



# Parliamentary Immunity

Background Paper prepared by  
the Inter-Parliamentary Union

UNDP Initiative on Parliaments, Crisis Prevention and Recovery  
In association with the Inter-Parliamentary Union

September 2006

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## PARLIAMENTARY IMMUNITY

### Introduction

When asked their opinion of immunity for public office holders, people generally react negatively and tend to see it as a means whereby state officials can put themselves above the law and escape justice. Time and again, high-profile cases bring this question into the limelight, such as that of former German Chancellor Helmut Kohl, who admitted to breaking the German law on political parties by accepting secret cash donations, but was finally not prosecuted. The negative public image of immunity was evident, for example, from an Internet debate held by the BBC in December 2005, after the governor of Bayelsa state in Nigeria, charged with money-laundering in the United Kingdom, had jumped bail and returned to Nigeria, where he enjoyed immunity<sup>1</sup>.

The question of immunity for senior state officials, including heads of State, has also evolved as a key issue in the discussions about transitional justice. The arrest of Chilean dictator Augusto Pinochet in London in October 1998 on a Spanish warrant charging him with human rights crimes committed in Chile during his rule triggered wide debate on this question, which was also one of the major issues in the discussions on the Rome Statute of the International Criminal Court. Today, it is widely recognized that no one, not even a head of State, enjoys immunity from prosecution for crimes against humanity.

The vision of immunity as an obstacle to the pursuit of justice has sometimes overshadowed the simple fact that members of parliament need some measure of protection, if they are to carry out their work. Immunity protects in particular the freedom of expression they require to speak out and empowers the institution of parliament as such. Clearly, only strong parliaments able to count on the unimpeded service of their members will be able to face the challenges of preventing conflict and of strengthening and supporting transitional processes. The question of immunity, its scope and legal form, is therefore crucial in the context of the UNDP Initiative on Strengthening the Role of Parliaments in Crisis Prevention and Recovery.

Parliamentary immunity is generally defined as the sum of the peculiar rights enjoyed by parliament as an institution and by members of parliament individually, which exceed those possessed by other bodies or individuals, and without which they could not discharge their functions.<sup>2</sup> The paper will focus on the parliamentary immunity, that is immunity afforded to members of parliament, and touch upon the corporate privileges of parliament only insofar as it is necessary in this context. Thus the paper describes the major systems of parliamentary immunity that exist today, their historical background and their functioning, with emphasis on the legal norms in force in the parliaments covered by the UNDP initiative.<sup>3</sup> The paper will also look at the relationship existing between human rights and parliamentary immunity as this question is of particular importance to transitional societies.

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<sup>1</sup> His immunity was, however, subsequently lifted.

<sup>2</sup> Erskine May, *Parliamentary Practice*, 22<sup>nd</sup> edition, 1997, p. 65.

<sup>3</sup> Afghanistan, Argentina, Bangladesh, Bolivia, Burundi, Cambodia, El Salvador, Georgia, Guatemala, Indonesia, Iraq, Kosovo, Lebanon, Liberia, Nepal, Philippines, Republic of Moldova, Rwanda, Serbia and Montenegro, Sierra Leone, Somalia, Sri Lanka, Sudan, Thailand, The Former Republic of Macedonia, Timor-Leste, Ukraine, Yemen, Zimbabwe.

The paper draws considerably on the comparative study by Mr. Robert Myttenaere on "The immunities of members of parliament", of September 1998<sup>4</sup> as updated by Ms. Hélène Ponceau, Secretary General of the Questure, French Senate<sup>5</sup>and on the study that Marc van der Hulst conducted at the request of the Inter-Parliamentary Union on the parliamentary mandate, published in 2000.<sup>6</sup> It also takes into account the work of the IPU Committee on the Human Rights of Parliamentarians<sup>7</sup>.

## 1. The purpose of immunity for members of parliament

The institution of parliamentary immunity is designed to ensure the proper operation of a parliament: It confers specific rights and privileges to members of parliament<sup>8</sup>, most importantly the privilege of freedom of speech. Indeed, freedom of expression is the working tool of members of parliament which enables them to do their job as representatives of the people, legislating, adopting the budget and overseeing the activities of the government. If they cannot speak out, criticize the government and investigate and denounce abuses because they fear reprisals by the executive branch or other powerful actors, they cannot live up to their role. Freedom of speech enables them to raise questions affecting the public good which might be difficult to voice elsewhere owing to the possibility of court action. They require immunity to freely express themselves without obstruction and without fear of prosecution or harassment of any kind.

Parliamentary immunity is not an individual privilege granted to members of parliament for their personal benefit, but rather a privilege for the benefit of the people and the institution which represents them, parliament. Any individual benefit that accrues to an individual parliamentarian is not possessed personally, but derives from the hard-won immunities that legislatures in the past have found necessary for the performance of their functions on behalf of the constituents they represent. It is therefore a matter of public order that parliamentarians cannot generally renounce. Parliamentary immunity ensures that parliament can fulfil its tasks and function without obstruction from any quarter. Obviously, a parliament can only work insofar as its members are free to carry out their mandate. This is very clearly reflected in Rule 6, paragraph 1, of the Rules of Procedure of the European Parliament, which stipulates the following: "In the exercise of its powers in respect of privileges and immunities, Parliament shall seek primarily to uphold its integrity as a democratic legislative assembly and to secure the independence of its Members in performance of their duties." Immunity is therefore a prerequisite for ensuring that a parliament can indeed function as an independent institution and vindicate its own authority and dignity.

However, as the following chapter shows, parliaments hold widely differing views as regards the scope of the specific rights and privileges which their members require to carry out their mandate "without fear or favour".

<sup>4</sup> Robert Myttenaere, The immunities of members of Parliament, in Constitutional and Parliamentary Information, No.175-1<sup>st</sup> Half-year 1998/ASGP Review.

<sup>5</sup> [http://www.asgp.info/documents/Geneva\\_2005/Geneva\\_Plenary\\_Minutes\\_October\\_2005.pdf](http://www.asgp.info/documents/Geneva_2005/Geneva_Plenary_Minutes_October_2005.pdf)

<sup>6</sup> Marc van der Hulst, The Parliamentary Mandate, A Global Comparative Study, IPU 2000.

<sup>7</sup> The IPU established the Committee in 1976 as part of its efforts to strengthen the institution of parliament, and entrusted it with the task of investigating communications about human rights violations of members of parliament.

<sup>8</sup> Details may be found in chapter 2

## 2. What kind of parliamentary immunity?

### 2.1. Two major systems of immunity

The parliaments of the world today apply two major systems of parliamentary immunity: one is based on the Westminster model and is commonly known as the privilege of freedom of speech or parliamentary non-accountability; the other derives from the French model, which offers members of parliament wider protection, as it comprises not only non-accountability but also "parliamentary inviolability".<sup>9</sup> In short, non-accountability affords parliamentarians special protection for their freedom of expression and entitles them to say what they feel (freedom of speech) and to discuss what they wish (freedom of debate). It means that they cannot be held accountable, except by parliament itself and by the people at elections, for anything they say in the exercise of their parliamentary duties and for any vote they cast in parliament. In addition to the above, parliamentary inviolability protects parliamentarians against any civil, administrative or criminal proceedings for statements or acts unrelated to the exercise of their parliamentary mandates. It implies, generally speaking, that they may only be arrested and/or prosecuted with the assent of the parliament.



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<sup>9</sup> The terminology in the field of parliamentary immunity differs widely. In the United Kingdom and Commonwealth countries, the term "parliamentary privilege" is used to describe the corporate privileges of parliament and those of its members. For the purpose of this paper, the term "parliamentary immunity" covers the privilege of freedom of speech (parliamentary non-accountability) and the privilege of inviolability; freedom of speech will be used instead of the term "non-accountability", and "inviolability" will be used to mean exemption from liability for acts committed outside the exercise of the parliamentary mandate. The term "parliamentary privilege" will be used when referring to corporate privileges of parliament.

## 2.2 Historical background

The desire to protect the freedom of speech of those chosen to speak on behalf of the people and defend their interests manifested itself very early in history. Generally, the sacrosanct nature of the tribunes in ancient Rome is viewed as a sort of precursor of immunity. The person of the tribune, an office established in 494 BC with the mandate to protect the plebs, was declared sacrosanct and a law (Lex Horatia, of 449 BC) protected tribunes from attack under penalty of death.

It is particularly interesting to take account of the historical background of the two systems of parliamentary immunity, as it shows that the protection of freedom of expression of members of parliament, and of their human rights in general, largely depends on the extent to which members of the public enjoy human rights.

In Great Britain, starting with the Magna Carta in 1215, the rights of the individual vis-à-vis those in power were affirmed and developed over the years, and offered guarantees against the abuse of royal power, in particular freedom from arbitrary arrest and imprisonment<sup>10</sup>. The Petition of Rights (1628), the Habeas Corpus Act (1679) and finally the Bill of Rights (1689) all referred to the common law tradition of individual rights, which they confirmed or further developed. The Anglo-Saxon concept of immunities is therefore rooted in the progressive development of custom, slowly but continuously consolidated, which applied to everyone irrespective of whether or not the individual was a parliamentarian.<sup>11</sup> The members of the British Parliament therefore did not feel the need to develop special protection, since the common law was considered sufficient to protect them against arbitrary action by the King or the Government.

This was not so in France, where a revolution was necessary to set forth the rights of the individual vis-à-vis state power. The 1789 Declaration of the Rights of Man and of the Citizen was not based on a common agreement on basic political values that had evolved over the years. Special measures were therefore deemed necessary to ensure the independence of the members of the National Assembly, and in particular their freedom of expression, their right to liberty and their freedom of movement. As Marc van der Hulst noted, since in the context of the Revolution the National Assembly had assumed a position of superiority over the other State organs, it could go further than its British counterpart.<sup>12</sup> When, on 25 June 1789, the King ordered the members of the Estates General to leave the building where they were meeting, the National Assembly adopted a motion in which it declared the person of each deputy inviolable and further proclaimed that every individual, corporation, tribunal or commission venturing to prosecute, arrest or attempt to arrest and detain a deputy during or after the session on account of proposals, statements or opinions given at the Estates General "are odious and traitors to the Nation, and are committing a capital crime".<sup>13</sup> This novel concept of inviolability was analysed as a measure of public order seeking to shelter the legislative power from encroachments

<sup>10</sup> It should be noted, however, that Article 39 of the Magna Carta which guarantees freedom from arbitrary arrest, concerned members of the aristocracy only.

<sup>11</sup> Marc van der Hulst, op. cit., p. 64, and Michel Ameller, Human Rights and Parliamentary Immunities, in : Parliament : a Guardian of Human Rights, introductory report to the Budapest Inter-Parliamentary Symposium, Geneva, IPU, 1993, p. 29.

<sup>12</sup> Marc van der Hulst, op.cit, p. 65.

<sup>13</sup> National Assembly, Sitting of Tuesday, 23 June 1789, p. 48, reproduced on the website of the French National Assembly [www.assemblee-nationale.fr/histoire/mirabeau.asp](http://www.assemblee-nationale.fr/histoire/mirabeau.asp).

by the executive and not as a privilege created for the advantage of a single category of individuals.<sup>14</sup> Its scope and its legal and practical implications developed, and a clear distinction emerged between acts carried out by parliamentarians in their official capacity and private acts. The French model thus came to comprise the privilege of freedom of speech and parliamentary inviolability. It had a considerable impact in Europe and the former French colonies, as of course did the Westminster model in the Commonwealth community of nations.



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<sup>14</sup> Helène Ponceau, Parliamentary Privileges and Immunities, Association of Secretaries General of Parliaments, 113th Assembly of the Inter-Parliamentary Union, October 2005.

### 3. Legal basis for parliamentary immunity

In the great majority of countries, parliamentary immunity is guaranteed in the Constitution. In some countries, the privileges of parliament are spelled out in specific laws, such as the Parliament Act in Canada, the Parliamentary Privileges Act in Australia<sup>15</sup>, and the Powers and Privileges Act in Sri Lanka. In other countries, immunity provisions are contained in specific laws on the status of deputies or the standing orders of Parliament. For the United Kingdom, Article 9 of the British Bill of Rights which declares 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" remains the primary legal guarantee of the privilege of freedom of speech. This is also true for a number of Commonwealth countries. In addition, there is a wealth of parliamentary precedent and traditions, which are of particular importance in common law countries.

As far as the countries covered by the UNDP initiative are concerned, apart from Sri Lanka, Zimbabwe and Indonesia, all other countries stipulate the principles governing parliamentary immunity in their constitution. In Sri Lanka and Zimbabwe, such provisions are contained in the Powers and Privileges Acts, enacted under a specific constitutional authorization; and in Indonesia it is the Law on the Structure and Composition of legislative bodies which stipulates a right to immunity.<sup>16</sup>

It is noteworthy that parliamentarians cannot claim respect for their immunity in another State<sup>17</sup>. If they hold a diplomatic passport, however, they may claim the rights granted under international law to the bearers of such documents.<sup>18</sup>

### 4. The scope of freedom of speech (parliamentary non-accountability)

The history of freedom of speech in parliament is closely linked to the constitutional history of the United Kingdom and the struggle between the House of Commons and the Crown. The vindication by parliament of that freedom is generally traced back to the year 1396/97, when the entire legislature - Commons, Lords and the King - agreed that a judgment sentencing a person to death for treason, on account of his having presented a bill to parliament for the purpose of reducing the excessive charge of the Royal Household, was in derogation of the privileges of parliament and was to "be annulled ...and of no force and effect".<sup>19</sup> The Glorious Revolution and the adoption of the Bill of Rights in 1689 is certainly the culmination of parliament's claim to the privilege of freedom of speech, since Article 9 of the Bill of Rights as stated earlier (see above 3) is still the major legal

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<sup>15</sup> The Parliamentary Privileges Act 1987 enumerates certain privileges and provides also that powers, privileges and immunities under the Constitution remain in force.

<sup>16</sup> Law 23/2003 on the Structure and Composition of the People's Consultative Assembly, the House of Representatives, the Regional Legislative Council, the Provincial House of Representatives and the Local House of Representatives.

<sup>17</sup> The immunity provisions of the European Parliament provide a noteworthy exception to this rule. The Protocol on the Privileges and Immunities of the European Communities (1965) stipulates in its Article 10 (b) that during the sessions of the European Parliament, its members shall enjoy "in the territory of any other Member State, immunity from any measure of detention and from legal proceedings".

<sup>18</sup> See, in particular, the 1961 Vienna Convention on Diplomatic Relations and Optional Protocols.

<sup>19</sup> J. Maingot, Parliamentary Privilege in Canada, 1997, p. 28.

source in matters concerning the exercise of freedom of speech in the United Kingdom and a number of Commonwealth countries.

Freedom of speech as the most fundamental right of a member of parliament is of course not restricted to Commonwealth parliaments. With the exception of a few countries (Cuba and Belarus, for example), parliamentary non-accountability is guaranteed worldwide either in constitutions or in specific laws, which means that it can be considered an essential feature of all parliamentary systems based on the free representational mandate.<sup>20</sup> As Marc van der Hulst noted, parliamentary non-accountability is not only relatively homogeneous but also a highly stable principle throughout the world, and relevant legislation has undergone little amendment over time.<sup>21</sup>

However, the scope of protection which the privilege of freedom of speech offers differs greatly from country to country. The following section provides an overview of the major rules and practices determining that scope by answering the following questions: (a) who is protected, (b) when does the protection begin and end, (c) where does it apply, and (d) precisely what acts are covered?

#### 4.1. Who is protected?

The beneficiaries of the privilege of freedom of speech are of course first and foremost members of parliament, including ministers in countries where those offices are not incompatible. In many countries, especially those following the Westminster model but also in France, this privilege has been extended to all persons required by their function to take part in parliamentary debates and proceedings, such as officers of parliament but also witnesses summoned to appear before parliamentary committees in the course of inquiries. Witnesses therefore generally enjoy absolute privilege in that they may not be prosecuted for words spoken during such meetings [see also under 4.4. (a)]. However, not everywhere is immunity for witnesses automatic. In the United States for example, if witnesses refuse to testify before a congressional body on the basis of their privilege against self-incrimination, that body may seek a court order whereby they are granted so-called "use" immunity and cannot be prosecuted for anything said in their testimony, except prosecution for perjury or giving a false statement or (18 U.S. Code collection, paras. 6002, 6005). In the Philippines, witnesses in legislative investigations may be admitted into a witness protection programme upon the recommendation of the investigating committee and approval of the Senate President or the Speaker of the House of Representatives when, in the judgment of the committee, there is a pressing need for such protection. In Zimbabwe, the protection of witnesses is subject to a certificate issued by the presiding officer of the parliamentary body before which testimony was given.<sup>22</sup> It is noteworthy that the protection of witnesses is particularly important for a parliament's capacity to discharge its oversight function. Moreover, absolute privilege, that is exemption from any challenge in court, is generally also afforded to the publishers and printers of parliamentary publications.

#### 4.2. When does the protection begin and end?

<sup>20</sup> As opposed to the so-called "imperative mandate" which entitles those who are represented to revoke the mandate of their representatives.

<sup>21</sup> Marc van der Hulst, op.cit, p. 66.

<sup>22</sup> Privileges, Powers and Immunities Act, Part IV, Section 13 (1).

Depending on the country, members of parliament enjoy protection either as of the time of their election, (generally countries with a French parliamentary tradition), of the validation of the election, or of their oath-taking (Argentina, Bangladesh, Philippines, Sri Lanka). In countries with a British parliamentary tradition, but also others, for example The Former Yugoslav Republic of Macedonia, the protection applies only during the sittings of parliament, and in others protection is afforded in all circumstances, regardless of whether parliament is in session or not (Sri Lanka, Thailand). The protection ends with the expiry of a member's term of office or with the dissolution of parliament. However, it is important to note that the protection is perpetual in that it remains in force after the expiry of the mandate for all words spoken and votes cast during the mandate. There is also no time limit on the protection of publications of parliamentary proceedings.

#### 4.3. Does the protection apply everywhere?

In most countries, the privilege of freedom of speech is related to the exercise of the parliamentary mandate rather than to the place where the contested statements were made. Therefore, although words spoken in parliament are generally protected, this may not be the case if the activity is deemed to be unrelated to or unnecessary for the exercise of the mandate, as in the case of a press conference in parliament, for example.<sup>23</sup> On the other hand, protection may apply to statements made outside parliament so long as they are seen as related to the exercise of the parliamentary mandate, an instance being the repetition outside parliament of words spoken within parliament. The important criterion is therefore the interpretation of the term "exercise of the parliamentary mandate". That interpretation not only differs considerably from country to country but also evolves over time as parliaments and judicial practice in countries adapt it to new circumstances.

#### 4.4. "Exercise of the parliamentary mandate": what does it mean?

##### (a) *Activities undertaken in the context of parliamentary proceedings*

The hard core of the privilege of freedom of speech is indisputably constituted by statements made from the floor of the House or in committees, bills or proposed resolutions and motions, written and oral questions, interpellations<sup>24</sup>, reports made at the request of parliament, and votes cast. These are protected by the absolute privilege of freedom of speech, as are generally documents which are ancillary to those matters, such as drafts of questions or notes. As stated earlier, absolute privilege means that such statements or acts cannot be challenged in court. Members of parliament can therefore be sued neither for defamatory statements they make nor for statements that would otherwise constitute a criminal offence (for example revealing information protected by secrecy provisions such as personal tax information).

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<sup>23</sup> For example, in a case in Canada (Quebec Court of Appeal), the court held that remarks made by a minister in the lobby of parliament to a journalist were not covered since "it is not the precinct of Parliament that is sacred, but the function and that function has never required that press conferences given by Members should be regarded as absolutely protected from legal liability"; Beauchesne, op. cit., p. 22, para. 76.

<sup>24</sup> Interpellation is generally a means of holding the government to scrutiny and enables either individual parliamentarians or parliamentary groups to call on government ministers to explain their acts or policies on topical issues or issues of public concern, and usually gives way to a debate.

However, in order to address the feeling of injustice that inevitably arises when a citizen cannot seek redress for a defamatory statement made in parliament about him/her and to respect fairness of process, the parliaments of Australia and New Zealand, for example, allow a right of reply for individuals who feel offended by remarks made about them during a parliamentary debate. In Australia, they may request that a response be inserted in the Hansard transcripts. In the United Kingdom, an amendment to the Defamation Act of 1996 allows members of the British parliament to waive their immunity in defamation matters. It did indeed happen that the absolute protection granted to freedom of speech in parliament prevented a member of the House of Commons from suing a newspaper for libel after the latter had successfully pleaded that a court could not inquire, even at the request of a member of parliament, into anything he or she had said or done in parliament. The amendment was criticized by a number of British parliamentarians as it meant that a collective privilege was surrendered to an individual (see under 1.2.)

A number of countries also afford the privilege of freedom of speech to words spoken during meetings of political groups in parliament (for example, The Former Yugoslav Republic of Macedonia). Countries following the British parliamentary tradition generally do not extend this privilege to such statements.

(b) *Repeating outside parliament words spoken in parliament*

In most countries, particularly those following the British parliamentary tradition, members of parliament may not invoke the privilege of freedom of speech when they repeat, in the press or elsewhere, words they have spoken in parliament, and may therefore be sued in a court of law. In a number of countries (for example Georgia, see also below, Mozambique, Romania, Uruguay, Burkina Faso), the protection nevertheless extends without restriction to the repetition outside parliament of words spoken in parliament.

(c) *Activities and statements made as part of constituency and general political work*

In countries with a British parliamentary tradition, the constituency work of a member of parliament generally enjoys qualified privilege under common law.<sup>25</sup> Qualified privilege exists where a person is not liable for action for defamation if certain conditions are fulfilled, in particular if a statement is not made with malice. In the United Kingdom for example, an exchange of letters between a member of parliament and his/her constituents, an exchange of letters with a minister or another member of parliament with a close bearing on proceedings in the House would be covered by such privilege, which can be invoked as defence before a court.

In France, any political act by a parliamentarian used to be viewed as being part of the exercise of the parliamentary mandate. However, this interpretation had to give way to a more restrictive approach whereby only such acts as are necessary for the discharge of the parliamentary mandate come within the ambit of the

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<sup>25</sup> The standard judicial definition is that made by Lord Atkinson in *Adam v. Ward* (1917 AC 309, at p. 334) "A privileged occasion is an occasion where the person who makes a communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding duty to receive it. This reciprocity is essential", quoted in Oonagh Gay, Chris Pond, Parliamentary privilege and qualified privilege, Parliament and Constitution Centre, House of Commons Library, 1994.

privilege of freedom of speech. That approach was endorsed by the Constitutional Council in 1989 when it decided that a report made by a parliamentarian in the context of a mission entrusted to him by the government (and not by parliament) could not enjoy the privilege of freedom of speech (see also under 6.c).

In Georgia the wording of Article 52 (1, 2) of the Constitution, which states that members of parliament may not be prosecuted on account of ideas and opinions expressed inside and outside parliament, suggests that the political work of members of parliament, wherever it is done, enjoys protection.

With some exceptions (for example, Burkina Faso, Kenya, Romania and Uruguay), statements made during debates on radio or television are not protected by freedom of speech. In other countries (for example, Namibia, Poland and Italy), they may be accorded privileged status if they are in some way related to parliamentary activities. In Italy more particularly, a parliamentarian may request the respective chamber to adopt a resolution stating that his/her utterances are protected. Such a resolution is subject to review by the Constitutional Court, which not only verifies its procedural lawfulness but also carefully examines whether the impugned statement had any connection with parliamentary activities.

In Switzerland, the Federal Chambers may decide that statements made during radio or TV debates, publications, and so on, of a member enjoy the privilege of freedom of speech, which means that any criminal proceedings may only be instituted with the authorization of the Federal Chambers.

(d) *Reproduction of parliamentary proceedings*

As stated earlier, the (unedited) reproduction of parliamentary debates and proceedings is covered by absolute privilege and members of parliament, together with the publishers and printers of such reports, cannot therefore be held accountable for anything recorded in those publications. In the United Kingdom, a special law was enacted in 1840 to this effect, the Parliamentary Papers Act which in its preamble states: "It is essential to the due and effectual exercise of the functions and duties of Parliament and to the promotion of wise legislation that no obstructions or impediments should exist to the publication of such of the reports, papers, votes or proceedings of either House of Parliament as such House of Parliament may deem fit and necessary to be published."<sup>26</sup> The Act provides that any proceedings against a person for the publication of papers printed by order of either House of Parliament must be stayed on the production of a certificate to the effect that such publication is by order or under the authority of parliament. *Bona fide* publication of extracts of debates generally enjoys qualified privilege. More generally speaking, accurate and *bona fide* reports of parliamentary proceedings can be said to enjoy qualified privilege. The Constitutions of Liberia and Sierra Leone, in addition to the parliamentary acts on privilege in Sri Lanka and Zimbabwe, contain very detailed provisions in this respect, which generally follow these lines.

The absolute privilege enjoyed by materials printed under the authority of parliament extends also to radio, television and Internet broadcasts of parliamentary proceedings, which, with the drive for transparency, are commonplace in an increasing number of parliaments. Here again, the same test applies: if proceedings are broadcast *in extenso*, absolute privilege applies whereas extracts of proceedings enjoy qualified privilege. This is not so in Thailand, however, where parliamentarians

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<sup>26</sup> Quoted in J.P. Joseph Maingot, op. cit., p. 66, 67.

may be sued if anyone, other than members of parliament themselves or ministers, feels defamed by anything said during a parliamentary debate which was broadcast by either television or radio.<sup>27</sup> The offended person may also request that an explanation be published by Parliament.

Indeed, the broadcasting of debates has posed a new challenge to free debate in parliament as it highlights the distinction made between members of parliament and members of the public (see also under 6.d).

#### 4.5. Restrictions based on the nature of the words spoken

Even absolute privilege does not mean that parliamentarians have an unlimited and unrestrained right to say whatever they wish. Their statements are subject to restrictions and disciplinary measures may be taken (such as a call to order, censure, non-payment of parliamentary emoluments and temporary suspension or even expulsion). Relevant rules are generally stipulated in the standing orders or codes of conduct and are designed to ensure the orderly conduct of proceedings. Such rules may even be enshrined in the constitution. For example, in its Article 97, the Constitution of Sierra Leone stipulates that members of parliament shall maintain the dignity and image (decorum) of Parliament both during the sittings in Parliament and in their acts and activities outside parliament. Its Article 99 empowers the presiding officer to refer to the Committee of Privileges a matter concerning a statement made by a member if the officer considers it to be *prima facie* defamatory of any person. If the Committee finds that it was defamatory, disciplinary measures may be taken.

Restrictions almost always concern insults to the head of the State and, in countries with a British parliamentary tradition, statements on pending court cases. In a number of parliaments, judges may only be criticized by way of a motion. For parliaments following the British tradition, there are publications listing words regarded as "unparliamentary" language.<sup>28</sup> Moreover, as a rule, the dissemination of information concerning closed sessions of parliament generally falls outside the scope of the privilege of freedom of speech and is not protected. Article 13 of the Standing Orders of the Indonesian House of Representatives contains a specific provision to this effect: Article 198, paragraph 2, stipulates that statements on matters agreed upon in an in camera session as being confidential are not protected. Likewise, it excludes from protection the dissemination of matters defined as state secrets.

In Ukraine and Yemen, members of parliament may not claim the privilege of freedom of speech in case of insult/slander or defamation (Article 80 in both cases). This also applies, for example, in Germany, Poland, Mali, Mozambique and Uruguay. The Constitution of Guatemala, in its Article 161 (a), stipulates that members of parliament must exercise their privilege without arbitrariness or excessive personal initiative and that, if they neglect that duty, the Congress may impose the necessary disciplinary sanctions.

<sup>27</sup> Article 157 of the Constitution stipulates that the privilege of freedom of speech does not extend to a "member who expresses words at a sitting which is broadcast through radio or television if such words appear out of the precinct of the National Assembly and the expression of such words constitutes a criminal offence or a wrongful act against any other person who is not a Minister or member of that House".

<sup>28</sup> For example, The Table, The Journal of the Society of Clerks-at-the-Table in Commonwealth Countries.

Although this is generally viewed as a public privilege, some countries afford members of parliament the possibility of waiving their immunity (for example, the United Kingdom; see 4.4. above). In countries where the privilege is confined to the floor of the House (Zimbabwe, Liberia, Sierra Leone, Bangladesh), parliamentarians only need to repeat a statement outside parliament if they wish to waive their immunity.

#### 4.6. Taboo issues

In addition to restrictions clearly spelled out in standing orders or otherwise firmly rooted in parliamentary tradition, there sometimes exists another type of constraint on freedom of speech in parliament. This is particularly true of countries emerging from internal conflict where issues linked to problems originally giving rise to the conflict, ethnicity for example, are considered taboo matters, or where forces outside parliament, in particular the military, dictate what can and what cannot be debated. In such cases, it is very difficult, if not impossible on account of the high personal risks involved, for members of parliament to raise such issues and related problems in parliament. While taboo issues may initially help a society to overcome past conflict, they may also have an adverse effect if maintained over time and prevent the settlement of real problems that have remained unsolved, and thus in fact stir new conflict. It therefore seems particularly important that parliament should ensure strict respect for the essentials of the privilege of freedom of speech and refuse the kind of censure which taboo issues entail.

#### 4.7. The punitive powers of parliament

The most important aspect of parliamentary privilege as far as it relates to parliament as an institution, is its ability to determine its own rules and to enforce them by means of disciplinary sanctions which may comprise suspension and even expulsion. Parliaments following British parliamentary tradition may in fact sit as a court of record and punish for breach of privilege (that is, any action disregarding or attacking the special rights of parliament) or contempt of parliament (an offence against the authority of parliament), *inter alia* by imposing fines and even committing the offenders to prison. While in the twentieth century, cases of parliaments imposing prison sentences are extremely rare,<sup>29</sup> the power still exists and the parliament of Zimbabwe, for example, used it as late as October 2003 when sentencing a member of parliament to one year's imprisonment with hard labour for assaulting a minister (and fellow parliamentarian) during a parliamentary debate. As provided for in the Privileges, Powers and Immunities Act, the matter was referred to the privilege committee and its recommendation was voted on by the House plenary along party lines. No appeal procedure was available to the parliamentarian concerned. The IPU held that, in countries where parliament has retained the power to sit as a court of record, the internationally recognized fair trial guarantees must be applied, in particular the right of appeal to a court of law.<sup>30</sup> Even then, however, it is questionable whether a parliament can be considered an independent and impartial tribunal as required under Article 14 of the International Covenant on Civil and Political Rights.

<sup>29</sup> In February 1913, the Canadian House of Commons committed a person to prison (Maingot, op. cit., p. 208); in 1955, the Australian House of Representatives sentenced two persons to three months' imprisonment for a serious breach of privilege by publishing articles intended to influence and intimidate a member in his conduct in the House (House of Representatives Practice, I.C. Harris (editor) Canberra 2005, pages 731-2).

<sup>30</sup> Resolution of the IPU Governing Council on the case of Mr. Roy Bennett and others, October 2004.

## 5. Parliamentary inviolability

As stated earlier, parliamentary inviolability is defined as the protection of members of parliament against civil and/or criminal proceedings for acts other than those undertaken in pursuance of their parliamentary duties. Its origin goes back to the French Revolution, which saw the advent of the concept of parliamentary inviolability. The essential features of inviolability were already present in the 1791 Constitution, which stipulates the following: "[Representatives of the Nation] may, for criminal acts, be arrested in flagrante delicto, or by virtue of a warrant of arrest; but the legislative body shall be notified thereof without delay, and proceedings may not be continued until the legislative body has decided that charges be brought".<sup>31</sup>

One can distinguish, broadly speaking, three major trends in matters of parliamentary inviolability:

In the United Kingdom, members of parliament have never had immunity from the operation of criminal law.<sup>32</sup> The ancient right of "freedom from arrest" which pre-dates freedom of speech, originally prevented impecunious members or their servants from being sequestered (seized), sued and prosecuted in the courts for civil debt. Today, it merely prevents a member from being imprisoned for a civil offence; however, since imprisonment for such offences is largely obsolete, so is the relevance of the privilege. What remains in the United Kingdom and other parliaments following British parliamentary tradition (including Bangladesh, Liberia, Sierra Leone and Zimbabwe) is that the House should be informed through the Speaker of the arrest and conviction of a member by the competent judge or magistrate. (This does not apply for example to Canada, where there has never been any such occurrence<sup>33</sup>). In Bangladesh, the Speaker must also be informed of the release (on bail or otherwise) of a member of parliament. Moreover, serving or executing civil or criminal process within the precincts of parliament without the prior permission of the parliamentary authorities is considered an instance of contempt. Two associated privileges, however, are still of relevance in most countries following British parliamentary tradition, namely freedom from attendance at court, be it in criminal or civil law matters since no parliamentarian may be compelled to appear in court as a witness, and freedom to avoid jury duty. It can therefore be said that in most parliaments following British parliamentary tradition in immunity matters, such as Bangladesh and Zimbabwe but also El Salvador or the Netherlands, parliamentary inviolability is largely insignificant.

In some countries (Liberia, Sierra Leone, Norway) inviolability is designed only to prevent the arrest of a member of parliament attending parliament and on his/her way to and from parliament so as to ensure the paramount right of parliament to the attendance and service of its members. In Liberia and Norway, this privilege does not operate in the case of certain offences specified in the constitution, for example treason or breach of peace. In Nepal members shall not be arrested (except in criminal offences) between the date of the issuance of the summons for a session

<sup>31</sup> Cited from "Parliamentary Immunity in the Member States of the European Union and in the European Parliament", European Parliament, Legal Affairs Series, 2000.

<sup>32</sup> Parliamentary Immunity in the Member States of the European Union and in the European Parliament, European Parliament, op. cit., p. 137.

<sup>33</sup> Beauchesne's, op.cit., p. 24, para. 88.

and its closure (Art. 62, para. 6, of the Constitution). The protection thus applies for the entire duration of the parliamentary session.

In a few countries the privilege of inviolability takes the form of a judicial privilege, which usually means that members of parliament are tried by special courts or higher courts, such as in Guatemala, Burundi or Colombia for example, where the Supreme Court is competent to judge members of parliament. In Colombia, members of parliament did not until recently enjoy the right to appeal. In a case concerning a Colombian member of parliament, the IPU has held this to be a violation of the right to fair trial as guaranteed under the American Convention on Human Rights.<sup>34</sup> The current provisions (Article 186 of the Constitution) provide for an appeal from the Criminal Chamber of the Supreme Court of Justice to the Court's plenary.

In most other countries, however, all cases of arrest and/or prosecution are prohibited without the express authorization of the assembly to which a parliamentarian belongs. Parliamentary inviolability can therefore be described as a kind of moratorium which only defers arrest and/or prosecution if the charges are founded. The underlying idea is that only the parliament, representing the sovereign nation, should be responsible for establishing whether proceedings are fair and well-founded and not attributable to political or other ill-founded considerations. This is very well reflected in Article 98 of the Standing Orders of the National Assembly of Lebanon (*Règlement intérieur*), which states that in its examination of the demand for the lifting of parliamentary immunity the National Assembly and its joint committee "must evaluate (apprécier) the seriousness of the prosecution, and assure themselves that the demand has no political motives and that it does not seek to prevent the member of parliament concerned from exercising his political activity". .

This is the kind of system which will be described below in more detail.

#### 5.1. The scope of protection

##### (a) *Who is protected?*

Inviolability applies only to members of parliament. However, among the countries covered by the UNDP initiative, there is one important exception: Article 13 of the Law on the Status of Deputies in the Republic of Moldova stipulates that members of parliament are deemed to be exercising their functions throughout their mandate, and that any aggression against them is considered an insult (outrage) to be punished in accordance with the law. The same applies to family members (husband, wife, children and parents) if such aggression seeks to exert pressure on the parliamentarian concerned in connection with the exercise of his/her mandate.

##### (b) *Time frame*

The time frame during which inviolability is valid is usually the same as in the case of freedom of speech (see above 4.2.) with one crucial exception. Contrary to the privilege of freedom of speech, inviolability is only afforded for the duration of the mandate. Once it has expired, members of parliament may consequently be prosecuted for offences in respect of which parliament had not lifted immunity. The Standing Orders of Timor-Leste and Argentina provide specifically that, in the case of

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<sup>34</sup> Resolution of the IPU Governing Council, October 2005.

a refusal to lift inviolability, the prescription period of a crime is suspended (Article 8, para. 5, Article 5 of Law 25.320 on the Lifting of Parliamentary Immunity, respectively). However, there seems to be an exception to this rule in Iraq since Article 60 C of the Constitution stipulates that a member of the Council of Representatives may not be arrested after the legislative term without the consent of the Speaker, unless he/she is accused of a felony or is caught in flagrante delicto committing a felony. With respect to judicial proceedings pending at the time of taking up office, in the majority of countries they cannot be pursued without the explicit authorization of the assembly.

(c) *Restrictions based on the nature of the offence*

As regards restrictions based on the nature of the offence, there are many different practices. Some countries make no such distinction (Bolivia, Burundi, Cambodia, Lebanon), others exclude protection for serious offences and others, on the contrary, take the view that immunity should apply in serious cases only and not for minor offences (for example Rwanda, where parliamentarians suspected of a serious felony enjoy protection).

(d) *Restrictions concerning criminal procedural acts*

In most countries, inviolability precludes either the institution of legal proceedings and/or arrest and detention of a member of parliament without the consent of parliament. As stated earlier, there is a clear tendency to restrict inviolability to the arrest and detention of members of parliament and to exclude from its scope the institution of criminal proceedings. Among the countries covered by the UNDP initiative, Afghanistan, Iraq, Philippines, The Former Yugoslav Republic of Macedonia and Timor-Leste afford inviolability only for the arrest of a member of parliament. Such arrest is consequently subject to the consent of the parliament. In Argentina, the arrest of a member in the course of judicial proceedings (for the institution of which the consent of parliament is not required), is only possible with parliament's approval, as is the search of the house and workplace of the parliamentarian concerned and the interception of mail and telephone conversations. This is also the case in Georgia, where in addition to arrest or detention, the search of the home, car or workplace or any personal search of a member needs to be approved by the parliament (Article 52 of the Constitution). In the other countries covered by the study (except of course those following British parliamentary tradition), the judicial authorities must seek parliament's permission not only to arrest but also to institute judicial proceedings. In Thailand, members may not be arrested, detained or summoned as suspects in criminal cases without the consent of parliament. In addition, they may not be prosecuted on a criminal charge without the consent of parliament unless the charge was brought under specific laws (electoral law, law on the Election Commission and law on political parties) provided that the trial proceedings do not prevent the member from attending the sittings of the House.

(e) *Inviolability and flagrante delicto*

As a rule, inviolability does not apply to cases of flagrante delicto and members of parliament, when caught in the process of committing a crime may be arrested just like anyone else. There are some exceptions, however, as certain countries make distinctions based on the seriousness of the offence. Thus, in Iraq and Rwanda the flagrante delicto rule (arrest without consent of the parliament) applies only if a member is caught in the commission of a felony, in Serbia and Montenegro

and The former Yugoslav Republic of Macedonia, Timor-Leste only in the case of a crime punishable by over 5 years' imprisonment, and in Argentina only if the parliamentarian is caught while committing a crime punishable by death or one that is *infamante* or *afflictivo*. In some countries, parliament must be informed of the flagrante arrest of a member of parliament (Yemen) and in others this right goes hand in hand with the right to request the (provisional) release of the parliamentarian concerned (Georgia, Lebanon, Thailand). In the Republic of Moldova, in cases of flagrante delicto a member of parliament can only be placed under house arrest for 24 hours with the prior consent of the Prosecutor General, who in turn must inform the Speaker of Parliament. The latter can order the release of the member concerned.

Although flagrante delicto is a logical restriction on parliamentary inviolability because the validity of the prosecution cannot be questioned, given that the facts constituting the offence and the identity of the perpetrator are clearly established, it may serve as an ideal loophole for arresting a parliamentarian protected by immunity. As the experience of the IPU Committee on the Human Rights of Parliamentarians has shown, flagrante delicto is sometimes easily invoked even failing any ingredients of a flagrante delicto offence. Examples concern the arrest of members of parliament for several days and even months after the alleged facts under the pretext of a "flagrant crime", the arrest of parliamentarians who had participated in a peaceful demonstration, but were held responsible under the flagrante delicto procedure for acts of violence which occurred after they had left the premises, and the arrest of a parliamentarian for allegedly having signed uncovered cheques several months before his arrest. The Committee has consequently recalled that a broad interpretation of flagrante delicto may amount to voiding immunity itself of any real meaning.<sup>35</sup>

## 5.2. The procedure of lifting parliamentary inviolability

As already stated, parliamentary inviolability does not offer an absolute protection, and certainly does not seek to afford members of parliament impunity. It entitles parliament only to ensure that members of parliament are not arrested and prosecuted on baseless charges. If they are satisfied that such is not the case, parliaments lift immunity. The relevant procedures are broadly similar and differ mainly in terms of the authority empowered to file a request for the lifting of immunity, the possibility of waiving one's immunity, and the possibility of filing an appeal against the decision to lift immunity.

### (a) *Procedure generally observed*

Generally speaking, the judicial authorities (prosecutor, court, Minister of Justice) must send a request to the Presiding Officer. A parliamentary committee, either a standing committee on privileges or an ad hoc committee, is then entrusted with examining the request and making a recommendation to the plenary, which takes a vote. The composition of that committee may of course influence the outcome of deliberations, as may majority requirements for the vote in the plenary. These differ from country to country but generally a simple majority must be obtained (in Iraq an absolute majority is required). In some cases, for example Timor-Leste and the Republic of Moldova, the Rules of Procedure stipulate that the vote has to be secret. During periods when parliament is not sitting, the Assembly Bureau is usually competent to examine requests for the lifting of immunity and to take a decision, which at the Assembly's next sitting must be approved. In very rare cases, the

<sup>35</sup> Resolution adopted by the Inter-Parliamentary Council on case SN/02,03,04, September 1994.

Presiding Officer may decide on such matters. For example, the Speaker of the Iraqi Council of Representatives may authorize or not the arrest of a member after the expiry of his/her term (see also under 4b). Article 92 of the Constitution of Sudan vests the Presiding Officers of both Chambers with authority to decide whether or not to authorize the institution of criminal proceedings against a member of the respective Chamber or the taking of any measure against his/her personal belongings.

It is important to stress that procedures should be in place which, as far as possible, prevent decisions on the lifting of parliamentary immunity from being taken along party lines. Parliamentarians should be aware that immunity issues are not partisan issues, but affect the institution of parliament as such. Recent developments in the Philippines are noteworthy in this respect: On 25 February 2006, a reportedly unlawful attempt was made to arrest five opposition members of parliament. They were able to enter the House of Representatives and remained there from 27 February until 8 May 2006. On 28 February, the House of Representatives unanimously adopted a resolution affirming the right of the persons concerned to due process and granting them "protective custody" in the absence of any judicially issued arrest warrant resulting from a preliminary investigation or indictment.<sup>36</sup>

(b) *Decision taken by courts and not by parliament*

In very rare cases and as notable exceptions to the separation of powers, it is not parliament but the courts which lift parliamentary immunity. This is the case in Guatemala, for example, where the Supreme Court of Justice, after examining a report by a judge it appoints to this effect, decides whether or not proceedings shall be instituted against a member of the Congress of the Republic (Article 161a of the Constitution). In Chile, it is the competent court of appeal that is entitled to lift immunity, and members of parliament may lodge an appeal against the decision to the Supreme Court. In other countries, Israel for example, parliament's decision to lift immunity is subject to judicial review by the Supreme Court. A decision of parliament may therefore be overturned by court. In a recent case concerning a member of the Knesset whose immunity had been lifted by the Knesset to permit his prosecution on terrorism-related charges, the question of parliamentary immunity was raised as a preliminary issue in the judicial proceedings. An appeal to the Supreme Court was lodged against the first-instance court's decision to decide on this question at the end of the proceedings. In its ruling of 1 February 2006, the Supreme Court dismissed the charges against the member in question, taking the view that the offending statements came within the scope of his parliamentary immunity, the aim of which is to secure effective representation for all groups and political opinions in Israel.<sup>37</sup>

(c) *The right to defence*

An important issue is respect for the rights of the defence. In some countries, the right of the parliamentarians concerned to present his/her defence is explicitly recognized in the constitution or standing orders. This applies for example to Bolivia (Art. 27b of the Standing Orders of the Chamber of Deputies) and the Republic of

<sup>36</sup> Charges of rebellion were brought against the parliamentarians concerned in February 2006; the court dismissed them on 4 May 2006. The prosecution brought new charges of rebellion on 11 May 2006. Pending a decision of the Supreme Court on a certiorari petition, the court suspended proceedings in August 2006. According to Section 11 of the Constitution, while Congress is in session, members of both chambers of parliament are privileged from arrest in all offences punishable by not more than 6 years' imprisonment. The crime of rebellion carries more than six years' imprisonment.

<sup>37</sup> Adalah The Legal Center for Arab Minority Rights in Israel, News Update, 14 February 2006.

Moldova (Art. 10, para. 2, of the Law on the Status of Deputies). Not in all countries, however, is it a matter of course for the parliamentarian in question to be heard before a recommendation is made or the vote is taken by the parliament. One of the most recent examples is a case which occurred in February 2005 when the Cambodian National Assembly lifted the immunity of three of its members without hearing them and offering them the possibility of presenting their defence. The IPU has always held that it is a principle of natural justice that parliamentarians be heard and entitled to defend themselves, even if such right is not explicitly mentioned in relevant law.

(d) *Monitoring of judicial proceedings*

The lifting of immunity opens the way to arrest and/or judicial proceedings. Apart from the cases referred to below, there are generally no specific provisions for parliaments to monitor proceedings against a member whose immunity has been lifted. However, such monitoring can be essential to ensure not only that the member of parliament in question receives a fair trial but also, generally speaking, that respect is strengthened for fair trial guarantees. In many cases, therefore, the IPU has recommended that parliaments monitor proceedings to this end.

A case in Burundi shows that this may be effective. In July 2004 a member of the then Transitional National Assembly, coordinator of a former rebel movement, was arrested in flagrante delicto on account of the presence in his home of a presumed criminal, a member of an armed group which reportedly wished to join the peace process. The Bureau of the Transitional National Assembly lifted his immunity "to enable the judiciary to investigate the case calmly and without hindrance" while reserving the right to review its position after a period of two months. The parliamentarian was released on parole in September 2004 and participated in the July 2005 elections, when he was indeed re-elected. However, charges of "association for the purpose of attacking persons and property" were still pending against him. The Bureau of the newly elected Assembly took up the case and refused to allow his prosecution finding that his flagrante delicto arrest was unjustified and that procedure had been substantially flawed since the Prosecutor General had failed to provide a report on the facts; the parliamentarian concerned had not been heard and the chairpersons of the parliamentary groups and standing committees had not been consulted, in breach of the relevant rules.

(d) *Waiving parliamentary inviolability*

In most countries, parliamentary inviolability is a matter of public policy and therefore cannot be waived. There are, however, exceptions to this rule and one of the foremost is the Philippines where members of parliament, and they alone, can waive inviolability either explicitly or by deciding not to invoke it under the relevant circumstances.<sup>38</sup>

(e) *Lifting of inviolability conditionally and right to request suspension of detention*

Generally, owing to the principle of separation of powers, parliaments are not entitled to impose any conditions on the lifting of immunity. However, in some countries (Belgium and France for example) a partial lifting of immunity is possible. In most countries, parliament is not entitled to suspend the detention of a member of parliament or proceedings against him/her. There are exceptions, however,

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<sup>38</sup> Marc van der Hulst, op. cit., p. 91.

particularly in countries with a French parliamentary tradition, but also in Germany and Austria, where parliament may adopt such a decision either on its own initiative or at the request of a certain number of its members, or of the member concerned. In Thailand, the speaker may request the release of a member who was detained during the investigation or trial before the start of parliament's session. (Constitution, Article 167)

(f) *Right of detained members to attend parliamentary sittings*

With respect to the right of a member of parliament held in preventive detention to attend sittings of parliament, only a few countries provide for this possibility (Greece, Mali, Thailand, Pakistan), although this would be in accordance with the principle of presumption of innocence and the interest of parliament to secure the attendance and service of its members. Taking account of the fact that, while a parliamentarian is in preventive detention, his/her constituents are without representation, the IPU has held in several cases that parliamentarians should be authorized to attend parliamentary sittings so long as judgment has not been handed down. In most countries, parliamentarians lose their mandate once they are sentenced to a specific term of imprisonment, and the question of attendance therefore no longer arises.

5.3. Parliamentary inviolability: an increasingly controversial institution

Today, parliamentary inviolability has come in for increasing criticism as being obsolete and anachronistic, and the tendency is clearly to reduce this type of protection. An increasing number of parliaments have legislated to this end - very often following corruption scandals - and have restricted inviolability to the arrest and detention of their members, thus enabling the judiciary to institute proceedings without the consent of parliament.

The question of whether or not parliamentary immunity regimes in transitional societies should afford inviolability is particularly important for transitional societies. On the one hand, inviolability may favour a perception that parliamentarians are above the law and thus undermine the confidence of the people in their parliaments, thereby weakening the democratic process. In newly-constituted parliaments, there may be considerable confusion over what parliamentary inviolability means. In Timor-Leste, for example, it happened that a member of parliament escaped arrest in a domestic violence case under the pretext of his parliamentary immunity. Although the case led to some discussion, the matter was never formally taken either to parliament or to court.<sup>39</sup> In some countries (Sierra Leone or Afghanistan, for example), there has also been concern that inviolability provisions may in fact be an incentive for criminals to stand for parliamentary office, so as to escape prosecution. On the other hand, transitional societies need strong parliaments, which are capable of defending themselves against encroachments of the executive branch and of controlling it effectively. Inviolability provisions were precisely conceived to this end.

Clearly, the reasons underlying the introduction of parliamentary inviolability in modern constitutions, namely fear of the executive and abuse of its powers, are still valid, even more so in transitional societies. What remains to be seen is how to strike the right balance between the need for parliaments to build and maintain their independence and the specific rights their members require to this end.

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<sup>39</sup> Information provided by the UNDP office in Timor-Leste.

## 6. Immunity and the right to equality

### (a) *Immunity: a reasonable and objective distinction*

Parliamentary immunity and the right to equality seem on the face of it to conflict, since a distinction is made between members of the public and parliamentarians possessing rights not enjoyed by the ordinary citizen. One must note here that it is a basic principle of international human rights law that distinctions based on reasonable and objective criteria do not constitute discrimination and an infringement of the right to equality. This applies to the privilege of immunities which is bestowed upon parliamentarians because of their special responsibilities as representatives of the people.



(b) *Testing parliamentary immunity before a supranational judicial body*

This question has been tested before the European Court of Human Rights (ECHR) in relation to the right of access to court, enshrined in Article 6 of the European Convention on Human Rights as part of the general fair trial guarantees. In a case it examined in 2002,<sup>40</sup> the plaintiff was an individual whose name had been mentioned by a member of the House of Commons of the British Parliament during a parliamentary debate in 1996 on municipal housing policy. Considering that the statement made by the parliamentarian in question was highly defamatory, she complained that the parliamentary privilege afforded to the parliamentarian prevented her from exercising her right of access to court and that she was disadvantaged compared with a person about whom equivalent statements had been made in an unprivileged context. It was argued that the privilege was an infringement of the prohibition of discrimination, as enshrined in Article 14 of the European Convention on Human Rights, read in conjunction with Article 6 of the Convention. While regretting the completely unfounded character of the statement in question, the ECHR took the view that the inability of a member of the public to sue a member of parliament for defamatory words spoken in parliament was justified as a proportionate way of promoting the legitimate aim of protecting free debate in parliament in the public interest and maintaining the separation of powers between the legislature and the judiciary. The Court found that an immunity attaching to statements made in the course of parliamentary debates in the legislative chambers and designed to protect the interests of parliament as a whole, as opposed to those of individual parliamentarians, was compatible with the Convention and ruled that there had been no violation of Article 14. In a judgment it handed down a year later, the European Court confirmed this position by taking the view that ironic or derisive letters accompanied by toys personally addressed to a prosecutor could not be construed as falling within the scope of parliamentary functions, even though an investigation conducted by the prosecutor had earlier been the subject of a parliamentary question by the parliamentarian concerned.<sup>41</sup> It therefore found a violation of Article 14 and considered that the question of discrimination did not need to be examined separately.

(c) *Testing parliamentary immunity before national courts*

In a case in France, the Constitutional Council invoked the right to equality to justify a restrictive interpretation of parliamentary privilege. The Council had to rule on the constitutionality of a law stipulating that a report made by a member of parliament at the request of the government was protected by parliamentary immunity and that it could not therefore be challenged in court. In its decision of 7 November 1989 (No 89-262 DC), the Council found that the law was contrary to the Constitution. It ruled that a report written at the request of the government (and not parliament) could not be considered to be part of the exercise of parliamentary functions and that, by totally exonerating a parliamentarian of all responsibility for acts distinct from those that he accomplished in the exercise of his function, the law neglected the constitutional principle of equality in law. (see also under 4.4. (c))

The particular protection of freedom of speech afforded to parliamentarians has been reaffirmed on many occasions by national courts, although in many countries parliaments and the courts have been divided over the competence to

<sup>40</sup> A v. United Kingdom, No. 35373/97, 17 December 2002.

<sup>41</sup> Cordova v. Italy, 30 January 2003, 40877/98.

define and determine the scope of privilege. To cite two examples, in the decision which it gave in *Roman Corp v. Hudson's Nay Oil and Gas Ltd*, the Court of Appeal of Ontario (Canada) stated as follows: "...the respondents (two members of parliament) cannot be called upon to plead to or to defend against, in any ordinary Court of law, the allegations concerning statements they made in the House of Commons. For more than hundred years no such Court has entertained an action based upon such statements, declaring it to be within the absolute privilege of the House itself to deal with them as the House may see fit".<sup>42</sup> A very different and most unusual approach was adopted by the Brussels Appeals Court in a ruling it gave on 28 June 2005 concerning a complaint which a religious group (*Eglise universelle du Royaume de Dieu*) had lodged against the Chamber of Representatives on account of the report of its commission of inquiry on sects, published in 1997.<sup>43</sup> While it affirmed that the privilege of freedom of speech (non-accountability) was applicable to the report of a parliamentary commission of inquiry, the Court held that the State as such could not claim that privilege. In the Court's view, the responsibility of the State could not be excluded, even if the responsibility of the State body giving rise to the offence charged could not be invoked. The Court therefore found the complaint partially founded insofar as the commission of inquiry had infringed its obligation to exercise caution (*devoir de prudence*) when drafting the report, such infringement having tarnished the reputation of the religious group in question. On 1 June 2006, the Cassation Court quashed that decision and confirmed the principle of the privilege of freedom of speech as enshrined in Article 58 of the Belgian Constitution.

(c) *Public broadcasting of debates*

The wide dissemination of parliamentary debates through broadcasting on radio, television and increasingly also on the Internet, which responds to the demands for good governance and transparency of public institutions, has aggravated the problems that may arise with respect to the unrestrained use of freedom of speech in parliament. It may lend weight to the views that parliamentary immunity is an unjustified exception to the principle of equality. Indeed, a very negative image of this institution may be created if parliamentarians, for example, bring lawsuits for defamation while their privilege of freedom of speech shields them from any such prosecution.

As we have seen earlier, some parliaments have attempted to remedy these problems by introducing a right to reply and others, like Thailand, have more or less decided to remove parliamentary debates which are broadcast from the realm of the privilege of freedom of speech. However, the general approach has been to encourage parliamentarians to adopt some measure of self-restraint. In this vein, presiding officers have urged members not to abuse their privilege in the light of the damage that can be done. Thus, the Speaker of the Canadian House of Commons cautioned in a ruling of 30 September 1994: "My colleagues, paramount to our political and parliamentary systems is the principle of freedom of speech, a member's right to stand in this House unhindered to speak his or her mind. However, when the debate in the House centres on sensitive issues, as it often does, I would expect that members would always bear in mind the possible effects of their

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<sup>42</sup> Beauchesne's Rules & Forms op. cit., p 22, para. 76.

<sup>43</sup> Enquête parlementaire chargée d'élaborer une politique en vue de lutter contre les pratiques illégales des sectes et le danger qu'elles représentent pour la société et pour les personnes, particulièrement les mineurs d'âge

statements and hence be prudent in their tone and choice of words".<sup>44</sup> One of the conclusions of the seminar which the IPU organized together with "Article 19- Global Campaign for Freedom of Expression" in May 2005, on "Freedom of speech, parliaments and the promotion of tolerance", was that parliamentarians should show self-restraint and, rather than bring lawsuits, respond publicly to criticism.

## 7. Parliamentary immunity and the general human rights context - Conclusion

There is no doubt that a well-defined system of parliamentary immunities is absolutely necessary for the functioning of a parliament, without which parliaments would degenerate into polite and ineffective debating forums. It is clear that this protection is all the more necessary for parliaments operating in a difficult environment as is the case in transitional societies. But parliaments do not operate in a vacuum and are largely dependent on their political environment and its respect for democratic and human rights principles. It is therefore also clear that parliamentary immunity in itself is not sufficient to create the space of liberty and independence that parliaments require.

In countries with a strong executive dominating the parliament, parliamentary immunity may fail to afford the protection it is meant to provide, and it is easy to see why: in such parliaments, the Presiding Officer and parliamentary authorities- generally members of the majority party and often inclined to support its interests - may use their disciplinary powers to the detriment of the opposition, censor opposition members for statements critical of the government, suspend their mandate and even expel them from parliament. If Rules of Procedure (Standing Orders) are not handled impartially, the opposition as such may end up being greatly hampered in effectively carrying out its mandate. Moreover, government-dominated parliaments may sometimes find it difficult to accept opposing views, and there have been cases where all - apparently legal - possibilities were resorted to in order to oust opposition members from parliament. Among the prominent cases is certainly that of the first ever opposition member in the parliament of Singapore, Mr. Joshua B. Jeyaretnam, who was stripped of his parliamentary mandate in 2001 after the then Prime Minister and Foreign Minister and others won a series of defamation proceedings against him, followed by bankruptcy proceedings.<sup>45</sup> The IPU Committee and many other human rights organizations took the view that in making the allegedly offending statements, Mr. Jeyaretnam was exercising his freedom of speech and that, moreover, the sequence and timing of the defamation and bankruptcy proceedings brought against him suggested a clear intention to target him for the purpose of making him a bankrupt and thereby removing him from parliament.<sup>46</sup>

Moreover, in parliaments with a majority that is obedient to the government, requests for the lifting of inviolability are usually accepted without any resistance, especially if they concern opposition parliamentarians, and the only protection inviolability then affords just covers the time the parliament needs to lift the immunity of the parliamentarian concerned, sometimes just enough to enable the

<sup>44</sup> (Robert Marleau and Camille Montpetit, House of Commons Procedure and Practice, Ottawa, House of Commons, 2000, p. 64).

<sup>45</sup> Members of the parliament of Singapore enjoy only the privilege of freedom of speech; they forfeit their mandate if declared bankrupt.

<sup>46</sup> Resolution adopted by the IPU Governing Council at its 170<sup>th</sup> session (March 2002).

parliamentarian concerned to leave the country to avoid arrest. A good example is the case of the opposition leader in Cambodia, Mr. Sam Rainsy, whose immunity was lifted in February 2005 when he went into exile until his pardoning by the King and return to the country a year later.

Moreover, parliamentary immunity may be of little use if the law enforcement officials are unfamiliar with this institution, fail to respect parliament and its members, especially if they belong to the opposition, and know that they will in any event enjoy impunity for arbitrary actions even if they concern parliamentarians. Examples abound. Suffice to mention the situation that prevailed in Zimbabwe in the context of the 2000 parliamentary and 2002 presidential elections, when scores of opposition parliamentarians were arbitrarily arrested and detained for various periods of time, some of them being beaten up and even tortured.<sup>47</sup>

Likewise, courts may not always be aware of the privileges attached to the parliamentary office - even though in most countries the privilege of freedom of speech is part of the general and public law and must be judicially noticed. They may therefore fail to examine whether or not parliamentary immunity was duly lifted and they are competent to pursue a case. Moreover, in a country with a weak judiciary and deficient rule of law, parliamentarians cannot expect more protection from tribunals than can members of the public.

The above shows that the general human rights context and the respect for human rights prevailing in a country has a major impact on the ability of parliamentarians, and particularly opposition members, to carry out their mandate, notwithstanding their parliamentary immunity which in such situations may become quite inoperative. One must at the same time note, however, that parliament is a guardian of human rights and thus largely responsible for adopting the laws required to protect and promote human rights and for ensuring that they are implemented and create an environment conducive to human rights. We are thus faced with a vicious circle: a weak parliament (weak also because of the failure of immunity to operate) may not be able or even willing to carry out an appropriate oversight function and thus ensure respect for human rights; and this in turn prevents it from acquiring a stronger position. In such a situation, the prospect for a parliament to contribute meaningfully to conflict prevention, conflict settlement and recovery is dim indeed. Any measures designed to improve such a state of affairs must include efforts not only to strengthen the opposition but also to convince members of the majority to carry out their oversight function effectively. A strong and well understood immunities regime is necessary to this end.

**Geneva, September 2006**

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<sup>47</sup> Details may be found in the report on the IPU mission to Zimbabwe, March/April 2004.