

## JUDICIAL REVIEW OF THE LEGISLATIVE PROCESS IN BRAZIL

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**Abstract:** Judicial review of the legislative process has been a controversial topic in the case law of the Federal Supreme Court in Brazil. Issues regarding enacted statutes are not as controversial as those involving pending processes. On one hand, the Court has been scrutinising cases based on procedural legislative rules that are enshrined in the Constitution. On the other, the Court has been refusing to examine procedures based on provisions not enshrined in the Constitution, such as the internal ordinances of the parliament. In the former situation, the Court sees itself compelled to perform a kind of prior control of constitutionality. In the latter, it states that evaluating whether the process abides by the parliament's own rules is an internal political (*interna corporis*) task, not a legal one. In this article, I argue that adherence to rules that govern the legislative process, regardless of their status, is not a matter of political discretionary choices, but a matter of compliance with the rule of law. Therefore, the Brazilian Federal Supreme Court should abandon the prior control of constitutionality rationale, and it should review pending legislative processes including those based on the internal ordinances of the parliament.

### A. INTRODUCTION

[The] parliament, by virtue of its whole nature, cannot successfully be made subject to obligations.<sup>1</sup>

Among the different forms of judicial review, the courts' scrutiny of the legislative process is one of the most contentious. Typically, arguments that flow from the separation of powers are invoked to keep the judiciary away from the parliament, particularly when the controlling standards are not enshrined in the Constitution. This is not different in Brazil, where there is little dispute concerning the appropriateness of judicial review that is based on legislative procedural rules enshrined in the Constitution, and which either lead to the invalidation of a statute or to an oversight labelled as prior control of constitutionality. In the latter case, the purpose is not to strike down a law (which has not yet come into existence), but to avoid a bill whose procedure does not comply with the Constitution from becoming law. Conversely, the

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<sup>1</sup> Hans Kelsen, 'Kelsen on the Nature and Development of Constitutional Adjudication' in Lars Vinx (ed), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (CUP 2015) 44.

Federal Supreme Court (STF, acronym for *Supremo Tribunal Federal*) has been avoiding intervening in the legislative process when the litigation refers to the application of the parliament's internal ordinances. Typically, the Court supports its decisions in such cases on the basis of *interna corporis* (internal affairs) arguments, according to which the procedures based on the Congress' own provisions amount to political issues and, consequently, are immune from judicial examination. As an example, this position was stated in the MS 22503 (MS is the acronym for *mandado de segurança*, writ of mandamus), judged in May 1996.<sup>2</sup> The case referred to alleged flaws regarding the passing of an Amendment to the Constitution whose purpose was the modification of the pension system. In opposition to the changes, some representatives filed a writ claiming that the President of the House of Representatives was not abiding by constitutional as well as internal procedural rules. In the judgement, the STF stated that the argument founded on the House's rules was 'an *interna corporis* matter, which could only be solved within the legislative branch and was not subject to the scrutiny of the judiciary'.<sup>3</sup> Accordingly, it admitted assessing the case based on the Constitution, but refused to rely on the ordinances of the House (ultimately, the writ was dismissed).

Concerning the judicial review of the legislative process (JRLP) in Brazil, I argue that the STF should review pending procedures even when the disputed issue is the application of an internal provision. Acting in this fashion, far from disrespecting the separation of powers, the Court may enhance participation and the flow of communication in the democratic process. Accordingly, I propose that the Court abandon the notion of a prior control of constitutionality. Additionally, I suggest that the Court reassess the *interna corporis* doctrine. In my view, the approach towards JRLP should not be based on the Constitution, but on the rule of law. From this perspective, alongside the constitutional provisions, the judiciary should rely on other legal texts while adjudicating cases wherein legislative procedures are at stake. Coupled with this approach, the Court should narrow its understanding of political questions to the ones related to discretionary choices, such as how public health care must be provided. Here, the aim is to draw attention to the fact that compliance with the internal rules does not belong to the political realm, but it is a matter of legality just as for the application of any statute. As these rules exist for organising the deliberative space, it is expected that their enforcement aid the democratic process by guaranteeing a minimal level of participation even to representatives that belong to

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<sup>2</sup> STF, *Tribunal Pleno* (Full Court), MS 22503, *Relator para o Acórdão* (Rapporteur for the Judgement) Maurício Corrêa, judged 8 May 1996 <<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=85766>> accessed 28 August 2017.

<sup>3</sup> *ibid* 383 (in the original: 'matéria interna corporis que só pode encontrar solução no âmbito do poder legislativo, não sujeita à apreciação do poder judiciário'; author's translation).

minority groups. Thus, grounded on the rule of law, the STF should enforce not only constitutional norms but also the Congress' own rules as the most straightforward way of safeguarding the democratic nature of the law-making process.

This paper is structured as follows. In section B, I will address the foundations of the justification of the type of JRLP I propose. I will clarify how the concept is to be understood under my proposal. Then I will show that the legislative process must abide by the rule of law to secure the legitimate expectations of those participating in the process. For this, I will draw upon the works of Hayek, Rawls and Raz. Moreover, I will address Ely's and Habermas' support of procedural judicial review in an attempt to link the monitoring of legislative procedures to the enhancement of democratic values. In section C, I will draw on similar reasoning used in other countries. I will start with doctrines that keep the judiciary away from the parliament, such as parliamentary sovereignty, exclusive cognisance and the enrolled bill rule, all resembling the *interna corporis* theory. Here, selected cases in the United Kingdom (UK) and the United States (US) will help assessing the issues at stake. I will then move on to interventionist approaches, grounded on the protection of rights, as in the case of Germany, or on the participation of the people, as in South Africa, while also criticising how the broadness of such approaches may result in too much intrusion in parliamentary affairs. Finally, I will address cases from Israel that resemble my conception of JRLP. In section D, I will describe the Brazilian situation and will argue in favour of the approach I think the STF should adopt. Section E contains concluding remarks.

## B. JUDICIAL REVIEW OF THE LEGISLATIVE PROCESS

'Judicial review of the legislative process' (JRLP) is a form of supervision of the legislature based on the 'due process of lawmaking'.<sup>4</sup> The breadth of this last concept varies in scholarship, but, overall, it can be said to relate to the production of law grounded on procedural rules or principles.<sup>5</sup> The law, in this case, may be enacted either by the legislative or the executive branches.<sup>6</sup> In addition, the rules involved may or may not be written and may enjoy either constitutional or sub-constitutional status, including the internal provisions of legislative

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<sup>4</sup> Ittai Bar-Siman-Tov, 'Separating Law-Making from Sausage-Making: The Case for Judicial Review of the Legislative Process' (Doctor of the Science of Law thesis, Columbia University 2011) 227-30.

<sup>5</sup> For a broader version of the concept, encompassing notions such as participation, see Philip P Frickey and Steven S Smith, 'Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique' (2002) 111 *The Yale Law Journal* 1707, 1709-10. For a stricter one, more focused on procedural rules, see Hans A Linde, 'Due Process of Lawmaking' (1976) 55 *Nebraska Law Review* 197; Suzie Navot, 'Judicial Review of the Legislative Process' (2006) 39 *Israel Law Review* 182, 230.

<sup>6</sup> Susan Rose-Ackerman, Stefanie Egidy and James Fowkes, *Due Process of Lawmaking: The United States, South Africa, Germany, and the European Union* (1<sup>st</sup> edn, CUP 2015) 1, 3.

houses.<sup>7</sup> In this paper, my focus is on the due process of law-making in the parliament. As such, I will not address questions related to judicial review of administrative procedures. For the purposes of this paper, JRLP will be ‘a form of judicial review in which courts’: either a) ‘determine the validity of statutes based on an examination of the procedure leading to their enactment’;<sup>8</sup> or b) oversee the adherence to procedural rules whilst the legislative process is going on. The first part of this definition allows courts to strike down statutes on the ground of flawed procedures.<sup>9</sup> For the second part, the objective is to keep the parliament on track, avoiding a flawed path from being followed. Whatever the purpose, there is a vast array of justifications for JRLP.<sup>10</sup> Some of them support stricter versions of the practice, whereas others justify the practice in broader forms. For the purposes of this essay, I do not think it is necessary to address all of them now. For instance, although the supremacy of the Constitution is an obvious candidate for grounding the practice, this argument does not serve as a rationale for law-making in parliaments being reviewed pursuant to rules that are not enshrined in the Constitution. Thus, I will address the justifications that I think are more suitable for grounding the practice: the rule of law, and democracy-based arguments.

### ***1. The rule of law and the protection of legitimate expectations***

The liberal strand of the rule of law offers a good justification for JRLP. By stating this, I do not intend to support one or another interpretation of the rule of law. Plainly, the rule of law is a topic that encompasses much more than legislative procedures. In this sense, it offers rationales either for more liberal approaches or for those that are also concerned with social rights. Accordingly, the rule of law may be designed to guarantee not only political freedoms, but also rights that protect people from harm resulting from market failures or inefficiencies.<sup>11</sup> Justifiable as such strands may be, I believe that the liberal tradition offers suitable arguments for a much smaller realm: the one wherein representatives pass legislation. What is at stake here is the expectation that the legislative process will follow certain rules. Thus, I argue that some aspects of the theorisation concerning the rule of law proposed by Hayek, Rawls or Raz are particularly worth examining, since it associates legal rules with legitimate expectations

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<sup>7</sup> Navot (n 5) 182; Bar-Siman-Tov (n 4) 230.

<sup>8</sup> Bar-Siman-Tov (n 4) 228.

<sup>9</sup> *ibid.*

<sup>10</sup> *ibid* 220-322.

<sup>11</sup> Jeff King, ‘The Social Dimension of the Rule of Law’ (working paper, forthcoming, version reviewed dated 28 July 2017) 3, 31-36

that may be enforced by judges not bound by the will of any officer (in the case of JRLP, such an officer may be the speaker or the president of a legislative house).<sup>12</sup>

A possible alternative to focusing on the protection of legitimate expectations would be the argument that complying with the rule of law requires legislators to abide by procedural rules in order not to breach the law.<sup>13</sup> However even disregarding the apparent tautology of this argument, I believe it does not offer a response to two challenges. Firstly, it does not address the objection that legislative procedures do not amount to a legal issue, but to a political one. This is typical in the case law of the STF, recommending that the Court keep away from such procedures. From this objection, it follows that adherence to procedural rules, especially when they refer to internal provisions, is not a matter to be dealt with under the rule of law. Secondly, the rationale does not overcome constitutional rules or principles establishing that acts of the parliament cannot be challenged elsewhere, as happens in the UK pursuant to the exclusive cognisance doctrine under the Bill of Rights 1689 art 9. Accordingly, in this situation, an alleged unfixed breach of the due legislative process will not harm the rule of law, as long as the law states that whatever is done within the Parliament is valid. In other words, if most of the representatives think otherwise, what is supposed to be a breach is not a breach at all. Thus, it is necessary to go beyond simply affirming that sticking to the procedural provisions is justified because it avoids breaking the law.

The rule of law, according to Hayek, Rawls or Raz, secures the right of anyone to pursue legitimate expectations.<sup>14</sup> Accordingly, the law establishes principles and rules the purpose of which are to inform citizens as to what they may expect when behaving in a certain way. In this sense, pursuant to Hayek's and Rawls' formulations, the rule of law ensures the citizen's liberty, insofar as it defines the boundaries within which someone's action may not be challenged or punished.<sup>15</sup> In other words, adherence to the rule of law permits citizens to foresee the consequences of their actions and to plan their movements accordingly, expecting the concretisation of the very same foreseen consequences.<sup>16</sup> Following this rationale, if legislation recognises the right to take industrial action in a certain situation, the rule of law grants workers in the same situation the right to plan accordingly and to take steps towards the improvement of their labour conditions without the fear of reprisals. Now, for the rule of law

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<sup>12</sup> F A Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, vol 2 (1<sup>st</sup> edn, Routledge 1998) 98, 102, 113; John Rawls, *A Theory of Justice* (rev edn, Harvard University Press 1999) 207; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 2009) 222.

<sup>13</sup> This is similar to the way the argument based on the rule of law is developed in Bar-Siman-Tov (n 4) 259-62.

<sup>14</sup> Hayek (n 12) 98, 102, 113; Rawls (n 12) 207; Raz (n 12) 222.

<sup>15</sup> Hayek (n 12) 107.

<sup>16</sup> Raz (n 12) 220.

to guarantee to a citizen the liberty to behave pursuant to legitimate expectations, the law must comply with some conditions.<sup>17</sup> It is not within the ambit of this paper to list all of them, but it is worth addressing the ones that are more suitable for the objective of grounding JRLP on the rule of law. Firstly, the law must be general and abstract.<sup>18</sup> Clearly, the law also contains particular orders, those directed to a certain individual, but these orders must themselves be based on principles and rules addressed to any person who may find herself in the situation abstractly described.<sup>19</sup> Secondly, it is necessary that ‘similar cases be treated similarly’, excluding an authority from deciding one case in one direction and an alike case in a totally different manner.<sup>20</sup> In Rawls’ terms, such a condition (or a precept, on his account) is a form of limiting an authority’s discretion.<sup>21</sup> Finally, the courts must have the power to review the fulfilment of this second condition (as well as other ones).<sup>22</sup> Summing up, any legal system that operates under the rule of law will entitle its subjects to the pursuit of legitimate expectations, and it will do so if, among other conditions, it encompasses general and abstract norms, limits the discretion of authorities by demanding that they decide similar cases alike and entitles the judiciary to assess whether such authorities are complying with this last requirement.

The legislative process is regulated by a subset of norms that are part of the legal system. If it is to promote the protection of legitimate expectations, such a process must be conducted under the rule of law. Thus, it must operate under general and abstract norms. Moreover, the officers in charge of conducting the process must be bound by the procedural rules. In the event they fail, the supervisory role of the judiciary may come into play. At this point, Raz’s objection, that arguments in favour of the supervision of elected bodies in charge of enacting laws by non-elected ones ‘have nothing to do with the rule of law’,<sup>23</sup> may be raised. However, Raz also states that the courts must review legislation in order to assess ‘conformity to the rule of law’.<sup>24</sup> From these two passages, it is possible to interpret that Raz’s objection refers not to judicial review of the process of law-making, but to the protection of democratic values through judicial review of legislation. His objection is specifically addressed to the justification of substantive judicial review.<sup>25</sup> Since, on his account, the rule of law is not

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<sup>17</sup> Rawls (n 12) 208-09; Raz (n 12) 214-18.

<sup>18</sup> Hayek (n 12) 97.

<sup>19</sup> Raz (n 12) 215.

<sup>20</sup> Rawls (n 12) 208.

<sup>21</sup> *ibid* 209.

<sup>22</sup> Raz (n 12) 217.

<sup>23</sup> *ibid* 216.

<sup>24</sup> *ibid* 217.

<sup>25</sup> Bar-Siman-Tov (n 4) 260.

attached to concepts such as democracy or human rights,<sup>26</sup> he argues that, even though a rationale based on such concepts may be valid for the revision of legislation, it will not be grounded on rule-of-law arguments. Whether one agrees with Raz regarding substantive judicial review or not, one thing is certain: taking into consideration the idea that obedience to procedural legislative rules is a matter of compliance with the rule of law, it follows that the courts have a role in the oversight of law-making. This is so because any representative is entitled to look for means of safeguarding her deliberating strategies according to the pertinent procedural steps.

## **2. *Democracy-based arguments: participation and flow of communication***

In addition to securing the right of a representative to the planning of deliberative strategies according to expected outcomes, compliance with procedures is the most direct way to safeguard democratic values such as freedom of speech and participation in the legislative process. In this sense, JRLP is the type of judicial review that most straightforwardly contributes to the advancement of these values.<sup>27</sup> In order to support this statement, I will rely on the arguments found in Ely's procedural view and Habermas' substantive procedural approach to judicial review.<sup>28</sup>

On Ely's account, judicial review is tailored to the policing of the legislative process.<sup>29</sup> He derives his theory from Justice Stone's footnote 4 in *US v Carolene Products Co*, where it is suggested that it is the duty of the courts to guarantee that political deliberation be open and respectful towards the rights of minorities.<sup>30</sup> Taking these ideas as a starting point, Ely scrutinises the US Constitution and its Amendments and concludes that the American constitutional provisions are remarkably concerned with the fairness of the democratic process.<sup>31</sup> Accordingly, on his view, the US Constitution provides a 'durable structure for the ongoing resolution of policy disputes',<sup>32</sup> safeguarding freedom of speech and empowering certain groups (black people, women) through the enhancement of voting rights.<sup>33</sup> In this sense, in terms of judicial review in the American legal system, the duty of the courts would not be the fulfilment of substantive rights, but granting those who want to have a say on what these

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<sup>26</sup> Raz (n 12) 211.

<sup>27</sup> Bar-Siman-Tov (n 4) 296.

<sup>28</sup> The labels on the works of Ely and Habermas are found in Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007) 107, 126. Part of the assessment of Ely's and Habermas' theories on judicial review were the object of the author's summative essay in Constitutional Theory in the 2016-2017 LLM (Master of Laws) programme at University College London.

<sup>29</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 73-104.

<sup>30</sup> 304 US 144 (1938).

<sup>31</sup> Ely (n 29) 87.

<sup>32</sup> *ibid* 90.

<sup>33</sup> *ibid* 93-94, 98-99.

rights should be the opportunity to participate in the political arena.<sup>34</sup> On Ely's account, this is the type of duty that judges are well suited to perform, insofar as they are specialised in processes and are outsiders considering the legislative sphere.<sup>35</sup>

In spite of the force of Ely's arguments, his theory is not immune to criticism. A powerful one is offered by Dworkin, for whom the assessment of procedural values such as freedom of speech or participation unequivocally relies on substantive scrutiny of the outcomes of the deliberative process.<sup>36</sup> As such, it would not be possible to say whether a deliberation is democratic without considering the relations between the capacity for political engagement and the distribution of burdens and rights within the society.<sup>37</sup> For instance, under Ely's 'representation-reinforcing approach to judicial review',<sup>38</sup> it is possible to uphold a statute that criminalises abortion based on the notion that the legislative process is open to all adult women, since they bear the right to vote.<sup>39</sup> However, this conclusion implicitly adopts a certain view of democracy, one that assumes that equal distribution of formal voting rights suffices as a criterion for taking the deliberative process as fair, regardless of the distribution of other elements that may also influence the participation of women, such as the actual conditions under which they are entitled to enjoy individual autonomy. In this sense, such a process-oriented decision unavoidably resorts to the same kind of assessment of substantive rights that remarkably characterised the US Supreme Court's decision in *Roe v Wade*, in which the core question was the scrutiny of women's constitutional right to privacy.<sup>40</sup> Therefore, one is forced to recognise that procedural approaches to judicial review also rely on substantive concerns, something that was acknowledged by Habermas.

The approach of judicial review proposed by Habermas focuses on the enhancement of communication flows in deliberative democratic processes.<sup>41</sup> On his account, when a court assesses the legitimacy of a statute, it must evaluate whether the 'procedural conditions of the legislative process' have been met.<sup>42</sup> The idea is to check whether the questioned outcome (the statute) flows from a rational process, wherein personal guarantees (constitutional rights) grant

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<sup>34</sup> *ibid* 87.

<sup>35</sup> *ibid* 88.

<sup>36</sup> Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 57-69.

<sup>37</sup> *ibid*; Bellamy (n 28) 110-11.

<sup>38</sup> Ely (n 29) 88.

<sup>39</sup> John Hart Ely, 'The Wages of Crying Wolf: A Comment on *Roe v Wade*' (1973) 82 *The Yale Law Journal* 920, 933-35.

<sup>40</sup> 410 US 113 (1973).

<sup>41</sup> Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29 *Political Theory* 766, 771.

<sup>42</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, MIT Press 1996) 263-64.



an individual her citizenry entitlements of participation (popular sovereignty).<sup>43</sup> Therefore, the Habermasian account of judicial review explicitly resorts to substantive rights in order to evaluate the conditions under which citizens actually participate in the democratic process.<sup>44</sup> There is, however, a problem in Habermas' theory, as it leads to a circular justification.<sup>45</sup> The problem is as follows. In one moment, a statute (A) is under scrutiny. For it to be legitimate, it must flow from a rational deliberative process. This process is deemed to be rational if it provides for the guarantees that safeguard the free participation of those interested in it. These guarantees, however, may be the object of another statute (B). In a second moment, it is necessary to evaluate whether statute (B) itself is legitimate, and the kind of assessment that went on for statute (A) will go on for statute (B). Now, it must be clear that such a circular rationale will lead to an 'infinite regress', reaching the Constitution and going beyond it, searching for the rational basis for the adoption of the fundamental law.<sup>46</sup>

One possible solution to this problem would be to stop the regress at the Constitution. Nonetheless, if the procedural approach merely ends up resorting to constitutional principles, there would not be much difference between Habermas' proposal and a substantive account to judicial review such as one based on Dworkin's 'moral reading of the Constitution'.<sup>47</sup> Thus, what Habermas proposes to circumvent the circularity problem is to look at the Constitution as an 'ongoing process ... across generations'.<sup>48</sup> Hence, after enunciating the primary fundamental principles, the constitutional project will continue by enhancing both private and citizenry autonomy through the democratic process.<sup>49</sup> In Habermas's account, the spelled out words of the Constitution remain 'dependent on an ongoing explication that is carried out in the course of applying, interpreting, and supplementing constitutional norms'.<sup>50</sup> Under such an approach, the Constitution is realised through the democratic process, and the rules that govern the procedures come to be decisive to guarantee that the deliberation be fair and open.<sup>51</sup> This is so regardless of whether the deliberation occurs in normal moments or in more critical situations wherein the constitutional foundations are themselves shaken.<sup>52</sup> Even though the

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<sup>43</sup> *ibid.*

<sup>44</sup> Bellamy (n 28) 126.

<sup>45</sup> Frank Michelman, 'Democracy and Positive Liberty' (1996) 21 *Boston Review* 3, 6; Habermas, 'Constitutional Democracy' (n 41) 773; Bellamy (n 28) 128.

<sup>46</sup> Habermas, 'Constitutional Democracy' (n 41) 774.

<sup>47</sup> Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996) 2; Bellamy (n 28) 128.

<sup>48</sup> Habermas, 'Constitutional Democracy' (n 41) 768.

<sup>49</sup> *ibid* 779.

<sup>50</sup> *ibid* 775.

<sup>51</sup> *ibid* 771.

<sup>52</sup> *ibid* 774.

constitutive basis of the polity may be under reassessment in particular occasions, requiring new answers to substantive questions such as how to ‘best produce majority rule, guarantee free discussion or protect minorities’, the logic of the disputes regarding either normal or constitutional politics will always claim for at least a set of ‘procedural rules to hold elections [or voting sessions, I add], conduct debates and so on’.<sup>53</sup> Therefore, the democratic disputes demand the enforcement of at least straightforward procedural norms, and the courts are tailored to perform such a task. At this point, it is worth returning to Ely, whose lesson, although outlined more broadly for the oversight of freedom of speech, fits well here: ‘Courts must police inhibitions on expression and other political activity because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out.’<sup>54</sup> In the very special cases of legislative processes, representatives belonging to small parties or advocating for minorities may come to be the outs to which Ely refers: although formally in, their discourse or actions may be simply ignored by the majoritarian group. Hence, they may have no option but to rely on the judiciary to ensure their rights of participation in the enactment of legislation.

In addition to the rule of law and the safeguard of participation and communication, the experiences of courts throughout the world contribute other elements in relation to the assessment of the legislative process. They may refer to theories that keep the judiciary away from the legislature, similarly to the *interna corporis* acts doctrine. Alternatively, they may foster a kind of judicial intervention that is too intrusive. In the following section, I will go through some of these experiences in search for a balance that I consider appropriate for the Brazilian case.

### C. LESSONS FROM SOME INTERNATIONAL EXPERIENCES

JRLP has been applied in some jurisdictions. In others, there has been a degree of resistance to the adoption of this kind of judicial review, especially where principles like *interna corporis* acts are central in the constitutional system. In this part, I will start with the latter kind of system, addressing cases from the UK and the US. Then, I will move to jurisdictions where at least a form of the due process of law-making is applied, as in Germany and South Africa. Finally, I will address situations wherein the judiciary has been applying a type of JRLP akin to my definition, as in Israel.

#### 1. *Parliamentary sovereignty and exclusive cognisance in the UK*

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<sup>53</sup> Bellamy (n 28) 135.

<sup>54</sup> Ely, *Democracy and Distrust* (n 29) 106.

Judicial review of primary legislation is foreign to the UK tradition. In the country, two doctrines resembling the *interna corporis* theory ground the relations between the judiciary and the legislative: parliamentary sovereignty and exclusive cognisance. According to the first doctrine, law enacted by the Parliament forms the highest norm of the country.<sup>55</sup> Pursuant to the Bill of Rights 1689 art 9, the second doctrine means that speeches and procedures performed in the Parliament may not be challenged elsewhere.<sup>56</sup> These two principles form the basis for British judicial review taking place in limited ways. The origin for this can be traced back to the struggles of the Parliament to protect itself from the Crown. Clearly, the conditions for the performance of legislative affairs have changed since 1689, however the commitment to non-interference remains in place.<sup>57</sup> In *Pickin v British Railways Board*, the relation between the courts and the Parliament could have changed pursuant to a Court of Appeal decision asserting the possibility of scrutiny to assess whether a private bill had been passed under a fraudulent process.<sup>58</sup> In the case, the Court held that ‘Even an act of Parliament cannot authorise the Court to give effect to a fraud’.<sup>59</sup> Accordingly, in *Pickin* it was observed that the Court was ‘not trespassing on the jurisdiction of Parliament itself’, but ‘acting in aid’ of the legislature.<sup>60</sup> This statement frames the issue not in terms of an intrusion, but in terms of an enhancement of the democratic process. Nonetheless, when it reviewed the case in its judicial capacity, the House of Lords did not uphold this position.<sup>61</sup> Hence, parliamentary sovereignty and exclusive cognisance still keep the courts away from primary legislation, despite the acknowledgement that these principles may not be absolute in certain circumstances.<sup>62</sup> This is particularly true in light of the developments in international law.

The UK accession to the communities that formed the European Union (EU) introduced novel standards in constitutional law. On this issue, the House of Lords, again in its judicial role, held in 1990 that, in the case of a conflict between an act of the Parliament and

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<sup>55</sup> Dawn Oliver, ‘Parliament and the Courts: A Pragmatic (or Principled) Defence of the Sovereignty of Parliament’ in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), *Parliament and the Law* (1st edn, Hart Publishing 2013) 309.

<sup>56</sup> Liam Laurence Smith, ‘Privilege, Exclusive Cognisance and the Law’ in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), *Parliament and the Law* (1st edn, Hart Publishing 2013) 20.

<sup>57</sup> Oonagh Gay and Hugh Tomlinson, ‘Privilege and Freedom of Speech’ in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), *Parliament and the Law* (1st edn, Hart Publishing 2013) 37-38.

<sup>58</sup> [1973] QB 219 (CA). In the UK Parliament, there may be public, private and hybrid bills; for an account on them, see Malcolm Jack (ed), *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (24th edn, LexisNexis 2011) 525.

<sup>59</sup> *M’Kenzie v Stewart* (1752) 9 Mor 7443.

<sup>60</sup> *Pickin* (n 58) 231.

<sup>61</sup> *British Railways Board v Pickin* [1974] AC 765 (HL); Malcolm Jack (n 58) 295.

<sup>62</sup> *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [102], [104].

the Community law, the former should be interpreted consistently with the latter.<sup>63</sup> Later, the UK Supreme Court had to deal with the relation between national and EU law regarding legislative procedures. In *R (Buckinghamshire CC) v Secretary of State for Transport*, decided in 2014, the case referred to the parliamentary examination of a railway project.<sup>64</sup> The government alleged that the legislation should be passed as a hybrid bill, whereas the opponents argued that such a path would not comply with an EU Directive on the environmental impact assessment.<sup>65</sup> Briefly, the opponents feared that the hybrid bill process would not allow ‘effective public participation’, as demanded by the directive, due to the boundaries imposed by ‘party oversight’ and ‘collective ministerial responsibility’ over the members of the Parliament.<sup>66</sup> Ultimately, the Court dismissed these arguments, stating that partisan behaviour was inherent to democratic procedures and, as such, the envisaged legislative path was not incompatible with the EU Directive.<sup>67</sup> Interestingly, however, as in the Court of Appeal’s reasoning in *Pickin*, the Supreme Court referred to its role as one of ‘assistance to Parliament’, observing that judicial scrutiny was not ‘a challenge to its [Parliament’s] supremacy’.<sup>68</sup> Although I concede that in the UK, as stressed in *Buckinghamshire* itself,<sup>69</sup> this is not interpreted as a compromise towards judicial review of primary legislation, I believe that assuming that the Judiciary may assist Parliament is a step towards procedural judicial review, leaving room for the defence of legitimate expectations and the assurance of communication flow in the course of the democratic process.

## **2. The enrolled bill doctrine in the US**

JRLP is also limited in the United States. Although the courts have been exercising a strong form of judicial review since *Marbury v Madison*,<sup>70</sup> the courts have been avoiding intervening in the legislative process.<sup>71</sup> On this issue, the American judiciary, with the exception of some states, follows the British doctrine of the enrolled bill.<sup>72</sup> In the UK, pursuant to the decision of *The King v Arundel* in 1615, this doctrine holds that bills that have received the royal assent

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<sup>63</sup> *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603 (HL).

<sup>64</sup> [2014] UKSC 3, [2014] 1 WLR 324.

<sup>65</sup> *ibid* [1].

<sup>66</sup> *ibid* [68], [70], [71], [100].

<sup>67</sup> *ibid* [101], [113].

<sup>68</sup> *ibid* [96].

<sup>69</sup> *ibid* [111], [206].

<sup>70</sup> 5 US 137 (1803).

<sup>71</sup> Bar-Siman-Tov (n 4) 235; Rose-Ackerman, Egidy and Fowkes (n 6) 37.

<sup>72</sup> David Sandler, ‘Forget What You Learned in Civics Class: The “Enrolled Bill Rule” and Why It’s Time to Overrule *Field v Clark*’ (2007) 41 *Columbia Journal of Law and Social Problems* 213, 214; Bar-Siman-Tov (n 4) 7; Rose-Ackerman, Egidy and Fowkes (n 6) 49-50.

enjoy an absolute presumption of validity outside the Parliament.<sup>73</sup> This resembles the principle of exclusive cognisance, but there is a subtle difference: the enrolled bill doctrine in the UK is grounded on trusting the monarch's word, whereas exclusive cognisance is based on shielding the Parliament.<sup>74</sup> From the enrolled bill doctrine, it also follows that the legislative deliberations are immune from judicial scrutiny.<sup>75</sup>

Similarly, in the US, the enrolled bill doctrine, established in 1892 in *Marshall Field & Co v Clark*,<sup>76</sup> states that a bill signed by the presiding officers of the House of Representatives and the Senate cannot be challenged in courts on the basis of the process that led to its enactment.<sup>77</sup> Accordingly, the doctrine is grounded on the assumption that an act certified by those in charge of the legislative branch has been adequately passed.<sup>78</sup> One of the rationales behind this idea is that the officers' attestation is stronger proof of the regularity of the legislative process than evidence from parliamentary records.<sup>79</sup> This made sense when documents were handmade, when there was an increased likelihood that the records did not mirror the actual process, but not in the era of informatics.<sup>80</sup> Hence, the presumption of validity generated by the signatures may not mean shielding the legislative process from scrutiny. Indeed, the separation of powers is not merely a way of protecting a branch from the interference of another, but an arrangement that demands mutual oversight without hierarchical subordination.<sup>81</sup> Therefore, if, despite the signatures, there are reasonable doubts concerning the legality of the process, it is appropriate that the judiciary assess the case. Such an approach would avoid an instance like the passing of the 2005 Deficit Reduction Act, which was passed as one version in the Senate and as another in the House, and remained unchallenged due to the Supreme Court's refusal to review its validity.<sup>82</sup>

*Marshall Field* remains an authority regarding law-making in the US, but it does not fully immunise the legislative process, and two situations arise which are at odds with it. On the one hand, the judiciary has been assessing cases wherein constitutional procedural rules are at stake.<sup>83</sup> On the other, where there is no procedural rule at stake, it has been held that the Supreme Court may delve into parliamentary records to find out whether there is enough

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<sup>73</sup> 80 ER 258; Sandler (n 72) 217.

<sup>74</sup> Sandler (n 72) 217; Rose-Ackerman, Egidy and Fowkes (n 6) 49.

<sup>75</sup> Sandler (n 72) 217.

<sup>76</sup> 143 US 649 (1892).

<sup>77</sup> *ibid* 672; Bar-Siman-Tov (n 4) 7.

<sup>78</sup> *Marshall Field* (n 76) 672.

<sup>79</sup> Sandler (n 72) 222-23.

<sup>80</sup> *ibid* 234.

<sup>81</sup> Rose-Ackerman, Egidy and Fowkes (n 6) 6-7.

<sup>82</sup> Sandler (n 72) 214-15, 236-37; Bar-Siman-Tov (n 4) 13-17; Rose-Ackerman, Egidy and Fowkes (n 6) 52-53.

<sup>83</sup> Bar-Siman-Tov (n 4) 110.

justification for the passing of statutes that disturb the federal pact where this is necessary to assess a constitutional value. One illustrative case of the former situation is *US v Munoz Flores*, wherein the Court dealt with a statute that imposed on persons convicted of certain misdemeanours the payment of an amount to a victims' fund.<sup>84</sup> Allegedly, the statute, whose bill had been presented in the Senate, violated the origination clause, according to which 'All bills for raising revenue shall originate in the House of Representatives' (US Constitution art I § 7).<sup>85</sup> In its decision, the Court found that the clause did not apply to the case before it,<sup>86</sup> but made remarks seemingly at odds with the enrolled bill doctrine.<sup>87</sup> Despite Justice Scalia's invocation of this doctrine, the majority ruled that the case did not represent 'a nonjusticiable political question' and that *Marshall Field* was not applicable insofar as 'a constitutional provision ... [was] implicated'.<sup>88</sup>

Now, addressing the cases on federalism, by the end of the twentieth century, in the Justice Rehnquist era, the Supreme Court started overturning federal statutes that invaded the competences of the states grounded on the quality of the legislative deliberations.<sup>89</sup> In American law, pursuant to the Constitution art I § 8 cl 3, the Congress may only regulate state affairs if interstate commerce is involved.<sup>90</sup> To reverse a longstanding balance favouring the Union, the Court decided to scrutinise the legislative records in search of elements that could justify the enactment of certain statutes.<sup>91</sup> Thus, in *US v Lopez*,<sup>92</sup> for instance, the Court 'invalidated the federal Gun Free School Zones Act of 1990 ... on the ground that the statute ... contained no congressional findings linking it to commerce'.<sup>93</sup> This is an example of the second type of situation at odds with *Marshall Field*. With Frickey and Smith, I believe that this kind of assessment goes too far because it is more subjective than one similar to the *Munoz Flores* case, in which a procedural rule offers a more objective standard for judicial scrutiny.<sup>94</sup> Taking as a paradigm an ideal pattern of rational deliberations in search of the will of the legislator, the *US vs Lopez* type of assessment does not take into account the features of the parliament, wherein there is no unique will, but a multitude of interests that may only result in

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<sup>84</sup> 495 US 385 (1990).

<sup>85</sup> *ibid* 385.

<sup>86</sup> *ibid* 387-88.

<sup>87</sup> Bar-Siman-Tov (n 4) 52.

<sup>88</sup> *Munoz-Flores* (n 84) 385, 391 (fn 4).

<sup>89</sup> Frickey and Smith (n 5) 1708, 1718, 1720.

<sup>90</sup> *ibid* 1713.

<sup>91</sup> *ibid* 1720-21.

<sup>92</sup> 514 US 549 (1995).

<sup>93</sup> Frickey and Smith (n 5) 1721.

<sup>94</sup> *ibid* 1708-09.

an outcome through bargaining and compromise.<sup>95</sup> Therefore, instead of the Court's approach to federalism (of which the *US v Lopez* case is an example), I think that the *Munoz Flores* type of assessment, grounded on procedural rules, is more objective and therefore a more suitable form of scrutiny of the legislative process.

### 3. *Rights protection in Germany*

In Germany, alongside the enforcement of constitutional procedural rules,<sup>96</sup> the oversight of the legislative process aims at the protection of rights, not the furtherance of majoritarian democratic values.<sup>97</sup> The justification for this kind of purpose can be traced backwards to the Nazi regime, which left a certain suspicion regarding the empowerment of the people and the fragility of individual rights.<sup>98</sup> As per Carl Schmitt's theory, popular sovereignty in Nazi Germany was personified by the nation's leader, who embodied the Constitution against the foreign and internal enemies of the people.<sup>99</sup> As a consequence of the annihilation of certain groups during that period, the legal reconstruction gave emphasis to the protection of human dignity. Following this objective, the Federal Constitutional Court has been reviewing procedural steps in the enactment of legislation, leaving concerns about political accountability as a 'secondary by-product'.<sup>100</sup> In its assessment, the Court has been checking whether the legislature's reasoning is transparent and consistent.<sup>101</sup> The primary purpose, in this situation, is to aid the Court itself in guaranteeing fundamental rights,<sup>102</sup> as it can be seen in the 2010 *Hartz IV* decision.<sup>103</sup> In this case, the Court found that the so-called Hartz IV legislation on social benefits had not complied with the guarantee to a subsistence minimum, pursuant to the Basic Law arts 1(1) – human dignity – and 20(1) – social state.<sup>104</sup> Though the Court acknowledged the parliamentarians' margin of appreciation in choosing the method to quantify the benefits, it argued that such a method should be plausible and based on 'reliable figures'.<sup>105</sup> Moreover, it stated that, 'in order to facilitate ... [the] constitutional review, there is an obligation for the legislature to disclose the methods and calculations'.<sup>106</sup>

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<sup>95</sup> *ibid* 1728-33, 1740-45.

<sup>96</sup> Rose-Ackerman, Egidy and Fowkes (n 6) 173-74.

<sup>97</sup> *ibid* 178.

<sup>98</sup> *ibid* 25.

<sup>99</sup> Lars Vinx, 'Carl Schmitt', *The Stanford Encyclopedia of Philosophy* (Spring edn, 2016) (especially the last two paragraphs in s 4) <<https://plato.stanford.edu/archives/spr2016/entries/schmitt/>> accessed 2 July 2017.

<sup>100</sup> Rose-Ackerman, Egidy and Fowkes (n 6) 6-7.

<sup>101</sup> *ibid* 3, 174-75.

<sup>102</sup> *ibid* 178-79.

<sup>103</sup> BVerfG, Judgment of the First Senate of 9 February 2010 - 1 BvL 1/09 - paras (1-220) <[http://www.bverfg.de/entscheidungen/ls20100209\\_1bvl000109en.html](http://www.bverfg.de/entscheidungen/ls20100209_1bvl000109en.html)> accessed 29 June 2017.

<sup>104</sup> *ibid* headnote 1.

<sup>105</sup> *ibid* headnote 3, paras 139, 143.

<sup>106</sup> *ibid* para 144.

This rationale was reaffirmed in the 2012 *Asylum Seekers Benefits Act* case, in which the Court declared that the amount of the benefits stipulated in that Act was incompatible with the Basic Law, inasmuch as they had not been updated for almost twenty years.<sup>107</sup> In this more recent decision, however, the Court recognised the role of ‘political compromise’ in the passing of statutes.<sup>108</sup> Despite the few words dedicated to this point, the mentioning of such an aspect was important because it left room for the acknowledgement of unavoidable bargaining within the legislature.<sup>109</sup> Like the US approach to federalism, I do not think the *Hartz IV*-style review is appropriate. Notwithstanding the good intentions behind it, I believe that such a review is too intrusive upon the political realm, ‘creating the danger of arbitrary, case-by-case enforcement by the Court’, insofar as the examination of the procedures is not based on clear rules.<sup>110</sup>

#### **4. Broad participation in South Africa**

The South African approach differs from the German due to its reliance on the democratic argument.<sup>111</sup> In South Africa, the origins of the rationale for reviewing legislative procedures may be traced back to the departure from the apartheid regime.<sup>112</sup> Accordingly, one of the main concerns during the transition period was fostering participation in the political process.<sup>113</sup> This is why the 1996 Constitution, in sections 59(1)(a) and 72(1)(a), states that public involvement must be facilitated ‘in the legislative and other processes’ in the Parliament. Pursuant to these provisions, the Constitutional Court has adopted a broad approach concerning its jurisdiction towards the oversight of legislative procedures.<sup>114</sup> In this sense, *Doctors for Life International v The Speaker of the National Assembly* is a landmark decision.<sup>115</sup> The case referred to an application complaining that one of the Houses of the Parliament had failed in inviting ‘written submissions’ and conducting ‘public hearings’ while examining bills on health issues.<sup>116</sup> The Court then concluded that the lack of public hearings was unreasonable, justifying the invalidation of certain statutes. This kind of conclusion, however, has been tempered by the notion that the representatives are not legally bound by the opinions of the public.<sup>117</sup>

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<sup>107</sup> BVerfG, Judgment of the First Senate of 18 July 2012 - 1 BvL 10/10 - paras (1-110) headnote 1 and item 1 of the judgement <[http://www.bverfg.de/e/ls20120718\\_1bvl001010en.html](http://www.bverfg.de/e/ls20120718_1bvl001010en.html)> accessed 4 July 2017.

<sup>108</sup> *ibid* para 72.

<sup>109</sup> Rose-Ackerman, Egidy and Fowkes (n 6) 181, 187.

<sup>110</sup> *ibid* 187.

<sup>111</sup> *ibid* 103.

<sup>112</sup> *ibid*.

<sup>113</sup> *ibid* 107-08.

<sup>114</sup> *ibid* 113.

<sup>115</sup> 2006 (6) SA 416 (CC).

<sup>116</sup> *ibid* para 3.

<sup>117</sup> *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC) para 62.



Furthermore, the discretionary role of the Parliament in defining how the participation may occur is an open question, since the Constitution does not provide standards beyond general principles.<sup>118</sup> Here, along with a dissenting opinion in *Doctors for Life International*,<sup>119</sup> I argue that overturning a statute based on broad concepts of participation may be too intrusive a form of judicial review. I believe that a better approach is the enforceability of participation whilst the deliberation is going on, taking the internal rules of the legislature as the standard. However, in the event that specific provisions are lacking, public engagement may lead to the appropriate regulation.

### **5. Review based on the parliament's internal rules in Israel**

The assessment of legislative procedures based on the parliament's ordinances is permitted in the Israeli case law, as well as judicial interference in pending processes. For instance, in *Kahane v The Speaker of the Knesset* (as the Israeli parliament is called), the latter 'had refused to table two private-member bills [with racist content] Kahane [a member himself] had submitted'.<sup>120</sup> Despite an internal rule according to which 'the speaker had to approve bills before placing them before the plenum', upon Kahane's file, the Constitutional Court set aside the speaker's conduct and ordered the placing of the bills.<sup>121</sup> Additionally, the Court may, in theory, invalidate statutes based on similar considerations.<sup>122</sup> On this aspect, two decisions delivered in 2004 are worth examining: one is *Litzman v Knesset Speaker*;<sup>123</sup> the other, *Israel Poultry Farmers Association v Government of Israel*.<sup>124</sup> In *Litzman*, a member of the parliament challenged the validity of a statute on the ground of breaches in a voting session. Specifically, it had been discovered that some representatives had voted instead of others.<sup>125</sup> In its ruling, the Court considered the possibility of assessing the parliament's procedures. First, the Court stated the need to act with restraint in light of the separation of powers.<sup>126</sup> Accordingly, it stated that the scope of the review should only result in the invalidation of the statute where the flaw: a) harmed 'the basic values of the democratic system that lie at the heart of the legislative proceedings';<sup>127</sup> and b) affected the outcome.<sup>128</sup> Grounded on this rationale,

<sup>118</sup> Rose-Ackerman, Egidy and Fowkes (n 6) 115.

<sup>119</sup> *Doctors for Life International* (n 115) para 244(7).

<sup>120</sup> Daniel Friedman, *The Purse and the Sword: The Trials of Israel's Legal Revolution* (Haim Watzman tr, OUP 2016) 168; *Kahane* is a 1984 Israeli case to which I only had access through Friedman's text.

<sup>121</sup> Friedman (n 120) 168.

<sup>122</sup> Navot (n 5) 182-83, 196.

<sup>123</sup> HCJ 5131/03, 2004 IsrLR 363.

<sup>124</sup> HCJ 4885/03, 2004 IsrLR 383.

<sup>125</sup> *Litzman* (n 123) paras 6, 8, 17.

<sup>126</sup> *ibid* paras 7, 10.

<sup>127</sup> *ibid* para 11.

<sup>128</sup> *ibid* para 18.

the Court dismissed the petition after finding that the statute would have been passed had the fraudulent votes complied with the norms.<sup>129</sup>

*Poultry Farmers* concerned a challenge to a chapter in the Economic Recovery Programme Law for 2003-2004, a complex statute passed ‘after a very rushed legislative process’.<sup>130</sup> As in *Litzman*, the Court referred to the necessity of identifying not just an injury, but a substantive one upon the basic values of the democratic regime, to declare a statute void.<sup>131</sup> The Court then focused on the principle of participation and found that the rushed procedure had not impaired the right of a representative to participate, by means of formulating her position, in the process.<sup>132</sup> Although in both cases the Court refused to declare the invalidity of the statutes, what matters is the assessment of the doctrine formulated therein. The Court stated that it may overturn legislation on the ground of violations of the parliament’s internal regulation that result in serious harm to a fundamental democratic principle. Under a certain point of view, such a statement makes sense in Israel, where there is no formal document labelled as a Constitution.<sup>133</sup> It may be argued that this may not be the case where there is an analytical constitutional text containing provisions on the law-making process, as in Brazil. In a situation like Brazil’s, the standards for evaluating whether a harm is severe enough to justify the invalidation of a statute is given by the words of the Constitution themselves. In other terms, where a constitutional text provides detailed norms on legislative procedures, a breach regarding internal regulations alone may not severely harm the fundamental principles of the legislative process. This rationale, however, does not apply to parliament’s pending procedures. In this case, judicial intervention would not overturn a law, but simply enforce a mandatory step. I argue that the justification does not necessarily rely on the most fundamental (constitutional) principles, but on the notion of rule of law. I will develop this idea in the next section, wherein I address the Brazilian case.

#### **D. THE CASE OF BRAZIL**

Provisions regarding the legislative process in Brazil are provided both by the constitutional text and sub-constitutional norms. In the latter case, the internal ordinances of the Senate and of the House of Representatives offer central standards for passing federal legislation in both houses. Regarding the enforcement of such provisions, judicial review is clearly permissible

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<sup>129</sup> *ibid.*

<sup>130</sup> *Poultry Farmers* (n 124) para 2.

<sup>131</sup> *ibid* para 16.

<sup>132</sup> *ibid* paras 18-25.

<sup>133</sup> Friedman (n 120) 189.

when legislative procedural rules enshrined in the Constitution are at stake. However, the situation is much less clear when the parliament's internal rules are the basis upon which a dispute erupts. In this section, I argue that the judiciary should assess legislative procedures in order to either: a) strike down statutes that have not complied with procedural constitutional rules (but not internal provisions), as is already done by the STF; or b) enforce the obedience to procedural provisions while a bill is under examination, regardless of the status of the procedural rules.

The invalidation of statutes passed by the parliament is explicitly permitted in the Brazilian legal system. It may happen in the American fashion, where a single judge is able to declare a law unconstitutional whilst a concrete case is under assessment.<sup>134</sup> It may also occur under the Kelsenian model, in which a constitutional court is in charge of safeguarding the basic law.<sup>135</sup> This happens through abstract actions, the content of which does not refer to a real dispute between the parties, but just to the validity of a normative act before the Constitution.<sup>136</sup> In addition to the separation between concrete and abstract cases, the Brazilian doctrine and case law also refer to the differentiation between substantive and formal control of constitutionality. Regarding the former, the judicial authority scrutinises whether the content of the enacted legislation is compatible with the rules and principles enshrined into the Constitution. Now, concerning the formal control, what is at stake is the process that leads to the enactment of the legislation.<sup>137</sup> Here, for instance, the Constitutional Court may declare void a law that has been passed by just one of the houses of the National Congress.<sup>138</sup> In situations like this, there is no doubt that the Court may strike down a statute on the ground of violations of procedural constitutional provisions.<sup>139</sup> However, when the controlling standard is given not by the Constitution, but by the internal rules of the parliament, the STF denies itself authority to nullify a law.

### ***1. Overturning statutes under constitutional procedural breaches***

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<sup>134</sup> José Afonso da Silva, *Curso de Direito Constitucional Positivo* (38th edn, Malheiros 2015) 52-53, 56.

<sup>135</sup> Kelsen (n 1) 45.

<sup>136</sup> Luís Roberto Barroso, *O Controle de Constitucionalidade no Direito Brasileiro: Exposição Sistemática da Doutrina e Análise Crítica da Jurisprudência* (7th edn, Saraiva 2016) 41, 86.

<sup>137</sup> Roberto Rosas, *Legislativo e Judiciário* (Fundação Petrônio Portella 1981) 24; Gilmar Ferreira Mendes, Inocêncio Mártires Coelho and Paulo Gustavo Gonet Branco, *Curso de Direito Constitucional* (Saraiva 2007) 961; Barroso (n 136) 48.

<sup>138</sup> STF, *Tribunal Pleno, ação direta de inconstitucionalidade* (ADI, direct unconstitutionality action) 574-0, *Relator* (Rapporteur) Ilmar Galvão, judged 3 June 1993 <<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=266422>> accessed 11 August 2017.

<sup>139</sup> Barroso (n 136) 37-40, 48-50.

In Brazil, for the judiciary to declare the unconstitutionality of a legal norm it is necessary that there is a direct (immediate) violation of the Constitution.<sup>140</sup> To realise what such a statement means, take three different normative species, the Constitution, a statute (a law approved by the parliament), and an administrative act (a legal instrument adopted by the executive branch). They are linked to one another according to the Kelsenian hierarchy, wherein the norm ranked at superior levels provides the standards for the norm immediately below: the Constitution is on the top and the administrative act is placed on the bottom.<sup>141</sup> In this scheme, the statute provides normative density to the constitutional rules or principles, and the administrative act regulates how the statute is to be applied. Here, it is not possible to assess the administrative act under the Constitution, because the assessment of whether such an act is flawed can only be conducted by reference to its compliance with the statute,<sup>142</sup>. Simply put, it may happen that the administrative act is flawed because the statute fails to comply with constitutional rules or principles. In this situation, however, the scrutiny of the unconstitutionality will check the statute itself, not the administrative act.<sup>143</sup>

Now, this kind of rationale also applies to the evaluation of a statute on the ground of the regularity of the legislative process. Accordingly, it is not possible to strike down a statute or other normative act passed by the Congress due to a procedural failure related just to internal regulations of the legislative branch.<sup>144</sup> Indeed in the ADI 2666 (ADI is the acronym for *ação direta de inconstitucionalidade*, direct unconstitutionality action), the plaintiff – a political party – argued that the STF should invalidate certain provisions of an Amendment to the Constitution. Under the Brazilian legal framework, proposals of Amendments to the Constitution must follow a specific legislative process into the National Congress and are subject to judicial review in light of immutable clauses of the original 1988 text as well as constitutional procedural rules. In that case, the plaintiff argued, among other things, that the Amendment had not complied with the regular constitutional procedure. In reply, the officer in charge of supporting the validity of the Amendment claimed that the alleged procedural breach merely referred to an internal rule of the Senate and that, as such, the matter could not be assessed by the Court.<sup>145</sup> In its initial findings, the Court, in the terms of the Justice

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<sup>140</sup> *ibid* 212, 220.

<sup>141</sup> Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (Bonnie Litschewski Paulson and Stanley L Paulson trs, OUP 1997) 63-75.

<sup>142</sup> Barroso (n 136) 220.

<sup>143</sup> *ibid*.

<sup>144</sup> STF, *Tribunal Pleno*, ADI 2666-6, *Relatora* (Rapporteur) Ellen Gracie, judged 3 October 2002 <<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=266881>> accessed 2 August 2017.

<sup>145</sup> *ibid* 180.

Rapporteur's vote, agreed with the argument that the legislative houses' internal ordinances could not serve as a parameter for the assessment of unconstitutionality, though it went on with the task by acknowledging that there could actually be a breach of a constitutional provision (ultimately, the Court upheld the Amendment).<sup>146</sup> Thus, regarding the assessment of the unconstitutionality of legislation, the STF is right in restricting the testing standards to the terms of the Constitution.

## ***2. The oversight of pending legislative processes***

In respect of judicial review of the legislative process while it is pending, I argue in favour of compliance with the procedural rules regardless of their status. Here, my argument differs from the mainstream position of the STF. Until now, the Court has been admitting cases when the dispute over parliamentary process refers to a constitutional rule.<sup>147</sup> Typically, the case is the object of a writ of mandamus in which a representative or a senator (or a group of them) argues that an officer with decision power, such as the President of the Senate or of the House of Representatives, does not abide by the appropriate procedural provisions.<sup>148</sup> For instance, in the MS 34562, filed in December 2016, the question at stake referred to a bill modifying some provisions on the regulation of the telecommunications sector.<sup>149</sup> According to art 58 para 2(I) of the 1988 Constitution, in certain situations, after the deliberation in a commission, a bill of law may be 'exempt from being submitted to the Plenary Assembly, except in the event of an appeal from one-tenth of the members of the respective House' (either the Senate or the House of Representatives). In the case, pursuant to this rule, the bill had been approved by one commission of the Senate, had skipped a final voting session at the plenary and had been sent to the executive branch for sanction. The problem, however, was that some senators had presented appeals (for the assessment of the Senate itself) claiming that the bill should be submitted to the plenary. In the course of the MS 34562, the STF ordered that the bill was sent back to the Senate and not forwarded to the executive until the Senate itself ruled on the appeals (as of 16 January 2018, the bill remained in the Senate, and no further action was taken concerning it).<sup>150</sup> This case clearly shows the kind of dispute that may arise in a pending

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<sup>146</sup> *ibid* 177, 183.

<sup>147</sup> Several cases may be brought forward in this regard. For a recent one, see STF, MS 34574, *medida cautelar* (precautionary measure), *relator* Celso de Mello, monocratic decision, judged 1 February 2017, published in the *Diário da Justiça Eletrônico* (DJE, Electronic Journal of Justice) 33 of 20 February 2017, 102-106 <[https://www.stf.jus.br/arquivo/djEletronico/DJE\\_20170217\\_033.pdf](https://www.stf.jus.br/arquivo/djEletronico/DJE_20170217_033.pdf)> accessed 25 July 2017.

<sup>148</sup> MS 34574 (n 147) 102-106.

<sup>149</sup> STF, MS 34562, *relator* Alexandre de Moraes, monocratic decision, judged 5 October 2017, published in the DJE 231 of 9 October 2017, 120-121 <[https://www.stf.jus.br/arquivo/djEletronico/DJE\\_20171006\\_231.pdf](https://www.stf.jus.br/arquivo/djEletronico/DJE_20171006_231.pdf)> accessed 16 January 2018.

<sup>150</sup> The legislative steps of the bill to which the MS 34562 refers may be checked in Portuguese at <<http://www25.senado.leg.br/web/atividade/materias/-/materia/127688>> accessed 16 January 2018.

legislative process and how the judiciary may deal with it, a type of judicial review that the STF and the doctrine label as prior control of constitutionality.<sup>151</sup>

According to the literature on the theme,<sup>152</sup> the basis for the judicial prior control of constitutionality was settled in the MS 20257, filed in 1980 before the Supreme Court.<sup>153</sup> In that case, two senators claimed that the President of the National Congress should have refused to table a proposed Amendment to the Constitution (PEC, acronym for *proposta de Emenda à Constituição*) that allegedly harmed the immutable clauses of the 1969 text.<sup>154</sup> In the end, the Congress passed the PEC, and the court refused the claim. Regardless of the outcome, the significant aspect of the judgement relies on Justice Moreira Alves' leading vote. According to him, as per the doctrine of separation of powers, as well as the notion that unconstitutionality does not arise unless a flawed norm has come to existence, the court shall not as a rule intervene in the parliament's pending procedures.<sup>155</sup> However, in a situation in which the Constitution itself forbids the legislative deliberation, judicial review is possible.<sup>156</sup> Thus, following this reasoning, the court was prepared to delineate the way it could exert prior control of constitutionality.

Since the landmark decision in the MS 20257, the STF has framed the way it may review a pending legislative process. Firstly, it has stated that only senators or representatives have legitimacy to claim for alleged non-adherence to procedural rules.<sup>157</sup> Based on this, the court has already denied a common citizen the possibility of petitioning on the same grounds.<sup>158</sup> Secondly, it has refused the use of constitutional abstract actions for the oversight of the processing of bills.<sup>159</sup> Here, the reason is twofold. On one hand, according to the 1988 Constitution art 103, parliamentarians are not eligible to file a direct abstract action. On the

<sup>151</sup> Mendes, Coelho and Branco (n 137) 1025; Barroso (n 136) 68-69; Flávia Danielle Santiago Lima, 'Perdedores no Congresso Nacional e no STF? A Judicialização das Questões Interna Corporis do Legislativo' (2016) 115 *Revista Jurídica da Presidência* 307, 316-23.

<sup>152</sup> Mendes, Coelho and Branco (n 137) 1025; Elival da Silva Ramos, *Controle de Constitucionalidade no Brasil: Perspectivas de Evolução* (Saraiva 2010) 64; Lima (n 151) 312.

<sup>153</sup> STF, *Tribunal Pleno*, MS 20257, *relator* Moreira Alves, judged 8 October 1980 <<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=85046>> accessed 5 August 2017.

<sup>154</sup> The Senate and the House of Representatives form the National Congress. Although both houses have their own regulations, certain procedures are subject to common provisions. Moreover, depending on the matter, specific legislative steps are taken jointly by both houses. In these situations, the President of the Senate is in charge of presiding the works and he takes on the role of President of the Congress (1969 Constitution art 29 para 3; 1988 Constitution art 57 para 5).

<sup>155</sup> MS 20257 (n 153) 337.

<sup>156</sup> *ibid* 338.

<sup>157</sup> MS 34574 (n 147); Kildare Gonçalves Carvalho, *Direito Constitucional* (17th edn, Del Rey 2011) 368.

<sup>158</sup> STF, *Tribunal Pleno*, MS 21303, *agravo regimental (internal appeal)*, *relator* Octavio Gallotti, judged 19 June 1991 <<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=325598>> accessed 14 August 2017; STF, MS 28005, *relator* Marco Aurélio, monocratic decision, judged 5 May 2016, published in the DJE 95 of 11 May 2016, 87 <[https://www.stf.jus.br/arquivo/djEletronico/DJE\\_20160511\\_095.pdf](https://www.stf.jus.br/arquivo/djEletronico/DJE_20160511_095.pdf)> accessed 14 August 2017.

<sup>159</sup> Mendes, Coelho and Branco (n 137) 963; Carvalho (n 157) 368.

other, following the rationale delivered in the MS 20257, the court has acknowledged that only statutes that had already been passed may be challenged via constitutional abstract actions.<sup>160</sup> In other words, a bill of a law, which may turn into a statute or not, may not be the object of such actions. Therefore, pursuant to the 1988 Constitution art 5(LXIX), the court has been holding that the appropriate action is the writ of *mandamus*, insofar as the case refers to a concrete dispute assessing whether a public officer is violating the right to the due legislative process.<sup>161</sup> Finally, the STF has also held that the controlling standard must be a procedural provision enshrined in the Constitution.<sup>162</sup> Under this approach, the purpose is to avoid dealing with either: (a) substantive questions before the legislative process comes to an end; or (b) problems the object of which concerns the application of the parliament's own regulations. In both cases, the reasoning is that such cases amount to *interna corporis* issues.<sup>163</sup> In other words, they refer to the internal affairs of the parliament. In these cases, thus, the Court defers to the legislators.

### ***3. Proposed approach to the scrutiny of pending processes: narrow interna corporis doctrine and no prior control of constitutionality***

Concerning the STF's actual approach to pending legislative processes, I argue that the court is right in avoiding substantive scrutiny, but is misled regarding compliance with the internal rules. In the parliament, decisions concerning the content, or the substance, of a legislative proposal may be seen as *interna corporis* issues, those that depend on political considerations or on a certain degree of discretionary power.<sup>164</sup> Indeed, the legislator may choose among several options whenever she is called upon to regulate a matter, and her choices reflect, among other things, her convictions, her relations with the electorate and the bargaining process within the parliament. In the first instance, it is not for the judiciary to invalidate the decisions taken by elected actors, except, under the presumption of constitutional supremacy, when these decisions violate the Constitution.<sup>165</sup> Plainly, such an exception may only arise when the piece

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<sup>160</sup> *ibid.*

<sup>161</sup> STF, *Tribunal Pleno*, ADI 5498, *medida cautelar, Redator para o Acórdão (Rapporteur for the Judgement)* Teori Zavascki, judged 14 April 2016, 19 <<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=12872463>> accessed 14 August 2017; Mendes, Coelho and Branco (n 137) 1025; Lima (n 151) 324.

<sup>162</sup> MS 34574 (n 147); Mendes, Coelho and Branco (n 137) 962; Lima (n 151) 314, 321.

<sup>163</sup> *ibid.*

<sup>164</sup> Hely Lopes Meirelles, Délcio Balestero Aleixo and José Emmanuel Burle Filho, *Direito Administrativo Brasileiro* (39th edn, Malheiros 2013) 794-95.

<sup>165</sup> Even so, the role of the courts will only be undisputed where the task is explicitly assigned to the judiciary. Where this is not the case, as in the US, the overturning of statutes by a judge is highly controversial. See Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *The Yale Law Journal* 1346.

of legislation has already been passed, not while the parliamentarians are debating the matter.<sup>166</sup> Indeed, it is also the duty, as well as the prerogative, of the legislators to perform what the doctrine labels as the political control of constitutionality or the French style control.<sup>167</sup> Moreover, it is always possible that a flagrant violation of the Constitution may be corrected until the process is complete, or that flawed proposals may be rejected. Thus, it is for the elected politicians to decide on such proposals while legislative procedures are underway. This is a typical *interna corporis* activity, recommending judicial deference to the parliament.

The situation, however, is totally different when the application of the internal rules is at stake. As I have stated in the first section, the houses' own provisions are subject to the rule of law because they enable the pursuit of legitimate expectations. Clearly, the adoption of these provisions is an *interna corporis* act. Nonetheless, once they are established, their application is not subject to the will of an authority or a majoritarian group. Admittedly, there may be situations wherein something like a margin of appreciation comes into play, as happens in cases in which the provisions themselves offer alternative ways or are not clear enough. In many other instances, however, the internal ordinances, alongside the procedural rules enshrined in the Constitution, entitle any parliamentarian to demand that the legislative process abide by them, following steps that otherwise would be arbitrary. As per this rationale, judicial intervention in pending parliamentary procedures should not be seen as a type of prior control of constitutionality, but simply as a form of legal oversight of the due process of law-making that, in certain cases, may be based on constitutional rules. Under this perspective, it is not even necessary that judicial review is heard before a constitutional court. In Brazil, the STF appears as the legitimate institution to do so because the 1988 Constitution art 102(I)(q) assigns it the original competence to trial the writ of mandamus filed against acts performed by authorities such as the Presidents of the Senate or the House of Representatives. From all these considerations, it follows that the STF should revise its mainstream position in order to: (a) set aside the notion of a prior control of constitutionality; and (b) review pending legislative procedures not only grounded upon rules enshrined in the Constitution, but also on the parliament's internal provisions.

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<sup>166</sup> MS 20257 (n 153) 337.

<sup>167</sup> Mendes, Coelho and Branco (n 137) 955; Paulo Bonavides, *Curso de Direito Constitucional* (29th edn, Malheiros 2014) 306-08; Silva (n 134) 51; Manoel Gonçalves Ferreira Filho, *Curso de Direito Constitucional* (40th edn, Saraiva 2015) 65; Barroso (n 136) 67-68. For an account on the French political control, see Frederico Fabbrini, 'Kelsen in Paris: France's Constitutional Reform and the Introduction of a Posteriori Constitutional Review of Legislation' 9 *German Law Journal* 1297.



Although the STF has been deferring to the parliament regarding the resolution of procedural issues based on internal legislative ordinances, authoritative commentators on the Court have been diverging from the dominant position. To assess the controversy, a Court's recent decision concerning the impeachment of the President of the Republic Dilma Rousseff is worth examining. Pursuant to the 1988 Constitution art 86, the impeachment trial occurs before the Senate. However, prior to the trial itself, it is up to the House of Representatives to decide on the admission of the charges against the President grounded on an opinion issued by a special committee of deputies. In the MS 34127, filed in April 2016, a deputy claimed that the voting process by which the special committee would deliver its opinion did not comply with the internal rules of the House.<sup>168</sup> Clearly, the disagreement did not refer to the passing of a norm, but this does not matter, insofar as the Brazilian Court does not differentiate among legislative or quasi-judicial procedures that take place in the parliament.<sup>169</sup> Thus, the vantage points that emerged from the discussions surrounding the MS 34127 illustrate the approaches towards JRLP. For the purposes of this paper, it will suffice to present the essence of the Justices' arguments. In its ruling, the plenum of the Court came to a five to five draw (the Court is composed by eleven Justices, and one of them was absent),<sup>170</sup> an outcome that was interpreted in favour of the House of Representatives (thus, against the plaintiff) due to the presumption of legality of the official acts.<sup>171</sup> As expected, the defence of those who voted for the House was based on the *interna corporis* argument. In this sense, Justice Teori Zavascki mentioned that only if there were an explicit harm to the Constitution should judicial deference be strayed from.<sup>172</sup> Likewise, Justice Celso de Mello reinforced the notion that acts based on merely internal provisions do not attract judicial scrutiny.<sup>173</sup> The dissenting judges observed that the judiciary should intervene in order to enforce the House to abide by its own regulations, setting aside the internal affairs argument. Accordingly, Justice Edson Fachin stated that the right to due legislative process follows from the due process principle, enshrined in the 1988 Constitution art 5(XLVI). As such, the Court cannot but demand compliance with the House's internal rules.<sup>174</sup> Justice Marco Aurélio, in line with the preservation of legitimate expectations under the rule of law, argued that 'such a trial could not be ruled by a voting criterion that

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<sup>168</sup> STF, *Tribunal Pleno*, MS 34127, *medida cautelar, Redator para o Acórdão* Teori Zavascki, judged 15 April 2016 <<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=11828384>> accessed 26 July 2017.

<sup>169</sup> As opposed to what happens in Israel, as per Navot (n 5) 185.

<sup>170</sup> MS 34127 (n 168) 2.

<sup>171</sup> *ibid* 64.

<sup>172</sup> *ibid* 22.

<sup>173</sup> *ibid* 40-41.

<sup>174</sup> *ibid* 20.

eventually directs the final outcome'.<sup>175</sup> Finally, despite his general agreement with the *interna corporis* thesis, Justice Ricardo Lewandowski affirmed that there was no impediment for the judicial scrutiny of political acts in specific situations, such as one as serious as the impeachment of the President of the Republic. For him, thus, the Court had to try the case in light of the proceedings established by the House of Representatives' internal ordinances.<sup>176</sup> From the discussions in the MS 34127, though the STF ultimately upheld the House's position, it is possible to conclude that the Court may in the near future set aside the *interna corporis* reasoning in cases wherein legislative pending procedures are at stake.

### E. CONCLUSION

This essay started with Kelsen's remark about how difficult it is for a parliament to comply with its obligations.<sup>177</sup> His argument related to the annulment of a statute that was not in accordance with the Constitution. Ideally, the legislators themselves could perform such a task, but, as they behave as free law creators, they do not feel bound by a superior authority to review their own acts.<sup>178</sup> Although the context of his observation was a different one, it fits well in situations wherein the application of procedural law-making rules is at stake. In such cases, it may well occur that a representative with the competence to apply these rules disregards them. Such conduct may harm those parliamentarians who develop deliberative strategies in line with the expectation that the legislative process will follow the track fixed in the pertinent provisions. I reject the British view that merely places judges as 'servants of the Queen and the legislature'.<sup>179</sup> Instead, I argue that a more appropriate approach is one closer to Ely's characterisation of judges as referees of the democratic process,<sup>180</sup> safeguarding the channels for participation and, in Habermas' terms, the communication flow.<sup>181</sup> Clearly, there are many ways to do so, but I take the view that solutions questioning the rationale for the enactment of a statute, as in the American case law on federalism or in the German review for the protection of rights, leave too much power with the judiciary. Likewise, the scrutiny of the citizens' participation in the legislative process grounded on broad democratic principles, as in South Africa, may also threaten the independence of the parliament. To avoid these side effects, and

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<sup>175</sup> *ibid* 35-36 (in the original: 'Um julgamento desta magnitude não pode ser regido por critério de votação que eventualmente direcione o resultado final'; author's translation).

<sup>176</sup> *ibid* 45-46.

<sup>177</sup> Kelsen, 'Kelsen on the Nature and Development of Constitutional Adjudication' (n 1) 44.

<sup>178</sup> *ibid* 44-45.

<sup>179</sup> *Lee v Bude & Torrington Junction Railway Co* (1870-71) LR 6 CP 576, 582.

<sup>180</sup> Ely, *Democracy and Distrust* (n 29) 73, 88, 103.

<sup>181</sup> Habermas, *Between Facts and Norms* (n 42) 264.

minimise the risk of politicising the courts, I argue that the best way to enhance deliberations in the legislative process is via the judicial enforcement of procedural rules, whether on the basis of constitutional or internal provisions. In this case, the interference of the judiciary is justified in terms of the rule of law and grounded on the more straightforward standards given by the legislators themselves. Such an approach to the JRLP may be easily applied in Brazil provided that the STF moves away from its current approach to the issue. In this sense, the Court should stop viewing the oversight of the legislative process as prior control of constitutionality, which only permits reviewing pending procedures on constitutional grounds. Furthermore, the Court should narrow the scope of the *interna coporis* acts test, taking into account the idea that compliance with internal provisions of the legislative houses is not a matter of political choices, but of legality. With these two measures, the STF shall ultimately be able to assess pending legislative processes not only in terms of rules enshrined in the Constitution, but also in light of the parliament's own ordinances grounded on the rule of law.