

E C P R D

BRUSSELS 8-9 NOVEMBER 2007

**PARLIAMENT
&
JUDICIARY**

N. IGOT, A. REZSÖHÁZY and M. VAN DER HULST (eds.)

S e m i n a r

organised by the legal departments
of the Belgian House of Representatives
and the Belgian Senate
within the framework and with the collaboration
of the European Centre for Parliamentary
Research and Documentation



House of Representatives

Senate



E C P R D SEMINAR

Brussels

8-9 November 2007

PARLIAMENT

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JUDICIARY

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Published by the legal departments of the Belgian House of Representatives and the Belgian Senate

Layout and printing: Central Printer of the Belgian House of Representatives

Legal deposit: D/2008/4686/4

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PREFACE

Marc Van der Hulst

*ECPRD Correspondent,
Director of the Legal Department of the Belgian House of
Representatives
and member of the Constitutional and Administrative Law Division of
the Vrije Universiteit Brussel (VUB)*

André Rezsöházy

*ECPRD Correspondent
and Principal Adviser at the Legal Department of the Belgian Senate*

Parliaments have long considered that they were protected from any form of scrutiny by the Judiciary, and that they were accountable to no-one except the electors who gave them their legitimacy.

This view, which prevailed until recently, derived from the idea that the Houses of Parliament are sovereign, and therefore, untouchable. The great specialist in parliamentary law, Eugène Pierre, reflects popular 19th century opinion in his *Traité de droit politique* (Treatise on political law): “*The House is not bound either by the text of laws, nor by decisions by universal suffrage. It is sovereign, with absolute, unreserved sovereignty.*” According to this conception, the Houses of Parliament are sovereign, because they have been elected by the people, they hold a monopoly of representativeness, they are the custodians of democratic legitimacy. The Houses of Parliament are sovereign, because they enjoy full powers (the “residue of sovereignty”, to use an expression from the Belgian Constitutional Court), and their role is to draw up the rules which apply to the other institutions and to all citizens. According to the stock phrase, the Parliament can do anything except change a man into a woman.

The Parliament, conceived as the supreme authority of the nation, was a sort of citadel which no jurisdiction could hope to besiege: “*The Judiciary would impinge on the sovereignty, on the very mission of the Parliament if it had pretensions to judge (...) the work of the elected parliamentary assemblies, the seat of national sovereignty*” (Senate Hansard, 26 June 1975, 2671).

Have the constitutions themselves not often given the Houses of Parliament protection from any action by the other powers, in particular the Judiciary, whether for the drafting and implementation of their Rules of Procedure, the adoption of their budget or the verification of credentials of their members? The same is true of freedom of speech, which protects the institution as well as its members.

* * *

Over the last forty years or so, a change has been observed in Belgium in the relationships between the Judiciary and Parliament. The dogma of absolute inviolability of the parliamentary assemblies has been breached. The parliamentary assemblies are now accountable not just to the electors but also to the courts.

A first breach in the dogma of the inviolability of the assemblies was opened up by the *Le Ski* judgement of 27 May 1971, in which the Court of Cassation upheld the supremacy of the norm of self-executing international law.

In 1980, Article 142 of the Constitution (former Article 107^{ter}) established a Court of Arbitration in Belgium, nowadays the Constitutional Court, charged with hearing actions for annulment of laws. It would hand down its first judgement on 5 April 1985.

It is interesting to note that the Constitutional Court has refused so far to interfere in the legislative process. “*Grievances not concerning the content of the provisions challenged but the process by which they were adopted are, in principle, outside the jurisdiction of the Court. It is true that the Court may verify whether a provision challenged must be adopted by a special majority (...) but in principle, it does not have jurisdiction to rule on the internal workings of a legislative assembly*” (Court of Arbitration, 25 March 2003, no. 35/2003).

As an extension of actions for annulment of laws, the principle of the responsibility of the State in its legislative function, “the last bastion of the responsibility of the State”, has gradually become established. In the 19th century, it could still be claimed that it “*would be inconceivable for a court, whose prime duty is to observe the law, to proclaim that the law constitutes a harmful act by the legislator, for which the legislator should be held liable*” (Cass., 27 June 1845). The principle of the State’s liability in its legislative function was finally recognised, first of all by the Court of Justice of the European Communities in its famous *Francovich* and *Brasserie du Pêcheur* judgements, then by the trial judges in Belgium. This evolution reached its epilogue with the judgement by the Court of Cassation in *Ferrara* on 28 September 2006, ruling that a harmful fault committed in the exercise of the legislative function makes the State liable.

In a judgement handed down a little earlier, on 1 June 2006, the Court of Cassation had nevertheless refused to hold the Belgian State liable for assertions contained in the report by a parliamentary committee of inquiry. In this way, the Judiciary declined to interfere in the “nucleus” of parliamentary activity: “*the Constitution does not allow the courts to oversee, either directly or indirectly, the way in which the Parliament exercises its right of inquiry, or reaches its conclusions,*

nor, consequently, the way in which the Houses of Parliament express their opinion” (Cass., 1 June 2006).

A second breach was opened in the dogma of inviolability of the assemblies in Belgium by the Constitutional Court, in its judgement no. 31/96 of 15 May 1996. The Council of State, the highest administrative Court in Belgium, had till then always declared that it had no jurisdiction to hear annulment applications against the administrative acts by the Houses of Parliament. The Constitutional Court, declaring that the absence of any possibility to apply for the annulment of such acts was contrary to the constitutional principles of equality and non-discrimination, opened up a new avenue for judicial review of Parliament’s acts: the laws of 25 May 1999 and of 15 May 2007, adopted in the wake of the Court’s judgement, extended the jurisdiction of the Supreme Administrative Court to the acts and Rules of Procedure of the legislative assemblies or their organs with regard to public procurement and personnel.

Meanwhile, the Court of Justice of the European Communities, in its judgement no. C-323/96 of 19 September 1998, had found against the Belgian State for non-respect by a legislative assembly of European directives on public procurement. While, in the internal legal system, a legislative assembly may claim immunity, in the European legal system, that is not the case. The European Court only recognises States, without regard for whether a violation of European law is done by an administration, a court or a legislative assembly.

In its subsequent case law, the Constitutional Court outlined the judicial review of acts of an administrative nature by the assemblies: after having pointed out that the independence of the Parliament is one of the basic principles of the democratic structure of the State, the

Court accepted that the assemblies' acts connected with their political or legislative activity could be immune from the judicial review of the Council of State (Court of Arbitration, 26 May 2004, no. 93/2004). This is the case, *inter alia*, of decisions taken by the Electoral Expenditure Review Committee, as well as nominations and appointments to high State offices made by the assemblies. Another area which, according to consistent case law, totally escapes judicial review is that of the verification of credentials.

Finally, concerning the decisions taken by the assemblies with regard to MPs or political groups, the civil courts have not hesitated to sanction them when subjective rights were at stake. MPs "*enjoy the protection of their subjective rights by the law courts. This principle applies both for rights deriving from the law in the broad sense and for rights which have a regulatory basis*" (Civ. Brussels, 21 April 1997).

* * *

The evolution of case law in Belgium, of which we mentioned a few key moments, and which is probably not yet complete, reflects a strong tendency in our society, a tendency towards referring matters of public life to the court. Members of the public (who may also sometimes be MPs) no longer have the slightest hesitation in asserting their rights, demanding reparation, and demanding the respect of the rule of law. Citizens have probably become more assertive than previously, more aware of their rights, and more determined to have them upheld.

The idea that the State itself, and especially the legislative assemblies, could be above the law, offends modern sensibilities. The immunities and privileges that the parliamentary assemblies enjoy, whatever

their justification, are often considered by public opinion as being unacceptable privileges.

The dogma of the absolute immunity of the legislative assemblies has now been abandoned. In many fields, it is no longer justified. Trying to reconcile principles as conflicting as the sovereignty of the Parliament and the rule of law is like trying to combine something with its opposite. *“Organs which are described as holding sovereignty risk misunderstanding the scope of this assertion. (...) The political institutions are expected to act on behalf of the nation, and the people who run them are tempted to take for themselves that sovereignty which is claimed to be held by the nation”* (Michel Leroy, *Requiem pour la souveraineté, anachronisme pernicieux*). Recourse to the concept of sovereignty often conceals a violation of substantive law.

Case law has endeavoured to find a balance between two often contradictory requirements: the protection of subjective rights, without which there is no rule of law, and the protection of the prerogatives of assemblies, without which democracy is in danger.

In searching for this difficult compromise, case law moves forward a step at a time. It had barely opened up a new avenue in judicial review of Parliament's acts when it went back to define the limits of that review: the Constitutional Court was assigned jurisdiction for cases concerning the constitutionality of laws, but it refuses to censure the process through which laws are enacted. The same Court opened the way for judicial review of the administrative acts by the Houses of Parliament, but closed access to review of acts linked to their political activity. The Court of Cassation acknowledges the responsibility of the State in its legislative function, but it upholds its immunity in the exercise of political oversight by the Parliament ...

With regard to the “non-legislative” acts by the assemblies, *i.e.* acts that assemblies carry out alone, and which relate to the exercise of parliamentary functions or the management of the Parliament, we are starting to see, via a case law that is gradually feeling its way, a demarcation line between two types of acts: those which are part of the “nucleus of the parliamentary activity”, “which are linked to the political and legislative activity” of the Houses of Parliament, and which cannot be censured without challenging the independence of the Parliament, on the one hand, and those which are not part of that “nucleus”, which are linked to the administrative activity of the Houses of Parliament, and which can be censured without affecting the exercise of the parliamentary functions, on the other hand.

How far can judicial review of Parliament’s acts go, without upsetting the balance between the three powers, and without affecting the essential autonomy of the Parliament? This is the question underlying any new change in case law, and it is important enough in our opinion to justify a comparative study and the organisation of a seminar.

* * *

So we took the initiative of sending our colleagues in the other Parliaments of Europe a questionnaire about the scrutiny of Parliament’s acts, and then of organising a seminar at the Belgian Federal Parliament. Both have been organised in the context of the European Centre for Parliamentary Research and Documentation (ECPRD).

The questionnaire covered a very broad range of questions. Our intention was to cover the issue of judicial review of Parliament’s acts as comprehensively as possible, and to select, on the basis of the responses received, topics which would be raised during the seminar. Thirty-two Parliaments replied.

A series of preliminary questions were aimed at outlining the general context in which the responses to the actual questionnaire were situated. These preliminary questions concerned the relationship between the Parliament and the Judiciary (scope of the principle of separation of powers and of the autonomy of legislative assemblies), the various aspects of representation of the Parliament before the courts (legal personality of the Houses of Parliament, decision to act at law, representation in court cases, functional interests) and certain procedural matters (seizures and searches in the Parliament buildings, access to internal documents of the Parliament, forced execution).

The issue of judicial review of Parliament's acts was then dealt with in various questionnaires, making a distinction according to the nature of the act. Therefore, we defined beforehand a typology of the various categories of acts by the Parliament:

- acts of a constitutional nature;
- acts of a legislative nature;
- acts pertaining to political oversight;
- acts of a (quasi-)jurisdictional nature;
- rules of procedure of the assembly;
- acts regarding individual MPs and political groups;
- acts of an administrative nature regarding the Parliament's staff;
- acts of an administrative nature regarding third persons;
- other acts.

For each category of acts, we asked the same sequence of questions. Essentially, it concerned the existence of judicial review, the type of court having competence to carry out the review, the time when the review was carried out (prior or subsequent review) and the scope of the review (review as to the substance of the act or review as to compliance with forms and procedures), the reference norms and the

type of decisions that courts may take (suspension or annulment of the act, granting of compensation, forced execution, etc.).

Our objective was to “guide” the responses as much as possible, to make them easier to write, and ensure the greatest possible comparability between them.

We were well aware of the limitations of this kind of exercise. Indeed, even if we tried to define the various categories of acts as tightly as possible, they were not completely watertight. Certain acts are not simple to classify, and certain concepts may cover different realities.

Moreover, the writing of a questionnaire always reflects the viewpoint of its author: he tackles the study of foreign Parliaments with the categories and concepts of his own institutional system. This kind of bias is inherent in any process of comparative law.

* * *

The scale of the subject justified making choices for the seminar. We selected four themes on the basis of the responses received.

We deliberately excluded the issue of annulment applications (and the associated question of the State’s liability in its legislative function), a question which would justify a seminar all on its own. In countries like Belgium, where the legislative power is exercised jointly by the assemblies and the government (the King), it is the latter, and not the assemblies, who is primarily concerned by applications to annul laws.

We preferred to move into a new and largely unexplored field, a subject area that is changing fast, that of acts which we described as “non-legislative”, *i.e.* acts which assemblies carry out alone, and which are part of the exercise of parliamentary functions or the management of the Parliament.

Thirty-six assemblies, sixty people in all, took part in the seminar which was held at the Belgian Federal Parliament on 8 and 9 November 2007.

A general introduction to the issues dealt with in the seminar was given by P. Caboor (House of Representatives, Belgium) and G. Van der biesen (Senate, Belgium).

The first theme concerned **search and seizure in the precincts of the Parliament**. The synthesis of the responses to the questionnaire was presented by P. Caboor (House of Representatives, Belgium). Four speakers addressed the seminar: Chr. Ringvard (*Folketing*, Denmark), M. Cerase (*Camera dei Deputati*, Italy), Prof. M. Verdussen (Catholic University of Louvain, Belgium) and Prof. S. Navot (*Public Law Division of the School of Law*, Israel).

The second theme related to the **representation at law of parliamentary assemblies**. The synthesis of the responses to the questionnaire was presented by M. Wouters (Senate, Belgium). Five speakers addressed the seminar: C. Genta (European Parliament), O. Gay (*House of Commons*, United Kingdom), G. Kiesenhofer (*Parlament*, Austria), K. Muylle (Constitutional Court, Belgium) and Prof. S. Navot (*Public Law Division of the School of Law*, Israel).

The third theme concerned **judicial review of acts accomplished by Parliament in the exercise of key parliamentary functions**. This covered all acts contributing to the exercise of classic parliamentary functions, acts which normally come under the autonomy of the Parliament. This refers to acts involved in the process of making laws, acts relating to the function of political oversight, the Rules of Procedure of the assembly, and nominations and appointments to high State offices. The synthesis of the responses to the questionnaire

was proposed by A. Goris (House of Representatives, Belgium). Five speakers addressed the seminar: O. Gay (*House of Commons*, United Kingdom), P. Chybalski (*Sejm*, Poland), G. Sierk (*Bundestag*, Germany), Prof. H. Vuye (*University of Hasselt*, Belgium) and Prof. S. Navot (*Public Law Division of the School of Law*, Israel).

The fourth theme related to **judicial review of acts accomplished by the Parliament outside the scope of key parliamentary functions**. This refers to acts of an administrative nature, concerning the Parliament's staff, acts relating to public procurement, acts related to the status of the MPs and political groups, and acts of a quasi-judicial nature, such as verification of credentials, scrutiny of electoral expenditure, disciplinary measures against MPs (or even removal of MPs) as well as acts relating to the procedure for lifting parliamentary immunity. The synthesis of the responses to the questionnaire was presented by M. Veys (Senate, Belgium). Five speakers addressed the seminar: M. Cerase (*Camera dei Deputati*, Italy), G. Kiesenhofer (*Parlament*, Austria), J. Milaj (*Kuvendi*, Albania), K. Muylle (Constitutional Court, Belgium) and Prof. S. Navot (*Public Law Division of the School of Law*, Israel).

All the speeches the text of which has been reproduced in this document demonstrate great diversity in parliamentary traditions. There is no single parliamentary model. Each Parliament is a construction *sui generis*, a reflection of the socio-historic conditions in which it was shaped. It must be studied in its political and constitutional context.

* * *

We dare to hope that this book, which would never have seen the light of day without the devotion and enthusiasm of so many colleagues, will be more than the synthesis of a seminar (which is, incidentally,

extremely interesting), more than a souvenir which brings to mind the fruitful exchanges of views and very pleasant meetings.

We hope that it will not be a conclusion, but the start of a process of reflection about the balance between the State powers, in general, and on the relationship between the Parliament and the Judiciary, in particular.

May its final page be only a temporary end, a call for further considerations and new developments.

OPENING ADDRESS

Robert Myttenaere

Secretary-General of the Belgian House of Representatives

Mr. President,

Ladies and Gentlemen,

On behalf of my colleague Luc Blondeel, Secretary General of the Senate, and speaking for myself, it is a real pleasure to welcome you here today.

During my career, I had the opportunity for a number of years to be a correspondent of the European Centre for Parliamentary Research and Documentation (ECPRD), which naturally adds an aspect of pleasure and emotion to the fact of being able to speak these few words of welcome to you today.

I would like to raise a few ideas on the subject of the seminar. My colleague from the Senate will join you at the end of your work. He will give you his impressions on the subject and the theme that you have been working on.

On 30 and 31 May 2002, the Federal Parliament organised a colloquium, together with the ECPRD, on the “digitisation of parliamentary documentation and archives”. This time, the subject to be discussed is a less “nuts-and-bolts” theme, *i.e.*: “Relations between the Parliament and the Judiciary”.

Separation of powers is one of the cornerstones of our constitutional State, but – in accordance with Belgian legal tradition – the autonomy of each of the State powers is relative, since for the State to function

properly, close cooperation between the State powers is a prerequisite. So it would be more correct to refer to “interdependence” than “separation of powers”.

The relationship between the legislative and executive powers is highly visible in the routine work of a parliamentary assembly during the debates about legislation, in the scrutiny of the budget, and in the exercise of the right of parliamentary oversight. The Rules of procedure of every parliamentary assembly ensure that these relations run smoothly.

Relations between the Parliament and the Judiciary are of a completely different nature, are less visible, and they are difficult to govern, if at all, by a code of conduct similar to the Rules of procedure of a parliamentary assembly. Where the paths of both powers cross, sometimes this is in a constructive atmosphere, but just as often the atmosphere is tense.

By means of a few practical examples, I shall give you a brief illustration of relations between these two State powers:

Sometimes, the courts enter the preserve of the legislator. Since 1 October 1984, the Belgian Constitutional Court has had the final word on whether legislation is constitutional. Through its judgements, the Court encourages the legislator to produce good legislation, and provides citizens with the means to sanction inappropriate legislation. If one were to look at this power with a suspicious mind, it might be considered as a licence for “government by the judges”, where compromises that took such a lot of hard work to achieve are jeopardised or crippled. However, that would be a one-sided interpretation. If the Court rules a petition unfounded, this judgement strengthens the position of the legislator. If the judgement leads to the nullity of the contested norm,

the Parliament should not adopt a defensive position. The Parliament can equally well devote greater attention to this outcome and follow up the judgement by the Constitutional Court in a constructive manner. In recent years, the House of Representatives has worked on examining, in consultation with the Government, the extent to which judgements by the Constitutional Court require a legislative initiative.

The Court can also be confronted with an over-eager legislator and express its annoyance with a surfeit of legislation that makes efficient dispensation of justice impossible, increases the number of conflicts between laws and causes a longer judicial backlog.

The Court may reproach the legislator for negligence or alleged negligence. In this regard, on 4 July 2002, the Brussels Court of Appeal ordered the Belgian State to compensate someone who had sustained prejudice, in its opinion, due to the abnormal duration of the lawsuit initiated by that person, which was attributable to an inadequate number of magistrates. The judgement by the Court of Cassation of 28 August 2006 dismissed an appeal by the Belgian State. Since then, every six months, the government sends the House a summary of court cases in which the courts have found against the Belgian State as the legislator.

The Parliament may also impinge on the preserve of the courts. The activities of parliamentary committees of inquiry may sometimes interfere with rights such as “the protection of the privacy of third parties”, “professional confidentiality”, or “protection of witnesses”. In the course of the activities of a parliamentary committee of inquiry, leaks may occur which soon find their way into the media. Despite the fact that under the law on parliamentary inquiry, members of the House are bound to confidentiality in respect of information obtained

in committee meetings that are not open to the public, leaks can never be ruled out in a parliamentary environment.

Sometimes, the courts make remarks about constitutional principles such as “parliamentary privilege” (freedom of speech). Such judgements risk making the normal performance of core parliamentary tasks more difficult. With reference to the inclusion of a list of sectarian organisations in the report by the parliamentary committee of inquiry investigating sects, an association took legal action with a view to having the Belgian State held liable because of the doing of the committee of inquiry. Whereas the court in the initial case ruled the petition inadmissible, the Court of Appeal accepted the liability claim and the Court even ordered the Belgian State to publish the judgement on pain of a fine, and the State was ordered to pay compensation. The theoretical scope and the application of parliamentary privilege, as laid down in Article 58 of the Constitution, were of fundamental importance for the House. The President of the House appealed the judgement by the Brussels Appeal Court. On 1 June 2006, the Court of Cassation quashed the decision by the Brussels Court of Appeal, and hence upheld the principle of parliamentary privilege.

The juridification of our society has also led to disputes where attempts are made to hold the Parliament liable for implementing decisions of “day-to-day management”. Until recently, the legislator had not provided any legal remedy for this category of dispute. Recently, it became possible to challenge decisions in relation to the personnel of the legislative houses and on public procurement before the Supreme Administrative Court (Council of State). This also applies to regulatory acts by the higher authorities of the assemblies.

All these practical cases illustrate that the paths of the Parliament and the courts cross frequently, and that there are answers to the question

of how both State powers can deal with each other with respect for their mutual powers and in a non-conflictual and appropriate manner.

Ladies and Gentlemen,

The theme discussed over these two days of the seminar constitutes a fascinating area of research. A meeting between experts from the Parliaments of various countries, each characterised by a specific vision and culture, always leads to interesting and mutually beneficial meetings. So I wish you every success in your endeavours, and would like to congratulate in particular the legal services of the House and the Senate and their directors, as well as the excellent head of the ECPRD, Mr. Wojciech Sawicki, for having this very good idea of bringing you all together here.

I am certain that the proceedings of this seminar will be extremely interesting and will provide food for thought for both those in charge of the judicial system and those involved in Parliaments.

Thank you.

GENERAL INTRODUCTION

*The sensitive relationship between
Parliament and Judiciary*

Pieter Dirck G. Caboor

*Lawyer at the Legal Department of the Belgian House of Representatives,
freelance lecturer at the Hogeschool-Universiteit Brussel (University Language Centre)
and teaching assistant at the Vrije Universiteit Brussel (VUB),
Constitutional and Administrative Law Division*

Gert Van der biesen

*ECPRD Deputy Correspondent
and Lawyer at the Legal Department of the Belgian Senate*

It is not by chance that the legal departments of the Belgian House of Representatives and Senate decided to hold a seminar on the relationship between the Parliament and the Judiciary. The choice of the sub-title of this general introduction (“The *sensitive* relationship between the Parliament and the Judiciary”) was also carefully considered.¹

Belgian legal doctrine on the liability of the public authorities has changed considerably over the past century.² While at the beginning of the last century, it was still being taught that the public authorities could not be held liable for their acts³, nowadays it is widely accepted

¹ See also: “Preface” by M. VAN DER HULST and A. RESZÖHAZY (p. 11 - 22); P.D.G. CABOOR and M. VAN DER HULST, “De delicate relatie tussen parlement en gerecht: een rechtsvergelijkend perspectief”, *C.D.P.K.* 2008, *to be published soon*.

² Many authors have considered the question of the liability of the State. For an overview of the legal doctrine concerning the liability of the legislator, see: A. ALLEN, “La responsabilité des pouvoirs publics pour les fautes du législateur”, *J.T.* 2008, 97, footnote no. 3; A. VAN OEVELEN, “De aansprakelijkheid van de Staat, de Gewesten en de Gemeenschappen voor onrechtmatige wetgeving”, *T.v.W.* 2006, 400-416.

³ X., “Responsabilité civile”, in E. PICARD, N. D’HOFFSCHMIDT and J. DE LE COURT (ed.), *Pandectes belges*, Brussels, Larcier, 1907, no. 61-78. As for the

that the courts may rule on the acts by the Executive⁴ and, in certain circumstances, on those of the Judiciary⁵. Except for certain acts under European law⁶, only the acts of the Legislature escape ruling.

The unliability of the Legislature has been – and remains, especially in a parliamentary context – justified by the separation of powers, by parliamentary autonomy and by parliamentary privilege. Does a parliamentary assembly not decide how it deals with its own business? This prerogative is enshrined in the Belgian Constitution.⁷ And do MPs not have absolute freedom of speech in the exercise of their duties? This prerogative is also enshrined in the Belgian Constitution.⁸ So surely it is obvious that a court cannot assess the acts of the Legislature – the supreme power of the State – in the light of the precautionary

Legislature, the following may be quoted as an example: Cass. 27 June 1845, *Pas.* 1845, I, 392.

⁴ The turning point in the case law of the Belgian Court of Cassation is the “La Flandria” judgement: Cass. 5 November 1920, *Pas.* 1920, I, 193, conclusions, *J.L.M.B.* 2000, 23, note.

⁵ The turning point in the case law of the Belgian Court of Cassation consists of the two “Anca” judgements: Cass. 19 December 1991, <<http://jure.juridat.just.fgov.be>>; Cass. 8 December 1994, <<http://jure.juridat.just.fgov.be>>.

⁶ See, among others: C.J.E.C. 19 November 1991, judgement “Francovich and Bonifaci and others”, C-6/90 and C-9/90, *Rec. C.J.C.E.* 1991, I-05357, <<http://eur-lex.europa.eu>>; C.J.E.C. 5 March 1996, judgement “Brasserie du Pêcheur and Factortame Ltd and others”, C-46/93 and C-48/93, *Rec. C.J.C.E.* 1996, I-01029, <<http://eur-lex.europa.eu>>; A. VAN OEVELEN, “De aansprakelijkheid van de Staat, de Gewesten en de Gemeenschappen voor onrechtmatige wetgeving”, *T.v.W.* 2006, 400-416.

⁷ Article 60 of the Belgian Constitution: “*Each house determines, in its rules of procedure, the way in which it exercises its duties.*”

⁸ Article 58 of the Belgian Constitution: “*No member of either House can be prosecuted or be the subject of any investigation with regard to opinions expressed and votes cast by him in the exercise of his duties.*” See also: LEGAL DEPARTMENT OF THE BELGIAN HOUSE OF REPRESENTATIVES, *Brief Parliamentary Law, The Parliamentary Privilege (Freedom of speech)*, Brussels, October 2007, 28 p., <www.lachambre.be>.

principle, and the court is even less in a position to designate the said acts by Parliament as the cause of a damage sustained by a citizen, liable to give rise to compensation?

Four recent judicial decisions in Belgium have shaken that trust in the judicial immunity of the Legislature in general, and the Parliament in particular.⁹

A first case concerns the report by a House of Representatives parliamentary committee of inquiry which, a decade ago, considered the phenomenon of sects.¹⁰ The report by this committee listed, in particular, acts imputed to several organisations. Although it had not always been possible to verify this information, it had been transcribed almost indiscriminately. One of the organisations accused then took legal action. In the summer of 2005¹¹, the Court of Appeal considered that the report by the committee of inquiry had not been written rigorously, and ordered that part of its judgement should be published. The Court of Appeal deemed that the arguments of separation of powers and parliamentary privilege were not relevant in this case, since the Court was not criticising the Parliament or the Legislature, but the Belgian State (albeit represented by the House of Representatives).¹²

⁹ Belgian legal circles attached a great deal of importance to these court decisions. They quickly published and commented on them (see below).

¹⁰ This is the committee of inquiry which aimed to draw up a policy with a view to combating illegal practices by sects and the danger that they represent for society and for persons, particularly for minors. For the report, see: *Doc. parl.* House of Representatives 1995-1996, no. 313/7 and no. 313/8.

¹¹ Brussels 28 June 2005, *C.D.P.K.* 2005, 655, note, *J.L.M.B.* 2005, 1576, notes, *J.T.* 2005, 594, note, *T.B.B.R.* 2005, 556, note.

¹² For the comments in the legal doctrine, see among others (by alphabetical order): P. HERBOTS, "Parlement niet aansprakelijk voor 'onzorgvuldig' sektenrapport", *De Juristenkrant* 21 June 2006, 1 and 9; K. MUYLLE, "Luidt artikel 1382 B.W. de doodsklok over artikel 58 G.W.?" (note under Brussels 28 June 2005), *C.D.P.K.* 2005, 666-675; K. MUYLLE and J. VAN NIEUWENHOVE,

In June 2006¹³, the Belgian Court of Cassation (Belgian supreme court) relied on the parliamentary privilege argument to quash this judgement. The Court of Cassation considered that this privilege applied to “all parliamentary work” and that it would be against the Constitution for citizens to have the right to claim compensation from the State on grounds that statements were made that lacked rigour in the context of the work of Parliament.¹⁴

“Rechter stelt staat aansprakelijk wegens fout in verslaggeving van een parlementaire onderzoekscommissie”, *T.B.P.* 2006, 24-25; M.-F. RIGAUX, “La responsabilité de l’État pour une faute commise par une commission d’enquête parlementaire”, *J.T.* 2005, 598-602; M. UYTTENDAELE, “Réflexions à froid sur un petit coup d’État jurisprudentiel” (note under Brussels 28 June 2005), *J.L.M.B.* 2005, 1590-1600; H. VUYE, “Overheidsaansprakelijkheid over het doen en laten van parlementaire onderzoekscommissies... waarom niet en waarom wel?” (note under Brussels 28 June 2005), *T.B.B.R.* 2005, 503-514; J. WILDEMEERSCH, “Quand le pouvoir judiciaire se mêle du pouvoir législatif...” (note under Brussels 28 June 2005), *J.L.M.B.* 2005, 1600-1611.

¹³ Cass. 1st June 2006, <<http://jure.juridat.just.fgov.be>>. See also: *J.T.* 2006, 461, note, *J.L.M.B.* 2006, 1524, notes, *NjW* 2006, 559, note, *C.D.P.K.* 2006, 905, note, *R.W.* 2006-2007, 213, conclusions and note, *T.B.P.* 2006, 435, note.

¹⁴ For the comments in the legal doctrine, see among others (in alphabetical order): A. ALEN, “La responsabilité des pouvoirs publics pour les fautes du législateur”, *J.T.* 2008, 97-101; I. BOONE, “Geen aansprakelijkheid van de Staat voor een beweerd onzorgvuldige meningsuiting in het raam van een parlementair onderzoek” (note under Cass. 1st June 2006), *NjW* 2006, 561-562; E. MAES, “Geen rechterlijke controle, dus geen fout: artikel 58 G.W. belet overheidsaansprakelijkheid voor ‘foutief’ verslag van parlementaire onderzoekscommissie” (note under Cass. 1st June 2006), *C.D.P.K.* 2006, 908-916; K. MUYLLE, “Overheidsaansprakelijkheid voor een fout van het Parlement na het ‘Sektarrest’ van het Hof van Cassatie” (note under Cass. 1st June 2006), *T.B.P.* 2006, 438-441; M.-F. RIGAUX, “Éloge de la modestie publique. Réflexions en marge des arrêts de la Cour de cassation du 1^{er} juin 2006 and du 28 septembre 2006 concernant la responsabilité civile de l’État pour les fautes commises par le pouvoir législatif”, in S. LUST and M. NIHOUL (ed.), *Le droit public au tournant du millénaire. Édition anniversaire 10 ans C.D.P.K.*, Bruges, Uitgeverij Vanden Broele, 2007 195-225; Y. THIELS and I. WOUTERS, “La responsabilité des pouvoirs publics. Le pouvoir législatif mis en cause: révolution ou simple évolution ?” (note under Cass. 1st June 2006), *J.L.M.B.* 2006, 1526-1548; M. UYTTENDAELE, “Du réflexe salutaire à l’ivresse du pouvoir – Premières réflexions sur les arrêts de la Cour de cassation Église universelle du Royaume de Dieu and F.J.” (note under Cass. 28 September 2006),

What a fine parliamentary summer in 2006! The discussion was closed, once and for all, by the highest jurisdiction: long live parliamentary autonomy! But all great stories have an ending. In September 2006¹⁵, the same Court of Cassation ruled in another case: a case concerning the backlog of legal cases in the Brussels judicial district and, in particular, a case which had already lasted over twenty years, particularly because it was often necessary to wait several years to obtain a hearing in the court of first instance or the appeal court. So there was a violation of the right enjoyed by any person to have a fair trial within a reasonable period, and therefore of Article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms. The Court of Cassation upheld the judgement of the Court of Appeal, which found against the Legislature for not having taken all the necessary legal measures to catch up the backlog of cases in the Brussels legal district. However, the decision to adopt or not adopt a law seems to constitute one of Parliament's acts *par excellence*, about which the Court had declared, a few months earlier, that parliamentary privilege applied.¹⁶

J.L.M.B. 2006, 1554-1564; S. VAN DROOGHENBROECK, "Observations" (note under Cass. 1st June 2006), *J.T.* 2006, 462-463; A. VAN OEVELEN, "De aansprakelijkheid van de Staat, de Gewesten en de Gemeenschappen voor onrechtmatige wetgeving", *T.v.W.* 2006, 400-416; A. VAN OEVELEN, "De aansprakelijkheid van de Staat voor fouten van het Parlement: wel in de uitoefening van de wetgevende activiteit, maar niet voor de werkzaamheden van een parlementaire onderzoekscommissie" (note under Cass. 1st June 2006), *R.W.* 2006-2007, 222-227; J. WILDERMEERSCH, "L'arrêt de la Cour de cassation du 1^{er} juin 2006 versus l'arrêt du 28 septembre 2006: le loup était déjà dans la bergerie" (note under Cass. 28 September 2006), *J.L.M.B.* 2006, 1550-1554; A. WIRTGEN, "Recente ontwikkelingen inzake overheidsaansprakelijkheid", in *Actualia Publiekrecht. Rechtsbescherming*, 1, Bruges, die Keure, 2008.

¹⁵ Cass. 28 September 2006, <<http://jure.juridat.just.fgov.be>>. See also: *J.T.* 2006, 594, conclusions and note, *J.L.M.B.* 2006, 1548, notes, *NjW* 2007, 319, note, *R.A.B.G.* 2007, 320, note, *R.C.J.B.* 2007, 353, note, *R.G.A.R.* 2007, 14.242, note, *Rev. not. b.* 2006, 648, note, *R.W.* 2006-2007, 27, note, *T.B.P.* 2007, 546, note.

¹⁶ For the comments in the legal doctrine, see among others (in alphabetical order): A. ALEN, "La responsabilité des pouvoirs publics pour les fautes du

Besides these two judgements by the Court of Cassation, there was also, at the end of 2005 – beginning of 2006, an urgency order by the President of the Court of First Instance in Bruges.¹⁷ A complaint had been submitted to him, following the award of a property belonging to the Belgian State to a potential buyer, while another potential buyer felt discriminated against, and criticised irregularities in the procedure.

législateur”, *J.T.* 2008, 97-101; C. BEVERNAGE, “Gerechtelijke achterstand”, *De Juristenkrant* 8 November 2006, 4; I. BOONE, “Aansprakelijkheid van de staat voor fouten begaan in de wetgevende functie” (note under Cass. 28 September 2006), *NjW* 2007, 320; R. ERGEC, “Quelques doutes sur la soumission du législateur au droit commun de la responsabilité civile”, *J.T.* 2007, 440-441; E. MAES, “Wetgever aansprakelijk voor gerechtelijke achterstand in Brussel”, *De Juristenkrant* 11 October 2006, 1 and 5; E. MAES, “Het Hof van Cassatie over de fout van overheidsorganen: streng, strenger, strengst...”, *T.B.P.* 2007, 547-553; P. MOREAU, “L’arriéré judiciaire à la croisée des pouvoirs – Réflexions à la suite de l’arrêt de la Cour de cassation du 28 September 2006”, *R.G.A.R.* 2007, 14.241; M.-F. RIGAUX, “Éloge de la modestie publique. Réflexions en marge des arrêts de la Cour de cassation du 1^{er} juin 2006 et du 28 septembre 2006 concernant la responsabilité civile de l’État pour les fautes commises par le pouvoir législatif”, in S. LUST and M. NIHOUL (ed.), *Le droit public au tournant du millénaire. Édition anniversaire 10 ans C.D.P.K.*, Bruges, Uitgeverij Vanden Broele, 2007, 195-225; M. UYTTENDAELE, “Du réflexe salutaire à l’ivresse du pouvoir – Premières réflexions sur les arrêts de la Cour de cassation Église universelle du Royaume de Dieu and F.J.” (note under 28 September 2006), *J.L.M.B.* 2006, 1554-1564; J. VAN COMPENOLLE and M. VERDUSSEN, “La responsabilité du législateur dans l’arriéré judiciaire”, *J.T.* 2007, 433-439; S. VAN DROOGHENBROECK, “Arriéré judiciaire and responsabilité de l’État législateur: dissiper les malentendus et les faux espoirs”, *R.C.J.B.* 2007, 367-421; A. VAN OEVELEN, “De aansprakelijkheid van de Staat, de Gewesten en de Gemeenschappen voor onrechtmatige wetgeving”, *T.v.W.* 2006, 400-416; A. VAN OEVELEN, “De aansprakelijkheid van de Staat voor het foutieve verzuim zijn wetgevende bevoegdheid uit te oefenen” (note under Cass. 28 September 2006), *R.W.* 2006-2007, 1124-1128; C. VERBRUGGEN, “Een nieuwe stap in de erkenning van overheidsaansprakelijkheid: de aansprakelijkheid van de Staat wegens de uitoefening (of niet-uitoefening) van de wetgevende macht”, *R.A.B.G.* 2007, 323-332; J. WILDERMEERSCH, “L’arrêt de la Cour de cassation du 1^{er} juin 2006 versus l’arrêt du 28 septembre 2006: le loup était déjà dans la bergerie” (note under 28 September 2006), *J.L.M.B.* 2006, 1550-1554; A. WIRTGEN, “Recente ontwikkelingen inzake overheidsaansprakelijkheid”, in *Actualia Publiekrecht. Rechtsbescherming*, 1, Bruges, die Keure, 2008, 121-158.

¹⁷ Court of Bruges (summary proc.) 14 December 2005, *unpublished*.

Under Belgian law, the sale of a public property can only be allowed with the approval of the Legislature, *i.e.* by the adoption of a domanial law. To prevent the sale becoming definitive, the party deeming itself injured called for the Legislature to be prohibited from adopting such a domanial law. The court acceded to this request, and prohibited the Legislature from giving assent to this deed of sale, a deed which is nevertheless part of the prerogatives of the Legislature. The House of Representatives and the Senate opposed this order. Finally, the order was withdrawn, not on grounds of separation of powers, but due to the lack of urgency.¹⁸

A final decision by a Belgian court which illustrates perfectly “the *sensitive* relationship between the Parliament and the Judiciary” concerns the composition of the Senate after the elections of 10 June 2007. In this case, some members of a political party brought an urgent action against the Senate and its Clerk on grounds that this party was being deprived of a mandate for a co-opted senator. Although the Senate has complete discretion in running its business¹⁹, the Brussels court considered that it had sufficient competence to hear the case. According to the court, the dispute related to the subjective right of the applicants to have a co-opted senator, which allowed it to make a provisional and marginal ruling on the point of whether, in the exercise of its powers, the legislator had been guilty *prima facie* of a breach of the subjective rights of the applicants, without, it is true, allowing it to take the place of the legislative chamber. The attitude of the Senate

¹⁸ For the comments in the legal doctrine, see among others (in alphabetical order): K. MUYLLE and J. VAN NIEUWENHOVE, “Rechter verbiedt Kamer domaniale wet aan te nemen”, *T.B.P.* 2006, 221-222; M. VAN DER HULST, “Rechter belet het parlement om te legifereren”, *T.v.W.* 2007, 50-51.

¹⁹ See footnote no. 7.

and its Clerk was then subject to judicial scrutiny, after which the application was ruled unfounded.²⁰

Separation of powers, parliamentary autonomy, parliamentary privilege ... None of these principles was able to prevent the Belgian Judiciary considering that it has more and more powers, in the aforementioned judgements and rulings, to assess the acts by the Legislature. Moreover, this evolution has already been perceptible for longer in the everyday practice of the legal departments of the Belgian House of Representatives and Senate. The number of disputes relating to personnel matters has increased since, under pressure from the Constitutional Court²¹, the legislator itself empowered the Council of State (supreme administrative court) to rule on individual²² and regulatory²³ administrative decisions concerning the personnel of the House and the Senate.²⁴ In general, in recent years, an increase has been observed in the number of cases in which the House of Representatives or the Senate has been summoned to appear before a court.

²⁰ Court of Brussels (summary proc.) 19 July 2007, *unpublished*. See also: F. JUDO, “Voorlopig geen tweede senator voor Lijst Dedecker”, *De Juristenkrant* 26 September 2007, 2.

²¹ Constitutional Court no. 31/96, 15 May 1996, <www.courconstitutionnelle.be>; Constitutional Court no. 89/2004, 19 May 2004, <www.courconstitutionnelle.be>.

²² From the entry into force of the law of 25 May 1999 amending the laws on the Council of State, coordinated on 12 January 1973, the law of 5 April 1955 on the salary of office-holders at the Council of State, as well as the Judicial Code.

²³ From the entry into force of the law of 15 May 2007 amending Article 14 of the laws on the Council of State, coordinated on 12 January 1973.

²⁴ Article 14 (1), paragraph 1(2), of the laws on the Council of State, coordinated on 12 January 1973 (free translation): “The section rules by means of judgements on annulment actions for breach of substantial forms or forms prescribed on pain of nullity, as well as for abuse or misuse of power, submitted against acts and regulations: 2° of the legislative assemblies or their bodies, (...) relating to public procurement and members of their staff.”

Therefore, it seems increasingly probable that professors charged with teaching the “liability of the public authorities” in the law faculties will have to rewrite – or, even better, update – the chapter in the course devoted to the Legislature’s liability.

* * *

So what do we learn from all this?

Firstly, as far as lawyers are concerned, the message is clear. Bad legislation means big damage claims. Lawyers being legendary ambulance chasers, they just might quit chasing ambulances and start chasing poor laws. There are definitely some new market opportunities right here.

But, as far as Parliament is concerned, things aren’t that simple. If the replies to the elaborate questionnaire that we sent to the ECPRD member assemblies taught us anything (and it taught us a lot), it is that the relationship between courts and Parliament is not just a sensitive one, but also a very complex one. Indeed, parliamentary law and, more in particular, parliamentary sovereignty and parliamentary privilege are, in their detail, a complex, technical and somewhat esoteric subject. This is partly because of their historic origins, rooted in tradition and custom, and partly because of the various functions of Parliament. Parliament is an assembly that adopts the Constitution and enacts the laws. It carries out acts pertaining to political oversight. It verifies credentials, it takes disciplinary measures against members and non-members, it selects candidates for offices and positions, it awards public procurement contracts, it appoints staff members and dismisses them, it even consents to the marriage of the monarch, or to his divorce, for that matter. The range and variety of acts carried out by Parliament may even impress experienced law scholars. For every

single one of these acts, two questions occupy us: is this act submitted to judicial review and, if so, how does the judicial review take place?

As the answers to the questionnaire indicate, every Parliament enjoys a certain degree of sovereignty. Some acts are free from judicial review. To a certain extent, Parliament is untouchable. At least from a judicial perspective. Surely, from a political perspective, Parliament is always answerable for the conduct of its affairs to the public as a whole and specifically to the electorate.

Parliamentary sovereignty consists of the rights and immunities which the Parliament and its members and officers possess to enable them to carry out their parliamentary functions effectively. Without this protection members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the Executive and as a forum for expressing the anxieties of citizens would be correspondingly diminished.²⁵ Parliament is entitled, in the words of the United States Supreme Court, to an adequate breathing space.

But what exactly is an adequate space? Which part of the parliamentary action should be beyond the reach of the courts? How do we identify the areas where the ordinary law of the land prevails, enforceable by the courts, and the no-go areas where the courts must step back and the special rights and immunities of parliamentary privilege prevail? Boundary questions arise and might at times even turn into skirmishes or clashes. That's exactly what the cases we just presented are all about. They are fine examples of demarcation problems.

²⁵ JAG. GRIFFITHS and M. RYLE, *Parliament – Functions, Practice and Procedures* (1989), p. 85, cited in House of Lords and House of Commons Joint Committee on Parliamentary Privilege, *Report: Volume I – Report and Proceedings of the Committee*, March 1999 (paragraph 3).

So there's the main question. How can we reconcile the proper functioning of Parliament with contemporary standards of fairness and public accountability? How can we balance fairly the needs of Parliament with the rights of the individual? What's new, is that the answers to these questions are not just given by Parliament, but increasingly by the courts. That holds true for Belgium, but certainly for some other countries as well. Parliamentary law once used to be formulated by Parliament, but now the Judiciary increasingly acts as a cowriter. One could say that, in that manner, parliamentary law just starts to resemble any other branch of law.

Still it isn't merely a confrontation between courts and Parliament. It is not just the Judiciary vs. Parliament. It is basically the people vs. Parliament. Nowadays people are increasingly vigorous in their efforts to obtain redress for perceived wrongs. They have a more developed sense of their rights, of what is owed to them, and they look to the courts to defend their rights. So it's not as much of a question of the separation of powers turning into a war of powers, as it is a question of just plain citizens demanding Parliament to justify its action. All powers are subject to a more intense public scrutiny, and Parliament just seems to get its share of it.

So where could this shifting relationship between courts and Parliament take us? Could it pose a real threat to Parliament carrying out its principal functions which are to inquire, to debate and to legislate? Could it tempt politicians to get a firmer grip on the appointment of judges? Or will it have a salutary, healthy effect on the way Parliament conducts its business, with a stronger emphasis on good management and better lawmaking?

* * *

Whatever happens, in the aforementioned cases and in the perceptible tendency for increased judicial review of acts by parliamentary assemblies, the legal departments of the Belgian House of Representatives and the Senate have seen sufficient reason to consult the European Centre for Parliamentary Research and Documentation (ECPRD) on the relations between, on the one hand, the legislator and the Parliament and, on the other hand, the Judiciary. In view of the importance of this subject, the organisation of a seminar devoted to this issue – and therefore a direct debate with all the European parliamentary assemblies – was a self-evident decision.

FIRST THEME

Case-study of an area of tension between the autonomy of parliamentary assemblies and the general legal principles: search and seizure on Parliament's premises

The first theme of the seminar is a case study that focuses on an area of tension between the autonomy of parliamentary assemblies and the general legal principles: search and seizure on Parliament's premises. An area of tension, because the key issue of this theme is at the crossing between criminal law (search and seizure) and public law (on Parliament's premises).

The analysis of the replies to the preparatory questionnaire (see Appendix, Part I, Section 6) focuses on five main issues: (1) the possibility of search and seizure on Parliament's premises (most assemblies respond in the affirmative), (2) the possibility to carry out such acts against Parliament itself (only four assemblies confirm this possibility), (3) the possibility to carry out such acts against MPs (which is mostly the case), (4) the procedural guarantees that must be observed (additional guarantees are often required due to the parliamentary context), and (5) the applicable legal framework (in general, common rules on search and seizure are applicable). What is most salient in the replies to the questionnaire on search and seizure are however the recurrent remarks on the absence of or the existence of only a few cases in practice.

Two keynote speakers offer a close look into the conditions under which search and seizure are allowed on the premises of their parliamentary assembly. Mrs Christina Elisabeth Ringvard gives more details on the Danish *Folketing*, paying particular attention to the fact that the *Folketing*

does not enjoy any privilege or immunity as far as search and seizure are concerned. Mr Marco Cerase of the Italian *Camera dei Deputati* explains the Italian system of territorial immunity of Parliament's precincts.

Professor Marc Verdussen provides an academic legal overview of the Belgian situation with regard to search and seizure on Parliament's premises, while professor Suzie Navot presents an overall conclusion of the first theme of the seminar.

Pieter Dirck G. Caboor

*Lawyer at the Legal Department of the Belgian House of Representatives,
freelance lecturer at the Hogeschool-Universiteit Brussel (University
Language Centre)
and teaching assistant at the Vrije Universiteit Brussel (VUB),
Constitutional and Administrative Law Division*

Analysis of the ECPRD correspondents' replies

I. Key issue

The first theme of the ECPRD-seminar of 8 and 9 November 2007 is a case study that focuses on an area of tension between the autonomy of parliamentary assemblies and the general legal principles: search and seizure on Parliament's premises.

Part I of the preparatory questionnaire, sent out on 20 April 2007 to all ECPRD-correspondents, contained a question number 6 on search and seizure (see Appendix, Part I, Section 6). More specifically we asked the following multiple-choice questions:

- Can a search or a seizure be carried out in the precincts of the parliamentary assembly?
- Against whom can such acts be carried out?
- What are the procedural guarantees?

Thirty-nine assemblies answered these questions, *i.e.* the assemblies of Albania, Armenia, Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Iceland, Israel, Italy, Macedonia, the Netherlands,

Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland and the United Kingdom.

II. Analysis

The annexed chart no. 1 gives a theoretical overview of the different legal systems that exist as regards search and seizure on Parliament's premises. This chart can be completed with the information provided by each responding assembly. A summary of all relevant information can be found in the documentation annexed to this analysis (see Chart no. 2 and Chart no. 3).

A lot of classifications can be made starting from this chart and almost all options of the theoretical chart can be illustrated by the correspondents' replies. Since this is merely a statistical exercise, the scope of this analysis is limited to outlining a couple of significant results that can be broken down into five main issues.

First issue:

The possibility of search and seizure on Parliament's premises

The main question is whether or not searches and seizures can be carried out on Parliament's premises. Almost all responding assemblies declare this is possible, though not always to the same extent and with the same procedural guarantees and requirements.

Attention must be paid to the recurrent remark in several assemblies' replies that only a few precedents are known and in some cases even none at all. But most respondents confirm that search and seizure on Parliament's premises are legally allowed (even if the question might be theoretical or controversial).

However, search and seizure are not possible in the responding assemblies of Iceland, Russia and Serbia. No further information is available, although the Italian system could offer an explanation.

The Italian assemblies state that no search or seizure can be carried out on Parliament's premises. The Italian *Camera* and *Senato* enjoy inviolability of their precincts (a kind of territorial immunity). Their presidents can nevertheless grant derogation. During the seminar, Mr M. Cerase, a representative of the Italian *Camera*, took the floor as a keynote speaker to give more details on this system. His written contribution can be found on pages 69 to 74.

Second issue:

The possibility to carry out such acts against Parliament itself

Only four assemblies respond that searches and seizures can be carried out against Parliament itself. It concerns the responding assemblies of Bosnia-Herzegovina, Croatia, Denmark and Norway.

As far as Norway, Bosnia-Herzegovina and Croatia are concerned, this could be explained by the fact that their assemblies have legal personality and act at law as an independent body (see second theme: "The representation at law of a parliamentary assembly", page 93 onwards). Denmark, on the other hand, declares that it has not yet been clarified whether or not the *Folketing* has legal personality, although it seems to act at law as an independent body.

All other responding assemblies exclude search and seizure against Parliament itself.

Third issue:

The possibility to carry out such acts against MPs

In most cases, searches and seizures can be carried out against MPs on Parliament's premises. But very often parliamentary privilege and immunity are referred to as factors accounting for the restriction of the possibility to carry out searches and seizures and for the extension of the procedural guarantees that must be met.

Some assemblies rule out that any search or seizure could be carried out against MPs on Parliament's premises. The replies to the questionnaire do not provide any more details, although it can be assumed that this is due to parliamentary privilege and immunity.

Fourth issue:

Procedural guarantees

As far as procedural guarantees are concerned, one can distinguish two kinds of legal requirements:

- On the one hand, the general legal requirements for search and seizure must be met, *e.g.* a judicial order (although the U.K. responding assembly seems to confirm that no specific guarantees would apply).
- On the other hand, the execution of a search or seizure on Parliament's premises occasionally imposes additional procedural guarantees, such as the authorisation by or presence

of the assembly's President or Secretary-General. The specific parliamentary context in general, and the parliamentary privilege and immunity in particular, most probably account for these additional guarantees.

Fifth issue:

Legal framework

Although we did not send out a specific question on this topic, the assemblies' replies seem to indicate that, as far as procedural guarantees are concerned, search and seizure are in principle regulated by general law (in some cases supplemented with a special protection for MPs). The Danish and Swedish responding assemblies even confirm the absence of any special rule regulating search and seizure on Parliament's premises. During the seminar, Mrs Christina Elisabeth Ringvard, a representative of the Danish *Folketing*, took the floor on this issue. Her written contribution can be found on pages 63 to 68. In Switzerland, by contrast, a specific Act on Parliament regulates the possibility to carry out searches and seizures on Parliament's premises, but no precedent would be available.

The absence of precedents and the absence of a specific legal framework to carry out a search or a seizure on Parliament's premises have caused hesitation in some correspondents' replies, as one can notice in these two examples:

- Both the Polish *Sejm* and Senate answered our questionnaire. The Polish *Sejm* considers that searches and seizures can be carried out on Parliament's premises, although this answer would be controversial according to Polish constitutional law. The respondent

refers in this respect to a kind of territorial immunity (*cf.* Italy). But on the other hand, the Polish Senate confirms clearly that searches and seizures can be carried out on Parliament's premises. In the end, the answers of both Polish assemblies come down to the same result, although one assembly shows more restraint than the other.

- The Slovenian responding assembly also seems to hesitate. In principle, no search or seizure could be carried out on Parliament's premises, although the answer to the next question seems to indicate that searches and seizures could be performed against parliamentary assistants and staff.

III. Preliminary conclusion

From a theoretical point of view, the majority of the responding assemblies confirm that it is possible to carry out searches and seizures on Parliament's premises. The general legal principles, as well as some specific measures intended to protect MPs, are applied when carrying out a search or a seizure in a parliamentary environment.

Three assemblies rule out any possibility of a search or a seizure being carried out on their premises. Italy mentions the concept of immunity of its Parliaments' premises, but also points out that the President of the assembly concerned can grant derogation.

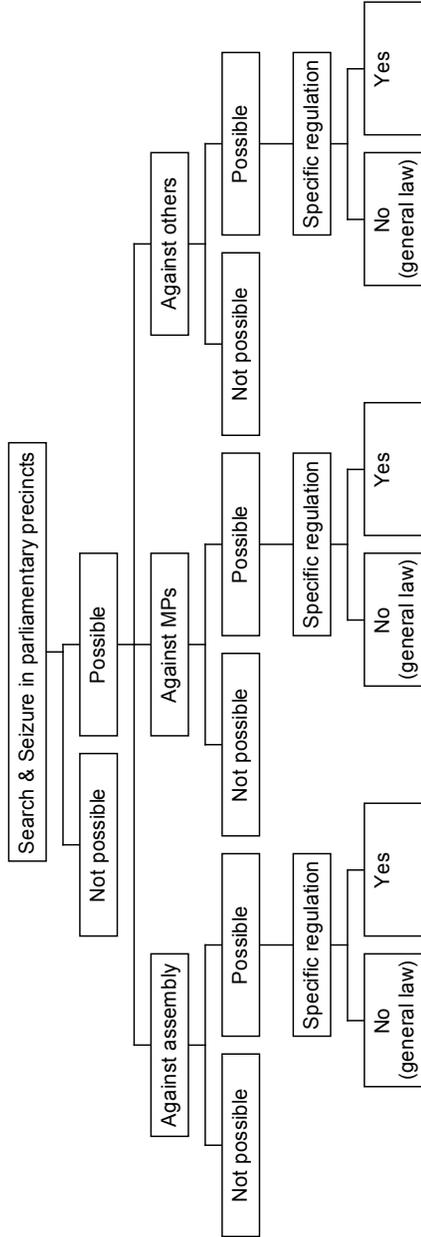
The place where the search or the seizure is performed, namely on Parliament's premises, seems to have an influence on the legal guarantees that must be met. Besides the general legal requirements that accompany search and seizure, the authorisation or presence of

the assembly's President (or another kind of parliamentary preventive control) is often mandatory.

What is most salient in the replies to the questionnaire on search and seizure are however the recurrent remarks on the absence of or the existence of only a few cases in practice. The tension referred to in the title of this theme might not be so tense at all, or do we face a kind of reticence of the Judiciary towards confronting Parliaments and their so-called autonomy?

Charts referred to in the text above

- Chart no. 1: theoretical overview



- *Chart no. 2: one-page overview of the replies*

Country	S&S in parliamentary precincts	Against Parliament	Against MPs	Against MPs' assistants	Against staff	Procedural guarantees
ALBANIA	X		X	X	X	X
ARMENIA	X			X	X	X
AUSTRIA	X		X	X	X	X
BELGIUM	X		X	X	X	X
BOSNIA-HERZEGOVINA	X	X	X	X	X	X
BULGARIA	X		(X)	X	X	X
CROATIA	X	X	X	X	X	X
CZECH REPUBLIC	X		X	X	X	X
DENMARK	X	X	X	X	X	X
ESTONIA	X		X	X	X	X
FINLAND	X		X	X	X	X
FRANCE	X		X	X	X	X
GEORGIA	X		X	X	X	X
GERMANY	X		X	X	X	X
GREECE	X			X	X	X
ICELAND	-					
ISRAEL	X		X	X	X	X
ITALY	(X)					
MACEDONIA	X		X	X	X	X
NETHERLANDS	X		X	X	X	X
NORWAY	X	X	X	X	X	X
POLAND	(X)					
SEIM						
SENATE	X		X	X	X	X
PORTUGAL	X		X	X	X	X
ROMANIA	X		X	X	X	X
RUSSIA	-					
SERBIA	-					
SLOVAKIA	X		X	X	X	X
SLOVENIA	(X)			X	X	X
SPAIN	X			X	X	X
SWEDEN	X		X	X	X	X
SWITZERLAND	X		X	X	X	X
UNITED KINGDOM	X		X	X	X	X

- Chart no. 3: assembly-by-assembly overview of the most relevant replies

S+S = search and seizure

<p>Albania</p>	<p>S+S possible</p> <p>Against MPs, assistants and staff</p> <p>Specific regulation for MPs: Constitutional Court + immunity (pre-authorisation by Parliament)</p>
<p>Armenia</p>	<p>S+S possible</p> <p>Against assistants and staff</p> <p>Court order</p>
<p>Austria</p>	<p>S+S possible</p> <p>Against MPs, assistants, staff, third persons</p> <p>MPs: immunity + prior consent of the Immunity Committee</p>
<p>Belgium</p>	<p>S+S possible</p> <p>Against MPs, assistants, staff, third persons</p> <p>Court order, presence of the President (in case of an MP)</p> <p>Controversial: S+S in the context of an enquiry against an MP or a third person</p>

<p>Bosnia- Herzegovina</p>	<p>S+S possible</p> <p>Against assembly, MPs, assistants, staff</p> <p>Presence of the Secretary-General (if S or S concerns staff)</p> <p>Presence of the President of the Credentials and Privileges Commission (if S or S concerns MP)</p>
<p>Bulgaria</p>	<p>S+S possible</p> <p>Against assistants, staff, third persons</p> <p>MPs: parliamentary immunity</p> <p>Authorisation by and presence of judicial authorities</p>
<p>Croatia</p>	<p>S+S possible</p> <p>Against assembly, MPs, assistants, staff</p> <p>Presence of the Secretary-General (if S or S concerns staff)</p> <p>Presence of the President of the Credentials and Privileges Commission (if S or S concerns MP)</p>
<p>Czech Republic</p>	<p>S+S possible</p> <p>Against MPs, assistants, staff</p> <p>MPs: immunity</p> <p>Court order</p>

Denmark	<p>S+S possible</p> <p>Against assembly, MPs, assistants, staff, third persons</p> <p>Court order</p>
Estonia	<p>S+S possible</p> <p>Against assistants, staff and third persons</p> <p>Court order</p>
Finland	<p>S+S possible</p> <p>Against MPs, assistants, staff and third persons</p> <p>Special guarantees of the Coercive Measures Act</p>
France	<p>S+S possible</p> <p>Against MPs, assistants, staff</p> <p>Court order, authorisation by the President, presence of the Secretary-General and competent civil servants</p>
Georgia	<p>S+S possible</p> <p>Against staff</p> <p>Court order</p>

Germany	<p>S+S possible</p> <p><i>Zeugnisverweigerungsrecht</i></p> <p>Against MPs, assistants, staff</p> <p>Specific regulation for MPs: authorisation by President + presence of a representative of the President + presence of another MP</p>
Greece	<p>S+S possible</p> <p>Against assistants, staff</p> <p>Court order</p>
Iceland	<p>S+S</p>
Israel	<p>S+S possible (based on one precedent)</p> <p>Against MPs, assistants, staff</p> <p>Authorisation by and presence of the President (not clear)</p>
Italy	<p>S+S</p> <p>Territorial immunity</p>
Macedonia	<p>S+S possible</p> <p>Against MPs, staff, third persons</p> <p>Court order, presence of President, presence of Secretary-General</p>

Netherlands	<p>S+S is possible (except in case of a meeting)</p> <p>Against MPs, assistants, staff</p> <p>Court order</p>
Norway	<p>S+S possible</p> <p>Against assembly, MPs, assistants, staff</p> <p>Court order</p>
Poland – <i>Sejm</i>	<p>S+S possible (controversial)</p> <p>Territorial immunity + parliamentary immunity</p> <p>Authorisation by the Marshall of the <i>Sejm</i></p> <p>Confidentiality</p>
Poland – Senate	<p>S+S possible</p> <p>Against MPs, assistants, staff</p> <p>Parliamentary immunity, consent of the Senate, notification of the Speaker, court order</p>
Portugal	<p>S+S possible</p> <p>Against MPs, assistants, staff, third persons</p> <p>Court order</p>

Romania	<p>S+S possible, as regulated for all public locations</p> <p>Against MPs, assistants, staff, third persons</p> <p>As far as MPs are concerned, the procedure in case of parliamentary immunity must be observed</p> <p>Court order, presence of the MP concerned, presence of the Secretary-General, presence of the staff member concerned</p> <p>Staff members can act as witness</p>
Russia	<p>S+S</p> <p>Parliamentary immunity</p>
Serbia	S+S
Slovakia	<p>S+S (theoretical, no precedents)</p> <p>Against MPs, assistants, staff</p> <p>Court order, presence of judicial authority</p>
Slovenia	<p>S+S possible / S+S</p> <p>Persons concerned should be summoned in court</p> <p>MPs enjoy parliamentary immunity</p> <p>Probably against an assistant, staff</p>

Spain	<p>S+S possible (but no precedents)</p> <p>Against assistants, staff</p> <p>Authorisation by the President</p>
Sweden	<p>S+S possible</p> <p>Against MPs, assistants, staff, third persons</p> <p>Court order</p>
Switzerland	<p>S+S possible (no precedent)</p> <p>Against MPs, assistants, staff, third persons</p> <p>Authorisation by the College of Presidents</p> <p>Act on Parliament</p>
United Kingdom	<p>S+S possible</p> <p>Against MPs, assistants, staff, third persons</p> <p>Authorisation by the President (as a matter of courtesy), although MPs do not enjoy immunity for offences committed in a parliamentary context</p>

Christina Elisabeth Ringvard

*ECPRD Deputy Correspondent
and Member of the Library, Archives and Information Section
of the Folketing (Danish Parliament)*

Search and seizure on the premises of the Danish Parliament: conditions, background and practice

I. Introduction

The *Folketing* (Danish Parliament) does not enjoy any special protection against search and seizure. Such acts can be carried out against MPs, MPs' assistants, staff of the *Folketing* and third persons who are present on the premises. As for the possibility of performing a search or seizure against the parliamentary assembly itself, there are no rules which actually forbid to resort to such measures. Supposing that all the other requirements are fulfilled, search or seizure would probably be possible, but it would also require that the assembly does have legal personality, which is unclear in the Danish court practice.

Search and seizure on the Parliament premises are subject to the generally applicable rules and are carried out in compliance with all procedural guarantees.

The general principle concerning search and seizure has been established in Article 72 of the Danish Constitutional Act, while the more specific rules in this field are laid down in a series of provisions of the Administration of Justice Act.

As far as procedural guarantees are concerned, it may suffice to point out that the general legal requirements, including compliance with the principles of proportionality and leniency, must be met, and that no law provides additional procedural guarantees to the Danish Parliament.

II. General principle and specific rules

As mentioned above, the **general principle** concerning search and seizure is laid down in Article 72 of the *Constitutional Act*.

This Article, which dates back to 1849, states that “*The dwelling shall be inviolable. House search, seizure, and examination of letters and other papers, or any breach of secrecy that shall be observed in postal, telegraph and telephone matters, shall not take place except under a judicial order, unless particular exception is warranted by statute*”.

In Denmark, there are at present over 200 laws providing for such very particular exceptions to the obligation of having a judicial order, but none of them relates to the Parliament. So, as far as the Parliament is concerned, a judicial order would always be required.

Let us note that when this article was adopted as part of the first Danish Constitutional Act, the constitutional fathers very much focussed on the citizens and the citizen’s protection of his civil rights, including the protection of his house, but they did not pay any attention to protecting the Parliament against search or seizure in particular. Hence, it is the general rules that apply.

As for **the more specific rules about search and seizure**, they can be found in the *Administration of Justice Act* (as it was mentioned above).

Pursuant to Section 793 of this Act, the police can conduct searches and seizures, but it is stated in Section 796 that as a main rule such decisions must be made by court order. The latter Section also provides that in this court order the specific circumstances must be stated upon which the decision is based and furthermore that the person who is in possession of the dwelling or residence must be given the opportunity to make a statement before the court decides to issue such an order. There are of course exceptions to this rule. For instance, if the purpose of the whole search or seizure would be forfeited by awaiting a court order, the police could decide to proceed to such acts.

When taking a closer look at the specific conditions, one can notice that these conditions fall into two parts. They differentiate according to whether the person who is in possession of the premises is or is not a suspect.

If the person in possession of the premises is a suspect, then there must be reasonable grounds to suspect that he/she has committed an offence which is prosecuted by the State and the search must be presumed to be of significant importance for the investigation. Moreover, the investigation must concern an offence which under law can result in imprisonment or there must be specific reasons to presume that evidence in the case or objects which can be seized, can be found by the search.

If the person who is a suspect gives a written consent, the judicial order is not necessary.

If the premises to be searched are in the possession of someone who is not a suspect, then again no judicial order is necessary if that person gives his/her written consent. If no such consent is granted, a search can only take place if the investigation concerns an offence which

under law can result in imprisonment and there are specific reasons to presume that evidence in the case or seizable objects can be found by the search.¹

¹ *Administration of Justice Act provisions applicable to searches:*

Section 793

- (1) Pursuant to the rules of this Chapter, the police can conduct searches of
- 1) residences or other dwellings, documents, papers, and similar, as well as the contents of locked objects, and
 - 2) other objects as well as premises other than dwellings.

Section 794

- (1) Searches of dwellings, other premises or objects, of which a suspect has possession, can only be conducted if
- 1) the individual on reasonable grounds is suspected of an offence, which is prosecuted by the State, and
 - 2) the search is presumed to be of significant importance to the investigation.
- (2) As for searches of the kinds mentioned in Section 793, Subsection 1, n° 1 [residences or other dwellings, documents, papers, and similar, as well as the contents of locked objects], it is further required either that the case concerns an offence which under the law can result in imprisonment, or that there are specific reasons to presume that evidence in the case or objects, which can be seized, can be found by the search.

Section 795

- (1) Searches of dwellings, other premises or objects, of which a person, who is not a suspect, has possession, are not regulated by the rules of this Chapter, if the individual grants written consent to the search or if, in connection with the detection or report of an offence, consent is granted by the individual. Otherwise a search of the possession of a person, who is not a suspect, may only take place if
- 1) the investigation concerns an offence, which under the law can result in imprisonment, and
 - 2) there are specific reasons to presume that evidence in the case or objects, which can be seized, can be found by the search.

Similar rules and guarantees apply with regard to seizures.²

Section 796

- (1) Decision of search concerning the objects or premises mentioned in Section 793, Subsection 1, n° 2 [objects which are no documents, papers, and similar, and no contents of locked objects, as well as premises other than dwellings], of which a suspect has possession, is made by the police.
- (2) Decision of search in other situations is made by court order [unless the individual grants a written consent to the search being conducted, or the search is in connection with the detection or report of an offence and a search of the scene of the crime is to be conducted]. The court order shall state the specific circumstances of the case upon which the court bases its view that the conditions for the measures are fulfilled. The court order can at any time be reversed.
[...]
 - If the purpose of the measure would be forfeited by awaiting a court order, the police can make the decision.
 - Upon request, the police shall submit the case to the court within twenty-four hours.
 - Before the court makes a decision, the person who has possession of the dwellings, premises or objects shall be given the opportunity to make a statement.
 - The police can decide to search a dwelling, etc., in connection with the detection of an offence if the person in possession is not a suspect and cannot be contacted immediately.

² Administration of Justice Act provisions applicable to seizures:

Section 801

- (1) Pursuant to the rules of this Chapter, seizure can take place
 - 1) to secure evidence,
 - 2) to secure the claim of the State for costs, confiscation and fine,
 - 3) to secure the claim of the victim for restoration or compensation, and
 - 4) when the defendant has absconded from further prosecution of the case.

Section 806

- (1) Decision about seizure and orders of disclosure are made upon request of the police. Request of seizure to secure a claim for compensation can be made by the victim as well.
- (2) [In normal circumstances,] decisions are made by the courts in the form of an order. The latter shall state the specific circumstances of the case upon which the court bases its view that the conditions for the measures are fulfilled. The court order can at any time be reversed.

III. Parliamentary immunity after search and seizure

According to Article 57 of the *Danish Constitutional Act*: “No member of the Folketing shall be prosecuted or imprisoned in any manner whatsoever without the consent of the Folketing, unless he is caught in flagrante delicto. Outside the Folketing, no member shall be liable for his/her utterances in the Folketing, save by the consent of the Folketing.”

So, the members of the *Folketing* enjoy parliamentary immunity.

In practice, the consent to proceed to seizure is always granted, unless an indictment relates to utterances in the *Folketing*. If that is the case, such a consent has up to the present never been given.

Marco Cerase

*Counsellor to the Immunities Committee of the Camera dei Deputati
(House of Deputies of the Italian Parliament)*

Search and seizure in the Italian Parliament ... and elsewhere

On February 23rd 1981, colonel Tejero, of the Spanish army, broke on to the Floor of the Spanish Congress and pulled a few shots on the trigger of his hand-gun toward the ceiling.

He ordered all the Members to lie down and he announced a military coup that—in his intentions—would end constitutional and parliamentary rule, only so recently restored after the end of Franco's dictatorship.

Only three Members refused to obey: the outgoing prime minister, Adolfo Suarez; the defence minister, Gutierrez Mellado; and the Communist leader, Santiago Carrillo.

Fortunately the young Spanish democracy was already a strong one: King Juan Carlos appeared on television the following day and declared the tentative coup totally illegitimate and warned everybody that he would not accept an interruption of the democratic process. The few military persons that had supported Tejero thus surrendered.

It is the job of the historians to dwell on this story and on its happy ending. It is the job of parliamentary clerks to underscore that Tejero chose exactly the Floor of the Spanish House as the place where he would try to crush democracy.

Parliamentary immunity has a long history and is as old as Parliaments themselves.

It goes with freedom of speech – as laid down in Paragraph 9 of the Bill of Rights – that the Executive and the Judiciary branch cannot break into the parliamentary precincts for searches and seizures; and it comes obvious that no one can enter armed.

In the Italian tradition, police power within Parliament belongs to the Speaker. Only he can allow armed forces to enter the see of the House and he can order the police onto the Floor only after he has suspended parliamentary proceedings.

Only the Bureau of the House is empowered to punish Members for disorderly or violent behavior.

If army personnel is elected to office, the Member has to dress as a civilian: he cannot wear a uniform (soldiers – of course – may keep their uniform if they are not Members and are summoned by committees for hearings).

The source of this law is not directly in the Constitution. Article 64 of the latter states that each House adopts its own rules with an absolute majority. But Parliamentary rules (article 62 for the Italian House and article 69 for the Senate) do provide for the immunity of the precincts.

Another relevant source of law in this area is precedent.

The Italian Constitutional court has recognized the validity of such sources, even if in general terms (decisions no. 231 of 1975, 129 of 1981 and 154 of 1985).

Article 62 of the Italian House Rules also states that no police investigation may take place within Parliament buildings without the Speaker's consent. This is a general rule and has no regard to whether the investigation seeks evidence against a Member, staff or third parties.

Usually the Speaker denies consent if the investigators do not offer a precise explanation of the purposes of their inspection or search and the Speaker thinks the investigation would end up with disrupting ordinary legislative work.

If the police only wish to acquire specific documents that do not relate to proper parliamentary work (such as telephone records, administrative certificates, papers concerning work of contractors on the House premises *etcetera*), the Speaker usually allows consent.

It is worth mentioning that a special projection of the House immunity is the need for the Speaker's consent also to question staff members of the House as witnesses in investigations or trials. Usually such testimony is allowed, but a counselor designated by the Speaker is present to the questioning.

On a theoretical level, the Judiciary could challenge a denial in the Constitutional Court, but this has so far never happened. It has occurred however that the Special parliamentary committee on secret services has denied a court access to documents relating to secret matters, relevant to a criminal pursuit. The Constitutional Court has upheld such a denial in a recent decision (no. 139 of 2007) on the basis of the fact that the Court had not given sufficient reasons in its complaint.

In order – now – to reach over from immunity regarding Parliament's premises to immunity involving Members, one recent episode appears to me like a very significant *trait d'union*.

Some of you might recall that during the terrible days of hurricane Katrina – in 2005 – many people had to flee New Orleans. One night however, police officers and journalists noted a National Guard vehicle going against the stream of the crowd. At one point, the vehicle stopped in front of a house and a man ran in and came out a few minutes later with a funny bag.

It later was ascertained that the man was Congressman Jefferson, a Democrat of Louisiana, an influent member of the House Committee on Ways and Means.

I need not to specify what was in the bag, since Mr. Jefferson was soon accused of bribery and his other home – in Washington DC – was searched and money found in the freezer in his kitchen.

By Italian law, the search of his home or hotel room or car would not have been allowed without consent of the House. But the US Constitution has no such rule. Article I, paragraph 6, clause 1, however offers the freedom of speech-non liability rule.

And in the US the clause has not only a liability meaning, but also a testimonial meaning. The fact that a Member cannot be questioned is read also in the testimonial sense.

So when, later in the investigation (May 2006), the FBI searched Mr. Jefferson's office on Capitol Hill, this prompted a new parallel court case: Rayburn House Office Building v. United States, the original criminal case being of course United States v. Jefferson.

According to the Office of the House Counsel, the search in the congressional office of Mr. Jefferson amounted to forcing him to disclose his legislative work, something quite similar to questioning him on privileged matters.

The district judge ruled against Congress, arguing that the House precincts could be considered no “sanctuary at the taxpayers’ expense”.

The federal Court of appeals of the District of Columbia circuit, however, turned out to be less in tune with the man of the street and more acquainted with parliamentary orthodoxy, thus reversing the previous judgment.

The DC circuit Court explained that the testimonial privilege related to the Speech or Debate Clause includes a non-disclosure privilege, which allows a member of Congress to refuse to hand over material produced and/or kept in his congressional offices. Relying on precedent, the Court stated that the testimonial privilege does comprehend also a documentary aspect: documents in fact may turn out to be evidence just as much as oral communications (see *Rayburn House v. United States*, argued May 15 and decided August 3, 2007, at 11-12).

It is then easier for me to turn now back to the total immunity provided for Members’ domicile in the Italian Constitution.

The idea underlying this constitutional provision is that the home, the car and hotel room of the Member are his inner and intimate places where he must be left alone, free from interference in putting his thoughts together and preserving his peace of mind.

It was the persuasion of our Founding Fathers that – coming out of the Fascist regime and Nazi occupation – parliamentary democracy had to be restored on traditional bases.

Too fresh was the memory of the physical assassination of Giacomo Matteotti, Giovanni Amendola and the imprisonment of Antonio Gramsci. The fascist and German practice to raid the homes of

opponents stamped the memories of the newly elected politicians of 1946. This is why police and magistrates cannot order searches and seizures in Members' homes without Parliament's consent.

Of course, today you might wonder if those reasons are still valid. It is a question that even Members themselves appear to ask, in light of the independence of the Judiciary from the Executive. We have had at least two recent cases in which the police ordered or even executed the search of the Member's home and the Member either did not complain at all or did not press his privilege in court.

In 2002, a Member – as a tenant – tried to state his privilege against the landlord's eviction case. But the Speaker of the House did not support him.

In 2004, however, the House did challenge in the Constitutional Court a search executed in the office of a Member that was situated in his party's headquarters. The Court argued that the prosecution had not given sufficient evidence that it had previously examined and selected proof that the office did not contain legislative material (decision no. 58 of 2004).

Search and seizure in the parliamentary precincts in Belgium¹

Since Montesquieu, the separation of powers has never been conceived as a watertight compartmentalisation. Nevertheless, for decades, it justified a largely derogatory system of judicial liability of ministers, and particularly Members of Parliament (MPs). This is not the place to make a substantiated, reasoned judgement about such a difference in treatment compared with other citizens. It had its reasons for existing, and it still has those reasons today. However, in Belgium as elsewhere, we can see that this differentiated treatment has gradually become blurred. From the criminal viewpoint, prosecutions of ministers and MPs were littered with constitutional obstacles, which were partly cleared by the constitutional revisions adopted in 1997 and 1998². From the civil viewpoint, the Court of Cassation, in a judgement handed down on 28 September 2006, asserted for the first time the principle of State liability resulting from legislating³.

¹ My thanks to Anne-Stéphanie Renson, research assistant at UCL, for the intelligent assistance that she gave me in the preparation of this paper.

² See M. VERDUSSEN, “La répression pénale des ministres et des parlementaires en Belgique”, *Rev. sc. crim.*, 2001, pp. 771-779.

³ Cass. 28 September 2006, *J.T.* 2006, p. 595, with the concurring conclusions by the First Advocate General J.-Fr. Leclercq. About this judgement, see *inter alia* A. ALEN, “La responsabilité des pouvoirs publics pour les fautes du législateur. Réflexions sur les arrêts de la Cour de cassation du 1^{er} juin 2006 et du 28 septembre 2006”, *J.T.* 2008, pp. 97-101; R. ERGEC, “Quelques doutes sur la soumission du législateur au droit commun de la responsabilité civile”, *J.T.* 2007, pp. 440-441; Y. THIELS and I. WOUTERS, “La responsabilité des pouvoirs publics. Le pouvoir législatif mis en cause : révolution ou évolution ?”, *J.L.M.B.* 2006,

Quite clearly, these recent measures reflect a significant evolution in the relationship between the Judiciary and the two other powers, and particularly the legislative power. This evolution is borne out, in particular, with regard to searches and seizures carried out against Members of Parliament.

The key question which concerns us here is clearly defined: can an investigating magistrate carry out a search, or make a seizure against an MP within the precincts of the Parliament, and in particular, in the MP's office?

The question immediately comes up against a preliminary problem: is an MP's office a "home" as defined by Article 15 of the Belgian Constitution and Article 8 of the European Convention on Human Rights? Now, this question has to be answered in the affirmative. It is true that the case law of the Court of Cassation is cautious, considering that the right to respect of privacy includes business premises, provided that "the activities carried on there are of a private nature", and that "confidential correspondence is kept there"⁴. However, the case law of the European Court of Human Rights is more categorical, as the Court's judges include the place where a professional activity is carried out in the concept of privacy. Based upon a dynamic interpretation of

pp. 1526-1548; J. VAN COMPERNOLLE and M. VERDUSSEN, "La responsabilité du législateur dans l'arriéré judiciaire", *J.T.* 2007, pp. 433-439; A. VAN OEVELEN, "De aansprakelijkheid van de Staat voor het foutieve verzuim zijn wetgevende bevoegdheid uit te oefenen", *R.W.* 2006, pp. 1124-1128; M. UYTENDAELE, "Du réflexe salutaire à l'ivresse du pouvoir. Premières réflexions sur les arrêts de la Cour de cassation 'Église universelle du royaume de Dieu' et 'F.J.'", *J.L.M.B.* 2006, pp. 1554-1564; S. VAN DROOGHENBROECK, "Arriéré judiciaire et responsabilité de l'État-législateur : dissiper les malentendus et les faux espoirs", *R.C.J.B.* 2007, pp. 367-421; J. WILDEMEERSCH, "L'arrêt de la Cour de cassation du 1^{er} juin 2006 versus l'arrêt du 28 septembre 2006 : le loup était déjà dans la bergerie", *J.L.M.B.* pp. 1550-1554.

⁴ Cass. 19 February 2002, *Pas.* 2002, I, p. 498.

the Convention, the Court even goes as far as to consider that “the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company’s registered office, branches or other business premises”⁵. The Court of Justice of the European Communities rapidly concurred with this case law⁶.

Along the same lines, it is pointed out that the *Palais de la Nation*, the seat of the Belgian House of Representatives and the Belgian Senate, does not enjoy any form of *territorial protection* which would preclude a search being carried out there. When the law of 2 March 1954 aimed at preventing and repressing infringements of the free exercise of the sovereign powers established by the Constitution criminalises certain behaviours, particularly in the precincts of the Parliament, it does this in order to curb any event aimed at disrupting the course of Parliament’s work⁷.

After having overcome this preliminary difficulty, we can approach the question whether a search – which is provided for and organised by

⁵ E.C.H.R., judgement *Sociétés Colas et alia v. France*, of 16 April 2002. Along the same lines, see not. E.C.H.R., judgement *Ernst et alia v. Belgium*, of 15 July 2003; judgement *Van Rossem v. Belgium*, of 9 December 2004; judgement *Buck v. Germany*, of 28 April 2005; judgement *Wieser and Bicos Beteiligungen GmbH v. Austria*, of 16 October 2007.

⁶ C.J.E.C., judgement *Roquette Frères SA vs. France*, of 22 October 2003, case C-94/00.

⁷ M. VERDUSSEN, *Contours et enjeux du droit constitutionnel pénal*, Brussels, Bruylant, 1995, pp. 301-302.

the federal legislator⁸ – comes up against rules which would enshrine *personal protection* in favour of MPs?

Before the revision in 1997 of Article 59 of the Constitution – which is the basis of parliamentary immunity⁹ – a search could not be carried out against an MP unless his/her immunity has been lifted beforehand by an authorisation from the assembly to which he/she belonged. This rule generated genuine problems. Indeed, the assessment by the assembly of the grounds for the request to lift parliamentary immunity supposed that it received a sufficiently substantiated dossier, with sound indications as to questions of fact, as well as indications of guilt. However, as a general rule, it was precisely the need to find evidence to substantiate the dossier that led to the request by the Public Prosecutor to have parliamentary immunity lifted. This resulted in a stalemate: the Public Prosecutor could not advance his investigations – by applying to an investigating magistrate – without an authorisation by the assembly, which could only grant this on condition that the investigations already carried out were sufficiently conclusive.

Since the revision of this provision¹⁰, searches, like charging, form part of the investigative acts which can be ordered and carried out without lifting parliamentary immunity. However, the search cannot

⁸ Art. 87, 88, 89 and 89*bis* of the Criminal Investigation Code; Law of 7 June 1969 setting times during which (house) searches cannot be carried out. See H.-D. BOSLY and D. VANDERMEERSCH, *Droit de la procédure pénale*, 4th ed., Bruges, La Chartre, 2005, pp. 654-671; M. FRANCHIMONT, A. JACOBS and A. MASSET, *Manuel de procédure pénale*, 2nd ed., Brussels, Larcier, 2006, pp. 452-464; R. VERSTRATEN, *Handboek strafvordering*, 4th ed., Antwerp-Apeldoorn, Maklu, 2007, pp. 285-296.

⁹ Art. 120 of the Constitution: “All members of Community and Regional Parliaments benefit from the immunities described in Articles 58 and 59”.

¹⁰ See G. GOEDERTIER, “De nieuwe regeling van de parlementaire onschendbaarheid”, *C.D.P.K.* 1998, pp. 424-444; M. VERDUSSEN, “Une inviolabilité parlementaire tempérée”, *J.T.* 1997, pp. 673-679.

be carried out freely. It is subject to a number of constitutional rules, which are aimed at preventing several specific risks.

The first risk is that of an arbitrary, or at the very least, reckless search. Two rules preclude such searches.

First of all, pursuant to Article 59, second paragraph of the Constitution, when an investigating magistrate considers that a search needs to be carried out against an MP, he cannot order it himself, but must apply via the channel of the First President of the Court of Appeal. Only the First President is authorised to take the decision, *i.e.* to “*assess, on the basis of the dossier, whether the measure requested is justified*”¹¹. This is a filter mechanism, intended to curb suspect or ill-timed initiatives by unscrupulous investigating magistrates. In all probability, the choice of the First President of the Court of Appeal is justified by the fact that, pursuant to Article 398 of the Judicial Code, investigating magistrates, like the other judges of the Court of First Instance, are subject to the control of the competent Court of Appeal.

Next, if despite this rule, an arbitrary or reckless search is ordered, another rule will then come into play. Pursuant to Article 59, fifth paragraph of the Constitution, an MP who is subject to judicial investigation “may, at any stage of the judicial inquiry request during a session and in criminal matters that the House of which he or she is a member suspend proceedings”, if – as stated in the preparatory work – he can demonstrate “*through convincing arguments*”, that this prosecution has been “*initiated in an ill-considered, irresponsible or vexatious manner*”, or that it is “*arbitrary*”¹². When such a request is made, the assembly must decide by an increased majority of two-third of votes cast. During the parliamentary discussions, this rule

¹¹ *Hansard*, Senate, ord. session 1996-1997, sitting of 15 January 1997.

¹² *Parl. doc.* Senate ord. session 1996-1997, no. 1-363/11, pp. 3 and 5.

was described as an “alarm-bell procedure”, which is liable to cause confusion with another procedure, which is well outside the scope of our discussion today. Perhaps it would be better to say that for the MP, and for the assembly to which he/she belongs, it is a “safety valve”.

The second risk relates to the possibility that the investigating magistrate may seize documents covered by parliamentary privilege¹³ or by professional confidentiality¹⁴. It is precisely to obviate such a risk that, pursuant to Article 59, third paragraph of the Constitution, “*All searches and seizures [...] can be performed only in the presence of the President of the House concerned or a Member appointed by him*”. Admittedly, the President or a Member appointed by him is unable to oppose the search or the seizure of documents. However, his role is not passive: if he has objections or reservations to express, particularly as to the documents of which seizure is being considered, he must be able to demand that these are recorded in an official record. This will be the case if the document is covered by parliamentary privilege or professional confidentiality, or if this document does not appear to him to be sufficiently closely connected with the subject matter of the investigation.

The third risk consists of the possibility that the investigating magistrate carries out the search at an inopportune time in relation to the programme of parliamentary business. In our opinion, when Article 59, second paragraph of the Constitution obliges the First President of the Court of Appeal to notify the decision to carry out the search to the President of the assembly concerned, it is to enable him not only to be present at the time when the decision is implemented,

¹³ Art. 58 of the Constitution.

¹⁴ Art. 3, para. 4 and 5, and Art. 8, 1st para., of the Law of 3 May 1880 on parliamentary inquiries, amended by the Law of 30 June 1996. See P. LAMBERT, *Secret professionnel*, Brussels, Bruylant, 2005, pp. 75-77.

as stated earlier, but also to arrange with the judge a time which is not incompatible with the programme of parliamentary business¹⁵.

The key question examined above raises other questions.

Do the solutions outlined apply when the search in an MP's office relates to events with which the MP is unconnected? Under the old arrangements that applied until 1997, the Court of Cassation accepted that a search could be carried out at an MP's home, without authorisation from the assembly to which the MP belonged, when the tortious events were attributed to third parties¹⁶. If the search carried out under such conditions nevertheless led to uncovering evidence or clues against the MP in question, it had to be considered null and void to the extent – and only to the extent – that it concerned that MP¹⁷. This case law seems to us to be transposable – *mutatis mutandis* – to the new arrangements under Article 59 of the Constitution.

¹⁵ A circular from the Public Prosecutor General at the Court of Appeal of Brussels emphasises the necessity to make this notification “without delay, and in any case, before the execution of the binding measures envisaged by the person who gave the order, *i.e.* the First President of the Court of Appeal” (Circ. n° COL.6/97).

¹⁶ Cass. 30 September 1992, *J.L.M.B.* 1992, p. 1226, obs. O. KLEES, *Rev. dr. pén. crim.* 1993, p. 96, note H.-D. BOSLY and T. BOSLY. The judgement of the indictment chamber of the Liège Court of Appeal of 27 August 1992, annulled by the aforesaid judgement of the Court of Cassation, was published: *J.T.* 1992, p. 576. Concerning this case, see M. UYTENDAELE, “Actualité de l’immunité parlementaire”, *J.T.* 1993, pp. 437-443. The solution of the Court of Cassation concurs with the opinion issued in the inaugural address which the Public Prosecutor General R. HAYOIT DE TERMICOURT pronounced on 15 September 1955 in the official opening audience of the new term of the Court of Cassation (“L’immunité parlementaire”, *J.T.*, p. 617).

¹⁷ See M. UYTENDAELE, “Actualité de l’immunité parlementaire”, *op. cit.*, pp. 439-440. It is preferable to say that the search is inopposable to the MP rather than to say that it is (partly) “null and void”: see D. VANDERMEERSCH, “Les poursuites à charge d’un parlementaire”, obs. under Justice Committee of the Senate 18 January 1994, *J.L.M.B.* 1994, p. 735.

Can an investigating magistrate carry out a search freely, or make a seizure, in the precincts of the Parliament – for example in the office of a member of the Legal Service of the Senate – if the measure is not aimed at an MP? Definitely. The rules quoted for MPs do not apply here. However, one reservation must be made: in principle, an investigating magistrate is not allowed to seize documents covered by parliamentary privilege or confidentiality¹⁸, even if the assembly or its President are not really in a position to oppose it¹⁹. To the extent necessary, we should point out that these are exceptional measures that, in practice, are used by investigating magistrates with the greatest circumspection, making quite sure that they inform the President of the assembly concerned.

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To conclude, it seems to us that the way in which Belgian law governs searches and seizures in the Parliament precincts reflects a judicious balance between concerns which, as such, are not convergent: on the one hand, the concern to ensure proper administration of penal justice and, on the other hand, the concern not to hamper in an abusive way the accomplishment of parliamentary business and the freedom of speech of MPs. This balance could be found because certain judicial cases revealed serious shortcomings in the previous system.

¹⁸ On the possibility of seizing or not seizing minutes of the hearing of witnesses drawn up by a parliamentary committee of inquiry when the hearing took place behind closed doors, see A. DE NAUW and J. VELU, “Avis sur la consultation des documents des commissions d’enquête de la Chambre des représentants”, *R.B.D.C.*, pp. 438-448.

¹⁹ “In Belgian law, there is no body with general jurisdiction to settle disputes by the federal constitutional bodies, particularly disputes which could possibly arise between the House of Representatives or a Committee of inquiry and an investigating magistrate or other judicial authorities about the handing over or the seizure of documents of a Committee of inquiry of the House” (A. DE NAUW, “Avis complémentaire sur la consultation des documents des commissions d’enquête de la Chambre des représentants”, *R.B.D.C.* 1999, p. 463).

Excerpts from the discussions devoted to the first theme

After having emphasised that Members of Parliament already enjoyed total immunity with regard to freedom of speech, and moreover, immunity from prosecution motivated by political or other reasons, **Mr. Koen MUYLLE**, Law Clerk at the Belgian Constitutional Court, asked what could justify this personal immunity being extended to the buildings of the Parliament.

He also asked how a search of premises could be prevented from interfering directly with the work of the assembly. A search can lead to a degree of turmoil, so that it is hard to imagine that it could take place during parliamentary activities without disrupting them. How do countries which allow searches of Parliament buildings manage to avoid such disruption?

These questions were the subject of replies from the two keynote speakers.

Mrs. Christina Elisabeth RINGVARD pointed out that, in practice, it was a very limited problem. Incidentally, it had never arisen in Denmark.

Apart from the fact that Denmark has long been a very stable democracy, polls invariably reveal that the Danish people have the utmost trust in the police, to such a point that nobody could imagine that these authorities would commit any abuse relating to search or seizure.

According to the speaker, this made it totally unnecessary to provide for special arrangements applicable to the Parliament.

Mr. Marco CERASE observed that if, in all democracies in Europe and around the world, relations between the judiciary and the legislative and political powers were peaceful and characterised by mutual trust, the *parliamentary privilege* enjoyed by Members of Parliament would suffice. Unfortunately, it has to be stated that, in some countries or during certain periods, these relations were anything but harmonious. So, in Italy, during the Fascist era (from 1922 to 1943), the Judiciary was used as a weapon by the executive to crush opponents of the regime.

The speaker considered that what matters most of all is to achieve a balance, as emphasised by Mr. Pieter CABOOR in the overall introduction to the seminar. He did not think that it was necessary to delete from the Constitution or the Rules of procedure of the assemblies the provisions that searches or seizures could only be carried out with the consent of the assembly concerned, but considered that the assembly should use or refuse its consent power with great prudence, wisdom and foresight, and that consent should usually be granted.

He illustrated his remarks by presenting the case of the Commission of inquiry into organised crime, set up by the Italian Parliament. In the course of its work, which lasted many years, this Commission observed that the judicial authorities seemed in little hurry to advance the investigations, and decided to collect evidence itself. What a paradox it would have been if the judicial authorities had made seizures within the Commission of inquiry which was attempting to show the ineffectiveness of those same authorities!

To conclude, Mr. CERASE said that he was in favour of keeping the immunity of buildings situated within the Parliament precincts in countries where relations between the powers pose a problem.

Mr. André REZSÖHAZY, Conference chairman, added that there would be a genuine danger for the work of parliaments if the judicial authorities could suddenly access documents containing confidential statements, by carrying out searches. It needed to be borne in mind that these statements were sometimes made by people whose lives were in danger, as was the case at the Belgian Senate in the context of the Commission of inquiry on the events in Rwanda.

Suzie Navot

Professor of law,

Head of the Public Law Division at the School of Law, College of Management – Academic Studies, Israel

Final remarks and conclusion

Final remarks

The first conclusion following the comprehensive analysis of the questionnaire sent to all ECPRD correspondents – and in my view the most important one – is that most countries included in the research do allow search and seizure within Parliament. This conclusion shows a clear movement from the protection of the House itself – of the building as a traditional symbol of parliamentary sovereignty – towards the protection of the legitimate functions of Parliament and its members.

This conclusion is consistent with the historical precedents. Parliamentary privileges, such as freedom from arrest, have never been allowed to interfere with the administration of criminal justice. Parliament as such is not immune from the ordinary criminal process and ordinary law.

Within this conclusion it is important to emphasise the fact that some countries do admit that search and seizure are possible, even if the Constitution does not specifically allow for it, and even if the possibility is theoretical because for the moment there are no precedents known. This is an implication that reveals the importance given in those countries to the principles of the rule of law and equality.

When dealing with search and seizure, a distinction should be made between general search in Parliament against third parties, employees, or MP's assistants on the one hand, and against Members of Parliament on the other hand. My conclusion will focus on Members of Parliament, because of their special protection granted within parliamentary privileges.

The first statement to be presented on this subject is that Parliament's capacity to function effectively is not threatened by permitting MP's offices to be searched. The reason for that seems clear. Privileges are meant to protect the performance of parliamentary "legitimate function" and if a search is conducted against Members of Parliament, it is usually conducted because of a behaviour alleged to be "non legitimate". We have seen this lately in many countries, for example in cases concerning corruption and bribery.

Once the first "obstacle" has been overcome – meaning that most countries are of the view that search and seizure is possible –, the focus needs to be transferred to the second stage – dealing with the guarantees for search and seizure.

According to the questionnaire, in a general overview of all countries, the execution of a search must meet two different requirements:

- 1) a legal requirement such as a judicial order (a warrant) and
- 2) the authorisation or/and the permission or/and presence of the assembly's President.

These requirements are problematic. A legal requirement does not take into consideration issues of parliamentary privileges. The permission of the Speaker, or the presence of the Speaker, seems to be a "personal guarantee". It is something that has rather more of a ceremonial

value, a symbolic value, than a real guarantee that immunities will not be infringed. The Speaker's presence may offer an opportunity for members to seek advice and raise concerns about the search. But I doubt whether it is a significant guarantee that parliamentary immunities will not be violated.

Therefore the new question that should be of concern, is how to allow for such a search without uncovering documents that are confidential, material that enjoys parliamentary immunity or is part of "proceedings in Parliament".

One of the most striking examples of this new necessity for Parliament comes from a new case¹ decided lately in the U.S., where for over two hundred years since the American Constitution was drafted, no search was even conducted within Congress against congressmen – until last year.

In this case the FBI conducted an investigation into whether a Congressman was involved in bribery, and filed an application for a warrant to search his office in Congress for documents and computer files. The FBI executed the warrant, taking copies of files and hard drives of the office's computers.

The Congressman filed a motion for return of the property, arguing that the search was unconstitutional as it violated the immunity granted by the speech or debate clause and that it violated the separation of powers principle. The Congressman argued that he was not given the opportunity to segregate the material and to see – before the documents were taken – whether there was any privileged material.

¹ U.S. Court of Appeals (Columbia Circuit) No. 06-3105, *United States of America v. Rayburn house office building* (decided August 3rd 2007).

The motion was denied by the District Court. But the Court of Appeals in Columbia decided on August 3rd 2007 that the search and seizure violated the legislative immunity, that the congressman should have been allowed to claim immunity for particular documents before they were seized, so that immune documents would not fall into the hands of the law enforcement agencies.

Judge Rogers stated that:

“The special procedures outlined in the warrant affidavit would not have avoided the violation of the Speech or Debate Clause because they denied the Congressman any opportunity to identify and assert the privilege with respect to legislative materials before their compelled disclosure to Executive agents.”

Therefore the Court ruled that the Congressman was entitled to the return of all materials (including copies) that are privileged legislative materials:

“Applying these principles, we conclude that the Congressman is entitled, as the district court may in the first instance determine pursuant to the Remand Order, to the return of all materials (including copies) that are privileged legislative materials under the Speech or Debate Clause. Where the Clause applies its protection is absolute.”

What this new decision shows is that the warrants or the legal authorisations do not avoid – *per se* – the violation of parliamentary privileges. These judicial orders usually do not allow Members of Parliament any opportunity to identify and assert the privilege with respect to legislative materials before they are disclosed to the police.

We may deduce from this case that also in regimes with a strong tradition of separation of powers, Members of Parliament cannot

frustrate criminal investigation of activities that are not privileged or protected. But it appears that search and seizure within Parliament is a completely new problem to deal with.

Conclusion

Three different questions or three different phases are to be dealt with within the issue of “search and seizure in Parliament”:

- 1) The first question is whether a specific country allows for search and seizure within the precincts of Parliament. This was the first stage of the research, and the answer given by the vast majority of countries included in the research was in the affirmative.
- 2) The second question, asked to countries where the answer to the first question was in the affirmative, deals with the legal requirements to proceed with the search and seizure. Here we saw that most countries require a legal order, a warrant and permission or presence of the Speaker.
- 3) The third question or the third new stage deals with the new problems that need to be answered nowadays by Parliaments: what procedures should be established to examine and determine whether any of the documents and things seized are immune by virtue of parliamentary privilege? It should be remembered that material taken from the House may be privileged, and so are computer files and documents found in member’s chambers.

Therefore, Parliaments are in need of new “procedures”, new “mechanisms” and new rules to resolve disputes about privileged documents. Such rules have to deal with questions such as: who will take care of the “segregation” of the material? Is it a matter to be dealt

with exclusively by Parliament or is it better for Parliament to establish a “neutral third party” to make this determination? Which should be the legal test to be used for “mixed documents”? Take for example the “dominant purpose” test, which is usually applied by the courts in respect of legal professional privilege: is it suitable to be applied also to documents to determine their immunity under parliamentary privilege?

I conclude with the advice that Parliaments should move to the “third phase” and should develop a protocol or set of rules to handle the procedures for searches and seizures, procedures that will seek to preserve the basic principles of parliamentary privileged documents.

SECOND THEME

The representation at law of a parliamentary assembly

The second theme focuses on Parliament as a legal actor. Does the parliamentary assembly have legal personality? Does the Parliament have the power to go to court? If it has, who decides to do so and who represents the Parliament in court? (See Appendix: Part I, questions 3 to 5).

While in most countries, the Parliament may be a party to legal proceedings before the national courts, this is not always the case. Contributions from the Austrian and the British Parliaments highlight two alternative approaches to the question of representation at law.

In Austria, the Federal Financial Agency (the *Finanzprokurator*) has a representation monopoly; it represents the Republic in all legal proceedings, including matters relating to the Parliament.

In the United Kingdom, the House of Commons cannot have legal personality or represent itself before the courts. Different practical solutions exist to round these obstacles. The choice of the solution depends on the nature of the litigation.

The defence of the prerogatives of Parliaments before the courts is also examined. This was also the focus of a request sent out by the European Parliament, which is put into context here in a contribution from this Parliament.

This theme comes full circle in the academic contribution by Koen Muylle, who relates the question of the defence of Parliament's prerogatives to the questions of legal personality and representation at law, and its examination is brought to a conclusion by professor Suzie Navot.

Analysis of the ECPRD correspondents' replies

Questionnaire:

***Part I (“Preliminary questions & procedural issues”),
sections 3 to 5:***

3. *Does your parliamentary assembly have legal personality?*

3.1. *What is the legal basis of its legal personality?*

4. *Does your assembly act at law?*

4.1. *Which Parliament's body decides whether to act at law or not?*

4.2. *Which Parliament's body represents your parliamentary assembly at law?*

4.3. *In which capacity does the parliamentary assembly act at law?*

5. *Can a Member of Parliament (MP) allege a “functional interest” before a court of law? In other words, can he argue that the harming of the prerogatives of the institution he belongs to gives him cause to act at law?*

5.1. *What is the legal basis for the allegation of a “functional interest”?*

5.2. *Does a “functional interest” allow to act at law on behalf of the parliamentary assembly?*

5.3. *In which circumstances can a “functional interest” be alleged?*

I. Legal personality of the parliamentary assembly

On the question whether their parliamentary assembly (assemblies) has (have) legal personality, 19 countries answer in the affirmative, 13 answer in the negative (see annexed table – column “Legal Personality”).

It should be noted that Israel initially answered “no”, but comments that “the Knesset can be brought to Court meaning that its legal personality [is derived] from case law”. In general, the distinction between the question whether the Parliament has legal personality (section 3), on the one hand, and the question whether it has capacity to engage in legal proceedings (section 4), on the other hand, is not clear-cut. According to the German answer, for instance, the *Bundestag* has no legal capacity in the civil law sense, but it does have “partial legal capacity” in the sphere of constitutional law, because it can become a party to proceedings before the Constitutional Court (*Organstreitverfahren*). Likewise, in Spain, the Congress and the Senate are deemed to enjoy *de facto* legal personality, on the basis that both Chambers may have to appear as a defendant in the Supreme Court. Bulgaria also mentions a provision of its Civil Procedure Code about representation before the courts as the basis of the National Assembly’s legal personality. Finally, Denmark comments that it is not clarified whether its Parliament has legal personality, because it is intentionally avoided to draw the *Folketing* into lawsuits or other situations where the question of legal personality could be raised.

* * *

On the other hand, many countries *do* make a distinction between legal personality and the capacity to be a party in a legal proceeding. Italy, for instance, states explicitly that its courts have recognized that both

the House of Representatives and the Senate are a subject of rights and duties in contracts, torts and other legal fields.

In most countries where the distinction is made, the parliamentary assembly has no legal personality, but does have the capacity to engage in litigation. Iceland, however, declares that its Parliament, although it has legal personality, does not act before the courts. Switzerland confirms that its Parliament has legal personality “as an organ of the Swiss Confederation”; it may also initiate legal proceedings as the representative of the Confederation which is the actual plaintiff. Neither country elaborates on its answer.

Finally, Austria comments that both the National Council (*Nationalrat*) and the Federal Council (*Bundesrat*) are public institutions of the Republic, while the Parliament (National and Federal Council together), represented by the President of the National Council, is a so-called public body corporate (*Körperschaft öffentlichen Rechts*) and has limited legal personality.

* * *

In several countries, the parliamentary assembly itself – the elected political body – is not a body corporate, but legal personality is conveyed upon an administrative organ or authority supporting the activities of Parliament. In the UK the House of Commons Commission is a body corporate established by statute in 1978, which has responsibility for finance and personnel. In Sweden, the *Riksdag* Administration (an authority, led by the *Riksdag* Board, with the task of supporting the activities of the *Riksdag*, providing service and information to members of the *Riksdag* and the public and supplying the necessary resources for the smooth functioning of the work of the Chamber, the parliamentary committees and other *Riksdag* bodies) is

considered to be an administrative authority and therefore, implicitly, a legal person.

The comments of some other countries seem to suggest a similar structure. In Slovakia, for instance, the National Council is represented by the Chancellery, a State budgetary organization which provides expert, organizational and technical services related to the operation of the Council and carries out duties in the area of employment relations, protection and administration of public property, and spending of public funds. In Finland, the Parliamentary Office, operating under the supervision of the Office Commission, is responsible for creating the proper conditions for Parliament to carry out its tasks as a State organ. An official in the Parliamentary Office, the Director of Administration, decides about legal proceedings and represents the parliamentary assembly before the courts.

It is not clear whether these organs are bodies corporate. The Czech answer explicitly states that the Office of the Chamber of Deputies (which, according to the Rules of procedure, is authorized to act, acquire rights and commit itself in matters of economic relationships, labor law relationships and other relationships) is deemed an “organizational body” of the Czech Republic, the Republic being the legal person (Act 219/2000 on the Property of the Czech Republic and its Representation in Legal Relations).

* * *

The column “Legal basis” of the annexed table offers an overview of the answers to section 3.1 of the questionnaire (“rules” = Rules of procedure of the parliamentary assembly; “gp law” = general principle of law).

II. The Parliament as a party to legal proceedings

On the question whether their parliamentary assembly may engage in litigation, all but three of the responding countries answer in the affirmative (see annexed table – column “Act at Law”). Only the Netherlands, Iceland (both without elaborating further) and Austria answer in the negative. Sweden stresses that the parliamentary assembly itself (the *Riksdag*), as a politically elected body, cannot be a party to any legal proceeding. However, the Riksdag Administration, which is a body corporate (see above), may initiate legal proceedings, for instance in relation to public works contracts, public supply contracts and public service contracts, or when filing a complaint for damages caused to the parliamentary building.

In Austria, the *Finanzprokuratur* (Federal Financial Agency, under the jurisdiction of the Finance Ministry) has a representation monopoly with regard to the Republic. The *Finanzprokuratur* represents the Republic in all legal proceedings, also in matters pertaining to the National and the Federal Council.

The comments of some other countries which initially answered “yes” seem to suggest that they have similar rules regarding legal representation.

Poland stresses that the question is still controversial among constitutional lawyers. Cases involving the *Sejm* (the lower house of the bicameral National Assembly) are generally rare. As a rule, the right to represent the State in legal proceedings is vested in the State Treasury Solicitors Office. The Office is obliged to represent the State in, *inter alia*, disputes on tort related to a damage caused by a statute declared unconstitutional or by omission of adoption of a statute, the adoption of which was compulsory. As a result, most of the

legal disputes in which the *Sejm* is involved are serviced by the State Treasury Solicitors Office. In case of other disputes, the Office may represent the State, but it is not obliged to do so. When representation is not taken over by the Office, the duty to represent the State is imposed on a head of the respective State institution, in this case the Marshal (Speaker) of the *Sejm*. According to its own reply, the Polish Senate can be a party only before the Constitutional Tribunal. In all other proceedings, the prerogative is reserved to the State Treasury.

In Macedonia, the Assembly of the Republic may be a party to property and employment proceedings. However, although the Assembly is considered a litigant, it shall act through the Procurator General, who represents the interests of the Assembly in court proceedings. In general, the Office of the Procurator General, established as a government body, undertakes all measures necessary for the legal protection of the proprietary rights and interests of the Assembly.

* * *

The reference by the Polish Senate to constitutional proceedings is notable, because the Czech Republic, Germany and Slovakia add a similar proviso: the parliamentary assembly may be a party before the Constitutional Court only.

Special rules regarding proceedings in the Constitutional Court also exist in other countries.

In Italy, both the House of Representatives and the Senate may be sued in courts of law, but only in the Constitutional Court do they have the right to initiate proceedings (when they deem their powers and prerogatives abridged by other institutions).

In Slovenia, the National Assembly may be sued in court, either on the basis of Article 26 of the Constitution, which provides for the right to compensation for damage caused to legal or natural persons by a State authority, or – in disputes under labour law – by its staff. Before the Constitutional Court, the National Assembly may be a party in the constitutional review procedure, but (contrary to the National Council which can be considered as Slovenia’s “imperfect” upper house) may not itself contest a law. The National Assembly may, however, impeach the President of the Republic before the Constitutional Court for serious violation of the Constitution or the law (Article 109 of the Constitution).

In Belgium, as a rule, the Minister responsible for the subject matter of the dispute represents the State in legal proceedings. However, when the subject matter of the dispute falls within the exclusive competence of the House of Representatives or the Senate, the assembly concerned represents the State (for example, when a member of its staff challenges a decision taken by a body of the assembly with respect to that member, or when the assembly files a complaint for damages caused to the parliamentary building). On the other hand, when the liability of the legislator is at stake, the responsible Minister represents the State, because the Parliament and the government exercise the legislative power jointly. Special rules exist for lodging an action with the Constitutional Court with a view to the annulment of a legislative act. The President of each assembly may institute such an action when two-thirds of the members of the assembly so request. In all other cases brought before the Constitutional Court, he may introduce a statement.

* * *

Finally, in the UK, it is possible for the House of Commons to take action when the subject matter of the dispute falls within parliamentary control. The House authorities may secure legal representation in cases affecting the privileges of the House. A separate Legal Services Office is headed by the Speaker's Counsel, who has the duty of advising the House administration on legal questions.

* * *

The columns "Decision" and "Representation" of the annexed table offer an overview of the answers to sections 4.1 ("*Which Parliament's body decides whether to act at law or not?*") and 4.2 ("*Which Parliament's body represents your parliamentary assembly at law?*") of the questionnaire.

Several countries refer to a general provision in the Constitution, in the law on Parliament or in the Rules of procedure, stating that the parliamentary assembly shall be represented by its President. Generally speaking, one would expect that formal powers in this field (decision to engage in litigation, representation in court) might be distinguished from actual practice. Although some comments explicitly acknowledge the distinction (e.g. Germany, Greece), this is not always clear from the answers. Nevertheless, the distinction explains several multiple answers (where applicable, completed on the basis of the comments).

But a multiple answer can also have another explanation. In several Parliaments, the solution depends on the nature of the litigation. In Albania, the President decides and represents the assembly in proceedings before the Constitutional Court; the Secretary-General before other courts. In Italy, the plenary assembly decides to engage in constitutional proceeding, while in all other instances the President decides. The Czech Act on the Constitutional Court provides for

several proceedings (annulment of legislation, constitutional review of international treaties, actions against decisions in the context of verification of credentials, conflicts between Parliament and President, jurisdictional disputes between State bodies) in which either (one of) the Chambers of Parliament or a group of MP's may be a party. Accordingly, either the plenary assembly or a group of MP's decides, depending on the procedure. Finally, in the UK, if the House of Commons had to engage in litigation, its Speaker would decide in cases relating to the parliamentary privilege, whereas the House of Commons Commission would make the decision in cases regarding the administration of that House.

* * *

The answers to the final question of this section (“*In which capacity does the Parliamentary assembly act at law?*”) are presented in the column “Capacity” of the annexed table. This technical question didn't prove very useful. None of the respondents offered any comments.

III. “Functional interest”

On the question whether a Member of Parliament may go to court on the grounds that the prerogatives of the assembly he belongs to have been infringed upon, only 5 respondents (including Belgium) answer in the affirmative (see annexed table – column “Functional interest”).

Armenia and Georgia do not provide cases of application or any other comment.

Portugal refers to two forms of constitutionality review – the “prior review of constitutionality” (article 278 of the Constitution) and the “abstract review of constitutionality and legality” (article 281 of the

Constitution) – where a request may be addressed to the Constitutional Court by one-fifth or one-tenth of the members of the assembly respectively.

Finally, Denmark, provides an extensive comment, a case-law precedent which is reproduced here in its entirety:

“The question of whether an MP had a functional interest has – to our knowledge – only been raised once in a court of law: the case (UfR 1994.29 H) concerned, among other things, the observance of rules regarding the protection of minorities. Section 73 (2) of the Constitutional Act contains a minority protection provision, which states that one-third of the members of the *Folketing* may, within three weekdays from the final passing of a Bill relating to the expropriation of property, demand that it shall not be presented for the Royal Assent until new elections to the *Folketing* have been held and the Bill in question has again been passed by the new *Folketing* assembling hereafter.

“In the particular case, the dispute was about whether the privatisation by law of a former State-owned life insurance company was expropriation. After the Bill was passed, the required one-third minority, which believed that the Bill was indeed an act of expropriation, demanded that the Bill should not be presented for the Royal Assent and called for a general election in accordance with the rules in Section 73 (2) of the Constitutional Act quoted above. The government disregarded the minority’s request, denying that the Bill was expropriation, and went ahead and obtained the Royal Assent, thus rendering the Bill into law.

“Two MPs, who had been part of the mentioned minority, then sued the Ministry of Finance both in their capacity of insurance holders and as MPs, claiming that the sale of the State insurance company

was expropriation, and that their rights according to the Constitutional Act had been breached, thus rendering the Act invalid. The Ministry of Finance contested that the procedural rules of the *Folketing* could be tried by the courts except for cases of clear abuse or other obvious disregard of the rules.

“The court disregarded this argument and ruled that the two MPs in fact did have the necessary legal interest in having the court assess whether the Act in question was expropriation. Had that been the case, the Act would have been found invalid, because the minority protection rule was not observed. However, the court did not find that the Act was expropriation, but did however confirm that they found themselves competent to rule on whether the rules in the Constitutional Act designed to protect a minority of members in special situations have been unlawfully neglected.”

Summary table

THEME 2	Legal Personality	Legal Basis	Act at Law	Decision	Representation	Capacity	Functional Interest
Albania	yes	law	yes	president secretary-general	president secretary-general	independent	no
Armenia	yes	constitution rules	yes?	-	president	representative	yes
Austria	yes	constitution gp law	no	-	-	-	no
Belgium	no	-	yes	president	president	representative	yes
Bosnia	yes	rules	yes	secretary-general	secretary-general	"legal person"	no
Bulgaria	yes	constitution? [law]	yes	president	president secretary-general other?	other?	no
Croatia	yes	rules	yes	secretary-general	secretary-general	"legal person"	no
Czech republic	no	-	yes	plenary assembly group of mp's	president	-	no
Denmark	no	-	yes	president	secretary-general	independent	yes
Estonia	no	-	yes	president	president	representative	yes? [no]
Finland	no	-	yes	director of administration	director of administration	representative	no
France	no	-	yes	president quaeators	president quaeators	representative	no
Georgia	yes	rules	yes	president bureau	president	independent	yes
Germany	yes	constitution	yes	president	president legal affairs committee	"oberstes bundesorgan"	no
Greece	no	-	yes	president	president state legal advisor	representative	no
Iceland	yes	constitution	no	-	-	-	no
Israel	no? [yes]	- ? [case law]	yes	president committee	legal advisor to the knesset	independent	yes? [no]
Italy	yes	case law	yes	plenary assembly president	president	independent	no

Macedonia	no		-	yes?	secretary-general	secretary-general procurator-general	“litigant”	no
Netherlands	no		-	no	-	-	-	no
Norway	yes		gp law	yes	conference of presidents	secretary-general	independent	no
Poland	no		-	yes	president	president	representative (sejm) independent (senate)	no
Portugal	yes		law	yes	president	president	independent	yes
Romania	yes		constitution gp law	yes	secretary-general	secretary-general legal service	independent	no
Russia	yes		constitution law rules	yes	plenary assembly	president plenary assembly?	independent	no
Serbia	yes?		constitution law	yes	secretary-general	legal officer of the republic	representative	no
Slovakia	no		-	yes	president	mp or mp’s	independent	no
Slovenia	no		-	yes	plenary assembly committee	president	representative	no
Spain	yes		constitution law	yes	bureau	secretary-general	“independent and constitutional body”	no
Sweden	yes [riksdag administration]		rules	yes [riksdag administration]	secretary-general legal service	secretary-general legal service	independent	no
Switzerland	yes		gp law	yes	concerned body	president of the concerned body	representative	no
UK	no		-	yes	president house of commons commission	secretary-general	independent	-

The use of square brackets means that the original answer has been revised or completed on the basis of the comment.

Claire Genta

Administrator at the Policy Department “Citizen’s Rights and Constitutional Affairs” of the European Parliament

Defending the prerogatives of the European Parliament before the courts

In view of the limited possibilities that the European Parliament (EP) has to assert its rights before the courts, and in particular to defend its prerogatives or those of its members before the national courts, the Legal Affairs Committee of the EP called on the ECPRD to examine the possibilities open to national parliaments in actions before the courts. In this way, it would be possible to highlight certain effective national mechanisms.

While it should be pointed out that the Community structure should not be treated like that of a Member State, and that the Parliament should not be treated like a national legislature or the Commission like a government, on the other hand, there is nothing to prevent the ECPRD observing the practices of national States, and drawing on the most effective examples to attempt to transpose them at Community level by analogy. This was the basic purpose of the questionnaire issued to the ECPRD.

1. Questionnaire sent to the ECPRD

1. *Does your national Parliament have legal personality?*
2. *Is your national Parliament entitled to bring, or intervene in, judicial proceedings in the national courts*
 - (a) *where the Parliament considers that its prerogatives or those of one of its members have been breached,*
 - (b) *in the event that the election of a member is contested, or*
 - (c) *in any other circumstances (please specify)?*
3. *If question 2 is answered in the affirmative, please specify in what courts, in what circumstances and by what procedure, mentioning any avenues of appeal and citing any relevant case-law.*
4. *If question 2 is answered in the negative, please provide any other information which you consider relevant.*

The responses received have been analysed and compiled into a table which is shown below.

This questionnaire was launched at the request of Mr. Gargani, Current Chairman of the European Parliament's Legal Affairs Committee.

2. The context of the request and the status of Community law

At the meeting of the EP's Legal Affairs Committee on 11 June 2007, Mr. Gargani submitted a working document announcing his intention to draw up an own-initiative report about the defence of the EP's prerogatives before the courts. His remarks were prompted by the "Marchiani"-case, which was the subject of heated exchanges between the EP and the French authorities about the system of immunities offered to an MEP.

Immunity provisions for members of the European Parliament

This system is governed partly by Community law, and for the rest, by national provisions.

The **Protocol on the privileges and immunities of the European Communities** dates from 1965. So it was established before election of MEPs by universal suffrage. MEPs were granted protection at national level by each Member State and the system was conceived as a supplementary system which only covered the "European" part of the MEP's work. Today, it is apparent that this system has deficiencies.

The European Commission had considered amending the system in 1984, but ultimately no action was taken.

The Protocol provides that immunity can be lifted by the Assembly at the request of the appropriate authorities of a Member State. This request is sent to the President, who forwards it to the relevant committee (*i.e.* the Legal Affairs Committee). The committee makes

no pronouncement on the possible guilt of the MEP concerned, nor on the appropriateness of prosecution, but proposes, in a resolution put to the plenary assembly, to accept or reject the request.

It is also interesting to observe the rules that govern disqualification from the office of member of the European Parliament.

The **1976 Act on the election of the European Parliament by direct universal suffrage** does not provide conditions for ineligibility or disqualification from office and therefore this system is governed by national legislations. This state of affairs was clearly laid down in the new version of this Act adopted in 2002: disqualification from office under national legislation takes effect automatically and the EP is informed and merely has to take note that the seat has become vacant.

Mr Marchiani, a French MEP, was subject to a criminal prosecution in France. He had claimed immunity as an MEP in order to invalidate the results of the phone tapping to which he had been subjected.

Article 100-7 of the French Code of Criminal Procedure stipulates that “no telephone interception may be carried out on the line of a member of the *Assemblée Nationale* or a senator, without the President of the assembly to which he belongs being informed by the investigating magistrate”. However, in the case of Mr Marchiani, the President of the EP had not been informed.

In its judgement no. 1784 of 16 March 2005, the French Court of Cassation refused to apply this provision by analogy to a member of the European Parliament.

So, in a resolution of June 2005, the EP requested that this judgement by the Court of Cassation be annulled or overturned so that the immunity of its MEP could be respected.

The French Justice Minister replied that the judgement had become final, and therefore, there was no legal remedy that could be used to annul or overturn it.

Then, in a further resolution, the Parliament put forward the following reasoning: the Protocol on the privileges and immunities forms part of primary Community law. By refusing to apply the Article of the French Code of Criminal Procedure to a member of the EP, the French court had infringed Community law and therefore the French State was liable.

Therefore, the EP called on the European Commission, as the guardian of the treaties, to initiate an action for failure to fulfil an obligation, provided for under Article 226 of the Treaty establishing the European Community (ECT), against France.

In this case, the Commission refused to do so. Nevertheless, it is empowered to do so, since it has the power to assess the appropriateness in the situation, and therefore to take into consideration elements other than strict legality.

It merely notified its refusal, without giving any explanation or justification.

In the current state of Community law, the EP does not have any other means of action to ensure that the immunity of one of its members is protected.¹

¹ The same was true in the “Geremek case”, where the EP was unable to protect Mr Geremek against the decision by Poland to withdraw his mandate as an MEP for failing to comply with a law compelling him to declare that he had never collaborated with the secret police of the former Communist regime.

Indeed, although Community institutional law has evolved towards an increase in the powers of the EP, by offering it a more important role within the Community system, the EP has no powers to act alone to defend the immunity of its members.

The EP's possibilities of action before the Court of Justice of the European Communities

– **Action for cancellation** (Art. 230 ECT).

This is an action concerning the legality of acts adopted jointly by the EP and the Council, of acts of the Council, of the Commission and of the European Central Bank, and of EP acts intended to produce legal effects.

An act can only be challenged if it is proven that it exists, that it is attributable to an institution, and intended to produce legal effects.

So far, the EP never had the capacity to take this type of action, for the ECT introduces a distinction between privileged petitioners and private individuals.

Privileged petitioners do not have to establish that they have an particular interest, because they are deemed to be acting in the public interest. Originally, the letter of the Treaty only mentioned the European Commission, the Council and the Member States as privileged petitioners.

It was considered that the EP did not have active legitimation, and could not bring an action for cancellation.

A first change occurred in the case law: in a “Chernobyl” judgement (EP v. Council, Case C-70/88, Rec. 1990, I-2041), the Court of Justice of the European Communities, without treating the EP as a privileged petitioner, considered that it could bring an action for cancellation to defend its own prerogatives.

Afterwards, this principle was introduced into the Maastricht Treaty.

Finally, the Nice Treaty enabled the EP to become a privileged petitioner in its own right, except for acts adopted in the context of Title VI of the Treaty on European Union (TEU).

– the EP can also bring an action **for failure to act**, pursuant to Article 232 ECT (originally, on the other hand, it was not one of the institutions against which action could be taken for failure to act; the change took place with adoption of the Maastricht Treaty).

However, it is not allowed to bring an action for failure to act against the Commission having omitted to initiate an action for failure to fulfil an obligation against a Member State.

– **Action for failure to fulfil an obligation**

This remedy is only open to Member States and the Commission, as the guardian of the treaties and protector of the Union’s interests.

In this regard, the Commission has the power to assess the **appropriateness** of an action in the situation.

Note: the European ombudsman has limited the discretionary power of the Commission when a complaint by a private individual is referred to it: the Commission must inform the plaintiff (= *word used in the treaty*) of the follow-up of his/her complaint, and the

ombudsman inquires into the way in which the complaint was examined, to verify that there has not been maladministration. Therefore, the Parliament has a less favourable regime than that for private individuals.

3. Argumentation by Mr Gargani, Current Chairman of the Legal Affairs Committee

As indicated previously, Mr Gargani intends to draw up an own-initiative report on the defence of the EP's prerogatives before the national courts.

In the context of this procedure, he has undertaken not to propose any amendments to the Treaty (which would be a matter for the Parliament's Constitutional Affairs Committee).

It is merely a matter of encouraging new practices of cooperation with national systems and between institutions in the Community system itself.

In a speech to the members of the Committee which he chairs, Mr Gargani set out his demands and thoughts about the issue of defence of the prerogatives of the EP and its members:

– Considering that the Commission is under no obligation to take action for failing to fulfil an obligation against a Member State, Mr Gargani considers, nevertheless, that the Parliament should be able to be informed of the reasons behind the decision not to take action.

– In the context of a case about the immunity of an MEP, the European Court of Human Rights (ECHR) consulted Mr Gargani as an expert (*amicus curiae*), in his capacity as Chairman of the Legal Affairs

Committee. Mr Gargani recommended to grant the Chairman of the Legal Affairs Committee a genuine legitimacy to participate in judicial proceedings in which the prerogatives of the Parliament are being challenged.

– In the context of requests for preliminary rulings by the Court of Justice of the European Communities, Article 23 of the Statute of the Court stipulates that the Parliament may submit observations where these requests concern the validity or interpretation of acts adopted under the co-decision procedure. However, the Parliament’s Rules of procedure do not form part of these documents. To enable the Parliament to defend itself effectively before the Court of Justice of the European Communities, Article 24, paragraph 2 of the Statute of the Court under which “the Court may also require the Member States and institutions not being parties to the case to supply all information which the Court considers necessary for the proceedings” could be amended so as to offer the EP the right to submit observations on any occasion when its prerogatives are threatened.

– Mr Gargani emphasised the necessity of allowing the Parliament to defend its prerogatives and those of its members before national jurisdictions. Participation by the EP in judicial proceedings brought before the national courts could, first of all, limit in some cases the recourse to requests for preliminary rulings and thereafter, eliminate discrimination between national MPs and MEPs. Therefore, Mr Gargani suggests improved collaboration between the EP and the national courts. In this regard, interesting practices have already developed with certain courts in Member States of the Union.

– Mr Gargani also refers to Article 8 of the protocol on the application of the principles of subsidiarity and proportionality (appended to the

TEU), under which the Court of Justice has jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act [...] brought by Member States or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it. He suggests that if national parliaments have a right to take action (even indirectly) before the Court of Justice in the event of non-compliance with the principle of subsidiarity, the EP should be allowed to be heard in proceedings relating to its prerogatives before the national courts.

Note: however, it should be borne in mind that the Court of Justice has already refused to extend the powers of national parliaments by simple analogy to the EP, in a 1999 judgement “EP v. Council”.

In that case, the EP claimed that the provisions of the treaties relating to the powers of the assembly concerning approval of international agreements should be interpreted with reference to the powers of national parliaments.

The Court considered that “the scope of this provision could not be affected by the scope of the powers held by national parliaments”.

– Mr Gargani also quoted the judgement by the Court of Justice of the European Communities in the “*Union de Pequenos Agricultores*” case (2002). The Court ruled that “it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.” In addition, he called for respect for the sincere and fair cooperation by the Member States with the Union as affirmed in Article 10 TEC to back his call to the Member States to allow consultation of the EP in the examination of cases involving respect of its prerogatives.

– In view of the results of the questionnaire submitted to the ECPRD, Mr. Gargani cited the example of the Belgian judicial system, which allows the Federal Parliament to take part in court cases concerning one of its members, in order to defend the interests of the MP or those of the assembly as a whole. These provisions are particularly interesting in that the federal organisation of the Belgian State is similar to the “multinational” structure of the European Union, and that the Belgian Parliament, like the EP, has no legal personality.

To conclude, Mr. Gargani called for the establishment of close collaboration between the EP and the national courts. This proposal does, however, require careful reflection about its implementation, particularly for aspects relating to the separation of powers and the independence of the Judiciary.

Summary table: replies to the E.P. questionnaire

Questions	Austria	Belgium	Czech Republic	Denmark	Estonia	Finland
1. Does your national Parliament have legal personality?	Yes, but limited	No	No	Not specified in Danish law	No answer	Yes
2. Is your national Parliament entitled to bring, or intervene in, judicial proceedings in the national courts?	The Constitutional Court decides: - upon application by a popular representative body (such as the National Council) on a loss of seat by one of its members; - upon application by at least 11 Austrian MEP, on a loss of seat by a MEP from the Republic of Austria.	Whenever the subject/ matter of a dispute falls within the competence of the House of Representatives or the Senate, the assembly concerned can bring judicial proceedings in front of the national courts on behalf of the State. In accordance with the general provisions governing intervention in judicial proceedings, the House of Representatives or the Senate can, except in criminal matters , intervene in a case brought against a member, in order to safeguard the interests of the	The Houses of Parliament or groups of MPs are entitled to bring or take part in judicial proceedings. <u>Ex:</u> the jurisdictional (competence) dispute between State bodies: proceeding following the proposed annulment of a statute or some other enactment (via a petition); proceeding in appeal against a decision concerning the validation of the election of a deputy or a senator; proceeding in cases of doubt concerning a deputy or senator's loss of eligibility or in case of	<i>The answer from the Danish Parliament's service only deals with cases of judicial actions brought against the Parliament.</i>		If the prerogatives of a Member of the Parliament were to be breached, the primary actor would be the Member in question. But the <i>Eduskunta</i> (Parliament) would also have the right to be part of the action alongside its member. The <i>Eduskunta</i> cannot participate in appeal proceedings against a decision confirming the results of an election and does not have a right of appeal against the courts' decisions in such cases.

Questions	Austria	Belgium	Czech Republic	Denmark	Estonia	Finland
	<p>legislative assembly or of its member.</p> <p>Special rules exist for lodging an action before the Constitutional Court with the view to the annulment of a legislative act for violation of constitutional provisions regarding the distribution of powers in the Federal State or fundamental rights. The president of each assembly may institute such an action when two-third of the members of the assembly request so.</p>	<p>incompatibility under the Constitution of the deputy's or senator's mandate with some other position or activity.</p> <p>A supreme administrative court is in charge to check the legal fairness of elections. The deputy or senator (or his/her party) affected by the decision on the validity of his/her mandate can bring action to the Constitutional Court. When he/she does so, the Houses of Parliament can act as defendants.</p> <p>Finally, the Senate may bring a charge before the Constitutional Court against the President of the Republic for</p>				

	<p>"It might be wise to provide the European Parliament with the right to bring an application to the EU Court of Justice for a loss of seat by one of its members when it considers that the prerogatives of one of its members have been breached"</p>	
<p>high treason.</p>		<p>In general, it is intentionally avoided to draw the <i>Folketing</i> (parliament) into lawsuits or other situations where the question of legal personality could be raised. For instance, if someone would bring an action against legislation passed by the <i>Folketing</i>, this action would be lodged against the Minister responsible for the subject matter of the given legislation.</p> <p>In matters concerning the staff of the <i>Folketing</i> (Parliament) and in civil cases, for instance liability cases, the <i>Folketing</i> is represented by its Secretary General.</p>
	<p>An Official may be detained as a suspect only if the Parliament has granted consent to the preparation of a statement of charges with regard to such person.</p>	

Remarks

Questions	Germany	Italy	Lithuania	Luxembourg	Netherlands	Portugal
1. Does your national Parliament have legal personality?	<p>No</p> <p>The <i>Bundestag</i> (Parliament) has the capacity to institute and be a party to proceedings before the Constitutional Court.</p> <p>- In disputes between federal bodies (the <i>Bundestag</i> and its components can be party)</p>	<p>Yes</p> <p>The two Houses of the Italian Parliament must give their consent in all proceedings related to parliamentary prerogatives (immunities and rights enforcement) - art.68 of the Constitution. The involved court may challenge the House's decision in front of the Constitutional Court</p> <p>- art.134 of the Constitution.</p> <p>If the court does not comply with this parliamentary privilege regarding proceedings, the parliamentary body concerned may defend its own prerogative and seek a decision by the Constitutional Court to strike down the first court's order.</p>	<p>No. But its Office has rights of a legal person.</p> <p>The Office of the Lithuanian Parliament may participate in judicial proceedings related to its activity.</p> <p>The Parliament in itself (called the <i>Seimas</i>) may bring a case only in front of the Constitutional Court.</p>	<p>Yes</p> <p>The Parliament cannot bring judicial proceedings in cases where it considers that its prerogatives or those of its members have been breached. (but the issue could be raised within a prejudicial question addressed by a national court to the Constitutional Court.)</p> <p>It can bring before national courts any dispute, pursuant civil and criminal legal procedures, in relation to all legal matters it is faced with. No detail.</p>	<p>No</p> <p>No. No detail</p>	<p>Yes</p> <p>The Portuguese Parliament (the Assembly of the Republic) is represented by its President who is responsible for deciding if the Assembly takes legal action.</p> <p>The Assembly may be involved in lawsuits dealing with:</p> <ul style="list-style-type: none"> - administrative disputes (ex: when administrative acts related to the statutory rights of its members are questioned); - civil disputes; - constitutional disputes. <p>Members of the Assembly can request the Constitutional Court to judge appeals of cases related to the loss</p>
2. Is your national Parliament entitled to bring, or intervene in, judicial proceedings in the national courts?						

<p>of seats and elections held in the Assembly. No detail about the procedure.</p>				<p>However, it may not intervene in judicial proceedings involving its members.</p> <p>In the cases related to disputed elections, each House reviews its own members' qualifications and settles electoral disputes - art 66 of the Constitution. No court may intervene.</p>		
					<p>The <i>Bundestag</i> determines whether a member has lost his seat. A complaint against the decision of the <i>Bundestag</i> concerning the validity of an election or the loss of a seat in the <i>Bundestag</i> may be lodged with the Constitutional Court by the member whose seat is in dispute.</p>	<p>Remarks</p>

Questions	Poland	Romania	Sweden	Slovenia	Slovakia	UK
1. Does your national Parliament have legal personality?	No	Yes	No	No	No	No
2. Is your national Parliament entitled to bring, or intervene in, judicial proceedings in the national courts?	<p>The Parliament can only intervene before the Constitutional Tribunal:</p> <ul style="list-style-type: none"> - in competence disputes with other State institutions established by the Constitution. - in cases about constitutionality of legislation and international agreements, the conformance of legislation with ratified international agreements the ratification of which requires a prior consent in the form of a legislative act. the conformance of enactments by central State institutions with the Constitution, ratified international 	No	<p>The Parliament (<i>Riksdag</i>) in itself cannot be party to a proceeding in court.</p> <p>Parts of its structure (the <i>Riksdag</i> Administration for instance) may act as a party in judicial proceedings, but only within the competences given to them (ex: case related to public contracts as far as the <i>Riksdag</i> Administration is concerned).</p>	<p>The Parliament does not appear in front of national courts.</p> <p>BUT it can play a role in the proceedings in front of the Constitutional Court: it may file a request to initiate the proceeding to decide on:</p> <ul style="list-style-type: none"> - the constitutionality and legality of a Government or Minister's regulation, a local community regulation or a general act issued to exercise public authority; - competence disputes between the National Assembly and the President of the Republic, the Government, a court or other State or local authority; - the 	<p>The National Council (sole legislative body of the Slovak Republic) has limited competency in some constitutional issues brought before the Constitutional Court.</p> <p>The Constitutional Court shall launch the proceedings upon a motion submitted by not less than 1/5 of all members of the National Council.</p> <p>On the other hand, the National Council may not be party to an action before civil or criminal courts.</p>	<p>The Parliament does not intervene directly in judicial proceedings.</p> <p>In several occasions, the House of Commons has sought the assistance of Government officers, when legal action was necessary. Ex: in 1999, the Secretary of State for Justice applied for a resolution stating that an MP was entitled to resume her seat, although initially found guilty of election fraud.</p>

	agreements and statutes, and the constitutionality of the objectives and activities of political parties.			unconstitutionality of acts: - the activities of political parties.	Slovak law maintains the principle of the sovereignty of the National Council's legislation: nobody shall sue the National Council for the exercise of the legislative power. However, recently, some judges of different courts sued the National Council for violating the equal treatment principle regarding the judges' salary when it approved the related Act. Furthermore, all general courts have rights to initiate a proceeding before the Constitutional	Since 1992 the Clerk of each House is enabled to enter into legal contracts on behalf of the Houses.
Remarks			The verification of credentials and appeals against elections or decisions of <i>Riksdag's</i> bodies in administrative matters are handled by bodies elected by the <i>Riksdag</i> .	It can also act as a defendant, especially in a proceeding against its decision confirming an MP's election.	Slovak law maintains the principle of the sovereignty of the National Council's legislation: nobody shall sue the National Council for the exercise of the legislative power. However, recently, some judges of different courts sued the National Council for violating the equal treatment principle regarding the judges' salary when it approved the related Act. Furthermore, all general courts have rights to initiate a proceeding before the Constitutional	

Questions	Poland	Romania	Sweden	Slovenia	Slovakia	UK
					Court in case of doubts on the compatibility of laws with the Constitution, constitutional laws and international treaties.	

PS: No answer from Bulgaria, Cyprus, France, Greece, Hungary, Ireland, Latvia, Malta, Spain.

John Vaux

*Speaker's Counsel
at the House of Commons (British Parliament)*

The representation at law of the House of Commons

I. The House of Commons of the United Kingdom

1. Neither the House of Commons nor the House of Lords (collectively the Parliament of the United Kingdom) has any legal personality. No Parliament may continue longer than five years (the Septennial Act 1715 as amended by section 7 of the Parliament Act 1911). In practice Parliaments are dissolved by the Queen on the advice of the Prime Minister before five years expire. Once Parliament is dissolved, there is no longer a House of Commons. Such a body is incapable of having legal personality or of representing itself before the courts. Even if means were found to jump that hurdle, practical decision-making would surely require a system of delegation.
2. In the United Kingdom, there are three practical solutions to these difficulties. The choice of the solution depends on the nature of the litigation.

Protection of the privileges of the House of Commons

3. The courts are prohibited from interfering in any way with the proceedings of either House of Parliament. As expressed in the antique but still highly relevant language of the Bill of Rights 1689:

“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”.

4. From time to time the House of Commons needs to intervene in legal proceedings to protect its autonomous jurisdiction (its privileges). Recently it intervened in a dispute in the High Court and thereafter in the Court of Appeal to assert that to rely on evidence given to, or views expressed by, a select committee, in the course of a judicial review of executive action, breached its privileges. *In such cases the House of Commons is represented by Her Majesty’s Attorney General on behalf of the Speaker of the House of Commons.*

Employment litigation

5. The House of Commons (Administration) Act 1978 created a body corporate called the House of Commons Commission (“the Commission”). Its members are the Speaker (who chairs it), the Leader of the House (a member of the Government), the Shadow Leader and three representative back-benchers. It appoints all the staff who work in the departments which comprise the House Service, who accordingly work under contracts of employment with the Commission. *In all litigation relating to employment the House is represented by the Commission.*

Property and contracts

6. The Parliamentary Corporate Bodies Act 1992 created a Corporate Officer of the House of Commons who is a corporation sole. Corporations sole were originally ecclesiastical; for example all bishops of the Church of England (but not of the Roman Catholic

Church) are corporations sole. Their peculiarity is that a natural person has, by virtue of his or her office, a second, corporate capacity.

7. The Corporate Officer is always the Clerk of the House. As Corporate Officer he has perpetual succession, an official seal and power to sue and be sued under that name. He holds property of all kinds on behalf of the House and enters into all its contracts other than contracts of employment. *The Corporate Officer represents the House in litigation over property rights (which are in practice very rare or non-existent) and over contracts, for example, contracts with building contractors.*

Freedom of information

8. The Freedom of Information Act 2000 and the Data Protection Act 1998 apply to the House of Commons. Under the former Act persons are entitled to request information held by a public authority unless it falls within one of a number of statutory exceptions. If a public authority refuses to disclose information pursuant to a request, the requester can appeal to the Information Commissioner. If the requester or the public authority disagree with the Information Commissioner's decision, he, she or it can appeal to the Information Tribunal from which an appeal lies to the High Court on a point of law only. *As the Corporate Officer is, for the purposes of the Data Protection Act 1998, data controller in respect of data held by the House of Commons he represents the House in applications to the Information Tribunal.*

II. Joint departments

9. The Parliament (Joint Departments) Act 2007 authorises the Corporate Officers of the House of Lords and of the House of Commons to establish joint departments which carry out functions on behalf of both Houses. No such department has yet been established. The Corporate Officers acting jointly are the employer of staff in a joint department. *The Corporate Officers jointly will represent a joint department in any legal proceedings.*

Gerhard Kiesenhofer

*Member of the Parlamentsdirektion,
Austrian Parliament*

The representation monopoly of the *Finanzprokurator*

The Austrian legal system distinguishes between natural persons – natural personality – on the one hand, and legal persons – legal personality on the other.

Like natural persons, legal persons have full legal capacity. These legal persons are represented by natural persons – called organs – and have rights and possibilities which in most cases correspond to those of a natural person. Legal persons are able to enter into contracts. They can enforce their rights before the courts. They are allowed to sue and can be sued.

In the Austrian legal system, there are two different types of legal persons: legal persons under private law – such as societies/associations (*Vereine*, in German) or companies (*Gesellschaften*) – and legal persons under public law. One type of legal person under public law are the so-called public corporations (“*Körperschaften öffentlichen Rechts*”). While legal persons under private law are usually established by contract, the *Körperschaften öffentlichen Rechts* are normally established by law or by the Constitution.

The most important kind of *Körperschaften öffentlichen Rechts* are the so-called “*Gebietskörperschaften*” (regional authorities). In accordance with the federal structure of the Austrian State, they

either cover a certain sub area of the State or the entire State area. *Gebietskörperschaften* are the communities, the *Länder* (federal provinces) and the Federal State. All public bodies of the Federal State, such as the Federal President, the *Nationalrat* (National Council, one chamber of the Austrian Parliament), the *Bundesrat* (Federal Council, the other chamber of Parliament), the federal government and its ministers, the courts etc, act on behalf of the Federal State as a *Gebietskörperschaft*. The public bodies do not have a legal personality of their own. The National Council, for example, cannot exercise any private rights such as ownership or cannot enter into contracts.

So, who is the owner of the Parliament building, who hires service institutions which work in the Parliament, such as the restaurant, builders, etc...? These contracts are made between the Federal State as a *Gebietskörperschaft* – represented by the president of the National Council – and the other contracting partner. Any claims arising from such a contract would have to be addressed to the Federal State, and not to the National Council or the President of the National Council.

In such legal proceedings, the Federal State should be represented by the *Finanzprokurator* according to the provisions of the “*Prokuratorgesetz*”, the act governing the *Finanzprokurator*.

The *Prokuratorgesetz* provides that the Republic of Austria (and several public organisations) should be represented and counselled by the *Finanzprokurator*. The representation before civil courts – and the Supreme Court – is compulsory, while the representation before the Constitutional Court and the Administrative Court is voluntary. The *Finanzprokurator* acts as the solicitor of the Republic of Austria. The staff of the *Finanzprokurator* are employees of the Federal Ministry of Finance (which, in turn, – or the minister – is also a body of the

Federal State as a *Gebietskörperschaft*). The civil servants who are lawyers at the *Finanzprokurator* should have passed the Austrian *Rechtsanwaltsprüfung*, the compulsory examination for solicitors to work in Austria (within 5 years).

Summary

In Austria, the two legislative assemblies do not have their own legal personality when they act as bodies of the Federal State as a *Gebietskörperschaft* (regional authority). So these legislative assemblies cannot sue and be sued before courts. But the Federal State can sue and be sued for its bodies – in case of the Austrian Parliament, either the National Council or the Federal Council. In these cases the *Finanzprokurator* acts as a solicitor for the Federal State and therefore exercises a representation monopoly.

Koen Muylle

*Law clerk at the Belgian Constitutional Court
and voluntary scientific collaborator at the Catholic University of
Leuven – KUL (Belgium)*¹

Three questions in relation to the representation of a legislative assembly before the courts

1. Since a legislative assembly is both a political actor and a public authority, it sometimes happens that it finds itself before the courts, either because someone has summoned it to appear before a court, or because it wishes to bring an action, or intervene in third party proceedings. In that case, the problem arises of how a legislative assembly should be represented before the courts. This problem raises three questions: 1°) first of all, should an assembly be able to act at law *itself* to uphold its interests?; 2°) secondly, to be able to do so, must it have legal personality?; 3°) thirdly, should a Member of Parliament be able to act at law to uphold the prerogatives of the assembly to which he or she belongs?

I. Should an assembly be able to act at law *itself* to uphold its interests?

2. In order to answer this question, we must first ask ourselves how it can happen that a legislative assembly finds itself in a courtroom. Why should a legislative assembly be able to act at law or defend

¹ The opinions expressed are given in a personal capacity and are not binding in any way on the institutions for which the author works.

itself in a court case? In examining the actual instances, we can discern two categories:

- First of all, there are the disputes under ordinary law – supplies, staff disputes, extracontractual liability, etc. These are disputes in which any other person, public or private, could become involved. Behind the Belgian legislation on the subject², for example, we find a conflict between the Parliament of the Brussels-Capital Region and one of its tenants, a famous conjuring trick and novelty joke shop³. The French Council of State (supreme administrative court) considerably broadened its competence with regard to Parliament’s acts when it ruled on a dispute concerning a public procurement contract let by the President of the *Assemblée nationale*⁴.
- Then there are disputes which relate to the actual business of the assembly. These disputes directly challenge the prerogatives of the assembly and/or its members. In Belgium, for example, there have been disputes concerning, among other things, the right of the House of Representatives to adopt or not a law on estates belonging to the State⁵ or to carry out a

² Law of 26 May 2003 on the representation of Federal legislative chambers in judicial and extrajudicial acts, *Belgian State Gazette*, 16 July 2003, err. *Belgian State Gazette*, 21 October 2003.

³ The Parliament wanted to get rid of this tenant, whose presence on the ground floor of its buildings was deemed to be harmful to the reputation of the institution. Finally, this shop moved to new premises opposite the Brussels Parliament: see <http://www.picard-egafun.com/new/homepag12.html>.

⁴ French Council of State, Ass., 5 March 1999, *Président de l’Assemblée nationale, Les grands arrêts de la jurisprudence administrative*, Paris, Dalloz, 2001 (11th ed.), 826.

⁵ Trib. Bruges (summary proc.), *unpublished*. See on this subject K. Muylle and J. Van Nieuwenhove, “Kroniek Parlementair Recht. Rechter verbiedt Kamer domaniale wet aan te nemen”, *T.B.P.* 2006, 211-212. This judgement was overturned:

naturalisation⁶, the right of the Parliament of the Brussels Capital Region to appoint the members of a judicial panel⁷ and the scrutiny exercised by the House of Representatives and the Senate – via a Joint Committee – over electoral expenditure and government communications⁸. Two recent cases before the Court of First Instance of the European Communities concerned the parliamentary immunity of members of the European Parliament.⁹ In this case, the assembly acted at law in order to defend parliamentary specificity.

3. Bearing in mind the above, should a parliamentary assembly be able to act at law itself? On reading the responses to the questionnaire¹⁰, what is particularly striking is the number of countries where a legislative assembly cannot act at law at all (neither as a plaintiff, nor as a defendant), or it has to do so via another authority, which depends on the executive or the judiciary. Is this problematic?

What is at issue here is whether the independence of the assembly is guaranteed by this process. On the face of it, it is tempting to say that any mechanism which makes a legislative assembly dependent on another authority to uphold its interests before the courts is,

Trib. Bruges (summary proc.), 8 March 2006, *unpublished*. See on this subject M. Van der Hulst and P.D.G. Caboor, “Rechter belet het parlement om te legifereren”, *T.v.W.* 2007, 50-51.

⁶ Court of Arbitr., no. 75/98, 24 June 1998, *Rev. dr. étr.* 1998, 317, note D. Renders.

⁷ Court of Arbitr., no. 93/2004, 26 May 2004.

⁸ Court of Arbitr., no. 20/2000, 23 February 2000, note D. Delvax, *J.T.* 2000, 446.

⁹ CFI, Order of 12 May 2006, T-042/06, *Golnisch vs. European Parliament*; CFI, Orders of 16 March 2007, 27 June 2007 and 22 November 2007, T-345/05 R I, II and III, *V. v. European Parliament*.

¹⁰ See the contribution by Mr. Wouters on this theme (“Analysis of the ECPRD correspondents’ replies”).

by definition, incompatible with this principle. Nevertheless, this answer would need to be qualified. It all depends on the relationship between the assembly and the authority which represents it. One could imagine that the latter would be acting on the instructions of the assembly. So the minister or the public prosecutor would be obliged to initiate proceedings if the assembly requests it. However, the replies do not specify this.

4. Even on the assumption that the assembly can compel another authority to act on its behalf, it is not sure that this solution would be satisfactory, taking account of the possibility of a conflict between the executive and the legislature. Let us consider, for example, the many conflicts between the European Parliament, the Commission and the Council of Ministers concerning the procedure to be followed to adopt a future European norm. If this conflict is taken before the Court of Justice, how can the Parliament ensure that its interests are upheld if it cannot act at law itself? The Court of Justice is well aware of the situation: after having accepted in the “*Les Verts*” judgement that a plaintiff may summon the European Parliament to appear in court, whereas the former Article 173 [current Article 230] of the Treaty of Rome did not provide for this eventuality¹¹, the Court then accepted that the European Parliament itself could bring an action to uphold its prerogatives¹².
5. But apart from this hypothesis, which is, after all, totally exceptional, of a conflict between the legislature and the executive, an assembly that needs to rely on the services of the executive to be able to act at law finds itself in a delicate situation. What can

¹¹ ECJ, 23 April 1986, 294/83, “*Les Verts*” vs. *European Parliament*, *Jur.* 1986, 1339.

¹² ECJ, 22 mai 1990, C-70/88, *European Parliament v. Council*, *Jur.*, I, 2041; 28 June 1994, C-187/93, *European Parliament v. Council*, *Jur.* 1994, I, 2857.

it do if the executive refuses to take any interest in the matter? This hypothesis is far from theoretical, given that – as has just been explained – a legislative assembly would like to act at law to uphold its own interests or to defend a parliamentary specificity.

It could be asserted that it will suffice to hold the minister concerned politically accountable. The mechanisms of ministerial accountability are not sufficient, however:

1°) first of all, not all assemblies can enforce that responsibility, either because they are operating in a presidential system, or because the government is only accountable to one of the two assemblies;

2°) secondly, even if an assembly does have this power, it is difficult to imagine a minister being compelled to resign because he did not uphold the interests of a parliamentary assembly properly at law;

3°) thirdly, this answer does not take account of the domination currently exercised by the government over the Parliament.

In other words, accountability mechanisms will not offer a remedy if the assembly which depends on the executive to be able to defend itself at law is dealing with a rather uncooperative executive.¹³

¹³ Zuleeg also invokes another argument to enable an assembly to defend itself before the courts: the legitimacy of the institution. According to him, when the Parliament defends its legal position in public, this “contributes to its legitimation [...] The role of defender forces MPs to develop a determination, at least by the majority, on the defensive strategy to be adopted.” (“Le Parlement face à la Cour”, in *Le Parlement européen*, Brussels, Editions de l’Université libre de Bruxelles, 1989, 185).

II. Must a legislative assembly have legal personality to be able to act at law?

6. From the text above, it would seem desirable that a legislative assembly should be able itself to defend its interests at law. However, does it need legal personality to do so?
7. In some countries, the answer to this question must be “yes”. The District Court of Luxembourg for instance, in a judgement handed down on 18 May 2007, decided that the European Parliament, a European Community institution which has no legal personality, cannot be a party to proceedings brought before a Luxembourg court.¹⁴
8. In other countries, the absence of legal personality does not prevent the parliamentary institution from being represented at law. In Belgium, a legislative assembly may act at law, either as plaintiff or defendant. In this case, it is the authority (Federal State, Region or Community) on which the assembly in question “depends”, which is a party to the suit. However, this authority is represented by the assembly, which is itself represented by its President. So if the House of Representatives or the Senate is involved in a dispute which gives rise to legal proceedings, it is the Federal State, represented by the House or the Senate – itself represented by its President – which is a party to the suit.
9. However, one could envisage other solutions. The European Parliament may act before the Court of Justice or the Court of First Instance of the European Communities, without having to “borrow”, so to speak, the legal personality of the Communities.

¹⁴ See European Parliament, Legal Affairs Committee, working document on upholding the prerogatives of the European Parliament before national jurisdictions, E.P. 390.575, 8 June 2007.

On a different point, the Belgian Constitutional Court accepts that unincorporated associations¹⁵ may act before it – although they have no legal personality – when they are “*acting in matters for which they are legally acknowledged as forming discrete entities, and, while their intervention is legally recognised, some aspects of this are challenged*”¹⁶.

III. Should a member of parliament be able to act at law to uphold the prerogatives of the assembly to which he/she belongs?

10. Final question: should an MP be able to act at law to uphold the prerogatives of the assembly to which he/she belongs? Few countries seem inclined to answer this question in the affirmative. During parliamentary debates concerning the creation of the Belgian Constitutional Court, for instance, several amendments were proposed in order to create a mechanism similar to the right of appeal of 60 MPs before the French Constitutional Council¹⁷. They were rejected on grounds that they would allow an MP who had been minorised in his/her assembly to introduce an appeal to the Constitutional Council¹⁸. There is a risk that an annulment

¹⁵ Such as political parties and trade union organisations.

¹⁶ See, among others, Court of Arbitr., no. 23/1999, 23 February 1999, B.1; no. 43/2000, 6 April 2000, B.2.2.3-B.2.2.5; no. 43/2000, 6 April 2000, B.1; no. 84/2002, 8 May 2002, B.2.2; no. 43/2005, 27 April 2005, B.4; no. 185/2005, B.2.2; no. 90/2006, 24 May 2006, B.6-B.9; no. 133/2006, 28 July 2006, B.10-B.12.

¹⁷ Article 61, paragraph 2 of the French Constitution.

¹⁸ *Doc. parl.* Senate 1981-1982, no. 246/1, 102-104. See also the report by Messrs. Lallemand and Baert, *Doc. parl.* Senate 1988-1989, no. 483/2, 46 and 62-64 and the report by Mrs. Onkelinx and Merckx-Van Goey, *Doc. parl.* House of Representatives 1988-1989, no. 633/4, 21-23.

action may be intended to continue the parliamentary debate in the courts. In his thesis *The birth of judicial politics in France*, Alec Sweet Stone demonstrated convincingly that the right of appeal by 60 MPs had transformed the proceedings before the French Constitutional Council, which became – in his opinion – the third legislative chamber of the French legislature¹⁹.

11. The Belgian Constitutional Court accepts, nevertheless, that an individual MP does have the interest required to bring an action against a law, provided that it prejudices the *individual exercise* of his mandate²⁰. For example, this would be the case if a legislative norm affected the weight of an MP's vote. However, the Court does not accept an MP bringing an action to defend the prerogatives of the assembly as such²¹.

The Belgian Council of State (supreme administrative court), Administrative Disputes Section, seems prepared to go further. It accepts that an MP has a functional interest to request the annulment of an act by the government which disregards the prerogatives of his/her assembly²². The Council of State, Legislation Section, is on the same wavelength, because it considers that: “the concept of functional interest appears to be linked [...] to the objective

¹⁹ A. Sweet Stone, *The birth of judicial politics in France. The Constitutional Council in comparative perspective*, New York, Oxford University Press, 1992.

²⁰ Court of Arbitr., no. 43/1999, 1 April 1999; no. 35/2003, 25 March 2003; no. 131/2003, 8 October 2003.

²¹ Court of Arbitr., no. 133/1999, 22 December 1999, B.6-B.7.

²² Council of State (supreme administrative court), no. 82.791, 8 October 1999, *Ceder and Annemans*, *R.W.* 1999-2000, 500, note P. Popelier, *Rev.dr.étr.* 1999, 454, note M. Kaiser, commentary S. Wyckaert, *A.J.T.* 1999-2000, 309-312; Council of State, no. 90.758, 14 November 2000, *Annemans and others*. The arguments that they can invoke must concern their individual prerogatives or those of their assembly.

necessities of effective operation of an assembly and respect of its prerogatives and those of its members. [...] The functional interest rules out possible abuses that could result from the majority preventing an act by the executive from being contested through political oversight mechanisms or judicial channels [...]”²³.

12. These considerations seem to me to be absolutely essential. They show great political realism. There seems to be general agreement that the traditional divide between the Parliament and the government has been replaced by the divide between the majority and the opposition. This development went hand in hand with an erosion of the power of scrutiny of the Parliament. In this context, the possibility of an MP bringing a case before the constitutional, administrative or other courts following an infringement of the prerogatives of his/her assembly could compensate the shortcomings of the majority parliamentary system in which we live today, and which creates confusion between the powers, for the benefit of the parties that constitute the majority.²⁴

²³ Council of State, Legislation Section, Opinion no. 32.901/AG of 27 March 2002, *Doc. parl.* Senate, 2001-2002, no. 2-238/3.

²⁴ K. Muylle, “L’intérêt fonctionnel d’un parlementaire et le (dés)équilibre des pouvoirs”, *C.D.P.K.* 2003, 493-503.

Excerpts from the discussions devoted to the second theme

At the invitation of **Mr. André REZSÖHAZY**, Conference Chairman, **Mr. Fernando SAINZ MORENO**, Head of the Legal Department (“*Asesoría Jurídica*”) of the Spanish “*Congreso de los Diputados*”, presented the arrangements for the “*Cortes Generales*” to be represented in legal actions.

Mr. SAINZ MORENO started by saying that the adoption of the Spanish Constitution of 1979 had had the effect of extending the effective judicial scrutiny provided for by the Constitution and submitting all the public powers, including the Parliament, to the application of Constitutional standards and all other legal standards. He emphasised that it ensued that the Houses of Parliament did not enjoy any privilege before the courts of justice.

Then he pointed out that nobody in Spain challenges the capacity of the “*Cortes Generales*” to act at law in cases challenging the legality of its actions as a legislative assembly or the legality of actions by the Parliament’s administration.

The representation of the “*Cortes*” in legal actions, both before the “*Tribunal Constitucional*” and before all other judicial bodies, is carried out only by parliamentary officials known as “*letrados (i.e. lawyers) de las Cortes*”. On the one hand, as lawyers, they are subject to the professional laws of their professional body, and are therefore

bound to act in good faith, be loyal and truthful; on the other hand, as officials of the “*Cortes*”, they act under the directives of the Secretaries General of each Chamber, and are subject to a duty of obedience, which means in particular that they cannot refrain from acting, except if the mandate given to them by the President of their assembly forces them manifestly and formally to infringe a legal standard or any other general provision.

The speaker considered that this was a perfectly adequate form of representation, given that it is part of the framework of parliamentary autonomy, that it is inexpensive and does not pose any major problem.

As **Mr. Marco CERASE**, Advisor on the Immunities Committee of the Italian House of Representatives, had asked whether the “*letrados*” represented the Spanish House of Representatives and the Senate before the “*Tribunal Constitucional*” in proceedings known as a “*recurso of amparo*” brought by private individuals, **Mr. Fernando SANTAOLALLA LOPEZ**, Director of the Studies Department of the Spanish Senate, stated that it was very rare for such an action to be brought by a private individual (moreover, he could not think of a single such case) and pointed out that the majority of “*amparo*” actions brought against the Parliament were brought by MPs who were challenging a particular decision by the Bureau or by the President of the House.

Mr. Gerhard KIESENHOFER, keynote speaker, answered in the negative to a question from Mr. André REZSÖHAZY enquiring whether the fact that the Austrian Parliament, unlike the Spanish Parliament,

was defended by an external body, did not restrict the scope of the Parliament's defence. The "*Finanzprokurator*" is part of the Finance Ministry, and the Finance Minister is responsible to the Parliament.

Addressing Mrs. Claire GENTA, keynote speaker, **Mr. Marco CERASE** referred to the Marchiani case that she had raised during her presentation, stating that his understanding was that the judicial decision could not be revoked if the immunity and parliamentary privilege were not claimed in time.

However, he gave details of another, older case, concerning a Member of the European Parliament of Italian origin (Mr. Pannella), who was prosecuted for having distributed hashish in the streets of Rome in order to promote the legalisation of soft drugs. In this case, the person concerned also attempted to assert his immunity after the guilty verdict had become final, but unlike what happened in the Marchiani case, the European Parliament did not attempt to have the judgement set aside. The speaker deduced from this that the Parliament's attitude had changed between the two cases.

Reacting to the remarks by the previous speaker, **Mrs. Claire GENTA** pointed out that, given that Mr. Marchiani had manifestly indulged in an illegal activity, it was a delicate matter to come to his defence.

She cited another case which, in her opinion, showed clearly the weakness of the European Parliament when it came to defending the prerogatives of its Members. This was the Geremek case, named after the Polish MEP, a former member of *Solidarnosc*, whose government was threatening to force to give up his membership of the European Parliament. In this case, the person affected was able to stay in office,

because the Polish Constitutional Court judged that the law allowing this threat to be made was unconstitutional. But what would have happened if the Constitutional Court's decision had gone the other way? The European Parliament would have had no remedy, except the possibility of bringing an action for failure of the Member State to fulfil an obligation.

Suzie Navot

Professor of law,

Head of the Public Law Division at the School of Law, College of Management – Academic Studies, Israel

Final remarks and conclusion

The question of whether the assembly may be represented in court, or appear in court as a plaintiff, as an appellant, a defendant, etc., was answered affirmatively by almost every country included in the research. This conclusion means that we understand nowadays the diversity of Parliament functions. Parliament is not only the legislative power. It is also an employer, a party in a contract, it may be responsible in tort for damages occurred in the building and it is – last but not least – a “producer” of laws that may be declared “unconstitutional”.

Even if it is not clear in many countries whether Parliament has a legal personality *de jure*, we learnt from the analysis of the questionnaire that *de facto*, Parliament acts at law.

My remarks will focus on one of the aspects covered by the questionnaire, and deal with the question whether a Member of Parliament may go to court to litigate parliamentary affairs.

Politicians may go to court concerning parliamentary activity mainly in two different kinds of cases:

1. When a decision taken by Parliament violates an MP's personal rights (for example, in countries with a “double model” of

parliamentary immunity¹, where a decision can be made to lift the MP's procedural immunity in order to permit charges, while he argues that his actions are privileged).

The decision of Parliament may also be against a Member of Parliament as part of the minority – as in the Danish case mentioned in the analysis by Mark Wouters (see pages 95 to 107), in which the court stated that it would interfere if the constitutional rules designed to protect a minority had been unlawfully neglected.

Another example is the German Wuppesahl case², concerning a Member of Parliament who was elected to the *Bundestag* on behalf of the Green party. After leaving the party, the party replaced him with another party member in some committees. Thomas Wuppesahl, who became a single member (one-man fraction), appealed to the court, attacking a number of parliamentary rules that infringed his rights as an elected member.

In Israel, similar arguments were raised in the 80's when a racist party (the *Kach* party) was elected into the Israeli Parliament (the *Knesset*) and the head of the party gained a seat there. The *Knesset* took several decisions aimed at preventing him from taking some parliamentary actions. In one of these cases, for example, the *Knesset's* Rules of Procedure stated that “every fraction can put forward a motion of ‘non-confidence’ against the Government”. The Committee in Parliament charged with the interpretation of the Rules decided that “one-member fractions cannot put forward non-

¹ Mainly the European model, allowing for two different parliamentary immunities: (1) non- accountability (immunity protecting freedom of speech in the fulfilling of Parliament functions) and (2) inviolability (a “procedural immunity” that can be lifted by Parliament, mainly preventing judicial procedures while in charge). See Marc Van der Hulst, *The Parliamentary Mandate*, IPU 2000.

² 80 BVerfGE 188.

confidence motions”. It was obvious that this decision was against this specific member. Following the denial of his parliamentary rights, he appealed before the Supreme Court against the Israeli Parliament.

In this first kind of cases, a parliamentary affair or decision is brought to court by a Member of Parliament (or a party) whose rights have been infringed, or by a group with limited access to the legislative decision-making process (such as parliamentary minorities).

2. The second possibility for litigating parliamentary affairs – which was dealt with in the analysis of the questionnaire – is that of a member claiming that assembly’s privileges have been violated. This has been presented in the questionnaire as a “functional interest” – meaning a case where the prerogatives of the assembly have been infringed. In this possibility the politician goes to court (if he is allowed to) in order to “protect” Parliament as a whole.

I would like to take this possibility a step further and suggest a third possibility.

3. The question is whether a Member of Parliament may go to court – not in order to defend assembly’s privileges, not in order to claim the “honour” of Parliament, and neither because his rights were violated. In other words, may an MP act at law against Parliament just because he or she is not pleased with the decision taken by Parliament? May an MP go to court as part of the political game, in order to “attack” Parliament, even if the decision taken by the assembly has nothing to do with him, because his rights have not been infringed.

We usually expect MPs to be engaged in parliamentary procedures. We do not expect to find members of the legislature involved in litigation. One would not expect those who control the policy-making processes to resort to litigation when they don't like the outcome of the political process. Litigation is not another standard tool of political action. If an MP goes to court, it may even harm the status and effectiveness of the institution of which he is a member, because it infringes the principle of separation of powers.

Despite the apparent logic of the argument above, in several countries MPs have, over the last years, taken to going to court as a routine, as part of their political activity. It seems as if they do not care if this way of action harms the status of Parliament. They care about themselves.

An interesting research was conducted in Israel on this issue³ and from the results we learnt that politicians bring cases to litigation mainly to enhance their media exposure. Politicians tend to seek litigation even when their chances to win in court are not high, and they do so because they usually get immediate media coverage. This is an important factor if you need to be chosen as a party candidate for election.

The media do not usually cover the “grey” work done every day in Parliament's committees, but it does cover a petition to the Constitutional Court against a political decision by Parliament.

Politicians go to court even in countries where it is difficult to do so. In the U.S. for example, litigation is decentralized, it starts in lower courts, it takes a complicate process to make its way to higher courts,

³ Y. Dotan & M. Hofnung, *Legal Defeats - Political wins: Why Do Elected Representatives Go to Court?* Comparative Political Studies, Vol. 38, no. 1, February 2005.

the process is time consuming, it is expensive and requires standing. But, even despite the sometimes “chilly” judicial attitude, members of Congress still continue to file lawsuits.

In Europe, judicial review is conducted by a specialized constitutional court; so MPs have easy access to the highest judicial institutions. In France and Italy, elected politicians are the only actors who can initiate constitutional litigation in the constitutional courts. In Germany and Spain, elected officials have a monopoly over the power to challenge legislation. The European experience shows a high rate of success of opposition members in challenging legislation in front of constitutional courts.

Let me conclude by arguing that we shall see in the future more politicians trying to transform court proceedings into an electoral advantage. This new phenomenon of “legislators’ litigation” is – in my opinion – one of the main reasons for the expansion of judicial review on parliamentary decisions.

THIRD THEME

The judicial review of acts accomplished by Parliament in the exercise of key parliamentary functions

In a significant number of countries, the key functions of Parliament are not shielded from judicial review.

The summary of the answers to the questionnaire on these acts (see Appendix, Part II, Sections 1 to 3, 5, 6 and – partially – 9) is evidence that at different moments and to varying degrees judges interfere in core parliamentary business, *i.e.* making laws and holding the government to account.

These different approaches are exemplified by presentations from three Parliaments with diverse historical and legal traditions.

In the United Kingdom, parliamentary privilege covers not only the freedom of speech of individual members, but all “*proceedings in parliament*”. Consequently, Parliament has exclusive control over its internal affairs.

Poland provides illustration of a Constitutional Court asserting, by judicial interpretation, its power to review all normative provisions of the resolutions of Parliament.

The contribution from the German *Bundestag* shows that a wide range of decisions of Parliament may, by various procedures, be challenged before the German Constitutional Court. MPs and political groups readily avail themselves of these possibilities.

In his academic contribution, professor Vuye attempts to trace the outlines of a *ius commune* regarding the protection of the citizen against acts forming the core of parliamentary activity.

Alberik Goris

*ECPRD Deputy Correspondent
and Principal Adviser at the Legal Department
of the Belgian House of Representatives*

Analysis of the ECPRD correspondents' replies

Introduction

The way parliaments organise themselves and conduct their business was – and in many countries still is – seen as mainly an internal matter for these parliaments. From that traditional perspective, proceedings in Parliament should not be subject to judicial review. The idea is that the autonomy of Parliament entails immunity from jurisdiction, because it is thought necessary to enable parliaments and their members to fulfil their functions.

The answers to the questionnaires show, however, that in many other countries parliamentary autonomy and judicial review are not mutually exclusive, even when Parliament's key functions, which are by nature political, are at issue.

Also, where there is no domestic review of a particular category of acts of Parliament, there remains ultimately the possibility of review by the European Court of Human Rights.

For the purpose of the debate on the third theme, we analysed the answers to the part of the questionnaire regarding acts pertaining to the main political functions of Parliament, that is lawmaking and holding the Government to account, as well as pertaining to the power of Parliament to nominate or appoint candidates to high offices outside

of Parliament (see Part II of the questionnaire, Sections 1 to 3, 5, 6 and, partially, 9). However, as far as lawmaking is concerned, the issue of judicial review of the substance of statutes was left out of the analysis. There are several reasons for this: statutes are often not the product of parliamentary activity alone; also, they contain general norms that are binding on third parties (outside of Parliament), which is a characteristic non-legislative acts of Parliament generally lack. That is why we have looked into the issue of judicial review of statutes only as far as compliance with parliamentary procedures is concerned; we wanted to know whether courts exercise control over the legislative procedure and to what extent.

As far as methodology is concerned, the summary is based on the information retrieved from the answers to the questionnaire. That means that where data are uncertain, either because of the lack of case-law or because no comments placing them into context were added, their interpretation is bound to be tentative.

I. Rules of Procedure

Section 5 of Part II of the questionnaire addresses the judicial review of the Rules of Procedure as such, that is as normative acts, excluding acts whereby these rules are applied to a specific case (those acts are being dealt with in other sections).

We found that in nearly half of the responding countries (15 out of 31) there exists some form of judicial review of the Rules of Procedure (Armenia, Austria, Bulgaria, the Czech Republic, France, FYROM, Germany, Israel, Poland, Portugal, Romania, Russia, Serbia, Slovakia and Spain).

In three of those countries, the review concerns only the substance of the Rules of Procedure, not the procedure for adopting them (FYROM, Serbia and Slovakia); in 12 countries (Armenia, Austria, Bulgaria, France, Germany, Israel, Poland, Portugal, Romania, Russia, partially Slovenia, and Spain) the courts not only examine the substance of the Rules of Procedure, but also the procedure for adopting them.

Except in the case of France and Romania, where the judicial review takes place before a rule enters into force, the review is carried out *ex post*.

Judicial review of the Rules of Procedure is a task conferred on the Constitutional Court or the Supreme Court (Israel).

To some practitioners, the fact that there are so many countries where there is judicial review of the Rules of Procedure may come as a surprise. After all, as one respondent commented, Rules of Procedure only have internal effect; they cannot bind third parties. Does not that make judicial review unnecessary?

Thus in Slovenia, only the provisions of the Rules of Procedure of the National Assembly that regulate relations with third parties (such as the National Council, the Government, the President of the Republic and the voters as proposers of laws) are subject to judicial review.

The way the Rules of Procedure are enacted, may have a bearing on the possibility of judicial review.

In some countries where there is judicial review of the Rules of Procedure, these are formally established by law (the Rules of Procedure of the Austrian *Nationalrat*, of both chambers of the Parliament of the Czech Republic, and of the Slovak National Council) or have the status of a law (the Rules of Procedure of the Austrian *Bundesrat*).

The Austrian Constitution even provides that the Rules of Procedure of the *Bundesrat* may contain provisions that have effect beyond the inner sphere of the *Bundesrat* insofar as the handling of its business so requires.

Sometimes the competence of the Constitutional Court as regards state acts is worded in a way that leaves room for interpretation.

In Poland, the Constitutional Tribunal has thus, starting from 1992, come to assert its competence to exercise a complete control of the Rules of Procedure, by interpreting a constitutional provision empowering it to decide disputes concerning the compatibility of “*legal provisions issued by central State organs*” with the Constitution, ratified international agreements and statutes (article 188, par. 3, of the Polish Constitution).

On the contrary, in Italy, the Constitutional Court refused to interpret a comparable article of the Constitution (empowering it to decide disputes concerning “*laws and acts with the force of law*”; article 134 of the Italian Constitution) as comprising also the Rules of Procedure of Parliament. In a decision of 1996, the Court confirmed the existence of rights connected to the status of the parliamentarian, which are governed exclusively by the Rules of Procedure of Parliament and not subject to judicial review (judgement no. 379/1996).

The question arises whether there is a correlation between, on the one hand, the judicial review of legislative acts as far as compliance with forms and procedures is concerned and, on the other hand, judicial review of the Rules of Procedure.

There seem to be two countries (Albania and Greece) where courts may annul a law because the proper parliamentary procedures were not followed, but at the same have no competence to carry out any review of the Rules of Procedure.

In Italy, the Constitutional Court, when reviewing a law, may only ascertain compliance with the provisions of the Constitution but not with the Rules of Procedure, these Rules not being subject to judicial review.

In the same vein, in Denmark, where there is no judicial review of the Rules of Procedure, the courts are, as a rule, not competent to examine whether the Rules of Procedure have been observed during the consideration of a bill in the *Folketing*. There has been, however, a case where one of the constitutional rules protecting parliamentary minorities was at stake. A court ruled that MPs had a legal interest in having the court verify the qualification of a legal act (expropriation or not), because the rights of the parliamentary minority depended on that qualification.

In Romania, where the Constitutional Court carries out an *ex ante* review of the Rules of Procedure, but has no power to do so *ex post*, the Court cannot, logically it seems, annul a law for non-compliance with procedures.

The questionnaire does not address the policy the courts have adopted with regard to the exercise of their power to review acts of Parliament. It appears nonetheless, from the comments, that the Polish Constitutional Tribunal has declared that, taking into account the principle of parliamentary autonomy, it will be cautious in reviewing the Rules of Procedure. Along the same line, the intervention of the Supreme Court of Israel is said, in practice, to have always been restrained and

controlled. The Supreme Court, which, already in the 1980s, held that it had the power to scrutinize the affairs of the *Knesset*, including its internal procedures, requires proof that fundamental constitutional principles have been violated.

II. Acts pertaining to political oversight

A number of parliaments seem to have interpreted the questions concerning acts pertaining to political oversight (see Section 3 of Part II of the questionnaire) as referring to acts *regulating* political oversight and not acts whereby political oversight is exercised in an specific case (for example by way of a parliamentary question or a decision to set up a committee of inquiry). This seems to account for the answers of some parliaments that they do not carry out any acts pertaining to political oversight.

If we leave out the ambiguous answers (due to the misunderstanding about what we meant by “*acts pertaining to political oversight*”), it would seem that the judicial review of those acts takes place only in Armenia (limited to compliance with procedures), Germany, Israel, partially Poland, Russia and partially Spain.

In Poland, the constitutional court has only power where normative provisions are at issue.

In Spain, there is as a rule no such review, but Bureau decisions not to proceed with an oversight initiative can be challenged before the Constitutional Court.

Other parliaments have indicated that there is no judicial review of acts pertaining to political oversight, because of the parliamentary privilege enjoyed by members of Parliament. Members cannot be prosecuted or

be the subject of any investigation with regard to opinions expressed and votes cast (or with regard to any activity performed) in the exercise of their mandate. It is certainly true that parliamentary privilege has a bearing on the possibility of judicial review of acts of political oversight carried out by members. Yet the question which arises next is whether in some countries parliamentary privilege would also exclude judicial review of collective acts of political oversight. Unfortunately, the questionnaire does not distinguish between acts of members (for example, the tabling of a motion) and acts of the Parliament or of a body of Parliament (for example, a decision by Parliament to set up a committee of inquiry). In the United Kingdom, such collective acts would be covered by parliamentary privilege, because parliamentary privilege applies to all proceedings in Parliament. But is this also the case in other countries?

III. Acts regarding members and political groups

In the context of the third theme, we envisage acts such as decisions concerning the speaking time, the recognition of a political group, the admissibility of questions or proposals, the appointment of members to committees.

Acts of this kind are subject to judicial review in Armenia, Bulgaria, Estonia, Germany, Israel and (theoretically) Spain. Particularly in Germany there have been a number of cases where acts regarding members and political groups were scrutinized by the Constitutional Court, for instance, in the framework of an “*Organstreitverfahren*” (example: decisions of the *Bundestag* limiting the speaking time for a specific debate or concerning the way in which the allocation among the groups of seats on the *Vermittlungsausschuss* had to be calculated).

The case-law of the Supreme Court of Israel is also worth mentioning. It illustrates the policy of that court to exercise judicial restraint. The Supreme Court refused to intervene in a decision by the Speaker of the *Knesset* to adjourn a debate on a motion of no confidence from the morning to the afternoon (in order to to enable *Knesset* members supporting the Government to return to Israel from abroad and participate in the vote), and in a decision to appoint a *Knesset* member to the position of chairman of a committee (decision that was controversial in view of the criminal record of that member).

The Supreme Court did intervene when the *Knesset* presidency disqualified a member's bill because of its racist content, because there was at that time no rule allowing the presidency to do so. The Court held the decision not to table the bill was an "*acute violation of parliamentary life*".

IV. Nominations and appointments

Is there judicial review of nominations and appointments by Parliament of candidates for high offices outside of Parliament, such as judges of the Constitutional Court and ombudsmen?

The answers to that question have to be interpreted with caution. Firstly, because there was no direct question asked, only questions related to "other acts" (see Section 9 of Part II of the questionnaire). Some parliaments did not mention these acts, although they do nominate or appoint candidates for high offices outside of Parliament. Secondly, a small number of parliaments answered that all their resolutions (or resolutions and decisions) are subject to judicial review (Bulgaria and Serbia), which might include this type of nominations or appointments.

Only one Parliament (the Israeli *Knesset*) expressly indicated that such acts may be reviewed.

That nominations and appointments to posts outside of Parliament seem almost never subject to judicial review is perhaps not surprising: after all, the fact that Parliament is involved implies that these acts partake of its political functions.

Yet these acts are not purely internal, but have consequences for third parties, whose careers are directly affected by them. It is therefore noteworthy that even in countries where the Constitutional Court has the power to scrutinize acts of Parliament which are purely internal (for example, Germany), there is no judicial review of these acts.

Summary table

- = there is no judicial review
- c = there is judicial review by the Constitutional Court
- x = there is judicial review by courts other than the Constitutional Court
- o = does not apply
- S = review as to the substance of the act
- F = review as to compliance with forms and procedures

	Review of constitutional acts			Review of legislative acts			Review of Rules of Procedure			Review of acts pertaining to political oversight			Review of acts regarding members and political groups			Review of nominations and appointments			
	S	F	Ex ante post	S	F	Ex ante post	S	F	Ex ante post	S	F	Ex ante post	S	F	Ex ante post	S	F	Ex ante post	
Albania	-	-	-	c	c	c	-	-	-	-	-	-	-	-	-	-	-	-	-
Armenia	o	o	o	-	c	c	c	c	c	c	c	c	-	c	c	c	c	c	c
Austria	c	c	c	c	c	c	c	c	c	c	c	c	c	c	c	c	c	c	c
Belgium	-	-	-	-	c ¹	(-) ²	-	-	-	-	-	-	-	-	-	-	-	-	-
Bosnia	-	-	-	-	c	c	-	-	-	-	-	-	-	-	-	-	-	-	-
Bulgaria	c	c	-	c	c	c	c	c	c	c	c	c	c	c	c	c	c	c	c
Croatia	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Czech Republic	-	-	-	-	c	c	-	c	c	c	c	-	-	-	-	-	-	-	-
Denmark	(-)	(-)	(-)	x	(-) ⁴	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Estonia	-	-	-	-	x ⁵	-	-	-	-	-	-	-	-	x ⁵	x ⁵	-	-	-	-
Finland	x ⁶	-	x ⁶	x ⁶	x ⁶	-	-	-	-	-	-	-	-	-	-	-	-	-	-
France	-	c	c ⁷	c	c	c	c	c	c ⁹	-	-	-	-	-	-	-	-	-	-
FYROM	-	-	-	-	c	c	c	c	c	c	c	c	c	c	c	c	c	c	c
Germany	c	c	-	c	c	c	c	c	c	c	c	c	c	c	c	c	c	c	c
Greece	-	-	-	-	x ¹⁰	x ¹⁰	-	-	-	-	-	-	-	-	-	-	-	-	-
Iceland	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Israel	x ¹¹	x ¹¹	-	x ¹²	x ¹²	x ¹²	-	-	-	-	-	-	-	-	-	-	-	-	-
Italy	c	c	c	c	c	c	c	c	-	-	-	-	-	-	-	-	-	-	-
Netherlands	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Norway	-	x ¹²	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Poland	-	-	-	-	c	c	c	c	c	c ¹³	c ¹³	c ¹³	c ¹³	-	-	-	-	-	-
Portugal	x ¹⁴	x ¹⁴	-	x ¹⁴	x ¹⁵	x ¹⁵	x ¹⁵	c	c	c	c	c	-	-	-	-	-	-	-
Romania	c	-	c	c	c	c	-	-	-	-	-	-	-	-	-	-	-	-	-
Russia	c	c	-	c	c	c	c	c	c	x ¹⁷	x ¹⁷	x ¹⁷	-	-	-	-	-	-	-

	Review of constitutional acts			Review of legislative acts			Review of Rules of Procedure			Review of acts pertaining to political oversight			Review of acts regarding members and political groups			Review of nominations and appointments		
	S	F	Ex ante	S	F	Ex ante	S	F	Ex ante	S	F	Ex ante	S	F	Ex ante	S	F	Ex ante
Serbia	c	-	- c	c	-	-	c	-	-	? ?	? ?	? ?	? ?	? ?	? ?	? ?	? ?	? ?
Slovakia	-	-	-	c	-	-	c	-	-	-	-	-	-	-	-	-	-	-
Slovenia	-	-	-	c	c	-	c ¹⁸	c ¹⁸	-	? ?	? ?	? ?	-	-	-	-	-	-
Spain	-	c	- c	c	c	-	c	c	-	- ¹⁹	- ¹⁹	-	c	c	-	-	-	-
Sweden	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Switzerland	? ?	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
UK	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-

¹ All courts may test legislative acts against international treaties

² Only in some specific cases is the constitutional court entitled to check compliance with forms and procedures

³ A court of the Judiciary may grant damages if a subjective right of a member or of a group has been violated

⁴ Only in some specific cases are the courts entitled to check compliance with forms and procedures

⁵ Supreme Court

⁶ All courts

⁷ Before promulgation

⁸ Other courts may test legislative acts against international treaties

⁹ Before they enter into force

¹⁰ All courts

¹¹ Supreme Court

¹² Supreme Court and lower regional courts

¹³ Only normative provisions

¹⁴ Constitutional Court and lower national courts

¹⁵ Constitutional Court, supreme administrative court and lower national courts

¹⁶ Theoretically, members of Parliament would enjoy the protection of their subjective rights by the courts of the Judiciary

¹⁷ Constitutional Court and Supreme Court

¹⁸ Only provisions which regulate relations with third parties

¹⁹ Bureau decisions not to proceed with an oversight initiative can be challenged before the Constitutional Court

Oonagh Gay

*Head of the Parliament and Constitution Centre (Library)
of the House of Commons (British Parliament)*

Freedom of speech, “exclusive cognisance” and application of the European Convention on Human Rights at the British Parliament

Introduction

The UK does not have a codified constitution, in contrast to almost all developed states. Therefore, the principle of the separation of powers is not set out in a constitutional document. Instead a mixture of statute law and conventions apply.¹

Parliament is composed of the Sovereign, the House of Lords and the House of Commons. The legal existence of Parliament results from the exercise of royal prerogative, in the form of a royal proclamation. However, each House has an autonomous existence, although there is no one statute which sets out its powers.² As one of the oldest Parliaments in the world, a collection of parliamentary rights and practice has grown up since medieval times, which exists alongside common and statute law. *Erskine May's Parliamentary Practice* states that Parliamentary privilege “is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court

¹ For an outline of the issues, see the First Report from the Lords Select Committee on the Constitution HL 11, Session 2001-02, at <http://www.publications.parliament.uk/pa/ld200102/ldselect/ldconst/11/1103.htm>.

² The *Parliament Acts 1911-1949* deal with the power of one House in relation to the other House. Other legislation covers only specific aspects, such as parliamentary privilege, defamation, administration of the Commons, etc.

of Parliament, and by Members of each House individually, without which they could not discharge their functions and which exceed those possessed by other bodies or individuals”.³

The reference to the High Court of Parliament refers to its medieval origins. Although the House of Commons was originally part of the High Court of Parliament, it has not been involved in judicial work since 1399. The House of Lords retains a judicial function in addition to its legislative and deliberative function in the form of the judicial committee, composed of the Law Lords.⁴ The court operates as the supreme court of appeal. It acts as the final court on points of law for the whole of the United Kingdom in civil cases and for England, Wales and Northern Ireland in criminal cases. Its decisions bind all courts below.

This is an unusual role for a legislative body that is part of Parliament. In most other democracies, the judiciary is separate from the legislature – usually in the form of a supreme court of appeal. For this reason in 2005 the Government introduced legislation to establish a United Kingdom Supreme Court that will be constitutionally and physically separate from Parliament.⁵ The new UK Supreme Court is expected to come into operation in October 2009: until then the present system will continue.⁶

There is no generally accepted hierarchy of laws within the English or Scottish legal tradition and no constitutional court as such.⁷ UK courts

³ *Parliamentary Practice* (23rd ed 2004) p. 75.

⁴ This system came into operation after the *Appellate Jurisdiction Act 1876*.

⁵ *Constitutional Reform Act 2005*.

⁶ See *House of Lords Briefing: The Judicial Work of the House of Lords* at <http://www.parliament.uk/documents/upload/HofLBpJudicial.pdf>.

⁷ But see *Jackson v HM Attorney General* [2005] UKHL 56; [2006] 1 A.C 262 where the doctrine of absolute parliamentary sovereignty was challenged.

do not have the right to strike down primary legislation. However, the courts are under a duty to treat as inapplicable primary legislation adopted in breach of the UK's EC obligations. Also, under the *Human Rights Act 1998* the courts can declare that Acts are not compatible with the European Convention on Human Rights.⁸ Such a declaration of incompatibility does not however strike down the law. Instead, it is left to the Government to amend the legislation to make it compliant with the Convention. In all cases where the court has made a declaration, the Government has indicated that it would comply.

What is parliamentary privilege?

Parliamentary privilege is intended to protect the proceedings of the House as an institution and to provide what may be described as "parliamentary service immunity". It has two main components:

- Freedom of speech, which is guaranteed by Article 9 of the Bill of Rights 1689,
- The exercise by Parliament of control over its own affairs, known technically as "exclusive cognisance".

Freedom of speech

The privilege of freedom of speech protects what is said in debate in either House. As Article 9 states:

⁸ A declaration of incompatibility has not consequences for the parties to the case in which the declaration is made and amending legislation may not be retrospective in effect.

*“freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.”*⁹

Possible meanings of the word “impeach” include hinder, charge with a crime, challenge and censure. Article 9 gives the members of each House the right to say what they will (freedom of speech) and discuss what they will (freedom of debate). It is therefore generally regarded as “a cornerstone of parliamentary democracy”.¹⁰

There were a series of disputes between the courts and the House of Commons over the boundaries of parliamentary privilege in the 18th and 19th century. It is now generally agreed that it is the courts which determine the boundaries where there is a lack of clarity, but the judiciary in turn are careful to respect the separate sphere of action and privileges of Parliament.¹¹

The principles of parliamentary privilege have been adopted by individual Commonwealth states, and cases in other jurisdictions have a major bearing on the development of privilege in the UK. It should be noted that of course, that the concept of privilege could in theory be codified in statute, as has occurred in Australia in the *Parliamentary Privileges Act 1987*. In its report the Joint Committee on Parliamentary Privilege recommended a new Parliamentary Privileges

⁹ Spelling modernised.

¹⁰ Report of the Joint Committee on Parliamentary Privilege, HL Paper 43/HC 214-I, Session 1998-99, <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4302.htm>.

¹¹ The leading 19th case is *Bradlaugh v Gosset* [1883-84] 12 QBD 271. See Lord Simon of Glaisdale in *Pickin v British Railways Board* [1974] AC 765 for comments on separate spheres and further Lord Browne-Wilkinson in *Prebble v Television New Zealand Ltd* [1995] 1 AC 332.

Act.¹² The report was debated by both Houses in October 1999 but its recommendation has not been implemented. One concern is that statutory codification would probably make privilege subject to the jurisdiction of the courts.

The scope of proceedings in Parliament

Parliamentary privilege is not designed to offer protection to individual Members and is not a system of parliamentary immunity. Members can be imprisoned for criminal offences, or prosecuted for civil offences without the permission of either House. Imprisonment for over a year leads to disqualification by Act of Parliament. However, since what Members say in the House as part of formal debate falls within the definition of a proceeding in Parliament, it follows that Members are protected from legal liability for what they have said or done in Parliament *as part of a proceeding*.

The phrase “proceedings in Parliament” has been the subject of judicial consideration both in the United Kingdom and in other (mainly Commonwealth) Parliaments which have imported the concept of parliamentary privilege into their constitutional arrangements. *Erskine May* states:

*“The primary meaning of proceedings, as a technical parliamentary term, which it had at least as early as the seventeenth century, is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process...by which it reaches a decision”*¹³

¹² Joint Committee on Parliamentary Privilege HL Paper 43-/HC 214 1998-9, para 376-7 <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jt-priv/43/4302.htm>.

¹³ *Parliamentary Practice* (23rd edition 2004), pp. 110-11.

An individual Member, or officer or other person may also take part in a proceeding by recognised forms of formal action, such as debating or voting, or carrying out orders of the House, or giving evidence to a committee.¹⁴

The courts have a role in defining the term, since Article 9 is of course part of statute law. There have been some recent judgements which have affected the interpretation of Article 9. In *Pepper v Hart*¹⁵ the House of Lords in its judicial capacity decided that clear statements made in Parliament concerning the purpose of legislation in the course of its enactment by Parliament could be used by the courts as a guide to the interpretation of ambiguous statutory provisions. The exact scope of the judgement has been the subject of further judicial decisions.¹⁶ The recent growth in the use of judicial review¹⁷ also has resulted in the examination of parliamentary proceedings where a statement by a minister made in Parliament is considered to be the authoritative account of the reasons for the decision.

Some grey areas or uncertainties remain as to the scope of parliamentary proceedings.¹⁸ Since the term parliamentary privilege is covered in recent legislation, such as the *Freedom of Information Act 2000* (see below), parliamentary officials need to consider whether activities within the parliamentary precincts should be classified as proceedings in Parliament. The areas of uncertainty may be summarised as:

¹⁴ Op. cit. pp 111-13.

¹⁵ *Pepper (Inspector of Taxes) v Hart* [1993] AC593.

¹⁶ See *Erskine May* (23rd ed 2004) pp. 106-108.

¹⁷ In judicial review, the High Court reviews the lawfulness of administrative decisions.

¹⁸ See discussion of the term “proceeding in Parliament” by the Joint Committee on Parliamentary Privilege, *Op. cit.*, paras 97-129.

- Correspondence by Members. Unless directly related to parliamentary proceedings, correspondence to ministers or constituents would not come within the scope.
- Drafts and notes by Members as preparation for parliamentary proceedings.
- Committee papers – the subject matter is relevant to a decision as to scope. For example, papers connected with travel arrangements for a visit may not be sufficiently connected with a proceeding to fall within the definition.

The *Defamation Act 1996*, section 13, unusually allows an individual Member of either House to waive the protection of Article 9 in respect of actions for defamation, which might otherwise prevent the examination of proceedings in Parliament during the trial. This followed a case in 1995 where a Member sued a newspaper for defamation over allegations of corrupt use of his right to ask parliamentary questions; the judge stopped the case on the ground that it would not be fair to the defendants, since Article 9 prevented the newspaper from justifying its comments.¹⁹ The *Defamation Act 1996* has been criticised as creating an anomalous situation, but it remains on the statute book (although no Member has used its provisions since the original Member in 1998).

The term “place out of Parliament” also poses some questions of interpretation. In theory, proceedings should not be questioned anywhere outside Parliament, but this would prevent the public from criticising matters debated in Parliament, and so “place” is interpreted more strictly. But there is a question about the use of proceedings in the context of statutory tribunals of inquiry which has not been tested in the courts. New legislation determining the form of statutory

¹⁹ For a discussion, see the Joint Committee on Parliamentary Privilege, *Op. cit.*, paras 60-69, which also highlights similar Commonwealth cases.

tribunals also did not refer to the use of parliamentary proceedings (*Inquiries Act 2005*).

Exclusive cognisance or control by Parliament over its internal affairs

Each House has the right to provide for its proper constitution and to judge the lawfulness of its own proceedings. The power to regulate the behaviour of its Members and to discipline them if necessary is based on the second aspect of privilege, which also underpins the right to compel witnesses to attend and give evidence. If a matter is considered within the scope of parliamentary privilege, then the courts will not intervene. Once again, problems of definition and scope apply. “Internal affairs” is potentially wide ranging. The Joint Committee considered that the precincts of Parliament should not be considered as an area where statute law did not apply and criticised the decision in *R v Graham-Campbell ex p A P Herbert* in 1935 where Lord Justice Hewart decided that the courts would not entertain a complaint regarding sales of alcohol within the precincts of Parliament without a necessary licence.²⁰ It has been pointed out that the Houses would have had difficulty in applying for a licence, since at that time the House had no legal status as a person. This has now been rectified with the *Parliamentary Corporate Bodies Act 1992* which established Corporate Officers for each House, who could sign contracts, sue and be sued. The wide interpretation of internal affairs in *Herbert* was criticised by the Canadian Supreme Court in 2005 in a case involving the employment rights of a chauffeur to the Speaker.²¹ The Court

²⁰ [1935] KB 594 The background to the case is set out in *The Table* Vol 74 2006 “An opportunity missed: The Joint Committee on Parliamentary Privilege”.

²¹ *Canada (House of Commons) v Vaid* [2005] 1 SCR 667, 2005 SCC 30. This case is discussed in *The Table* Vol 75 2007 “Shield or Sword? Parliamentary Privilege, Charter Rights and the Rule of Law”.

decided that the Canadian Human Rights Act applies to the Canadian Parliament and its employees. The broad interpretation of exclusive cognisance advanced by the Canadian House of Commons would not have been used in the UK Parliament, where employees are covered by statutory employment rights.

Since 1935, a series of statutes have been treated as non-binding on Parliament even though it might be argued that the subject matter would not directly affect the affairs of Parliament. These include the *Health and Safety at Work etc Act 1974* and the *Food Safety Act 1990*. The criticism is that law makers are themselves exempt from the laws they make.²² The Joint Committee recommended that there should be a principle of statutory interpretation that Acts should bind both Houses, unless there was a contrary expression of intention in a particular piece of legislation. This recommendation has not been acted upon. Some recent legislation has expressly extended to both Houses of Parliament, including the *Freedom of Information Act 2000* and the *Data Protection Act 1998*, but others, such as the *Health Act 2006*, which regulates smoking in public places, does not.

The right to regulate the internal affairs of both Houses means that rules of procedure set out in Standing Orders or elsewhere may not be reviewed by the courts. Nor may the processes by which primary legislation is adopted be examined. These conventions have proved uncontroversial in domestic courts, with the possible exception of a recent case involving the interpretation of the Parliament Acts (which prevent the House of Lords from delaying indefinitely bills passed by the lower House).²³ However, there have been attempts to review

²² See “Statute law and the case law applicable to Parliament” in *Law and Parliament* Dawn Oliver and Gavin Drewry eds *Law and Parliament* 1998.

²³ *Jackson v Attorney General* [2005] UKHL,56; [2006] 1 A.C. This is discussed in *Public Law 2006* “What is delegated legislation?” and “Parliamentary Sover-

internal procedures with reference to the devolved Scottish Parliament, which was established with only a statutory immunity from defamation, rather than parliamentary privilege.²⁴

In return the Houses use internal rules to ensure that Members do not comment on legal cases which are still before the courts. The purpose is not to prejudice court proceedings and to uphold the principle of “comity”, whereby it is considered undesirable for Parliament to act as an alternative forum to decide court cases. MPs are forbidden from indicating their views of possible outcomes under this *sub judice* rule, which is enforced by parliamentary resolutions in both Houses.²⁵

Application of the European Convention on Human Rights

It should be noted that Parliament is not beyond the scope of the ECHR, although both Houses were not defined as public authorities for the purposes of the *Human Rights Act 1998*. Two recent applications have not been successful in respect of challenging the principle of parliamentary privilege. In *A v United Kingdom* the Court considered a case brought by a constituent who considered she had been defamed by a Member speaking during a debate in the Commons.²⁶ She argued that the parliamentary privilege of freedom of speech violated her right to a fair hearing under Article 6 and her right to a private and family life under Article 8. The Court ruled by a majority that the

eignty under the New Constitutional Hypothesis”.

²⁴ See *Whaley v Lord Watson* 2000 S.C. 340 and *Adams v Advocate General* 2003 S.C. 171 *Others* at http://www.scotcourts.gov.uk/opinions/p557_02.html.

²⁵ See House of Commons Library Standard Note no. 1141 *The Sub Judice Rule* at <http://www.parliament.uk/commons/lib/research/notes/snpc-01141.pdf>.

²⁶ *A v United Kingdom* 2002 (35373/97). See M R Jack “A v the UK in the European Court of Human Rights” [2002], *The Table* 73 (2003) pp. 31-36.

parliamentary privilege did not impose a disproportionate restriction on the right of access to a court or on respect for private or family life and that Articles 6 and 8 were not violated.

In 1997 the Speaker ruled that Members who failed to take the parliamentary oath were not entitled to use the facilities of the House. Following an unsuccessful request for leave for judicial review of the decision in the High Court of Northern Ireland, which was refused on the grounds that control of Parliament's internal affairs was not subject to review by the courts, Martin McGuinness applied to the European Court of Human Rights, which unanimously found the application inadmissible, on grounds of proportionality and margin of appreciation.²⁷

The Joint Committee noted that it was in the interests of Parliament as well as justice that Parliament should adopt the minimum requirements of fairness in its procedures. The increased emphasis on human rights is likely to see further judicial activity where ECHR rights may be at issue.

²⁷ Decision as to the admissibility of application no. 39511/98 by Martin McGuinness against the United Kingdom.

Piotr Chybalski

*Legislation Expert in the Bureau of Research of the Chancellery
of the Sejm (House of Deputies of the Polish Parliament)*

Constitutional review of parliamentary resolutions in Poland – The Banking Investigative Committee case

This exposé is comprised of two parts. Its first part highlights the evolution of the constitutional review of parliamentary resolutions in Poland. The second part analyses the judgment of the Polish Constitutional Tribunal, of 22nd September 2006 on the so-called “Banking Investigative Committee” (Ref. no. U 4/06).

I. Evolution of the constitutional review of parliamentary resolutions

Until 1992/1993, it was considered that resolutions by the Polish Parliament were not liable to review by the Constitutional Tribunal.

The reasons for this were:

1. that the Constitutional Tribunal had developed a closed catalogue of sources of universally binding law (which included the Constitution, the Statutes, the regulations issued in order to execute Statutes and the ratified international treaties, but not parliamentary resolutions);

2. that such a review of parliamentary resolutions would have clashed with the principle of parliamentary autonomy, since these resolutions were considered as purely internal acts; and
3. that according to the “old” mentality that still prevailed in Poland and dated back to the times of communism, the *Sejm* was still regarded as a “supreme State organ”, as the most important institution of the State.

In 1992 and 1993, after the *Sejm* had adopted a series of controversial resolutions (among which an internal decision by which the Parliament ordered one of the members of the Council of Ministers to prepare a list of deputies who had been agents of communist special services), the tide turned. The Constitutional Tribunal passed three judgments (U 6/92, U 10/92 and U 14/92) which ruled on the basis of Article 1, para 2 of the old Constitutional Tribunal Act of 1985 (that gave the Constitutional Tribunal the power to review “*normative acts*” issued by “*supreme and central State organs*”) that constitutional review of parliamentary resolutions is admissible provided they are “*normative*”, *i.e.* create abstract and general legal norms. This in fact meant that the admissibility of constitutional review of parliamentary resolutions required passing a “*normativity test*” (not an official term) which was to be applied by the Constitutional Tribunal in every case where the constitutionality of a parliamentary resolution was put into question.

Furthermore the *Sejm*’s Rules of Procedure (the Standing Orders of the *Sejm* of the Republic of Poland) became also liable to constitutional review, because generally they were considered as a “*normative*” act. As regards this matter, the Constitutional Tribunal gave an example: if the Parliament violates the provisions on the legislative procedure and this violation is due to the incorrectly drafted Rules of Procedure,

such a violation may affect the contents of the Statutes (which are all “normative acts”). That is why the Rules of Procedure could, in the view of the Constitutional Tribunal, be considered “normative”.

For many years, the state of law created in 1992 and 1993 was unaffected by the adoption of the present Constitution in 1997. But it was finally affected by a Constitutional Tribunal’s judgment of 22 October 2006 known as the “Banking Investigative Committee Judgment”.

II. Analysis of the Banking Investigative Committee Judgment (Ref. No. U 4/06)

To begin with, let us point out that the legal framework needed to set up an investigative committee in the Republic of Poland is provided by:

- Article 95, para 2 of the Polish Constitution of 1997 (“The Sejm shall exercise control over the activities of the Council of Ministers within the scope specified by the provisions of the Constitution and statutes”). It is important to note that the “Council of Ministers” is interpreted broadly as not being only the Council itself, but also all the government administration institutions which are supervised by this Council. Nevertheless, this provision implies that the Sejm is unable to exercise its controlling function of the second branch of the Executive (the directly elected President of the Republic) and some other institutions created by the Constitution (e.g. the Supreme Chamber of Control);
- Article 111, para 1 of the said Constitution (“The *Sejm* may appoint an investigative committee to examine a particular matter”); and

- the Act of January 21st 1999 on *Sejm* Investigative Committees (Dz.U. no. 35, item 321, with amendments).

So, when Deputies deemed it necessary to charge an investigative committee from their Parliament with inquiring into the privatisation of the banking sector, the *Sejm* could make use of the possibility offered by that legal framework to pass the “*Resolution of March 24th 2006 on the appointment of the Investigative Committee to examine decisions concerning capital and ownership transformations in the banking sector, and the activities of banking supervision authorities from June 4th 1989 to March 19th 2006*”.

This Resolution was comprised of four Articles concerning respectively the setting up of the Committee, the scope of its activity, the number of its members and the entering of the Resolution into force.

The creation of the investigative committee triggered serious political controversies. In consequence a group of Deputies of the *Sejm* applied to the Constitutional Tribunal for a review of Articles 1 and 2 of the Resolution.

It is worth noting that the Constitutional Tribunal was obliged to concentrate on these two provisions and could not adjudicate on the constitutionality of the whole Resolution. The reason is Article 66 of the Constitutional Tribunal Act of 1st August 1997 (Dz.U. no. 102, item 643, with amendments), stating that *the Tribunal shall, while adjudicating, be bound by the limits of the application, question of law or complaint*.

As regards the review of Article 1 (setting up of the Investigative Committee), the Constitutional Tribunal, which had in fact to carry out a test on normativity of the Article, ruled that “*an act establishing a new organ shall be the act of applying, as opposed to creating, the*

law. Thus, acts appointing Sejm committees, including extraordinary ones, cannot be the subject of review by the Constitutional Tribunal.” In other words, the Tribunal determined that the Article did not create a general and abstract norm, that it did affect not everyone, but only the members of the *Sejm* who were elected to the Committee. It meant that “*the normativity test*” was not passed and, accordingly, that the proceedings relating to Article 1 had to be discontinued by the Tribunal.

As regards the review of Article 2 (scope of activity of the Committee), the Constitutional Tribunal ruled that this provision was general (because it affected all potential witnesses who could be called to testify). Surprisingly enough, it did not analyse whether the Article was abstract (*i.e.* whether it regulated repeatable behaviours that could be defined in a generic manner). So, only the small conclusion that everyone may be called to testify was enough to rule that the provision was a normative one.

Furthermore, the Tribunal determined that the Resolution did not create a complete legal norm, but was only “*an element of a legal norm*” (together with Article 7, para 1 of the Act on *Sejm* Investigative Committees¹). The fact that Article 2 was only such an “element”, or the core of a legal norm, was enough to regard it as a normative provision, hence subject to constitutional review.

After successfully applying “*the normativity test*”, the Tribunal was entitled to examine the conformity of Article 2 of the Resolution with the Constitution. It appeared that many aspects of the provision violated the Constitution. For instance the Tribunal decided:

¹ Article 7, para 1 of the Act on *Sejm* Investigative Committees: “*The Committee shall be bound by the scope of its subject as specified in the Resolution of its establishment.*”

- that the scope of activity of the Committee was generally too broad and too general (since the members of the Committee were ordered to look into eighteen years of functioning of the banking system);
- that an investigative committee was not entitled to control the National Bank of Poland and the Committee for Banking Supervision (as the Constitution grants independence to these institutions); and
- that an investigative committee was not allowed to violate the autonomy of private persons and entrepreneurs.

III. Conclusion

For the purpose of analysing the scope of admissible constitutional review of parliamentary resolutions in Poland, a double conclusion can be drawn from the above remarks. Firstly, it is admissible for the Polish Constitutional Tribunal to review parliamentary resolutions, even if only some of their provisions are “normative”. Secondly, it is also admissible for the Constitutional Tribunal to review provisions of parliamentary resolutions, even if they do not constitute “complete” general and abstract legal norms, but only elements of such norms. Thus the Banking Investigative Committee judgment shows a further (after 1992 judgments) extension of the admissibility of constitutional review of parliamentary resolutions in Poland.

Gabriela M. Sierck

*Member of the Liaison Office of the Bundestag (German Parliament)
in Brussels*

The German system of judicial review of Parliament's acts

1. Introduction

Some key elements of the legal framework of the work of the German Bundestag are:

a. The Basic Law

The *Basic Law* is the constitution of the Federal Republic of Germany. It lays down the fundamental structure and essential values of the State. Among other things, the Basic Law defines the principles according to which the elections to the German Bundestag are conducted. It provides the basis for the status and rights of Parliament's freely elected members and outlines how the German Parliament should be organised and carry out its business.

b. The Rules of Procedure

The *Rules of Procedure* of the German Bundestag regulate the organisation and working methods of the German Parliament in detail.

c. The Act governing the legal framework for committees of inquiry

Committees of inquiry primarily examine possible cases of misgovernment, maladministration and misconduct on the part of politicians. The Act governing the legal framework for committees of inquiry regulates the rights of these committees.

d. The Act on the legal status of members of the German Bundestag

The *Act on the legal status of members of the German Bundestag* lays down the rights and duties of the members of the German Bundestag. It guarantees members the free exercise of their mandates and regulates the benefits to which they are entitled.

e. The electoral legislation

The conduct of elections to the German Bundestag is regulated by the Federal Electoral Act in conjunction with the Federal Electoral Code and its Annexes. The validity of elections to the Bundestag is reviewed in accordance with the Act on the Scrutiny of Elections.

f. The Act on political parties

The *Act on political parties* regulates the rights of political parties in Germany, setting out statutory guidelines for the parties' democratic structures and the funding they receive from the State.

Source: http://www.bundestag.de/htdocs_e/parliament/function/legal/

2. Tasks of the Federal Constitutional Court

The Federal Constitutional Court's task is to ensure that all institutions of the State obey the Constitution of the Federal Republic of Germany. Since its foundation in 1951, the Court has helped to secure respect and effectiveness for the free democratic basic order. This applies particularly to the application of the fundamental rights.

All government bodies are obliged to comply with the Basic Law. Should any conflict arise here, the jurisdiction of the Federal Constitutional Court may be invoked. Its decision is final. All other institutions of government are bound by its case law.

The work of the Federal Constitutional Court also has political effect. This becomes particularly clear when the Court declares a law unconstitutional. But the Court is not a political body. Its sole review standard is the Basic Law. Questions of political expediency are not allowed to play any part as far as the Court is concerned. It merely determines the constitutional framework for political decision-making. The delimitation of State power is a feature of the rule of law.

There are three different possibilities of judicial review of acts accomplished by Parliament:

a. Constitutional complaints

Anyone who feels that his or her fundamental rights have been infringed by the public authorities may lodge a constitutional complaint. It may be directed against a measure of an administrative body, against the verdict of a court or against a law.

A constitutional complaint requires admission for decision. It must be admitted for decision if it is of fundamental constitutional importance, if the claimed infringement of fundamental rights is of special severity or if the complainant would suffer particularly severe detriment from failure to decide the issue. The Federal Constitutional Court itself has to decide whether the prerequisites for admission are met before deciding the constitutional complaint.

As a general rule, a constitutional complaint is admissible only after the complainant has resorted unsuccessfully to the otherwise competent courts. Various filing deadlines must be complied with. The constitutional complaint must be submitted in writing and state reasons. There is no obligation to be represented by a lawyer. The proceeding is free of charge. In cases of abuse a fee of up to €2,600 may be levied.

The Federal Constitutional Court only reviews compliance with the fundamental rights. Judgment of other points of law and the finding of facts are for the other courts only. As long as no fundamental right has been infringed, the Federal Constitutional Court is bound by their decisions.

Between 1951 and 2005, 157,233 applications were lodged with the Federal Constitutional Court. Of these, 151,424 were constitutional complaints. The great majority were not admitted for decision. Only 3,699 constitutional complaints were successful, or 2.5%. Despite this low figure, the constitutional complaint is an important extraordinary legal remedy. A favourable decision can have repercussions that reach far beyond the individual case.

b. Proceedings on the constitutionality of statutes

Only the Federal Constitutional Court may find that a statute is incompatible with the Basic Law. Should another court consider a statute to be unconstitutional and therefore wish not to apply it, it must first obtain the decision of the Federal Constitutional Court (*concrete review of statutes*). Additionally, the Federal Government, a State Government or one third of the members of the Bundestag may have the constitutionality of a statute reviewed (*abstract review of statutes*).

Examples:

- The liberal Party *FDP* has gone to Court because of the Budget 2004, but the Constitutional Court decided in 2007 that the Budget 2004 had not violated the Constitution.
- The decision that Art. 14 of the aviation security act is anticonstitutional. Some lawyers complained at the Constitutional Court that the aviation security act allows to shoot down an aircraft. They said that this allowance is against the human dignity of innocent passengers and that Art. 14.3 of the Aviation Security Act is also incompatible with the right to life (Art. 2.2 sentence 1, of the Basic Law) in conjunction with the guarantee of human dignity (Article 1.1 of the Basic Law) to the extent that the use of armed force affects persons on board the aircraft who are not participants in the crime.

3. Constitutional disputes

The jurisdiction of the Federal Constitutional Court may also be invoked if differences of opinion arise between constitutional bodies

or between the Federation and the *Länder* (Federal States) regarding their mutual constitutional rights and duties (*Organstreit* proceedings, State-Federal conflicts). In *Organstreit* proceedings, the matters at issue may concern questions of political party law, electoral or parliamentary law. State-Federal conflicts frequently have to do with questions of competence.

One recent example:

Judgment of the Second Senate (of the Federal Constitutional Court) of July 3rd 2007 in the *Organstreit* proceedings on the applications for a ruling that the Federal Government had infringed the rights granted to the German Bundestag under Article 59.2 of the Basic Law in taking part in the consensual further development of the North Atlantic Treaty of 1955, which contravened fundamental structural provisions of the Treaty and so implied that the Federal Government had acted outside the authorisation framework defined by the Consent Act (*Zustimmungsgesetz*). Applicant was the parliamentary group *PDS/Die Linke* in the German Bundestag, represented by its chairmen Gregor Gysi and Oskar Lafontaine. The applications were rejected as unfounded.

Hendrik Vuye

Full Professor at the Hasselt University¹ (Belgium)

**The relationship between the Parliament
and the Judiciary analysed from the viewpoint
of the legal protection of the citizen.
Outline of a *ius commune***

I. Introduction

1. Constitutional law, a national law or the expression of a common constitutional heritage?

In several fields of law, we can discern the advent of an *ius commune*². The European Union underlies a degree of harmonisation of commercial and consumer law. Under the influence of the case law of the European Court of Human Rights, or of the Court of Justice, we are moving towards a common denominator in other fields of law. So, for example, there is a certain harmonisation of family law under the influence of the case law of the European Court of Human Rights concerning Article 8 of the ECHR.

Nowadays, constitutional law seems to remain, *par excellence*, a national law. The explanation for this observation is easy and obvious,

¹ www.uhasselt.be

² See, in particular, J. SMITS, *Europe privaatrecht in wording. Naar een Ius Commune Europaeum als gemengd rechtsstelsel*, *Ius Commune Europaeum* 32, Antwerp-Groningen, Intersentia, 1999; J. SMITS, *The Making of European Private Law. Towards a Ius Commune Europaeum as a Mixed Legal System*, Antwerp, Intersentia, 2002.

at least at first sight. Constitutional law is intimately linked with national sovereignty. This explanation certainly has some relevance. However, it should not make us lose sight of the fact that our respective democracies have shared common values for a long time. There are many of them: the separation of powers, the right to free elections, the independence and impartiality of the Judiciary, the rule of law, parliamentary scrutiny of government action, human rights, fair trial, legal protection, social and economic rights,... So there definitely is a shared constitutional heritage.

In its important “Refah Partisi” judgement, the Grand Chamber of the European Court of Human Rights referred to this shared heritage. It argues that “European countries have a common heritage of political tradition, ideals, freedom and the rule of law”³. In this common heritage, the Court perceived the values underlying the Convention; on several occasions, it pointed out that the Convention was intended to uphold and promote the ideals and values of a democratic society.

2. *Towards a constitutional ius commune?*

It has to be said that the assertion that constitutional law remains a national law is but a decoy. In reality, since the end of the *Ancien Régime*, there has already been a shared body of values which characterised European countries. These are the values which, among others, have been expressed in the Declaration on the Rights of Man and the Citizen (1789). Article 16 of that declaration proclaimed that any society in which there was no separation of powers has no constitution.

³ ECHR Grand Chamber, 13 February 2003, “Refah Partisi (Welfare Party) and others v. Turkey”, appl. 41340/98, 41342/98, 41343/98 and 41344/98, § 83 citing the judgement of the Grand Chamber “United Communist Party of Turkey and others v. Turkey” of 30 January 1998, appl. 19392/92, § 45.

In addition, since then, this cultural heritage has been enhanced by new values, for example social and economic rights, the right to free elections, etc. ... We can even conclude that a country which does not respect this nucleus of common values cannot be described as a democracy.

It is easy to designate certain points around which a constitutional *ius commune* is in the process of developing nowadays.

A prime place is undoubtedly reserved for the case law of the European Court of Human Rights concerning the right to free elections (Article 3, first add. prot.). In its case law on this freedom, the Court allows countries broad discretion. Recently, the Grand Chamber of the Court reaffirmed this point⁴. It considers that there are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought.⁵ Nevertheless, the Court sets an important European standard when it states that any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of the right to free elections.⁶ In the “Hirst v. United Kingdom” case, the Grand Chamber emphasised that contracting states had no discretionary power to deprive convicted prisoners of the right to vote, by taking account of the duration of their sentence or the nature or seriousness

⁴ ECHR Grand Chamber, 6 October 2005, “Hirst v. United Kingdom”, appl. 74025/01, § 61; ECHR Grand Chamber, 16 March 2006, “Zdanoka v. Latvia”, appl. 58278/00, § 103.

⁵ ECHR Grand Chamber, 6 October 2005, “Hirst v. United Kingdom”, appl. 74025/01, § 61.

⁶ ECHR Grand Chamber, 6 October 2005, “Hirst v. United Kingdom”, appl. 74025/01, § 62.

of the crime committed. It considered that a general, automatic and undifferentiated restriction on voting for persons serving a prison sentence “must be seen as falling outside any acceptable margin of appreciation”.⁷

Certain initiatives by the Council of Europe also tend to favour the development of a *ius commune*. I am thinking more specifically of the “European Commission for Democracy through Law” – better known as the “Venice Commission”, which was set up in May 1990 by 18 Member States of the Council of Europe⁸. Since 2002, non-European countries have been able to become members of the Commission. This is a consultative body on constitutional questions. The “Code of good practice in electoral matters”⁹ adopted by the Venice Commission in 2002 will probably be a useful instrument in gradual harmonisation of electoral law.

The rules of good practice in the management of public affairs formulated in the two reports by the Committee of independent experts on allegations regarding fraud, mismanagement and nepotism at the European Commission (1999)¹⁰ also express the shared values of our democracies.

3. *Object and plan*

The subject of this contribution is certainly not to list or analyse the various initiatives that are or could be behind the development of a

⁷ ECHR Grand Chamber, 6 October 2005, “Hirst v. United Kingdom”, appl. 74025/01, § 82.

⁸ See <http://www.venice.coe.int>.

⁹ See [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-f.pdf](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-f.pdf).

¹⁰ See http://www.europarl.europa.eu/experts/default_fr.htm.

constitutional *ius commune*. On the other hand, it appears opportune to verify whether it is already possible to discover the outline of a possible *ius commune* in the field of judicial review of the actions of Parliament.

At first sight, this task hardly seems easy, because the activities of the Parliament are highly diverse. However, it must be said that two missions constitute the nucleus of the parliamentary mission: (a) voting for laws and (b) scrutinising the action of the government. These activities are eminently political and are ultimately aimed at the proper organisation of society. In practice, however, we observe that even the best possible management of public affairs can cause unexpected collateral damage. Certain actions taken for the public good can have disastrous consequences for certain citizens, whose rights or interests are harmed. The objective of this study is to find out whether it is possible to identify a *ius commune* concerning legal protection of the citizen. What level of protection do our democracies offer citizens harmed by the above-mentioned actions of the Parliament?

II. The law: the only expression of national will?

1. The law: expression of national sovereignty and the common will?

The law is usually considered as the expression of the national will, or even of national sovereignty. On this point, our democracies are the heirs to the French Revolution of 1789. Article 6 of the Declaration of the Rights of Man and the Citizen of 26 August 1789 already stated that the law was the expression of the general will. This idea remains widespread nowadays.

However, it has to be said that this idea no longer corresponds to the way our democracies are organised. It is not only the legislator but also the other powers which express the general will. The various powers of a modern State all enjoy democratic legitimacy. Moreover, the normative activity of the executive goes way beyond that of the legislature. Eminent authors have even raised the idea of a “decadence” of the law in favour of regulatory value standards.¹¹

Finally, our political systems are increasingly positioned as “*multilevel governance*”. Law is no longer national in the strict sense of the term. National law is increasingly influenced, or even directed, by international law. At the same time, that international law is usually nothing more than the common denominator of various national laws. This continuous interaction between national law and international law even constitutes one of the most powerful drivers of change in our legal systems.

2. *The erosion of the law and the immunity of the legislative State*

Already in the “Costa v. E.N.E.L.” case of 1964, the Court of Justice of the European Communities had decided that Community law had primacy over national law.¹² In a judgement of 17 December 1970, the primacy of Community law over the Constitution of the Member States was subsequently asserted.¹³ Faced with this case law, lawyers are forced to observe that the law is no longer the supreme standard.

¹¹ J. GHESTIN, G. GOUBEUX and Mr. FABRE-MAGNAN, *Traité de droit civil. Introduction générale*, Paris, L.G.D.J., 1994, pp. 214-215, no. 256.

¹² Court of Justice, 15 July 1964, “Costa v. E.N.E.L.” case no. 6/64.

¹³ Court of Justice, 17 December 1970, “Internationale Handelsgesellschaft”, no. 11/70.

The majority of Member States now recognise the primacy of international law over national law.

When the law, and even the Constitution, are no longer considered as the supreme standards of the State, it goes without saying that the legislative State inevitably loses its status of intangibility. For a long time, the legislature, an emanation of the Nation or the people, benefited from absolute immunity. Any liability of the legislative State was out of the question. This dogma was partly overturned by the Court of Justice of the European Communities, in two stages¹⁴: the “Francovitch” judgement¹⁵ concerns a European directive compelling Member States to set up a “guarantee fund” to ensure that workers would be paid any amounts owed in wages in the event of their employer becoming insolvent. The Member States had to comply with the European directive before 23 October 1983. Non-compliance with this deadline would be an infringement of Community law and, in principle, the Member States would be liable for damages caused on that occasion. This liability is imposed by Community law and not by the national law of the State. According to the Francovitch judgement, the legal basis is Article 10 of the Treaty¹⁶ establishing the European Community, which provides that the Member States must take all general or specific measures appropriate to ensure the implementation of all obligations arising from the treaty. More recent decisions mention that this is a “responsibility inherent in the treaty system”.

¹⁴ See H. VUYE, “Overheidsaansprakelijkheid wegens schending of het Europe gemeenschapsrecht”, *Tijdschrift voor Belgisch Handelsrecht*, 2003, 743-763.

¹⁵ Court of Justice, 19 November 1991, “Francovitch and Bonifaci v. Italy”, no. C-6/90 & C-9/90.

¹⁶ Formerly Article 5.

In the “S.A. Brasserie du Pêcheur” case,¹⁷ the Court of Justice states that this liability applies for any hypothesis of breach of Community law by a Member State, and whichever organ – the executive, judiciary or legislature – is responsible for the action or omission that is the cause of the failure. In this case, the breach of Community law was due to the legislature of a Member State.

The immunity of the legislative State had reached the end of the line. It is true that the case law of the Court of Justice only concerns the very precise hypothesis of disregarding a standard of Community law. Nevertheless, the dogma of the immunity of the legislative State had been shattered. I think that there is no longer any reason that could justify immunity of the legislature when it fails to comply with other standards of Community law. In other words, the civil liability of the legislative State is a *ius commune* in the making.

III. The scrutiny role of the Parliament

1. Parliamentary privilege and its scope

The scrutiny missions of the Parliament are very diverse: questions, interpellations, committees of inquiry, etc. The majority of countries grant parliamentary privilege to the members of their national legislative organs, although the precise arrangements vary from one country to another. Currently, this parliamentary privilege still constitutes an *ius commune*. In its “A. v. United Kingdom” judgement, the European Court of Human Rights ruled that the application of a rule of absolute Parliamentary immunity cannot be said to exceed the margin of

¹⁷ Court of Justice, 5 March 1996, “S.A. Brasserie du Pêcheur v. Bundesrepublik Deutschland”, no. C-46/93 & C-48-93.

appreciation allowed to States in limiting an individual's right of access to a court.¹⁸ In other words, such a limitation was not contrary to Article 6 of the Convention. In the "Cordova v. Italy" judgement, the Court stated that an immunity that also covered actions and statements unconnected with the exercise of parliamentary functions *stricto sensu* is, on the other hand, contrary to Article 6 guaranteeing right of access to a court¹⁹. This case law has been consistent since then²⁰.

According to a long-established tradition in the United Kingdom, this parliamentary privilege covers all the actions of the Parliament. Not only is the liability of MPs ruled out, but any liability of the State in this regard as well, and this covers all the actions of the Parliament. It is to be feared that several countries may follow this Anglo-Saxon tradition, thus depriving citizens from any legal protection against a parliamentary act.

It should be borne in mind that the European Court of Human Rights has certainly not decided that parliamentary privilege must necessarily rule out any legal protection. Is it necessary to refer to Article 53 of the Convention at this point? This article provides that the protection afforded by the European Convention on Human Rights is only minimum protection; the State may offer greater protection.

In addition, we should perhaps not overestimate the scope of the "A. v. United Kingdom" judgement. In its concurring opinion published under the judgement, the current President of the Court, Jean-Paul

¹⁸ ECHR, 17 December 2002, "A. v. United Kingdom", appl. 35373/97.

¹⁹ ECHR, 30 January 2003, "Cordova v. Italy" (2 judgements), appl. 40877/98 and 45649/99, § 63.

²⁰ ECHR, 3 June 2004, "De Jorio v. Italy", appl. 73936/01; ECHR, 6 December 2005, "Ielo v. Italy", appl. 23053/02; ECHR, 20 April 2006, "Patrono, Cascini and Stefanelli v. Italy", appl. 10180/04. See also ECHR, 16 November 2006, "Tsalkitzis v. Greece", appl. 11801/04.

Costa, emphasised that “since the *Bill of Rights* of 1689 or the French Constitution of 1791, relations between parliaments and the outside world have changed. Parliaments are no longer solely or chiefly concerned with protecting their members from the sovereign or the executive. Their concern should now be to affirm the complete freedom of expression of their members, but also, perhaps, to reconcile that freedom with other rights and freedoms that are worthy of respect”²¹. He considered nevertheless that the European Court of Human Rights cannot impose any particular model on the contracting States, in such a politically sensitive field. He concluded that, in this field, change is desirable and possible.

2. *A desirable change in the light of the rule of law*

There is no doubt whatever that change is desirable. A political regime which grants privileges to some, particularly the privilege to harm, is not a modern democracy. The Declaration of the Rights of Man and the Citizen of 1789 already stated that “the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights” (Art. 4). There is no State governed by the rule of law without legal protection.

To illustrate this point of view, it is useful to point out the sad events which gave rise to the “A. v. United Kingdom” judgement. During a debate on social housing, Michael Stern MP stated that Mrs A and her family were “*neighbours from hell*”. The MP mentioned Mrs A’s name several times, mentioned her address and accused her of vandalism, making noise at night, verbal and physical abuse, violence, drug trafficking, etc. The MP’s remarks made front page headlines. From

²¹ Concurring opinion J.-P. COSTA under ECHR, 17 December 2002, appl. 35373/97.

then on, Mrs A. was assaulted in the street; strangers spat at her and called her the “neighbour from hell”. She received racist hate mail. One of these letters read – I quote: “You silly black bitch, I am just writing to let you know that if you do not stop your black nigger wogs nuisance, I will personally sort you and your smelly jungle bunny kids out.” An expert appointed by the Housing Association found that Mrs A. had been put in considerable danger as a result of her name being released to the public. Finally, Mrs A. was re-housed and her children had to change schools.

The financial and moral damage was considerable. Who would dare to claim that this is the price of democracy? Who would dare to claim that Mrs A. should have to bear this heavy burden in the interests of society? Is that parliamentary democracy?

3. A change that is desirable from the viewpoint of free political debate

There is no democracy without free political debate. As the European Court of Human Rights helpfully reminds us, “... one of the principal characteristics of democracy [is] the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression”²². Freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention²³.

²² ECHR Grand Chamber, 13 February 2003, “Refah Partisi (Welfare Party) and others v. Turkey”, appl. 41340/98, 41342/98, 41343/98 and 41344/, § 97 citing the judgement of the Grand Chamber “United Communist Party of Turkey and others v. Turkey” of 30 January 1998, appl. 19392/92, § 57.

²³ ECHR, 8 July 1986, “Lingens v. Austria”, appl. 9815/82, § 42.

Parliamentary privilege cannot guarantee free political debate. Parliamentary privilege is usually functional, *i.e.* limited to actions of parliamentary life. The reason for this restriction is historic. Parliamentary privilege was to protect MPs against the King. Parliamentary privilege is not complete, because it only protects MPs, not politicians. The explanation is also historic. At the time, political parties in the modern sense of the term did not exist. The extent of parliamentary privilege is usually absolute, but the scope of the immunity remains limited strictly to the parliamentary function. In other words, this protection is not complete, and does not guarantee free political debate outside the strict framework of the parliamentary function.

But there is more. Parliamentary privilege must be functional because, according to the European Court of Human Rights, an immunity which also covers actions and statements unconnected with the exercise of a parliamentary function *stricto sensu* is contrary to Article 6 guaranteeing access to a court²⁴. This squares the circle: parliamentary privilege is not complete and cannot be supplemented...

Therefore, it is desirable to look for a different balance, if possible a balance that guarantees free political debate at the same time, and offers sufficient legal protection to citizens.

4. *A possible change?*

Change is also possible. In fact, we can discern a *ius commune* of the case law of the European Court of Human Rights concerning freedom of expression for politicians (Article 10 ECHR; Article 19 Covenant

²⁴ ECHR, 30 January 2003, “Cordova v. Italy” (2 judgements), appl. 40877/98 and 45649/99, § 63.

on Civil and Political Rights). Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. The European Court of Human Rights has emphasised on innumerable occasions that it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”²⁵.

5. Freedom of expression by politicians

Since the “Castells v. Spain” judgement, the Court has stated that while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of Parliament call for the closest scrutiny on the part of the Court.²⁶ A person opposed to official ideas and positions

²⁵ Consistent case law since ECHR, 7 December 1976, “Handyside v. United Kingdom”, appl. 5493/72, § 49.

²⁶ ECHR, 23 April 1992, “Castells v. Spain”, appl. 11798/85, § 42; ECHR, 10 October 2000, “Ibrahim Aksoy v. Turkey”, appl. 28635/95, 30171/96 and 34535-97, § 59; ECHR, 27 May 2001, “Jerusalem v. Austria”, appl. 26958/95, § 36; ECHR, 22 February 2005, “Pakdemirli v. Turkey”, appl. 35839/97, § 33; ECHR, 14 February 2006, “Christian Democratic People’s Party v. Moldova”, appl. 28793/02, § 67; ECHR, 11 April 2006, “Brasilier v. France”, appl. 71343/01, § 42; ECHR, 18 April 2006, “Roseiro Bento v. Portugal”, appl. 29288/02, § 41; ECHR, 4 May 2006, “Alinak and others v. Turkey”, appl. 34520/97, § 33; ECHR, 7 November 2006, “Mamère v. France”, appl. 12697/03, § 20; ECHR, 24 April 2007, “Lombardo and others v. Malta”, appl. 7333/06, § 53; ECHR, 17 July 2007, “Sanocki v. Poland”, appl. 28949/03, § 63; ECHR, 20 November 2007, “Filipovic v. Serbia”, appl. 27935/05, § 54.

must be able to find a place in the political arena.²⁷ The European Court of Human Rights attaches the utmost importance to freedom of expression in the context of political debate, and considers that political speeches should not be curbed without compelling reasons²⁸. The freedom of political debate is undoubtedly not absolute in nature. A contracting State may make it subject to certain “restrictions” or “penalties”.²⁹

6. The broad scope of freedom of expression

The scope of freedom of expression by politicians is broad. Unlike parliamentary privilege, it not only concerns actions in parliamentary life, but all actions in political life. In other words, this liberty reflects the modern organisation of political debate and the existence of political groups. We all know that for a long time now, the Parliament is no longer the only place where political debate takes place. Political debate constitutes, in a modern democracy, a broader concept than just parliamentary debate, even broader than the debates between politicians. For citizens who may be adversely affected by remarks made during a political debate, this freedom of expression has the advantage of not being absolute and, therefore, not excluding all legal protection.

²⁷ ECHR, 27 April 1995, “Piermont v. France”, appl. 15773/89 & 15774/89, § 76. ECHR, 11 April 2006, “Brasilier v. France”, appl. 71343/01, § 42: this includes, of necessity, the possibility of being able to discuss the regularity of an election.

²⁸ ECHR, 6 July 2006, “Erbakan v. Turkey”, appl. 59405/00, § 55.

²⁹ ECHR, 23 April 1992, “Castells v. Spain”, appl. 11798/85, § 46; ECHR, 27 April 1995, “Piermont v. France”, appl. 15773/89 & 15774/89, § 76.

In other words, this new criterion has the advantage of protecting the politician in his/her capacity as a politician, and not just as a Member of Parliament. This criterion is therefore closer to the reality of political life. In addition, this new criterion meets the standards of modern, social democracy by offering genuine legal protection to citizens.

7. The new criterion

Based on the case law of the European Court of Human Rights, it appears possible for us to introduce the following distinctions:

a. Freedom of expression about the government

The limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system, the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities, but also of the press and public opinion³⁰. In the “Castells v. Spain” case, an opposition MP was given a prison sentence for insulting the government. The Court decided that the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media. The nature and severity of the punishment inflicted are elements to be taken into account when assessing the proportionality of the interference. Nevertheless it remains open to the

³⁰ ECHR, 23 April 1992, “Castells v. Spain”, appl. 11798/85, § 46; ECHR, 9 April 2002, “Yazar v. Turkey”, appl. 22723/92, 22724/93 and 22725/93, § 59; ECHR, 10 December 2002, “Democratic Party of Turkey (DEP) v. Turkey”, appl. 25141/94, § 59.

competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.³¹

When criticising the government, the freedom of expression of politicians is broad and almost unlimited. In principle, any criminal prosecution or civil action is ruled out.

b. The freedom of expression before a democratically-elected assembly

In a democracy, Parliament or such comparable bodies – for example a municipal council – are the essential fora for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein.³² As mentioned above, it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.³³

³¹ ECHR, 23 April 1992, “Castells v. Spain”, appl. 11798/85, § 46. See also ECHR, 9 June 1998, “Incal v. Turkey”, appl. 22678/93, § 54; ECHR, 8 July 1999, “Sürek v. Turkey (n° 2)”, appl. 24122/94, § 34; ECHR, 10 October 2000, “İbrahim Aksoy v. Turkey”, appl. 28635/95, 30171/96 and 34535-97, § 52; ECHR, 4 June 2002, “Yagmurdereli v. Turkey”, appl. 29590/96, § 43; ECHR, 9 July 2002, “Seher Karatas v. Turkey”, appl. 33179/96, § 37 ECHR, 15 October 2002, “Ayşe Oztürk v. Turkey”, appl. 24914/94, § 67; ECHR, 4 March 2003, “Yasar Kemal Gokceli v. Turkey”, appl. 27215/95 and 36194/97, § 33; ECHR, 4 March 2003, “C.S.Y. v. Turkey”, appl. 27214/95, § 40; ECHR, 23 September 2003, “Karkin v. Turkey”, appl. 43928/98, § 28; ECHR, 6 April 2004, “Mehdi Zana v. Turkey”, appl. 26982/95, § 35; ECHR, 14 February 2006, “Christian Democratic People’s Party v. Moldova”, appl. 28793/02, § 65.

³² ECHR, 27 May 2001, “Jerusalem v. Austria”, appl. 26958/95, § 40.

³³ ECHR, 23 April 1992, “Castells v. Spain”, appl. 11798/85, § 46. See also

Also in this hypothesis, the scope of politicians' freedom of expression is almost unlimited. In principle, any criminal prosecution or civil action is ruled out.

c. Freedom of expression between politicians

The European Court considers that in the context of an election, the intensity of the remarks is more tolerable than under other circumstances³⁴. In this case “*Brasilier v. France*”, a politician had accused a political opponent of electoral fraud. The Court of appeal considered that by not providing evidence of these allegations, the politician had committed a civil wrong. It ordered the politician to pay one franc in damages to his opponent. The European Court of Human Rights emphasises that the nature and severity of “punishments” imposed are elements to be taken into consideration when assessing the proportionality of the interference. Although the sentence to a “symbolic franc” was the most lenient possible, it considered that it would not suffice *in casu* to justify interference in the right of expression. In fact, an attack on freedom of expression can run the risk of having a deterrent effect on the exercise of this freedom³⁵.

ECHR, 9 June 1998, “*Incal v. Turkey*”, appl. 22678/93, § 54; ECHR, 8 July 1999, “*Sürek v. Turkey (n° 2)*”, appl. 24122/94, § 34; ECHR, 10 October 2000, “*Ibrahim Aksoy v. Turkey*”, appl. 28635/95, 30171/96 and 34535-97, § 52; ECHR, 4 June 2002, “*Yagmurdereli v. Turkey*”, appl. 29590/96, § 43; ECHR, 9 July 2002, “*Seher Karatas v. Turkey*”, appl. 33179/96, § 37 ECHR, 15 October 2002, “*Ayşe Oztürk v. Turkey*”, appl. 24914/94, § 67; ECHR, 4 March 2003, “*Yasar Kemal Gokceli v. Turkey*”, appl. 27215/95 and 36194/97, § 33; ECHR, 4 March 2003, “*C.S.Y. v. Turkey*”, appl. 27214/95, § 40; ECHR, 23 September 2003, “*Karkin v. Turkey*”, appl. 43928/98, § 28; ECHR, 6 April 2004, “*Mehdi Zana v. Turkey*”, appl. 26982/95, § 35; ECHR, 14 February 2006, “*Christian Democratic People’s Party v. Moldova*”, appl. 28793/02, § 65.

³⁴ ECHR, 11 April 2006, “*Brasilier v. France*”, appl. 71343/01, § 42. See also ECHR, 6 November 2007, “*Lepojic v. Serbia*”, appl. 13909/05, § 74.

³⁵ ECHR, 11 April 2006, “*Brasilier v. France*”, appl. 71343/01, § 33 etc.

In another case concerning a politician ordered to pay compensation for defamation and insulting the President, the Court had already reached a similar conclusion. In this case, the two protagonists in the case had a long history of political antagonism. The Court argued that in a civil case, the quantum of compensation alone that is imposed on the condemned person can constitute an interference as defined by Article 10 of the Convention, on the understanding that any decision awarding compensation must have a reasonable relationship of proportionality with the harm caused to the reputation. In addition, the limits of admissible criticism are wider for a politician than for an ordinary individual. A politician inevitably and deliberately subjects him/herself to attentive scrutiny of his/her actions and attitudes both by journalists and by the general public. Therefore, he/she must show greater tolerance. Ordering a particularly large amount of compensation to be paid cannot be considered necessary in a democratic society³⁶.

Between politicians, freedom of expression is particularly broad. In principle, any criminal prosecution or civil action is ruled out.

d. Limits of freedom of expression by politicians: incitement to violence

Where utterances incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression³⁷. In this hypothesis, criminal proceedings and civil actions cannot be ruled out.

³⁶ ECHR, 22 February 2005, “Pakdemirli v. Turkey”, appl. 35839/97, § 55 etc.

³⁷ ECHR, 8 July 1999, “Sürek v. Turkey (n° 2)”, appl. 24122/94, § 34; ECHR, 10 October 2000, “Ibrahim Aksoy v. Turkey”, appl. 28635/95, 30171/96 and 34535-97, § 52; ECHR, 4 June 2002, “Yagmurdereli v. Turkey”, appl. 29590/96, § 43; ECHR, 9 July 2002, “Seher Karatas v. Turkey”, appl. 33179/96, § 37; ECHR, 15 October 2002, “Ayse Oztürk v. Turkey”, appl. 24914/94, § 67; ECHR, 4 March 2003, “Yasar Kemal Gokceli v. Turkey”, appl. 27215/95 and 36194/97, § 33; ECHR, 4 March 2003, “C.S.Y. v. Turkey”, appl. 27214/95, § 40; ECHR, 23 September 2003, “Karkin v. Turkey”, appl. 43928/98, § 28.

We should bear in mind, however, that the fact that a political appeal is deemed incompatible with the repressive legislation of a State does not make it contrary to democratic rules. An appeal, even if it encompasses a call for a general strike and public resistance, is hardly any different from that issued by political movements in several Member States of the Council of Europe.³⁸

e. Limits of free political debate

The limits of admissible criticism about an ordinary individual are much stricter. When a politician expresses views about an ordinary citizen, he/she must behave as a normally prudent and diligent politician. When a politician expresses views solely with the intention of being harmful and causes serious adverse effects to a citizen, it is not acceptable from a democratic viewpoint to grant any kind of immunity to that politician. If the politician expresses views in a negligent way, or when the remarks made are not relevant to the political debate, no argument can justify it being impossible to bring a civil case. Freedom of expression by politicians is broad, in the interest of free political debate, but when that free political debate is no longer at issue, there is no reason to grant a right to cause harm. A modern democracy cannot tolerate such a “licence to kill”.

³⁸ ECHR, 9 July 2002, “Seher Karatas v. Turkey”, appl. 33179/96, § 42; ECHR, 23 September 2003, “Karkin v. Turkey”, appl. 43928/98, § 36.

IV. Conclusion

Is parliamentary privilege useful or dangerous?

It has to be said that concerning freedom of expression, the approaches are divergent. The United States Supreme Court advocates a “clear and imminent danger” test. In the “Schenck v. United States” judgement (1919), Judge Holmes established the criterion as follows: “The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree”³⁹. In the “Dennis v. United States”, the Court adopted the formula of Chief Judge Learned Hand: “In each case, courts must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger”⁴⁰. The United States Supreme Court concentrates on the potential consequences of an opinion expressed; it does not immediately scrutinise the content of the opinion concerned. The European Court of Human Rights adopts a different approach. In the “Jersild” judgement, the Court emphasises at the outset that it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations⁴¹, which implies an immediate scrutiny of the content of the opinion expressed.

At first sight, the difference between these two approaches does have consequences for free political debate. When the criterion of “clear and imminent danger” is used, the politician would have no need whatever

³⁹ U.S. Supreme Court, 3 March 1919, “Schenck v. United States”, 249 U.S. 47.

⁴⁰ U.S. Supreme Court, 4 juin 1951, “Dennis v. United States”, 341 U.S. 494.

⁴¹ ECHR Grand Chamber, 23 September 1995, “Jersild v. Denmark”, appl. 15890/89, § 30.

of parliamentary privilege. In this conception, the freedom of opinion of citizens – including politicians – becomes almost absolute. In other words, the freedom of expression of the citizen and the politician is of the same order. It is only when laws limit freedom of expression that it is necessary to introduce privileges which will allow some people to make full use – “in the public interest”, as they say – of their freedom of opinion. In any case, that is how parliamentary privilege is usually presented: it must safeguard the free manifestation of MPs’ thoughts⁴². The first books on Belgian constitutional law, for example, state that the prime duty of an MP is to say what he/she thinks is useful for the interests of the Nation⁴³.

Apparently, nobody dares question this viewpoint. Parliamentary privilege forms part of the sacrosanct nucleus of public law. However, it has to be said that the interpretation given to freedom of expression by the politician and to free political debate renders that privilege completely superfluous. Freedom of expression by politicians is already so broad that he/she can express thoughts freely. No need to duplicate that freedom of expression with the excessive privilege of parliamentary immunity. In reality, parliamentary privilege, to the extent that it goes beyond the limits of what is necessary to guarantee free political debate, is just permission to harm the rights of others. This parliamentary privilege does not contribute any added value to democracy; on the contrary, it deprives citizens of the fundamental right which is that of access to a court. In a democratic society, which fully guarantees free political debate, parliamentary immunity is the

⁴² See H. VUYE, “Les irresponsabilités parlementaire et ministérielle: les articles 58, 101, al. 2, 120 et 124 de la Constitution”, *Chroniques de droit public – Publiekrechtelijke kronieken* 1997, pp. 2-27.

⁴³ F.-G.-H. THIMUS, *Traité de droit public*, II, Liège, 1846, p. 105; C. DE BROUCKÈRE and F. TIELEMANS, *Répertoire de l’administration et du droit administratif de la Belgique*, IV, Brussels, 1838, v^o “Chambre des représentants”, p. 286.

negation of citizens' fundamental right to legal protection. This is to overlook that in a democracy, judicial review is always added value.

Excerpts from the discussions devoted to the third theme

Addressing all the speakers so far on the third theme, **Mr. Brendan KEITH**, Head of the Judicial Office of the House of Lords, asked what harm there had ever been, or could be, from a practical viewpoint, from the Judiciary and the Parliament being in conflict.

This question was the subject of quite divergent answers from the two keynote speakers.

Mrs. Oonagh GAY considered that in practice, such a conflict entailed hardly any risks, and could even contribute to clarifying certain matters. The only problem lay, in her opinion, in that it could give rise to inappropriate legislation, as could be seen from the example of the 1996 Defamation Act. This law had cut across the principle of parliamentary privilege by allowing a Member of Parliament to waive this principle so that a parliamentary procedure could be the subject of a defamation case, merely with the aim of serving the MP's personal or political ambitions.

Mrs. Gabriela SIERCK considered that the emergence of a conflict between the Judiciary and the Parliament could have substantial effects. She pointed out that a conflict of this type could lead the Judiciary to take over certain powers of the legislature, and to substantiate this, she cited the fact that a few years ago, following an action brought before the Constitutional Court by a group of parents complaining

that the law on child benefits did not take account of the financial burden of bringing up children, the Court not only judged that the tax legislation on child benefits was unconstitutional, but also ruled that any household with dependant children could reduce its income tax by a fixed amount if the Parliament had not adopted an amending act by the end of the year.

Mr. Hendrik VUYE, academic speaker, went on to highlight a rather manifest ambiguity. He found it inconceivable that politicians should ask the citizens to trust the courts while wishing to be immune from their jurisdiction as soon as they themselves were affected.

Therefore, he felt, a different approach was necessary. It was necessary to find a balance in law between civil liberties. According to the case law of the European Court of Human Rights, free political debate was not an absolute liberty, so that in practice, a balance needed to be struck with other rights, such as the right of access to justice, or the right to privacy. The speaker added that it would be wrong to consider that a judicial review of the Parliament would necessarily be detrimental to the working of the Parliament; it was quite possible that it would have the opposite effect.

We should point out that during the presentation that he made as an academic speaker in the context of the discussion on theme IV, **Mr. Koen MUYLLE** made a comment about the prospective views put forward by Mr. Hendrik VUYE in his presentation.

Concerning the possibility raised by Mr. VUYE of replacing parliamentary privilege by Article 10, relating to freedom of expression, of the European Convention on Human Rights, specifically in the context of relations between a Member of Parliament and the government, Mr. Koen MUYLLE pointed out that, while it was correct

from a legal viewpoint, to consider that this Article 10 would enable the objective pursued to be attained, treating it as a guarantee of free political debate would entail risks: from the practical viewpoint, the mere possibility that the government would have of bringing legal action against the MP would have a chilling effect (this possibility alone could deter the MP from expressing certain criticisms). That is why he considered that Article 10 did not offer adequate guarantees, and he remained in favour of absolute parliamentary privilege.

(N.B.: Mr. Hendrik VUYE, who was absent at the time this comment was made, did not have an opportunity to respond)

Suzie Navot

*Professor of law,
Head of the Public Law Division at the School of Law, College of
Management – Academic Studies, Israel*

Final remarks and conclusion

The dilemma of judicial intervention in the internal parliamentary proceedings is one of the more difficult questions under discussion today in European doctrine. This issue seems to be the core of the tension existing nowadays between Parliament and the Judiciary.

It is the main issue in dispute because when Parliament members (or Parliament itself) are acting within the parliamentary functions, there is, *prima facie*, no justification for judicial intervention. The European discourse has focused on the theory of *interna corporis*, the concept of parliamentary independence, the principle of separation of the powers, and the transition from the model of parliamentary supremacy to the model of constitutional supremacy.

The rule commonly accepted is that Parliament internal acts should not be reviewed by ordinary courts. Therefore the results of the questionnaire show that (in opposition to the results on the issue of search and seizure, where the analysis showed that most Parliaments do allow such search, because it is not really an “intrusion” into parliamentary life) when it comes to “legitimate parliamentary life and activity”, most countries do not allow for judicial review of or control on parliamentary decisions.

Judicial review of internal parliamentary proceedings is performed in few European countries and is primarily derived from the existence of the judicial review of laws. Prior to the entrenchment of judicial review of laws in Europe, the issue of defective internal parliamentary proceedings was simply not relevant.

A perusal of comparative law indicates that constitutional courts do not suffice with the provisions of the different constitutions, which provide a possible formal legal basis for judicial review, but a comprehensive discussion is being conducted on the question of authority.

I. Judicial review of Rules of Procedure

Judicial review of Rules of Procedure is the “easiest” issue from the judicial review point of view. It is “easy” because it deals with a legal “norm” which seems to be already “separated” from the personal member, from the internal proceeding inside Parliament. A rule of procedure is much closer to an act of law than any other internal act.

In order to elaborate this argument, let us imagine a “spectrum”, a “scale” of judicial review of parliamentary activity. At the one end of the spectrum, or the scale, there is judicial review of laws, of completed legislative acts called “laws”, which are legal norms that have consequences outside Parliament. At this end of the spectrum, most modern democracies do allow for judicial review of laws argued to be unconstitutional.

At the other end, there is regular judicial review of all internal parliamentary decisions, whether administrative, political or legislative. For example, a decision by the Speaker concerning a vote, a decision to ask a member to leave the floor because of his behaviour, a decision

made by one of the assembly's committees, etc. At this end, we find the core of parliament activity, the outcome of political decision-making.

Only rarely do states and their judiciaries position themselves clearly at either of the spectrum's extremities, although examples can be found of both approaches, *i.e.* the approach that constitutionally negates the possibility of judicial review of internal parliamentary issues, and the approach that regards internal parliamentary functions as "regular" legal questions, hence admitting of judicial review.

Between the two extremities, there are some intermediate approaches. All along the scale, there are acts of a different nature, such as acts of a quasi-judicial nature. Naturally, the further away one moves on the scale towards the daily parliamentary decisions, the less judicial review will be found. Starting from judicial review of laws and moving towards judicial review of internal political acts, there is a continuous "decreasing" in judicial review.

Now the question is where – along the scale – are located the Rules of Procedure.

I argue that Rules of Procedure are much closer to an act of "law" than any other internal parliamentary decision. Rules of Procedure are rules. Parliament usually votes to change them or to adopt them, as it would do with a regular law.

The results of the questionnaire in this matter are consistent with this argument. In the analysis made by Alberik Goris (see pages 155 tot 165), we learnt that almost half of the countries included in the research (15 out of 29) do have some kind of judicial review of Rules of Procedure. In many of these countries, the ground for judicial review is the legal "status" of the Rules of Procedure, or the fact that they are

considered an “act with the force of law”. As mentioned above, the closer to an act of law, the easier the judicial review is.

II. Internal parliamentary acts

At the other far end of the spectrum, we find internal acts connected with the key functions of Parliament: political oversight, speaking time, bill proposing, the recognition of a political group, the admissibility of questions or proposals, the appointment of members, etc. Each country gives its own particular response about its position along the scale, this decision being based on the specific “variables” of every state. These variables include the status of the Constitutional Court, its relative position in the system, its power, and its degree of independence. This position also depends on custom and political culture, as well as on constitutional arrangements, which sometimes exclude these areas from the Court’s jurisdiction.

Most European countries do not allow for judicial review of Parliament’s internal affairs. It is interesting to check the common factors that allowed this particular kind of judicial review to develop in those very few countries (Germany, Israel and Spain, as well as according to the new constitutions of Armenia, Bulgaria and Estonia).

Germany, Spain and Israel have some common characteristics, which allow for this kind of judicial review, and may illuminate the possibilities in other countries as well. Those are countries in which democracy has not always been obvious, countries in which the Supreme Court (or Constitutional Court) played and still plays a crucial role in establishing democracy, in defending democracy and in protecting minorities in Parliament. The constitutional jurisprudence in Germany, Spain and Israel reveals that constitutional values and principles are being used

by the courts to allow for a broad interpretation of the Constitution. These are also countries with strong “activist” constitutional courts.

In a comparative perspective, following the case-law in Germany, Spain and Israel I argue that a constitutional democracy needs three basic premises in order to allow judicial review of internal parliamentary acts:

- 1) an internal decision that violates constitutional values or constitutional rights;
- 2) a strong court ready to give a broad interpretation to the Constitution and enforce constitutional values; and
- 3) a literally “constitutional discourse” or “constitution-based rhetoric”.

If a Constitution does not explicitly forbid judicial review, and those three basics are present, it is possible to develop judicial review of internal acts, even in countries where legal culture and history do not allow for it.

The German Constitutional Court, for example, pointed out that “Parliament has broad discretion about its organization and procedure. But the constitutional principles are ‘checks’ on this power”.

And the Spanish Constitutional Court stated that “The doctrine of *interna corporis* can only be applied where there is no violation of rights and freedoms stipulated in the Constitution”.

This constitutional discourse enables the court to confront the principle of parliamentary independence, and to replace it with the idea that every parliamentary organ is subordinate to the principles of the Constitution.

In conclusion, a constitutional discourse, a strong court and a serious violation by Parliament of constitutional rights or principles are factors that may open the door for judicial review of internal acts. It should be remembered that the court should not be an address for rectifying the failures of the elected authorities. It must not become a governmental alternative, but it has to be prepared to function as a judicial watchdog.

FOURTH THEME

The judicial review of acts accomplished by Parliament outside the scope of key parliamentary functions

Parliament accomplishes a broad range of acts outside the area of its traditional functions. In the context of the fourth theme, particular attention is paid to jurisdictional acts, administrative acts and acts concerning the members of the assembly or the political groups (*see* Appendix, Part II, Sections 4, 6, 7 and 8).

The systems arranging judicial review of these acts are very diverse. The category of administrative acts is the one which is most subject to judicial review. On the other hand, the courts have shown a degree of reluctance about decisions involving members of the assembly or the political groups.

The Italian representative described the principle of “*autodichia*”. This is a judicial review of administrative measures concerning the personnel of the Parliament, which is exercised by bodies consisting of members of the Italian Senate itself.

The Austrian speaker presented a dual system, in which the administrative acts of the President of the *Bundestag* relating to personnel may be appealed before the Supreme Administrative Court or the Constitutional Court.

The Albanian speaker described a single system of judicial review exercised in relation to parliamentary decisions on public procurement contracts. In the context of this system, a preliminary decision taken by a specific body established by law determines whether third parties have the possibility or not of asserting their rights before the national courts.

Koen Muylle, Law Clerk at the Belgian Constitutional Court, made a particularly illuminating presentation of his own vision of the theme, emphasising recent developments in Belgium.

Marc Veys

*Lawyer at the Legal Department of the Belgian Senate
and teaching assistant at the Vrije Universiteit Brussel (VUB),
Constitutional and Administrative Law Division*

Analysis of the ECPRD correspondents' replies

The third theme is about the acts accomplished by Parliament in the exercise of key parliamentary functions: acts of a constitutional nature, acts of a legislative nature, acts pertaining to political oversight and the rules of procedure. The fourth theme, on the other hand, focuses on the Parliament's acts of a jurisdictional (or quasi-jurisdictional) nature and on the acts of an administrative nature regarding the Parliament's staff or regarding third persons.

I. Parliament's acts of a (quasi-)jurisdictional nature

The category of Parliament's jurisdictional acts must, of course, be taken broadly and considered from a functional, and not from an organic point of view. Within the strict context of the separation of powers, the assembly's act could, indeed, automatically lose any jurisdictional character merely because it is carried out by a parliamentary assembly or by another parliamentary body.

In some countries, the parliamentary assembly does not carry out any jurisdictional or quasi-jurisdictional act. These countries are: Bulgaria, Croatia, Iceland, Norway, Russia and Serbia.

In most countries, the jurisdictional or quasi-jurisdictional acts are performed in one or more of the following domains:

- verification of credentials (decision on the validity of the election and the validity of the mandates);
- disciplinary measures;
- parliamentary immunity.

Some assemblies also mention the supervising procedures on electoral expenditure and/or on the financial accounting of political parties (Belgium, Denmark, FYROM, Germany and Slovakia).

Austria also mentions the assembly's decision upon "unseating an MP". In case a decision based on the absolute majority of the valid votes is reached, a petition to unseat the MP is filed with the Constitutional Court. The Constitutional Court thereafter makes a final decision on the matter.

All the above-mentioned types of jurisdictional and quasi-jurisdictional acts lie within the scope of parliamentary autonomy and are not submitted to judicial review. Only a small number of countries, such as Germany, Israel, Portugal, Slovenia, Spain and Sweden, have a system of judicial review of those acts.

In the Swedish system, however, it is not the assembly as such which carries out acts of a (quasi-)jurisdictional nature. The *Riksdag* elects certain bodies responsible for tasks such as the verification of credentials and the appeals against elections for the *Riksdag*. Provisions regarding appeal against a decision taken by a *Riksdag* body can be found in a specific law.

In Germany, Portugal, Slovenia and Spain, Parliament's acts of a (quasi-) jurisdictional nature are appealed to the Constitutional Court.

II. Parliament's acts regarding individual Members and political groups

The Parliament's acts regarding individual Members and political groups usually concern decisions with respect to the parliamentary activities *sensu stricto* (e.g. decisions about the admissibility of parliamentary questions, decisions about internal appointments, etc.); therefore, these acts were dealt with within the framework of the third theme.

These Parliament's acts regarding individual Members and political groups mostly lie within the scope of parliamentary autonomy and are not submitted to judicial review.

On the contrary, a court of the Belgian Judiciary declared admissible an action brought by a Member of the House of Representatives in order to obtain the enforcement of an internal regulation of the House's Bureau determining on which conditions the political groups were allowed to recruit assistants. The Court considered that the courts of the Judiciary are competent to protect the subjective rights of citizens and that there is no reason to ignore this competence when a legislative body is a party to the lawsuit. The courts of the Belgian Judiciary must ensure the same judicial protection to the Members of Parliament when subjective rights of the latter are involved.

III. Parliament's acts of an administrative nature regarding staff

What appears first from the replies we received is that a number of assemblies have only a limited or indirect competence or no competence at all to carry out acts of an administrative nature with respect to their staff. Moreover, when an assembly has such a limited or indirect competence in this field, the exercise of this competence is mostly not submitted to judicial review.

According to the Standing Orders of the Polish *Sejm*, for instance, the Marshall of the *Sejm* appoints the Chief of the Chancellery of the *Sejm*. One of the standing committees, the Rules and Deputies' Affairs Committee, is supposed to exercise a permanent supervision over the work of the Chancellery of the *Sejm*. However, the committee does not have any strict powers concerning the Chancellery. As a consequence, the Rules and Deputies' Affairs Committee limits itself to issuing suggestions concerning the work of the Chancellery.

Another example: in the German Bundestag the internal regulations (*Dienstanweisungen*) are issued by the Director of the assembly (and consequently not by the Parliament itself).

Sweden is a particular case. In this country, the *Riksdag* Administration forms a distinct administrative authority which has its own legal personality. The assembly as such is not a legal person and does not carry out any administrative acts with relevance to the employees of the *Riksdag* Administration. Appeals against decisions of the *Riksdag* Administration, that forms part of the *Riksdag* bodies, are governed by special legal rules. Among other things, decisions regarding the employment of personnel working at the *Riksdag* may be appealed to the *Riksdag* Appeals Board. The Appeals Board consists of a chairman,

a permanent salaried judge who is not a member of the *Riksdag*, and four other members elected by the *Riksdag* from among its members. Elections for the Appeals Board are valid for the electoral period of the *Riksdag*.

The Belgian reply showed clearly that acts of an administrative nature regarding the Parliament's staff can be submitted simultaneously to different systems of judicial review. Firstly, there is a possibility of lodging a request for annulment with the country's supreme administrative court (Council of State); secondly, the courts of the Judiciary can abstain from applying the act if it is unlawful, and thirdly, a claim for damages can be lodged with the civil judge on the basis of civil liability.

It is worth noticing that in the countries where the legislative assembly itself can take decisions concerning its staff, a procedure to obtain the annulment of those decisions exists. However, the jurisdictional bodies empowered to annul such a decision can be quite different.

In Greece, the judicial review is carried out by administrative courts at two levels, namely by the supreme administrative court (at the top of the structure) and by any other administrative court.

In Romania, administrative disputes can only be dealt with by special divisions, specialized in administrative and taxation disputes, of lower courts (courts of appeal) as well as of the High Court of Cassation and Justice.

Some countries, such as Albania, Finland, France, Portugal, Slovenia and Serbia, only mention the competence of a "supreme administrative court", whereas in some other countries the ordinary courts, including the Supreme Court, are entitled to carry out the judicial review of acts

of an administrative nature regarding the Parliament's staff. These latter countries are Denmark, Israel and Norway.

The most remarkable form of judicial review of acts of an administrative nature regarding the Parliament's staff is found in Italy, where this review is carried out exclusively (1°) in first instance, by the Committee for the Settlement of Disputes ("*Contenzioso*") and (2°) in second instance, by the Guarantee Council ("*Consiglio di Garanzia*") of the Senate. Both the Committee and the Council are independent bodies, but even though they are functionally independent, they are selected from among Members of the Senate.

In some other countries, the competence for dealing with those matters belongs to the Constitutional Court.

As we already pointed out, all the aforementioned countries have a system for annulling unlawful acts. In a number of these countries, a suspension of the act can be obtained before its annulment. In almost every country, however, it is also possible to claim damages on account of the unlawful administrative act. In most cases, such a claim is lodged with the lower, ordinary courts.

IV. Parliament's acts of an administrative nature regarding third persons

Roughly a third of the countries answered that they do not carry out acts of an administrative nature regarding third persons: Armenia, Austria, Bulgaria, Germany, Iceland, Norway, Poland, Russia, Serbia and the United Kingdom. The United Kingdom pointed out: "Normally, actions of an administrative nature would not be submitted to judicial review. The Parliament does not pass law relating to this matter. However, like

any employer and large organization, permanent staff have to organize the administration of the Parliament. The main exception would be employment protection cases and requests for information under Freedom of Information, where Parliament is specifically covered by statute law”.

Croatia and Switzerland indicated that their respective Parliaments do carry out such acts of an administrative nature, but without any judicial review of them.

Bidding procedures are an example of Parliament’s acts of an administrative nature regarding third persons. The judicial review to which these acts are submitted in Albania is peculiar, since it rests with a specific body established by the law to make the preliminary decision on whether a third person can claim his/her rights in front of the national courts.

It appears from most of the answers given to our questionnaire that Parliament’s acts of an administrative nature regarding third persons relate to public procurements. Cases regarding disputes over public procurements or liability cases are mostly dealt with by ordinary courts. In many countries, a possibility is also offered to file a request for annulment with a supreme administrative court, as it is the case in Belgium, Denmark, Israel and Portugal.

In some other countries, the treatment of such cases belongs exclusively to administrative courts. This is the case in Estonia and Greece.

In the FYROM, the review of administrative acts regarding public procurements falls under the specific responsibility of the Committee on Public Procurement Complaints of the Government. This Committee reviews the complaints filed against the decisions of the first instance committees.

Slovakia mentions the administrative acts issued in connection with the National Security Authority. The Committee of the National Council of the Slovak Republic has competence to review decisions of the National Security Authority. Jurisdiction to review the decision of the Committee lies with the Supreme Court of the Slovak Republic.

In the Italian reply we find again the system of judicial review that also applies to Parliament's acts of an administrative nature regarding the assembly's staff. This system is hinged on the Committee for the settlement of disputes (*Contenzioso*, first instance) and the Guarantee Council (second instance) of the Senate. These independent bodies which conduct the review are selected from among the Members of the Senate or by the Speaker.

The appeal procedure applying in the Swedish system is the same as that which is implemented for Parliament's acts of an administrative nature regarding the Parliament's staff: appeal can be lodged against decisions taken by a *Riksdag* body; such an appeal is heard by an administrative court of first instance in cases determined by the *Riksdag*, and otherwise by the *Riksdag* Appeals Board.

Sometimes, this category of Parliament's acts concern the access to documents. Denmark pointed out that cases regarding access to documents cannot be submitted to judicial review, as the *Folketing* (Danish Parliament) is exempted from the Act on Administrative Publicity which regulates the right to access to public documents. The *Folketing* does, however, to a wide extent follow the principles laid down in the Act on Administrative Publicity. Decisions on granting access to documents to the press, citizens, etc., are in the last instance taken by the Speaker.

Summary Table

	(quasi)jurisd.	members/groups	staff	third persons	other acts
1. Albania	no JR	no JR	JR	JR	no JR
2. Armenia	-	JR	JR	-	-
3. Austria	no JR	JR	JR	-	no JR
4. Belgium	no JR?	no JR?	JR	JR	JR
5. Bulgaria	-	JR	-	-	JR
6. Croatia	no JR	no JR	no JR	no JR	no JR
7. Denmark	no JR	no JR	JR	JR	no JR
8. Estonia	no JR	JR	JR	JR	no JR
9. Finland	no JR	JR	JR	JR	no JR
10. France	no JR	no JR	JR	JR	no JR
11. Germany	JR	JR	no JR	-	no JR
12. Greece	no JR	no JR	JR	JR	no JR
13. Holland	no JR	no JR	no JR	no JR	no JR
14. Iceland	-	no JR	no JR	-	-
15. Israel	JR	JR	JR	JR	JR
16. Italy	no JR	no JR	JR	JR	JR
17. Macedonia	no JR	no JR	JR	JR	no JR
18. Norway	-	no JR	JR	-	no JR
19. Poland	no JR	no JR	no JR	-	no JR
20. Portugal	JR	no JR	JR	JR	no JR
21. Russia	-	no JR	JR	-	no JR
22. Romania	no JR	no JR	JR	JR	no JR
23. Serbia	-	-	JR	-	JR

	(quasi)jurisd.	members/groups	staff	third persons	other acts
24. Slovakia	no JR	no JR	JR	JR	no JR
25. Slovenia	JR	no JR	JR	-	no JR
26. Spain	JR	JR	JR	JR	JR
27. Sweden	JR	no JR	JR	JR	-
28. Switzerland	no JR	no JR	no JR	no JR	no JR
29. Czech Republic	no JR	no JR	-	JR	no JR
30. Un. Kingdom	no JR	no JR	-	-	no JR

Marco Cerase

*Counselor to the Immunities Committee of the Camera dei Deputati
(House of Deputies of the Italian Parliament)*

“Autodichia” v. ordinary justice

The word “*autodichia*” used in Italy has obviously a Greek derivation and means “self-justice” or better “in-house justice”.

It was in the Italian tradition that Parliament’s independence asked for shielding from all judicial procedures. Not only Members could not be questioned outside the House, but even staff or contractors could not summon the Houses in court, because that would have meant to indirectly force Parliament under judicial rule.

All this was tied to the Italian judicial tradition, similar to the French one, from the *Arrêt Blanco* on.

In short, public authority – administrations, public bodies, cities, etc. – could not simply be taken to court. Their formal procedures, orders and acts had to be challenged in special administrative tribunals that were empowered to strike down public orders. An ordinary court could not afford as much.

These special bodies however were not – until 1971 – completely independent from the Executive branch. So Parliament – which is a public authority – did not find it comfortable to allow its cases to be heard in these special courts.

So when an employee wished to file a complaint for the proper salary, severance pay or a discipline matter, he or she had to seek justice from internal political bodies. The same went for contractors unsatisfied – for instance – with the treatment of their bids or the punctuality of payments.

Over the years, however, the administrative judges became independent and the equal protection of the laws principle became more binding. So two cases reached the Constitutional Court.

The first involved the duty of the Houses of Parliament to hand over their accounts and balance sheets to the *Corte dei conti* (our General Comptroller). The Houses refused to submit their accounts and the General Comptroller challenged that refusal in the Constitutional Court.

With the decision no. 129 of 1981 however the Court upheld parliamentary independence and struck down the Comptroller's order.

The second case involved just exactly a case relating to personnel litigation. Our *Corte di cassazione* (the equivalent of the French "*Cour de cassation*") challenged the Rules of the Senate that provided "*autodichia*" and deprived the employee of his day in court. But once again the Court upheld the reasons of Parliamentary autonomy and declared it could not even take into consideration the merits of the case because it did not involve a law, but internal rulings of the Senate (see decision no. 154 of 1985).

Further events however were to change this legal landscape. Not only vast criticism of politics broke out in 1992-1993 – the so-called *Tangentopoli* years and the related "Clean hands" investigations –, but also the European Union general rules on equal access to contracts

and public benefits induced both Houses of Parliament to revise their systems.

Finally, in 1996 the Constitutional Court – with decision no. 379 – gave its last warning. Parliamentary autonomy could be tolerated within the Houses' procedures and in as much as it did not abridge third parties' rights. Outside those borders, Parliamentary independence could not limit the general rule of law and basic human rights. In the specific case, it upheld the decision of the House to claim immunity for irregular internal voting procedures, but for the future both Houses were warned.

For these reasons, the Houses have changed their Rules, introducing better-tailored legal bodies that deal with cases brought either by personnel or by external contractors.

Moreover, it is now a principle that ordinary tort cases involving the Houses as such are treated in ordinary courts.

The House has established a double track: an internal court for staff cases; and another one for contract cases. They are both composed of elected members, chosen by the Speaker. The personnel court – of five members – deals also with complaints related with staff selection procedures; while the contract court – of three members – also handles complaints filed by companies that did not succeed in winning contracts. The decisions of these bodies may be appealed to a division of the Bureau of the House. It is not frequent that the division of the Bureau finally decides in favor of the plaintiff, but it does happen.

The Italian Senate, in 2000, created two similar bodies: the so-called Litigation Committee (*Commissione contenziosa*) and a special appellate committee.

The Litigation Committee, which is a first step forum, deals with all cases, staff and contracts. Five people sit on the Committee, three senators and:

- two staff members – if the case deals with personnel matters – or
- two consultants appointed by the President – if the case involves contract law.

The appellate body is a Special Committee composed of five senators, appointed by the President upon advice of the Bureau.

It is important to underscore that gradually these internal justice bodies have been driven to enforce the general rule of law and not only domestic wisdom and administrative traditional procedures. Slowly the “*détournement de pouvoir*” test has been recognized as valid in principle, specially by the lower body. At the House, more than once the division of the Bureau has handed down decisions not favorable to the House itself. This is why on the whole, ordinary courts have so far not challenged the fairness and legitimacy of this domestic system. Actually in 2004 the *Corte di cassazione* has upheld it, dismissing a claim by a person who was not hired after a selection procedure.

It is however still to be established if – ultimately – these internal judicial procedures comply with article 6 of the European Convention on Human Rights.

Gerhard Kiesenhofer

*Member of the Parlamentsdirektion,
Austrian Parliament*

One employer, two remedies

Austria has three different “supreme courts”:

1. the Constitutional Court,
2. the Administrative Court and
3. the Supreme Court.

The main responsibility of the **Constitutional Court** is to pronounce whether a law is unconstitutional or whether decrees (*Verordnungen*) are antinomic, *i.e.* contradictory to law. A further very important responsibility of the Constitutional Court is to pronounce on rulings or notifications (*Bescheide*) by administrative authorities in so far as the appellant alleges that the ruling or notification constitutes an infringement of a constitutionally guaranteed right or an infringement of personal rights which is caused by the application of an illegal ordinance or unconstitutional law. The complaint can only be filed after all stages of legal remedy have been exhausted.

The Constitutional Court has the power to annul the illegal ruling in question, the illegal ordinance used or the unconstitutional law used.

The main aim of the **Administrative Court** is to pronounce on complaints alleging illegality of rulings or notifications by administrative authorities. A complaint based on illegality can be brought against the ruling of an administrative authority by anyone who, after exhaustion of all appellate stages, alleges that the ruling infringes her or his

rights. The ruling may be illegal because it infringes administrative regulations (*Verletzung von Verwaltungsvorschriften*) or because its content is illegal (*Rechtswidrigkeit des Inhalts*).

The Administrative Court has the power to annul the illegal ruling in question.

The **Supreme Court** is the highest court or the last stage in civil law (*Zivilrecht*, as opposed to public law), including criminal law (*Strafrecht*).

As I pointed out in my presentation about the representation at law of a parliamentary assembly (second theme of the seminar – see pages 131 to 133), the two Austrian parliamentary Chambers do not have legal personality, and neither has the Parliament. As a consequence, parliamentary staff is not employed by the National Council or the Federal Council but by the Federal State – represented by the President of the National Council. According to the Austrian Constitution, all parliamentary staff (of both Chambers) is subordinate to the President of the National Council. The internal organisation of the parliamentary staff with regard to matters concerning the Federal Council is settled in agreement with the President of the Federal Council, who is likewise invested with the authority to issue instructions on how to implement the functions assigned to the Federal Council on the basis of the law. Employees of the Austrian Parliament are nominated by rulings of the President of the National Council. The Constitution states that the President of the National Council is also responsible for all other matters regarding parliamentary personnel. According to the provisions of the Constitution, the President of the National Council is the highest administrative authority in the execution of the administrative matters. He or she exercises these powers exclusively.

The Austrian parliamentary staff work for both Chambers. Therefore it is expedient that only one body is responsible for personnel matters. The good understanding of the President of the National Council with the President of the Federal Council is beyond doubt. The President of the National Council is also the administrative authority responsible for administrative matters relating to members of the Federal Council. He or she issues the rulings concerning administrative matters with regard to members of both parliamentary Chambers.

Summary

If a parliamentary employee receives a ruling of the President of the National Council – there are no rulings of the President of the Federal Council –, he or she has the right to file a complaint (within six weeks) against it at the *Constitutional Court*, alleging that the ruling or notification constitutes an infringement of a constitutionally guaranteed right or an infringement of personal rights which is caused by the application of an illegal ordinance or unconstitutional law.

A parliamentary employee also has the right to complain (also within six weeks) against such a ruling at the *Administrative Court*, alleging that the ruling is illegal because it infringes administrative regulations (*Verletzung von Verwaltungsvorschriften*) or because its content is illegal (*Rechtswidrigkeit des Inhalts*). These complaints can be filed because the President of the National Council is the highest administrative authority in these administrative matters.

Jonida Milaj

*Legal adviser at the Legal Service
of the Kuvendi (Albanian Parliament)*

The Albanian public procurement procedures

The number of administrative acts that the Parliament can carry out is actually quite limited. With regard to the Albanian system, only disciplinary measures aimed at Parliament's staff and public procurement decisions can be mentioned. The latter can be considered as administrative acts regarding third persons. Since public procurement rules are quite specific, they do not form part of the Parliament's Rules of Procedure. They are laid down in the Albanian Public Procurement Law¹.

Albania is a country that is striving hard to meet the Stabilisation and Association Agreement² criteria and the big priority it has to achieve as soon as it can is the approximation of the national laws with the European legislation.

The new Public Procurement Law that entered into force on January 1st 2007 is part of that achievement.

Even if the different requirements of the European legislation in this field were taken into account and complied with when drafting this law, on one point the Albanian legislator had to be quite creative: it had

¹ Ligj no. 9643, datë 20.11.2006 "Për prokurimin publik", Fletore Zyrtare no.133/22.12.2006.

² The Stabilisation and Association Agreement between the European Union and the Republic of Albania was signed in June 2006. Its ratification by the national Parliaments of the Member States is currently in progress.

to conjure up an alternative contentious procedure, since Albania did not have any administrative court.

As far as public procurement procedures are concerned, the main contracting authority for the Albanian Parliament is not the Speaker, but the Secretary General as the highest civil servant of the institution, as provided by the Constitution³.

The person who considers himself or herself harmed by public procurement proceedings cannot go directly to court. The law requires him or her to first file a claim with the contracting authority within five days from the moment when he or she came to know the facts which this claim is about⁴.

The contracting authority must suspend all the proceedings and clarify all the facts and proceedings complained of within a period of only five other days from the filing of the claim⁵.

If the person concerned is not satisfied with the outcome of the claim, the next obligatory step he or she has to take according to the law consists in lodging a complaint with the Public Procurement Agency⁶.

The Agency⁷ is a legal person of public law, depending on the Prime Minister and financed by the State budget.

³ See Article 76.2 of the Albanian Constitution.

⁴ Article 63.2 of the Public Procurement Law.

⁵ Article 63.3 of the Public Procurement Law.

⁶ Article 63.6 of the Public Procurement Law.

⁷ As regards the organisation of the Public Procurement Agency, see Article 13 of the Public Procurement Law.

The head of the Agency is appointed by the Prime Minister and the staff is part of the civil service.

All claims relating to public procurement, including those in cases where the contracting authority is the Parliament represented by its Secretary General, must be filed with the Agency.

The Agency has the right to suspend all public procurement proceedings and to carry out all necessary administrative investigations⁸.

The Agency has twenty days to terminate the proceedings. Then, if it deems that the law has indeed been broken, it can (i) give an interpretation of the procedural rules and ask the contracting authority to comply with them, (ii) make a declarative decision on the basis of which the court can decide to which extent the person concerned must be compensated, (iii) fine the contracting authority and propose imposing disciplinary measures on the responsible persons⁹.

It is only after the person concerned has gone through all the procedural steps involving the contracting authority and the Agency that he or she can file a claim against the contracting authority with the Court of First Instance of Tirana and then follow the ordinary procedures before the courts¹⁰.

There is still another authority, the Public Procurement Advocate¹¹, who can start investigations regarding claims from third persons concerned and communicate the findings of these investigations to the Public Procurement Agency, which can take a decision.

⁸ See Articles 63.8 and 65 of the Public Procurement Law.

⁹ As regards the rights the Public Procurement Agency, see the Article 64 of the Public Procurement Law.

¹⁰ See Article 68 of the Public Procurement Law.

¹¹ Article 14 onward of the Public Procurement Law.

Since the Public Procurement Advocate is elected and answerable to the Parliament, he is quite unlikely to take any action against the institution itself.

As a matter of fact, and even if the malfunctioning of public procurement procedures is common talk in Albania¹² and a new inquiry committee was set up by the Parliament in October to investigate the application of these procedures, there is at this moment no claim against State bodies or the Parliament pending before national courts.

¹² The inquiry committee investigates all public procurement procedures conducted by State bodies during the period 2001-2007.

Koen Muylle

*Law clerk at the Belgian Constitutional Court
and voluntary scientific collaborator at the Catholic University of
Leuven – KUL (Belgium)*¹

Judicial review of non-legislative acts by the Parliament in the light of the separation of powers

I. Introduction

1. The acts carried out by a parliamentary assembly outside the exercise of its traditional functions of legislation and oversight are, to a greater or lesser extent, subject to judicial review. Following the responses to a questionnaire sent by the Association of Secretaries General of Parliaments, an association working within the framework of the Interparliamentary Union, Mr. Couderc summarises the situation as follows: “A third of assemblies state that they are not under any form of judicial review, a third that they are subject to the general law in all matters and to various competent court authorities, a third that they are partially subject to the review of courts for some of their administrative actions (relations with third parties only, or on the other hand matters in dispute with all or some of the staff)”². This paper is not intended to provide a survey of the level of immunity which parliamentary assemblies³

¹ The opinions expressed are given in a personal capacity and are not binding in any way on the institutions for which the author works.

² M. Couderc, “The administrative and financial autonomy of parliamentary assemblies”, *Constitutional and Parliamentary Information* 1999, no. 177, 27.

³ In the broad sense of the term, non-legislative acts of a parliamentary assembly

enjoy with respect to their non-legislative acts⁴. Instead, it aims to explore the justification of that immunity. As we shall see (II), such immunity is generally based on the autonomy of Parliament, the sovereignty of the legislator and the separation of powers. However, the immunity which covers or did cover non-legislative acts came into being in a specific historic context, characterised by the will of Parliament to be free of all interference, in particular by the monarch. This context has changed (III): in the light of the increasing power of the executive, which – in a parliamentary system – dominates the Parliament through the majority that it holds, we can see a growth in judicial review of the acts of public authorities, imposed in particular by the European Court of Human Rights. Given this development, the question arises of whether nowadays there are still valid reasons for excluding non-legislative acts by the parliamentary assemblies from judicial review (IV). This question must draw a qualified answer: immunity is still justified, but only to the extent that the creeping imbalance between the majority and the opposition is taken into account.

are deemed to be all acts emanating from parliamentary bodies, except the law. In France, these are referred to as “Parliament’s acts”: see D. Pollet, “Vers une disparition prochaine des actes parlementaires”, *R.D.P.* 2004, 695. The purpose of this paper is more limited, as we will not be referring to legislative acts nor political oversight. To make things easier, however, we will use the term “non-legislative act”, it being understood that this term covers acts accomplished by parliamentary assemblies or their bodies outside their functions of legislation and political oversight.

⁴ It may prove helpful to refer to the paper by Mr. Veys in the context of this theme: “Analysis of the ECPRD correspondents’ replies”.

II. The autonomy and sovereignty of the Parliament and the separation of powers

2. The argument that is traditionally raised against the idea of judicial review of the non-legislative acts of a parliamentary assembly is the *autonomy* of the Parliament. This autonomy is defined by the assembly's independence of or its non-subordination to the executive and the judiciary. It can take various forms^{5/6}: the power of an assembly to organise itself and its work as it sees fit; the power to set its own budget (principle of financial autonomy); the power to recruit its own staff and set their conditions of employment; autonomy with regard to the exercise of police power, since order is maintained within the assembly by the President; and finally, the autonomy of the assembly in relation to the courts, as the non-legislative acts of the assembly are not subject to any judicial review.
3. The principle of the autonomy of legislative assembly is intrinsically linked to the theory of separation of powers as defended by Locke and Montesquieu⁷. This – or at least the interpretation that was

⁵ X. Roques, "Parliament's independence of the Executive in relation to internal management", *Constitutional and Parliamentary Information* 2003, no. 185, 5-12.

⁶ Which does not mean that each assembly possesses each of these aspects of parliamentary autonomy.

⁷ M. Couderc, "The administrative and financial autonomy of parliamentary assemblies", in *Constitutional and Parliamentary Information* 1999, 15. Winetrobe ("The autonomy of Parliament", in D. Oliver and G. Drewry (eds.), *The Law and Parliament*, London/Edinburgh/Dublin, Butterworths, 1998, 15), examining the autonomy of the United Kingdom Parliament from the viewpoint of separation of powers, cautions readers, considering that this concept "may serve to conceal or confuse, as much as it reveals or explains". However, he accepts that "at the risk of perpetuating constitutional myths", the concept of separation of powers may be useful for two reasons:

subsequently made of it⁸ – postulates that each power – executive, legislature, judiciary – is entrusted to distinct bodies, whose independence must be as wide-ranging as possible, in order to achieve a balance between the powers. Therefore, the French Constitution of 1791 adopted an absolute vision of separation of powers, each power being conceived as a totally separate entity, independent of the others, which ruled out any interdependence or reciprocal oversight. In the same way as the courts did not have jurisdiction for acts of the executive, which prevented the courts from testing these acts for compatibility with legislative norms (system of the “*administration-juge*” in which the administration is a judge in its own cause), the ordinary courts could not rule on legislative or other acts of Parliament.

4. Furthermore, the autonomy of legislative assemblies is also justified by the sovereignty of Parliament. The nation being sovereign⁹, the Parliament as its representative is the supreme power. Thus national sovereignty resides in the elected Chambers. This sovereignty would preclude any judicial review of Parliament’s acts. So it is with reference to national sovereignty that, in 1975, the Belgian Senate adopted a bill prohibiting any constitutional review of laws. One Senator stated:

“First, so much of the existing discussion – academic, political and, especially, judicial – tends to adopt this approach, for whatever reason. Secondly, a ‘separation of powers’ approach does provide a convenient analytical framework within which to consider the pivotal and multi-layered constitutional position of Parliament” (*Ibid.*).

⁸ Indeed, legal doctrine generally concurs in saying that Montesquieu did not want complete separation of powers, either on the functional or personal and material level, but that he was seeking a combination of powers which would guarantee moderation of power; see Ch. Eisenmann, “L’esprit des lois et la séparation des pouvoirs”, in *Mélanges Carré de Malberg*, Paris, Sirey, 1933, 165-192.

⁹ See Article 3 of the Declaration of the Rights of Man and the Citizen of 3 and 14 September 1791.

“We believe that the judiciary would encroach on the sovereignty and on the specific mission of the Parliament if it claimed to judge the work of the elected Chambers, the seat of national sovereignty”¹⁰.

Likewise, the French Council of State referred explicitly to “national sovereignty” to justify not being able to take cognisance of the decision by the Assembly refusing to reinstate the pension of one of its former members.¹¹

III. A context which has changed

5. However, the concept of sovereignty of the legislature and the theory of separation of powers, as well as the constitutional rules which prevented and continue to prevent judicial review of non-legislative acts of the parliamentary assemblies, must be put in their historic context. Originally, the theory of separation of powers aimed to limit the power of the executive in particular. This is easy to explain: the theory of Locke and Montesquieu was, above all, a reaction against the absolute powers claimed by the King¹². And the concept of “sovereignty”, although originally devised by Bodin to justify the power of the King, was adopted by the French revolutionaries to consolidate the powers of the National Assembly.

¹⁰ *Ann.parl. (Hansard)*, Senate, 26 June 1975, 2671-2672.

¹¹ Council of State (France), 4 July 2003, *Papon*, note J.P. Camby, “L'autonomie des assemblées parlementaires”, *R.D.P.* 2003, 1227-1235.

¹² R. Lesaffer, *Inleiding tot de Europese rechtsgeschiedenis*, Leuven, Universitaire Pers, 2004, 346-355.

6. There is widespread agreement that the traditional conception of the separation of powers, where the Parliament and the government hold each other in respect, no longer applies today. The traditional divide between the Parliament and the government has made way for a divide between the majority and the opposition¹³. In a parliamentary system where the government is responsible to the Parliament, the increasing power of the political parties and the control that they exert on their MPs prevent the Parliament as such from still playing a counter-balancing role to the government. Nowadays, this has become the role of the opposition. This is particularly true in the case of a coalition government. As the members of the parliamentary majority are unable to exercise full political oversight without jeopardising confidence in the government, it is up to members of the opposition to take over this role.

7. As concerns the sovereignty of the Parliament, it should be pointed out that this concept, although it is often cited, has lost much of its value. The supremacy of the legislature no longer corresponds to a political reality. It has also been subject to legal challenge. Therefore, a growing number of countries have introduced some form or other of constitutional review of laws, which the French revolutionaries would certainly have rejected in the name of parliamentary sovereignty. Although judicial review of non-legislative acts cannot be treated in the same way as judicial review of laws¹⁴, the two questions often seem to be linked. In fact, by

¹³ H. Van Impe, *Le rôle de la majorité parlementaire dans la vie politique belge*, Brussels, Bruylant, 1966, 9; W. Dewachter, *Van oppositie tot elite. Over macht, visie en leiding*, Leuven/Leusden, Acco, 2003, 34.

¹⁴ These two do not necessarily always go together. One can imagine that legislative acts of an assembly might be subject to judicial control, but non-legislative acts might not. Conversely, non-legislative acts might be subject to scrutiny by the

accepting judicial review of laws, the Constituent – or the courts – put an end to the supremacy and infallibility of the legislature. In this context, it becomes easier to envisage judicial review of the non-legislative acts of assemblies. As Paul Martens puts it, “judicial review of laws inevitably meant that the work of Parliament was no longer considered sacred”¹⁵. This opens the way to a challenge of the immunity of non-legislative acts by the Parliament¹⁶. All in all, it is often the (Supreme) Court which, having acquired the power to review the constitutionality or conventionality of laws, demands or decides that judicial review should be extended to non-legislative acts. So in Belgium, the Constitutional Court, which was still known as the Court of Arbitration at the time – was given powers in 1989 to review the compatibility of legislative acts, particularly with Articles 10 and 11 of the Constitution (principle of equality and non-discrimination). Just a few years later, it deemed that the absence of any judicial review of the acts by legislative assemblies concerning their personnel was contrary to these rules. So, it was the Constitutional Court which was behind the laws extending the powers of the Council of State (supreme administrative court) to the acts of assemblies concerning their personnel or public procurement¹⁷.

courts, while legislative acts would be exempt from any judicial review.

¹⁵ P. Martens, “Le juge et l’ élu”, in *En hommage à Francis Delpérée, Itinéraires d’un constitutionnaliste*, Brussels and Paris, Bruylant and L.G.D.J., 2007, 934.

¹⁶ In addition, the acceptance of judicial review of the law is often a reflection of increasing propensity to litigate in society: citizens find it difficult to accept that they cannot take a public body to court over a decision that they dispute.

¹⁷ Court Arbitr. (now Const. Court), 15 May 1996, *Rev. reg. dr.* 1996, 369, note C. Horevoets, and *J.T.* 1997, 2, note H. Simonart.

IV. What judicial review should be exercised over non-legislative acts by parliamentary assemblies in the modern context?

8. When we invoke the autonomy of the Parliament and the underlying principles of sovereignty of the Parliament and the separation of powers, to preclude any judicial review over non-legislative acts by a legislative assembly, this takes inadequate account of the historic development¹⁸. That does not mean that we have to abandon the theory of separation of powers¹⁹, or rather the balance between the powers. However, the question of judicial review of acts by a legislative assembly needs to be re-examined in the light of another principle, that of the balance between the majority and the opposition.

¹⁸ See also B. Winetrobe, “The autonomy of Parliament”, in D. Oliver and G. Drewry (eds.), *The Law and Parliament*, London/Edinburgh/Dublin, Butterworths, 1998, 14-32, which analyses the autonomy of the Parliament through the spectre of dominance by the executive.

¹⁹ On the other hand, the concept of sovereignty of the Parliament, as presented above, seems to be of little use in determining which of parliament’s acts should be subject to judicial review. See the critique by M. Leroy “Requiem pour la souveraineté, anachronisme pernicieux”, in *Présence du droit public et des droits de l’homme, Mélanges offerts à Jacques Veu*, Bruxelles, Bruylant, 1992, t. I, 96-106, according to which the concept of “sovereignty”, which derived from absolutism, no longer has a role to play in public law. See also P. Popelier, “Democratie in de Belgische Grondwet”, in M. Adams and P. Popelier (eds.), *Recht en democratie. De democratische verbeelding in het recht*, Antwerp, Intersentia, 2004, 123.

A. *Acts accomplished in the exercise of the administrative function which concern personnel and third parties*²⁰

9. As for acts accomplished in the exercise of the administrative function which concern the personnel, on the one hand, and third parties on the other, one can be relatively brief²¹. In fact, it is hard to see how the possibility of a review of the legality of these acts can have an impact – positive or negative – on the balance of powers between the legislative and the executive or on relations between the majority and the opposition. On the other hand, making it impossible to have such a review may entail the risk of failure to abide by the rules²², arbitrary decisions or abuse of power. There

²⁰ These are not necessarily administrative acts in the strict sense. In a judgment of 5 March 1999, the French Council of State decided that public procurement contracts entered into by parliamentary assemblies were administrative contracts (Council of State, Ass., 5 March 1999, *Président de l'Assemblée nationale, Les grands arrêts de la jurisprudence administrative*, Paris, Dalloz, 2001 (11th ed.), 826). The Council thus recognised the administrative nature of these acts. In Belgian law, due to the fact that the acts and rules of procedure of legislative assemblies were not actually administrative acts, they were not within the jurisdiction of the Council of State. This is the situation criticised by the Constitutional Court in its above-mentioned judgement no. 31/96).

²¹ This does not mean that the courts may, on their own initiative, extend their jurisdiction to this type of act. The aforementioned judgement by the French Council of State of 5 March 1999 was criticised. In fact, the order of 17 November 1958 relating to the functioning of the parliamentary assemblies had recognised the competence of the administrative courts *only* with regard to (i) damages of any kind caused by the services of the parliamentary assemblies and (ii) disputes of an individual nature concerning the staff of the assemblies.

²² In the “*Les Verts*” judgement, the Court of Justice of the European Communities considered that (free translation):

“The acts which the European Parliament adopts in the sphere of the EEC treaty could, in the absence of a possibility of referring them for review by the Court, encroach on the competence of the Member States or other institutions, or go beyond the limits of the competence of their author. Therefore, it should be considered that an annulment action may be brought against acts by the European Parliament intended to produce legal effects vis-à-vis third parties” (CJEC, Case 294/83, *Parti écologiste “Les Verts” v. European Parliament*, judgement of 23 April 1986, para. 26).

is no reason to exempt these acts from judicial review.

10. Moreover, if we do not accept the argument of the balance between the powers, there are reasons for wondering whether a system for exemption of such acts accomplished in the exercise of the administrative function is compatible with Article 6 of the European Convention on Human Rights. It is true that the European Court of Human Rights exempted the internal and disciplinary system of parliamentary assemblies from the application of Article 6 of the European Convention on Human Rights. In the *Demicoli* judgement of 27 August 1991, the European Court of Human Rights considered that disciplinary measures by the parliamentary assemblies relating to their organisation and smooth operation did not come within the scope of the European Convention on Human Rights. However, this case law seems to concern only internal measures taken by an assembly against one of its members²³. The same cannot be said about members of staff and third parties. As far as the former are concerned, it is necessary to refer to the criterion that the European Court of Human Rights has developed recently to determine whether Article 6 of the European Convention on Human Rights applies to disputes in the civil service. In the *Vilho Eskelinen* judgement, the Grand Chamber of the Court ruled as follows:

“In order for the respondent State to be able to rely before the Court on the applicant’s status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in

²³ E. Com. HR, 28 November 1994, *Di Nardo* (Appl. no. 16794/94).

the State's interest. The mere fact that the applicant is in a sector or department which participates in the exercise of power conferred by public law is not in itself decisive. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists, to use the words of the Court in the *Pellegrin* judgment, a 'special bond of trust and loyalty' between the civil servant and the State, as employer. It is also for the State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond. Thus, there can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent Government to demonstrate, first, that a civil-servant applicant does not have a right of access to a court under national law and, second, that the exclusion of the rights under Article 6 for the civil servant is justified"²⁴.

It ensues that a legislative assembly which wishes to exempt a dispute relating to its staff from judicial review must do so explicitly, and be able to justify this. It is true that the European Court of Human Rights has accepted that the right of access to the courts guaranteed by Article 6 of the European Convention on Human Rights can be limited by the immunity enjoyed by international

²⁴ ECHR (Grand Chamber), *Vilho Eskelinen and others v. Finland*, judgement of 19 April 2007, § 62, *AJDA*, 2007, 1360, note F. Rolin (1362), *J.T.* 2007, 633, note D. Renders and D. Caccamisi (640), *J.L.M.B.* 2007, 860, note M. Van Brutsem and E. Van Brutsem (869).

organisations²⁵, sovereign states²⁶ and – more importantly in the context of this paper – Members of Parliament²⁷. However, the latter case concerned parliamentary immunity and the European Court of Human Rights accepted the restriction on access rights to a court in view of the importance of freedom of speech for members of legislative assemblies. This argument does not apply to disputes with personnel of the parliamentary assemblies.

*B. Acts accomplished in the exercise of a (quasi-)jurisdictional function*²⁸

11. As regards acts accomplished in the exercise of a (quasi-)jurisdictional function, a distinction needs to be drawn between verification of credentials and parliamentary immunity²⁹.

1. Verification of credentials

12. Verification of credentials has a dual purpose: the assembly assesses the eligibility of its members by checking whether an elected

²⁵ ECHR, 18 February 1999, *Waite and Kennedy v. Germany*, R.T.D.H. 2000, 81, note H. Tigroudja.

²⁶ ECHR, 21 November 2001, *Al-Adsani v. United Kingdom*, NJCM-Bulletin 2002, 760, note M.C. Zwanenburg and R.T.D.H. 2003, 139, note J.F. Flauss; 21 November 2001, *Fogarty v. United Kingdom*; 21 November 2001, *Mc Elhinney v. Ireland*.

²⁷ ECHR, 17 December 2002, *A. v. United Kingdom*.

²⁸ These are acts of a jurisdictional nature accomplished by a legislative assembly.

²⁹ We do not consider the case, which is rare in any case, where a legislative assembly imposes a penalty on someone – either disciplinary or criminal – for *contempt of Parliament*. One may however wonder about the need for such a power in terms of balance between the powers, and compatibility with Article 6 of the European Convention on Human Rights. See on this subject ECHR, judgement of 27 August 1991, *Demicoli v. Malta*.

member fulfils all the eligibility criteria and verifies the regularity of elections by ensuring that electoral operations have occurred in accordance with the legal requirements. In a substantial number of the Member States of the Council of Europe, the verification of credentials is an exclusive power of the assemblies. In Belgium, for example, both the Constitutional Court³⁰ and the Supreme Administrative Court³¹, as well as the ordinary courts³² have so far refused to make any pronouncement on the validity of decisions taken by a legislative assembly in this field³³.

13. The tradition of verification of credentials by the legislative assemblies dates back to the 16th century, when in England, the Parliament took away from the Crown the authority to verify and check the lawfulness of the award of a legislative mandate. The French legislative Chambers were also granted powers in 1789 to decide whether to validate the credentials of their members, with a view to freeing themselves from the power of the King. Under the *Ancien Régime*, the various orders that made up the States-General verified the regularity of credentials given to each of their members. However, the King considered that this was a royal

³⁰ Court Arbitr. (now Const. Court), No. 34, 19 February 1987; no. 20/2000, 23 February 2000; no. 81/2000, 21 June 2000; no. 30/2003, 26 February 2003.

³¹ Council of State (Belgium), *February*, no. 17.303, 25 November 1975; *Ylieff* and others, no. 27.619, 4 March 1987; *Féret and Nols*, no. 53.793, 16 July 1995.

³² Cass. 18 October 1995, *J.L.M.B.* 1996, 1078, note Ph. Coenraets and *R. Cass.* 1996, 77, commentary H. Vuye; 11 June 2004, *C.D.P.K.* 2004, 553, note K. Muylle.

³³ After the elections of June 2007, the President of the Court of First Instance of Brussels handed down a judgement in summary proceedings which – for the first time – presaged minimal review of this type of act. The President considered, in fact, that he may – in a provisional and marginal way – verify whether a legislative assembly may have violated the subjective rights of a third party during the exercise of its powers: Trib. Brussels (summary proc.) 19 July 2007, no. 07/1154.

concession, and that he was allowed to carry out this verification himself. In the event of a dispute, the King's Council took the final decision³⁴. At the States-General of 1789, a conflict about this power of verification by the King led to the decision by the Third Estate to transform itself into a National Assembly³⁵. The credentials of the members of this Assembly were subject to a "Verification and Disputes Committee", on whose proposals the Assembly ruled without appeal. The Constitution of 3 September 1791 enshrined the principle according to which verification of credentials was no longer a power of the King, stating that "the electoral assemblies have the right to verify the capacity and the credentials of those who stand as candidates, and their decisions will be enforced provisionally, subject to the judgement of the legislative assembly during the verification of the credentials of members".

In both cases, the absence of judicial review was thus justified by the balance between the powers. The exclusive powers of the legislative assemblies with regard to verification of credentials were intended to guarantee their independence vis-à-vis the King and the judiciary.

14. Meanwhile, that reason has disappeared. What remains, on the other hand, are the criticisms that one could make about the verification of credentials by the assemblies themselves. This poses a dual problem of impartiality. First of all, at the beginning of a parliamentary term, the credentials of members are verified by

³⁴ See L. Philip, *Le contentieux des élections aux assemblées politiques françaises*, Paris, L.G.D.J., 1961, 5-6.

³⁵ On the conflict between the King and the States General on the subject of the verification of credentials, see also R. Scurr, *Fatal purity. Robespierre and the French Revolution*, New York, Henry Holt, 2007, 82.

an assembly consisting of members whose own credentials have not yet been validated, and have not yet taken the oath. Secondly, by entrusting the scrutiny of elections to the Parliament itself, the Parliament becomes judge and jury in its own case. Indeed, members whose credentials have been challenged can take part in the verification of their own credentials and the ensuing vote. And even if their own credentials are not challenged, it may be that their political interests or those of their party are. The UK and France saw this risk. In these two countries, the system for verification of credentials gave rise to such a level of abuse that it was abandoned. In the UK, the Election Petitions and Corrupt Practices at Elections Act (1868) gave powers to the High Court to hear electoral disputes. In France, disputes concerning electoral operations for the legislative elections are heard by the Constitutional Council³⁶.

15. Moreover, questions need to be asked about the compatibility of this system with the European Convention on Human Rights. It is no use to invoke Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial. Actually, the European Court of Human Rights threw out an action which asserted that verification of credentials by a legislative assembly was contrary to Article 6 of the European Convention on Human Rights³⁷, on grounds that, in principle, this provision is not applicable to electoral disputes³⁸. However, what could be invoked is Article

³⁶ Article 59 of the French Constitution. On this subject, see J.-P. Camby, *Le Conseil constitutionnel, juge électoral*, Paris, Dalloz-Sirey, 2007.

³⁷ ECHR, 2 June 2006, *Levaux v. Belgium*.

³⁸ Consistent case law since ECHR, 21 October 1997, *Pierre Bloch v. France*. See on this subject J.F. Flaus, “L’applicabilité de la Convention européenne des droits de l’homme au contentieux des élections parlementaires: les enseignements de l’arrêt Pierre Bloch”, *Les cahiers du Conseil constitutionnel* 1997, no. 4, pp. 123 onward (available on <http://www.conseil-constitutionnel.fr/cahiers/ccc4/ccc4somm.htm>).

3 of the First Additional Protocol to the European Convention on Human Rights, which guarantees the right to free elections. In that respect, the case law of the European Court of Human Rights gives reason to believe that the exclusive exercise of verification of credentials by a legislative assembly is not compatible with this provision³⁹. In the *Podkolzina* case, the European Court of Human Rights considers:

“The right to stand as a candidate in an election, which is guaranteed by Article 3 of Protocol No. 1 and is inherent in the concept of a truly democratic regime, would only be illusory if one could be arbitrarily deprived of it at any moment. Consequently, while it is true that States have a wide margin of appreciation when establishing eligibility conditions in the abstract, the principle that rights must be effective requires the finding that this or that candidate has failed to satisfy them to comply with a number of criteria framed to prevent arbitrary decisions. In particular, such a finding must be reached by a body which can provide a minimum of guarantees of its impartiality. Similarly, the discretion enjoyed by the body concerned must not be exorbitantly wide; it must be circumscribed, with sufficient precision, by the provisions of domestic law. Lastly, the procedure for ruling a candidate ineligible must be such as to guarantee a fair and objective decision and prevent any abuse of power on the part of the relevant authority.”⁴⁰

³⁹ See K. Muylle, “La vérification des pouvoirs et le vote automatisé face à la Convention européenne des droits de l’homme: la Cour de cassation temporise”, note *sub* Cass. 11 June 2004, *C.D.P.K.* 2004, 567-572.

⁴⁰ ECHR, judgement of 9 April 2002, *Podkolzina*, § 35, *C.D.P.K.* 2003, 305, note C. Desmecht.

All the procedural guarantees of Article 6 of the European Convention on Human Rights need not be applied to Article 3 of the First Protocol, particularly in terms of impartiality⁴¹. However, verification of credentials by a legislative assembly does not provide *any* guarantee whatever of impartiality, given that an MP is allowed to judge his own election. In as far as the verification of credentials does not offer the guarantees required by the Court, one may express doubts about the conformity of the verification of credentials with Article 3 of the First Additional Protocol to the European Convention on Human Rights.

16. The verification of credentials is the type of act, *par excellence*, which should be subject to review by an independent court. The Court of First Instance of the European Communities was fully aware of this when it suspended the decision taken by the European Parliament to reject the credentials of an Italian MEP⁴². So the Court intervened directly in the decision intended to determine who should hold parliamentary office⁴³.

⁴¹ Along the same lines: J.F. Flaus, “L’applicabilité de la Convention européenne des droits de l’homme au contentieux des élections parlementaires: les enseignements de l’arrêt Pierre Bloch”, *Les cahiers du Conseil constitutionnel* 1997, no. 4, pp. 123 onward (available on <http://www.conseil-constitutionnel.fr/cahiers/ccc4/ccc4somm.htm>) according to which “the procedural guarantees liable to be based on Article 3 of Protocol no.1 would logically not be among the most consistent”. However, this statement pre-dates Podkolzina.

⁴² CFI (summary proc.), Case T-215/07 R, *Donnici v. European Parliament*, Order of 15 November 2007 (available on <http://www.curia.eu>).

⁴³ The CFI then referred the case to the Court of Justice, as Italy had also submitted an annulment application against the same decision to the same court (Case C-393/07): CFI, Case T-215/07, *Donnici v. European Parliament*, Order of 13 December 2007.

2. Parliamentary immunity

17. As far as parliamentary immunity is concerned, given that the decision by an assembly about whether or not to lift the immunity of one of its members is usually taken by a simple majority, the divide between majority and opposition risks coming strongly into play. In this regard, the absence of any judicial review could harm the interests of the member in question. The President of the Court of First Instance of the European Community recently made a pronouncement on an application to suspend execution of a European Parliament resolution to lift the immunity from legal proceedings of one of its members. In response to objections of inadmissibility from the European Parliament, the Court asserted that “It is therefore conceivable in the present case that the contested act affects the applicant’s personal interests and brings about a distinct change in his legal position in that it has deprived him of the possibility of enjoying the privileges and immunities conferred on him under Rule 5(1) of the Rules of Procedure of the Parliament.”⁴⁴ Indeed, lifting the applicant’s immunity did deprive him of certain prerogatives connected with the privileges and immunities which a member of the European Parliament usually enjoys. Furthermore, it was established that any suspension of the European Parliament’s decision would also lead to a suspension of the national criminal procedure⁴⁵. Although the President of

⁴⁴ CFI, case T-345/05 R, *V. v. European Parliament*, § 49, Order of 16 March 2007.

⁴⁵ In the case *Gollnisch v. European Parliament*, the opposite situation arose: the applicant was seeking the suspension of the Parliament’s decision not to uphold his immunity against the French judicial authorities. The President of the Court of First Instance declared the application inadmissible. Without passing judgement on the question of whether such an act can be subject to its review, the President of the Court of First Instance observed that any suspension of the European

the Court of First Instance did not decide to suspend the contested decision, one can see in this order the beginnings of judicial review of the decisions of the European Parliament concerning the lifting or protection of the immunity of its members. The President observed that the applicant did not show in concrete terms that he would be restricted in exercising his office⁴⁶. One wonders what would have happened if the applicant had been able to show the opposite.

IV. Conclusion

18. Legislative assemblies are, in general, not inclined to accept judicial review of their non-legislative acts. They usually invoke their autonomy and the separation of powers as grounds for this rejection. In view of the historic context which has changed fundamentally, it needs to be asked whether this argument is still valid. Given that the divide between the executive and the legislature has been replaced by a divide between the majority and the opposition, it seems to me that instead of violating an outdated conception of the separation of powers, judicial review of the non-legislative acts which have been examined in this paper could instead contribute to establishing a new balance between the powers.

Parliament's decision would not oblige it to uphold Mr. Gollnisch's immunity. Even if the Court quashed the decision by the Parliament, the assembly would only have to re-examine Mr. Gollnisch's request to uphold his immunity (recital 31): CFI, Case T-42/06 R. *Gollnisch v. European Parliament*, Order of 12 May 2006.

⁴⁶ Afterwards, the applicant tried twice to obtain a revision of this order. His application was dismissed each time: CFI, case T-345/05 R II and III, *V v. European Parliament*, Order of 27 June 2007 and 22 November 2007.

Excerpts from the discussions devoted to the fourth theme

Mrs. Oonagh GAY, Head of the *Parliament and Constitution Centre* of the House of Commons (United Kingdom), and **Mr. Marco CERASE**, keynote speaker, agreed that in the light of past experience, it was preferable that the verification of the validity of election results and the settlement of electoral disputes should not be a matter for the legislative assemblies, but should be governed by the law and therefore left to the competence of the judges, as is the case in the United Kingdom.

Mr. Marco CERASE cited, in this regard, a case that had arisen in Italy, in which although it was manifest that the electoral results obtained by two candidates had been mixed up, these results were nevertheless validated by the legislative assembly, so that the seat was awarded to the candidate who received less votes ... and was part of the parliamentary majority. The speaker saw this example as a confirmation that, if indeed there is a cleavage, it is not between the legislature and the Judiciary, but between the majority and the opposition. And he added that it is quite a different matter when an assembly is asked to vote on a request to lift the parliamentary immunity of one of its members, since, in that case, it was the Constitutional Court which had the last word.

Starting out from the observation that judges were particularly suspicious of what went on in the parliamentary assemblies, and never missed an opportunity to “sink their teeth into the parliamentary apple”, **Mr. Philippe JABAUD**, Head of the Legal Department of the

National Assembly (France), raised three points that this observation egged on to highlight:

- 1° following the proliferation of court cases brought by members of staff of the Assembly, it was noticed that, although it refers to the basic rights of the civil service, the Staff Regulations were still characterised by paternalism, and the judges took advantage of this state of affairs to reaffirm those basic rights; so the authorities of the Assembly felt the need to review a number of regulatory provisions, about which nobody complained until a court case arose;
- 2° following a rather scathing decision by the Council of State, the administration of the Assembly decided not only to apply the public procurement regulations, but also to apply them extremely thoroughly and strictly;
- 3° disputes about relations between Members of Parliament and their personal assistants (recruited by each MP, financed from a budget allocation) also proliferated; it should be borne in mind that, from the outset, it was decided that the relationship between the MP and his personal assistant was an employer-employee relationship) governed by labour law, so that any dispute between the parties ends up before the *Conseil des Prud'hommes* (labour court), with all the media coverage that this implies; one staff association took legal action against the National Assembly itself, considering that, insofar as personal assistants are paid out of public funds, they have a link with the National Assembly, but for once the *Conseil des Prud'hommes* ruled in favour of the Assembly, confirming that the assistant was the MP's employee.

Mr. Philippe JABAUD emphasised, to conclude, that the judges' attitude to the Assembly had led it to abandon sometimes haphazard processes and to have a concern to be completely above reproach.

Mr. Marc VAN DER HULST, Conference Chairman, brought the debate to a close stating that in the Belgian House of Representatives (but not in the Senate), it is the political groups who choose the assistants working for MPs, while the contract is established with the House; therefore if, as the result of a dispute between an MP and his assistant, the latter brings the matter before the courts, it is the House which has to defend itself before the courts, before possibly being found guilty ... of an act completely outside its control.

Suzie Navot

*Professor of law,
Head of the Public Law Division at the School of Law, College of
Management – Academic Studies, Israel*

Final remarks and conclusion

Final remarks

I will focus my final remarks on the issue of judicial review of acts of a quasi-jurisdictional nature. In this last theme of the seminar, I would like to recall the “spectrum”, the scale of judicial review I proposed to you in our session dealing with judicial review of parliamentary acts in the exercise of parliamentary functions (see pages 214 to 219). At the one end there of this spectrum, there is judicial review of laws, and at the other far end, judicial review of internal administrative and political decisions.

The question to be answered now is where to place judicial review of quasi-jurisdictional acts, usually decisions concerning disciplinary measures and the lifting of parliamentary immunity (when this immunity is procedural and may be lifted).

The findings of the questionnaire were surprising. I was surprised to see that only very few countries carry out this kind of judicial review, mostly the same countries that have judicial review of almost every other internal act, such as Germany, Israel and Spain, and three more countries: Portugal, Slovenia and Sweden.

The reason given by the countries for the denial of judicial review is that quasi-judisdictional acts lie within the scope of parliamentary autonomy. This is true, of course, but it is also true for every other legal body that has its own disciplinary measures. Is there a real difference – concerning judicial review – between Parliament and a university, the civil service or a professional union (such as unions of lawyers and doctors), all of which have their own disciplinary proceedings? Some similarities may be noticed between those bodies and a Parliament:

- they all have autonomy in disciplinary measures;
- members are judged by their own colleagues;
- in all of them, the same question may be asked: what are the guarantees that the body conducting the procedures will not abuse its powers?

I therefore wish to argue that quasi-judisdictional parliamentary acts should be regarded from a completely different aspect. Not just as regular internal parliamentary acts.

Decisions concerning discipline, expulsions, immunities are internal decisions that need “special guarantees”. Applying disciplinary measures is closer to criminal law and therefore basic principles should be protected, such as due process. Some of the basic requirements for a proper disciplinary proceeding are, for example: the notification of the charges, a hearing, an opportunity to defend oneself, the presentation of evidence, etc. This is very similar to a legal criminal process. What happens if rules of procedure concerning the process are infringed?

This question may also be asked as to the role of Parliament when taking disciplinary measures against its own members. I argue that, when Parliament takes the “role” of another power (a “jurisdictional” or “quasi-jurisdictional” role), it must be controlled. This means that

another authority has to review whether the judicial process is proper and whether the rules of the process have been kept. The need to protect Members of Parliament from unfair and arbitrary imposition of penalties is a role to be taken by the Judiciary.

In this issue of internal discipline, Parliament does not differ from other bodies having internal disciplinary procedures. All these bodies are usually controlled by courts of law. There is no real justification to leave quasi-judicial acts out of judicial review.

The reasoning needed in order to allow for judicial review of these acts is again mainly based on a clear constitutional discourse. Quasi-judicial decisions may violate fundamental constitutional principles. If constitutional principles are guarded by the court, then judicial review of a quasi-judicial decision violating constitutional principles should be allowed. Such is for example a decision to lift parliamentary immunity or a decision to expel a member from Parliament in contravention of the principle of representation.

Constitutional reasoning may allow any constitutional country – if it only wishes to do so – to judicially review acts of a quasi-judicial nature (mainly issues relating to immunities and discipline).

An interesting example of such approach may be seen in a decision delivered in January 2007 by the Supreme Court of India.

First of all, it should be noted that India has an English legacy and has a specific provision in its Constitution that forbids any judicial review of parliamentary proceedings.

Article 122 of the Indian Constitution provides that “The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure”.

In this case¹, some members of the Indian Parliament were videotaped while receiving money for raising questions in the House. The film was shown on TV and a special committee of the House, after having checked the allegations, decided to expel these members from Parliament according to the Rules of Procedure, which allowed such proceedings.

The members expelled appealed to the Supreme Court of India, arguing that their rights had been violated and that Parliament did not have the right to expel members.

The Parliament argued that these were “internal proceedings” and that the Supreme Court should not interfere.

The appeal was dismissed by the majority of the judges – with one dissenting opinion –, which means that the expulsion was held to be “constitutional”. But looking only at the decision on the issue itself is misleading. What is outstanding in this case is the willingness of the Court to check and actually review the internal parliamentary decision, to control the procedure and to establish its power for judicial review on these matters, notwithstanding the explicit rule in the Constitution.

The Court turned first of all to the Constitution. It stated: “We have a written Constitution. This court has to play the role of a ‘sentinel’ to protect the fundamental rights guaranteed by the Constitution”.

The judges decided that decisions, orders or conclusions by Parliament are subject to judicial review, on limited grounds. But when there is gross abuse of power by Parliament, the Court will not hesitate to interfere.

¹ *Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha & Ors*, 10 January 2007, Writ petition (civil) no. 1 of 2006.

The example of India – which has a specific provision in the Constitution forbidding judicial review – shows that when the three premises mentioned above exist (when there is a Constitution, a violation of constitutional values and a willing court), then judicial review in a quasi-jurisdictional matter is possible, even if it is an internal act of Parliament. In the same context, we have learned that the Belgian Judiciary stated that the courts are competent to protect members of Parliament when their legal rights have been infringed.

Conclusion

In order to conclude this seminar in a more general way, I will venture to argue that in the future there will be more judicial intervention and more judicial review in the relations between Parliament and the Judiciary. In constitutional countries where for the moment there is no such review, it might start with a change in the rhetorics used by the court, even if its decision itself is not to interfere. Results of the cases may be misleading. It is incumbent on those dealing with parliamentary law to check for the court's rhetoric, reasoning and arguments. We must look for the change in the discourse, the “shifting” of words

- from parliamentary independence to the supremacy of the Constitution;
- from privileges and immunities to equality and the rule of law;
- from parliamentary autonomy to legitimate activity; and
- from the argument that internal proceedings are “non-justiciable” to the argument that the courts have the power to review them, although it may use this power only in extreme cases.

The winds of change may bring more intervention in Parliament, and maybe more tension between Parliament and Judiciary. Those changes do not mean that the Judiciary will control each and every decision by Parliament. The power for judicial review has to be used with self-restraint and on very specific grounds. Not every minor violation of constitutional principles may trigger judicial intervention: the violation must be major and substantive in order to justify the intervention. Parliament should be given the autonomy and opportunity to conduct its own business and even to deal with its own failures. But at the same time Parliament has to understand that “checks and balances” between authorities mean that also within its internal proceedings, someone is watching over.

CLOSING STATEMENT

Luc Blondeel

Secretary-General of the Belgian Senate

For several years now, the relations between Parliament and the Judiciary have gone through profound changes. Courts have extended their powers to fields which, until recently, were thought to be inaccessible to judicial scrutiny. The dogma of the unlimited sovereignty of Parliament has been shattered: our Houses are no longer above the law. Surely it is a sign of the times: this development reflects the fact that citizens have become ever more assertive, holding public authorities accountable for their acts... and their mistakes. And even Parliaments do make mistakes, no matter how hard all of us try to prevent them.

The relationship between parliamentary autonomy and judicial review is developing right before our eyes, not only here in Belgium, but everywhere in Europe. And it seems safe to predict that it will continue to do so. In the comments sections of the preparatory questionnaire, many correspondents pointed out that some question or other was still controversial among constitutional lawyers in their country, or still uncertain in parliamentary practice. Therefore, it was our conviction that this development deserved a closer examination.

What better forum is there to examine such question than the ECPRD? The massive response to the questionnaire and your enthusiastic participation to this seminar have proved us right. We have heard and learned from speakers from all over Europe, from the Danish *Folketing* to the Italian *Camera dei Deputati*, from the UK House of Commons to the *Sejm* of the Republic of Poland... I am sure all of you will agree

with me, when I say that the many valuable insiders' perspectives, the rich exchange of ideas and practical experiences between colleagues, all of this framed by equally important theoretical insights from national and international academic experts, have made this seminar an unqualified success.

Obviously, the chosen theme of the seminar could never be exhausted in two half-days. In the future, other aspects of the relationship between Parliament and the Judiciary might be the subject of other seminars. Or other questionnaires, maybe *just* a little bit briefer than the one our Parliament sent out...

Judicial review has entered the realm of Parliament and there can be little doubt that its role and influence will continue to grow. All of us will continue to monitor this evolution, exchanging information, ideas and experiences between our Parliaments. Borrowing the name of a famous Belgian comic strip magazine, I would say: "*à suivre*"/"to be continued".

APPENDIX

*Questionnaire sent to the ECPRD
correspondents*

Preliminary explanations

The Belgian Parliament has drawn up two sorts of questionnaires.

Questionnaire n° 1 (“Preliminary questions & procedural issues”) is about the general relation existing between “Parliament & Judiciary”. It provides the basic legal framework for the questionnaires dedicated to each specific Parliament’s act and it also gives attention to a couple of procedural issues in which “Parliament & Judiciary” can come in contact with each other.

Questionnaire n° 2 (“Key issues regarding the judicial review of Parliament’s acts”) is meant to determine, in the light of a typology of the different sorts of Parliament’s acts, whether the activities of a given parliamentary assembly are subject to judicial review and, if so, what this review exactly consists in. It considers every form of review of Parliament’s acts. The following categories of acts are taken under scrutiny:

- *acts of a constitutional nature* (questionnaire II, section 1): the acts the Parliament performs as a constituent assembly, for instance when it amends the Constitution;
- *acts of a legislative nature* (II.2): the acts the Parliament performs as a branch of the legislative power, for instance when it passes prescriptive texts;
- *acts pertaining to political oversight* (II.3): the acts the Parliament or one of its members performs to oversee the action of the executive power, for instance by questioning the government or passing resolutions;
- *acts of a (quasi) jurisdictional nature* (II.4): the decisions the Parliament makes in its capacity as a judge or arbitrator, such as the decision to withdraw a political party’s allowance;
- *rules of procedure* (II.5): the rules the Parliament draws up in order to lay down its own methods of working and fix its internal procedures with a view to exercising the functions the Constitution has assigned to it (not the sheer management of the parliamentary institution);
- *acts regarding individual members and political groups* (II.6): the decisions the Parliament makes regarding individual members and political groups with respect to parliamentary activities and the members’ material status,

such as the decision to cut a member's salary or the decision to declare a question to the government inadmissible;

- *acts of an administrative nature regarding the Parliament's staff* (II.7): the decisions the Parliament makes regarding its own staff, such as the decision on appointing somebody definitively to a post;
- *acts of an administrative nature regarding third persons* (II.8): the decisions the Parliament makes regarding third persons, such as the decision on awarding a public procurement contract to a Parliament's supplier;
- *other acts* (II.9): the acts which cannot be classified in one of the preceding categories.

Each of the sections 1 to 9 of questionnaire n° II deals with the judicial review which is specifically exercised on the subject of the section. For instance, the subject of section 5 is the rules of procedure of the parliamentary assembly. Hence, the questions listed in this section seek to determine the competency the judicial power has to appraise those rules, to test them against other norms and, as the case may be, to take measures in this domain (suspension or annulment of rules of procedure, ...). The judicial review of individual applications of the rules of procedure comes under scrutiny in other sections.

**PART I:
PRELIMINARY QUESTIONS & PROCEDURAL ISSUES**

1. DOES THE PRINCIPLE OF THE SEPARATION OF POWERS EXIST IN YOUR COUNTRY'S LEGAL SYSTEM?

- No → *please go to question 2*
 Yes

1.1. WHAT IS THE LEGAL BASIS OF THE SEPARATION OF POWERS?

- Constitution
 Law
 General legal principle
 Jurisprudence (case-law)
 Other:

2. DOES PARLIAMENTARY AUTONOMY, I.E. THE INDEPENDENCE OF THE PARLIAMENT TOWARDS OTHER INSTITUTIONS, EXIST IN YOUR COUNTRY'S LEGAL SYSTEM?

- No → *please go to question 3*
 Yes

2.1. WHAT IS THE LEGAL BASIS OF PARLIAMENTARY AUTONOMY?

- Constitution
 Law
 General legal principle
 Rules of procedure of the parliamentary assembly
 Jurisprudence (case-law)
 Other:

2.2. IN WHICH INSTRUMENT CAN THE WORKING RULES OF YOUR ASSEMBLY BE FOUND?

- Constitution
 Law
 General legal principle
 Rules of procedure of the parliamentary assembly
 Jurisprudence (case-law)
 Other:

3. DOES YOUR PARLIAMENTARY ASSEMBLY HAVE LEGAL PERSONALITY?

- No → *please go to question 4*
 Yes

3.1. WHAT IS THE LEGAL BASIS OF ITS LEGAL PERSONALITY?

- Constitution
 Law
 Implementing decree
 General legal principle
 Rules of procedure of the parliamentary assembly
 Jurisprudence (case-law)
 Other:

4. DOES YOUR ASSEMBLY ACT AT LAW?

- No → *please go to question 5*
 Yes

4.1. WHICH PARLIAMENT'S BODY DECIDES WHETHER TO ACT AT LAW OR NOT?

- President / Speaker
 Bureau
 Conference of presidents
 Plenary assembly

- Committee
 - Clerk / Secretary-General
 - Other:
- 4.2. WHICH PARLIAMENT'S BODY REPRESENTS YOUR PARLIAMENTARY ASSEMBLY AT LAW?**
- President / Speaker
 - Bureau
 - Conference of presidents
 - Plenary assembly
 - Committee
 - Clerk / Secretary-General
 - Other:
- 4.3. IN WHICH CAPACITY DOES THE PARLIAMENTARY ASSEMBLY ACT AT LAW?**
- As an independent body
 - As a representative of the State
 - In another capacity:
- 5. CAN A MEMBER OF PARLIAMENT (MP) ALLEGE A "FUNCTIONAL INTEREST" BEFORE A COURT OF LAW? IN OTHER WORDS, CAN HE ARGUE THAT THE HARMING OF THE PREROGATIVES OF THE INSTITUTION HE BELONGS TO GIVES HIM CAUSE TO ACT AT LAW?**
- No → *please go to question 6*
 - Yes
- 5.1. WHAT IS THE LEGAL BASIS FOR THE ALLEGATION OF A "FUNCTIONAL INTEREST"?**
- Constitution
 - Law
 - Implementing decree
 - General legal principle
 - Rules of procedure of the assembly
 - Jurisprudence (case-law)
 - Other:
- 5.2. DOES A "FUNCTIONAL INTEREST" ALLOW TO ACT AT LAW ON BEHALF OF THE PARLIAMENTARY ASSEMBLY?**
- No → *please go to question 5.3*
 - Yes
- 5.3. IN WHICH CIRCUMSTANCES CAN A "FUNCTIONAL INTEREST" BE ALLEGED?**
-
 -
- 6. CAN A SEARCH OR A SEIZURE BE CARRIED OUT IN THE PRECINCTS OF THE PARLIAMENTARY ASSEMBLY?**
- No → *please go to question 7*
 - Yes
- 6.1. AGAINST WHOM CAN SUCH ACTS BE CARRIED OUT?**
- Parliamentary assembly
 - MPs
 - MPs' assistants
 - Staff of the parliamentary assembly
 - Other:
- 6.2. WHAT ARE THE PROCEDURAL GUARANTEES?**
- Special authorisation by judicial authorities
 - Presence of judicial authorities
 - Presence of the President / Speaker
 - Presence of the chairman of a political group
 - Presence of MPs

- Presence of the Clerk / Secretary-General
- Presence of Parliament's officials
- Other:

7. CAN A JUDICIAL AUTHORITY CLAIM DOCUMENTS BELONGING TO YOUR PARLIAMENTARY ASSEMBLY OTHERWISE THAN BY WAY OF A SEARCH?

- No → *please go to 8*
- Yes

7.1. WHICH DOCUMENTS?

- Archive documents
- Confidential documents
- Internal documents
- Documents concerning the staff of the parliamentary assembly
- Documents concerning the management of the parliamentary assembly
- Others:

7.2. MUST THE CLAIM FOR DOCUMENTS BE PART OF A SPECIFIC JUDICIAL INQUIRY?

- No → *please go to question 7.3*
- Yes
 - Against the Parliament
 - Against a MP
 - Against a political party
 - Against a staff member of the parliamentary assembly
 - Against third parties
 - Against another person or body:

7.3. WHAT ARE THE PROCEDURAL GUARANTEES?

- None
- Special authorisation by judicial authorities
- Specification of the claimed documents
- Other:

8. CAN A JUDGEMENT BE EXECUTED WITH FORCE ON PROPERTIES OF A PARLIAMENTARY ASSEMBLY?

- No → *please go to one of the next questionnaires*
- Yes

8.1. ON WHICH PROPERTIES?

- All properties
- Properties mentioned on a list drawn up to this end
- Properties required to perform the parliamentary function
- Properties which are not required to perform the parliamentary function
- Others:

8.2. MUST THE FORCED EXECUTION BE THE SEQUEL OF A LAW SUIT AGAINST A SPECIFIC PERSON?

- Against the Parliament
- Against a MP
- Against a political party
- Against a staff member of the parliamentary assembly
- Against third parties
- Against another person or body:

8.3. WHAT ARE THE PROCEDURAL GUARANTEES?

- Special authorisation by judicial authorities
- Specification of the properties concerned
- Presence of judicial authorities
- Presence of the President / Speaker
- Presence of the Clerk / Secretary-General
- Presence of Parliament's officials
- Other:

PART II:
KEY ISSUES REGARDING THE JUDICIAL REVIEW OF PARLIAMENT'S ACTS

SECTION 1:
ACTS OF A CONSTITUTIONAL NATURE

1. **DOES YOUR ASSEMBLY CARRY OUT ACTS OF A CONSTITUTIONAL NATURE?**
 - No → *please go to one of the next questionnaires*
 - Yes:

2. **IS THE ACT OF A CONSTITUTIONAL NATURE SUBMITTED TO JUDICIAL REVIEW?**
 - No → *please go to one of the next questionnaires*
 - Yes

3. **WHICH JUDICIAL BODY CARRIES OUT THE REVIEW?**

THIS IS:

 - A constitutional court
 - A supreme court
 - A supreme administrative court
 - A lower national / federal court
 - A lower regional court
 - Other:

4. **WHEN DOES THE JUDICIAL REVIEW TAKE PLACE?**
 - Before the act is carried out?
 - After the act has been carried out?

5. **WHICH SORT OF REVIEW DOES THE JUDICIAL BODY CARRY OUT?**
 - A review as to compliance with forms and procedures
 - A review as to the substance of the act

6. **WHICH DECISIONS CAN THE JUDICIAL BODY TAKE?**
 - Suspend the act
 - Annul the act
 - Grant damages
 - Order specific measures
 - Decide to proceed to forced execution
 - Other:

7. **WHICH NORMS IS THE ACT OF A CONSTITUTIONAL NATURE TESTED AGAINST?**
 - International law
 - European law
 - Constitution
 - Laws
 - Implementing decrees
 - Rules of procedure of the assembly
 - Other:

PART II:
KEY ISSUES REGARDING THE JUDICIAL REVIEW OF PARLIAMENT'S ACTS

SECTION 2:
ACTS OF A LEGISLATIVE NATURE

1. DOES YOUR ASSEMBLY CARRY OUT ACTS OF A LEGISLATIVE NATURE?

No → *please go to one of the next questionnaires*

Yes:

2. IS THE ACT OF A LEGISLATIVE NATURE SUBMITTED TO JUDICIAL REVIEW?

No → *please go to one of the next questionnaires*

Yes

3. WHICH JUDICIAL BODY CARRIES OUT THE REVIEW?

THIS IS:

A constitutional court

A supreme court

A supreme administrative court

A lower national / federal court

A lower regional court

Other:

4. WHEN DOES THE JUDICIAL REVIEW TAKE PLACE?

Before the act is carried out?

After the act has been carried out?

5. WHICH SORT OF REVIEW DOES THE JUDICIAL BODY CARRY OUT?

A review as to compliance with forms and procedures

A review as to the substance of the act

6. WHICH DECISIONS CAN THE JUDICIAL BODY TAKE?

Suspend the act

Annul the act

Grant damages

Order specific measures

Decide to proceed to forced execution

Other:

7. WHICH NORMS IS THE ACT OF A LEGISLATIVE NATURE TESTED AGAINST?

International law

European law

Constitution

Laws

Implementing decrees

Rules of procedure of the assembly

Other:

PART II:
KEY ISSUES REGARDING THE JUDICIAL REVIEW OF PARLIAMENT'S ACTS

SECTION 3:
ACTS PERTAINING TO POLITICAL OVERSIGHT

1. **DOES YOUR ASSEMBLY CARRY OUT ACTS PERTAINING TO POLITICAL OVERSIGHT?**
 - No → *please go to one of the next questionnaires*
 - Yes:

2. **IS THE ACT PERTAINING TO POLITICAL OVERSIGHT SUBMITTED TO JUDICIAL REVIEW?**
 - No → *please go to one of the next questionnaires*
 - Yes

3. **WHICH JUDICIAL BODY CARRIES OUT THE REVIEW?**

THIS IS:

 - A constitutional court
 - A supreme court
 - A supreme administrative court
 - A lower national / federal court
 - A lower regional court
 - Other:

4. **WHEN DOES THE JUDICIAL REVIEW TAKE PLACE?**
 - Before the act is carried out?
 - After the act has been carried out?

5. **WHICH SORT OF REVIEW DOES THE JUDICIAL BODY CARRY OUT?**
 - A review as to compliance with forms and procedures
 - A review as to the substance of the act

6. **WHICH DECISIONS CAN THE JUDICIAL BODY TAKE?**
 - Suspend the act
 - Annul the act
 - Grant damages
 - Order specific measures
 - Decide to proceed to forced execution
 - Other:

7. **WHICH NORMS IS THE ACT PERTAINING TO POLITICAL OVERSIGHT TESTED AGAINST?**
 - International law
 - European law
 - Constitution
 - Laws
 - Implementing decrees
 - Rules of procedure of the assembly
 - Other:

PART II:
KEY ISSUES REGARDING THE JUDICIAL REVIEW OF PARLIAMENT'S ACTS

SECTION 4:
ACTS OF A (QUASI) JURISDICTIONAL NATURE

1. **DOES YOUR ASSEMBLY CARRY OUT ACTS OF A (QUASI) JURISDICTIONAL NATURE?**
 - No → *please go to one of the next questionnaires*
 - Yes:

2. **IS THE ACT OF A (QUASI) JURISDICTIONAL NATURE SUBMITTED TO JUDICIAL REVIEW?**
 - No → *please go to one of the next questionnaires*
 - Yes

3. **WHICH JUDICIAL BODY CARRIES OUT THE REVIEW?**

THIS IS:

 - A constitutional court
 - A supreme court
 - A supreme administrative court
 - A lower national / federal court
 - A lower regional court
 - Other:

4. **WHEN DOES THE JUDICIAL REVIEW TAKE PLACE?**
 - Before the act is carried out?
 - After the act has been carried out?

5. **WHICH SORT OF REVIEW DOES THE JUDICIAL BODY CARRY OUT?**
 - A review as to compliance with forms and procedures
 - A review as to the substance of the act

6. **WHICH DECISIONS CAN THE JUDICIAL BODY TAKE?**
 - Suspend the act
 - Annul the act
 - Grant damages
 - Order specific measures
 - Decide to proceed to forced execution
 - Other:

7. **WHICH NORMS IS THE ACT OF A (QUASI) JURISDICTIONAL NATURE TESTED AGAINST?**
 - International law
 - European law
 - Constitution
 - Laws
 - Implementing decrees
 - Rules of procedure of the assembly
 - Other:

**PART II:
KEY ISSUES REGARDING THE JUDICIAL REVIEW OF PARLIAMENT'S ACTS**

**SECTION 5:
RULES OF PROCEDURE**

1. **DOES YOUR ASSEMBLY ADOPT RULES OF PROCEDURE?**
 - No → *please go to one of the next questionnaires*
 - Yes:

2. **ARE THE RULES OF PROCEDURE SUBMITTED TO JUDICIAL REVIEW?**
 - No → *please go to one of the next questionnaires*
 - Yes

3. **WHICH JUDICIAL BODY CARRIES OUT THE REVIEW?**

THIS IS:

 - A constitutional court
 - A supreme court
 - A supreme administrative court
 - A lower national / federal court
 - A lower regional court
 - Other:

4. **WHEN DOES THE JUDICIAL REVIEW TAKE PLACE?**
 - Before the act is carried out?
 - After the act has been carried out?

5. **WHICH SORT OF REVIEW DOES THE JUDICIAL BODY CARRY OUT?**
 - A review as to compliance with forms and procedures
 - A review as to the substance of the act

6. **WHICH DECISIONS CAN THE JUDICIAL BODY TAKE?**
 - Suspend the act
 - Annul the act
 - Grant damages
 - Order specific measures
 - Decide to proceed to forced execution
 - Other:

7. **WHICH NORMS ARE THE RULES OF PROCEDURE TESTED AGAINST?**
 - International law
 - European law
 - Constitution
 - Laws
 - Implementing decrees
 - Rules of procedure of the assembly
 - Other:

PART II:
KEY ISSUES REGARDING THE JUDICIAL REVIEW OF PARLIAMENT'S ACTS

SECTION 6:
ACTS REGARDING INDIVIDUAL MEMBERS AND POLITICAL GROUPS

1. DOES YOUR ASSEMBLY CARRY OUT ACTS REGARDING INDIVIDUAL MEMBERS AND POLITICAL GROUPS?

- No → *please go to one of the next questionnaires*
 Yes:

2. IS THE ACT REGARDING INDIVIDUAL MEMBERS AND POLITICAL GROUPS SUBMITTED TO JUDICIAL REVIEW?

- No → *please go to one of the next questionnaires*
 Yes

3. WHICH JUDICIAL BODY CARRIES OUT THE REVIEW?

THIS IS:

- A constitutional court
 A supreme court
 A supreme administrative court
 A lower national / federal court
 A lower regional court
 Other:

4. WHEN DOES THE JUDICIAL REVIEW TAKE PLACE?

- Before the act is carried out?
 After the act has been carried out?

5. WHICH SORT OF REVIEW DOES THE JUDICIAL BODY CARRY OUT?

- A review as to compliance with forms and procedures
 A review as to the substance of the act

6. WHICH DECISIONS CAN THE JUDICIAL BODY TAKE?

- Suspend the act
 Annul the act
 Grant damages
 Order specific measures
 Decide to proceed to forced execution
 Other:

7. WHICH NORMS IS THE ACT REGARDING INDIVIDUAL MEMBERS AND POLITICAL GROUPS TESTED AGAINST?

- International law
 European law
 Constitution
 Laws
 Implementing decrees
 Rules of procedure of the assembly
 Other:

**PART II:
KEY ISSUES REGARDING THE JUDICIAL REVIEW OF PARLIAMENT'S ACTS**

**SECTION 7:
ACTS OF AN ADMINISTRATIVE NATURE REGARDING THE PARLIAMENT'S STAFF**

1. **DOES YOUR ASSEMBLY CARRY OUT ACTS OF AN ADMINISTRATIVE NATURE (STAFF)?**
 - No → *please go to one of the next questionnaires*
 - Yes:

2. **IS THE ACT OF AN ADMINISTRATIVE NATURE (STAFF) SUBMITTED TO JUDICIAL REVIEW?**
 - No → *please go to one of the next questionnaires*
 - Yes

3. **WHICH JUDICIAL BODY CARRIES OUT THE REVIEW?**

THIS IS:

 - A constitutional court
 - A supreme court
 - A supreme administrative court
 - A lower national / federal court
 - A lower regional court
 - Other:

4. **WHEN DOES THE JUDICIAL REVIEW TAKE PLACE?**
 - Before the act is carried out?
 - After the act has been carried out?

5. **WHICH SORT OF REVIEW DOES THE JUDICIAL BODY CARRY OUT?**
 - A review as to compliance with forms and procedures
 - A review as to the substance of the act

6. **WHICH DECISIONS CAN THE JUDICIAL BODY TAKE?**
 - Suspend the act
 - Annul the act
 - Grant damages
 - Order specific measures
 - Decide to proceed to forced execution
 - Other:

7. **WHICH NORMS IS THE ACT OF AN ADMINISTRATIVE NATURE (STAFF) TESTED AGAINST?**
 - International law
 - European law
 - Constitution
 - Laws
 - Implementing decrees
 - Rules of procedure of the assembly
 - Other:

PART II:
KEY ISSUES REGARDING THE JUDICIAL REVIEW OF PARLIAMENT'S ACTS

SECTION 8:
ACTS OF AN ADMINISTRATIVE NATURE REGARDING THIRD PERSONS

1. **DOES YOUR ASSEMBLY CARRY OUT ACTS OF AN ADMINISTRATIVE NATURE (THIRD PERSONS)?**
 - No → *please go to one of the next questionnaires*
 - Yes:

2. **IS THE ACT OF AN ADMINISTRATIVE NATURE (THIRD PERSONS) SUBMITTED TO JUDICIAL REVIEW?**
 - No → *please go to one of the next questionnaires*
 - Yes

3. **WHICH JUDICIAL BODY CARRIES OUT THE REVIEW?**

THIS IS:

 - A constitutional court
 - A supreme court
 - A supreme administrative court
 - A lower national / federal court
 - A lower regional court
 - Other:

4. **WHEN DOES THE JUDICIAL REVIEW TAKE PLACE?**
 - Before the act is carried out?
 - After the act has been carried out?

5. **WHICH SORT OF REVIEW DOES THE JUDICIAL BODY CARRY OUT?**
 - A review as to compliance with forms and procedures
 - A review as to the substance of the act

6. **WHICH DECISIONS CAN THE JUDICIAL BODY TAKE?**
 - Suspend the act
 - Annul the act
 - Grant damages
 - Order specific measures
 - Decide to proceed to forced execution
 - Other:

7. **WHICH NORMS IS THE ACT OF AN ADMINISTRATIVE NATURE (THIRD PERSONS) TESTED AGAINST?**
 - International law
 - European law
 - Constitution
 - Laws
 - Implementing decrees
 - Rules of procedure of the assembly
 - Other:

PART II:
KEY ISSUES REGARDING THE JUDICIAL REVIEW OF PARLIAMENT'S ACTS

SECTION 9:
OTHER ACTS

1. **DOES YOUR ASSEMBLY CARRY OUT ANY OTHER PARLIAMENT'S ACTS?**
 - No
 - Yes:

2. **ARE THESE PARLIAMENT'S ACTS SUBMITTED TO JUDICIAL REVIEW?**
 - No
 - Yes

3. **WHICH JUDICIAL BODY CARRIES OUT THE REVIEW?**

THIS IS:

 - A constitutional court
 - A supreme court
 - A supreme administrative court
 - A lower national / federal court
 - A lower regional court
 - Other:

4. **WHEN DOES THE JUDICIAL REVIEW TAKE PLACE?**
 - Before the act is carried out?
 - After the act has been carried out?

5. **WHICH SORT OF REVIEW DOES THE JUDICIAL BODY CARRY OUT?**
 - A review as to compliance with forms and procedures
 - A review as to the substance of the act

6. **WHICH DECISIONS CAN THE JUDICIAL BODY TAKE?**
 - Suspend the act
 - Annul the act
 - Grant damages
 - Order specific measures
 - Decide to proceed to forced execution
 - Other:

7. **WHICH NORMS ARE THESE PARLIAMENT'S ACTS TESTED AGAINST?**
 - International law
 - European law
 - Constitution
 - Laws
 - Implementing decrees
 - Rules of procedure of the assembly
 - Other: