

THE PARLIAMENTARY
MANDATE

A GLOBAL COMPARATIVE STUDY

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Marc Van der Hulst

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Foreword

Over the years, the Inter-Parliamentary Union has devoted much of its work to the strengthening of parliamentary institutions, both by promoting better knowledge of the workings of these institutions and by enhancing their capacity to perform their constitutionally assigned functions in a more efficient manner. Although the thrust of its action in this field has been directed at the parliamentary institutions themselves, it has also focused on their members.

For instance, its Committee on the Human Rights of Parliamentarians has defended, very often with success, the rights of sitting or former members of parliament around the world. The issue of the status of members of parliament and the legal and material protection and resources to which they are entitled in the performance of their functions has been central to the work of this Committee.

It is therefore only natural that the series of monographs which the IPU initiated in 1997 to provide a sharper insight into specific aspects of the functioning of parliaments should also address the issue of the parliamentary mandate. The present publication, which is the second in the series¹, attempts to do just that. The high rate of response to the questionnaire sent by the IPU to all national parliaments in preparation for this study bears testimony to the highly topical nature of the issues involved.

The study focuses on the nature, duration and exercise of the parliamentary mandate. As the author himself concludes, conferring certain special rights on members of parliament does not mean that they are above the law. Rather, it is a recognition of the fact that, given the importance and magnitude of the mandate entrusted to them by the sovereign people, they require some minimum guarantees to be able to discharge this mandate in an independent and unhindered fashion.

The study is based on answers received from over 130 parliamentary chambers to the above-mentioned questionnaire. It is supplemented by data on the same subject matter available on the PARLINE database which can be accessed through the Union's Web site <http://www.ipu.org>.

The study offers a comparative analysis of the practice of several countries in terms of the nature, duration and exercise of the parliamentary mandate and the legal and material resources to which the parliamentarian is entitled. It looks at the duties and obligations of parliamentarians, which are meant to ensure that they do not betray the trust bestowed on them by the electorate. Besides, the study highlights the need for parliamentarians to maintain the highest standards of probity, thus setting an example in ensuring transparency and accountability in government and hence good governance. The fact that several parliaments

¹ The first was *Presiding Officers of National Parliamentary Assemblies*.

currently have codes of conduct/ethics for parliamentarians is highly significant in this regard.

The IPU would like to extend special thanks to those parliamentary officials, especially the Secretaries General and Clerks of parliaments, who took time from their busy schedule to respond to the questionnaire. This significant contribution to the Union's work is highly appreciated.

The IPU also wishes to extend its thanks to Georges Bergougnous, Head of the Legal Department of the French Constitutional Court (author of *Presiding Officers of National Parliamentary Assemblies*) and Bruno Baufume of the French Senate, both of whom kindly agreed to read and comment on the script, thus helping to enrich the text.

The IPU wishes to thank the author, Marc Van der Hulst, Chief of the Legal Service of the Belgian House of Representatives and lecturer at the Université libre de Bruxelles, who gracefully consented to undertake this study, on behalf of the Union, of what is a very complex subject. He is to be congratulated on the conscientiousness and patience with which he handled the wealth of material at his disposal as well as the numerous comments and suggestions on earlier drafts.

The IPU hopes that readers - members of Parliament, parliamentary staff, scholars and other practitioners and interested persons - will find this work useful in their pursuit of a better understanding of the nature of the parliamentary institution, its members and the mandate with which they have been entrusted by the people.

Anders B. Johnsson
Secretary General

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This monograph could not have been successfully completed without the active support of the Inter-Parliamentary Union team (among whom I owe a special debt of gratitude to Mr. Martin Chungong, Ms. Claudia Kissling, Ms. Daniele Kordon and Ms. Ingeborg Schwarz) and that of two of my colleagues in the Belgian Chamber of Representatives, Mr. Eric Vanderbeck, who gave me valuable editorial advice, and Mr. Stefaan Van der Jeught, who ably assisted me in analysing the replies to the questionnaire.

INTRODUCTION

This monograph is the second in the series of studies on comparative parliamentary law published by the Inter-Parliamentary Union. The subject it deals with —parliamentary mandates in general and the status of parliamentarians in particular — is of far broader scope than that addressed by Mr. Bergougous in his admirable work on the presiding officers of parliamentary assemblies.

The idea of covering such an extensive and varied subject in a single publication may at first seem presumptuous. The subjects addressed (parliamentary immunity, incompatibility, codes of ethics, discipline, etc.) are of such importance that each one of them might qualify for a comparative law treatise. Moreover, some aspects are so closely linked to the socio-economic situation in individual countries that any attempt to identify clear-cut common features, such as remuneration and pension schemes, is fraught with risk.

Nevertheless, we believe that a general study of parliamentary mandates has its place in this series of monographs, precisely because it provides an overview of a subject whose importance in terms of the proper functioning of parliamentary systems cannot be overrated. For example, the status enjoyed by parliamentarians, far from consisting of a panoply of privileges, is a prerequisite for their independence and hence for ensuring balance between the branches of government, which, notwithstanding the subtle distinctions arising from different circumstances, remains one of the basic principles of any parliamentary system.

The information provided below is drawn from the 134 replies to the questionnaire sent by the Inter-Parliamentary Union to all the world's parliaments in 1997. The replies have, as far as possible, been systematically compared with the constitutions, legislation and parliamentary rules *of procedure of* the respondent countries.

As the replies run to over 2,000 pages, it has obviously been necessary to make a selection, which, like any selection, will doubtless attract criticism that may often be justified. Some parliaments have certainly been mentioned less frequently than others. But this does not, of course, imply any value judgement and is sometimes due to factors such as the date on which replies were received or the data processed. More frequently, however, the selection is the logical outcome of an attempt to detect trends and currents in each area, an approach that was deemed

preferable to the presentation of an indigestible mass of data. In general, the trends have historical origins: some Western countries exported their ideas about the functioning of parliamentary systems during successive waves of colonisation (France, the United Kingdom, etc), while others, more recently, did so by virtue of their political and economic influence (the United States of America). In a study such as this, special attention is almost inevitably paid, on the one hand, to the "trend-setters" in a particular area — often to the detriment of countries which follow the same path no less skilfully some years later — and, on the other, to countries which systematically follow their own bent. We beg the reader's indulgence for our choices, which have been dictated solely by scientific and editorial exigencies and certainly not by a "Eurocentric" approach, which would be inappropriate, by definition, in the context.

For obvious reasons, we have followed the format of the questionnaire in preparing this monograph. Consequently, Part One deals with the nature of parliamentary mandates (paying particular attention to the traditional contrast between imperative and representational mandates, the latter having definitively carried the day since the fall of the Berlin Wall) and with the duration of mandates. Rather than focusing on the duration as such, we decided to concentrate on the beginning and end of the mandate. In this connection, special emphasis has been laid on the question of whether MPs have the right to terminate their mandate unilaterally and on circumstances in which a mandate may be lost or forfeited.

The whole of Part Two is devoted to the status of MPs as such, i.e. to the advantages and responsibilities whose purpose is to ensure that a parliamentarian's mandate is exercised freely. Chapter I deals with parliamentary salaries and allowances in the broad sense, including supplementary allowances, pension schemes and other benefits, Chapter II with the incompatibility regime, Chapter III with declarations of personal assets and interests, Chapter IV with parliamentary non-accountability and inviolability, and Chapter V with an MP's rank in the hierarchy.

Part Three addresses the parliamentary mandate from the standpoint of interaction between MPs and parliament, in the form of training programmes specifically designed for new members (Chapter I) and the various constraints imposed by parliament: compulsory attendance (Chapter II), rules of conduct within parliament (Chapter III) and outside ("codes of conduct") (Chapter IV), and "contempt" of parliament, a concept widely used in countries with a British parliamentary tradition (Chapter V).

As in any undertaking of this nature, we are aware that the questionnaire, however well designed, has operated as a straitjacket. It was only when the replies were being analysed, for example, that the scale of the overlap between subjects such as "declarations of assets and/or interests" and "codes of conduct" came to light. No doubt other choices could have been made, but we hope that the path we have chosen proves capable of sustaining the interest of our readers.

PART ONE: NATURE AND DURATION OF THE PARLIAMENTARY MANDATE

The nature of the parliamentary mandate (Chapter I) has always been the subject of lively debate. The advocates of imperative mandates have long argued that such mandates are more progressive and democratic because they stem directly from the concept of popular sovereignty. Those opposed to imperative mandates, on the other hand, consistently maintain that they have inevitably led to total dependence of parliamentarians on their parties or electorate. The fact that democratisation in the former socialist countries of Eastern Europe has (almost) systematically been accompanied by a transition from an imperative to a representational mandate seems at first glance to bear out their theory. In Chapter I, however, we shall see that it is unwise to over-generalise or draw premature conclusions.

The duration of the parliamentary mandate (Chapter II) is also related to the concept of representative democracy. We know that, in theory, parliamentary elections should be held at reasonably short intervals to keep pace with changes in voter sentiment but that the intervals should be wide enough to prevent undue upheavals in the running of public affairs. A judicious balance must therefore be struck between the demands of democratic legitimacy and those of continuity. Rather than focusing on the duration as such of the parliamentary mandate, we thought it preferable to concentrate on the beginning and end. We shall see that, as a rule, the mandate takes effect on the date on which the election results are declared, on the date of their validation or as soon as the oath is taken (usually at the inaugural sitting). We shall also pay special attention to the "validation" of mandates. The date on which a mandate ends varies considerably; it depends to a large extent on the starting date of the mandate, as the constituent assembly is usually keen to prevent an unduly large gap from occurring between the dissolution of the old assembly and the inauguration of the new one.

A key issue addressed in this chapter is whether MPs have the right to terminate their mandate unilaterally. While a total ban on resignation is rare (and characteristic of countries that have opted for an imperative mandate), there are countries where MPs have to resort to "ploys" if they wish to resign or complete a number of formalities of varying complexity.

Lastly, although most countries allow parliamentarians to terminate their mandates, there are also cases in which mandates may be lost involuntarily, either by means of removal from office by political parties or voters or by means of expulsion from parliament. Mandates may also be forfeited, automatically or otherwise, by judicial decision.

I. Nature of the parliamentary mandate

1. The traditional opposition between national sovereignty and popular sovereignty

In a famous passage in *The Social Contract*, J.J. Rousseau explained what was meant by the concept of the people's sovereignty. "Let us suppose", he wrote, "that the State is composed of ten thousand citizens ... Each member of the State then has a ten-thousandth share in sovereign authority." In other words, popular sovereignty is the sum total of the fractions of sovereignty held by each individual. Authority to command is vested in the people, who are assigned the status of a real being and may themselves exercise sovereignty.

This theory has a number of important corollaries. The first concerns the electorate: as each citizen has an individual share in overall sovereignty, he or she has a right to elect the rulers. The theory of popular sovereignty therefore implies the existence of a democratic regime based on universal suffrage. The second corollary concerns direct democracy. "Representative institutions are considered second-best: it follows that referendums and other forms of direct democracy should be held as frequently as possible."² The third and last corollary — of greatest relevance to this chapter — concerns the powers of the people's assembly. "In a system of popular sovereignty, commanding authority is exercised through the will of the majority in the parliamentary assembly without any need for checks or balances to avert the ever-present danger of a majority indulging in impulsive or ill-considered behaviour. Moreover, the electoral mandate is specific and imperative. It is specific in the sense that it reflects the will of a group of citizens: the voters in a constituency. It is imperative inasmuch as it is limited by the orders of the voters."³

² Velu, J., *Droit public* — Volume 1, *Le statut des gouvernants*, Brussels, Bruylant, 1986, p. 71. *Ibid.*, pp. 71-72.

The theory of national sovereignty, elaborated by the French Constituent Assembly of 1789 to rule out universal suffrage, stands in direct opposition to that of popular sovereignty. According to this theory, sovereign authority proceeds from the nation, viewed as an abstract and indivisible entity separate from individuals.

The corollaries of the principle of national sovereignty are obviously different from those of popular sovereignty. To begin with, the franchise "is not treated as a right but as a function: it is a prerogative exercised on behalf of the nation. The law can therefore regulate the exercise of the franchise, just like any other public function, for example by establishing the conditions in which individuals are authorised to take part in electing their rulers."⁴ Secondly, as parliamentarians are supposed to be the sole representatives of the will of the nation, direct democracy procedures are ruled out. The nation "can only express its wishes through its representatives".⁵ Lastly, two differences should be noted in terms of the powers vested in parliament. On the one hand, as the nation is viewed as an entity endowed with an awareness and will of its own directed towards the permanent interests of the social group, "the constitutional order should be devised in such a way as to channel the whims of a parliamentary majority: the powers of the people's assembly are limited to a greater or lesser degree by checks and balances."⁶ Moreover, representatives are not at the beck and call of voters. Condorcet summarised this as follows: "As a representative of the people, I shall do what I believe best serves their interests. They appointed me to expound my ideas, not theirs; the absolute independence of my opinions is my primary duty towards them." According to the theory of national sovereignty, a parliamentarian's mandate is thus general and representative: general because parliamentarians represent the nation as a whole and not a group of voters; representative because they cannot be bound by any order coming from the electorate.

However interesting this traditional opposition between popular sovereignty and national sovereignty may be in historical and theoretical terms, its practical import needs to be placed in perspective. G. Burdeau has rightly observed that "the traditional opposition is irrelevant unless

⁴ *Ibid.*

⁵ Burdeau, G., Hamon, F. and Troper, M., *Droit constitutionnel*, Paris, LGDJ. 1995, p. 180.

⁶ Vclu, 3., *op. cit.*, p. 71.

there is a logical link whereby acceptance of the principles necessarily entails acceptance of all the consequences, so that the members of a constituent assembly would first state one or other of the two principles and then proceed to draw the consequences. There is no basis for accepting this idea and a number of considerations indicate that it should be rejected.⁷ The theory of popular sovereignty was long defended in the former socialist countries of Eastern Europe as more democratic and progressive. But this may in reality have been an *a posteriori* justification for assuming full control over the representatives of the people — by means of an imperative mandate.

However that may be, the fact is that the doctrine of popular sovereignty has, in practice, been rapidly vanishing at the global level since the fall of the Berlin Wall. Accordingly, we shall first examine the representational mandate, which has become the rule, and then turn to the imperative mandate, which has become the exception.

2. The free representational mandate

In most of the countries considered, the imperative mandate is prohibited. In France, for example, the imperative mandate has been traditionally banned since 1789 and the Constitution of the Fifth Republic stipulates that "imperative mandates shall be null and void". Identical provisions have been incorporated in the constitutions of countries such as Bulgaria, Cote d'Ivoire, Croatia, Denmark, Mali, Poland, Republic of Korea, Romania, Senegal and Spain, and in the Statute for Members of the European Parliament.⁸ The German Constitution⁹ stipulates that members of the Bundestag shall not be bound by any order or instruction and shall act according to their conscience. The same idea of individual conscience is contained in other constitutions such as that of The former Yugoslav Republic of Macedonia.

As already noted, the parliamentary mandate has a number of common features in countries that have prohibited the imperative mandate.

To begin with, the parliamentary mandate is general. Many Constitutions explicitly state that parliamentarians do not represent their constituency or department but the nation as a whole (Belgium, France, Turkey, etc.). Thus, Duhamel and Meny note that in France

⁷ Burdeau, G., Hamon, F. and Troper, M, *op. cit.*, p. 182.

⁸ A draft Statute was adopted on 3 December 1998 and will come into force with effect from the next session of the European Parliament.

⁹* Art. 38.1, second sentence.

"parliamentarians from Alsace-Lorraine continued to hold their seats in 1871 following the territory's annexation by Germany, but in 1962 an order terminating the mandate of parliamentarians from Algeria was issued for political reasons."¹⁰ However, the general nature of the parliamentary mandate is subject to a number of exceptions. Some countries consider that MPs are elected to represent their constituencies (for example the United Kingdom), without, however, opting for an imperative mandate inasmuch as members are free to vote as they wish.

Secondly, "in accordance with the concept of national sovereignty, a mandate is representational, i.e. elected representatives enjoy absolute independence vis-a-vis their electorate. Just as parliamentarians are not representatives of only part of the population, so also they are precluded from defending special interests, deputies and senators exercise their mandates freely and are not bound by any undertakings given before their election or instructions received from voters during their mandate."" Elected representatives are not obliged either to support their party or any decisions taken by their group in parliament. It is for the party or group concerned to expel a parliamentarian whose conduct is deemed harmful to its interests. In no case, however, does expulsion entail the loss of a parliamentary mandate. Of course, parliamentarians are still free, once elected, to honour their pledges and comply with the voting instructions of their parliamentary group.

Lastly, as a logical corollary of free representation, "the parliamentary mandate is irrevocable: the electorate cannot terminate it prematurely and the practice of blank-form resignation is prohibited."¹² Voters cannot therefore "register their displeasure at the way their elected representatives have discharged their task save by withholding their votes when the same MPs stand for re-election".¹³

3- The imperative mandate

Although the imperative mandate has now become the exception, until the late 1980s it was the rule in socialist countries. The law in those countries not only stipulated that parliamentarians were accountable to the electorate but also guaranteed the effective exercise of that responsibility

¹⁰ Duhamel, O. et Meny, Y., *Dictionnaire constitutionnel*, Paris, PUF, 1992, p. 619.

¹¹ *Ibid.*, pp. 619-620.

¹² *Ibid.*, p. 620.

¹³ *Parliaments of the World*, London, Gower Publishing Company Ltd., 1986, p. 104.

in two provisions. First, parliamentarians were required to report regularly to the electorate on their individual action and the action of the assembly. In some cases, the minimum action required for a parliamentarian to discharge that obligation was laid down by law¹⁴. Secondly, parliamentarians could be recalled by an electorate if they betrayed the voters' trust or committed any act "unworthy" of their office. In Hungary, for example, a parliamentarian's mandate could be revoked on the initiative of one-tenth of the voters in the MP's constituency or on a proposal by the National Council of the Patriotic People's Front. A date was then set by the Presidium for a secret ballot and dismissal was confirmed by a majority of more than half the votes of the constituency. In the case of members elected from the national list, the decision was taken by the National Assembly on the basis of a proposal by the Patriotic People's Front (a similar procedure existed in Bulgaria, Czechoslovakia, the German Democratic Republic, Poland, Romania, the USSR, etc.).¹⁵

Since the fall of the Berlin Wall, the imperative mandate has become even less common than before. Among the former socialist countries of Eastern European, it has survived only in Belarus.

But this does not mean that the imperative mandate has completely disappeared. It still exists in many developing countries such as Indonesia (where political parties can recall their members), Cuba, Fiji, Namibia and the Seychelles. And it has also survived for totally different reasons in the German Bundesrat, whose members are not elected but appointed by the Lander. Their mandate is imperative to the extent that it is not the individual members who decide how to vote but the Government of the Land as a collegiate body. It follows that voting rights in the Bundesrat are exercised in practice by the Lander and not by the individual members representing them in the Bundesrat.

4. A choice motivated by pragmatic rather than ideological considerations?

Although the theory of national sovereignty was perceived by some as the perfect pretext for denying universal suffrage, it does not follow that the representational mandate, as derived from that theory, offers fewer democratic guarantees than the imperative mandate. In fact, experience

¹⁴*Ibid.*, p. 109.

¹⁵*Ibid.*

seems to indicate the contrary: when the imperative mandate is combined with a comparatively authoritarian — or even dictatorial — regime, it may prove extremely oppressive, inasmuch as the representatives of the people are at the mercy of their party and/or electorate. The imperative mandate has suffered a major setback since the fall of the Berlin Wall and some observers may be tempted to interpret the move from an imperative to a representational mandate as a corollary of the democratisation process in the former socialist countries of Eastern Europe.

It would be wrong, however, to over-generalise or jump to conclusions. In the first place, the free representational mandate is not, per se, a sufficient guarantee of the democratic functioning of a parliamentary system. Secondly, in many cases the preference shown for the representational mandate is, in our view, motivated less by ideological than by pragmatic considerations. In heterogeneous societies, the imperative mandate inevitably leads to increased polarisation, while the representational mandate seems to be more conducive to compromise and the search for consensus.

II. Duration of the parliamentary mandate

In almost all lower houses, the duration¹⁶ of the parliamentary mandate is four or five years. In very rare cases, it may be three years (Bhutan, El Salvador, Mexico, Tonga) or even two (United Arab Emirates, United States of America).

Members of upper houses (federal chamber or senate), on the other hand, are elected or appointed for longer periods in a number of countries. In such cases, provision is sometimes made for a partial renewal during the term of the house, for example in Argentina (senators are elected for a six-year term and half of the house is renewed every three years), Brazil (an eight-year term with alternating one-third and two-third renewals every four years), France (a nine-year term with a one-third renewal every three years), and the United States of America (a six-year term with a one-third renewal every two years).

It should be noted in this connection that the notion of a term of office does not exist in some assemblies, such as the German Bundesrat, where the term depends on membership of the Government of the Land

¹⁶ For further details concerning the duration of the parliamentary mandate, see *parliaments of the World, op. cit.*, pp. 18 and 19.

represented, and the Austrian Bundesrat, where the term ranges from five to six years depending on the province represented.

In addition, some assemblies have an unlimited term: members of the House of Lords in the United Kingdom are appointed for life and members of the Canadian Senate are appointed until retirement.

1. Beginning of the parliamentary mandate

(a) At what point does the mandate begin?

In some of the countries studied, the mandate takes effect on election day (Australia¹⁷, Czech Republic, Japan) or when the election results are declared (Andorra, Greece, Jordan, Trinidad and Tobago). However, the fact that a mandate takes effect when the election results are declared does not mean that members immediately assume the full powers of their office. Persons elected to the Australian House of Representatives, for example, can act as members as soon as the results are declared but cannot take part in the proceedings of the House until they have taken the oath.

In other countries, the mandate begins when the election results are validated. In Kazakhstan, for example, the mandate begins when parliamentarians are registered as members by the Central Electoral Commission. As parliament itself is usually responsible for validating election results, the beginning of the mandate often coincides with the inaugural sitting of the newly elected assembly (Equatorial Guinea, Latvia).

In a third category of countries (Guinea, Indonesia, Jamaica, Lesotho, Liechtenstein, Luxembourg, Mexico, Namibia, Slovakia, United Kingdom, United States of America), the beginning of the mandate coincides with the swearing-in ceremony, which also generally takes place at the inaugural sitting. The mandate of French deputies and senators takes effect when the term of outgoing parliamentarians comes to an end.

There are also a number of special cases. The mandate of senators in the Philippines begins at midday on 30 June following their election.¹⁸ Persons elected to the German Bundestag only become members when the returning officer receives a statement of acceptance and no sooner than the beginning of the new legal term of the Bundestag (i.e. the day on which the

¹⁷ At least for the House of Representatives and for senators from the Territories. Senators from the states, on the other hand, assume office at midnight on 1 July following a regular election.

¹⁸ The mandate of members of the House of Representatives, on the other hand, begins when they take the oath.

newly elected deputies attend their first sitting). An elected deputy who fails to submit a statement of acceptance within one week is deemed to have accepted his or her parliamentary mandate. In view of the special nature of the Bundesrat, which represents the Governments of the Lander, it is not surprising that the mandate of its members begins when they are nominated by the respective Land cabinet. In Canada, the mandate of House of Commons MPs officially begins when the teller signs the election report. Members may not occupy their seats, however, until they have taken the oath of allegiance.

(b) Validation of the mandate

An election does not end when the votes have been counted. In most cases, three steps must be taken before the identity of the new parliamentarians can be established: official declaration of the results, validation of each candidate's election and settlement of disputes concerning compliance with the electoral rules or determination of whether irregularities occurred in the conduct of the elections. Once candidates have been elected and the election validated (where validation exists), they may take their seats in parliament provided that their election has not been challenged and there is no incompatibility issue to be resolved.

Many countries have a special body responsible for validating parliamentarians' mandates, i.e. establishing that they meet the criteria for occupying a seat in the assembly. Cyprus, France (see below) and Zimbabwe are exceptions to this rule.

In countries with an official validating body, parliament itself is usually entrusted with the task. In view of its sovereign status, interference by other powers such as the Executive in the appointment of parliamentarians is deemed unacceptable.

Most countries set up a special committee for the purpose, which reports to the full assembly (Algeria, Denmark, Hungary, Latvia, Luxembourg, Netherlands, Romania, Russian Federation). In the Belgian House of Representatives, six "credentials committees" are established by lot and meet simultaneously. In all cases, it is for the assembly to decide whether or not to validate a mandate.¹⁹

¹⁹ The European Parliament is a special case. On the basis of a report by its "Committee on the Rules of Procedure, the Verification of Credentials and Immunities" it checks the credentials and decides on the validity of the mandate of each newly elected member but is not empowered to rule on disputes based on national electoral legislation.

The composition of the "validation committee" (or "credentials committee") varies considerably from parliament to parliament. In some cases such as Romania, its membership is based on proportional representation in order to reflect the political composition of the new assembly. In Latvia, the "Mandates Committee" is composed of one member from each party represented in the Saeima. In the Belgian Senate, the seven oldest members elected directly by the electorate make up the "Credentials Committee".

In countries where responsibility for validation does not lie with the assembly, the task is often entrusted to the Judiciary, usually the Constitutional Court (or equivalent body). This procedure is particularly common in French-speaking African countries (Benin, Guinea, Mali, Niger, Senegal, Togo) but is also found elsewhere (Kuwait, Malta).

In France, the assemblies were responsible for validating mandates after each renewal until 1958. But the procedure gave rise to abuse and the Fifth Republic decided to transfer authority to the Constitutional Council²⁰, which does not, however, operate a systematic validation procedure. Although Article 59 of the Constitution stipulates that "the Constitutional Council shall rule on the lawfulness of the election of deputies and senators in disputed cases", this does not amount to systematic verification. When specifying the scope of its jurisdiction, the Constitutional Council stated that it did not verify credentials but exercised judicial control over the lawfulness of the ballot.²¹

Greece is one of the rare countries in which the ordinary courts play a role in validating the mandates of elected representatives, such authority being exercised by the courts of first instance. It should be noted, however,

²⁰ Duhamel, O. and Meny, Y., *op. cit.*, p. 620.

²¹ Pursuant to Article 33 of Order No. 58-1067 of 7 November 1958 establishing the Constitutional Council, "the election of a deputy or senator may be challenged before the Constitutional Council within ten days following the declaration of the election results. All persons registered on the electoral roll of the constituency in which the election was held and any person who stood as a candidate shall have the right to enter a challenge".

The Constitutional Council only entertains petitions that meet the conditions of admissibility laid down by law. It may thus refuse to examine the conduct of an election, even where it seems to have been marred by serious irregularities. In principle, the Constitutional Council only entertains petitions concerning the election itself and rejects challenges to the lawfulness of administrative acts pertaining to the organisation and running of elections to the office of deputy or senator, unless "such acts cast doubt on the lawfulness of all future elections" (Delmas decision, 11 June 1981).

In practice, the Constitutional Council annuls an election only if the irregularities alleged by the petitioner have been such as to distort the results of the ballot.

that the courts rule on the basis of a kind of draft decision laid before them by the "Supreme Supervisory Commission", an ad hoc body composed of three senior judges and two senior officials.

Lastly, it should be noted that the Clerk of the Crown is responsible for validation in the United Kingdom and state governors in the United States of America.

2. End of the parliamentary mandate

(a) At what point does the mandate end?

The point at which a mandate ends varies considerably from country to country. It depends in large measure on the starting date of the mandate, the main concern of the constituent assembly and/or legislators generally being to ensure that the gap between the dissolution of the old parliament and the inauguration of the newly elected assembly is not unduly wide.

In a number of countries, the parliamentary mandate ends on the last day of the legal term of the legislature or, if it is dissolved prematurely, on the date of dissolution. This is the case, *inter alia*, in Bulgaria, the French National Assembly²², Gabon, Greece, India, Indonesia and the United States of America.

In other countries, the mandate of outgoing parliamentarians ends on the date of new elections (for example in Denmark) or on the date of validation of the mandates of newly elected parliamentarians (for example in Cyprus).

In some cases, the mandate of outgoing parliamentarians extends beyond the date of validation of the mandates of newly elected members: in Ethiopia, Germany, Guinea, Hungary and the Lao People's Democratic Republic, for example, the mandate ends on the first day of the term of the newly elected parliament.

Different regimes may coexist within the same assembly. In the Belgian Senate, for instance, the mandate of directly elected senators ends on the date of new elections, while the mandate of "community senators" (appointed by community councils) ends on the date set for their

~ In the case of French senators, the Electoral Code stipulates, with a view to maintaining symmetry with the provisions concerning the beginning of the mandate, that the mandate of previously appointed senators expires upon the opening of the ordinary session following the renewal of the three-yearly series during which they were appointed.

replacement and that of co-opted senators on the day before the first sitting of the new Senate. In the event of premature dissolution, however, the mandate of all outgoing members ends on the date of dissolution.

(b) Can an MP resign?

Countries in which resignation is prohibited

Before looking at resignation procedures, it should be noted that in some countries resignation is not an option. It is quite logical that resignation should require the consent of the party or electorate in countries in which the parliamentary mandate is deemed to be imperative. This was the case until the late 1980s in some Eastern European countries (German Democratic Republic, Yugoslavia) and is still the case in some countries that have retained the imperative mandate. In Cuba, for example, deputies who wish to resign must file a request with the assembly of the municipality in which they were elected, which decides whether to accept the resignation after hearing the opinion of the National Assembly.

Parliamentarians are not authorised to resign in Norway either, and in Chile there is simply no provision for resignation. In some Nordic and other countries (Finland, Guatemala, Italy, Senegal, Sweden), the authorisation of the assembly is required. In Finland, members may only resign if they can prove the existence of a legal impediment or some other valid reason precluding the completion of their mandate.

In the United Kingdom, it is also "technically impossible" to resign from the House of Commons, but a rare and unusual custom can be invoked to circumvent the prohibition. Parliamentarians wishing to divest themselves of their parliamentary mandate can apply for, and usually obtain, an office that is fictitiously classified as remunerative and as forming part of the civil service. These jobs (steward of the "Chiltern Hundreds" or "Northstead Manor"), which in fact entail neither remuneration nor duties, are incompatible with a parliamentary mandate.

Resignation procedures

In the vast majority of countries, however, parliamentarians may resign without even having to state the grounds for their decision.

In some of these countries, resignation takes effect automatically. In the Belgian Senate, for example, a letter of resignation is addressed to the

President of the assembly (or during a recess to the Minister of the Interior); the Senate simply takes note. In Sri Lanka, a letter to the Secretary General of the assembly suffices.

In other countries, there is a more formal procedure. The Rules of Procedure of the French National Assembly stipulate that deputies may resign either, if their election has not been contested, upon expiry of the ten-day period allowed for presentation of a petition contesting an election, or, if their election has been contested, after notification of the decision by the Constitutional Council dismissing the petition.

There are also formal rules governing the authority empowered to accept resignations and the form in which resignations are to be tendered. In most cases, they must be addressed to the speaker of the assembly (Greece, India, Israel, Mali, Philippines). In Australia, the Constitution expressly stipulates that, where there is no speaker or when the speaker is travelling abroad (outside the Commonwealth), the letter may be addressed to the Governor General. In Gabon and Spain, on the other hand, the Bureau of the Assembly is the competent authority. In Andorra, the letter to the President must be confirmed in person before the Bureau. In The former Yugoslav Republic of Macedonia, members must tender their resignation in person to a plenary session of the assembly, but the latter merely takes note of the fact.

In some countries (such as Guinea), an oral statement is sufficient, but in most cases resignations must be tendered in writing.

Other countries have even more stringent formalities. Members of the *German Bundestag* must have their statement of resignation drawn up by a notary public or a diplomat authorised to draw up official documents. The resignation only becomes official once it has been registered in the presence of the President of the Bundestag and a notary public or a diplomat authorised to draw up official documents. In Mali, a letter of resignation must be addressed to the President of the National Assembly, who announces it to the members at a plenary sitting. However, the resulting vacancy must be announced at a public sitting by the Constitutional Court. Lastly, the Bulgarian Constitution requires the assembly to adopt a resolution accepting the resignation.

3. Loss of **mandate**

There are three ways in which a mandate may be lost prior to its expiry. In some countries, parliamentarians may be recalled at the instigation of the

electorate or their political party. In others, a parliamentarian may be expelled from the assembly. In general, such parliamentarians no longer meet eligibility criteria or have accepted an office that is incompatible with their parliamentary mandate. In many countries (especially those with a British parliamentary tradition), expulsion by the assembly can be the ultimate disciplinary sanction. Lastly, parliamentarians in some countries may forfeit their mandate by judicial decision.

(a) Removal from office before a mandate expires

As seen above, the question of the dismissal of a parliamentarian is closely bound up with that of the imperative mandate. If one subscribes to the theory that parliamentarians are legally bound by their promises to voters, it is only logical that the electorate (or the party) should recall them if they break their word. This principle was applied in the former socialist countries of Eastern Europe and it has survived in countries that have retained the imperative mandate (Cape Verde, Cuba, Fiji, Indonesia).

We cannot fail to be surprised, however, by the fact that some countries claiming to have a free representational mandate allow voters or the party to recall "their" parliamentarian. In this category we find Ethiopia, Gabon, the Lao People's Democratic Republic, the Philippines and Zambia. It should be noted that the Council of the Inter-Parliamentary Union, when reviewing the case of Equatorial Guinea in 1991-1992 (i.e. at a time when the country was still operating a one-party system) objected to the fact that expulsion from the party could entail the loss of a parliamentary mandate despite the provision in Equatorial Guinea's Constitution to the effect that imperative mandates were null and void.²³

Removal from office by or at the instigation of the electorate

Cuba offers a typical example of removal from office by the electorate. The dismissal procedure may be initiated either by the National Assembly or by the municipal assembly of the municipality that elected the parliamentarian. Dismissal must in all cases be endorsed by the municipal assembly.

²³ See the report by Mr. Leandro Despouy entitled *Functioning and 'Jurisprudence' of the IPV Committee on the Human Rights of Parliamentarians*, Geneva, IPU, 1993, p. 254.

In the Seychelles, the filing of a written petition against a member, supported by one third of the voters in his or her constituency, necessarily entails the holding of new elections. In Ethiopia, the petition must be supported by more than 15,000 voters in the constituency.

If the electorate in the Lao People's Democratic Republic loses confidence in a parliamentarian, they may file a complaint in writing to the "bureau of parliamentarians" in their constituency. The bureau considers the complaint and — after conducting an inquiry — reports to the Standing Committee of the National Assembly, which takes a decision by majority vote at its next session.

Removal from office by the party

Indonesia offers the best example of removal from office by a political party. Indonesian parliamentarians can be recalled at any time by their party for a breach of party discipline, political principles or regulations. The party simply arranges matters beforehand with the Speaker of the assembly and proposes a candidate to replace the member who is being recalled. On a number of occasions, the Inter-Parliamentary Union's Committee on the Human Rights of Parliamentarians has deplored the fact that Indonesian legislation gives political parties the right to recall the representatives of the people, disregarding the fundamental principles of Indonesia's Constitution set forth in the preamble: sovereignty of the people, democracy and consultation among representatives.²⁴

In the Seychelles, a distinction is made between persons elected directly and indirectly. The former can only be recalled by the political party on whose list they were elected if they leave the party. Persons elected indirectly, however, may be recalled at any time and the party is not even required to state the grounds for its decision.

In Sri Lanka, removal from office at the instigation of the party is possible but parliamentarians enjoy more safeguards. They may lodge an appeal with the Supreme Court within one month, and the Court either confirms or revokes the party's decision within two months.

In some countries where the party itself has no authority to remove its parliamentarians from office, defection from the party on whose list a

²⁴ See for example the decision on Case No. IDS/10 Sri Bintang Pamungkas ("Report of the Committee on the Human Rights of Parliamentarians submitted to the 99th Inter-Parliamentary Conference in Windhoek", Geneva, IPU, 1998, pp. 83-93).

parliamentarian was elected may lead to the loss of his or her mandate. "In India, following a series of defections which led to the fall of a government, a constitutional amendment was passed in 1985 pursuant to which any defecting Member lost his/her seat in the House".²⁵ Similar provisions exist in Cape Verde, Fiji, Jamaica, Malawi, Namibia, Trinidad and Tobago, Zambia and Zimbabwe. In Cote d'Ivoire, parliamentarians who switch political allegiance during their mandate are recalled by the Constitutional Council, to which the matter is referred by their sponsoring party or political group.

Lastly, it should be noted that, while changing parties is generally punished more severely than defection to sit as an independent, the opposite is also true in a small number of cases. In Thailand, for example, expulsion from a party entails loss of mandate unless the member joins another party within 60 days.

(b) Permanent expulsion of MPs by the parliament of which they are members

Parliaments in many countries are not authorised to expel members permanently (Cyprus, France, Gabon, Lesotho, Norway, Romania and the European Parliament). Temporary suspension, on the other hand, is allowed in many cases as a disciplinary measure.

In countries where permanent expulsion is allowed, the grounds invoked are quite varied. In general, they fall into three categories: disciplinary penalties, loss of eligibility, and an activity that is incompatible with the mandate. Other grounds may also be invoked, for example in Latvia, where members can be expelled if their knowledge of the national language is found to be inadequate for the purpose of exercising their parliamentary mandate, and in the Thai Senate, where there is a procedure for expulsion of a member suspected of unlawful enrichment or corruption.²⁶

²⁵ Ndebele, C.E., "The particular situation of independents and the fate of members who change party allegiance after elections", Geneva, Inter-Parliamentary Union, to be published. In: *Parliamentary Seminar on Relations between Majority and Minority Parties in African parliaments, 17 - 19 May 1999, Libreville, Gabon*, Geneva, Inter-Parliamentary Union, to be published in 1999.

²⁶ In such cases, a petition may be filed with the Speaker by one-quarter of the members of the assembly or at least 50,000 voters. The petition must be substantiated and takes effect only if adopted by the assembly.

Procedures for expulsion from parliament are also extremely varied. The decision is often taken by a two-thirds majority of the assembly (Argentina, Israel, Jordan, United States of America). In Thailand, a majority of three quarters is required and in Finland one of five sixths. The expulsion procedure is usually based on a recommendation by a committee assigned to consider the case and report to the assembly.

Needless to say, permanent expulsion must remain an exceptional procedure confined to cases that are strictly specified in the relevant legal instruments. Otherwise, it could become a dangerous weapon — comparable to verification of credentials — in the hands of the majority.

Incompatible functions

Failure to resign from an office that is deemed to be incompatible²⁷ (or acceptance of such an office) is frequently cited as grounds for expulsion (Greece, Latvia, Luxembourg, Mexico, Poland, Portugal).

In many countries, acceptance of an incompatible office automatically entails loss of mandate (Luxembourg, Poland). In such cases, acceptance of the office is viewed as an implicit form of resignation rather than as grounds for expulsion.

In Greece, the offices that are incompatible with a parliamentary mandate are listed in the Constitution. Members who find themselves in a situation of incompatibility must decide between their parliamentary mandate and the incompatible office within eight days of being elected. Failure to do so automatically entails the loss of their parliamentary mandate (a similar situation prevails in Senegal).

In Togo, a deputy who disregards the legal provisions governing incompatibility is automatically declared to have resigned by the Constitutional Court, at the request of the Bureau of the National Assembly or the Office of the Public Prosecutor. In Slovakia, members are also deemed to have resigned if they fail, within 30 days, to relinquish an office that the Constitutional Court considers to be incompatible with the exercise of a parliamentary mandate.

Lastly, in Mexico a member who accepts an incompatible office in a state or provincial body, without prior authorisation, is liable to expulsion by the assembly ("political judgement" procedure).

²⁷ We shall only describe cases in which incompatibility entails permanent expulsion. disregarding regimes such as that in Belgium where a parliamentarian who becomes a minister loses his or her parliamentary mandate but recovers it in full on resigning from the Government.

Loss of eligibility

Loss of eligibility is undoubtedly the reason most frequently cited for expulsion of a parliamentarian from an assembly, but it is not always easy to differentiate between expulsion proper and mere determination of loss of eligibility.

In Australia, for example, the House is not authorised to expel members as a disciplinary measure, but they can be disqualified on a number of grounds such as treason, bankruptcy and insolvency. In Greece, parliamentarians who have lost their eligibility, for example through loss of Greek citizenship, are automatically deprived of their status.

In most countries, however, loss of eligibility must be determined by a court. A member convicted of an offence by a court and hence deprived of his or her civic rights may be expelled from parliament. In some instances, expulsion follows the judicial decision as a matter of course; in others, the assembly takes the decision in the light of the court's verdict.

Disciplinary penalties²⁸

Expulsion may be the ultimate disciplinary measure taken against a member by an assembly. It is commonly employed in countries with a British parliamentary tradition as well as in Japan, where the grounds for expulsion — absence from meetings without a valid reason, disclosure of confidential information to outside persons, failure to respect the order or dignity of the assembly — are specifically stated in the Diet Act and the rules of procedure of the House of Councillors.

Neglect of duties in general and non-attendance at parliamentary sittings in particular are the most common grounds for expulsion. In Australia, for example, a member who fails to attend parliamentary sittings, without authorisation, for two months running loses his or her seat. This is also the case in Cape Verde (a total number of unjustified absences in excess of the maximum allowed by the rules of procedure of the People's National Assembly), in The former Yugoslav Republic of Macedonia (unjustified absence for over six months), in Equatorial Guinea (unjustified non-attendance at three sessions, the parliamentarian being given an opportunity present his or her case), in Latvia (unjustified absence from over half the plenary sittings of the Saeima during a period

²⁸* See also Part Three. Chapter III, Discipline.

of three months) and in Senegal (absence from the sittings of two ordinary sessions). In Niger, unjustified absence from all the sittings of one of the two ordinary sessions also provides grounds for expulsion, but such action requires a decision by two-thirds of the members of the National Assembly and a Supreme Court ruling. The Supreme Court may also expel members for other reasons (disciplinary or otherwise) at the request of the Bureau of the National Assembly.

Provision is also made for expulsion in some countries (including India) when a member is found guilty by the assembly of misconduct or other offences unworthy of a parliamentarian.. Under the Bolivian Constitution, each House may decide by a two-thirds majority to expel (temporarily or permanently) any member found guilty of major misconduct in the exercise of his or her duties.²⁹

In the United Kingdom, a Member of the House of Commons may also be expelled by decision of the House, in particular for breaching the code of conduct or the rules governing discipline (see below).¹⁰ Nowadays, such an expulsion would only be contemplated following an inquiry and a recommendation by the Select Committee on Standards and Privileges.³¹

(c) Loss of mandate by judicial decision

Forfeiture of a parliamentary mandate pursuant to a judicial decision — usually termed "disqualification" — is a practice that exists in virtually all countries. The Syrian Arab Republic and the United States of America are exceptions to the rule, however. Under the American Constitution, only the House of Representatives and the Senate have authority to decide on matters pertaining to the election and qualifications of their respective members.¹²

²⁹ See also Part IV. Chapter IV, Codes of Conduct.

¹⁰ For further details on grounds for expulsion, see Erskine May, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, London, Butterworths, 1989, p. 112.

³¹ It should be noted that in countries that follow British parliamentary tradition, Parliament usually has criminal jurisdiction. Any breach of the rules governing discipline or the code of conduct (known as "contempt of the House") can entail, *inter alia*, expulsion of the member concerned.

¹² In *Powell v. McCormack* 39? U.S. 486 (1969), the Supreme Court ruled that authority to assess the qualifications of members was restricted to an examination of qualifications specifically mentioned in the Constitution. In the case of the House of Representatives, this means that an elected representative must be at least 25 years of age, have held American citizenship for at least seven years and be domiciled in the State where he or she was elected.

The distinction is thus not so much between countries where disqualification by judicial decision exists and those where it does not, but rather between countries where the judicial decision takes effect *ipso jure* and those where it must be followed up by an assembly decision.

Automatic disqualification

In some countries, a court conviction automatically entails forfeiture of the parliamentary mandate. In Belgium, for example, a Deputy or Senator who is deprived by judicial decision of his or her civil and political rights no longer fulfils all the eligibility criteria and must be deemed to have resigned (the same situation prevails in Kazakhstan).

In Namibia, parliamentarians who are sentenced to a term of imprisonment of more than 12 months that cannot be commuted to a fine are automatically disqualified.

It should be noted that, as a rule, members only lose their status as a deputy when the judgement becomes final.

Disqualification by a decision of parliament

In a number of other countries (Ecuador, Germany, Hungary, Slovenia), a court conviction does not automatically entail forfeiture of the parliamentary mandate but must be followed up by a decision on the part of the assembly or another State body.

In Germany, the Council of Elders ("Ältestenrat") of the Bundestag rules on disqualification in cases of criminal conviction. Members have two weeks to file an appeal with the plenary assembly. Appeals against the plenary assembly's decision lie with the Federal Constitutional Court ("Bundesverfassungsgericht"). The mandate ends on the date of the Constitutional Court's decision, which is not appealable.³³ In Germany, mandates can also be forfeited following the conviction of a party, for example when the Federal Constitutional Court declares a party to be unconstitutional.³⁴

^u This situation has not arisen to date.

¹⁴ Article 21.2, second sentence, of the German Constitution. The Constitutional Court has twice declared a party to be unconstitutional, namely the Sozialistische Reichspartei (SRP), successor (o (he NSDAP, in 1952, and the Kommunisti.sche Partei Deutschlands (KPD) in 1956. The party was not represented in Parliament in either case.

In Hungary, parliamentarians may be disqualified if they are declared legally incompetent, deprived of their political rights, sentenced to a term of imprisonment for criminal offences, subjected to compulsory medical treatment or found to be in debt to the State. However, disqualification is not automatic in any of these cases. The assembly must always adopt a decision, after hearing the report of the Committee on Immunity, Incompatibility and Credentials, which gives the member a hearing. A two-thirds majority is required for termination of the mandate of the member concerned.

In Denmark, the Folketing may expel a member who has been convicted of an offence that renders him or her unworthy to retain a seat in the assembly. In Benin, parliamentarians may be permanently expelled if they have been convicted of a criminal offence, but only if a two-thirds majority of the National Assembly demands their expulsion.

The contrary situation arises in certain very rare instances. In Slovenia, for example, an unconditional term of imprisonment automatically entails forfeiture of the mandate unless the assembly decides otherwise.

PART TWO: STATUS OF MPs

Parliamentarians enjoy a certain "status", i.e. advantages and responsibilities designed to safeguard the free exercise of their mandate and protect them against pressures that might undermine their independence.

Under this heading, we shall first consider parliamentary salaries, allowances, facilities and services (Chapter I), benefits whose primary justification "consists in the democratic requirement that everybody, regardless of personal wealth, should have access to parliament". Moreover, MPs who enjoy a decent standard of living should, in principle, be less susceptible to corruption. Over the years, all kinds of supplementary allowances such as pension schemes {in some countries} and other facilities (secretaries, assistants, housing, official vehicles) have been added to the basic salary.

We shall then consider the incompatibility regime (Chapter II), whose purpose is to prevent a parliamentarian's occupation from compromising his or her role as a representative of the nation. The "traditional" incompatibilities are thus primarily designed to uphold the principle of the separation of powers. In most countries, they have recently been supplemented by regulations restricting the accumulation of mandates, the aim being not so much to safeguard the independence of parliamentarians as to ensure that they have the minimum time required to discharge their mandate properly.

Concern to ensure transparency and to protect MPs from corruption has led to a major upsurge during the past ten years in the practice of requiring declarations of assets and/or interests (Chapter III). In some countries, such declarations are directly related to the incompatibility regime and declarations of assets are accompanied by a list of mandates held.

Chapter IV deals with parliamentary immunities, which are also intended to guarantee the free exercise of mandates by protecting parliamentarians against legal proceedings brought either by governments or by individuals. There are two categories of immunity: non-accountability, whose purpose is to prevent MPs from being paralysed by fear of prosecution for the opinions they express or the votes they cast in

•" Burdeau, G., Hamon, F. and Troper, M., *op. cit.*, p. 563.

exercise of their mandate; and inviolability, which protects MPs against lawsuits (usually criminal proceedings) for acts that are (to some extent) unrelated to their office.

Lastly, mention should be made of an aspect of the status of MPs that may appear less vital in terms of their independence but that nevertheless helps to ensure due respect for their office, namely their rank in the hierarchy both within and outside parliament (Chapter V).

I. Salaries, allowances, facilities and services

1. Parliamentary salaries and allowances

(a) Introduction

In every country, salaries and allowances form an integral part of an MP's status, although their characteristics may vary from country to country.

Originally, the basic purpose of remuneration was to reimburse the costs incurred by MPs in discharging their office. It was a logical principle when the frequency and length of sessions were extremely limited and relatively few professional sacrifices were required of MPs in the pursuit of their parliamentary activities.

Moreover, membership of parliament was such that the scale of remuneration must be viewed in strictly relative terms. In many nineteenth-century (and even early-twentieth-century) parliamentary systems, the tax-based suffrage created a situation in which the wealthy were elected by the wealthy. Even in the first few decades after the introduction of universal suffrage, parliaments (and particularly their "upper houses") were often still composed of well-off members who had no need whatsoever of their parliamentary salary to keep body and soul together.

The growing demands of parliamentary life, the increased frequency and duration of sessions, and the democratisation of political recruitment following the extension of voting rights were some of the factors that led to the endowment of MPs with the means of subsistence that they could no longer obtain from their professional activities. The fact that a growing number of occupations were being declared incompatible with a parliamentary mandate accelerated this development. Parliamentary

remuneration thus evolved from being a disbursement for the defrayal of costs to become a proper salary designed to guarantee MPs a decent standard of living and to protect them from corruption.

Only a few exceptions to this rule survive. Until the fall of the Berlin Wall, socialist countries still applied the procedure of monthly or annual reimbursement, whereby parliamentarians continued to practise their profession while exercising their mandate and thus continued to receive their regular salary. Since the early 1990s, however, Cuba seems to be the only country retaining this system.

It may therefore be concluded that parliamentary remuneration has now become a fully fledged salary designed basically to achieve three aims; first and foremost, to ensure that every citizen, regardless of his or her personal means, has access to parliament; secondly, to protect elected representatives from pressures or temptations; and, lastly, to offset expenses pertaining to the mandate.

The variety and complexity of the methods used to calculate parliamentary salaries and allowances make the task of providing an overview extremely difficult. To begin with, differences in the economic and social structure of States mean that there is little point in comparing parliamentary salaries and allowances in France and Senegal without at the same time comparing the cost of living in the two countries. We shall therefore refrain from citing figures and shall try to use more objective criteria.

Secondly, parliamentary remuneration usually consists of two separate components: the basic salary and supplementary allowances (which are often viewed as a "reimbursement of expenses"). It is frequently difficult to strike a balance between these two components, particularly since they usually fall under different headings for taxation purposes.

Thirdly, remuneration cannot be dissociated from the social benefits enjoyed by MPs. In some countries, parliamentarians are paid what might seem to be a modest salary for the duties they are required to discharge, but this is counterbalanced by extremely comprehensive social protection and/or a generous pension scheme.

Lastly, parliamentary salaries and allowances are supplemented in many countries by a wide range of benefits in kind and by diverse facilities which are deemed necessary for the proper discharge of the parliamentary mandate and which defy comparative analysis.

(b) *Basic salary*

Not quite universal

Although parliamentarians are paid a salary in almost every country, there is a handful of exceptions to the rule. In Cuba, for example, a Deputy is granted leave without pay for the period of the mandate but receives remuneration equivalent to his or her previous salary plus an allowance for additional expenses.

Cape Verde and Poland are exceptions to the extent that salaries are paid only to "career deputies" who work in parliament on a full-time basis (Presidents, Vice-Presidents, presidents of groups, members of parliamentary committees).

In some African countries, members are paid a daily allowance comparable to an attendance fee instead of a fixed salary (Burkina Faso, Gabon, Niger).³⁶

There are also assemblies whose members are not paid a salary because they are already receiving one in another capacity. Members of the German Bundesrat, for example, receive no salary or benefit in that capacity (except for free public transport), but are paid a salary as a member of the Government of the Land that they represent in the Bundesrat. The same rule applies, *mutatis mutandis*, to members of the Parliamentary Assembly of the Council of Europe, who receive no salary in that capacity but are paid by their respective member States.

Members of the British House of Lords must also rest content with a lump-sum payment for expenses incurred each day they attend a sitting.

In virtually all other countries, parliamentarians are paid a fixed salary that is in no way related to the number of sittings attended. This principle is usually laid down in the Constitution, which generally entrusts the legislature with responsibility for establishing its amount.

Civil service salaries as the frame of reference

MPs' salaries are usually based on other salaries or stipends, the civil-service salary scale being the most common frame of reference.

³⁶ We shall see later on that other countries also operate an attendance fee system, but as a supplement to the fixed salary.

Parliamentary salaries may be aligned with those payable to top civil servants, with the average salary prevailing in the civil service or with the salary payable in respect of a specific office.

In Algeria, for example, deputies are paid on the basis of the most favourable index of the highest offices of State (the same procedure is applied in Latvia and Mali). In Senegal, an MP's salary is equivalent to the highest index figure for officials in the top ranks of the judiciary, the military and the civil service. In Turkey the monthly salary may not exceed that of the top civil servant, a principle of such importance that it is mentioned in the Constitution.

Similarly, MPs' salaries in the Czech Republic are linked to the top civil service salary, with a supplement for certain office-bearers in the assembly (Presidents and Vice-Presidents of the Chamber, committee and group chairpersons, etc). In Finland, parliamentary salaries are also linked to the general civil service salary scale, with MPs ranking seven grades lower than ministers on the scale. In contrast to the situation in the Czech Republic, Presidents and Vice-Presidents receive the same salary as other parliamentarians. Finland is also the only country to award a bonus for length of service.

In France, the basic parliamentary salary is equivalent to the average of the highest and lowest salaries of senior civil servants whose rank places them beyond the general salary scale.

MPs salaries in Belgium are linked to the starting salary of judges of the highest administrative court (the Council of State). However, salaries are not incremental in terms of seniority, unlike those of Council members.

Lastly, in a number of countries, salaries are based on those of members of the Government. In Hungary, they correspond to half the salary of a minister, with a supplement for certain assembly office-bearers (for example, the salary of a committee chairperson is the same as that of a minister and the salary of a group chairperson and, of course, that of the President of the assembly is even higher). In Chile, the principle whereby deputies and senators are paid the same salary as a Secretary of State is written into the Constitution. In Japan, Presidents of the assembly earn as much as the Prime Minister, Vice-Presidents as much as ministers and MPs as much as deputy ministers. In Poland, parliamentary salaries are aligned with those of deputy secretaries of State.

Average monthly salaries as the frame of reference

Although civil service salaries are the most widespread frame of reference, other standards are also applied. In some of the former socialist countries of Eastern Europe, the average monthly wage serves as the basis for calculating MPs' salaries. Bulgaria and The former Yugoslav Republic of Macedonia use data compiled by the National Statistical Office. The average salary of a private-sector employee is multiplied by a factor of 3 in Bulgaria and Slovakia, 3.5 in The former Yugoslav Republic of Macedonia and 5 in Slovenia. In the last two countries, the basic salary is supplemented by a bonus for each additional year's service (0.5 per cent in The former Yugoslav Republic of Macedonia).

Other procedures

In most countries where salaries are linked to the price index, this linkage is also applicable to parliamentary salaries. Some countries expressly require indexation of an MP's salary in accordance with civil service regulations (Belgium, Cyprus). In Canada, the Parliament Act provides for an adjustment on 1 January each year calculated on the basis of the following figures: the composite index of economic activity, minus 1 per cent, or the consumer price index, also minus 1 per cent.

It should also be noted that the existence of fixed parliamentary salaries does not preclude the payment of supplementary allowances based on attendance at sittings. In Egypt, parliamentarians receive a fee for each plenary sitting or committee meeting attended in addition to their monthly salary. Similar schemes exist in Greece, Kenya, Latvia, Lesotho, Mali, Romania, Sri Lanka and a number of other countries.

Although members in some countries can supplement their basic income by means of assiduous attendance at meetings, the contrary situation is much more common. In the event of unjustified absence from committee meetings and/or plenary sittings, MPs in many countries may forfeit part of their basic salary (see the chapter on participation in proceedings).

The European Parliament is a special case: its members are paid a basic salary by the parliaments or governments of member States which is equivalent to an MP's salary in the country concerned.

(c) *Supplementary allowances*

An MP's basic salary is usually supplemented by allowances that go by a variety of different names: "*indemnité representative defrais de mandat*", "*indemnité supplemental pourfrais de representation*", "*indemnité de residence*". "*credit affecté a la remuneration des collaborate urs*" (France), "electorate allowance" (Australia, India), "*indemnité de representation*" (Algeria), "expense allowance" (Canada), "housing allowance" (Fiji), "office expense allowance" (India), "subsistence allowance", "car allowance" (Israel), "office costs allowance", "additional costs allowance" (United Kingdom), "members' representational allowance" (United States of America), "allowance for general expenses", "lump-sum travel allowance", "subsistence allowance", "secretariat allowance" (European Parliament).

In virtually all countries, supplementary allowances are paid to individual MPs. In Bulgaria, however, the supplementary allowance (subject to a ceiling of two-thirds of an MP's monthly salary) is paid to the groups, who decide how it should be allocated.

Although in most cases supplementary allowances are lump-sum payments unrelated to expenses actually incurred, Austria constitutes an exception in requiring some form of substantiation as a basis for disbursements.

The two systems are sometimes complementary. According to the recently adopted Statute for Members of the European Parliament, members are entitled, on the one hand, to reimbursement of duly substantiated travel expenses incurred in the exercise of their mandate, and, on the other, to a monthly lump-sum payment in reimbursement of expenses.

The criteria for granting supplementary allowances are basically twofold: discharge of the duties pertaining to a specific office in the assembly and reimbursement of specific expenses.

Supplementary allowance for the office of speaker

Speakers are usually paid an allowance over and above their salary. It is frequently calculated as a percentage of the salary and its scale varies considerably from country to country. According to G. Bergougnous¹⁷, it

¹⁷ Bergougnous, G., *Presiding Officers of National Parliamentary Assemblies*, Geneva, IPU, 1997, p. 38.

ranges from just 11 per cent in Botswana to 37 per cent in the Netherlands, 50 per cent in Bulgaria, 71 per cent in Thailand, 110 per cent in Canada and 166 per cent in Brazil.

The same author notes that the speakers of the two houses of one bicameral parliament may be treated differently. In Ireland, for example, while the Speaker of the Dail receives an office allowance amounting to 118 per cent of his or her salary, the allowance of the Speaker of the Senate amounts to only 64 per cent of a Senator's salary, which is in any case lower than that of a member of the Dail.

In other countries, the speaker's salary is based on that of top State officials: it is equivalent to that of a minister in Denmark, Iceland, Kuwait, Malta and the United Kingdom; to that of a Head of Government in Israel, Italy, Japan, the Council of the Russian Federation, Sweden and Togo; to that of the Vice-President of the Republic in Egypt and to that of the Head of State in The former Yugoslav Republic of Macedonia. In Portugal it is equivalent to 80 per cent of the salary of the Head of State and 40 per cent of his or her expense allowance.

In Poland, on the other hand, the country's average salary serves as the basis for calculating the remuneration of the President of the Diet, namely 4.6 times the average salary plus a special allowance equivalent to 1.8 times the average salary. At all events, cases such as that of the Argentine Chamber of deputies and the two chambers in Chile, in which speakers receive only a regular MP's salary, are very much the exception.

Supplementary allowance for offices other than that of speaker

In quite a number of countries, supplementary allowances are not viewed as a (lump-sum) reimbursement of expenses incurred in discharging a parliamentary mandate but rather as a reward for exercising specific functions and/or an expense allowance related to those functions.

Belgian deputies and senators, for example, may claim a non-taxable expense allowance equivalent to 28 per cent of their gross parliamentary salary. Members of the Bureau of the Senate, however, receive a supplementary expense allowance whose amount varies in terms of the office held and, in the case of group presidents, in terms of the size of the group.

In Burkina Faso, the expense allowance is a lump sum payable only to members of the Standing Bureau.

In Hungary, the allowance varies in terms of the office held and is equivalent to a percentage of the basic salary (180 per cent for the President of the Assembly, 120 per cent for group presidents and the independent members' delegate, 100 per cent for chairpersons of standing committees and group vice-presidents, 80 per cent for vice-chairpersons of committees, etc.).

In Latvia and Poland, supplementary allowances are reserved for committee chairpersons and vice-chairpersons and are substantially smaller (around 10 to 20 per cent of an MP's salary).

In some countries, several categories of supplementary allowance may coexist. For example, the allowance based on constituency size payable to Canadian MPs (see below) coexists as a matter of course with the allowance for special duties (Leader of the House, Whip, Deputy Whip, Deputy Speaker, Secretary).

Reimbursement of expenses

In cases where supplementary allowances are viewed as a reimbursement of expenses, their scale is sometimes based on constituency size, for example in Canada, where MPs from the vast rural constituencies listed in Annex III to Canada's Electoral Act receive an allowance which is about 25 per cent greater than that of other MPs (one-third greater in the case of the two MPs from the North-West Territory). In Australia, too, the constituency allowance depends on the area of the constituency concerned.

One other criterion frequently used to calculate this type of supplementary allowance, especially in Scandinavian countries (Denmark, Norway), is the distance between parliament and the MP's place of residence. In Denmark, for instance, parliamentarians living in Greenland or the Faeroe Islands receive an expense allowance that is three times greater than that payable to parliamentarians living within a 45 kilometer radius of Copenhagen.

2. MPs and taxation

In some countries, the sum total of an MP's salary and allowances is free of tax (Burkina Faso, Cyprus, Egypt, Guinea, India, Morocco).

In the vast majority of countries, however, the whole of an MP's basic salary is taxable, while expense allowances are exempt (e.g. Australia,

Belgium, Denmark, Germany, Spain). In France, the basic salary and housing allowance are taxed in accordance with the regulations applicable to wages and salaries but the duty allowance is not (being treated as "mandate expenses").

In a very small number of cases, even expense allowances are taxable (20 per cent of the total in Finland and the whole amount in the Philippines).

But the fact that parliamentary salaries and allowances are taxable does not imply that MPs are entirely subject to the ordinary legal regime. In Belgium, for example, the material regulations applicable to parliamentarians are those of ordinary tax law, but MPs' tax returns are assessed in a centralised tax office in order to avoid inconsistent interpretations.

Lastly, it may be noted that the salaries and allowances of members of the European Parliament are subject only to Community tax.

3. Pension schemes for MPs

A number of countries have no special pension scheme for MPs and parliamentarians in some of these countries have no pension entitlement whatsoever, even after discharging several mandates (Chad, Mauritania, Russian Federation). In other countries, they are subject to the ordinary social security regime (Andorra, Hungary). They may even be assigned by law to a particular category of social security beneficiaries: civil servants (Algeria, Benin), the self-employed (Chile), wage- and salary-earners (Cuba).

In many other countries (Australia, Belgium, Canada, Croatia, Denmark, Fiji, France, Germany, India, Israel, Senegal, Sweden, United Kingdom), MPs have their own pension scheme, often based on legally established principles.

The technical characteristics of pension schemes and the methods of calculation used are so varied that they cannot be discussed in depth in a work of this kind. We shall therefore focus on a limited number of salient features.

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It should first be noted that pension schemes vary not only from country to country but also occasionally between one assembly and another in the same country. In Belgium, Canada and France, for instance, different pension schemes are applicable to deputies and senators. The pension funds of the assemblies are kept strictly separate and modes of contribution and other characteristics differ markedly.

Let us take a closer look at the situation in France, The National Assembly's pension fund was set up in 1904 (and that of the Senate in 1905). It is financed by contributions from deputies' salaries and a subsidy from the Assembly's budget. Pensions are based on the number of annual contributions, but deputies pay a double contribution for the first 15 years of their mandate. In the National Assembly, the earliest retirement age is 55 years (in the Senate 53 years). In both chambers, the retirement age may be reduced to 50 years in certain specified cases (resistance or political deportees or internees) and in the case of deputies and senators who opt for a reduced pension. Moreover, despite the fact that the assemblies have separate pension funds, members who have exercised a parliamentary mandate in both chambers have their cumulative years of service taken into account when their pension is calculated.³⁸

Secondly, although MPs' retirement pensions are usually financed by means of deductions from their salaries, such funds generally fail to cover the entire cost. The assembly budget thus frequently provides for some form of subsidy or grant (e.g. in France). In the United Kingdom, the Exchequer's contribution is proportional to the contributions by members and ministers (a factor of 2 was applied in 1988-1989). Very few countries go as far as Fiji, where the *Government* makes direct contributions to the MPs' pension fund.

Thirdly, in most countries contributions are compulsory, although in some cases (e.g. the United Kingdom) members may choose whether or not to join the scheme. It is not surprising that pension schemes for parliamentarians broadly reflect the principles underlying a country's general social security system. In the United States of America, for example, members of both the House of Representatives and the Senate can opt for one of four pension schemes offering different levels of protection; they may also participate in pension savings schemes.

Fourthly, where a pension scheme for MPs exists, the pension entitlement is usually based on two criteria. The first is a minimum age, which is usually fairly similar to that at which pensions are payable to other members of the population: 65 in Germany and Sweden, 58 in Belgium (with no early retirement option), 55 in France (with an early retirement

³⁸ In Belgium, pensions in respect of a "mixed" career (Chamber and Senate) are established, calculated and paid in accordance with the regulations of the pension fund of the house in which the beneficiary commenced his or her parliamentary career.

option) and Canada. Croatia maintains a distinction between men and women: 55 years for men and 50 for women. MKs in Israel may begin to draw a pension at the age of 45. The second criterion is a minimum length of parliamentary service: nine years or two full mandates in the Jamaican House of Representatives, eight years in Germany, six years in Sweden (though with a guaranteed income after three years of service), five years in the Rajya Sabha (Indian Council of States), four years or election on two occasions in the Lok Sabha (Indian House of the People) one year in the Danish Folketing, etc. Needless to say, this minimum refers to initial pension entitlement and not to the number of years required to obtain a full pension, which is usually about 20 years (e.g. Denmark) or more. In Canada, pensions are based on average remuneration per session during the six most favourable years of service, multiplied by 3 per cent for each year counting towards pension, up to a maximum of 25 years.

Lastly, it should also be noted that, in the event of decease, the surviving spouse and children usually receive a reversion pension, for example in Norway and the United Kingdom. There may also be provision for a disability pension: in Australia, such pensions are paid if the disability occurs during the exercise of a parliamentary mandate.

4. Other facilities

In almost all parliaments, members enjoy other facilities and benefits in addition to the basic salary and supplementary allowances. The Council of Europe and some "young" parliaments (for example in the Armenian Republic) constitute exceptions to this rule.

Assembly office-bearers, particularly speakers, are usually accorded more facilities than other members. In exceptional cases, they are the only members to enjoy such facilities. In the Syrian Arab Republic, for example, they alone are entitled to a secretariat, assistants, official housing and cars, security personnel, and postal and telephone services. Other members are only allowed free transport (air/rail) between Damascus and their place of residence. In Cuba, only members of the Bureau enjoy staff assistance, communication facilities and official cars.

(a) Secretariat

In many countries (Australia, Belgium, Russian Federation), all members are provided with a fully equipped office in the parliament building. In a

few cases, this facility depends on the size of the political group (a minimum of four members in Fiji) or is restricted to certain members (e.g. leading office-bearers and chairpersons of committees in Senegal).

Less frequently, members are also provided with an office in their constituency, for example in Australia and the Czech Republic. In Canada, the "Members' office budget" is used to defray expenses such as rents, telephone bills, public services, furniture, office equipment, stationery, etc. for offices in electoral districts. In Romania, the staff employed in senators' constituency offices actually form part of the Senate staff.

In the United Kingdom, Members of the House of Commons have an office at Westminster and their "office cost allowance" is intended to cover the cost of running an office in their constituency. In France, members have an office in the Palais Bourbon and the Assembly also grants loans for the purchase of housing or office premises either in Paris or in the member's constituency.

Some assemblies prefer to pay political groups a monthly secretariat allowance for each member as a contribution to individual secretariat requirements (e.g. the French Senate). In practice, this usually results in several members "sharing" a secretarial assistant (e.g. the Swedish Riksdag).

In some cases, individual members have no right to a secretariat and depend on their political group for such facilities (Norway, Spain).

(h) Assistants

Some 15 years ago, secretariat staff and parliamentary assistance were basically a pooled facility but this situation has changed radically in recent years. Parliamentarians often feel vulnerable vis-a-vis the government, basically on account of the relationship between the two powers but also because rapidly changing societies have tended to view centralised decision-making as preferable to assemblies that are by nature fraught with dissension. But lack of intellectual support for MPs is another source of frustration with government. Ministers can usually rely on their department to draft legislation or provide answers to parliamentary questions. They also often have political advisers to attend to their schedule, prepare speeches and deal with more confidential matters. Parliamentarians, on the other hand, are frequently left to their own devices. They can, of course, draw on the services of parliamentary personnel, but staff of this kind will

studiously avoid providing partisan support. Although they may also have access to an individual or group secretariat (see above), the support it provides tends to be administrative rather than intellectual. Again, their group may have experienced collaborators, but they must be shared with colleagues and individual members may wish to develop initiatives that are not assigned high priority by the group.

It is not surprising, therefore, to find that assemblies almost everywhere have decided over the years to offer their members the opportunity to employ assistants, who are often graduates and may to some extent be viewed as a counterweight to the assembly's personnel. Whereas the latter are bound to be impartial, assistants are required to "toe the line". Whereas the regular staff must treat each parliamentarian equally, assistants must seek to further the interests of "their" member.

Save in a few cases such as The former Yugoslav Republic of Macedonia, Finland, the German Bundesrat and the Austrian Bundesrat, parliamentarians are now either assigned or recruit one or more assistants. As loyalty to the MP is of the essence, assistants are not usually recruited on the basis of a competitive examination.

The number of assistants differs greatly from one assembly to another. In Belgium, the general rule for many years was one assistant for every four deputies, but since 1995 each deputy has been entitled to employ an assistant. In Australia, individual members may have three assistants, who are only supposed to assist them in exercising their mandate and not to work for the party. Some office-bearing MPs are entitled to additional assistance. In the Russian Federation, parliamentarians may employ up to five assistants (plus five unpaid voluntary assistants). Lastly, in India the number of assistants is not fixed, but more than two-thirds of the office expense allowance is supposed to be used for the recruitment of one or more assistants.

(c) Official housing

The practice of providing speakers with official housing is very widespread. Many speakers are assigned an official residence, which may be an apartment within parliament (as in Denmark and the Polish Diet) or a separate residence, known as the President's residence in Belgium and France. The President of the French National Assembly also has an official apartment at the Palace of Versailles, the seat of the parliamentary

Congress. Some speakers even have a second residence: the President of the Philippines Senate, for example, has a summer residence in Baguio City. Speakers are usually assigned domestic staff, sometimes quite a large complement, for the upkeep of their official residence and the Speaker at Westminster may even draw on the services of a chaplain.³⁹

In some parliaments, official housing is not the exclusive privilege of the speaker but is enjoyed by all leading office-holders (Cape Verde, Denmark, Senegal).

In others, all members receive a housing or residence allowance (Benin, Estonia, Kenya) to cover all or part of their housing costs.

In some countries, parliament provides ordinary members with accommodation in houses (Poland, Russian Federation) or apartments (Sri Lanka). In Norway, for example, the Storting has 140 apartments that may be occupied free of charge by members residing outside Oslo (Romania, Slovakia, Slovenia, Turkey operate a similar system). In some cases, the use of such facilities is explicitly linked to the session (Israel, Niger).

(d) Official vehicles

An official vehicle⁴⁰ is a privilege usually reserved for speakers and deputy speakers of parliament (Cape Verde, Chile) or the Leader of the Opposition (United Kingdom). It is sometimes extended to chairpersons of committees (Czech Republic, Japan, Senegal) and even group leaders (Czech Republic). In Japan, vehicles are made available to political groups and in other parliaments (such as the German Bundestag), a fleet of vehicles is placed at the disposal of all parliamentarians for official occasions.

Australia goes even further, placing an official vehicle at the disposal of all senators. Members of the House can request the provision of a Government-leased vehicle for parliamentary, electoral or private purposes. These cars are serviced and maintained at Government expense but members must contribute to the cost of provision of the vehicle.

³⁹ See Bergougous, G., *op. cit.*, p. 39.

⁴⁰ It should be noted that "official vehicle" is no longer necessarily synonymous with "official car". The President of the Bundesrat, for example, may use "Bundesgrenzschutz" helicopters and "Luftwaffe" planes.

Lastly, there are some countries in which members may purchase a tax-free car (Cyprus, Kenya, Sri Lanka).

(e) Security guards

The assignment of security personnel is a relatively rare privilege reserved for specific office-bearers (the presiding officers of the assembly in Chile and Cyprus, ministers and the Leader of the Opposition in the United Kingdom) or special circumstances.

It should also be noted that the army detachment assigned to speakers in many countries plays a dual role: attending to security, on the one hand, and enhancing the prestige of the speaker's office through ceremonial duties, on the other.

(f) Postal and telephone services

In some countries (such as Australia), MPs are paid an annual lump sum to cover the cost of correspondence related to the exercise of their mandate.

In most countries, however, members' correspondence is post-free, regardless of whether it is directly related to their mandate, when it is mailed from within the premises of parliament.⁴¹

Free carriage is sometimes unrestricted (Algeria, France) but in most cases quotas are applied. In Israel, for example, members of the Knesset are entitled to mail 15,000 communications free of charge within the country. Belgian senators may send all their mail through the public services free of charge provided that they use an envelope bearing the arms of their assembly. For other correspondence, they have the right to 1,500 envelopes franked at the ordinary postage rate.

The same conditions are usually applicable to the use of telephone (and telefax) facilities but on a somewhat more restricted basis. In the Belgian Senate, for example, the telephone charges of leading office-holders are reimbursed up to a certain limit (25,000 Belgian francs a year). In Israel, parliamentarians have an annual quota of 25,000 to 30,000 units depending on their place of residence. In Norway, telephone charges from a member's place of residence are refunded if they exceed a certain

⁴¹ In the United Kingdom free postage applies only to mandate-related correspondence and correspondence with European Union institutions.

threshold. The Storting also refunds the rental of a mobile telephone and the cost of a fixed number of calls.

Lastly, in some countries (such as Denmark) postal and telephone charges are held to be covered by the general allowance for expenses incurred in exercising a mandate.

(g) Travel and transport

The very nature of their duties makes it important for parliamentarians to have transport facilities. Such facilities assume different forms.

The simplest scheme consists in reimbursement of travel between a parliamentarian's place of residence and the seat of the assembly (Australia, Finland). In such cases, reimbursement is restricted to travel undertaken in the exercise of a mandate but it covers the whole amount and is applicable to all means of transport. In Finland, for example, expenses incurred for domestic flights as well as for transport from the parliamentarian's place of residence to the airport and from parliament to the airport are reimbursed (for a maximum of four return trips a week).

In Canada, reimbursement of travel expenses is based on a points system. Each Canadian MP is entitled to reimbursement for a total of 64 return trips within Canada, equivalent to 64 points, during a 12-month period. Subject to certain conditions, an MP may attribute a limited number of points to dependents.

In many countries, travel is free on State-operated or State-licensed means of transport. This is a long-standing practice and was originally intended as a means of enabling parliamentarians to exercise political control throughout the country. It follows that this category of free transport is applicable only within national frontiers.

The scale of free transport depends on technical and geographical circumstances in the country concerned and on the extent to which means of transport have been privatised. Public transport in general and the railway network in particular are covered in virtually all countries (Belgium, France, Germany, Hungary, India, Norway, Sri Lanka) but some countries also include air transport (Czech Republic, Japan, Poland) or sea transport (Bulgaria, Russian Federation).

Travel by car may also be reimbursed, usually on the basis of a flat rate per kilometre (Belgium, Canada). In Costa Rica, parliamentarians are

given petrol coupons, and in the Lao People's Democratic Republic a monthly petrol allowance.

(h) Other facilities

The facilities offered by some parliaments are so varied that they cannot all be enumerated in a work of this scope, for example creches for MPs' children (Canada, Sweden), insurance facilities (Croatia, Ecuador, Norway, European Parliament), language and/or computer courses (Belgium, Canada, Denmark, Sweden) and grants for study trips abroad (Sweden).

Among these miscellaneous benefits, special mention should be made of the separation grant. In some cases, it depends on length of service: one month's salary per year's service in Parliament in Denmark and 10 per cent of the total salary received during an MP's mandate in the Seychelles (there is a similar scheme in Zambia). In other cases, it is a lump sum (e.g. six months' salary in Hungary).⁴²

II. Parliamentary incompatibilities

1. A guarantee of independence

In 1966, M. Ameller defined incompatibility as "the rule that prohibits members of parliament from engaging in certain occupations during their term of office. Like ineligibility, its object is to prevent members from becoming dependent upon either public authorities or private interests. But the rule operates in a less direct way: it does not prevent a member from being a candidate, nor can the validity of an election be questioned on that account. But a member must choose within a predetermined period, which is generally short, between membership and the occupation that is held to be incompatible with it."⁴³

Over the years, this definition has remained valid. The primary purpose of incompatibility has been to ensure that members' public or private occupations do not influence their role as representatives of the nation. Thus, the principle of the separation of powers is the source of the

⁴² In Cape Verde, parliamentarians receive both a resettlement grant at the end of their mandate and an installation grant on assuming office.

⁴¹ Ameller, M., *Parliaments*, Cassell, London, 1966, p. 66.

"traditional" incompatibilities in most countries between the parliamentary mandate and ministerial or judicial offices and certain public functions.

Private occupations, on the other hand, are in principle compatible with parliamentary mandates. They are viewed as a means of preventing the exercise of a parliamentary mandate from becoming a fully fledged profession and of enabling professional groups to be represented in parliament. However, this principle has been undermined by a series of scandals based on collusion between politics and finance and certain private occupations have as a result been declared incompatible with political office.

Lastly, many Western countries — largely but not exclusively those influenced by French traditions — have recently introduced regulations governing plurality of mandates in addition to those governing incompatibilities in the strict sense. These restrictions are motivated largely by "the desire to ensure that parliamentarians have sufficient time at their disposal to exercise their mandates properly ..."⁴⁴

2. The different categories of incompatibility

(a) Incompatibility with non-elective public office

As the rights enjoyed by parliament were won through a struggle with the monarchy, the legislator's first concern was to shield parliamentarians from government influence. It follows that the purpose of most incompatibilities is to prevent parliament from being composed of persons who are subject to government control because of their professional connections or economic dependence.

Logically, therefore, the criterion most frequently applied as an indicator of incompatibility is appointment by the government or remuneration from public funds. In practice, all civil servants fall under this heading. In countries as diverse as Argentina, Australia, Costa Rica, Fiji, Germany (Bundestag), Japan, Kuwait, Mexico, New Zealand, Switzerland (federal officials), the United Kingdom and the United States of America (federal officials), MPs may not hold a civil service post during their term of office.

It goes without saying that "[t]he principle of incompatibility that applies to an office held before an election naturally applies to any office offered to members once they have been elected."⁴⁵

In some instances, fear that parliamentarians may become beholden to a government that has appointed them to certain posts after their election has even led to an extension of incompatibility in time. "In the United States, for example, no member of Congress may be appointed to an administrative office that has been created or for which the salary has been provided during his or her term of office. The same prohibition exists in the Philippines. In Argentina, such appointments require the authorisation of the chamber concerned."⁴⁶ In other countries, a parliamentarian may accept an assignment from the government, but only for a limited period.

Teachers, especially in higher education, constitute the most common exception to the principle of incompatibility of the parliamentary mandate with civil service employment, for example in Chile, Germany, Senegal, etc.⁴⁷

Moreover, to avoid debarring civil servants from parliamentary activity and/or jeopardising the careers of civil servants elected to parliament, various categories of special status have been established ("political leave", "detachment", "temporary leave of absence", etc.) Parliamentarians who enjoy some such status are not required to relinquish their status as a civil servant. They retain their entitlements to promotion and retirement and return to the civil service on completing their mandate, though perhaps not to the same post.

Although these new categories of leave of absence are to be welcomed, they create new problems and may eventually create new kinds of inequality. While the State can guarantee that civil servants will recover their job (or at least an equivalent post) on completing their mandate and can extend the system to certain private-sector employees, it cannot offer similar guarantees to members of the liberal professions or the self-employed.

Not all countries prohibit the concurrent holding of a parliamentary mandate and non-elective public office. Some countries exclude only top civil servants (Brazil, Italy, Spain). In Algeria, incompatibility applies only

•" Ameller, M., *Parliaments, op. tit.*, p. 67.

^{Ab} *Ibid.*

⁴¹ *Ibid.*

to public officials serving in the constituency concerned. In Canada it applies to the chief of police, in Ireland to the Comptroller and Auditor General, and in Austria to the President and Vice-President of the National Audit Office.

Other countries confine incompatibility to specific public offices, regardless of the rank of such offices in the hierarchy. In many countries, members of the police force, the army or the security forces fall into this category (Algeria, Cameroon, Costa Rica, Hungary, India, Mali, Mexico, Poland, Romania, Senegal, Spain, United Kingdom). In some, however, the ban affects only chiefs of staff and high-ranking officers (e.g. Israel). Persons with electoral responsibilities belong to another traditional area of incompatibility (Fiji, Malaysia, Mexico, Republic of Korea, Spain). In some countries, members of the clergy are prohibited from exercising a parliamentary mandate, for example in Israel (chief rabbis, salaried rabbis and other holders of religious office), the United Kingdom (members of the Anglican clergy) and many other countries (Argentina, Mexico, etc.). Lastly, in some cases incompatibility applies to mediators ("ombudsmen") (Finland, France), parliamentary staff (Netherlands, Poland, Sri Lanka), members of the Economic and Social Council (Cameroon, Senegal, Tunisia), the Commissioner for Children's Rights (Poland) and members of the National Broadcasting Council (Poland).

(b) Incompatibility with ministerial office

As Mr. Ameller rightly notes⁴⁸, the issue of plurality of ministerial and parliamentary offices transcends the issue of incompatibility and, by virtue of its relationship with the nature of political regimes, comes within the scope of constitutional theory.

Incompatibility of ministerial and parliamentary duties is the general rule in regimes based on a formal separation of powers and is also one of the characteristic features of presidential regimes⁴⁹. It is to be found in such diverse countries as Brazil, Costa Rica, Portugal, Switzerland and the United States of America.

On the other hand, the incompatibility rule is basically at odds with the concept of a parliamentary regime, which is predicated on close collaboration between the legislature and the executive.⁵⁰ With the

ibid., p. 69.

ibid.

Ibid.

exception of Belgium, France, the Netherlands, Norway and Sweden, in most parliamentary regimes the combination of ministerial and parliamentary duties is not only authorised but actively encouraged in order to strengthen the ties between assemblies and the Executive.

In the United Kingdom, for instance, MPs who were appointed ministers were long required to run immediately for re-election in order to have their mandate confirmed. The purpose of this rule was to have the parliamentarian's accession to ministerial office ratified by the electorate. The principle of plurality was thus officially endorsed.⁵¹ The rule was abolished in 1926 but echoes survive in some parliamentary regimes based on the British tradition. In Fiji and Malta, for example, ministers must be members of parliament, and in Australia and India they must either be a member of parliament or become a member within a certain period following their appointment (three and six months respectively). In Kuwait and Mali, ministers who have not been elected to parliament are deemed to be *ex officio* members. These rules remain the exception, but there are still many parliamentary regimes in which custom requires that ministers be members of parliament (e.g. Canada and the United Kingdom) despite the absence of a legal provision to that effect.

Although compatibility between parliamentary and ministerial functions is defended for the most part on the grounds that incompatibility would make collaboration between the Executive and the Legislature more difficult, this argument seems to be run counter to current trends. On the one hand, public opinion is more averse than in the past to the idea of an individual holding several offices concurrently. On the other, a parliamentarian who becomes a minister while remaining an MP no longer participates fully in parliamentary work. An assembly that loses a dozen of its most experienced members in this way after each election may be considerably weakened.

This is why some European parliamentary regimes have recently made ministerial and parliamentary duties formally incompatible. It is a somewhat "watered down" version of incompatibility because the seat of the member who has become a minister is (temporarily) occupied by a substitute. For example, ministers in Sweden and Belgium (since the 1995 general elections) have their seats restored on resigning from the cabinet. In France, on the other hand, the substitute occupies the seat for the full

term of parliament." In the Netherlands, parliamentarians who become ministers also lose their seats to the candidate who received the next largest number of votes on the same electoral list. However, ministers who resign and are elected to one of the houses before their resignation takes effect may carry out both functions until the resignation is accepted.

(c) Incompatibility with judicial functions

The incompatibility in many countries between parliamentary mandates and judicial functions is also based on the principle of the separation of powers and the need to distinguish between those who make laws (the Legislature) and those who apply them (the Judiciary).

In many countries, this incompatibility applies to the Judiciary as a whole, for example in several countries based on the French model {Algeria, Belgium, France, Senegal, Switzerland) and in Canada, Germany, Mexico, etc. In Israel the principle of incompatibility applies to both civil and religious courts.

In other countries, incompatibility applies only to senior judges. In Austria, it is confined to members of the Constitutional Court, the Supreme Court and the Administrative Court, in Finland to members of the Supreme Court and the Supreme Administrative Court, in Gabon to members of the Supreme Court, and in the Republic of Korea to judges of the Constitutional Court.

The concurrent holding of a parliamentary mandate and judicial office raises no problems in countries as diverse as the United Kingdom (and some other Commonwealth countries), the United States of America and some Scandinavian countries (Denmark, Sweden). It should also be noted that compatibility between the offices of judge and parliamentarian was a characteristic feature of the former socialist countries of Eastern Europe (GDR, Hungary, Romania, USSR) and still exists in some cases (e.g. Latvia).

(d) Incompatibility with other elective offices

In general, nobody may be a member of both houses simultaneously in a bicameral system. This is a logical rule in the light of the theory

⁸⁵ According to Burdcau, in France "(he number of substitutes becoming deputies following the appointment to government office of the person they replace has reached a level that calls into question the representative nature of the Assembly. By the end of the 1977 term, there were 89 substitutes" (Burdcau, G., Hamon, F. and Troper, M., *op. cit.*, p. 565)

underlying bicameralism. Either the second house is there to ensure a "second reading" of legislative instruments, in which case an upper house composed wholly or partly of the same members as the lower house makes little sense, or else the upper house is not a mirror image of the lower house and is supposed to represent specific segments of the population or components of the State (particularly in federal systems), in which case it is equally illogical to allow a person to be a member of both houses concurrently.

In countries as different as Australia, India and the United States of America, parliamentarians are prohibited from serving as a member of both the national parliament and the assembly of a federated state. Incompatibility also exists in Italy and Spain between membership of the national parliament and of a regional assembly. The same rule has applied in Belgium since the direct election of regional and community assemblies (1995), with the exception of the 21 senators appointed by regional and community assemblies from among their members. In Malaysia, on the other hand, membership of the assembly of a federated state is not incompatible with a parliamentary mandate (except for the Speakers of the Senate and the House).

In some member countries of the European Union, a national parliamentary mandate is incompatible with membership of the European Parliament. This rule currently applies in Austria, Belgium, Portugal and Spain. In Greece, an exception is made for the first two members elected from each political party in European elections.

In most cases, parliamentarians may also serve as elected representatives at the local level, although there are some exceptions. In Belgium and Canada, a member of parliament may not concurrently be a member of a provincial assembly. Argentina applies the same rule at both the provincial and municipal levels (as do Cyprus, Egypt, Latvia and the Republic of Korea).

In the past, plurality of elective office remained virtually unchallenged, probably because it was thought to reflect the people's will. In recent years, however, attitudes seem to have changed, and several European countries have tended to set limits on concurrent mandates, while stopping short of outright prohibition. In France, the legislation of 30 December 1985 stipulates that no one may hold more than two of the following elective offices: a national parliamentary mandate, a European mandate, a regional mandate, a departmental mandate, mayor of a

commune of more than 20,000 inhabitants, deputy mayor of a town of more than 100,000 inhabitants, and councillor in Paris.

(e) Incompatibility with private-sector employment and other duties

In order to safeguard the independence of parliamentarians from financial and economic influence and to prevent them from exploiting their mandate in certain professions, many countries have deemed it necessary to extend the scope of incompatibility to include certain private-sector professions and activities.³³

In many countries, a parliamentarian may not be a supplier of goods or services to the State or party to a contract with the State (Australia, India, Philippines, United Republic of Tanzania) or may not be a "public contractor" (Costa Rica). In some countries (e.g. Belgium), a lawyer employed by a public authority may not be a member of parliament.

By the same token, management staff in State-owned companies are excluded from parliamentary office in many countries. In Cameroon and Egypt, this type of incompatibility applies to managers and members of the board of directors of State enterprises; in France it applies to managers of national enterprises and government-owned corporations, State-subsidised companies, savings and lending institutions, companies under contract to the Government, public issue companies and real-estate agencies, in Italy to managers of State or State-subsidised companies, in Belgium to government commissioners dealing with joint-stock companies, and in Senegal to managers of State and State-subsidised companies, savings and lending institutions and companies under contract to the Government. In all these cases, the incompatibility rules apply to certain executive or managerial personnel but not to shareholders in semi-State enterprises.^M

Moreover, in some countries, incompatibility applies not only to managers but also to employees of (semi-)State companies (Japan,

^M Amcller, M., *op. cit.*, p. 68.

⁴ In this connection, an interesting case arose in France: "Ruling in the case of Marcel Dassault, who was the majority shareholder in a number of aeronautical construction companies under contract to the State, the Constitutional Court decided that incompatibility could not be extended to persons who, 'owning a portion of a company's capital, regardless of its scale', exercise the rights pertaining to such ownership. But incompatibility would apply if it was proved that the majority shareholder managed the company either directly or through an intermediary (Decision No. 77-51 of 18 October 1977, Rec. p. 81)" (Burdeau, G., Hamon, F. and Troper, M., *op. tit.*, pp. 566-567).

Republic of Korea, Tunisia) or to permanent advisers to State-owned companies (France).

In a very few instances, no mention is made of the State ownership or partial ownership of a company. In Kuwait, for example, a parliamentarian may not be a manager or member of the board of directors of a company; Egyptian parliamentarians may not be members of the board of a joint-stock company.

Lastly, some countries — especially African countries influenced by French tradition — are particularly suspicious of persons occupying positions in foreign companies or international organisations. In France a parliamentary mandate is incompatible with certain positions conferred by a foreign State or an international organisation, but other countries take this rule still further. In Gabon, a parliamentary mandate is incompatible with any paid employment by a foreign State or an international organisation, in Senegal with the status of a paid official of a foreign or international organisation, and in Tunisia with any office conferred and remunerated by a foreign country. In Egypt, incompatibility applies to all employees of foreign companies.

It should be stressed that these cases of incompatibility with more or less "private" posts are exceptional. Compatibility between parliamentary mandates and private posts remains the rule, firstly because private-sector employment is supposed to present less of a threat to a parliamentarian's independence and secondly because of a general feeling that the creation of a large class of "career politicians" is undesirable.

III. Declaration of personal assets/interests

1. A recent phenomenon

Barely a decade ago, the declaration of assets was a marginal phenomenon that did not even merit a heading in the Inter-Parliamentary Union's publication "Parliaments of the World". Today, at least thirty States have introduced some form of declaration of interests or assets and many others are contemplating a move in that direction. The spread of such declarations is particularly striking in Western Europe: by 1996, all but one of the fifteen member States of the European Union (Luxembourg) had joined the trend.⁵⁵

⁵⁵ "Transparency and Members of Parliaments' Financial Interests in the European Union", Directorate-General I for Research of the European Parliament, W-6 (Rev.), 1996.

The upsurge in declarations of assets is doubtless attributable to the growing need for higher moral standards and greater transparency in politics. Traditional mechanisms such as regulations governing ineligibility, incompatibility and the financing of political parties and electoral campaigns have clearly proved unequal to the task. As a result, declarations of assets are often coupled with a requirement to furnish a list of mandates exercised, especially in countries based on the French model.

Three broad trends are discernible in the systems currently prevailing throughout the world. The first and oldest may be termed the "British trend". It includes not only countries with a British parliamentary tradition such as Australia, Ireland and the United Kingdom but also other European countries such as Germany and Portugal. Then there is the "French trend", which has had a major impact on countries with a French legal tradition (Algeria, Cape Verde, Spain) and also on the new democracies of Central Europe (Hungary, Poland, Romania), some Asian countries such as Japan and some Latin American countries such as Bolivia, Uruguay and Venezuela. Lastly, there is the "Nordic trend" (Denmark, Finland, Norway, Sweden), which is also followed in the Netherlands. These three major trends differ in some respects and overlap in others, as will be seen below.

2. Declaration of interests or assets?

In countries based on the British or Nordic parliamentary traditions, the term "declaration of interests" is more accurate than "declaration of assets". More emphasis is placed on financial and economic connections that might affect members' independence than on the risk of unlawful accumulation of wealth.

The resolutions adopted by the British House of Commons on 22 May 1974 provide for two categories of declaration. The first is ad hoc and does not have to be filed in all circumstances. It stipulates that "in any debate or proceeding of the House or its committees or transactions or communications which a Member may have with other Members or with Ministers or servants of the Crown," a Member must disclose "any relevant pecuniary interest or benefit of whatever nature, whether direct or indirect, that he may have had, may have or may be expecting to have". A further resolution of 13 July 1992 states that "when a member of a committee, particularly the Chairman, has a pecuniary interest which is directly affected by a particular inquiry or when he or she considers that a personal

interest may reflect upon the work of the committee or its subsequent report, the Member should stand aside from the committee proceedings relating to it". On 6 November 1995, the House also decided that "no Member of the House shall, in consideration of any remuneration, fee, payment, or reward or benefit in kind, direct or indirect, which the Member or any member of his or her family has received, is receiving or expects to receive: (i) advocate or initiate any cause or matter on behalf of any outside body; or (ii) urge any Member of either of the Houses of Parliament, including Ministers, to do so by means of any speech, Question, Motion, introduction of a Bill or amendment to a Motion or Bill".⁵⁶

The second category of declaration is, on the other hand, systematic and subject to formal disclosure. It requires Members of the House of Commons⁵⁷, at the beginning of their term (and subsequently upon any important change), to inform the Registrar of Members' Interests of the following:

- Any consultancy contracts under which they accept money or other benefits in exchange for services rendered or advice given in their capacity as Members of Parliament;
- Any financial interests in companies that lobby Parliament;
- Any other special interests that they wish to disclose because they concern matters that might affect how public opinion views the way in which they carry out their parliamentary duties.⁵⁸

An almost identical system was introduced in Australia by resolutions adopted in the House (1984) and the Senate (1994). While the initial oral declaration is virtually a carbon copy of that required under the British system, the written declaration is much more detailed in Australia. Members must declare not only their personal interests but also those of their spouse and dependent children.⁵⁹ Company shares, family and business trusts, immovable property, directorships,

* First report of the Select Committee on Members' Interests, 1990-1991 (House of Commons, 108, 1990-1991, paragraphs 8-16, 24 and 25), quoted in "Transparency and Members of Parliaments' Financial Interests in the European Union", *op. cit.*, p. 5.

-) Members of the House of Lords are not required to make this type of declaration.

⁵⁵ For example, paid directorships of public or private companies, paid employment or positions, professions, clients, financial sponsorships, gifts, overseas visits, payments from abroad, land and property of substantial value or from which a substantial income is derived, shareholdings, etc.

^w In the United Kingdom, the requirement to declare the assets of spouses and dependent children applies only to company shareholdings (under certain conditions), hospitality, gifts and overseas visits.

partnerships, assets and liabilities, savings accounts, bonds and other investments, sources of substantial income, gifts (above a certain value), sponsored visits and any other interests liable to lead to a conflict of interest must all be declared.

Other European countries — Ireland (1995) and Portugal (1993) — have recently decided to introduce the British system of a twofold declaration of interests.

Germany's approach is also similar to that of the United Kingdom in that parliamentarians who have a professional or pecuniary interest in a matter to be discussed in a Bundestag committee must, if they are a member of the committee concerned, declare their interest before the debate begins. Members of the Bundestag and the BundesratTM are not, however, required to disclose their private assets. An indication of activities engaged in or offices held is deemed sufficient; income from declared activities must be specified only if it exceeds certain minimum sums that are fixed periodically.

In the Scandinavian countries and the Netherlands, declarations are also designed essentially to disclose members' interests outside parliament. It follows that they focus on financial and economic commitments and interests rather than on the composition of a member's assets.

In Sweden, for example, deputies must refrain from taking part in debates in the Chamber or in committee meetings dealing with matters in which they themselves or persons with whom they are closely connected have a special interest. If a Swedish parliamentarian decides to make a declaration, it must contain the following information:

- Names of companies in which the member owns shares exceeding a certain value;
- Official name under which immovable assets used for commercial purposes are registered (except for private dwellings);
- Name of employer and type of contract for any non-temporary employment;
- Name of employer and type of agreement for any financial agreement with a former employer giving rise to remuneration during a member's term of office;

TM Some members of the Bundesrat have to file a declaration of assets under the legislation of their respective Lander.

- Name of employer and type of agreement for any financial agreement that enters into effect on completion of a member's term of office;
 - Type of contract and name of company where a member engages in extra-parliamentary activities;
 - Type of contract and name of company where a member serves on a board of directors;
 - Type of contract and name of employer for any public administration or local authority post held other than on a temporary basis;
 - Type of benefit and name of source where a member regularly enjoys material benefits or some form of assistance (secretariat, research, etc.)
- The above information contains no specific figures.⁶¹

In countries that have opted for a "French-style" declaration (Algeria, Cape Verde, Hungary, Italy, Japan, Poland, Spain, Uruguay, Venezuela), members must disclose the composition of their assets down to the smallest detail: immovable property, transferable securities, other movable property such as cars, boats and aircraft, claims, deposits and debts. Moreover, declarations of assets must include not only the member's assets but often those of the community or assets deemed to be jointly held.

3. Who is required to make a declaration?

It should first be noted that declarations are not compulsory in the Scandinavian countries. Individual members may choose whether or not to join the system, but once they do, any declaration must be made in full.

In almost all countries where the declaration of assets is compulsory, the requirement extends to all parliamentarians. Zambia constitutes an exception, however: only ministers and the Speaker and Deputy Speaker

⁶¹ The Danish system is very similar but differs in terms of the details to be supplied. In addition to the categories of information required in Sweden, a Danish member must also declare:

- Gifts from private persons in excess of Dkr 2,000 where the gift is linked to membership of the assembly;
- Travel abroad in cases where the cost is not fully defrayed by the State, the member or his or her party and the travel is linked to membership of the assembly;
- Payments, financial benefits or gifts received from foreign authorities, organisations or private individuals where the gift is linked to membership of the assembly, etc.

Comparable systems exist in Norway and Finland. In Finland, the regime for ministers is far more stringent. While parliamentarians may simply make a voluntary declaration to their assembly at the beginning and end of their terms of office, members of the Government are required by law to submit a declaration and any significant changes in its content to Parliament, which may even hold a debate on the subject.

of Parliament are required to declare their assets. Backbenchers need only declare interests in government contracts.

In some countries, the *ratione personae* scope of the requirement to file a declaration of assets is much broader. Since 1988 in France, for example, not only parliamentarians and the President of the Republic but also members of the Government and elected representatives with executive powers at the regional and local authority level are required to file a declaration of assets.

In the United States, the requirement also applies to Congress staff and to candidates for election to the House and the Senate.

4. When must the declaration be made?

In the Scandinavian countries and those based on the French tradition, declarations are usually made in writing at the beginning and end of a member's mandate: in Algeria, within a month of the beginning of the mandate and within the two months following its completion; in France, within two months of the beginning of the term of office and not less than two months and not more than one month prior to its completion⁶²; in Japan, within 100 days of the beginning of the mandate; in Poland, within 30 days of the beginning of the term and two months before elections; in Sweden, within the four weeks following the beginning and end of the mandate.

Declarations must often be renewed during a mandate, either annually (e.g. by 30 January in Cape Verde, between 1 and 30 April in Japan and by 31 March in Poland) or when significant changes occur (e.g. as soon as a change occurs in Algeria and within 30 days of each major change in Spain). The aim is to facilitate the assessment of changes in members' assets between the date on which they assume office and the date on which the mandate ends and to ensure that they have not accumulated excessive wealth during their mandate by virtue of their elective office.

In countries with a British parliamentary tradition and in the German Bundestag, parliamentarians must declare orally, at the beginning of a debate, any pecuniary or other interest they have in the subject to be discussed. In the light of this declaration, the House may, *inter alia*,

⁶² Or, if Parliament is dissolved or the term ends for any reason other than death, within two months following the end of the term.

decide against appointing individual members to serve on certain committees.⁶¹

5. What body is competent to receive the declaration?

In almost every country where declarations of assets and financial interests by parliamentarians have become a formal requirement, a "register" of such documents is kept.

Declarations are usually made to the Speaker of the assembly and kept in the general secretariat. But records may also be kept by another body: the Auditor General's Department in Belgium, the Integrity Commission in Jamaica; the Parliamentary Commissioner for Standards in the United Kingdom.

In Algeria, declarations are made to the Committee on the Declaration of Assets, which is composed of the First President of the Supreme Court, a representative of the Council of State, a representative of the Auditor General's Department, two elected representatives at the national level appointed from among the members of the Legislature by its President, and the President of the National Law Society.

The addressee sometimes depends on the status of the person making the declaration: in Romania, for example, declarations of assets by the Presidents of the Senate and the Chamber are addressed to the President of the Republic, while declarations by other parliamentarians are made to the President of their respective assembly.

Some countries keep separate registers, one to keep track of changes in parliamentarians' assets and the other to monitor incompatibilities and potential conflicts of interest during a term of office. In France and Portugal, for example, all declarations on MPs' activities and professional commitments are filed with the legislative assemblies, while a register of declarations of members' assets is kept by another body (in France, the Committee on Financial Transparency in Politics, in Portugal, the Constitutional Court).

6. Public or confidential declaration

"The question of whether or not the content of declarations is made public is one of the most controversial aspects of this subject. Those who believe

⁶¹ Contrary to what one might be led to expect, the United States is closer to the French than the British model in this regard. American parliamentarians are merely required to file a written declaration by 15 May each year and within 30 days after the expiry of a term of office; there is no requirement to make an oral declaration before a debate.

such information should be kept confidential base their arguments on the right to privacy (...)" whereas those in favour of public access to declarations "argue that the public good (transparency and moral standards in political life, citizens' right to information and public controls on democratic institutions) cannot be made secondary to private interests" and that "the acceptance of political duties must always entail a certain limitation of the right to privacy".*¹⁴

The different content of declarations goes a long way towards explaining why they are confidential in some countries and public in others.

As a rule, the stronger the emphasis on the composition of assets, the greater the likelihood of confidentiality (France, Poland, Romania, Spain, Uruguay, Venezuela). In France, the Committee on Financial Transparency in Politics is not only responsible for recording and considering declarations, but also for ensuring that they remain confidential and are only communicated at the express request of the declarant or his or her designated representative or in response to an application by a court of law. In Spain, the «private assets of parliamentarians» component of the register of interests is not open to the public, but the rest of the register (activities exercised) may be consulted on request by persons with a proven interest in the matter.

Some countries that require parliamentarians to declare all their assets constitute an exception to the rule of confidentiality. Algeria, unlike other countries based on the French model, publishes declarations by parliamentarians in the Official Gazette. In Hungary, extracts from declarations are made public.

In the case of British- or Scandinavian-style declarations of interests, however, the public usually has access to the register of declarations or else they are published in the form of a parliamentary document in the Official Gazette. In Sweden, declarations are kept in a public database. The information is deleted from the register at the end of the mandate or at any other time at the request of the member concerned. In the United Kingdom, the register is published once a year. It is regularly updated in a loose-leaf version and may be consulted by prior appointment with the appropriate service. In Australia, any citizen may consult the register

^M Transparency and Members of Parliaments' Financial Interests in the European Union, *op. cit.*, pp. 6-7.

subject to certain conditions laid down by the Committee on Members' Interests. However, the part of the register containing data on the assets of spouse(s) and children remains confidential.

The case of the Bundestag is interesting because of the distinction made between public and confidential information. The following information is published: occupation before becoming a member; professional activities during the mandate; donations amounting to more than DM 20,000. The following are deemed to be confidential and are disclosed only to the President of the Bundestag: activities prior to the beginning of the mandate as a member of the executive bodies of companies, businesses or public institutions; consultancy or representation contracts; activities other than the member's profession and parliamentary duties (in particular, the preparation of expert opinions, publications and lectures) provided that the remuneration received does not exceed a certain sum; large holdings in companies with share capital or partnerships, etc.⁶⁵

7. Oversight and sanctions

A distinguishing feature of the Scandinavian countries and the Netherlands is the almost total absence of penalties other than moral sanctions for failure to comply with existing legislation. They thus differ sharply from the majority of countries that have opted for a "French-style" declaration, in which case members who fail to file a declaration of assets are liable to criminal sanctions (a term of imprisonment or a fine) and forfeiture of their mandate.

In France, the Committee on Financial Transparency in Politics monitors changes in members' assets. It keeps the Bureau of the National Assembly or Senate informed of cases in which a Deputy or Senator fails to file either of the two above-mentioned declarations, a transgression that provides grounds for disqualification. The Bureau of the Assembly refers the cases to the Constitutional Council, which rules on disqualification and, where appropriate, declares that the parliamentarian has resigned as an automatic consequence of failure to observe the rules. Non-compliance with the obligation to file a declaration also entails the loss of a member's right to a lump-sum reimbursement of electoral expenses by the State. If

/ibid., p. 7.

the Committee comes across changes in assets that are unaccounted for, it refers the matter to the prosecuting authorities.

In Algeria, there are three types of sanction. First, if the Committee on the Declaration of Assets finds changes in assets that the person concerned is unable to explain (satisfactorily), it mentions the fact in its annual report. Secondly, false declarations entail criminal proceedings. The Committee transmits the case to the competent court, which initiates proceedings. Lastly, failure to file a declaration of assets by the prescribed date entails the institutions of proceedings for disqualification. Failure to do so at the end of a member's term is deemed to be equivalent to a false declaration.

In Romania, if the assets declared at the beginning of a mandate differ substantially from those declared on its completion and if it is clear that certain property or securities could not have been acquired with a member's statutory income or by other lawful means, the assets are subject to inspection. The investigation is carried out by a special committee composed of two Supreme Court judges and a prosecutor from the Principal Prosecutor's Office of the Supreme Court. The request for an investigation may be made by the Minister of Justice or the Principal State Prosecutor, or by parliamentarians themselves if their assets have been the subject of public criticism. Such cases are heard by the Supreme Court. If it is proved that the acquisition of certain assets (or a portion thereof) cannot be accounted for, the Court decides either to confiscate the asset (or portion thereof) or to require payment of a sum equivalent to the value of the asset. If it finds that an offence has been committed, the Court transmits the case to the competent prosecuting authorities, which decide on the appropriateness of bringing criminal proceedings. Where it is established by an irrevocable judicial ruling that the parliamentarian is unable to account for the source of specific assets, he or she is obliged to resign.

In Japan, the Council for Ethics may require members who deliberately break the law to resign, to absent themselves from the assembly for a specified period or to resign from certain offices within the assembly.

Some countries with a French-style declaration have refrained from applying such draconian sanctions (Hungary, Spain, Uruguay). In Hungary, for example, members may not exercise their rights and are deprived of their salary until such time as they make their declaration; an

inaccurate declaration may entail incompatibility proceedings but the member cannot be forced to resign. In Uruguay, the sanctions for failure to file a declaration or for making a false declaration are of a purely moral character.

In the United Kingdom, any member who deliberately fails to file a declaration or to indicate any changes within 28 days, or who furnishes misleading or false information, becomes guilty of contempt of Parliament (see Part Three, Chapter V). "Complaints, whether from Members or from members of the public, that a Member has failed to meet his or her obligations with regard to registration or disclosure of financial interests or has in any other way acted contrary to the rules of conduct laid down by the House, must be addressed in writing to the Parliamentary Commissioner for Standards. If the Commissioner is satisfied that sufficient evidence has been tendered in support of the complaint to justify his taking the matter further, he will ask the Member to respond to the complaint and will then conduct a preliminary investigation. If he decides, after some inquiry, that there is no *prima facie* case, he will report that conclusion briefly to the Select Committee. If he finds that there is a *prima facie* case or that the complaint raises issues of wider importance, he will report the facts and his conclusions to the Committee, who will make a recommendation to the House on whether further action is required."⁶⁶ In 1990, the former Select Committee on Members' Interests upheld a complaint against a Member, who was disciplined by the House (suspension and loss of remuneration for 20 days) and lost his seat in the general election. In 1995, the former Committee on Privileges upheld a complaint against two Members of the House and suspended their mandates for one and three weeks respectively.⁶⁷

In the United States of America, if the Ethics Committee finds that a declaration has not been made or is false, civil proceedings may be brought against the member before the competent district court.

Finally, mention should be made of an original system in force in Poland, where the information contained in declarations of assets is systematically considered by a parliamentary committee, which reports to

⁶⁶ House of Commons, *Manual of Procedure in the Public Business*, 14th edition, p. 61, quoted in «Transparency and Members of Parliaments' Financial Interests in the European Union», *op. cit.*, p. 10.

⁶⁷ *Ibid.*

the Bureau of the Diet. The committee may, if it sees fit, compare current declarations with previous ones (which are kept for six years).^{6*}

IV. Parliamentary immunities⁶⁹

1. Introduction

Michel Ameller rightly notes that "[I]n ancient Rome, the tribunes of the people, who were to some extent the parliamentarians of the day, were held to be sacrosanct and accordingly enjoyed special protection. It was strictly prohibited to attack them or hinder them in the exercise of their functions. Anyone who infringed that prohibition placed themselves beyond the law and could be executed by the first person to come along."⁷⁰

Although today's right to immunity (fortunately) stops short of such action, it is nonetheless based on the same idea: the representatives of the people must enjoy certain guarantees, on the one hand to underline the dignity, gravity and importance of their office and, on the other and more importantly, to give them the peace of mind they need to discharge their mandate. From this standpoint, the institution of parliamentary immunity is undoubtedly imbued with universal and permanent value, although its characteristics and scope differ from country to country.

The different approaches adopted to the protection of parliamentarians by means of parliamentary immunities broadly reflect two different approaches to the protection of human rights.

The idea of a written statement of the rights of the individual vis-a-vis those in power is of Anglo-Saxon origin. "Its first manifestation goes far back in history, to the Magna Carta which the English barons imposed on their sovereign in 1215. It was then necessary to wait until 1627 for the Petition of Rights. The famous *Habeas Corpus* came shortly afterwards, in

^{6*}This type of systematic control by a parliamentary committee is not confined to Poland; it also exists in the Republic of Korea, where the National Assembly Public Official Ethics Committee may examine all declarations of assets, which must be filed with the Assembly's Secretariat by 31 January each year. Unlike the Polish body, however, this Committee comprises not only four members of the Assembly but also five outside experts. If it finds errors in the declarations, the Committee may recommend disciplinary sanctions.

^w In this chapter, we have used information compiled by Mr. Robert Myttenaere, Deputy Secretary General of the Belgian Chamber of Representatives («The immunities of members of Parliaments Constitutional and Parliamentary Information, ASGP, 1998, no. 175, p. 100-137).

⁷¹ Ameller, M., "Human Rights and Parliamentary Immunities» in *Parliament: Guardian of Human Rights*, introductory report to the Budapest Inter-Parliamentary Symposium, Geneva, IPU, 1993, p. 28.

1670., followed by the Bill of Rights of 1689 and the Act of Settlement of 1701."⁷¹ All of these acts confirmed, regularised or developed the rights of the individual vis-a-vis the powers of the day. Their shared feature is that they refer to "common law", i.e. to the traditional rights and freedoms of individuals against the abuse of royal power. "No prerogative was created, Ancient rights were merely confirmed or extended as the scope of the central power became established."⁷²

The historical background in the United States of America is similar. The 1787 Constitution does not contain a declaration of rights in the formal sense. The historic and customary rights imported by the Mayflower Pilgrims had prevailed as a matter of course some time previously and had been incorporated in the 1776 Declaration of Independence. Subsequently, many amendments (especially the "due process of law" amendment of 1868) rationalised and reinforced these rights, which were initially viewed as self-evident, in written form.

The Anglo-Saxon concept of immunities therefore has its roots in the progressive development of custom, which was slowly but continuously consolidated. In this context, "the protection of the individual, whether or not he or she is a parliamentarian, is a natural right and, if by mischance that should not be so, there still remains one last recourse against the encroachment of power: an appeal to justice which has been based since 1215 on the Magna Carta, and which was further specified four hundred years later in the *Habeas Corpus*. It is therefore understandable that the members of the British Parliament have not felt the need to establish specific protection for themselves, since common law is sufficient to prevent and suppress illegal and arbitrary proceedings, arrests and detention."⁷¹ Such a system is clearly only possible if there is fundamental agreement in the country on basic political values.

Events followed a completely different course in France. The 1789 Declaration of the Rights of Man and of the Citizen did not confirm a series of rights that had already been recognised but proclaimed a new universal aspiration that was to prevail by virtue of the triumph of pure reason.

⁷¹ *Ibid.*, p. 21.

⁷² *Ibid.*

⁷³ *Ibid.*, p. 29.

On the one hand, the Declaration of the Rights of Man and of the Citizen and the establishment of the National Assembly were the outcome of a revolution and were not based on broad agreement among large sectors of the population. As a result, special measures were necessary to safeguard the representatives of the people, to ensure their independence, freedom of movement and expression, and to protect them against abuses that prevented them from exercising their mandate. These measures were clearly directed against the Executive.

On the other hand, the National Assembly had assumed a position of superiority in the revolutionary context over the other organs of State and could therefore go further than its British counterpart. On 23 June 1789, for example, the French National Assembly declared that "the person of each deputy shall be inviolable". The novel concept of inviolability thus came into being.

Over the years, the legal and practical implications of the principle of inviolability were streamlined. A clear distinction gradually emerged between acts carried out by parliamentarians in their official capacity and private acts. Two separate categories of immunity — non-accountability and inviolability — took shape. The French model, based on these two components, had the greatest impact, first in European countries and then in the (former) colonies.

We propose to look first of all at the principle of freedom of speech, also known in countries based on the French model as parliamentary non-accountability (section 2), and then to consider parliamentary inviolability (section 3).

2. Parliamentary non-accountability

(a) An established British right

As already mentioned, the history of freedom of speech is inextricably bound up with the constitutional history of the United Kingdom. It developed in parallel with the occasionally fierce and protracted struggle between the House of Commons and the Crown.

The origins of freedom of speech may be traced back to the British Parliament's session in early 1397, when the House of Commons adopted an act denouncing the scandalous behaviour of the court of Richard II, King of England, and the enormous financial burden it entailed. Thomas

Haxe, MP, was tried and sentenced to death for treason as the instigator of an act aimed directly against the King and his court. However, as a result of pressure from the House of Commons, the sentence was not carried out and he was granted a pardon by the King.

This incident led the House of Commons to consider the question of the right of parliamentarians to discuss and deliberate quite independently and freely without any interference from the Crown. Almost three hundred years later, freedom of speech, established as a principle in the House of Commons at the beginning of the sixteenth century, was reaffirmed in Article 9 of the 1689 Bill of Rights, which expressly stipulated that discussions and acts by MPs were exempt from all forms of interference or contestation from outside Parliament.

Today, it is still customary for Speakers, following their election at the start of the new session, to assert their rights before the House of Lords on behalf of the House of Commons, by humbly petitioning that the ancient and uncontested rights of the House of Commons be reaffirmed, particularly freedom of speech.⁷⁴

The majority of Commonwealth countries have been influenced by British tradition and have adopted similar provisions. But the principle of freedom of speech or parliamentary non-accountability is not confined to the Commonwealth. The rule whereby parliamentarians cannot be prosecuted for opinions expressed or votes cast in exercise of their mandates exists in one form or another in almost all other countries (with the exception of Cuba and Kazakhstan). Thus, unlike parliamentary inviolability (see below), we find a large measure of homogeneity in this area, although substantial differences may be encountered in terms of scope.

Parliamentary non-accountability or "privilege" is therefore not only relatively homogeneous but also a highly stable principle throughout the world. Most countries indicate that there have been no recent amendments to the relevant legislation.⁷⁵

⁷⁴ Erskine May, *op. cit.*, pp. 70-74.

⁷⁵ There are some exceptions:

- The Australian Senate has recently adopted a provision whereby a person to whom an adverse reference has been made during a parliamentary sitting may have a response inserted in the minutes;
- In the United Kingdom, an amendment has been made to the Defamation Act, 1996, whereby MPs may renounce their privilege in libel and defamation proceedings. The existence of an individual privilege had not previously been recognised.

(b) *Scope*

The scope of parliamentary non-accountability (freedom of speech) may be viewed from four different angles: *ratione personae* (protection for whom?), *ratione temporis* (when does protection begin and end?), *ratione loci* (protection only within the precincts of parliament or also beyond?) and *ratione materiae* (what acts are covered by non-accountability?).

Ratione personae

Obviously, members of parliament are the prime beneficiaries in the case of parliamentary non-accountability, together with ministers who are also parliamentarians (in countries where the two offices are not incompatible).⁷⁶

In a number of countries — primarily but not exclusively those with a British parliamentary tradition (Canada, Netherlands, Switzerland, New Zealand), "protection is broader and extends to all persons taking part in parliamentary debates (such as ministers, even if they are not members of parliament) or participating in the proceedings». ⁷⁷ This is the case in Australia and the United Kingdom for example, where freedom of speech extends to everybody involved in the proceedings of parliament (officials, witnesses, lawyers, petitioners).⁷⁸ Ireland has recently adopted an amendment to its legislation providing for freedom of speech for witnesses summoned to appear before parliamentary committees. Such witnesses enjoy total immunity and may not be prosecuted for words spoken during committee meetings.

In Kenya, Namibia, Sri Lanka, Zambia and to some extent in Bangladesh, protection also extends to parliamentary officials. In the Philippines, members' assistants are also protected.

In countries that are more influenced by French tradition, non-accountability applies, in principle, only to parliamentarians. It should be noted, however, that, pursuant to the Act of 29 July 1881 concerning freedom

⁷⁶ In some countries, however (Belgium, Guinea), ministers enjoy a special category of non-accountability related to their ministerial office. In Romania, the legal non-accountability regime in respect of the political opinions of parliamentarians is also applicable to the President of the Republic.

⁷⁷ Myttenacre, R., *op. cit.*, p. 104.

⁷⁸ It also applies to debates in committee and sessions of the House of Lords sitting in its judicial capacity.

of the press, French case law recognises that protection also extends to witnesses appearing before parliamentary committees of inquiry.^{7y}

Ratione temporis

In some countries, "members of parliament enjoy protection from the time of their election, on condition that the election is not subsequently declared invalid."^{8w} This is the case in many countries with a French parliamentary tradition (Belgium, Italy) and in many of the new democracies of Eastern Europe (Czech Republic, Estonia, Poland, Slovenia). In other countries (including Mali, Russian Federation), protection is granted after the member's election has been validated. In some cases, the oath-taking ceremony is the point of departure for protection (Argentina, Austria, Bangladesh, Chile, Cyprus, Hungary, India, Malaysia, Mongolia, Mozambique, Namibia, Netherlands, Philippines, Republic of Korea, Sri Lanka, Switzerland, Uruguay).

Freedom of speech applies only during sittings in a number of countries with a British parliamentary tradition (Australia, United Kingdom) and in Egypt, The former Yugoslav Republic of Macedonia, Malaysia and the Philippines. Needless to say, members in these countries enjoy non-accountability only with effect from the first sitting. In many other countries, protection is afforded in all circumstances, regardless of whether parliament is in session. This rule is applied, *inter alia*, by certain Nordic countries (Denmark, Finland, Norway), countries influenced by French tradition (Gabon, Guinea, Italy, Mali, Spain) as well as Austria, Greece, Kenya, Kuwait, Mongolia, Poland, Romania, the Russian Federation, Switzerland, Sri Lanka and Thailand.

In all the cases considered, parliamentary non-accountability ends with the expiry of a member's term of office or the dissolution of parliament. It remains valid, however, for words spoken and votes cast during the exercise of his or her mandate. Moreover, non-accountability is subject to no time limit in the case of parliamentary proceedings and votes that are published in various forms.

^w Paris Court of Appeal, 16 January 1984; "It is considered that the statements of witnesses before a committee of inquiry enjoy the immunity applicable to reports and documents published by order of the National Assembly and the Senate, except for defamatory or injurious statements that have no bearing on the parliamentary inquiry or are made with malicious intent."

^y Myttenaere, R., *op. cit.*, p. 105.

Ratione loci

In most countries, the enjoyment of parliamentary non-accountability is related to the exercise of a parliamentary mandate rather than to the place in which the contested statements were made. The privilege of freedom of speech is therefore not limited in space, since it exists both within and outside parliament.⁸¹ On the other hand, acts that are unrelated to the exercise of a parliamentary mandate are excluded from non-accountability, even if they occur within the precincts of parliament.

In a number of countries (Bangladesh, Cyprus, Egypt, Estonia, Finland, Germany, India, Kenya, Malaysia, Namibia, Norway, Philippines, United Kingdom, Zambia), freedom of speech applies only within the parliament buildings and all other locations are excluded.

In the United Kingdom, for example, "the privilege is limited by a strict definition of 'proceedings in Parliament' confining them to 'everything said or done by a Member in the exercise of his functions as a Member in a Committee of either House, as well as everything said or done in either House in the transaction of parliamentary business'". MPs remain responsible, like any other citizen, for what they do outside proceedings in Parliament, "even where their actions relate to matters connected with their parliamentary functions, such as constituency duties. Thus, letters written on behalf of constituents to Ministers, Government Departments or public bodies would be unlikely to be considered by the courts of law as enjoying parliamentary privilege".*²

⁸¹ *Ibid.*, p. 106.

*: "(...) the House has been very cautious in its privilege decisions and especially in interpretation of the key phrase 'proceedings in Parliament' Forty years ago the House of Commons was prepared to regard political party meetings in the Palace of Westminster to discuss parliamentary business as being attended by Members 'in their capacity as Members' and so close (by inference) to a 'proceeding in Parliament' that unfounded allegations in respect of behavioural such gatherings could be a contempt of the House itself. There seems little doubt that, were such an issue to surface again, a different conclusion would be reached. Some thirty years ago, the Committee of Privileges of the House of Commons concluded (on the basis of precedent) that a letter written by a Member to a Minister on the affairs of a constituent was a proceeding in Parliament: the House took the opposite view, which has since prevailed. In a cognate area, when Committees of Privileges have recommended punitive action against journalists who published information improperly obtained from the private deliberations of committees or refused to identify the sources from which the material was obtained, the House has not been willing to agree. Though the journalists' actions were, on precedents, contempts, the House would not take punitive action unless the leaker of the information, the real offender as Members saw it, could be identified." (Parliamentary Immunity in the Member States of the European Community and in the European Parliament, Luxembourg, European Parliament, 1993, pp. 101, and 104-105.

The restriction in terms of location is sometimes even stricter: in Malaysia and Thailand, the non-accountability privilege is restricted to the floor of the assembly, in Bangladesh and Zambia to the floor of the assembly and committees, in South Africa to words spoken from the rostrum and statements from the floor of the House or in committee.

In Sweden, non-accountability is limited to acts related to normal parliamentary activities, such as the plenary sittings and meetings of the Riksdag's organs (committees, electoral committee, conference of Presidents), but does not apply to the Board of Administration, the auditors, or the committee that checks the validity of ballots.

Ratione materiae

Words spoken from the floor of the house or elsewhere

Statements from the floor of the house or in committee, bills or proposed resolutions, votes, written or oral questions and interpellations are universally viewed as being eligible for protection under the heading of parliamentary non-accountability.

In most countries, the same applies to suspensions of sittings, but there are some exceptions (Australia, Croatia, Czech Republic, Egypt, Gabon, Germany, Ireland, Kenya, Malaysia, New Zealand, Norway, Republic of Korea, Slovenia, Thailand, The former Yugoslav Republic of Macedonia).

While words spoken in the course of activities by political groups also enjoy the protection of parliamentary non-accountability in quite a few countries (Belarus, Belgium, Burkina Faso, Gabon, Germany, Greece, Guinea, Hungary, Mongolia, Portugal, Romania, Russian Federation, The former Yugoslav Republic of Macedonia, Uruguay), this privilege is not recognised in most countries, particularly those with a British parliamentary tradition.

Reproduction of words spoken in parliament

In most countries, a member cannot be held accountable for words or votes recorded in official parliamentary publications (minutes and other records of sittings drafted by parliamentary departments).

Opinions are divided, however, on the question of whether members of parliament may invoke the privilege of non-accountability when they repeat, in the press or other publications, words they have spoken in the

assembly.⁸³ In some countries (Austria, Burkina Faso, Croatia, Greece, Guinea, Hungary, Italy, Mali, Mozambique, Portugal, Romania, Slovenia, Uruguay), protection extends without restriction to the repetition outside parliament of words spoken in parliament. In most countries, however, members cannot claim non-accountability in such situations. In the United Kingdom, for example, MPs repeating words spoken during parliamentary proceedings outside the context of Parliament "would not be protected from actions for defamation, although the Courts would not allow evidence of proceedings within the House to be used in support of an action in respect of other words or actions of a Member outside Parliament".⁸⁴ Verbal or written communications between an MP and a minister, or between two MPs, on subjects with a close bearing on proceedings in the House or in committee would nevertheless generally be considered to fall within the protected ambit of freedom of speech.

Words spoken during debates on radio or television or at political gatherings

In a small number of countries (Belarus, Burkina, Faso, Egypt, Gabon, Greece, Guinea, Hungary, Kenya, Mongolia, Romania, Russian Federation, Uruguay), participation in televised or radio debates and interviews is protected by freedom of speech.

Generally, however, words spoken during debates on radio or television are not protected, although the rule is qualified in some circumstances. According to French case law, non-accountability is not applicable to words spoken by parliamentarians in a radio interview or to reports drafted by parliamentarians in the context of a mission undertaken for the Government.⁸⁵ In Australia, non-accountability is not applicable either to radio or television broadcasts. However, an exception is made for "compulsory"¹ records of parliamentary

*¹ Myttenacre, R., *op. cit.*, p. 107.

⁸⁴ Parliamentary Immunity in the Member States of the European Community and in the European Parliament, *op. tit.*, p. 101.

⁸⁵ Two schools of thought long coexisted in France on the issue of parliamentary non-accountability. According to the first — broader — approach, any political act by a parliamentarian was viewed as forming part of the exercise of his or her mandate. According to the second — more restrictive — approach, only such acts as were necessary for the discharge of the mandate came within the ambit of parliamentary non-accountability. The latter approach was endorsed in 1989 by a decision of the Constitutional Council.

proceedings on radio and television. The Parliamentary Proceedings Broadcasting Act of 1946 affords immunity from judicial proceedings ensuing from the (unedited) broadcasting of parliamentary proceedings by the Australian Broadcasting Corporation. Qualified immunity from prosecution exists in respect of fragmentary records (in the form of extracts), which are deemed to be "privileged" unless the words spoken display malicious intent or are inspired by inadmissible motives (e.g. publicity for political parties or in the context of an electoral campaign, satire or mockery, commercial motives). In Namibia, parliamentary non-accountability does not apply to televised or radio debates, unless they take place "at the request of Parliament". In Poland, non-accountability does not apply to debates or interviews, unless they are "indissociable" from parliamentary proceedings. In Italy, words spoken during an interview may be accorded privileged status if they bear some relationship to parliamentary activities.

Political gatherings are usually excluded from the scope of parliamentary non-accountability, but there are some exceptions (Belarus, Burkina Faso, Egypt, Greece, Guinea, Hungary, Mongolia, Romania, Russian Federation, Uruguay).

"Relative" non-accountability and "qualified privilege"

Some countries occupy an interesting intermediate position. In Switzerland, for example, (absolute) non-accountability is limited to statements in the Federal Assembly. The Federal Chambers may, however, allow (relative) non-accountability, following deliberation in committee, for acts directly related to parliamentary activities such as public talks, debates (on television or radio), publications, etc. This "relative" non-accountability means that criminal proceedings may only be instituted with the authorisation of Parliament (Federal Chambers). In Ireland, "qualified privilege" is granted for unofficial publications of words spoken by members during statements in Parliament. The difference between "qualified" and "absolute" privilege is that the courts and tribunals have jurisdiction in the former case but not in the latter. However, the member may claim privilege as a defence in a trial for libel or defamation. The same type of qualified privilege exists in New Zealand, where it also applies to communications between MPs and the voters in their constituencies.

Written or oral reproduction of parliamentarians' words or writings

Although a parliamentarian may not, as a general rule, be held liable for words or votes recorded in official parliamentary publications, the situation is different when other people reproduce or comment on a member's writings or words orally or in writing.

'This practice is authorised in most countries on condition that the reproduction is accurate and undertaken in good faith.'⁸⁶ Austria's Federal Constitution expressly stipulates that "no one shall be held accountable for publishing true accounts of proceedings at the public sessions of the National Council and its committees. In Germany, the legislation also explicitly stipulates that no one can be prosecuted for having accurately reported what is said at the plenary sessions of the Bundestag and in committees."⁸⁷

In a number of countries with a British parliamentary tradition (Australia, Ireland, New Zealand), a "qualified" privilege applies in such cases (see above). Under this privilege, courts and tribunals have jurisdiction, but privilege may be invoked as a defence in proceedings for libel and defamation.

In Mali, the reproduction of and accurate commentary on speeches by members of Parliament is possible only with their agreement. Publication then becomes the responsibility of the member concerned.*⁸

In a limited number of countries (including Kenya, Malaysia, Netherlands, Poland, the Republic of Korea and Thailand), the privilege of freedom of speech does not extend to written or oral reports of parliamentarians' words or writings.

Restrictions based on the nature of the words spoken

In most countries, parliamentary non-accountability is subject to certain restrictions. Some statements or forms of behaviour are deemed to be inadmissible and are therefore not wholly covered by immunity. Such restrictions are based on the standing orders of parliaments and are designed to ensure the orderly conduct of proceedings. As a rule, the

⁸⁶ Myttenaerc, R., *op. cit.*, p. 111.

⁸⁷ *Ibid.*

^{*} *Ibid.*

presiding officer of the assembly or a parliamentary committee⁸⁹ is responsible for ensuring compliance with the standing orders⁹⁰.

Insults to the Head of State (President, monarch) are not covered by freedom of speech in Australia, Cyprus and Malaysia. In Canada, insults to the royal family are also prohibited. In Cyprus, members are prohibited from showing lack of respect for the Head of State or other authorities during sittings. In Benin, abuse, provocation or threats directed against members of the Government and certain institutions are prohibited.

Some countries, usually those with a British parliamentary tradition (Australia, Belarus, Malaysia, New Zealand), also impose restrictions on criticism of judges and on statements concerning cases pending before a court (*sub judice* cases). "In Malaysia, members of Parliament are not permitted to criticise judges. In Australia, (...) custom requires that debates which could result in a position being taken with regard to pending court cases be avoided unless the assembly considers it appropriate to waive this rule in the public interest. This rule of custom does not appear in Parliament's Standing and Sessional Orders but it is applied and interpreted by the Speaker according to circumstances. In the United Kingdom, the Standing Orders of the House of Commons stipulate that members of parliament may not criticise a judge except through a motion. A member of parliament who does not respect this rule enjoys, however, the protection of privilege. Similar provisions exist in South Africa and Ireland with regard to accusations made against the head of state, members, judges and certain other elected representatives. Such accusations cannot be made during a debate but they can be made in a motion."⁹¹

The dissemination of information concerning closed sittings of parliament seems to fall outside the scope of parliamentary non-accountability in all cases. The same applies to acts such as assault, which are more serious than words. In Denmark, however, it is expressly stipulated that, alongside verbal statements, all "symbolic" actions are covered by privilege.

A number of countries also treat libel and defamation as inadmissible acts (Belarus, Estonia, Hungary, Mongolia, Republic of Korea).

⁸⁹ Egypt: "Ethics Committee"; Ireland: "Committee on Procedure and Privilege"; Kenya: "Committee on Privileges".

⁹⁰ See also Part Three, especially Chapters III (Discipline) and IV (Code of Conduct).

⁹¹ Myttenaerc, R., *op. cit.*, p. 112.

Lastly, the protection afforded by freedom of speech does not apply in some countries (Hungary, Mongolia) where there has been a breach of "State secrecy".⁹²

(c) Degree of protection afforded by parliamentary non-accountability

The degree of protection against prosecution afforded by parliamentary non-accountability differs considerably from one country to another.

In a number of countries, parliamentary privilege is absolute. All forms of judicial proceedings — criminal, civil and disciplinary — are excluded in, for example, Belgium, Canada, Denmark, Egypt, France, Hungary, Italy, Mongolia, Portugal, Switzerland and the United Kingdom. Non-accountability thus precludes the arrest of a parliamentarian or the issue of a summons to appear before a court or tribunal.

In some countries, particularly those with a British parliamentary tradition (India, New Zealand), non-accountability provides protection against civil but not against criminal proceedings. In rare cases, the situation is reversed (Guinea, Slovenia). In Spain, an Act of 1988 extended parliamentary non-accountability to proceedings before the civil courts, but it was annulled by the Constitutional Court as unconstitutional.⁹³

In Norway, non-accountability does not prevent members of parliament from being summoned to appear before the Constitutional Court, which is composed of parliamentarians and Supreme Court judges. It may convict members of criminal offences. To date, however, this procedure has not been applied.

Lastly "in South Africa there is a special legislative provision with regard to witnesses. If they have made statements before the assembly or in committee which, according to the Chair, are complete and truthful, they are provided on request with a certificate. This document obliges courts and tribunals to suspend all civil or criminal proceedings against them on the basis of their testimony to the assembly or a committee, except in cases of perjury."⁹⁴

⁹² In Poland, on the other hand, a member of the Diet who published secret service documents was acquitted by the Supreme Court, which considered that parliamentary non-accountability applied (Decision of the Supreme Court of 16 February 1994, No. IKPZ 40/93, *Orzecznictwo Sadu najwyzszego*. Vol. 3-4 (1994)).

⁹¹ See in this connection Alba Navarro, M., *Prerogativas parlamentarias y jurisprudencia amstitucional*, Madrid, Centros de estudios constitucionales, 1996. 42 p.

⁹⁴ Myttcnaere, R., *op. cit.*, p. 114.

(d) Lifting of parliamentary non-accountability

In some countries, including Belarus, Croatia, Hungary, Mali, Mongolia, Mozambique, Namibia and Uruguay, parliamentary non-accountability can be lifted by a decision of the assembly.

In Germany, non-accountability does not apply to slanderous insults, but members may be prosecuted in such instances only when their parliamentary immunity has been lifted. In Poland, when the rights of third parties are involved (violation of personal rights, slander or defamation), the Diet may lift a member's privilege.

The lifting of parliamentary immunity nearly always requires prior authorisation, usually by a simple majority. In Switzerland, legal proceedings require authorisation by a simple majority of the members of the two Councils constituting the Federal Assembly. In some cases, a special majority is required to authorise the institution of proceedings against a member (in Finland five-sixths of the assembly). In Zambia, immunity is not lifted by the Parliament but by the Speaker.

In other countries such as Belgium, the Netherlands, Norway, Portugal, the Republic of Korea, Romania, Slovenia, South Africa, Spain and Sri Lanka, parliamentary non-accountability is so absolute that it cannot be lifted.

In most cases, parliamentary non-accountability is viewed as a public privilege and individual members are not at liberty to renounce it.⁹⁵ In some countries (Canada, Guinea), members may themselves decide to waive their immunity. In Hungary they may do so only for minor offences. It may be noted in this context that the United Kingdom recently adopted an amendment to the law (Defamation Act, 1996) authorising MPs to waive their privilege in trials for slander and defamation. In Greece, the decision is taken both by the assembly and the individual parliamentarian. The latter may waive his or her privilege in an individual capacity but the decision is not binding on the assembly, which must take its own decision by secret ballot.⁹⁶

In practice, parliamentarians may also waive their privilege in certain cases without following any formal procedure. For example, in countries where parliamentary non-accountability is limited in space to the building

Ibid.

Ibid., p. 115.

that houses the parliament (Ireland, Malaysia), members simply have to repeat their words outside the precincts. In some countries, a member may also waive the right to invoke privilege in the context of a trial.

(e) Proceedings against parliamentarians because of words spoken or votes cast in the exercise of their mandate

Most countries do not bring judicial proceedings against parliamentarians for words spoken or votes cast in the exercise of a parliamentary mandate.

In Canada, the Supreme Court issued a ruling in a case resulting from statements in the assembly from which it could be inferred that a particular law was going to be promulgated. The statements were repeated in a press release. A private business that had lost a contract as a result of the statements brought an action against the persons concerned.⁹⁷ The Supreme Court decided that it was not empowered to consider statements made in Parliament.⁴⁸

In the Philippines, the Supreme Court ruled that a member of parliament could not invoke privilege in the case of charges made in an open letter published in all the newspapers. The letter in question had been written during the parliamentary recess (*Jimenez v. Cabangbang*). In another case resulting from charges made against the Head of State, however, a member of parliament successfully invoked freedom of speech (*Osmena v. Pendatun*, 1960).⁹⁹

Other countries reporting cases concerning freedom of speech include the Czech Republic, Greece, Hungary, Malaysia, Mali, the Netherlands, New Zealand, Poland, the Republic of Korea, the United Kingdom and Uruguay.

Although freedom of speech does not, on the face of it, seem to entail a great many problems of application, it would be rash to conclude that it is recognised in all the world's parliaments. According to the report of the Inter-Parliamentary Union's Committee on the Human Rights of Parliamentarians for the period from 1 January 1977 to 4 February 1993, numerous cases of violation of members' freedom of expression within parliament were laid before the Committee.

Ibid.

Roman Corp. v. Hudson Bay Oil & Gas Co., 1973.
Myttenaerc, R., *op. cit.*, p. 116.

The report mentions, *inter alia*, the case of a parliamentarian who "was charged under the terms of the Law on National Security because of a speech made in the Assembly in which he called for the reunification of the two Republics of (...)"• Parliamentary non-accountability was recognised in article 32 of the Constitution. However, because the parliamentarian had distributed copies of the speech to the press corps several hours before its delivery, the authorities considered that these provisions did not apply». ¹⁰⁰ Several other cases of violations of the freedom of expression of parliamentarians are pending before the Committee. ¹⁰¹

3. Parliamentary inviolability/immunity

(a) *Fear of the Executive*

Like freedom of speech, freedom from arrest is a concept with deep roots in English history. This type of "inviolability", which protects members from arrest and assault, was demanded by the House of Commons as early as the fifteenth century. It was generally accepted in civil cases but protection against the monarch was more limited in scope until the political changes of the seventeenth century gave Parliament overriding authority. "Parliament made several attempts to balance the need for its Members to be free to attend to their duties without fear of arrest against the rights of members of the public in civil causes. Parts of two Acts which sought to strike this balance, the Privilege of Parliament Act 1603 and the Parliamentary Privilege Act 1737, are still on the Statute book." ¹⁰²

While Members of the British Parliament have thus long enjoyed "inviolability" that protects them from arrest, this privilege was soon withdrawn in criminal cases. ^{1M} "The only element which now remains is a duty imposed on the head of the local police force to inform the Lord

^{99M} Report of Mr. Leandro Despouy on behalf of the Inter-Parliamentary Union's Committee on the Human Rights of Parliamentarians (I January 1977 — 4 February 1993), Geneva, IPU, p. 246.

¹⁰¹ See, *inter alia*, the report of the Committee on the Human Rights of Parliamentarians to the 99th Inter-Parliamentary Conference held in Windhoek, 6-11 April 1998, IPU, Geneva, 1998, pp. 33,57,95.

¹⁰² Parliamentary Immunity in the Member States of the European Community and in the European Parliament, *op. cit.*, p. 100.

^{1M} Erskine May, *op. cit.*, p. 75.

Chancellor or the Speaker of any arrest that is followed by detention. If a Peer or Member is sentenced to a term of imprisonment, the court similarly informs the Lord Chancellor or the Speaker. A member can even be arrested in the precincts of the House in respect of a criminal offence."¹¹⁴ Inviolability thus protects a parliamentarian from arrest only in civil cases, i.e. in all cases other than criminal proceedings. While this was no doubt advantageous at a time when imprisonment for debt was not unusual, now that arrest or detention for civil offences is almost obsolete in the United Kingdom^m and most other Commonwealth countries, this type of inviolability serves little purpose. It means, for example, that a writ or summons cannot be served on a Member within the precincts of Parliament without the latter's authorisation.

In France, following the 1789 revolution, it became necessary to guarantee both the non-accountability of parliamentarians for opinions expressed in the exercise of their duties and their inviolability. The latter was recognised in the Decree of 26 June 1790, which guaranteed protection for members of the Assembly against indictment without the latter's authorisation. The 1791 Constitution, which contains the first constitutional provision governing immunity, establishes the basic principle underlying the regime: "[The representatives of the Nation] may, in the case of criminal offences, be arrested *in flagrante delicto* or on presentation of an arrest warrant; but the Legislature shall be notified thereof forthwith; and the proceedings may not continue until the Legislature has decided whether or not the charge is founded." As already stressed, the relatively broader scope of parliamentary inviolability in France is closely bound up with the pre-eminent position secured by the National Assembly through the revolution and with fear of the Executive, which was ubiquitous on the continent. It was this fear that gave rise to the principle whereby responsibility for establishing whether proceedings are fair and well-founded and not attributable to persecution on political or personal grounds lies with a committee that reports to the Assembly.

¹⁰⁴ Parliamentary Immunity in the Member States of the European Community and in the European Parliament, *op. cit.*, p. 100. In 1815, the House of Commons Committee on Privileges stated that the arrest of a Member had not violated parliamentary privilege, since he had been convicted of an indictable offence — even though he had been arrested within the Chamber itself.

^m Erskine May, *op. cit.*, p. 79.

(b) *Three major trends*

Parliamentary immunity, defined by R. Myttenaere as the protection of members of parliament against civil and/or criminal proceedings for acts other than those undertaken in pursuance of their parliamentary duties¹⁰⁶, is recognised in the vast majority of countries, but three major trends are discernible.

In a few countries (Grenada, Malaysia, Namibia, Netherlands, Norway, Suriname), ordinary law is deemed sufficient to protect all members of society, including parliamentarians. These countries thus recognise freedom of speech (see parliamentary non-accountability above), but their parliamentarians do not enjoy freedom from arrest (inviolability) in either criminal or civil proceedings. In the Netherlands, for example, an 1884 Act equates members of parliament with ordinary citizens in terms of prosecution and conviction for offences under ordinary law. On the other hand, jurisdiction in respect of offences committed by parliamentarians in connection with the exercise of their mandate lies with the Supreme Court (*Hoge Raad*).

Other countries tend in practice to follow a similar line, taking the view that inviolability cannot be allowed to obstruct the course of criminal justice. In the United Kingdom, for example, inviolability is limited in principle to civil cases in order to prevent arrest during a session or during the 40 days preceding or following a session. As the only case of arrest envisaged — enforcement against the person (arrest of a defaulting debtor) — was abolished in the nineteenth century, inviolability in this sense no longer serves any purpose. British parliamentarians are therefore subject to ordinary law, on condition, however, that the Speaker is notified of any proceedings brought against a member and may intervene if there has been an abuse of authority.

Most Commonwealth countries follow British practice. In Australia, for example, inviolability is limited to protection against arrest in civil cases and exemption from the obligation to appear before a court when Parliament is sitting and from jury service. In South Africa, a parliamentarian cannot be compelled to appear in court as a witness or defendant in civil cases being heard at a venue other than that of the seat of Parliament.

In a third group of countries, the risk of parliamentarians' freedom being obstructed by unjustified measures is more clearly discernible, the tendency being to focus on criminal proceedings, in which the latitude given to members of the judiciary or administrative officials may occasionally give cause for concern.¹⁰⁷ Under these circumstances, there are two possible methods of providing protection to members of parliament.

The first consists in giving priority to ensuring that parliamentarians can take part in parliamentary proceedings. Their arrest on the way to or from parliament or within its precincts must therefore be formally prohibited. This is a very rigorous and narrow interpretation of the concept of inviolability, restricting its impact to the minimum. It is applied, for example, in Norway and Ireland (but protection extends to arrest for acts committed by MPs before they were elected to parliament),

The second method consists in extending protection by introducing an effective procedure that nevertheless avoids giving the impression that a major privilege is involved. In a few rare cases (Andorra, Colombia), this procedure takes the form of a judicial privilege, the parliamentarian's case being heard by a different (and usually higher) court than the one that would normally have jurisdiction in such cases. In Colombia, parliamentary inviolability as such does not exist, but the Supreme Court of Justice has sole authority to investigate and try deputies and senators.^{im} The usual procedure, however, is to prohibit all cases of arrest or prosecution without the express authorisation of the assembly to which a parliamentarian belongs. This is basically the kind of system that we propose to consider below.

(c) *Scope*

Ratione personae

In the vast majority of cases, inviolability applies only to members of parliament. In countries with a federal structure, it applies in principle

¹⁰⁷ Ameller, M., *Human Rights and Parliamentary Immunities*, *op. cit.*, p. 32.

¹⁰⁸ A similar privilege exists in some cases alongside traditional inviolability, for example in Spain (judgement by the Criminal Chamber of the Supreme Court) (a similar provision exists in Romania).

both to members of the federal assembly/assemblies and to members of the parliaments of federated entities.^{1(w)}

Countries in which inviolability extends to persons other than parliamentarians may be divided into two broad groups.

In countries with a British parliamentary tradition, immunity — whose limited scope we have already noted — protects both those who testify before a parliamentary committee or an assembly (Australia, India, Kenya, New Zealand, Zambia) and certain officials of the parliamentary institution (Australia, Bangladesh, India, South Africa, Zambia).¹¹⁰¹ⁿ

In other countries, inviolability extends to other office bearers such as the head of State (Belgium, Romania, Switzerland (the Chancellor), The former Yugoslav Republic of Macedonia), ministers (Belgium, The former Yugoslav Republic of Macedonia) and judges of certain courts (Slovenia, Switzerland (Federal Councillors, Judges of the Federal Court), The former Yugoslav Republic of Macedonia). In Spain, the Office of the Public Prosecutor is also covered to some extent.

Ratione temporis

In a large number of countries, members of parliament enjoy immunity from the day of their election (or in countries where not all members of parliament are elected, for example in Egypt, from the day of their appointment). As a result, elected representatives in these countries enjoy parliamentary immunity even before taking the oath. In other countries, immunity does not come into effect on the day of election but on the day the oath is taken (or occasionally on the day of validation of their mandate, e.g. in Croatia).

It is difficult to see any logic in the preceding distinctions. Thus some countries with a British parliamentary tradition have opted for the day of election (Australia, India) and others for the day when the oath is taken

^{1m} It should be noted, however, that in Belgium protection is regulated by a federal constitutional provision, and that in Germany the inviolability of members of Lander parliaments is regulated by their respective constitutions.

¹¹⁰ Myttenaere, R., *op. cit.*, p. 119.

¹¹¹ Officials of the British Parliament do not enjoy immunity in their own right, but the issue of a summons to a person employed by Parliament or a committee to appear or testify before a court would be viewed as contempt of Parliament.

(Bangladesh). The same applies to the group of countries whose parliamentary system is based more on French tradition.¹¹²

The situation is similar as regards the relationship between inviolability and sessions of parliament. In some cases, members enjoy inviolability only during the session. It follows that, within one session, parliamentarians are deprived of this privilege when parliament is in recess (Philippines, Republic of Korea, Switzerland, Thailand).³ In practice, however, there is often no gap between the end of one session and the beginning of the next, so that the distinction is largely formal (cf. Belgium, United Kingdom). France has acted in consequence: since the 1995 revision of the Constitution, the duration of protection is no longer linked to sessions of Parliament.

In most countries, inviolability covers the entire mandate and may even be prolonged for a period before or after the session. The Czech Republic goes a step further: inviolability applies, following the completion of a parliamentarian's mandate, to all criminal offences committed by the Deputy or Senator for which the relevant assembly refused to authorise proceedings!⁴

Where proceedings have already been instituted when a parliamentarian acquires immunity, very many countries refrain from suspending immunity on that account.

In some countries (Finland, Philippines, Sri Lanka), the proceedings take their course and the individual concerned is tried under ordinary law. The same rule is applicable in other countries provided that a certain stage has been reached in the proceedings. In Estonia, for example, the following distinction is made: where a person has already been committed for trial in a criminal case, the proceedings continue as for any other citizen; where a person has not been committed for trial before election day, he or she may invoke immunity.

In a few rare instances, proceedings in progress continue unless the assembly demands their suspension (Poland). In some cases, however, the assembly can request suspension only at an advanced stage in the

"- Myllenaere, R., *op. tit.*, pp. 119-120.

¹ In New Zealand and India. For example, freedom from arrest in civil cases begins 40 days before and ceases 40 days after the session, while in Bangladesh it begins seven days before and ends seven days after the session. It should be borne in mind, however, that these are Commonwealth countries applying a very limited "British" version of inviolability.

¹¹⁴ Myllenaere, R., *op. cit.*, p. 120.

proceedings, more specifically in order to suspend (temporarily) the detention of members of parliament or proceedings against them before a court or tribunal (Belgium)."⁵

In most cases, however, judicial proceedings cannot be pursued without the explicit authorisation of the assembly. This rule applies in countries as diverse as Denmark, Germany, Greece and Switzerland. "Moreover, certain constitutions explicitly stipulate that the assembly must be informed at the beginning of the session of any proceedings against one or more of its members (Kuwait)". Here again, "it is the Czech Republic which goes furthest: if the assembly does not authorise the continuation of proceedings against one of its members for an act committed before his or her election, all proceedings are absolutely prohibited."⁶

Ratione loci

As a rule, the place where an offence was committed by a member of parliament is of no relevance from the point of view of parliamentary inviolability. It should be recalled, however, that in some countries with a British or Scandinavian parliamentary tradition, the question of location plays a role in terms of the scope of privilege (protection against arrest solely on the way to or from parliament or in the precincts of parliament: Ireland, Norway, Zambia).

Ratione materiae

The application of parliamentary inviolability is generally limited to criminal proceedings and does not even apply to all criminal cases.

However, countries with a British parliamentary tradition belong to a special category in this regard because inviolability is never applicable to criminal or disciplinary matters and only very limited protection is afforded in civil cases.

In rare cases (e.g. Guinea), inviolability is applicable to all proceedings, whether criminal, civil or disciplinary.

¹⁻⁵/&</., p. 121.

⁶*Ibidl.*

Restrictions based on the nature of the offence

Leaving aside cases of *flagrante delicto*, we find a wide range of restrictions based on the nature of the offence.

To begin with, some States make no distinction in terms of the nature or gravity of the offence. This group includes not only a number of parliamentary systems based on the French model (Belgium, Chile, France, Italy, Spain and Uruguay), but also countries such as Croatia, the Czech Republic, Estonia, Finland, Malaysia and Mozambique.

Among countries in which certain offences are not covered by parliamentary inviolability, a distinction may be made in terms of the nature/seriousness of the offence.

Some countries clearly base themselves on the principle that certain offences are so serious that the perpetrator cannot be granted immunity.⁷ Thus, criminal offences constitute an exception in many countries with a British parliamentary tradition (e.g. Kenya). In other cases, an exception is made for offences that are probably viewed as particularly shocking, for example high treason in Belarus and Ireland (where the same applies to felonies and breaches of the peace).^{11K} Libel and defamation also sometimes constitute an exception (Belarus). In some cases, a distinction is made on the basis of the term of imprisonment that may be imposed for a particular offence (in the Philippines no protection exists for offences punishable by more than six years' imprisonment; in Sweden protection exists only if the offence is punishable by less than two years imprisonment and the member of parliament has not acknowledged his or her guilt).

Other countries take the contrary view that immunity should apply in serious cases and not for minor offences.⁹ They doubtless consider that proceedings in serious cases are particularly likely to affect the exercise of the parliamentary mandate. In these countries, civil offences (Denmark, Gabon, Republic of Korea, Slovenia) and/or petty offences (Mali) are not covered by privilege. In Poland, all offences entailing civil liability and criminal or administrative liability are excluded.

⁷ *Ibid.*, p. 123

^{11K} //W., p. 124

Freedom from arrest only or also from committal or being summoned to appear before a court?

In some countries, inviolability precludes all legal proceedings. The Romanian Constitution, for example, stipulates that members of parliament "cannot be detained, arrested, searched or prosecuted for criminal or petty offences without the authorisation of the Chamber concerned, after a hearing, save in cases *offlagrante delicto*" In Poland, inviolability is applicable to all stages of criminal proceedings, thus covering all preliminary measures (such as examination of a suspect, service of a summons, taking into custody or delivery of a search warrant), all stages of judicial proceedings and the enforcement of penalties.

In most countries parliamentary immunity is less comprehensive and only offers protection against arrest (or various forms of deprivation of liberty) and/or committal or being summoned to appear before a court.¹²⁰

Protection against arrest is the most widespread form of immunity. In Argentina, for example, no member of parliament may be arrested without the authorisation of the assembly, but parliamentarians enjoy no protection whatsoever at any stage of legal proceedings (up to and including conviction).

The definition of "arrest" may vary greatly from one country to another.¹²¹ The provisions applied in Germany are the most explicit in this context: immunity precludes any measure restricting liberty, including all forms of detention such as the service of a warrant to bring a suspect before an investigating judge or a compulsory residence order, civil imprisonment, police custody or alternatives to imprisonment, house arrest or any restrictions on freedom of movement. In Belgium, on the other hand, "arrest" is defined solely as judicial arrest which comprises both arrest in enforcement of a judgement and detention on remand (pre-trial detention). This term does not, therefore, cover arrest undertaken in

¹²⁰ Among these countries. Belgium is a special case in that measures of enforcement requiring the intervention of a judge can only be ordered by a judge specially designated for that purpose (the First President of the Court of Appeal). Moreover, Belgium is apparently the only country where certain measures of investigation require the presence of a representative of the assembly: searches or seizure require the presence of the President of the assembly concerned or a member designated by the President. This rule applies not only to searches and seizure within the precincts of Parliament but to any such measures undertaken in the context of an investigation of a parliamentarian. (Myltenaere, R., *op. cit.*, p. 125).

¹²¹ In countries with a British parliamentary tradition, protection is confined to arrest in civil cases (Australia, India, Kenya, United Kingdom, Zambia), while in other countries it is confined to arrest on the way to or from parliament or within its precincts (Ireland, Norway).

execution of a warrant to bring a suspect before an investigating judge or administrative arrest by the police for preventive purposes and to keep the peace (the police may therefore take a parliamentarian who causes a disturbance on the public highway into custody for 12 hours). There is a comparable regulation in Slovenia, where immunity protects against arrest and detention but not against other forms of deprivation of liberty that may be ordered during an investigation. In Finland, immunity protects against arrest, detention and orders prohibiting travel.¹²²

In other countries, the lifting of a parliamentarian's immunity is a prerequisite not only for arrest but also for committal and the service of a summons to appear before a court, but only in criminal cases (Belgium, Croatia, Egypt, Gabon, Germany, Poland, Romania, Uruguay). It should be noted that Belgium requires not only prior authorisation by the assembly before a parliamentarian may be summoned, but also that the summons be issued by the Office of the Public Prosecutor. A member of parliament cannot therefore be directly summoned by a party claiming damages during a session of Parliament.

(d) *Parliamentary inviolability and flagrante delicto*

In most countries where parliamentarians enjoy protection against arrest in criminal proceedings, an exception is made for cases of *flagrante delicto*.^{12*} The notion is sometimes interpreted somewhat broadly. In Germany, for example, parliamentarians cannot invoke immunity if they are arrested the day after the offence is committed.

In applying the concept of *flagrante delicto*, a distinction is sometimes made in terms of the nature or seriousness of the offence. In Estonia, for example, inviolability still applies as a rule even if the parliamentarian is caught in the act of committing an offence. If it is a serious criminal offence, however, certain measures may be taken before Parliament suspends the MP's immunity. In Greece, parliamentarians do not enjoy inviolability if they are caught in the act of committing a felony. It follows that prior authorisation by Parliament is required for offences or misdemeanours other than felonies, even in cases of *flagrante delicto*. In Portugal, parliamentarians lose their immunity only in cases of *flagrante*

¹²² Mylienaere. R.. *op. cit.*, pp. 125-126.

^{12*} By *flagrante delicto* we mean any offence in the process of being committed or just committed.

delicto involving a crime punishable by a prison term of more than three years (in Finland more than six months, in the Philippines more than six years and in The former Yugoslav Republic of Macedonia more than five years).

In some countries, parliamentarians may be arrested in cases of *flagrante delicto* but the assembly's authorisation is required to keep them in pre-trial detention (Czech Republic, Hungary, Slovakia). Swiss law stipulates that, in cases of arrest *in flagrante delicto*, not only the assembly but also the individual concerned may authorise his or her own detention.

It is generally accepted that *flagrante delicto* is a logical restriction on parliamentary inviolability. It entails certain risks, however, as it may serve as the ideal loophole for arresting a parliamentarian protected by parliamentary immunity. For example, the report of the IPU Committee on the Human Rights of Parliamentarians refers to the case of two opposition members convicted by the *Flagrante Delicto* Court of an unspecified country for taking part in an anti-government demonstration that started out peacefully but degenerated and led to acts of violence. By virtue of their mere involvement in the demonstration, the two parliamentarians were deemed to be co-perpetrators of the offences and were convicted under the *flagrante delicto* procedure, without prior lifting of their parliamentary immunity.¹²⁴

(e) *Lifting of immunity*

Very few countries prohibit the lifting of parliamentary immunity. Not surprisingly, they include the countries where the scope of immunity is particularly limited, for example countries with a British parliamentary tradition, in which effective immunity consists solely of exemption from the duty to testify and/or protection against arrest in civil proceedings (Australia, India, South Africa, United Kingdom) or protection against arrest on the way to or from parliament or within its precincts (Ireland, Norway). These countries rightly consider that inasmuch as immunity is limited to its simplest form, no exception whatsoever may be tolerated.¹²⁵

¹²⁴ Report by Mr. Leandro Despouy on behalf of the Inter-Parliamentary Union's Committee on the Human Rights of Parliamentarians (I January 1977 — 4 February 1993), Geneva, IPU, p. 249.

¹²⁵ Only The former Yugoslav Republic of Macedonia applies a more extensive form of immunity (protection against detention) without making any provision for its lifting (Myttenaere, R., *op. tit.*, p. 127).

R. Myttenaere emphasises that immunity can be lifted in most countries. On the whole, procedures for the lifting of immunity are broadly similar. Differences occur mainly in terms of the authority empowered to file a request for the lifting of immunity, the possibility of opting to waive one's immunity and the possibility of filing an appeal against the decision to lift immunity.¹²⁶

What authority is competent to lift immunity?

Very few countries (Chile, Cyprus, Guatemala, Samoa) deviate from the rule that parliament alone is competent to lift the immunity of its members. In Chile, the National Congress is not empowered to lift immunity. The relevant Court of Appeal, sitting in plenary, is the body responsible for authorising prosecution. A deputy may lodge an appeal against its decision with the Supreme Court. Once the Court of Appeal states, in a final judgement, that grounds exist for the institution of legal proceedings, the mandate of the deputy concerned is suspended and he or she is committed for trial before the competent judge. The Constitution of the Republic of Cyprus stipulates that legal proceedings, arrest or detention must be authorised by the Supreme Court.

In almost all other countries where prior authorisation is required for certain legal proceedings, the assembly is the competent authority. In exceptional cases, authorisation may be given by the Bureau of the assembly, particularly in countries with a French parliamentary tradition (Burkina Faso, but only when Parliament is not in session, France and Gabon), or even by the presiding officer (Thailand, Zambia).

Who can request that immunity be lifted?

In many countries, the lifting of immunity must be requested by the office of the public prosecutor. In France, for example, the request is made by the Principal State Prosecutor to the competent court of appeal. Similar provisions exist in Belgium, in French-speaking African countries such as Gabon or Mali, and in Poland and the Russian Federation.¹²⁷ In some cases, the request to the assembly is filed by the Minister of Justice (his or her rank in the hierarchy being immediately above that of the Principal

^{2h} *Ibid.*

⁷ *Ihui.p.* 128.

State Prosecutor, for example in France). In other cases, the Principal State Prosecutor applies directly to Parliament (Belgium).

In some countries, the competent court must request the lifting of immunity (Uruguay, Switzerland). In some cases this is the Supreme Court itself (Spain). In such cases, the court applies directly to the assembly. In other countries, the request must come from one or more members of parliament (Burkina Faso) or from the Minister of Justice (Burkina Faso, Romania).¹²⁸ The assembly itself is also sometimes empowered to file such requests (Denmark, Thailand).

Germany provides for a whole array of procedures. The request may come from:

- The Office of the Public Prosecutor, the courts, bodies responsible for ethical oversight in public law and bodies responsible for ensuring compliance with professional codes of conduct;
- The courts in the case of private-law proceedings;
- Creditors in the case of coercive execution proceedings;
- The Committee for the Scrutiny of Elections, Immunity and the Rules of Procedure.

The Office of the Public Prosecutor and the courts address their requests to the President of the Bundestag through administrative channels (Federal Ministry of Justice). Creditors can apply directly to the President of the Bundestag.^{121*}

Can individual parliamentarians waive their immunity?

In most countries (and invariably in countries with a French legal tradition), inviolability is a matter of public policy and cannot be waived by individual parliamentarians,

This is not the case in other countries (Greece, Poland, Thailand), where members themselves can apply for the lifting of immunity. In Switzerland, parliamentarians cannot waive their own immunity in criminal proceedings relating to offences connected with their official activities or status. However, they may do so for felonies or misdemeanours unrelated to the exercise of their mandate.¹³⁰ The Philippines goes a great deal further in this regard: immunity is viewed as

¹²⁸ *ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*, p. 129.

a personal privilege which members of parliament, and they alone, can waive either explicitly or by deciding not to invoke it under the relevant circumstances.¹³¹

Procedure

The scope of this study precludes us from listing all procedural differences relating to the lifting of immunity. Moreover, despite the apparent diversity, broad similarities are also discernible.

In the vast majority of cases, applications for a waiver of immunity must be addressed to the presiding officer of the assembly, who informs the assembly of the request. The application is considered either by a special committee of the assembly (the Prosecution Committee in the Belgian Chamber of Representatives, the Immunities Committee in the German Bundestag, the Standing Orders Committee in Poland, the ad hoc Committee in Chad, etc.), by a standing committee with legal jurisdiction (the Justice Committee in the Belgian Senate and Ethiopia) or by the Bureau of the assembly. In the French National Assembly, for example, the Bureau authorises the lifting of immunity (a delegation of the Bureau conducts an investigation and makes proposals to the full Bureau).

In most cases, the above-mentioned bodies meet in closed session and report to the plenary of the assembly, which votes on the action to be taken.

In some cases the decision is, so to speak, delegated to a committee, subject to reservations. For example, the Immunities Committee of the Bundestag can be explicitly authorised to take a provisional decision which is communicated in writing to the members of the Bundestag. If this provisional decision remains unopposed for seven days, it acquires the status of a Bundestag decision. Otherwise, the plenary of the assembly is required to take an explicit decision.¹³²

There are major differences in the majority required to lift the immunity of a member in a plenary sitting of the assembly. In most countries, a simple majority is required. In Burkina Faso, however, immunity may be lifted by just one-third of the members (when the parliament is in recess, the decision is taken by the Bureau rather than the plenary). In other countries, a larger

¹¹ *Ibid.*

¹³² *Ibid.*, p. 130.

majority is required to lift immunity: two-thirds in Poland, Romania and Uruguay and at least five-sixths in Sweden.

In some countries, the member concerned is automatically given a hearing by the competent committee and may be assisted by another member (Poland) or by a lawyer. In other countries (Belgium, France), the member may request a hearing. In France, it has become the custom for a delegation of the Bureau to hear the deputy concerned.

In Spain, the grounds for any decision to lift immunity must be specified and they must be in conformity with the case law of the Constitutional Court.

Appeals against decisions to lift immunity are allowed only in very rare cases. In Austria, the member concerned may lodge an appeal with the Constitutional Court.¹³³

As a rule, an application to lift inviolability is not time-bound. Nevertheless, in some countries, the application lapses at the end of the current session of parliament (for example in Poland, Romania and Thailand). Where a member is re-elected, most countries require that the procedure be launched anew (e.g. Germany).

Can the assembly that lifts parliamentary immunity impose certain conditions on the arrest or proceedings?

Once immunity has been lifted, the principle of the separation of powers prevents the Legislature almost everywhere from requiring the Judiciary to respect certain conditions in the exercise of its jurisdiction. The assembly may accept or reject a proposed investigation, but it may not impose conditions on its conduct.

While an assembly is therefore unable, as a rule, to impose conditions on the arrest of a parliamentarian or the conduct of proceedings, a 'partial' lifting of immunity is nevertheless possible in certain countries. Thus, in Belgium the assembly may partially approve an application to lift immunity, for example by authorising committal for trial but not arrest.¹³⁴ [n France, the Bureau of the Assembly rejects or authorises specific measures of investigation on a case-by-case basis. Special mention should be made of Switzerland, where immunity guarantees only that a

¹³³ *Ibid.*

¹³⁴ *Ibid.*, p. 131.

parliamentarian may attend sittings. The member may therefore request that the assembly revoke a summons for major legal proceedings.

Can the assembly suspend the proceedings or detention?

Assemblies in most countries are not empowered to suspend the detention of parliamentarians or proceedings against them. Suspension is possible, however, in a number of countries with a French legal tradition (Belgium, Burkina Faso, France, Gabon, Guinea, Mali) and in Austria, Croatia and Germany. According to R. Myttenaere, one or more members of the French National Assembly may request the suspension of proceedings or detention in a letter to the presiding officer. The Assembly itself, rather than the Bureau, decides whether to act on the request, which is first referred to a committee. After hearing the originator of the request and the member concerned, the committee reports to the full assembly which, following a brief debate, decides by a simple majority whether or not to suspend the proceedings or detention for the duration of the session. The German Bundestag can also suspend legal proceedings, detention or any measure aimed at deprivation of liberty by a simple majority, thereby precluding prosecution for the remainder of the session. In Belgium, there are two possible procedures for suspension. On the one hand, the assembly, acting at the request of the parliamentarian concerned, may decide by a two-thirds majority of the votes cast to order the suspension of an investigation for which prior authorisation is not required at any stage in the proceedings. On the other hand, the assembly may decide on its own initiative by a simple majority to suspend the detention of members or legal proceedings against them (if they were detained or prosecuted when parliament was in recess or in cases *offlagrante delicto*).¹⁵

(f) Right of a parliamentarian held in custody to attend sittings of parliament

In most countries, a parliamentarian who is serving a sentence or has been remanded in custody pending a court judgement is not authorised to attend sittings of parliament.^{13,1} This often occurs because no provision has been

^x*Ibid.*.p. 132.

¹* *Ibid.*

made for such circumstances and ordinary law is therefore applicable (Belarus, Finland, Italy, Poland).¹³⁷

Only a few countries allow a member serving a prison sentence or remanded in custody to attend sittings (Greece, Mali, Thailand). The Greek Parliament operates on the principle that, inasmuch as members of parliament have not been deprived of their political rights, they may be authorised to leave prison to attend meetings of the assembly. In Mali, parliamentarians retain their status until a final judgement has been handed down. Until then, they can fully exercise their prerogatives as members of parliament.¹³⁸

V. Rank in the hierarchy

1. Rank in the hierarchy within parliament

A number of concepts must be defined before we address the question of the rank held by members of parliament within the hierarchy of their assemblies.

In most parliamentary regimes, the basic legislation clearly establishes the principle of the equal status of parliamentarians. This equality stems from their election on the basis of the uniform principles laid down in electoral legislation. As a result, distinctions in terms of the rights and duties of parliamentarians in pursuit of their mandate are generally prohibited by the Constitution and/or other legislation.

However, this principle of equal status does not preclude the establishment of distinctions for reasons of protocol. An order of precedence is necessary in any social structure for both practical and representational reasons. While the right to question a minister cannot be the prerogative of particular parliamentarians, it is a fact of life that all parliamentarians cannot be seated in the front row at official ceremonies outside parliament. Hence the need to lay down objective rules *in tempore non suspecto* to forestall disputes and hence the existence of some order of precedence in all the world's parliaments.

¹¹⁷ It should be noted that in some countries members of parliament sentenced to a specific term of imprisonment (over one year in the United Kingdom; over six months in Ireland) are automatically disqualified and compelled to resign. It obviously follows that they may no longer attend sittings.

¹¹⁸ Myttenaere, R., *op. cit.*, p. 133.

As a rule, two types of criterion — office held and seniority — are used to establish the order of precedence of parliamentarians within the assembly.

(a) *Precedence based on office*

The first criterion in virtually all parliaments is based on members' responsibilities and offices within the assembly.

The primacy of the presiding officer is universally recognised in all the world's parliaments, as G. Bergougnous demonstrates in detail.¹³⁹ He adds that primacy is not confined to cases in which the presiding officer, like the British Speaker, personally embodies the authority of the House. Even where such authority is vested in a collegiate body (Bureau, Presidium, Committee of Elders, Council of the Presidency), the primacy of the speaker remains unchallenged.¹⁴⁰ In countries with a French legal tradition, offices held in a collegiate governing body, where such a body exists, usually serve as the basis for the order of precedence. In many countries, the presiding officer is followed by the deputy presiding officers and the secretaries or clerks.

In addition to offices in a collegiate body, other offices such as president of a group or chairperson of a committees are also taken into consideration in the establishment of an order of precedence. In the French Senate, for example, the members of the Bureau, former Prime Ministers, presidents of political groups and chairpersons of standing committees (ranked by seniority) are followed by a whole series of other offices¹⁴¹ which take precedence in the order of protocol over "ordinary" senators, who are in turn ranked according to seniority and sometimes age.

Many other countries adopt the same approach, but some operate a far more complex ranking system. For example, the National Council of

¹³⁹ Bergougnous, G., *op. cit.*, pp. 35-37.

¹⁴⁰ There is no case in which joint precedence is conferred on a collegiate body to the detriment of the presiding officer. However, in the Swiss Council of States, members of the Bureau who aspire to the office of President must follow a five-year career path from Deputy Teller to Second Teller, First Teller and Vice-President, each office being held for one year. (Bergougnous, G., *op. cit.*, pp. 36-37).

¹⁴¹ The Rapporteur General of the Finance Committee, the delegate of the administrative meeting of senators who is not a member of any group, the President of the European Delegation, the President of the Planning Delegation, the President of the Office responsible for making scientific and technological choices and senators who are former ministers (ranked according to the date of their first election to the Senate).

Slovakia identifies no less than eight different ranks: the President of the Council, the Vice-Presidents, the chairpersons of committees, the Council's authentication officers, the vice-chairpersons of committees, the authentication officers of committees, the presidents of political groups and, lastly, the vice-presidents of such groups.

Countries with a British parliamentary tradition tend to apply a very similar order of precedence. In many cases (e.g. Bangladesh and Pakistan), the same order recurs: 1. Speaker; 2. Deputy Speaker; 3. Leader of the Majority; 4. Leader of the Opposition; 5. Majority Whip; 6. Opposition Whip; 7. ordinary members, usually ranked according to seniority.

Although seniority plays a considerable role in all these countries in the process of appointing particular members to offices within the assembly, it is usually just one of the criteria applied. For example, the chairperson of a committee may rank far lower in terms of seniority than other candidates but belong to the "right" political party.

(b) Precedence according to seniority

The situation is quite different in other countries where seniority is invariably the decisive factor in determining the order of precedence.

The situation in the United States of America is instructive in this regard. Although the Speaker of the House of Representatives is elected by the House and the Vice-President of the United States is the *ex officio* President of the Senate, the majority of members are ranked by order of seniority.¹⁴² Seniority plays a preponderant role in the appointment of chairpersons of committees and other officers. Where two members are of equal seniority, the order of precedence is determined by alphabetical order.

(c) Degree of formality of the order of precedence

The degree of formality of the order of precedence also varies from country to country.

In Sweden, it is determined both by seniority and by offices held in committees and other organs of the Riksdag (presidents of parties and

¹⁴² In the House of Representatives, seniority in the assembly is the sole criterion; in the Senate, years spent in the House or the Administration are also taken into account.

groups are assigned a special status), but this internal order of precedence is quite informal.

In other countries, the order of precedence is laid down in writing, usually forming part of the assembly's rules of procedure, which may be extremely detailed. For example, Article 11 of the French National Assembly's Rules of Procedure stipulates that, where there is a ballot, the order of precedence for Vice-Presidents and tellers is determined by the date of the ballot and the round of voting on which they were elected. If they were elected on the same round, precedence is determined by the number of votes received. Where there is no ballot, precedence depends on the order of presentation decided by the presidents of the groups. According to the penultimate paragraph of Article 39 of the Rules, there is no order of precedence among vice-chairpersons of committees.

Some countries, for example Romania, go even further, attaching so much importance to the internal order of precedence that it is enshrined in a legislative enactment.

2. Rank in the hierarchy outside the assembly

As in the case of the internal order of precedence, rank in the hierarchy outside the assembly may be laid down in writing, for example by decree in France and some French-speaking African countries (e.g. Benin) or in a table of precedence, which is published in the Official Gazette in Australia but not in Canada. In most cases, however, the order of precedence is determined by custom, a fact that by no means precludes the establishment of extremely detailed rules.

Given the scale of the task of compiling an exhaustive inventory of the order of precedence for presiding officers or parliamentarians outside the assembly, we shall confine ourselves to a brief review of the status of presiding officers and the order of precedence between assemblies in bicameral systems.

(a) The presiding officer's rank in the hierarchy

G. Bergougnous¹⁴³ notes that the status of presiding officers at the top of the pyramid is rarely confined to the assembly over which they preside. They usually also enjoy a high status in the State hierarchy.

¹⁴³Bergougnous, G., *op. dr.*, p. 40.

This is obviously the case when the presiding officer of the upper house is also the vice-president of the State and, as such, ranks next to the head of State in the hierarchy (Argentina, Bolivia, Germany, India, United States of America and Uruguay).

In general, however, even where the presiding officer is not the vice-president, he or she occupies a high rank in the State, usually second to fourth or fifth place. In such cases, the presiding officer usually follows the head of the Executive or the head of State (monarch/president or prime minister) in terms of rank.

This order of precedence exists in many countries influenced by the French parliamentary system, such as Luxembourg (second place after the Grand Duke) and Benin (second place after the President of the Republic). The same principle applies in other countries such as Estonia, Greece, Senegal, Turkey, Cyprus (third place after the President of the Republic and the Archbishop), Australia (fifth place after the Governor General, State Governors, the Prime Minister and Premiers/Chief Ministers in their own State/Territory) and New Zealand (third place after the Governor General and the Prime Minister).

In some countries, presiding officers actually take precedence over the head of the government. They include the Czech Republic (where the presiding officers of the Senate and Chamber rank second and third, immediately after the President of the Republic), Sweden (where the President of the Riksdag comes immediately after the King/Queen in the order of precedence) and Chad.

It goes without saying that the relative rank of presiding officers and other dignitaries partly reflects the status of their assembly in political life. A French Decree of 2 December 1958 amended the order of precedence to bring it into line with the new institutions of the Fifth Republic, "promoting" the Prime Minister to second place immediately after the President of the Republic.¹⁴⁴

Another interesting feature of the French system is that it deliberately distinguishes between the rank assigned to Presidents of the National Assembly and the Senate at official ceremonies in Paris and in other departments of France. The same kind of distinction is made in some French-speaking African countries such as Senegal, which operates a

¹⁴⁴ Given the general inertia in matters of protocol, it is unwise to draw too many political and/or legal conclusions from hierarchical status.

further distinction based on whether the constituent bodies are convened together or separately by an act of Government.

Lastly, Bergougnous notes that countries with a British parliamentary tradition present an exception to the tendency to rank speakers at the very top of the pyramid. As the order of precedence reflects, somewhat imperfectly, the existing hierarchy among the legislative, executive and judicial powers, it is perhaps not so surprising to find the Chief Justice taking precedence over the Speaker(s) in a common-law country.¹⁴³

(b) The order of precedence of assemblies in bicameral systems

The question of precedence between the members and presiding officers of parliamentary assemblies inevitably arises in bicameral parliamentary regimes

In many countries, such as Canada, the Czech Republic and the Philippines, the presiding officer and members of the Upper House take precedence, a practice that reflects the former "social" superiority of the Upper House.

In others countries, the order of precedence has been reversed to better reflect the political situation. In France, under the Fourth Republic, deputies were ranked higher than senators, who had preceded them under the Third Republic. In Poland, the President of the Diet takes precedence over his or her counterpart in the Senate.

In Australia, the order of precedence between the President of the Senate and the Speaker of the House of Representatives depends on the date on which they were appointed.¹⁴⁴ No distinction is made, however, between members of the House and the Senate: all members of the "Parliament of the Commonwealth" have the same rank in the hierarchy.

¹⁴³ The Speaker at Westminster ranks only twelfth, after the Lord President of the Council and many other dignitaries, and the Lord Chancellor, who presides over the House of Lords, ranks only sixth. Likewise, the Speaker and the President of the Australian Senate rank lower in the hierarchy not only than the Governor General and the Prime Minister, but also than the Governors and Premiers of the States. In Botswana, the Presidents of the High Courts take precedence over the Speaker; in India, although the presiding officer of the Upper House — the Rajya Sabha — is the Vice-President of the State, the rank of Speaker is lower than that of the Prime Minister and state Governors; in Malta, the Speaker defers to the Archbishop and the Chief Justice. In Singapore, the presiding officer ranks sixth and in Antigua and Barbuda seventh in the hierarchy. In Zimbabwe, the Speaker has the same rank as a minister (Bergougnous, G-, *op. cit.*, p. 42).

¹⁴⁴ If they were appointed on the same date, the President of the Senate takes precedence.

In Belgium, the Presidents of the Chamber and the Senate are assigned the same rank, precedence being given to the elder of the two. "Ordinary senators", on the other hand, continue to take precedence over "ordinary deputies".^f

3. Passports

While parliamentarians enjoy immunity from prosecution in their own countries, they lose this privilege when they travel abroad. However, some countries have decided to afford their parliamentarians some measure of protection in foreign countries.

The most common form of protection is, of course, a diplomatic passport. But few countries systematically issue diplomatic passports to all MPs. They include Armenia, some countries in Africa (Algeria, Benin, Cameroon, Cape Verde, Chad, Mali, Togo), South America (Chile, Ecuador) and Central Europe (Czech Republic, Hungary, Romania, Slovakia), Greece — the oldest democracy, Turkey and even Germany (where the use of a diplomatic passport is restricted to travel in connection with parliamentary business).

In most parliamentary regimes, however, diplomatic passports are reserved for a limited number of members.

In general, a diplomatic passport is issued on the basis of objective criteria. In some countries, the prime criterion is that of office: presiding officer (Austrian Nationalrat, Fiji, Trinidad and Tobago) and/or deputy presiding officer (Sweden), member of the Standing *Bureau* (Burkina Faso), leader of the opposition (Australia, Trinidad and Tobago), member of the foreign affairs committee (Cyprus, Sweden) and membership of an international parliamentary assembly (Austrian Nationalrat, Japan, Luxembourg.).

In other countries, the criteria governing the issue of a diplomatic passport to some members rather than others are less clear. In the Council of the Republic of Belarus, for example, the President and Vice-President are entitled to a diplomatic passport, but the privilege may be extended to other parliamentarians if the Head of State so decides. A similar situation obtains in Egypt, where a diplomatic passport may be issued in "exceptional" cases.

Parliamentarians in most other countries (Finland, Israel, Jordan, Poland, Republic of Korea) must usually rest content with an official passport. In some cases, even this category of passport is restricted to

members who are travelling on official business (Japan, United States of America) or who have applied for an official passport (Sweden).

In Belgium and Canada, parliamentarians are issued with a special passport that ranks mid-way between a diplomatic passport and an official passport and affords somewhat more protection than an official passport.

Lastly, some parliamentary regimes manifestly consider that a parliamentarian should make do with the same kind of passport as ordinary citizens. They include the United Kingdom and Spain (except for the President of the Assembly, who is entitled to a diplomatic passport).

PART THREE: EXERCISE OF THE MANDATE

While in Part Two we sought to describe the status of parliamentarians, with all it implies in terms of rights and duties, in Part Three we shall address certain aspects of the interaction between parliamentarians and their assembly.

After each election, there is an inflow of new members into parliament. However brilliant they may be, they will inevitably feel slightly disorientated, since parliament is an institution governed by customs and regulations that are frequently unwritten and tend to be somewhat abstruse. Furthermore, parliamentarians are aware that they have been elected for a specific period; hence there is no time to lose if they wish to put their ideas into practice. It is therefore important to "get the hang of things" as quickly as possible. If they have a more experienced "patron" or belong to a well-organised political group, they may get by without training in the usual sense. But if the membership of the newly elected assembly differs sharply from the preceding one (which is not unusual in States where a democratic regime is being established or restored) or if the new parliamentarian belongs to a small political group, he or she would do well to attend a training course. We shall see in Chapter I that such courses are generally run by the parliament's administrative services or by political parties or groups, sometimes assisted by international organisations or NGOs.

For parliamentarians, the exercise of a political mandate demands first and foremost the acceptance of a number of constraints.

For example, the assembly expects them to attend sittings regularly. We shall see in Chapter II that most parliaments impose some kind of formal duty of attendance at plenary sittings or even committee meetings. While it is only a moral obligation in some countries, we find that financial penalties for unjustified absence are not only becoming more widespread but are also proving increasingly effective inasmuch as a growing number of parliamentarians are wholly dependent on their parliamentary remuneration to keep body and soul together.

Assemblies also expect their members to observe certain rules of conduct, both within and outside parliament.

Within parliament, these "disciplinary" regulations are designed basically to ensure the smooth conduct of the proceedings. They range from prohibitions on the use of force or intimidation to protection of the "dignity" of the assembly and include a whole series of measures designed

to prevent the "illicit" obstruction of parliamentary business. We shall see in Chapter III that assemblies and/or presiding officers have a whole panoply of disciplinary sanctions at their disposal, ranging from a simple call to order to temporary expulsion.

In addition, the assembly expects its members to observe a number of moral/ethical precepts in their contacts with the outside world. There is a growing trend in Western countries (particularly those with a British parliamentary tradition) to amalgamate these precepts in a "code of conduct". Chapter IV explains that, while such codes of conduct were originally intended to prevent the assembly from being besmirched by the conduct of one of its members, they increasingly form part of the campaign against loss of confidence not only in parliament but in all political institutions.

Lastly, in Chapter V we shall consider the notion of "insult to" or "contempt of parliament. Readers may be surprised to find this notion dealt with in the section concerning the exercise of parliamentary mandates. After all, "contempt of parliament" is one of the privileges enjoyed by assemblies and their members in some countries (particularly those with a British parliamentary tradition), so that it could also have been covered in the section dealing with the status of parliamentarians. But we decided against that option for three reasons: firstly, the notion of contempt protects not only individual members but, more importantly, the assembly as a whole. Secondly, it protects the assembly not only against offences or insults from outside but also against acts perpetrated by its own members. Lastly, given the increasing popularity of codes of conduct, the borderline between non-compliance with a code and contempt of parliament is becoming blurred. It is significant in this regard that sanctions in both cases are often drawn up and/or adopted by the same "Ethics Committee".

I. Training in procedure

A general election held in accordance with a country's constitutional order brings new members into parliament who have no experience of parliamentary life.

As mentioned in a previous study,¹⁴⁷ new members may acquire the requisite experience for their parliamentary duties in a variety of ways. A

¹⁴⁷ See the Introductory Note by Mr. Wojciech Sawicki, Secretary General of the Senate of the Republic of Poland in "Induction Programmes for New Members", *Constitutional and Parliamentary Information* ASGP, 1994, No. 167, pp. 95-128.

newly elected MP who belongs to a party that has long been represented in parliament and has many experienced members is quite different from that of a new member whose party is entering parliament for the first time and whose political group is made up of deputies without any experience.

New parliamentarians are therefore in a relatively comfortable position in politically stable countries in which the membership of the new parliament is broadly similar to that of the previous one and a relatively small number of new members can be easily integrated into the existing system.

The situation is entirely different in States that are in the process of establishing (or restoring) a democratic system and in which the membership of the new parliament is completely different from that of its predecessor. Following the 1989 elections in Poland, for example, only 4 of the 100 senators elected had any previous parliamentary experience.

The same applies to countries undergoing a major change of political regime. For example, the replacement of a single-party system by a multiparty democracy in Cameroon and Zambia led to a substantial increase in the number of newly elected parliamentarians. The same phenomenon may occur, albeit on a smaller scale, in long-standing parliamentary regimes in the wake of certain political decisions.^m

Some training or induction programmes are run by political parties or groups and tend to focus on political issues. Other non-partisan programmes are run by the parliament's administrative services. They usually cover such subjects as the history of parliament, the standing orders of the assembly, aspects of constitutional and administrative law, the rights and duties of parliamentarians, the functioning of the parliament's administrative services, etc. In rare cases, a special body within parliament is entrusted with the organisation of training seminars (the Research and Training Institute in the National Assembly of the Republic of Korea and the Procedure Office in Australia). In the United States of America, universities are associated with the information programme.

^m* In Belgium, for example, the decision to introduce (imperfect) incompatibility between regional and federal parliamentary mandates and to have regional parliamentarians elected by direct suffrage compelled some parliamentarians to opt for a particular assembly. As this new measure was combined with a reduction in the number of members of the Federal Parliament, a far larger number of newly elected members than usual entered the federal assemblies after the 1995 general election. In Germany, a similar situation occurred after the December 1990 elections following German reunification.

Training programmes are sometimes run not only for parliamentarians but also for the staff of the assembly (e.g. in Sweden).

While training seminars in most parliaments are ad hoc short-term initiatives spread out over the session, some assemblies organise fully fledged seminars that run for several days or even weeks. In Slovakia and Australia,¹⁴⁹ they are held during the period between elections and the first sitting of the newly elected parliament. In Sweden, they begin before the opening of the session (guided tours, etc.) and continue afterwards.

It goes without saying that training programmes and courses designed to introduce members to parliamentary procedures and practices are particularly important in countries in which parliamentary traditions are less deeply rooted and/or there has been a major change in the membership of the assembly.

It is gratifying to note in this context that many developing countries have been putting a great deal of effort into their training programmes, often with the assistance of international organisations. Trinidad and Tobago and Zambia, for example, regularly organise training seminars in collaboration with the Commonwealth Parliamentary Association. In Guinea, Mali and Niger, the training is imparted by academics, senior officials or experienced parliamentarians from other countries, or experts from independent bodies (such as NGOs). Parliamentarians in Ecuador are trained at the Instituto Centroamericano de Capacitacion Empresarial (Costa Rica).

On the other hand, a strikingly large number of countries provide no training facilities for parliamentarians. It would be less surprising if they were all young democracies or developing countries, but this is by no means the case: the group also include countries such as Austria, Belgium, Greece and Spain.

It should not be inferred, however, that the lack of a training programme means that newly elected parliamentarians receive no assistance whatsoever. All parliaments, including those without official training programmes, provide newly elected members with material such as the Constitution, the standing orders of the assembly, information on parliamentarians' powers, duties and privileges, etc. In some assemblies (such as the French Senate), they are also briefed individually by the

¹⁴⁹ On Australia's remarkable training programme, see "Parliamentary education: the state of the play", in *Australia, The Table*, 1994, pp. 71-81.

various departments. Moreover, many long-standing parliamentary regimes have produced handbooks of parliamentary procedure that serve as comprehensive works of reference and a self-training course for newly elected members.

Such handbooks exist, for example, in Germany and in the French Senate, but the practice is most widespread in countries with a British parliamentary tradition. Outstanding examples are the *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords*, in the United Kingdom, the *House Manual* and *House Practice* in the House of Representatives of the United States of America. The Canadian House of Commons has no fewer than three documents that qualify as handbooks of parliamentary procedure: *The Precis of Procedure*, *Beauchesne's Parliamentary Rules and Forms* and the *Annotated Standing Orders of the House of Commons* (similar publications exist in Australia, India, Japan, etc.).

II. Participation in the proceedings of parliament

1. Compulsory attendance

(a) A widespread and essentially moral obligation

Most parliaments impose some formal rule of attendance, both at plenary sittings and committee meetings. Some countries actually incorporate the principle of compulsory attendance in their Constitution or legislation, but it is usually laid down in the standing orders. For instance, the Rules of Procedure of the German Bundestag require members to participate in the assembly's proceedings, an obligation that entails much more than mere attendance at meetings.

Although the obligation is generally formal, its observance is not systematically enforced in many countries (Indonesia, Russian Federation, United Kingdom, United States). It is above all a "moral" obligation. The reason most frequently adduced to account for the absence of specific penalties is the impossibility of verifying attendance, as parliamentarians often belong to several committees that regularly meet simultaneously.

In the United Kingdom, although absence from plenary sittings and committee meetings no longer entails a penalty,¹⁵⁰ this was not always the

¹⁵⁰ Except for the Opposed Private Bill Committee, for which attendance is still compulsory.

case. In 1975, for example, a committee was set up to consider the case of a Member of the House of Commons who lived in Australia and was therefore systematically absent. The committee recommended that he be expelled, but the Member resigned before a motion to that effect could be adopted.

This example demonstrates the special importance that countries with a British parliamentary tradition attach to attendance by members. The Canadian Senate may, whenever it chooses, compel one or more of its members to be present at a particular time. A Senator who fails to attend may even be accused of insulting the Senate (see Chapter V below). But the importance of the principle is more evident in the key role played by whips than in the formal rules: whips are responsible for ensuring that a sufficient number of members attend plenary sittings, committee meetings or other meetings at which their presence is required.

A somewhat paradoxical feature is that, even in assemblies reporting no formal attendance obligation, financial sanctions are sometimes imposed on members who are absent too frequently.¹⁵¹

In fact, there are only a few assemblies (including the Belgian Senate and the Parliamentary Assembly of the Council of Europe) with no form of compulsory attendance and no provision for sanctions in the event of repeated unjustified absence.

The attendance requirement is generally confined to plenary sittings and meetings of committees. It is sometimes extended to other parliamentary bodies such as the Bureau and the Conference of Presidents in Senegal.

(b) Justified or unjustified absence

In most parliaments with a compulsory attendance rule, there may be cases when absence is justified. What is meant by a "valid reason for absence" is

^m In Israel, if members of the Knesset are absent without a valid reason for at least two months or for at least one-third of the time, the Ethics Committee may issue a warning or reprimand or even retain part of their salary or supplementary allowances.

In the Luxembourg Chamber of Deputies, salaries are reduced in proportion to the number of unjustified absences.

In the European Parliament, deputies who have been absent for at least 50 per cent of the days fixed by the Bureau for sittings of Parliament must reimburse to the Assembly 50 per cent of their expense allowance for (his) period, unless they are excused by the President. In addition, the Bureau of the European Parliament recently decided that, as from the 1998 session, the daily allowance would be reduced by 50 per cent in the case of deputies who were absent for more than half the roll-call votes held each Tuesday, Wednesday and Thursday when Parliament was sitting in Strasbourg and each Thursday when it was sitting in Brussels.

usually left unspecified. The French Senate seems to be the only exception to the rule: Senate committee members may request the chairperson to excuse their absence, particularly when it is due to commitments associated with the exercise of a local mandate.

In most parliaments, the presiding officer decides on a case-by-case basis whether the reasons adduced are well-founded. In Slovakia, responsibility for verifying absences from plenary sittings lies with the President of the National Council and from committee meetings with the respective committee chairpersons. The reasons given for absence are considered at the end of each month and the members concerned are entitled to a hearing. If the reason is not deemed admissible, the member is liable to financial sanctions. In the Spanish Senate, the Bureau rules on the validity of the reasons adduced. If it views an absence as unjustified, the member may be deprived of his or her parliamentary salary for a specific period on the proposal of the President and subject to a decision by the assembly. In Cyprus, the Rules Observing Committee decides whether the reasons given for absence are valid.

2. Sanctions for absence

(a) Financial penalties

Forfeiture of part of a member's salary (or supplementary allowances) is undoubtedly the most common penalty for absence without a valid reason. It is imposed in a large number of countries (Costa Rica, Cyprus, France, Gabon, Germany, Guatemala, Hungary, Jordan, Luxembourg, Paraguay, Poland, Republic of Korea, Spain, Uruguay).

Financial penalties are usually proportionate to the length of a member's absence or the number of meetings that a member fails to attend. In Poland, for example, the President of the Diet orders a one-thirtieth cut in salary: (i) for each day of unjustified absence from plenary sittings and for each day on which a member fails to take part in more than one-fifth of the votes taken in plenary session; and (ii) for each day of unjustified absence from committee meetings provided that the number of absences exceeds one-fifth of the number of committee meetings during the month in question.

However, in some cases a ceiling is imposed on financial penalties. In the Belgian Chamber of Representatives, for example, while members

who are repeatedly absent without a valid reason have their salaries cut, they retain 40 per cent of the total even under the worst of circumstances.¹⁵² It should also be mentioned that in this assembly, as in many others, financial penalties are imposed only for absence from votes in plenary sittings.

Deputies in the French National Assembly who participate in less than two-thirds of open votes during a session have one-third of their salary docked for a period equal to that of the session. If they participate in less than one-half of the votes, the deduction is doubled. Failure to attend more than one-third of committee meetings during a session may also entail financial penalties.

(b) Other sanctions

Penalties for absence without a valid reason are not solely financial; they may also be disciplinary. In the Lao People's Democratic Republic members are given a warning and in Togo called to order. In the Gabonese Senate, sanctions not only include a cut in salary but also a call to order (sometimes placed on record) and a censure (with or without temporary expulsion). In Benin, members who have been absent on three consecutive occasions without a valid reason may be called to order. In the event of repeated absence for one-third of the meetings held during a session, members may be suspended for one year.

Definitive forfeiture of a mandate is less frequent but nevertheless quite common, particularly in countries with a British parliamentary tradition. In India, for example, if a member fails to attend meetings of the Lok Sabha for a period of 60 days or more without the assembly's authorisation, his or her seat may be declared vacant. In Zimbabwe, a member who has been absent for 21 consecutive plenary sittings may be expelled. The same rule applies in Australia, where the Constitution stipulates that, in cases of absence for over two consecutive months without the authorisation of the assembly concerned, the seat of a Senator or Member falls vacant. In Sri Lanka, the equivalent period is three months. In the Seychelles, sanctions are applicable if a member is

¹⁵² Members of the Belgian Chamber of Representatives who take part in 80 per cent of the votes are not affected. Members who participate in less than 80 per cent lose 10 per cent of their salary, those who participate in less than 70 per cent lose 30 per cent and those who participate in less than half the votes lose 60 per cent.

absent for more than 90 days without written authorisation from the Speaker. The same penalty applies if a member leaves the Seychelles for more than 30 days without the authorisation of the Speaker of the assembly.

Definitive forfeiture of a mandate for repeated absence is not confined to Commonwealth parliaments but also exists in Armenia, Austria, Japan, Thailand and Turkey. Turkish members who have been absent without a valid reason for five sittings during a one-month period may be definitively expelled by the assembly.

These examples might convey the impression that penalties are applicable only to continuous absence from plenary sittings. While it is true that, as a rule, definitive expulsion from an assembly applies only in cases of repeated absence from plenary sittings, some assemblies may also expel members for continuous absence from committee meetings. This type of penalty exists in Cote d'Ivoire, the French Senate and Portugal. In Portugal, deputies who, without a valid reason, fail to attend four meetings of the plenary assembly forfeit their mandate, while deputies who, also without a valid reason, fail to attend up to four meetings of a committee in one session have their monthly salary reduced by one-thirtieth. Deputies who are absent for more than four meetings forfeit their membership of the committee in question. A Senator who is absent three times running from a committee meeting in the French Senate without a valid reason is deemed to have resigned and may not be replaced during the current year. In addition, half of the Senator's salary is docked until the opening of the next ordinary session.¹⁵⁴

The above-mentioned financial and disciplinary sanctions are not the only penalties applied. In Estonia and Haiti, one form of punishment is to publish the attendance/absence list. In Haiti, a member who is frequently absent runs the risk of being banned or suspended from the Bureau or from participation in certain delegations.

In rare cases, a parliamentarian may be forcibly conveyed to the assembly. In the United States of America, for example, the Senate may vote to order the Sergeant-at-Arms to arrest the member concerned and/or forcibly convey him or her to the assembly.¹⁵⁴ The same provision exists in the Philippines (Chamber and Senate).

¹⁵¹ It should be noted that these provisions have never been implemented.

¹⁵⁴ Over the past 50 years, such orders have been given only on very rare occasions.

3. On whose authority are penalties imposed?

As may be gathered from the foregoing, it is usually the assembly that decides to impose serious penalties such as forfeiture of a member's mandate. The decision may be taken by an absolute majority (e.g. in Turkey) or by a qualified majority. In The former Yugoslav Republic of Macedonia, the Constitution stipulates that a member may be expelled by the assembly if he or she has been absent without a valid reason for over six months. However, the decision must be taken by a two-thirds majority of members (80 out of 120). Decisions are often drafted by a special committee such as the Committee on Absence of Members in Zambia and the Committee on Discipline in Japan, or they may even be adopted by the committee itself (the Ethics Committee in Israel). In some assemblies, decision-making authority is vested in the President of the Assembly (Belarus) or the Bureau (Romania).

In Norway, the Constitutional Court is empowered to impose penalties on members of the Stortinget who fail in their duty to attend plenary sittings and committee meetings.

Lastly, in countries with a British parliamentary tradition, it is the party that decides on any penalties, since it is the whip's duty to ensure that members attend sittings.

III. Discipline

1. Introduction

Members of parliamentary assemblies are required, like their counterparts in other organised bodies, to comply with common rules of conduct and to establish an authority responsible for ensuring observance of the rules.

In some countries, the Constitution explicitly authorises assemblies to establish the rules of conduct and ensure their observance.¹⁵⁵ In others, the right is a natural extension of the assembly's right to regulate its own functioning.¹⁵⁶

Common rules of conduct are almost always written down, either in a specific act of parliament or in the assembly's standing orders.

¹⁵⁵ The Constitution of the United States of America stipulates that: «Each House may determine the Rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two thirds, expel a Member.»

¹⁵⁶ The Belgian Constitution stipulates that: «Each Chamber shall determine, in its rules of procedure, the way in which its responsibilities shall be discharged.*»

In this chapter, we propose to consider the rules and precepts governing parliamentary discipline, except for sanctions for unjustified absence which have been dealt with above (Chapter II). We have deliberately omitted contempt of parliament (see Chapter V) and rules of conduct outside parliament, which are covered in Chapter IV on codes of conduct and in other chapters (e.g. penalties for failure to file a declaration of assets).

The rules governing parliamentary discipline are all in some way designed to ensure the smooth conduct of business.

The most graphic example is the prohibition of the use of force of any kind and the explicit (Slovakia) or implicit ban on carrying weapons.

Secondly, threats, intimidation, provocation and insults are prohibited in almost every parliamentary assembly.

The third category of disciplinary rule is no doubt the most important, both quantitatively and in terms of its practical impact. The rules in question may be broadly designated as measures intended to prevent "unlawful" obstruction of the proceedings. By this is meant cases in which parliamentarians clearly refuse to obey the rules of procedure and try to create an obstruction by word or deed. There is a long list of such "unlawful" procedures, of which we shall mention just a few: taking the floor without the speaker's authorisation; refusing to conclude a statement or to leave the podium; ignoring a call to order; refusing to defer to the authority of the speaker; introducing extraneous material into a statement or being tediously repetitive, etc.

A fourth category of disciplinary rules is designed to preserve the dignity of the assembly. Almost all assemblies prohibit language or behaviour liable to undermine their dignity. Preservation of dignity is actually the source of the dress code in some countries, particularly those with a British parliamentary tradition (Canada, Egypt, Zambia, Zimbabwe). In the Indian Rajya Sabha, the Rules contain a lengthy chapter on parliamentary etiquette, which stipulates, *inter alia*, that entering the chamber with a jacket on one's arm is inappropriate and contrary to the decorum of the House.

The vast number of rules of parliamentary conduct make it virtually impossible to provide a comprehensive overview. We have therefore decided to confine ourselves to a compilation of existing disciplinary sanctions and the authorities authorised to impose them.

2. Disciplinary sanctions

Assemblies (or their bureaux or business committees) may impose a wide range of penalties on members who fail to respect their rules of conduct. They are described below in order of severity, from a simple call to order to suspension and expulsion.

(a) From a call to order to censure with temporary expulsion

A call to order is not only the most lenient disciplinary sanction but also the most widespread. It is usually applicable to members who disrupt the debate or the order of the house. In almost all assemblies, it is the presiding officer who calls a member to order. It should be noted, however, that the presiding officer at the sitting in question may not always be the speaker of the assembly.

In countries influenced by French tradition, the next step up in terms of severity is usually a call to order with a corresponding entry in the record. In the French National Assembly, the President may impose this penalty on any deputy who, at the same sitting, has already been called to order or who has insulted, provoked or threatened one or more of his or her colleagues. It automatically entails a reduction of the deputy's salary by 25 per cent for one month. In the French Senate, a call to order with an entry in the record is applicable to any Senator who has already been called to order at the same sitting. It does not, however, have any impact on salary.

In some countries (Greece, Luxembourg, Slovenia, United States of America.), members who have been warned or called to order once may be (temporarily) deprived of the right to the floor if they persist in disobeying the rules. In the House of Representatives of the United States of America, a member who uses improper language is not excluded from the sitting — since that would mean denying representation to certain voters — but may be deprived of the right to take the floor for the rest of the day. In Luxembourg, members who have been called to order twice during the same sitting automatically lose the right to take the floor if it has already been accorded and are deprived of the right to take the floor for the remainder of the sitting.

In most assemblies, the presiding officer may have any slanderous, indecent, unworthy or improper remarks or, in general, any "unparliamentary language" deleted from the record (Belgium, Cyprus, India, United States of America).

In countries influenced by French tradition, a simple censure is generally ranked third on the scale of disciplinary sanctions. In the French National Assembly, it can be imposed on any deputy who, after being called to order with an entry in the record, fails to obey the President's ruling or causes a disturbance in the Assembly. As this is a more serious penalty, it is the Assembly that takes the decision by a standing vote and without a debate, on the President's proposal. The Deputy concerned is entitled to a hearing or to have a colleague speak on his or her behalf. There is an identical procedure in the French Senate, but the penalty is applicable, in addition to the two cases mentioned above, to Senators who insult, provoke or threaten their colleagues or use their offices for purposes other than the exercise of their mandate. In both chambers, a simple censure entails deduction of part of a member's salary for a month (one-half in the National Assembly and one-third plus the entire duty allowance in the Senate).¹⁵⁷ The word "reprimand" (*blame* in French) is sometimes used instead of "censure". In Luxembourg, the President issues a reprimand that is entered in the record to any deputy who, having been called to order and denied the floor, fails to obey the President's ruling or causes a disturbance in the assembly. This type of "censure" is commonly found in countries based on the French model, but it also exists elsewhere under a variety of names (e.g. "censure" and "reprimand" in the United States of America).

In many countries influenced by French tradition, censure with temporary expulsion is the penalty of last resort. In France, it is applicable to deputies or senators who ignore or have twice been subject to a simple censure, who call for violence at a public sitting, insult the assembly or its President, or insult, provoke or threaten the President of the Republic, the Prime Minister, the members of the Government or the assemblies provided for in the Constitution. The Senate's Rules of Procedure also target recidivist senators who have already subjected to a simple censure for having used their office for purposes other than the exercise of their mandates. This type of censure entails a ban on participation in the assembly's proceedings for 15 days from the date on which the measure

¹⁵⁷ According to Duhamel, O. and Meny, Y. [*op. cit.*, p. 31J), the simple censure has been applied only once under the Fifth Republic: on 2 February 1984 in the National Assembly against Jacques Toubon (RPR), Alain Madelin (UDF), and Francois d'Aubert (UDF) during the discussion of the bill on plurality of media enterprises (J.O. De'bats AN, t and 2 February 1984. pp. 442-450 and 475-481).

was taken. This period may be extended to 30 days if the parliamentarian refuses to obey the President's ruling. It entails deduction of part of the Senator's salary for two months. Censure with temporary expulsion is decided by the National Assembly or the Senate according to the same procedure as simple censure.¹⁵⁸ In the French National Assembly, this penalty is also applicable to deputies who assault a colleague, subject to a decision by the Bureau on the proposal of the President. The Bureau is also convened by the President when a deputy attempts to obstruct the freedom of the deliberations or of voting in the Assembly and, having attacked a colleague, refuses to obey the President's call to order.

(b) A typically British sanction: "naming "

In most countries with a British parliamentary tradition (Australia, Canada, Kenya, United States of America), the most severe penalty that a presiding office can impose on members is usually that of «naming» them.

In Canada, a member can be named for failing to respect the Speaker's authority by, for example, refusing to withdraw unparliamentary comments, to cut short an irrelevant or repetitive statement or to cease interrupting a member who has the floor. Persistent improper conduct after being asked by the Speaker to desist is another way of defying the Speaker's authority and may also entail the penalty of naming. Before taking that step, the Speaker usually warns the offender several times of the penalty that may be imposed for failure to obey. If the member apologises and the Speaker is broadly satisfied, the incident is usually deemed to be closed and no measure is taken. If, on the other hand, the member is named, the Speaker has two options: he or she may either order the offender to withdraw forthwith from the House for the remainder of the sitting or simply wait until the House takes any other disciplinary measure it deems appropriate. The first option was adopted in February 1986 and has always been used since to discipline a member who has been named. If the Speaker chooses the second option, another member — generally the Leader of the Government in the House — immediately moves the suspension of the member concerned. The motion may not be debated or amended and the Speaker immediately puts it to the vote. If the motion is adopted, the member must leave the House.

¹⁵⁸ Duhamel, O. and Meny, Y. (*op. cit.*, p. 311) note that the last instance of censure with temporary expulsion in France took place on 3 November 1950 in the National Assembly.

If the Speaker names a member in Australia, a motion for (temporary) suspension is put to the vote. If it is adopted, the member is expelled, on the first occasion for 24 hours, on the second (within the same year) for three consecutive sittings, and on the third (or any other occasion within the same year) for seven consecutive sittings. It should be noted that this amounts to a fully fledged suspension of the member's mandate rather than mere expulsion from the precincts of Parliament.

(c) Subsidiary sanctions

There are three further categories of sanction, which are usually subsidiary: pecuniary sanctions, compulsory presentation of an apology and loss of seniority.

Pecuniary sanctions may be of two kinds: in some assemblies, a fine is a penalty in its own right (Gabon, United States of America); in others, certain disciplinary sanctions automatically entail a reduction in the parliamentarian's salary for a specified period (see above: censure in France).

In a number of countries, the presiding officer may order the member to apologise. This type of sanction is common in Asian countries (Japan, Lao Democratic People's Republic, Republic of Korea) but also exists in other countries (Slovakia, United States of America). In many countries, members present an apology not because they are obliged to do so for disciplinary reasons but to avoid disciplinary sanctions (Romania, Slovakia, United States of America).

In the United States of America, the House of Representatives imposes a somewhat original penalty, namely loss of seniority. Although this penalty is more commonly imposed for failure to respect "ethical" rules than for purely disciplinary purposes, it should not be viewed as a purely symbolic sanction, because seniority is an important criterion for obtaining certain privileges (a large office) and for appointment to certain offices (e.g. committee chairperson).

3. Who imposes sanctions?

As noted above, the most lenient disciplinary sanctions are usually imposed by the person chairing a particular sitting. They are applicable to minor breaches of the rules. As presiding officers are responsible for the conduct of the proceedings and for maintaining order and decorum, it stands to reason that they should issue a ruling in such cases. In France, for example, the President has sole authority to call a member to order, with or without an

entry in the record, while more severe penalties (simple censure and censure with temporary expulsion) are imposed by the assembly, on the President's proposal. In Luxembourg, the decision to impose disciplinary sanctions is taken by the presiding officer, except for reprimands with temporary expulsion, which require a vote by show of hands, with an absolute majority, in the Chamber. It should be noted, however, that when a member assaults a colleague, the Labour Committee is responsible for deciding, where appropriate, to issue a reprimand with temporary expulsion.

While responsibility for decisions in less serious cases usually lies with the presiding officer, provision may be made for appeal in such cases. In the Belgian Senate, for example, a penalised member may appeal to the Bureau of the Senate. In India, the Speaker of the Lok Sabha may name a member, but any subsequent temporary expulsion requires the consent of the assembly, which may terminate the procedure at any time. In the United States of America, the Speaker may penalise a member who has made offensive remarks and refuses to withdraw them, but the member may appeal and the assembly takes the final decision.

Another interesting feature of sanction procedures in the United States is the fact that authority to initiate sanctions is not vested in the Speaker alone. Any member can set in motion a disciplinary procedure against a colleague and even call to order a member whose conduct is unseemly. This right exists in some other countries too. In Romania, for example, serious or repeated violations liable to entail suspension are submitted to the Legal Committee. The referring source may be a parliamentary group or an individual senator or deputy. The Legal Committee reports to the Bureau, which rules on the matter. The situation is similar in Slovakia, where the Mandates and Immunities Committee may take up a case itself or have the matter referred to it by an individual member who feels insulted by a colleague's remarks.

In very rare cases, all disciplinary sanctions are taken by the assembly on the proposal of the President (e.g. in Chad). As a rule, however, only severe sanctions (such as temporary expulsion) are imposed by the assembly and a special majority is sometimes required. In the Philippines, suspension of a mandate may not exceed 60 days and must be ordered by a two-thirds majority of members.^{15y}

^{15f}* These conditions are deemed to be rules of procedure and non-compliance entails judicial proceedings.

Lastly, a small group of countries adopt an intermediate approach, all disciplinary measures being taken either by the Bureau or equivalent body (e.g. the Lao Democratic People's Republic) or by a special committee. In the Israeli Knesset, for example, the Speaker may call a member to order but the decision to impose more severe sanctions (such as temporary expulsion) must be taken by the Ethics Committee. In the Republic of Korea, the Speaker refers cases to the Special Committee on Ethics, which reports to the plenary and the latter takes the final decision. In assemblies where such ethics committees exist, they usually also have jurisdiction in cases of breaches of ethical precepts or codes of conduct (see Chapter IV).

IV. Codes of conduct

1. Introduction

To avoid any misunderstanding, we must clarify what we mean by "code of conduct" for the purposes of this chapter. The term "code of conduct" denotes all moral or ethical precepts that parliamentarians must respect during their mandate (and sometimes beyond it) in their contacts with the outside world in order to preserve people's confidence in the integrity of their parliament and avoid any act that might compromise the assembly. The rules are largely designed to prevent cronyism, conflicts of interest and, in general, any suspicion of corruption.

This chapter is not concerned, therefore, with the rules governing the conduct of parliamentarians within the assembly, the non-observance of which may entail disciplinary sanctions (see Chapter III above). Instead, we shall focus on the rules governing parliamentary lobbying (see section 4 below).

While it is important to be duly selective and to avoid any confusion of categories, it is equally important to refrain from adopting an unduly formalist approach. The notion of a "code of conduct" in the sense of an instrument (or ordered collection of instruments) governing all aspects of parliamentary ethics tends to be associated with the British tradition and a scattering of other countries (including Germany and Japan). However, many countries have enshrined similar rules in different legislative enactments (for example legislation on the declaration of assets, incompatibility, etc.) and these also merit attention.

The successful spread of "codes of conduct" is a recent phenomenon and primarily characteristic of the Western democracies. As we have seen

in the chapter on declarations of assets, it is largely attributable to loss of confidence not only in parliament but in all political institutions.

As Lord Nolan aptly observed with typically British understatement in his report, it would be surprising if the standards of all members of a parliamentary assembly were uniformly impeccable.¹⁶⁰ There is in fact no reliable evidence that the number of cases of corruption among parliamentarians is on the increase. Financial scandals are, after all, nothing new but they have never led in the past to any generalised questioning of the value of the institutions themselves. Times have changed, however: every scandal is widely reported in the press and people who are better informed tend to require higher standards from their representatives.

Being aware of this loss of confidence and keen to restore it, parliamentarians in a number of countries have voluntarily subjected themselves to certain moral restrictions of varying degrees of severity, either in the form of a fully fledged "code" of conduct or in some other form. It is a rapidly evolving trend and a number of countries report that they are currently considering the introduction of a code of conduct (including Australia (Senate), Chile, Ecuador, India, Poland and the Russian Federation).

2. British-style codes of conduct

(a) The British model

Among countries whose parliaments have introduced a "code of conduct", mention should first be made of the United Kingdom. Although the code of conduct is, strictly speaking, a relatively recent phenomenon in the British Parliament, concern to prevent conflicts of interest or any form of dependence among parliamentarians has always been a guiding principle.

In 1695, after expelling Sir John Trevor for accepting bribes from the City of London in connection with the Orphans Bill, the House resolved that "the offer of money, or other advantages to any Member of Parliament for the promoting of any matter whatsoever, depending or to be transacted

¹⁶⁰ "It would be surprising in a body of some 650 men and women if all had standards which were uniformly impeccable." (*Standards in Public Life*, First Report of the Committee on Standards in Public Life, Chairman, Lord Nolan, London, 1995, p. 21).

in Parliament is a high crime and misdemeanour and tends to the subversion of the English Constitution."¹⁶¹

In 1858, the House resolved that "it is contrary to the usage and derogatory to the dignity of this House that any of its Members should bring forward, promote or advocate in this House any proceeding or measure in which they may have acted or been concerned for or in consideration of any pecuniary fee or reward".¹⁶²

In 1947, in reaction to attempts by a trade union to give instructions to a Member, a resolution was adopted to the effect that "it is inconsistent with the dignity of the House, with the duty of a Member to his constituency, and with the maintenance of the privilege of freedom of speech, for any Member of the House to enter into any contractual agreement with an outside body, controlling or limiting the Member's complete independence and freedom of action in parliament or stipulating that he shall act in any way as the representative of such outside body in regard to any matters to be transacted in Parliament; the duty of a Member being to his constituency and to the country as a whole, rather than to any particular section thereof."¹⁶³ This resolution prohibited Members from entering into a consultancy agreement that would oblige them, in return for payment, to speak, lobby or vote in accordance with the client's instructions or to act as the client's representative in Parliament. The resolution, which is still in force, does not, however, prevent Members from entering into an agreement to act as an adviser on parliamentary matters or from voluntarily lobbying for their client, provided that such activities do not conflict with their duties to their constituents.

In 1974, following corruption scandals, the House decided to establish a register of interests (see Part Two, Chapter III, above). However, it was not these scandals but rather the growing importance of parliamentary lobbying and the upsurge in the number of parliamentarians combining their mandate with a remunerated seat on the board of private companies that prompted the drafting of a "code of conduct" by the Select Committee on Standards in Public Life, chaired by Lord Nolan, in 1995 and its adoption by the House of Commons in July 1996¹⁶⁴. The purpose of the code is to provide an appropriate framework for determining whether or

[^] *Ibid.*, p. 24

^p *Ibid.*

^{rw} *Ibid.*

^{rm} *Ibid.*

not a parliamentarian's conduct is acceptable. It first specifies the political duties of Members: loyalty to the Crown, respect for the law and action in the interests of the country in general and of their constituents in particular.

The code requires parliamentarians (as well as ministers and officials of "quangos"¹⁶³) to respect in their personal conduct the "seven principles of public life", namely selflessness, integrity, objectivity, accountability, openness, honesty and leadership. Where there is a conflict between a Member's private interests and the interests of the community, the latter must always prevail.

The code of conduct reaffirms the prohibition on remunerated action in support of any cause and the principle of filing a declaration of interests. Members are also reminded that, in all their contacts with organisations with whom a financial relationship exists, their responsibilities to their constituents and their duty to serve the national interest must always be borne in mind.¹⁶⁶

(b) Some other examples

British-style codes of conduct also exist in the Philippines (where the law containing the code of conduct is applicable to all holders of public office and State officials), Trinidad and Tobago (Code of Ethics for Parliamentarians including Ministers) and Zambia (Parliamentary and Ministerial Code of Conduct Act). Other countries (Israel, Japan) and the European Parliament have established slightly different codes.

¹⁶³ Quasi-autonomous non-governmental organisations.

¹⁶⁴ "(...) A Member must not promote any matter in Parliament in return for payment.

A Member who has a financial interest, direct or indirect, must declare that interest in the currently approved manner when speaking in the House or in Committee, or otherwise taking part in parliamentary proceedings, or approaching Ministers, civil servants or public bodies on a matter connected with that interest.

Where, in the pursuit of a Member's parliamentary duties, the existence of a personal financial interest is likely to give rise to a conflict with the public interest, the Member has a personal responsibility to resolve that conflict either by disposing of the interest or by standing aside from the public business in question.

In any dealings with or on behalf of an organisation with whom a financial relationship exists, a Member must always bear in mind the overriding responsibility which exists to constituents and to the national interest. This is particularly important in respect of activities which may not be a matter of public record, such as informal meetings and functions.

In fulfilling the requirements on declaration and registration of interests and remuneration, and depositing of contracts, a Member must have regard to the purpose of those requirements and must comply fully with them, both in letter and spirit." (*Standards in Public Life, op. cit.*, p. 39)

We have already mentioned in the chapter on incompatibility that, under a general prohibition in force since 1996, Members of the Knesset are barred from earning income from any other occupation. In principle, this prohibition applies only to paid employment. However, Members must also refrain from engaging in certain unpaid activities that might: (i) sully the image of Parliament or of the Member; (ii) give rise to suspicion of accumulation of wealth or preferential treatment by virtue of the Member's status as a parliamentarian; or (iii) lead to a conflict of interests.

In Germany, the Bundestag adopted a code of conduct in 1972 which is based on the principle of compatibility between parliamentary mandates and private professions but which also seeks to ensure that any conflict of interest between a parliamentary mandate and income-generating activities is made public. The code of conduct lists a number of situations in which a member is obliged to disclose certain information and places restrictions on the acceptance of donations and valuable gifts.

In Japan, the Standard of Conduct for Diet Members requires members to ensure that their conduct is beyond reproach and to abstain from any act that might cast suspicion on their honesty. They must also communicate to the Speaker the names of companies and organisations in which they hold executive office, even if their services are unremunerated.¹⁶⁷ The Speaker and Deputy Speaker may not combine their mandate with any executive post in a company or organisation; a similar prohibition is applicable to chairpersons of committees in respect of companies and organisations that come within the remit of their respective committees.

The Rules of Procedure of the European Parliament state that the assembly may lay down a code of conduct but that it should not in any way prejudice or restrict Members in the exercise of their office or of any political or other activity relating thereto. Pursuant to this provision, the European Parliament has adopted rules on transparency and members' financial interests (see above).

3. Uncodified rules of conduct

Although codes of conduct as such exist only in a small number of countries, mainly those with a British parliamentary tradition, it does not follow that other countries apply no rules of conduct. In some countries,

Remunerated executive posts must be included in the member's declaration of assets.

similar rules exist but they are dispersed among different instruments. For example, criminal legislation on corruption is usually applicable to all holders of public office; including parliamentarians. Legislation on incompatibility and declarations of interests or assets also contains numerous ethical precepts.

In Australia, the Constitution stipulates that any Member of Parliament who has a direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth or directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth or services rendered in Parliament to any person or State automatically loses his or her seat. In addition, under the Commonwealth Crimes Act, a Member «who asks for or receives or obtains, or offers or agrees to ask for or receive or obtain any property or benefit of any kind for himself or any other person on the understanding that the exercise by him of his duty or authority as such a Member will, in any manner, be influenced or affected, is guilty of an offence» punishable by a two-year prison term. Under Australia's Electoral Act, a political candidate or Member who is guilty of bribery or attempted bribery, undue influence or interference with political freedom in relation to elections is debarred from being selected or from sitting in Parliament for two years , In addition to these legal provisions, a consensus seems to exist regarding various "ethical" standards listed in a 1978 Committee of Inquiry report.¹⁶⁸ According to this report, members must:

- Avoid any situations in which their private interests might enter into conflict with their public office;
- Never use information obtained in the exercise of their mandates to accumulate personal wealth;
- Never give the impression that anyone might exert undue influence on them;
- Never allow the pursuit of their private interests to interfere in the exercise of their public duties.

In the United States of America, the conduct of members is not governed by a single code but by a whole series of laws, notably on

¹⁶⁸ Bowen, N., 1979, Public Duty and Private Interest 31-32 (1979). The Report of the Committee of Inquiry established by the Prime Minister of 15 February 1978, quoted in Maskell, J.H., *Legislative Ethics in Democratic Countries: a Comparative Analysis*, Washington, Library of Congress. 1997, pp. 12-13.

corruption, illegal donations, conflicts of interest, declarations of assets and conduct after a mandate ends.^{fn9}

In Poland, the Constitution stipulates that members must "observe high standards of integrity", "give priority to the national interest and carry out their duties in accordance with their conscience", "refrain from abusing their position to acquire rights or interests in property or positions, or to assist others in acquiring such advantages, through an agreement or arrangements with the State or public bodies or industries".

In Benin, the Rules of Procedure of the National Assembly prohibit deputies from exploiting their status or allowing it to be exploited in financial, industrial or commercial companies, in the exercise of a liberal profession or, in general, for purposes other than the exercise of their mandate. In some countries, this type of prohibition may continue to apply after the expiry of a mandate. In Israel, for example, former Members of the Knesset are prohibited from exploiting their status in writings related to their commercial and/or professional activities.

4. A special case: regulations governing parliamentary lobbying

Parliamentary lobbying has long been a North American practice and is still essentially a Western phenomenon. As its importance depends to a large extent on a country's political and socio-economic structure, it is unwise to make inter-country comparisons. In the United States of America, for instance, a member may be contacted by lobbyists for multinational companies or trade unions. In some Western European countries, on the other hand, trade unions are associated with political parties (or were long associated with them in the past). Their influence is thus already discernible in the membership of electoral lists and they have no need to contact "their" parliamentarian to press their concerns.

In some assemblies, such as the Israeli Knesset, parliamentarians are strictly prohibited from representing the interests of clients, including pressure groups, at plenary sittings or in committee. This is a very strict rule, which may even prevent "unremunerated" representation, not to mention organised lobbying.

In Germany, the code of conduct makes it unlawful for members of the Bundestag to accept remuneration for exercising their mandate in a manner other than that laid down in the law. The Federal Constitutional

^{fn9} For further details, see Maskell. J.H., *op. cit.*, pp. 5-7.

Court has ruled that this type of income, which, as far as the remunerating organisation is concerned, can be motivated only by the hope of exerting influence over the member, is incompatible with members' independence and their right to equitable financial remuneration.

The Rules of Procedure of the French National Assembly prohibit the establishment within the Assembly of groups whose purpose is to promote individual, local or professional interests and which therefore require their members to accept an imperative mandate. The Rules also prohibit meetings of groups defending the same interests within the precincts of the Parliament. Deputies are also prohibited, on pain of disciplinary sanctions, from belonging to any association or group established to promote individual, local or professional interests or from entering into commitments vis-a-vis such groups regarding their parliamentary activity, where such membership or commitments imply the acceptance of an imperative mandate.

Parliamentary lobbying in other countries is a widespread phenomenon, but it has nevertheless been deemed necessary to assist parliamentarians in preserving their "virtue" by establishing safeguards against lobbyists.¹⁷⁰

In the United States of America, all former members of Congress must observe a one-year "cooling-off period" after their mandate expires before lobbying members of Congress or their staff. This moratorium also covers representation of an official foreign organisation before Congress or any other public body in the United States. The rules specify the exact type and amount of "donations" that members may accept from lobbyists or other persons. They may, for example, accept donations for a legal defence fund, but the reimbursement of travel costs or donations based on personal hospitality are prohibited.

In Canada, pressure groups are subject to the Lobbyists Registration Act, which requires them to supply certain information in a questionnaire.

In Europe, the European Parliament has played a pioneering role in the regulation of parliamentary lobbying. The Quaestors are responsible for issuing individual passes, valid for not more than one year, to persons wishing to enter the premises of the European Parliament regularly in order to provide deputies with information related to their parliamentary

¹⁷¹ We have only mentioned specific measures because legislation punishing deliberate corruptive practices naturally applies to lobbyists in the same way as to other citizens.

mandate, either on their own behalf or for third parties. In return, these lobbyists must be listed in a register¹⁷¹ kept by the Quaestors and must respect the code of conduct annexed to the Rules of Procedure of the European Parliament. The rules of conduct applicable to lobbyists at the European Parliament include the following: to disclose the interests they represent to the Members and staff of the Parliament; to refrain from claiming any formal relationship with the Parliament in their dealings with third parties; to observe the rule prohibiting Members from receiving any gift or benefit in the exercise of their mandate, except for financial support, in terms of staff or material, supplementary to that provided by the Parliament; to ensure that such support is declared by the beneficiary Members in the register; to comply with the provisions governing the status of officials in the event of recruitment of former officials and the Parliament's rules governing the rights and responsibilities of former Members; to obtain the prior consent of the Members concerned when drawing up contracts or hiring assistants. The individual passes are renewed only if the holders have met the conditions laid down in the Rules of Procedure. Any complaint by a Member regarding the activities of a lobbyist or interest group is referred to the Quaestors, who consider the case and may decide to maintain or withdraw the pass. Needless to say, these European regulations, however innovative, are largely confined to the formal and visible aspects of parliamentary lobbying.

5. Penalties for breaches of rules of conduct

If a member is charged with failing to respect rules of conduct, two questions arise: what penalty is applicable and who decides to impose it?

We propose to leave aside prohibitions stemming from criminal legislation (concerning corruption for example), which clearly have more serious implications than mere rules of conduct. If they are breached, the perpetrator is almost invariably liable to criminal sanctions imposed by a court. We are more concerned in this chapter with penalties in the event of a breach of purely ethical precepts such as those established by assemblies in their standing orders or in a resolution.

Penalties for non-observance of rules of conduct are often the same as the "disciplinary" sanctions imposed for failure to comply with provisions

¹⁷¹ This register is open to the public on request in all premises of the European Parliament and at information offices in member States in the form established by the Quaestors.

of the rules of procedure (see Chapter III above). In some assemblies, however, there are special penalties for "ethical offences" (see the case of Japan below).

In the United States of America, the most lenient penalties are those imposed by the Ethics Committee,¹⁷² for which a House ruling is not required. For more serious penalties, however, such as censure (or, more importantly, expulsion), the assembly is required to take a decision in the form of a resolution.^m Members may be assisted by a lawyer in proceedings before the Ethics Committee; they may also receive such assistance during plenary sittings, but the lawyer is not allowed to take the floor. The plenary assembly is never obliged to act on the recommendations of the Ethics Committee, but the member cannot appeal against its decision because the procedure is inquisitorial rather than adversarial.

Proceedings before the Ethics Committee have recently been heavily criticised because of the highly partisan atmosphere that prevailed during the Gingrich enquiry. A number of proposals to amend the "ethics complaints" procedure have been submitted by a working group for consideration by the assembly. In the meantime, a moratorium has been established.¹⁷⁴

In the United Kingdom, as breaches of certain rules of conduct are equated with contempt of parliament (see below), the House of Commons is theoretically authorised to sentence offenders to imprisonment, but it is highly unlikely to do so. Suspension for a specific period and expulsion are the most likely penalties. Only the House, through the Select Committee on Standards and Privileges, is empowered to rule on breaches of the code of conduct.

The situation is similar in Israel, where only the Ethics Committee of the Knesset is empowered to punish members who have breached the code of conduct. Accused members always have the right to be informed of the complaint and to respond in writing. They are also entitled to a hearing before the Committee and to the assistance of a lawyer.

^m Officially the "Committee on Standards of Official Conduct".

¹⁷¹ In January 1997, the Speaker of the House of Representatives, Newt Gingrich, was penalised for breaching the rules of conduct, notably by using charities to finance his electoral campaign. The House adopted a resolution containing an official reprimand and sentencing him to pay a fine of \$300,000 to cover the costs incurred by the Ethics Committee in endeavouring to obtain a clear picture from Gingrich's "mystifying" statements. (Koszczuk, J., "Gingrich Ethics Case — House Ethics Process", *Congressional Quarterly*, 1997-98).

¹⁷⁴ *Ibid.*

In Japan, the Deliberative Council on Political Ethics is responsible for ruling on cases of non-compliance with the rules of conduct. As in the assemblies mentioned above, members are entitled to a hearing before the Council. If a member is found guilty, the Council may choose among three categories of penalty: first, it may enjoin the member to observe the rules of conduct in the future; secondly, it may exclude him or her from meetings for a specific period; and thirdly, it may ask the member to resign from certain high offices. On the other hand, if the Council considers that the complaint is unfounded, it may take steps to "restore" the member's honour.

It may be gathered from the foregoing that, as a rule, responsibility either for imposing sanctions or for proposing them to the plenary assembly lies with a special committee of the assembly. There are, however, some exceptions to the rule. In some assemblies, the presiding officer takes the decision. This is the case in the German Bundestag, where the President decides whether or not a member has breached the code of conduct. An appeal may be filed against the President's decision by the Bureau and group presidents (but not by individual members). In the event of an appeal, the President reviews the complaint and takes a final decision that is not subject to appeal.

Lastly, authority to impose sanctions is sometimes vested in a judicial body. In Zambia, for example, ethics complaints are heard by a court composed of three judges appointed by the President of the Supreme Court from among former members of the Supreme Court or the High Court.

V. Contempt of parliament

1. A quintessentially British institution

Protection against "insults" to or "contempt" of parliament is a privilege enjoyed both by assemblies and individual members in some countries. The countries concerned may be divided into two categories.

The notion of contempt of parliament is alien to most countries. Clearly, this does not mean that insults to parliament are allowed but simply that no legal distinction is made between insults to parliament and those directed against some other public authority. Parliament is not protected in its own right but as part of the machinery of government whose dignity must be preserved in all circumstances. While the terms

"contempt of parliament" or "insult to parliament" are occasionally employed in some countries belonging to this group, especially those influenced by French tradition, their scope is different from that prevailing in countries with a British parliamentary tradition. The Rules of Procedure of the French Senate stipulate that a Senator who insults the Senate or its President is liable to censure with temporary expulsion from the Senate building. In such cases, the French Senate is not exercising criminal but disciplinary jurisdiction. Slander of the "constituent bodies" (including the Parliament) is punishable by a term of imprisonment of one year and a fine of FF 300,000 under the Act of 29 July 1881 concerning freedom of the press.

The second group of countries, on which we propose to focus in this chapter, consists for the most part of countries with a parliamentary tradition based on the British model (Canada, Ireland, United Kingdom, United States of America). In these countries, parliament has laid the foundations for its own protection: it enjoys criminal jurisdiction and may impose penalties on anybody who breaches its privileges.

2. Protection against interference by the Executive or the general public

The scope of the concept of contempt of parliament is somewhat unclear, *inter alia* because Commonwealth parliaments have always jealously guarded their right to determine whether or not their privileges have been breached. It is not surprising therefore that the Rules of Procedure of these parliaments rarely contain a definition of the notion of contempt of parliament.¹⁷³

As a rule, contempt of parliament denotes what may be termed "breaches of the privileges of parliament" or "insults to parliament". The following examples illustrate what this means in practice:

- Attacking, obstructing, abusing or insulting members or parliamentary officials in the performance of their duties;
- Bribing a parliamentarian;
- Refusing to obey parliament or its committees (attendance, production of papers, books, documents or reports);

¹⁷³ "The Rules of Procedure of the Indian Council of States (the Rajya Sabha) constitute an exception to this rule by defining contempt of the House in annex III as "any act or omission which obstructs or impedes any member or officer of such House in the discharge of his duty, or which has a tendency directly or indirectly to produce such results".

- Creating disturbances liable to disrupt parliamentary business;
- Defaming or slandering parliament and its members orally or in writing;^{17M}
- Publishing confidential information;
- Trying to influence parliamentarians' votes, opinions, assessments or action by fraud, threats or intimidation;
- Perjury before parliament or its committees;
- Use of force or threatening to use force to suspend a sitting, etc.

It may be gathered from this list, which is not exhaustive, that the aim is to protect the proceedings of the assembly against any kind of interference, primarily by the Executive or the general public.

When parliament decides to punish an offender, it usually does so in the form of a reprimand delivered by the presiding officer of the chamber concerned. Offenders who are not members of parliament are summoned to appear before the house. The right to impose sanctions includes the right to sentence offenders to limited terms of imprisonment.¹⁷⁷ Some parliaments are empowered to impose fines.

In the United Kingdom and most other Commonwealth countries, the courts recognise the exclusive jurisdiction of parliament in matters of privilege, but conflicts have arisen between parliament and the courts in cases in which the limits of privilege are unclear.¹⁷⁸

In the United States of America, the punitive authority of Congress is more limited than in the parliaments of the United Kingdom and some Commonwealth countries. The Constitution empowers the Congress to

^{17M} "It has not been unusual, for example, to raise as matters of privilege articles written by journalists or other publications which are alleged to defame Parliament. However, the boundary between fair comment and excessively strong criticism which might technically constitute a contempt is very thin as most Commonwealth parliaments recognise. For many years the British Parliament has been extremely hesitant to invoke its penal powers, and the Canadian Parliament almost never proceeds against journalists, whatever they may write, in the interests of safeguarding the freedom of the press. There have been some cases in recent years, notably in Malta and Zambia, indicating that some parliaments are more sensitive to derogatory criticism than others. One offence of which the British Parliament takes a particularly serious view is the unauthorised leaking of confidential committee proceedings" (Laundy, P., *Parliaments in the Modern World*, Lausanne, Payot, 1989. p. 120.).

¹⁷⁷ "Although it is very rarely invoked these days, it cannot be described as obsolete. As recently as 1955 the Australian House of Representatives sentenced two journalists to three months' imprisonment for publishing scurrilous allegations against certain members of Parliament" (Laundy, P., *op. cit.*, p. 121).

^{7H} "If, for example, parliamentary privilege is invoked as a defence in a case before the courts, it is the court which decides whether the argument is acceptable or not" (Laundy, P., *op. cit.*, pp. 121-122).

proceed against persons who breach the clearly established privileges of the two houses, for example a person who deliberately attempts to prevent a member from discharging his or her legislative duties. Congressional committees, all of which now have authority to subpoena, may proceed against witnesses who refuse to cooperate, with the proviso that self-incrimination by such persons is inadmissible. Congress is not, however, vested with general punitive authority and may not determine whether a particular form of behaviour constitutes contempt of Congress.¹⁷⁹

3. A weapon that can also be used against members of parliament

While the main purpose of the notion of "contempt of parliament" in countries where it exists is to protect the assembly and its members against acts by the Executive or the general public, members themselves may also commit the offence of contempt of parliament.

A member who is guilty of contempt of parliament, just like any other offender, is liable to a -reprimand, a term of imprisonment or a fine. Furthermore, in many Commonwealth parliaments the assembly may impose two other penalties: suspension of the member's mandate or expulsion.

In Western countries, parliaments display considerable reluctance to exercise this right. For example, the last occasion on which the British House of Commons expelled one of its members who had been found guilty of a gross breach of privilege was in 1947.^m In Australia, the 1987 Parliamentary Privileges Act not only abolished the authority of the two houses of parliament to punish individuals for defamation of parliamentarians, but also withdrew their authority to expel their own members.

In other Commonwealth countries, however, cases of suspension or even expulsion for contempt of parliament occur relatively frequently. In Zambia, for example, there have been four cases over the past thirty years: in 1968, a Member was suspended for the remainder of the term for racist allegations against colleagues; in 1970, a Member was expelled for offensive remarks that discredited the assembly; in 1993, a Member of Parliament and the Leader of the Opposition were accused of unjustly impugning the impartiality of the Speaker (the member was suspended);

⁷ⁿ/tod.,p. 121.

^mThi<!

lastly, in 1996 a Member was found guilty of serious contempt of parliament and expelled for openly dissociating himself from action taken by the assembly. It is therefore a manifestly dangerous weapon that should be used with the greatest circumspection.

CONCLUSION

During the last decade of the twentieth century, *free representational mandates* have become the rule. Since their abandonment by the former socialist countries of Eastern Europe (except for Belarus), imperative mandates have survived only in a few isolated instances (Cuba, Fiji, Namibia, Seychelles).

The normal *duration* of a parliamentary mandate in almost all lower houses is four or five years. In very rare instances it may run for only three or even two years. In some countries, members of the upper house are elected for longer periods. In such cases, the house is sometimes partially renewed during the course of the session. It should be noted in this connection that the notion of a term of parliament does not exist in some assemblies and that some parliaments sit continuously (House of Lords, Canadian Senate).

There is a striking lack of uniformity among parliaments regarding the *point at which a parliamentary mandate begins*. While it is relatively easy to identify broad trends in other areas, under this heading the task is considerably more difficult. Although three distinct categories are discernible (when the election results are declared, when the results are validated and when the oath is taken), it is far more difficult to establish a link with the predominant models, each parliament having apparently opted for the procedure that suits it best for a variety of reasons.

The fact that a similar lack of uniformity exists with regard to *the end of a mandate* is not so surprising because the date on which a mandate ends depends to a large extent on the date it begins. In general, the parliament's main concern is to prevent an unduly long vacuum between the two. In many countries, the end of the mandate coincides with the official end of the session or, in the event of early dissolution of parliament, with the date of dissolution. In other countries, the mandate of outgoing parliamentarians ends on the date of new elections. In some cases, the mandate ends only on the date of the first sitting of the newly elected parliament, which means that the mandate of outgoing parliamentarians extends in practice beyond the date of validation of newly elected representatives.

In most countries, members may terminate their mandate by tendering their resignation. The degree of formality of this procedure (oral or written statement, automatic entry into effect, acceptance by the assembly, etc.) varies considerably from country to country.

It is interesting to note that resignation is not permissible in every country. In the few countries that have retained an imperative mandate, for example, resignation requires the consent of the party or the electorate. But there are even some countries with a free representational mandate that prohibit resignation altogether, make it subject to authorisation by the assembly or compel members to resort to various kinds of subterfuges to achieve their aim.

Parliamentarians may also be deprived of a mandate against their will. In some countries, a parliamentarian's mandate may be revoked at the instigation of the electorate or the party. While revocation on the initiative of the electorate may give rise to a certain amount of concern, revocation by a member's party is considerably more worrying. It may be very tempting for a single or majority party to maintain discipline among its troops by threatening dissidents with forfeiture of their mandate. In countries with an imperative mandate, it is understandable that the right of revocation should be viewed as a natural extension of this type of mandate. But the fact that countries with a free representational mandate feel that they have a right to revoke the mandate of members of their assemblies (e.g. following expulsion from the party) is a troubling thought. Not so long ago, the Council of the Inter-Parliamentary Union protested at the fact that expulsion from a party could entail the loss of a parliamentary mandate although the Constitution of the country concerned deemed imperative mandates to be null and void.

It should also be borne in mind that it may sometimes be tempting for an opportunist parliamentarian to leave his or her own party and join another that secures a majority as a result of the move. In general, the parliamentarian in question ends up with a ministerial portfolio in the new government. This is no doubt what has prompted a marked trend in recent years in some countries (including India and some African countries) towards the introduction of measures designed to prevent such defections. One may well ask, with C.E. Ndebele, whether "the risks of political opportunism, by way of floor-crossing, pose a greater threat to democracy and participatory governance than limitations on the freedom of conscience and expression of elected Members in the House?". By leaving their political party, opportunistic or misguided members run the risk of failing in their task of representing their constituents. Conversely, "[i]s it not possible that Members who become disenchanted with their party would best serve the interests of their constituents by crossing the floor

and joining forces with other like-minded members rather than vacating their seat?"^{1*}

Parliamentarians may also be deprived of their mandate by the assembly. In countries where definitive expulsion is allowed, such action is usually taken on one of three different grounds. First, acceptance of an incompatible post entails loss of the mandate in many countries, either automatically (in which case it is a disguised form of resignation for the parliamentarian in question) or by a decision of the assembly. Secondly, loss of eligibility during a mandate may entail expulsion. It is gratifying to note in this regard that most countries require a court ruling on failure to comply with one of the eligibility criteria. Lastly, expulsion may be the ultimate disciplinary sanction imposed by an assembly on one of its members. It goes without saying that, given the serious nature of its consequences, such a decision should be taken only in exceptional and extremely serious cases and that appropriate safeguards should be provided to prevent its misuse by the majority as a formidable weapon against dissident deputies or members of the opposition.

It is not always easy to distinguish between the latter case and that of loss of a mandate pursuant to a judicial decision, which is usually termed "disqualification". The latter procedure exists in virtually all the countries studied except for the Syrian Arab Republic and the United States of America. Under the American Constitution, only the House of Representatives and the Senate have authority to rule on matters relating to the election and qualifications of their members. In other countries, disqualification may either be automatic (which means that the judicial decision takes effect without any involvement by the assembly) or require a decision by the assembly or another organ of State. In exceptional cases, disqualification ensuing from conviction by a court may be overruled by an express decision on the part of the assembly.

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With regard to *the status of parliamentarians*, given the broadening of access to political office to include all sectors of the population and the professionalisation of the parliamentary mandate, parliamentarians almost

everywhere now receive a *basic salary* that no longer bears any relationship to the number of meetings attended. The only exceptions to this rule are some African countries where members continue to receive daily allowances, and Cuba, where deputies receive an allowance equivalent to their salary before entering parliament throughout their mandate. In general, the basic salary is established by reference to salaries in the civil service (average salaries or salaries for a particular grade), but a number of the former socialist countries of Eastern Europe calculate parliamentary salaries on the basis of the average monthly wage multiplied by a specific factor.

In most cases, a *supplementary allowance* is added to the basic salary, usually in connection with the discharge of a particular office (presiding officer of the assembly, member of the bureau or business committee, chairperson of a committee, president of a group). Sometimes, the additional allowance is designed to compensate certain members for additional expenses incurred either because of the size of their constituency or because of the distance between their place of residence and parliament.

It is extremely unusual nowadays for parliamentary salaries to be entirely exempt from taxation. There is a general trend instead towards applying ordinary tax law to parliamentarians, at least as regards basic salary. Expense allowances, on the other hand, are often exempt, even in cases where it is difficult to prove that they cover only genuinely incurred expenses.

Pension schemes for parliamentarians are largely confined to Western countries. Elsewhere, it has either been deemed unnecessary to establish a special pension scheme (parliamentarians being subject to ordinary social legislation) or pension rights are simply non-existent. Where there is a special scheme, deductions from salary scarcely ever cover the cost; in general, some form of subsidy or appropriation is therefore included in the assembly's budget. Parliamentarians must usually meet two criteria to be eligible for a pension: they must have reached a minimum age (often much lower than the legal pensionable age) and have held a seat in parliament for a minimum number of years.

In virtually all assemblies, parliamentarians enjoy a certain number of *facilities and services* over and above their basic salary and supplementary allowances. Quite commonly, however, these facilities are either restricted to certain categories of member (e.g. members of the Bureau) or depend

on the size of the political group. A trend to be noted in this context is the move away from a secretariat and a "pool" of assistants to individual assistance. Parliamentarians usually have one or more assistants — often graduates — who are either assigned to them or whom they recruit themselves. This trend reflects the determination of assemblies to draw on intellectual support of a calibre comparable to that available to the Executive in the form of ministerial personnel.

While the independence of parliamentarians has always been the main reason for establishing certain *incompatibilities*, there has recently been an upsurge — particularly in Western Europe — in measures designed to establish additional incompatibilities unrelated to the goal of safeguarding members' independence in the strict sense of the term.

These initiatives have less to do with preventing corruption or financial and other scandals than with ensuring that parliamentarians have sufficient time in which to discharge their duties. In pursuit of this goal, countries such as Belgium, France and Italy have restricted plurality of mandates, while other countries have introduced ineligibility criteria (United Kingdom) or publicised parliamentarians' activities (Germany, United States of America). Since 1996, members of the Israeli Knesset may not earn income from any occupation whatsoever, although this restriction takes effect only six months after the beginning of a mandate.

All these measures designed to ensure that parliamentarians are free to perform their duties are of course praiseworthy, but they may also entail risks. For example, it is by no means certain that members with the most time available automatically contribute most to their assemblies. Obviously, when availability sinks beneath a certain threshold, the quality of parliamentary work will suffer. But the opposite may also be the case. Parliamentarians who also hold office at the municipal level can perhaps offset their slight loss of availability by turning their practical expertise to account, for example in the Internal Affairs Committee. Lastly, such measures may result in undue professionalisation of the parliamentary mandate.

It should be noted that the declarations of offices or interests recently introduced in many Western countries provide a full picture of the "extracurricular" activities of parliamentarians and ensure stricter compliance with legislation on incompatibility and concurrent mandates. The distinction between incompatibility regimes proper, declarations of assets and offices, and other ethical precepts is becoming more blurred every day.

Declaration of assets and/or interests is a practice that has become much more widespread in recent years, especially in Western Europe. This is a logical development inasmuch as all parliaments feel the same need to «clean up politics» and justify their existence vis-a-vis an increasingly critical population. This is probably why many countries are moving in the same direction, although, given the current state of legislation, one cannot yet speak of a fully fledged declaration of assets (Austria, Czech Republic, Latvia) and why other countries (Chile, India) are considering proposals to introduce a declaration of assets.

In this area, as in many others, the United Kingdom has undeniably played a pioneering role. The "British-style" declaration of interests has been copied by a large number of countries. Its chief merit consists in the fact that the declaration is not a mere set of figures but focuses on the possible links between MPs and private interests. The key concept is therefore transparency: the public must at all times be aware of the interests that an MP defends in order to assess his or her actions in their true light. Parliamentarians must report any appreciable financial or material interest they have in a discussion or debate in the House so that it may be taken into account (e.g. by replacing them on a committee).

The "French-style" declaration of assets is based on entirely different principles. It reflects, whether one likes it or not, a greater degree of mistrust of public office-holders than the British system (perhaps because it is more recent and hence more strongly influenced by recent financial scandals). At the risk of over-simplifying, we may even assert that its key concept is the fight against corruption rather than the promotion of transparency. This type of declaration serves primarily to establish whether a member has accumulated wealth at an abnormal pace during his or her mandate. However praiseworthy this approach may be, it is marred, in our view, by a number of shortcomings. To begin with, the generally confidential declaration provides no indication of the interests that members might defend without the knowledge of their constituents. To remedy this shortcoming, many countries that have opted for a "French-style" declaration have concurrently introduced a rule requiring members to present a list of offices held. The question is whether such a written declaration can be as effective as the written and oral declarations that all British MPs are required to make. Another weakness is that the "French-style" declaration inevitably entails severe penalties, usually of a criminal nature. This is a far cry from the Scandinavian approach, according to

which non-compliance with the rules governing declarations of interests is punishable by sanctions that are more moral than material, often imposed by the body responsible for monitoring compliance with the code of conduct.

Despite these reservations, the "French-style" declaration seems to be the preferred model at the global level. Moreover, there is a marked tendency to extend the *ratione personae* scope of this type of declaration to political players other than parliamentarians and ministers. The declaration of assets/interests is thus becoming one of the key factors in the endeavour to make politics more transparent and to shed light on the relationship between money and politics.

Parliamentary non-accountability is undoubtedly one of the most effective means of ensuring the proper democratic functioning of parliamentary systems, since it provides parliamentarians with watertight protection against prosecution for words spoken or votes cast in parliament.

The Council of the Inter-Parliamentary Union has therefore quite rightly emphasised that "parliamentary non-accountability is essential to the functioning of parliamentary democracy as it permits MPs to fulfil the mandate entrusted to them by their constituents without fear of any retaliatory measures on account of their opinions." The Council noted "that all parliamentary democracies without exception guarantee members of parliament non-accountability" and affirmed that "bringing judicial proceedings against MPs in respect of a vote cast and opinions expressed seriously undermines the institution of parliament as such and parliamentary democracy itself."¹⁸²

Apart from being a "fundamental freedom" of parliamentarians, parliamentary non-accountability is also an essential prerequisite for enabling parliamentarians to defend and promote human rights and fundamental freedoms in their respective countries. The IPU Council has stated that parliamentarians, "[i]n their capacity as representatives of the people and intermediaries between them and the State, to the extent that they enjoy the freedom of expression essential to their parliamentary functions, (...) are key actors in the promotion and protection of human rights and in building a society imbued with the value of democracy and

*: *Positions regarding human rights issues taken by the inter-Parliamentary Union in recent years*, Geneva, Inter-Parliamentary Union, 1998, pp.14-15.

human rights. They can, in particular, denounce before parliament and public opinion any abuses they notice or which are pointed out by members of the electorate."¹⁸³

It is therefore gratifying to note that, while the historical evolution of parliamentary non-accountability has been different in countries with a British or French parliamentary tradition, the current situation is relatively uniform. While certain differences exist in terms of the *ratione personae* scope of the privilege (which is confined to MPs in some countries and includes other participants in meetings in countries with a British parliamentary tradition) and the degree of protection afforded (full protection in some countries, protection only against specific proceedings or "qualified privilege" in others, etc.), on the whole, the degree of theoretical protection afforded is sufficient in all cases to ensure that parliamentarians enjoy the independence they need to exercise their mandate.

Unfortunately, parliamentary non-accountability, like any other basic right, is sometimes violated. Many cases of violation of the freedom of expression of MPs have been condemned in the reports of the Inter-Parliamentary Union's Committee on the Human Rights of Parliamentarians.

Unlike parliamentary non-accountability, *parliamentary inviolability or immunity*, which is defined as the protection of parliamentarians against civil and/or criminal proceedings for acts carried out in the performance of their duties, is a privilege on which positions differ widely from country to country.

We have already seen that inviolability does not exist at all in a number of countries. As Michel Ameller puts it diplomatically, "the fact that history records no regrettable incidents in this case just goes to show that these countries have made enviable progress in the organisation and functioning of the organs of State. Democracy has prospered in the countries concerned."¹¹⁴ Unfortunately, this is not always the case.

In a second group, composed mainly of Commonwealth countries, immunity has been reduced to the minimum (protection against arrest in civil cases, exemption from the requirement to appear before a court in certain cases). Some other countries (including Ireland and Norway), in which parliamentarians are protected against arrest only on the way to or from

^m *Ibid.*, p. 14.

^M Ameller, M., *Human Rights and Parliamentary Immunities*, op. cit., p. 32.

parliament and within its precincts, may be added to this group. Immunity rarely causes problems in these countries, probably because the regimes in question are based on a long democratic tradition and the protection afforded, although subject to restrictions, is relatively comprehensive.

In countries that prohibit prosecution or arrest without the express authorisation of the assembly to which the parliamentarian belongs, the notion of parliamentary immunity has proved to be considerably less stable than that of non-accountability. There is a general tendency in countries that have experienced radical changes in recent years (Austria, Belgium, France, Italy) to provide less comprehensive protection and to rely to a greater extent on ordinary law.¹⁸⁵ This trend is more pronounced in Western European countries influenced by French parliamentary tradition, in which immunity has hitherto afforded a broad measure of protection.¹⁸⁶

The trend towards reliance on ordinary law is attributable to the fact that it is becoming increasingly difficult in Western countries to justify the well-nigh "absolute"¹¹ privilege of parliamentary immunity. On the one hand, public opinion is less willing than in the past to accept special treatment and, on the other, "fear of the Executive" is frequently viewed as an exaggerated pretext used by parliamentarians to safeguard privileges that suit them only too well. This argument may be sound in some Western countries (there are certainly countries without immunity where its absence has never caused the slightest problem) but it should be stressed that they are a small group of fortunate countries with a long democratic tradition. In many other countries without any provision for parliamentary immunity in their constitution of legislation, there is every reason to be concerned about the possible misuse of power against parliamentarians. The importance of the role played by the Inter-Parliamentary Union's Committee on the Human Rights of Parliamentarians in this regard should not be underestimated.^{*7}

¹⁸⁵ In a small number of cases, a contrary trend has been discernible. For example, immunity was extended in the Philippines in 1987 to include protection against arrest for offences, whereas previously it protected parliamentarians only against arrest in civil matters.

¹⁸⁶ In France, for example, since the adoption of the Constitutional Act of 4 August 1995, the authorisation of the Bureau of the assembly of which the parliamentarian is a member is required only for arrest and the implementation of measures involving deprivation or restriction of liberty.

^{*} See the report by Mr. Leandro Despouy on behalf of the IPU Committee on the Human Rights of Parliamentarians (1 January 1977-4 February 1993, *op. cit.*, p. 251.

With regard to *order of precedence within the assembly*, one is struck by the relative uniformity of the approach adopted in different countries. In parliaments based on the British or French tradition, in Scandinavia and in Latin America, the order of precedence is almost invariably determined by parliamentarians' responsibilities or the office they hold within the assembly. The precedence of the presiding officer is, of course, universally recognised. As far as other offices are concerned, countries with a French parliamentary tradition tend to base the order of precedence on offices held within the assembly's governing body. They also tend to take into account such offices as president of a political group or chairperson of a committee or even offices held previously by the member in question (e.g. former prime ministers in France). Countries with a British parliamentary tradition are more predictable in terms of the order of precedence (which is nearly always the same, be it in Bangladesh, the United Kingdom or the United States) and by a more clear-cut alternation between the majority and the opposition. For example, the leader of the majority takes precedence over the leader of the opposition, who is followed by the majority whip and the opposition whip. It would be rash to infer from this that the rights of the opposition are better guaranteed in countries with a British tradition than elsewhere. In fact, a similar concern to ensure alternation in the procedure for appointing bureau members or committee chairpersons is usually discernible in other countries. Moreover, priority based on office is not universal inasmuch as seniority in the assembly plays such a key role in the process of appointing committee chairpersons and other office-bearers in some countries (including the United States of America) that "priority based on office" is largely equivalent in practice to "priority based on seniority".

The difference between countries with a British parliamentary tradition and others is more pronounced when we come to *rank in the hierarchy outside the assembly*. This is logical inasmuch as the rank of presiding officers broadly reflects the position held by their assembly among the organs of State. Thus, in most countries based on the French model, the president of the assembly comes immediately after the head of the Executive (monarch, president of the republic or prime minister) in the order of precedence. In exceptional cases, he or she may rank higher than the head of the government. Given the role played by parliament in these countries in the struggle against absolute monarchy, the high rank of the presiding officer is not surprising. In "common law" countries, on the

other hand, presiding officers occupy a manifestly lower position in the order of precedence. The prestige and importance of the Judiciary in these countries doubtless accounts for the fact that the presiding officer is preceded, *inter alia*, by the Chief Justice.

The conclusion to be drawn is probably that undue importance should not be attached to the order of precedence, particularly in countries where custom and tradition play an important role. Matters of protocol tend to be particularly unsusceptible to change and the rank that an institution occupies in the hierarchy generally tells us more about its political weight two centuries ago than its current political standing.

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New members tend to acquire the experience they so urgently require in a number of different ways. The need for *training or induction courses on procedure* is greater in cases in which parliamentary traditions are less well-rooted (where a democratic system is being introduced or restored) or there has been a substantial turnover in the assembly (e.g. a major change in the political regime). It is gratifying to note that many countries are putting a great deal of effort into the training process, with the assistance of international organisations.

Assemblies based on the British model have always attached special importance to *participation in the assembly's proceedings*. But in recent years, compulsory attendance has rapidly become the norm throughout the world. This trend has been accompanied by the introduction of formal rules and sanctions, which are mainly pecuniary.

This phenomenon is linked to the increasing professionalisation of parliamentary mandates and the greater control that public opinion exerts over parliamentary proceedings. Ordinary members of the public tend to compare their own lot with that of the men and women they have elected; they see no reason why they should run the risk of being dismissed for absence from work without a valid reason when they see rows of empty benches in parliament on the evening television news. But the enormous success of regulations on attendance is not due to pressure of public opinion alone. It would be wrong to overlook the fact that leaders of the majority and of the opposition find it extremely inconvenient to have to depend on only a small proportion of their troops. Assemblies based on the British model have long relied on majority and opposition whips but

others have remained virtually defenceless against mass absenteeism. The introduction of largely pecuniary sanctions is a way of killing two birds with one stone: order is restored in the assembly and the outside world sees that parliamentarians are professionals like everybody else.

Absenteeism is clearly a major problem. No member, however brilliant, can do good work without devoting a large proportion of his or her time to parliamentary duties. As political staff almost invariably work full time on behalf of the Executive, the fewer members present in a committee, the less the minister has to fear criticism and the better he or she can control the whole of the legislative process. It follows that measures must be taken to ensure that parliamentarians are present at their workplace.

However, the systems introduced throughout the world in recent years are marred by a number of shortcomings, first and foremost in terms of their effectiveness. For purely practical reasons, punishment is often confined to cases of absence from plenary sittings. As it is not the purpose of the exercise to establish an inquisition, parliamentarians know in advance at what time of the day or week their presence will be recorded. As a result, a better impression of parliament is conveyed on television because all members are present to cast their votes. But it is by no means certain that the quality of parliamentary work is significantly improved by regulations of this nature. One may, of course, follow the example of certain assemblies and extend the attendance requirement to include committee meetings and/or record attendance at times other than when votes are being cast. But in so doing, a parliament may run the risk of treating its members like schoolchildren. Surely members should have every right to spend two days in the archives of the Auditor General's Department or to march alongside strikers if their conscience tells them that this is the proper course of action. It may be argued that these are valid reasons for absence, but the presiding officer may disagree. It may also be argued that, save in extreme cases, the worst that can befall a member is the loss of part of his or her salary. That may well be, but the growing professionalisation of parliamentary mandates means that some members are increasingly dependent on their salary. In other words, the main aim must be to strike a precarious balance between the needs of the assembly, public expectations and the independence of the parliamentarian.

One may be tempted, in reading the chapter on *discipline*, to view parliament as some form of disciplinary institution in which the slightest misdemeanour entails a penalty. This is obviously not the case, first

because debates in parliament are usually characterised by self-discipline and respect for the rules of good conduct laid down in the rules of procedure. It is only during difficult debates involving sharp differences of opinion that questionable behaviour may occur. In a democratic regime, disciplinary sanctions are usually applied only on rare occasions and serve primarily as a warning or deterrent.^{1m} Secondly, the initial sanction is usually mild. It is only when an offence is repeated or a member ignores an order that stricter penalties are applied. The step-by-step application of increasingly severe sanctions is clearly illustrated in the European Parliament, where the President first calls to order a member who has disturbed the sitting. If the member persists, the President issues a second call to order with an entry in the record. If the disturbance continues, the President may expel the offending member from the chamber for the remainder of the sitting. In the British House of Commons, the Speaker first draws the assembly's attention to the behaviour of a member who persists in digressing from the subject or whose statement is tediously repetitious and asks the member concerned to return to his or her seat. If, despite repeated warnings, the member continues to behave in an unacceptable manner, the Speaker may order him or her to withdraw from the chamber immediately for the remainder of the day. If the member refuses to withdraw, the Speaker may opt for one of two more severe penalties: ordering the Sergeant-at-Arms to ensure that the member obeys the order to withdraw or naming the member.

While the importance of these disciplinary sanctions should not be exaggerated, it should nevertheless be borne in mind that some are more dangerous than others because they prevent members from carrying out their mandate. Among these, the most important are the order to withdraw from a sitting, temporary expulsion and suspension of the mandate, sanctions that exist not only in countries based on the French model, but also in those with a British parliamentary tradition and in countries that do not belong to either category. The President of the German Bundestag, for example, may order members who have seriously disturbed the

^m It will be noted, for example, that, after the sitting of 9 October 1987 at which deputies of the *Front National* caused repeated disturbances during the discussion of the bill against drug abuse, the Bureau of the French National Assembly refrained from imposing sanctions but adopted a solemn declaration denouncing "behaviour which, if repeated, might jeopardise the functioning of the institution and hence the exercise of democracy" (Duhamel, O. and Meny, Y., *op. cit.*, pp. 311-312).

proceedings to withdraw for the remainder of the sitting, without prior warning. Before the sitting closes, the President announces the number of days, up to a maximum of 30, for which the member is suspended. If the member considers the sanction unwarranted, he or she may submit a "reasoned objection", which is placed on the agenda of the next sitting and voted on without prior discussion.

In countries whose democratic credentials are above all suspicion, the risk of abuse is clearly limited. Unfortunately, according to the report of the IPLPs Committee on the Human Rights of Parliamentarians,¹⁸⁹ the temporary suspension of a parliamentarian's right to take part in parliamentary sittings is the disciplinary sanction most susceptible to abuse and misuse for political ends. It should therefore be used with great circumspection. This cautionary remark is all the more applicable to definitive expulsion, which is fortunately resorted to less frequently as a disciplinary sanction.¹⁹⁰

While two different approaches to the declaration of assets/interests are discernible (with the French and British approaches carrying broadly equal weight), the supremacy of the British model is unchallenged in the area of *codes of conduct*.

Its primacy is due first of all to the fact that the British Parliament took action sooner than any other assembly (in the seventeenth century!) against any form of corruption among its members. Secondly, no country has conducted such a rigorous process of reflection on parliamentary ethics as the United Kingdom. Lord Nolan's report¹⁹¹ has no equivalent in its field and will undoubtedly inspire many more parliamentarians in the future. Its merit lies in the fact that parliamentarians are viewed as men and women like anybody else, so that one should neither be unmindful of the temptations to which they are exposed nor fall into the opposite trap of treating them all as crooks.

Unlike other attempts to clean up politics, codes of conduct seem for the time being to be an essentially British practice. The few countries outside the British tradition that have gone furthest in this regard

¹⁸⁹ See the report by Mr. Leandro Despouy on behalf of the IPU Committee on the Human Rights of Parliamentarians (1 January 1977- 4 February 1993, *op. cit.*, pp. 258-259.

¹⁹⁰ The Constitution of the United States of America confers on the House of Representatives the right to expel a member, but in practice this option is restricted to persons who no longer meet eligibility criteria and its use in disciplinary cases is purely theoretical.

¹⁹¹ *Standards in Public Life, op. cit.*

(Germany, Japan) confirm the rule, since they have always been strongly inspired by the British and American parliamentary systems. This is not to say that other countries have stood idly by. Countries influenced by the French model, for example, have adopted legislation to counter cronyism. Unlike the United Kingdom, however, they have hitherto failed to develop a global perspective.

What we have said of codes of conduct is also applicable to regulations on *parliamentary lobbying*, although in this case it is another English-speaking country — the United States of America — that has blazed the trail. But a different issue is involved in the case of lobbying because it is not conducted in the same manner and with the same intensity everywhere. While ethical issues are broadly similar in all parliamentary systems, the situation is different in the case of lobbying, whose social acceptance and prevalence are closely bound up with a country's economic system. The globalisation and liberalisation of the economy will undoubtedly prompt more and more countries to adopt regulations comparable to those in the United States. It is significant that in Europe the assembly that has found it most necessary to take action in this regard is the European Parliament.

This trend is not undesirable in itself. It is always better to face up to reality and to seek to respond to new social developments, of which lobbying is just one aspect. It should nevertheless be borne in mind that most parliamentary systems are based on the principle of representative democracy, which cannot be set at naught by methods of direct action and influence on parliamentarians.

The purpose of conferring a certain status on British MPs at the end of the seventeenth century and, even more so, on French parliamentarians at the end of the eighteenth century was primarily to protect them against interference by the Executive. At that time, parliamentarians needed to enjoy rights that were withheld from or enjoyed to a lesser degree by the average citizen. Compared with the level of legal protection accorded to other citizens, parliamentarians thus undeniably enjoyed a (limited) number of privileges, the most striking of which were immunity and their rank in the hierarchy.

As time passed, the *de facto* status of parliamentarians gradually improved, a trend due essentially to the political and socio-economic

changes that radically changed the basis on which they were recruited. It is easy to see why parliamentary salaries were of greater importance to the first socialists elected to parliament in Europe than to the wealthy industrialists whose seats in parliament were passed down from father to son. The same remark applies, *mutatis mutandis*, to the introduction of incompatibilities, which hit some professions harder than others and had repercussions on the membership of parliament. A prominent feature of this initial enhancement of status was the recognition of a separate category of rights for parliamentarians. These developments tended to set them apart from the average citizen, even creating privileged castes in some countries.

History tells us that every movement sets off a counter-movement and this seems to be what happened to the status of parliamentarians. At very different points in time (in the nineteenth century in the United Kingdom, after the Second World War in many continental European countries and still more recently in some developing countries), the rights enjoyed by parliamentarians were supplemented by an increasing number of duties and obligations: the attendance requirement, the declaration of assets and/or interests, the prohibition on concurrent mandates and other codes of conduct. The status of parliamentarians is thus becoming a more or less balanced package, in which privileges are counterbalanced by occasionally onerous constraints.

During the last two decades of the twentieth century, this movement has gathered speed. In our view, recent developments can be broken down into three major categories.

The first broad trend in recent years has been *the tendency to abolish all "privileges" other than those required for the proper exercise of the parliamentary mandate* and to make parliamentarians increasingly subject to ordinary law. This trend is discernible, for example, in the taxation of salaries, with total tax exemption becoming extremely rare. It is even more striking in the area of parliamentary immunity. While parliamentary non-accountability is universally guaranteed and a very stable privilege, more and more countries are limiting the scope of parliamentary immunity, doubtless on the grounds that the guarantees currently afforded by ordinary law are sufficient to protect parliamentarians against any form of pressure. Experience shows, however, that immunity is still the Achilles heel of parliamentarians in countries in which democracy has not yet struck deep roots.

The second broad trend has been the *professionalisation of parliamentary mandates*, which seems to be a virtual fait accompli at the global level. In other words, the parliamentary mandate has become a "job" that is supposed to keep parliamentarians employed on a full-time basis and provide them with a decent standard of living. This trend is discernible, first and foremost, in the fact that parliamentary remuneration in almost all systems has assumed the form of a regular salary, the aim being to allow any member of the public, regardless of means, to enter parliament. Moreover, remuneration no longer bears any relationship to the number of meetings attended. This trend is also reflected in the fact that, alongside the traditional incompatibilities designed essentially to safeguard a parliamentarian's independence vis-a-vis the other branches of government, a growing number of prohibitions and/or limitations on concurrent mandates are being imposed on the grounds that a parliamentarian who holds too many offices (whether public or private) has insufficient time to devote to his or her parliamentary work. While this is an understandable development, it also carries the risk of cutting off parliamentarians from socio-economic realities and making them more vulnerable if they lose their mandates or are not re-elected. Concern to ensure that parliamentarians are free to do their parliamentary work has also prompted action to counter absenteeism.

The third and last broad trend is the *"cleaning up" of politics in general and of parliamentary activity in particular*. While it is questionable whether politics and parliaments are really more "immoral" today than in the past, it cannot be denied that public opinion, outraged by press reports of scandals involving bribery and other forms of corruption, demands increasingly irreproachable behaviour from its elected representatives. Aware of this loss of confidence and anxious to recover it, parliamentarians in many countries have accepted ethical restrictions of varying severity. The spread of declarations of assets is particularly significant in this regard. The same applies to codes of conduct — and to a lesser degree to rules on lobbying — although these are areas in which British and American supremacy is unquestionable. All these initiatives are based on the realisation that traditional methods of imposing moral standards on public life and making it more transparent (ineligibility, incompatibility, rules on the financing of political parties and electoral campaigns) have failed to restore the confidence of citizens in their institutions. To the extent that such initiatives seek to enhance

transparency, they are, of course, welcome. However, we are moved by the rapidity of current developments to sound a note of caution, firstly because some of these instruments, owing to their extremely formal character, may produce the contrary effect to that desired and, secondly, because perfectionism can sometimes be counter-productive: the people's representatives (fortunately) come from the people and it is unrealistic and even dangerous to demand that they meet impossible standards of saintliness and purity.

In this area therefore, as in so many others, we must persist in the endeavour to strike a proper balance between the public interest (transparency, the drive against corruption) and the admirable goal of representing all sectors of the population in an assembly elected by universal suffrage. We all know how easy it is to upset the balance and how difficult it is to restore it.

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