. The Court stressed the constitutional imperative to ensure the reasonable use of state budget funds allocated for the remuneration of the members of the Seimas as well as the fact, that the Constitution does not protect and does not defend any such rights acquired by a person

⁵⁵ German Federal Constitutional Court 19 June 2012, BVerfGE 131, 230.

⁵⁶ SCHÜRMAN, T. Plenarvorbehalt. In: M. Morlok – U. Schliesky – D. Wiefelspütz (eds.). *Parlamentsrecht*. Nomos, 2016, pp. 605–608.

⁵⁷ § 6 of the German Statute on the Federal Constitutional Court (Gesetz über das Bundesverfassungsgericht) as changed by the Ninth Statute to Change the Statute on the Federal Constitutional Court of 24th June 2015.

⁵⁸ German Federal Constitutional Court 10 May 1977, BVerfGE 44, 308.

that are privileges in terms of their content. Finally, the Court concluded that remuneration is linked to the fulfilment of the constitutional obligation of members of the Seimas to represent the Nation and thus to participate in the work of the Seimas. An MP who fails to fulfil such duty cannot receive any remuneration. Thus, in the view of this Court, the principle of representation outweighed not only parliamentary autonomy but also the rights of individual MPs.⁵⁹

V. THE RIGHTS OF PARLIAMENTARY OPPOSITION AND INDIVIDUAL MEMBERS OF PARLIAMENT

Finally, perhaps the most common reason for courts to interfere with the principle of parliamentary autonomy is protection of rights of opposition or individual MPs. This is a logical result of the fact that the principle of parliamentary autonomy itself favors the parliamentary majority. If parliament is free to regulate its internal affairs, it clearly follows that the majority can regulate the affairs of parliament. However, democracy is based on debate and one of the main purposes of parliaments' existence is to create an environment for a free deliberation that precedes adoption of generally binding laws. Thus, constitutions and courts in liberal democracies usually protect this environment and the rights of opposition and individual MPs to participate in parliamentary activities.

The autonomous right of a parliament to agree on its own rules of procedure must not be used to suppress rights of the opposition. This is the reason why the German Federal Constitutional Court ruled, in one of its oldest decisions, that the Rules of Procedure must not limit the constitutional right to propose bills by requiring that every bill with financial consequences also include a proposal for its funding.⁶⁰ As another example, the German federal constitution as well as state constitutions guarantee the right to establish a parliamentary investigative committee as a minority right; the parliament is obliged to establish such committee when at least a fourth of the MPs require it. The German Federal Constitutional Court has ruled that the majority cannot render the right of the minority to have such a committee established ineffective by later changing the purpose of its investigation.⁶¹ Similarly, the Lithuanian Constitutional Court stresses “[t]he recognition of parliamentary opposition is a necessary element of pluralistic democracy. The Statute of the Seimas must establish guarantees for opposition activities.”⁶²

Especially noteworthy is the Czech case law related to protection of minorities in parliament because it offers examples of two different situations where rules protecting the opposition are broken. On the one hand, the Czech Constitutional Court made clear in 2011, when reviewing economic legislation enacted in so called state of legislative emergency, that parliamentary majorities cannot limit minority rights as they please. In the

⁵⁹ Lithuanian Constitutional Court 5 October 2016, Case No. 12/2015. In: *The Constitutional Court of the Republic of Lithuania* [online]. 5. 10. 2016 [2019-01-19]. Available at: <<https://goo.gl/2yKhKp>>.

⁶⁰ German Federal Constitutional Court 6 March 1952, BVerfGE 1, 144.

⁶¹ German Federal Constitutional Court 2 August 1978, BVerfGE 49, 70.

⁶² Lithuanian Constitutional Court 25 January 2001, Case No. 3/99. In: *The Constitutional Court of the Republic of Lithuania* [online]. 25. 1. 2001 [2019-01-19]. Available at: <<https://goo.gl/hUP78j>>.

special emergency legislative procedure, the parliamentary discussion was substantially reduced which significantly limited time for the political opposition to express their view on the legislation. The Constitutional Court found that the emergency procedure was not properly, discussing the role of parliamentary opposition in a parliamentary democracy (which is linked to the abovementioned principle of representation), and emphasizing its importance. It stated explicitly that certain rights of the opposition may not be breached, especially those which “include rights guaranteeing parliamentary opposition their participation in parliamentary procedures; rights allowing the parliamentary opposition to carry out supervision and inspection of the governmental majority and the government itself”.⁶³

In another Czech case, however, the Constitutional Court surprisingly concluded that parliamentary autonomy can include even the right of a parliament to breach its own rules, as long as no constitutional principles are violated.⁶⁴ The government, facing clearly illegitimate blocking of its legislation by a minority of MPs, did not even try to change the Rules of Procedure in a way which would stop the obstruction; rather, it simply broke the rules by carving out a one-time exception through parliamentary motion. The Constitutional Court did not find this sufficient to declare the adopted statute unconstitutional even though in one of its older cases it struck down a constitutional statute which was designed for a single breach of a general constitutional rule.⁶⁵ This shows the Czech Constitutional Court to be far less strict than the Austrian Constitutional Court which takes a very stringent view of violations of statutory rules which are meant to protect a specific constitutional principle even when an actual violation of that principle is not shown. Based on this argument, it recently voided the presidential election, quoting intolerable breaches of electoral law provisions which “are directly meant to protect principles of elections and stop manipulations and malfeasances”.⁶⁶ In the Czech case, it could be argued that the provision of the Rules of Procedure allowing end of a debate only when no more MPs wish to speak was meant to guarantee constitutional principles of parliamentary proceeding. Therefore, under the Austrian approach, the breach of such a provision would have been considered to render the legislative procedure unconstitutional.⁶⁷

Finally, one of the most thorough German decisions on parliamentary autonomy concerned the rights of an independent MP. This case was already discussed above; the Federal Constitutional Court allows for an independent MP not to have voting rights in parliamentary bodies which breaches not only the principle of representation but, even more strongly, the MP’s individual rights. In this ruling, the Court stressed that “*the Bundestag is obligated to organize its work according the basic principle of participation*”. It follows

⁶³ Czech Constitutional Court 1 March 2011, Case Pl. ÚS 55/10. In: *Ústavní soud* [online]. 1. 3. 2011 [2019-01-19]. Available at <<https://goo.gl/5cqqTA>>. Shortly thereafter, the Czech Constitutional Court issued another decision based on similar reasoning; 19 April 2011, Case Pl. ÚS 53/10.

⁶⁴ Czech Constitutional Court 12 December 2017, Case Pl. ÚS 26/16.

⁶⁵ Czech Constitutional Court 10 September 2009, Case Pl. ÚS 27/09.

⁶⁶ Austrian Constitutional Court 1 July 2016, Case W I 6/2016, para. 504-508.

⁶⁷ ASKARI, D., WINTR, J. Parlamentní obstrukce ve světle ústavněprávních diskusí. [Parliamentary obstruction in light of constitutional discussions.] *Legislativní příloha odborného časopisu Správní právo*. 2017, Vol. 9, pp. CVI–CVII.

that “all MPs are meant to participate in work of the Bundestag with equal rights and obligations. That means that representation of the people takes place through the Parliament as a whole, i.e. the entirety of its membership as representatives. That means that all MPs should have the same ability to participate.” The autonomous Rules of Procedure “may in part limit the MPs individual rights, but not take them away altogether”. The autonomy principle is of importance, yet it has its limits. As the Court noted, “the Parliament has a broad margin of appreciation in deciding which rules it needs to organize itself and to ensure its smooth functioning; the constitutional oversight is limited to the determination whether the principle of participation of all MPs in functions of the parliament remains guaranteed.”⁶⁸

Disciplinary decisions of parliaments are another frequent basis for disputes which require balancing between parliamentary autonomy and rights of individual members of parliament. Parliaments and parliamentary functionaries usually have disciplinary powers over individual MPs. In principle, the reason for this lies in the need for division of powers (disciplinary powers of parliament over its members are the other side of the coin of the members’ immunities) and for efficiency of parliamentary proceedings (internal dispute resolution is more practical for the parliament than resolving the disputes before courts).

Within the recent case law related to parliamentary autonomy, the ECtHR’s Grand Chamber Judgment in the case of *Karacsony v. Hungary*, concerning disciplinary liability of MPs, has proven seminal.⁶⁹ On four separate occasions in 2013, MPs of the radical Jobbik party disturbed plenary proceedings with posters and shouting, once even going as far as pushing the chair from his seat.⁷⁰ A number of MPs participating in those activities received fines of no more than hundreds of euros. The Parliament decided on those fines by a vote without any debate. Their constitutional complaints launched with the country’s Constitutional Court were denied. While the Court accepted that MPs are entitled to freedom of expression, it found that in this instance parliament’s autonomous power to sanction its members outweighed their individual freedoms.⁷¹ The ECtHR Grand Chamber, however, reached a different conclusion, ruling that procedural obligations of the state to protect the MPs’ freedom of expression were violated as the MPs had not received an opportunity to effectively defend themselves before being fined.⁷²

Nevertheless, the ECtHR also noted the importance of parliamentary autonomy, stating it was a “well established constitutional principle” and that “[i]n accordance with this principle, widely recognized in the member States of the Council of Europe, Parliament is entitled, to the exclusion of other powers and within the limits of the constitutional framework, to regulate its own internal affairs, such as, inter alia, its internal organization, the composition of its bodies and maintaining good order during debates. [...] the rules concerning

⁶⁸ German Federal Constitutional Court 13 June 1989, BVerfGE 80, 188.

⁶⁹ See ECtHR, Appl.nos. 42461/13 and 44357/13, *Karacsony and Others v Hungary*, judgment of 17 May 2016.

⁷⁰ Video A földtörvény parlamenti szavazása. In: *YouTube* [online]. 21. 6. 2013 [2019-01-15]. Available at: <https://www.youtube.com/watch?v=gy0CVj0cp_s>; ECtHR, Appl. nos. 42461/13 and 44357/13, *Karacsony and Others v Hungary*, judgment of 17 May 2016, para. 21.

⁷¹ ECtHR, Appl.nos. 42461/13 and 44357/13, *Karacsony and Others v Hungary*, judgment of 17 May 2016, para. 32-38.

⁷² *Ibid.*, para. 154-159.

*the internal functioning of national parliaments, as an aspect of parliamentary autonomy, fall within the margin of appreciation of the Contracting States [...] [T]here is an overriding public interest in ensuring that Parliament, while respecting the demands of a free debate, can function effectively and pursue its mission in a democratic society. Therefore, where the underlying purpose of the relevant disciplinary rules is exclusively to ensure the effectiveness of Parliament, and hence that of the democratic process, the margin of appreciation to be afforded in this area should be a wide one.*⁷³

Nevertheless, the ECtHR emphasized the distinction between regulation of time, place and manner of parliamentary speech on the one hand and regulation of the content of parliamentary speech on the other. While parliaments can in principle independently regulate the former, they have very limited latitude in regulating the latter.⁷⁴ In the case at hand, the Court, however, concluded quite surprisingly that fining the opposition MPs constituted a violence of their freedom of expression and abuse of a dominant position of the parliamentary majority. That was not because the Hungarian Parliament regulated content of parliamentary speech but because the interference with freedom of MPs expression was not accompanied with adequate procedural safeguards. The ECtHR thus criticized the Hungarian Parliament for deciding about the fine without a debate and without providing reasons for its decision. It added, 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 [...] Similarly, the rules concerning the internal operation of Parliament should not serve as a basis for the majority abusing its dominant position vis-à-vis the opposition.*”⁷⁵ The ECtHR thus, in the major case defining the principle of parliamentary autonomy, discussed this principle in great detail but failed to use it as a strong principle. In effect, the conclusion of the Court means that national parliaments are not autonomous to regulate the procedure of their disciplinary decision-making.

Similarly, the ECtHR found that there has been a violation of Article 10 of the Convention in the case of Szanyi v. Hungary concerning another Hungarian MP:⁷⁶ Mr. Szanyi, a member of opposition Hungarian Socialist Party, had been fined for showing his left middle finger in the direction of the Jobbik MPs in 2013 and about a month later his interpellation on the Minister of National Development was repeatedly rejected by the Speaker with the reasoning that it contained statements that were injurious to the prestige of Parliament and inadmissible in a democratically functioning system. The ECtHR referred to its decision in the Karácsony case and found that both the fine and the rejection of interpellation violated Mr. Szanyi’s rights due to the lack of adequate procedural safeguards that would accompany the interference with freedom of expression. This time, the Court did not explicitly take parliamentary autonomy into consideration, even though the Government and one of the dissenting judges pointed the principle out.

The ECtHR case law is also problematic in relation to the German law regulating individual liability of MPs. As the introduction suggests, the Bundestag Rules of Procedure

⁷³ Ibid., para. 142, 144.

⁷⁴ Ibid., para. 140.

⁷⁵ Ibid., para. 147

⁷⁶ ECtHR, Appl.no. 35493/13, *Szanyi v Hungary*, judgment of 8 November 2016.

allow for rather strong punishments, including a fine of € 1000 and expulsion for up to 30 days without the right to vote. These punishments are decided on by the Bundestag President, no reasoning needs be given, and the MP is heard only insofar as he or she uses the opportunity to launch protest, on which the entire chamber decides without debate.⁷⁷ The only judicial body which can review such a punishment is the Federal Constitutional Court, which has never actually decided on merits of such a case; the state constitutional courts in Germany have on some occasions decided that disciplinary punishments of state MPs were disproportionately harsh.⁷⁸

A German legal scholar J. B. Daniels argues that fines and exclusion from proceedings as disciplinary punishments are generally constitutionally acceptable. However, he considers the current German form of those punishments unconstitutional, pointing out that MPs excluded from proceedings are not even allowed to vote, which he considers excessively harsh, and that some of the disciplinary delicts are not properly defined.⁷⁹ Nevertheless, the Bundestag uses those powers regularly, even as its relevant procedure hardly differs from the one used in Hungarian Parliament. The summary decision is taken by the Bundestag President and the MP is heard only insofar as he or she uses the opportunity to launch protest, on which the entire chamber decides without debate.⁸⁰ Conversely, Daniels considers the regulation of disciplinary liability of MEPs to be adequate,⁸¹ even though it generates no fewer disputes related to MEPs' individual freedoms.⁸²

The CJEU, for example had to deal with a conflict of parliamentary autonomy and an MP's freedom of speech in 2018 in the case of *Korwin-Mikke v. Parliament*. In 2017, the President of the European Parliament imposed disciplinary punishment on a member of the Parliament Janusz Korwin-Mikke for his statements made during a parliamentary debate concerning the gender pay gap where Mr. Korwin-Mikke, among other things, stated that women were weaker, smaller and less intelligent than men and that was why they had to earn less money than men. The MP sued Parliament, stating that the disciplinary punishment limited his freedom of speech. He succeeded as the CJEU General Court concluded that his statements did not cause disorder or disruption of Parliament and it was not possible to punish an MP only because the Parliament finds his statement defamatory, racist or xenophobic.⁸³

The Czech Republic offers an interesting example of parliamentarians having the option to choose, whether they wish to fall within the purview of parliamentary disciplinary powers or not. Chambers of the Czech Parliament may decide on administrative offences of MPs instead of the otherwise competent authorities if the MP chooses this option. In connection with such parliamentary proceedings the Czech Constitutional Court con-

⁷⁷ See § 39 of the Rules of Procedure of the German Bundestag (*Geschäftsordnung des Deutschen Bundestages*).

⁷⁸ See State Constitutional Court of Mecklenburg – Vorpommern 29 January 2009, Case Az. IVerfG 5/08, in which an MP who was disturbing parliamentary proceedings was expelled. This was considered disproportionate as it would have been sufficient to stop him speaking. Further such decisions are to be found in DANIELS, J. B. *Sitzungsausschluss und Ordnungsgeld*. Lit Verlag, 2018, pp. 191–194.

⁷⁹ DANIELS, J. B. *Sitzungsausschluss und Ordnungsgeld*. pp. 295–300.

⁸⁰ § 39 *Geschäftsordnung des Deutschen Bundestages* (Rules of Procedure of the German Bundestag).

⁸¹ DANIELS, J. B. *Sitzungsausschluss und Ordnungsgeld*. pp. 292–294 and 299.

⁸² E.g. CJEU General Court 31 May 2018, Case T-352/17, *Korwin-Mikke v Parliament*.

⁸³ CJEU General Court 31 May 2018, Case T-352/17, *Korwin-Mikke v Parliament*.

cluded that they were an expression of parliamentary autonomy and not subject to constitutional review.⁸⁴ This is a case of a court reasonably giving way to an unchecked autonomous decision-making process when the individual, whose rights are in question, voluntarily decided to subject himself or herself to that process.

Understandably, courts, whose task it is to protect the basic rights of individuals, must be ready to review disciplinary action taken by parliaments against their own members. Nevertheless, it must be acknowledged that even in this area it is necessary for parliaments to be afforded a relatively broad margin of appreciation. While parliaments cannot be allowed to limitlessly breach individual rights of MPs as well as the principle of representation through disciplinary punishments such as expulsion, it is also worth noting that the ability of a parliament to remain capable of properly functioning in a dignified manner lies at the crux of parliamentary autonomy. This is generally accepted by the courts, as the abovementioned cases prove; however, some cases such as *Karácsony and Szanyi*, decided by the ECtHR, arguably put unnecessary formal requirements on parliaments which might hinder their actionability. Such instances should be avoided.

Similarly to disciplinary powers, parliamentary autonomy is also reflected in the rules of debate. It is crucial for the proper functioning of a parliament that the majority has an opportunity to terminate or otherwise regulate debates. According to the German Federal Constitutional Court, *“the possibility of such limitations follows from the right of the Parliament to agree an end to a debate. Without this right, no parliament would ever remain capable of properly functioning in the long term since it would have to surrender to obstructions of minorities and even single MPs.”*⁸⁵ The Court explicitly pointed out that parliamentary autonomy is a sufficient reason to limit individual MPs’ rights.⁸⁶ The only limit to parliament’s autonomy in this respect is the ban on malfeasance.⁸⁷

In the Czech Chamber of Deputies, the Rules of Procedure do not allow for votes on ending to a debate which leads to a danger of obstructions. The Czech Constitutional Court dealt in one of its cases with a broad obstruction of a government tax bill conducted by a part of the opposition in December 2015 and January 2016. The government ended the obstruction by having the Parliament vote on a specific time of the final vote on the bill. However, this was in breach of § 66 (1) of the Rules of Procedure of the Czech Chamber of Deputies, according to which a debate can be only concluded by the chair when no more MPs wish to speak. In this case, a couple dozen still wished to speak at the point of the vote. However, the Constitutional Court did not agree with the parliamentary opposition that because of this breach of procedure, the bill was passed in an unconstitutional manner. Following up on its previous case law,⁸⁸ the Court was satisfied by the fact that

⁸⁴ Czech Constitutional Court 13 January 2015, Pl. ÚS 17/14, para. 45, 50.

⁸⁵ German Federal Constitutional Court 14 July 1959, BVerfGE 10, 4, para. 34.

⁸⁶ *Ibid.*, para. 35.

⁸⁷ *Ibid.*, para. 36.

⁸⁸ See Czech Constitutional Court 1 March 2011, Case Pl. ÚS 55/10 (here, the opposition was not allowed sufficient time in the debate) and 27 November 2012, Case Pl. ÚS 1/12 (here, even though there was only one debate conducted for 14 bills at the same time, the opposition was allowed sufficient time according to the Constitutional Court); WINTR, J. *Legislative Process and Principles of the Rule of Law*. In: L. Pítrová (ed.). *Rule of Law and Mechanisms of its Protection. Czech Perspective*. RWW Science and New Media, 2015, pp. 33–45.

the opposition had had sufficient time to present its proposals and opinions before the final vote.⁸⁹

VI. CONCLUSIONS

It is clear that neither parliamentary autonomy nor the other principles standing opposed to it can be completely abandoned in contemporary liberal democracies as both find strong support in universally accepted constitutional values. In the realities of today's world, it is also inescapable that in one way or another, the conflicts arising amongst those values will be assessed by judicial bodies, whether it be ordinary or constitutional courts. The case law analysis offered above has shown that courts relevant to Central and Eastern Europe accept that they need to respect parliamentary autonomy when it stands opposed to one of the three groups of competing principles. It has transpired that some of the most persuasive cases of interference with internal matters of parliaments take place when constitutional courts protect parliamentary minorities against majoritarian power grabs. Situations, in which the very principle of liberal democracy is under threat, are exactly those in which courts should be ready and willing to step in. In cases where stakes are not as high, involving publicity of proceedings, the principle of representation and the rights of individual MPs, tend to be less clear. In those cases, it emerges as reasonable to assess the conflict of parliamentary autonomy with its competing values via the proportionality test used in a number of cases by German courts, as proposed below.

Another finding which emerges from the case law analysis is that courts must follow clear and explicitly developed doctrinal criteria when interfering with parliamentary autonomy. Otherwise, their decisions tend to be arbitrary, even erratic, and counterproductive. While each constitution has its specificities and strict rules generally applicable to all jurisdictions in Central and Eastern Europe cannot exist, the following principles should be observed across the board in order to ensure that courts do not overreach in regulating parliamentary internal affairs, thus triggering unwanted consequences.

First, courts must consider interfering with parliamentary autonomy exceptional, not the rule. It is quite tempting for top courts, used to reviewing lower judicial decisions, to approach autonomous decisions of parliaments with similar strictness. However, this temptation must be avoided in order for the parliament to keep its rightful place in every constitutional order, which is the main representative body of the people. The courts should be ready to accept that there are spheres of parliamentary life where their interferences are not constitutionally warranted, and thus allow for parliaments to make even such decisions, which are considered incorrect or even illegal, as the Slovak Constitutional Court has explicitly done.

When parliaments are allowed sufficient room for their own autonomous decisions, it ultimately lays greater responsibility on their members. That could be seen for example in the recent debate of the British House of Commons whether to force the government to publish its internal legal opinion on Brexit, the United Kingdom being a perfect example

⁸⁹ Czech Constitutional Court 14 November 2017, Case Pl. ÚS 25/16.

of a system where the judiciary cannot review internal parliamentary decisions at all. Some MPs argued Parliament should not have the power to do so since it could potentially use it in an unreasonable way, such as forcing the government to publish secret intelligence information. However, other MPs voiced the rightful opinion that the potential for Parliament to abuse its power should not be a reason to deprive it of such power.⁹⁰ The House of Commons voted to force the Government to publish its legal opinion by holding it in contempt on 4 December 2018, clearly taking the latter view. At least in the British environment which is shaped by the principle of parliamentary sovereignty as well as by the specific conception of constitutional conventions it is thus very important that MPs as well as the public feel that it is mainly parliament itself, not courts, who has the responsibility of ensuring that parliamentary business is conducted reasonable within what the law permits.

Second, in cases where courts consider stepping into the area of parliamentary autonomy, they must identify a clear competing value which is based in the respective constitution. This is the only way to ensure that the judiciary does not excessively restrict legislatures without proper reasons. In most cases, the competing value will fall within one of the three categories identified above, specifically the public oversight over parliaments, the principle of representation and rights of parliamentary opposition or individual MPs.

Third, once the competing principles are identified by a court, it should strike the right balance amongst them adhering to strict consideration of proportionality. That ensures that the necessary steps are taken when a true threat to values such as the principle of representation or protection of individual MPs' rights is present, such as in the German cases related to representation of MPs in parliamentary committees. However, the proportionality principle will never allow courts to act as unreasonably strict enforcers of principles contrary to parliamentary autonomy, as has been shown for example by the Lithuanian Constitutional Court in the case of remuneration of MPs. Hopefully, this will help courts find the right balance in individual cases and make their decisions more persuasive in relation to both parliaments and the public.

⁹⁰ See the entire debate in the House of Commons Hansard, Volume 650, In: *UK Parliament* [online]. 4. 12. 2018 [2021-01-31]. Available at: <[https://hansard.parliament.uk/Commons/2018-12-04/debates/736EC33B-6555-4707-91D5-46867B781E66/Privilege\(WithdrawalAgreementLegalAdvice\)](https://hansard.parliament.uk/Commons/2018-12-04/debates/736EC33B-6555-4707-91D5-46867B781E66/Privilege(WithdrawalAgreementLegalAdvice))>.