

## V\* The immunities of members of parliament

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## INTRODUCTION

The idea for the present report emerged at the meeting of secretaries general in April 1997. During the discussion which resulted from my account of the Belgian system of immunities for members of parliament, the ASGP decided to entrust me with the task of drafting a comparative study on this subject.

The report is in two parts. The first discusses parliamentary privilege ("freedom of speech"). The second examines parliamentary immunity.

The report can be considered as fairly representative of the situation amongst members of the ASGP. 72 assemblies from 58 countries responded to the questionnaire.

I would like to thank my many colleagues who replied so readily and ably to the questionnaire and who provided valuable comments on the two draft reports presented at the meetings of the Association in April and September 1998.

## PART I: PARLIAMENTARY PRIVILEGE ('Freedom of Speech')

### *The concept of "parliamentary privilege"*

1. The concept of parliamentary privilege (*freedom of speech*) has been defined, for the purposes of the present study, as the protection members of parliament enjoy from legal action resulting from an opinion expressed or vote cast.
2. Thus defined, the concept of *freedom of speech* is known in all the countries which have collaborated in this study, even if important differences exist in the field of application (see below).

### *Legal basis*

3. In the great majority of countries, this principle is guaranteed by the Constitution.

In New Zealand, the Russian Federation and Sri Lanka parliamentary privilege is established by another legal instrument. In Sri Lanka by *Act of Parliament*, New Zealand by *statute law*, in the Russian Federation by a federal law on *the status of the Deputy of the Council of Federation and the*

*status of the Deputy of the State Duma of the Federal Assembly of the Russian Federation.*

In the United Kingdom and Canada, *freedom of speech* is not explicitly codified.

*Recent legal modifications*

4. Most countries state that there has been no recent modification to legislation concerning *freedom of speech*.

The Australian Senate has just agreed a provision whereby a person who has been referred to (negatively) during a parliamentary sitting can have a response inserted into the Minutes of the meeting. To date 26 responses of this kind have been published (figures to November 1997). Ireland has also adopted this procedure (in 1997). To date, five requests for the publication of a response have been presented, of which one has been accepted.

In the United Kingdom, an amendment has recently been made to the legislation (Defamation Act 1996) whereby members of parliament can renounce their privilege in the context of proceedings for slander/libel and defamation. The existence of an individual privilege had not previously been recognised.

In Ireland, a new law has recently been adopted concerning *freedom of speech* for those called to give evidence before parliamentary committees (see below no. 6).

In France, an evolution has taken place in jurisprudence. Two theses existed side by side with regard to parliamentary privilege. According to the first thesis, the broad thesis, every political action of a member of parliament was considered as carried out in the exercise of his parliamentary mandate. According to the second thesis, more narrow in scope, only those actions which were necessary to the accomplishment of the parliamentary mandate were covered by parliamentary privilege. This latter thesis was confirmed in 1989 by a decision of the Constitutional Council.

*Application "ratione personae"*

5. Clearly it is members of parliament who in the first instance are protected by *freedom of speech*. It follows from this that Ministers who are at the same time members of parliament (in countries where there is no incompatibility between the two functions) enjoy this privilege. In the following countries, this privilege only exists for the members of parliament them-

selves: Belarus, Burkina Faso, Chile, Colombia, Cyprus, Denmark, Egypt, Estonia, Finland, Gabon, Germany, Guinea, Hungary, Italy, Kuwait, Croatia, Austria, Poland, Russian Federation, Sweden.

In a certain number of countries ministers enjoy a specific protection (for example in Belgium, Guinea) which is linked to their office. In Romania the system of legal privilege for the political opinions of members of parliament also extends to the President of the Republic.

6. In certain countries (for example, in Switzerland) protection is broader and extends to all persons who take part in parliamentary debates (such as ministers, even if they are not members of parliament), or to every person who participates in parliamentary activities (such as witnesses, experts, officials and petitioners).
7. In Canada, and also in the Netherlands, there is protection for all who participate in the meetings.

In the United Kingdom, *freedom of speech* applies to all who take part in parliamentary activities, thus both to members of parliament and officials, witnesses, lawyers and petitioners.

In New Zealand, privilege applies equally to all participants in parliamentary proceedings, including witnesses and petitioners.

In France, privilege in principle only covers members of parliament. Jurisprudence accepts, on the basis of the law of 29 July 1881 concerning the freedom of the press, that witnesses who testify before a parliamentary committee of inquiry also enjoy immunity: "it is considered (Court of Appeal Paris, 16 January 1984) that the statements of witnesses heard before a committee of inquiry enjoy the immunity provided for every report and document published by order of the Assemblée nationale and the Senate, except in the case of statements which are malicious, defamatory or injurious to those external to the parliamentary inquiry".

Ireland has recently adopted a legal modification with regard to the *freedom of speech* of witnesses called to appear before a parliamentary committee (Committees of the Houses of Oireachtas; Compellability, Privileges and Immunities of Witnesses Act 1997). These witnesses enjoy an absolute immunity and cannot as a result be prosecuted for statements they have made during meetings of the Committee. The coming into force of this provision required the adoption of a resolution by one of the two chambers of the Irish Parliament.

In Namibia, Sri Lanka, Zambia, and, to an extent in Bangladesh, the protection extends to parliamentary officials.

In the Philippines, the assistants of members of parliament are also protected.

In Kenya, protection extends both to officials and witnesses.

*Application "ratione temporis "*

8. In certain countries, members of parliament enjoy protection from the moment of their election but on condition that the election is not subsequently declared invalid. This is, for example, the case in the following countries: Belgium, Chile, Denmark, Egypt, Estonia, Finland, Gabon, Greece, Hungary, Italy, Kuwait, Mali, Poland, Romania, Slovenia, Thailand, Czech Republic, Sweden. In other cases (for example in the Russian Federation), this protection is accorded after the election of the member of parliament has been validated.
9. In one group of countries, it is the taking of the parliamentary oath which is considered as the starting-point for protection. This is, for example, the case in the following countries: Argentina, Bangladesh, Chile, Cyprus, Philippines, India, Malaysia, Mongolia, Mozambique, Namibia, Republic of Korea, Netherlands, Austria, Sri Lanka, Uruguay, Zambia, Switzerland.  

In certain countries, privilege only exists during sittings. As a result the member of parliament enjoys the protection of privilege from the first sitting.
10. In a first group, the principle of *freedom of speech* is only observed during parliamentary sittings. One can give as examples of countries applying this principle: Australia, Canada, Chile, Egypt, Philippines, FYR of Macedonia, Malaysia, Mozambique, New Zealand, United Kingdom.
11. In another group of countries, protection applies in all circumstances, whether or not parliament is in session. Among the countries applying this rule are: Denmark, Finland, Gabon, Greece, Guinea, Italy, Kenya, Kuwait, Croatia, Mali, Mongolia, Norway, Austria, Poland, Romania, Russian Federation, Slovenia, Spain, Sri Lanka, Switzerland, Thailand.
12. *Freedom of speech* ends at the expiration of the mandate or at the dissolution of parliament. Privilege then remains in force for what took place during the exercise of the mandate. It appears that this is the case in all the countries which have collaborated in this Report.

### *Application "ratione loci"*

13. In a large number of countries, freedom of speech is not limited in location, being accorded both outside as well as within the parliamentary estate. The privilege is in this case limited to the execution of the member's parliamentary mandate more than to the location where the contested words were spoken. This is the case, for example, in the following countries: Argentina, Australia, Belarus, Belgium, Burkina Faso, Colombia, Croatia, Denmark, Gabon, Greece, Italy, Kuwait, Mali, Mongolia, Mozambique, New Zealand, Poland, Portugal, Czech Republic, Romania, Slovenia, Sri Lanka, Switzerland.
  
14. In certain *countries freedom of speech* applies only within the parliamentary buildings to the exclusion of all other places. This is the case in the following countries: Germany, Austria, Bangladesh, Cyprus, Egypt, Estonia, Finland, India, Kenya, Malaysia, Namibia, Norway, Philippines, United Kingdom, Zambia.  

In Thailand and in Malaysia the privilege is limited in place to the platform of the Assembly (i.e. when the member 'has the floor').

In Bangladesh and in Zambia the privilege is limited to the platform and to committees.

In South Africa privilege is limited to words spoken from the platform and to interventions in the assembly or in committee.
  
15. In France, privilege covers actions which are necessary to the accomplishment of the parliamentary mandate. Although the majority of these actions take place within the Parliament, some might also take place outside. According to French jurisprudence, privilege does not cover, however, either words of members of parliament in a radio interview, nor the report drafted by members of parliament in the context of a mission undertaken for the government.
  
16. In Sweden, *freedom of speech* is limited to actions linked to normal parliamentary activities, such as the sittings of the assembly, committee meetings and the "conférence des présidents", but not to the college of *questeurs* (*Board of Administration, Parliamentary Auditors*).
  
17. The repetition, in whatever circumstances, outside parliament, of words spoken within parliament (and thus covered by privilege) is the object of discussion in numerous countries.

In most countries, it appears that a member of parliament cannot be held responsible for words or votes which are recorded in the official publication of parliament (summary record and annals of sittings drafted by the parliamentary departments).

Opinions were divided, however, on the question of knowing whether a member of parliament can invoke privilege when he repeats, in the press or in writing, words he has spoken in the assembly.

In certain countries, the member of parliament cannot invoke privilege in this latter instance. This is the case in the following countries: Australia, Belarus, Belgium, Canada, Egypt, Estonia, Gabon, India, Kenya, Malaysia, Namibia, New Zealand, Norway, Netherlands, Poland, Czech Republic, United Kingdom, Sri Lanka, Thailand.

In other countries, protection applies without restriction. This is the case particularly in the following countries: Austria, Burkina Faso, Croatia, Greece, Guinea, Hungary, Italy, Mali, Mozambique, Portugal, Romania, Slovenia, Uruguay.

18. The case of Switzerland is interesting in this connection: (absolute) privilege is limited to interventions in the Federal Assembly. "Absolute" privilege means, in Swiss law, that no legal proceedings can be brought, be they criminal or civil. The Federal Chambers can, however, grant, after examination by committees, (relative) privilege for actions directly related to parliamentary activities, such as public talks, debates (on television or radio), publications, etc. "Relative" privilege means that criminal proceedings can only be brought with the authorisation of parliament (federal chambers).
19. In Ireland, a "qualified privilege" is accorded to unofficial publication of words spoken by members of parliament during an intervention in the assembly. The difference between "absolute" and "qualified" privilege is as follows: in the case of absolute privilege courts and tribunals do not have jurisdiction, whereas they do have jurisdiction in the case of qualified privilege, but the member of parliament can in this case invoke this privilege as a defence in a trial for libel and defamation.
20. In New Zealand there is also a qualified privilege.
21. In Australia, privilege does not in principle cover radio and television broadcasts. However, privilege has been provided for the "obligatory" record of parliamentary proceedings on radio and television. The *Parliamentary Proceedings Broadcasting Act* of 1946 grants immunity against

court proceedings resulting from the (complete) broadcasting of parliamentary proceedings by the *Australian Broadcasting Corporation*. Fragmentary records (in the form of extracts) of parliamentary proceedings are the object of qualified privilege by virtue of which they are "privileged" to the extent that they do not proceed from malicious intent or that they are not inspired by inadmissible motives (for example, publicity for political parties or in electoral campaigns, satire or mockery, or commercial motives).

*Comparative Table: actions covered by parliamentary privilege (freedom of speech)*

22. The tables below present a general idea of the various actions capable of being covered by parliamentary privilege. The various countries which have collaborated in this inquiry are mentioned in this overview to the extent that the responses provided have allowed them to be arranged in definite groups.

### **words spoken from the platform of the assembly or in committee**

yes: all countries

### **suspensions of the sitting**

yes: Bangladesh, Belarus, Belgium, Burkina Faso, Chile, Estonia, Philippines, France, Gabon, Greece, Guinea, Hungary, Italy, Japan, Kuwait, Mongolia, Netherlands, Austria, Romania, Russian Federation, Spain, Sri Lanka, Uruguay, United Kingdom, Switzerland.

no: Australia, Germany, Egypt, Gabon, Ireland, Kenya, Republic of Korea, Croatia, FYR Macedonia, Malaysia, New Zealand, Norway, Slovenia, Thailand, Czech Republic.

### **private members' bills or draft resolutions**

yes: all countries

### **votes**

yes: all countries

### **written or oral questions**

yes: all countries<sup>1</sup>

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<sup>1</sup> In France, the Rules of the Assemblée nationale state that written questions must not contain any personal imputation concerning a third person referred to by name.

**'interpellations'<sup>2</sup>**

yes: all countries

**activities of political groups**

yes: Belarus, Belgium, Burkina Faso, Germany\*, Gabon, Greece, Guinea, Hungary, FYR Macedonia, Mongolia, Portugal, Romania, Russian Federation, Uruguay

no: Australia\*, Bangladesh, Chile, Estonia, Finland, Philippines, France, Ireland, Kenya, Croatia, Republic of Korea, Malaysia, Nepal, Netherlands, New Zealand, Norway, Austria, Poland, Slovenia, Spain, Sri Lanka, Thailand, United Kingdom, Zambia, South Africa, Switzerland\*

\* **Australia:** privilege does not apply to activities which are not directly linked to parliamentary activities.

\* **Germany:** in the Bundestag parliamentary privilege for members does not apply during party meetings.

\* **Switzerland:**

**participation in televised or radio debates**

yes: Belarus, Burkina Faso, Germany\*, Egypt, Gabon, Greece, Guinea, Hungary, Kenya, Mongolia, Romania, Russian Federation, Uruguay

no: Australia\*, Bangladesh, Belgium, Chile, Estonia, Philippines, France, Ireland, Croatia, Republic of Korea, FYR of Macedonia, Malaysia, Namibia\*, Nepal, Netherlands, New Zealand, Norway, Austria, Poland\*, Slovenia, Spain\*, Sri Lanka, Thailand, Czech Republic, United Kingdom, Zambia, South Africa, Switzerland\*, Finland, Japan

\* **Australia:** see above no. 21

\* **Namibia:** *freedom of speech* does not apply to televised or radio debates unless they took place at the request of parliament

\* **Poland:** privilege does not apply to debates unless they are indissociable from parliamentary proceedings

\* **Spain:** unless debates took place in the context of an official parliamentary meeting

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<sup>2</sup> Questions to Ministers demanding an explanation or defence of actions criticised.

- \* **Germany:** the direct broadcast of debates taking place in the Bundestag is protected. Other participation in television or radio programmes, such as participation in talk-shows, is not covered by parliamentary privilege
- \* **Switzerland:** relative immunity (see above no. 18)

### interviews

- yes:** Belarus, Burkina Faso, Gabon, Greece, Guinea, Hungary, Italy\*, Mongolia, Romania, Russian Federation, Uruguay
- \* **Italy:** to the extent that there is a link with parliamentary activities
- no:** Australia, Bangladesh, Belgium, Chile, Germany, Egypt, Estonia, Philippines, Finland, France, Ireland, Kenya, Croatia, Republic of Korea, FYR of Macedonia, Malaysia, Namibia, Nepal, Netherlands, New Zealand, Norway, Austria, Poland\*, Slovenia, Spain, Sri Lanka, Thailand, United Kingdom, Zambia, South Africa, Switzerland\*
- \* **Poland:** unless indissociable from the parliamentary mandate
- \* **Switzerland:** relative immunity (see above no. 18)

### political meetings

- yes:** Belarus, Burkina Faso, Egypt, Greece, Guinea, Hungary, Mongolia, Romania, Russian Federation, Uruguay
- no:** Australia, Bangladesh, Belgium, Chile, Germany, Estonia, Philippines, Finland, France, Gabon, Ireland, Kenya, Croatia, Republic of Korea, FYR of Macedonia, Malaysia, Namibia, Nepal, Netherlands, New Zealand, Norway, Austria, Poland, Slovenia, Spain, Sri Lanka, Thailand, United Kingdom, Zambia, South Africa, Switzerland\*
- \* **Switzerland:** relative immunity (see above no. 18)

### other actions or circumstances in which *freedom of speech* is applicable

23. The enumeration above of actions covered by parliamentary privilege appears to be relatively exhaustive, given that practically no country participating in the inquiry has instanced other cases.
24. In New Zealand, a qualified privilege is accorded to communications, for example, between a member of parliament and the inhabitants of his electoral district. The depositing of a petition is also covered by privilege.
25. In France, actions performed in the context of a mission organised by the parliamentary authorities are also covered by privilege.

### *Written or oral reproduction of words of members of parliament*

26. In the cases mentioned above it is the writings or words of members of parliament which are covered or not covered by parliamentary privilege. But the situation is different when other persons repeat (reproduce), orally or in writing, or comment on the writings or words of members of parliament.

This practice is authorised in most countries, on condition that the reproduction is accurate and in good faith. This is, for example, the case in Australia, Bangladesh, Belarus, Burkina Faso, Canada, Chile, Colombia, Denmark, Estonia, the Philippines, Finland, Gabon, Greece, Guinea, Hungary, India, Italy, Kuwait, Croatia, FYR of Macedonia, Mongolia, Mozambique, Namibia, Norway, Austria, Portugal, Slovenia, Spain, Sri Lanka, Uruguay, United Kingdom, Zambia, South Africa and Sweden.

The federal constitution of Austria expressly provides that "no one shall be held accountable for publishing true accounts of proceedings in the public sessions of the National Council and its committees" (Article 33 of the Austrian Federal Constitution).

Also in Germany, the legislation explicitly provides that one cannot be prosecuted for having accurately reported what is said in the plenary session of the Bundestag and in committees.

In a certain number of countries so-called "qualified" privilege applies in a similar case. Under this privilege, courts and tribunals have jurisdiction (there is not therefore absolute immunity). This privilege can, however, be invoked as a defence in proceedings for slander/ libel and defamation. (Qualified privilege exists in Australia, New Zealand and Ireland.)

In Mali the reproduction of and accurate commentary on speeches of members of parliament is only possible with their agreement. The publication is the responsibility of the member of parliament.

Some countries, notably Kenya, the Republic of Korea, Malaysia, Netherlands, Poland, Thailand, do not recognise a privilege of this type.

### *Restrictions in the application of freedom of speech*

27. In most countries *freedom of speech* is subject to certain restrictions and certain declarations or behaviour are deemed inadmissible and are not covered by privilege. These restrictions are based on the rules of parliaments and aim to ensure the good order of meetings. It is the President/ Speaker of the assembly or chairman of the parliamentary committee

(Egypt: Ethics Committee; Ireland: Committee on Procedure and Privilege; Kenya: Committee on Privileges) who oversee their observance.

28. In some countries, insults to the head of state (President, King) are not covered by *freedom of speech*. This is, for example, the case in Australia, Belarus, Cyprus, Egypt, Malaysia, Mali, Nepal and New Zealand. In Canada insults addressed to the royal family are also forbidden.

In Cyprus, it is forbidden under a regulation of parliament, to show a lack of respect to the head of state or to other authorities during sittings.

29. In some countries restrictions are also imposed on the criticisms which members of parliament are authorised to make of judges and concerning cases pending before a court ('sub judice' cases) (Australia, Belarus, Canada, Egypt, Malaysia, Nepal, New Zealand ...).

In Malaysia, members of parliament are not permitted to criticise judges.

In Australia (House of Representatives and Senate) custom (in this case a convention which the assembly has imposed upon itself) requires that debates are avoided which could result in a position being taken with regard to pending court cases, unless the assembly considers it appropriate to waive this rule in the public interest. This rule of custom does not appear in parliament's regulations but it is applied and interpreted by the Speaker according to circumstances.

In the United Kingdom the regulations of the House of Commons provide that members of parliament cannot criticise a judge except through a motion. The member of parliament who does not respect this rule enjoys, however, the protection of privilege.

Similar provisions exist in South Africa and in Ireland with regard to accusations made against the head of state, members, judges and certain other elected representatives. Accusations against them cannot be made during debate but they can be made in a motion.

30. The broadcasting of information concerning parliamentary sittings held in secret session does not enjoy the protection of parliamentary privilege in the countries which participated in the inquiry.

Mongolia also mentions that the violation of a 'state secret' is not permitted.

31. All actions more serious than words, such as blows or injuries, are not covered by *freedom of speech* either. In Denmark, however, it is expressly stipulated that in addition to verbal statements all symbolic actions are covered by privilege.

32. Some countries also mention slander/libel and defamation as inadmissible acts (Belarus, Estonia, Finland, Hungary, Republic of Korea, Mongolia).

In Germany *freedom of speech* does not apply to slanderous insults. However, a member of parliament cannot be prosecuted in such a case until their parliamentary immunity has been lifted.

33. In Poland when the rights of third parties are involved (violation of personal rights, or slander and defamation), the assembly (the Sejm) can lift the privilege enjoyed by the member of parliament.

*Protection against proceedings offered by freedom of speech*

34. The degree of protection offered by *freedom of speech* against proceedings varies significantly from one country to another.

In some countries privilege is absolute and all form of proceedings - criminal, civil or disciplinary - is excluded. This is the situation in Belgium, Canada, Denmark, Germany, Egypt, Hungary, France, Italy, Mongolia, Portugal, the United Kingdom and in Switzerland.

The President/Speaker or other bodies of the assembly can, however, apply disciplinary sanctions against any disorder.

In some countries proceedings for slander/libel and defamation remain possible (for example, in Estonia, Greece, Hungary and Mozambique).

In some countries privilege only offers protection against civil proceedings but not criminal (for example, in New Zealand and India).

In other countries the reverse is true (Guinea, Slovenia).

In Spain, parliamentary privilege has been extended, in 1988, to proceedings before civil courts. This law has, however, been annulled by the Constitutional Court on the grounds of unconstitutionality.

In the Philippines *freedom of speech* only protects members of parliament in the case of proceedings for slander/libel and defamation.

In certain countries it is possible to initiate both criminal and civil proceedings (Belarus, FYR of Macedonia).

35. In some countries proceedings can only be entered upon after the preliminary authorisation of the assembly. This is particularly the case in Finland where a majority of 5/6 of the assembly is required to authorise proceedings against a member. *Freedom of speech* does not apply, however, to civil proceedings.

Moreover, in Switzerland legal proceedings against a person protected by *freedom of speech* are only possible after the Federal Chambers have authorised them by a simple majority of the members of each Council.

36. In Norway, *freedom of speech* does not prevent a member of parliament being brought before the Constitutional Court. This Court is composed of members of parliament and of judges from the Supreme Court. The Constitutional Court can convict members of parliament for what are criminal offences. To date this procedure has never been applied.
37. In South Africa there is a special legislative provision with regard to witnesses. If they have made, before the assembly or committees, statements 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 taken against them on the basis of their evidence before the assembly or committee, except in instances of perjury.
38. In most countries, privilege prevents any summons before a court or tribunal and any arrest. This is the case in Belgium, Canada, Chile, the Philippines, Gabon, Guinea, India, Ireland, Italy, Kuwait, Republic of Korea, FYR of Macedonia, Malaysia, Namibia, Netherlands, Austria, Poland, Portugal, Slovenia, Spain, Thailand, United Kingdom, Zambia and South Africa.

### *The lifting of parliamentary privilege (freedom of speech)*

39. In most countries, parliamentary privilege can be lifted by a decision of the assembly. This is the case in Germany, Belarus, Hungary, Croatia, France, Mali, Mongolia, Mozambique, Namibia and Uruguay.  
In Zambia the President/Speaker of the assembly can decide to lift immunity.
40. In some countries, parliamentary privilege cannot be lifted. This is the case in the Republic of Korea, Netherlands, Norway, Portugal, Romania, Slovenia, Spain, Sri Lanka, South Africa.

In most countries, the *freedom of speech* of a member of parliament is considered as being of a public nature, the member not being able to renounce it himself (Germany, Australia, Bangladesh, Belarus, Belgium, Chile, Colombia, Denmark, Egypt, Estonia, the Philippines, Finland, France, Gabon, Kenya, Croatia, Mali, Netherlands, Norway, Austria,

Poland, Portugal, Romania, Slovenia, Spain, Sri Lanka, Czech Republic, Uruguay, Sweden, Switzerland).

It is on the other hand possible in Canada, as well as in Guinea, the member of parliament being able to take the decision himself.

In Greece the decision belongs both to the assembly and to the member of parliament himself. The member of parliament can renounce his privilege in an individual capacity but his decision does not bind the assembly which must reach a decision by secret ballot.

In Hungary, the member of parliament can waive his privilege with regard to minor offences.

The United Kingdom has recently adopted a legislative modification (Defamation Act 1996) which allows members of parliament to waive their privilege in a trial for slander and defamation. Previously no individual privilege had been recognised.

A member of parliament can also in certain cases renounce his privilege without having to follow a formal procedure. Thus, in countries where *freedom of speech* is limited, in location, to the building which houses the parliament, the member of parliament can repeat his words outside the precincts (this possibility was mentioned in the responses from Malaysia and Ireland). The member can also waive the right to invoke privilege in the context of a trial.

*Legal proceedings against members of parliament*

41. Most countries did not mention court cases concerning *freedom of speech*. This was true of the following countries: Australia, Bangladesh, Belarus, Burkina Faso, Chile, Denmark, Egypt, Estonia, Finland, Gabon, Guinea, India, Ireland, Kenya, Croatia, FYR of Macedonia, Mongolia, Mozambique, Norway, Austria, Portugal, Romania, Slovenia, Spain, Sri Lanka, Thailand, Zambia, South Africa and Sweden.
42. In Canada the Supreme Court has ruled in a case following on statements made in the assembly, from which it could be inferred that a given law was going to be promulgated. These statements were repeated in a press release. A private business which had lost a contract as a result of these statements brought the persons in question before a judge. The Supreme Court decided that it was not empowered to examine statements made in parliament (*Roman Corp v. Hudson Bay Oil & Gas Co.*, 1973).

43. In the Philippines the Supreme Court has ruled that a member of parliament could not claim privilege in the case of accusations formulated in an open letter published in all newspapers. The letter in question had been written during the parliamentary vacation (*Jimenez vs Cabangbang*). In another case resulting from accusations made against the President, a member of parliament had by contrast successfully invoked *freedom of speech* (*Osmena vs Pendatun*, 1960)
44. In Poland a member of parliament has divulged secret documents of the security service (*Office of State Protection*) during a press conference. The Polish Supreme Court ruled that parliamentary privilege applied in this case.
45. Other countries also mentioned cases concerning *freedom of speech* - including Greece, Hungary, Republic of Korea, Malaysia, Mali, Netherlands, New Zealand, Poland, Czech Republic, Uruguay and United Kingdom.

## **PART II: PARLIAMENTARY IMMUNITY**

### *The concept of parliamentary immunity*

1. For the purposes of the present study the concept of parliamentary immunity has been defined as the protection of members of parliament against civil or criminal proceedings for acts undertaken outside the exercise of their parliamentary function.
2. The concept as thus defined is recognised in the great majority of countries which have collaborated in this study. Even if there are considerable differences to note with regard to its extent (see below). There are, however, some important exceptions which we will go on to consider below (see below nos. 3-7).
3. Certain countries (Malaysia, Namibia, Netherlands ...) recognise *freedom of speech* (see Part.1), but not (or no longer) parliamentary immunity.
4. In other countries, the concept has been so emptied of meaning that one can no longer speak practically of genuine parliamentary immunity. In Australia, for example, immunity is limited to protection against arrest in civil cases, an exemption from the obligation to appear before a tribunal or court when parliament is sitting and an exemption from the obligation of being a

- juror (comparable regulation in New Zealand). In Canada, immunity is limited to the exemption from the obligation to appear before a court as a witness during the session (even in civil cases). We find a similar rule in South Africa where a member of parliament cannot be constrained to appear to give evidence or as a defendant in civil cases in any place other than where parliament is sitting.
5. In the United Kingdom where immunity previously existed in the sense of the classic definition mentioned above, a simple protection has evolved against arrest in civil cases.
  6. In Norway and in Ireland, immunity only protects against arrest on the way to parliament and within the parliamentary estate (but also against arrest for acts done by the interested party before he became a member of parliament).
  7. In Colombia, finally, parliamentary immunity does not exist as such but only the Supreme Court (Corte Suprema de Justicia) is competent to conduct an inquiry concerning deputies and senators and to judge them. Rather than immunity one should speak in this case of a privilege of jurisdiction. Sometimes a similar privilege is found, in addition to classic immunity (Spain: judgement by the Criminal Chamber of the Supreme Court, similar provision in Romania).

*Legal basis*

8. In countries where the system of parliamentary immunity is still in force, the principle is in almost all cases found in the constitution or in a "constitutional law" (Portugal) and at a subsidiary level in the laws and regulations of the assemblies. Sometimes the principle is only included in statute law (for example, in New Zealand and Switzerland) or is founded both on precedent and on law (as the United Kingdom).

*Recent legal changes*

9. In general the concept of parliamentary immunity seems fairly unchanging and in most of the countries it has hardly evolved in recent times.
10. In countries where, by contrast, fundamental changes have occurred in recent years, it is generally stated that the range of immunity has been restricted.

In France, for example, the constitutional law of 4 August 1995 has modified in an important way the system of immunity. Henceforth only arrest or the implementation of custodial measures or measures restricting liberty are subject to the authorisation of the Bureau of the assembly to which the member of parliament belongs.

In Italy it is the constitutional law no. 3 of 1993 which has suppressed immunity for criminal proceedings (immunity is limited to the prohibition of the arrest of the member of parliament, the prohibition to search a member of parliament, of intercepting or taking any measure with regard to a member of parliament which restrains his personal liberty and the prohibition of any seizure of his correspondence)

In Belgium, all proceedings or arrest in criminal matters were, before the 1997 revision of the Constitution, subject to the preliminary authorisation of the relevant chamber (except in the case of *flagrante delicto*). Since this revision, most proceedings can be effected without the preliminary authorisation of the chamber (even if certain of these acts, such as searches and seizure of property cannot be done except in the presence of the President/Speaker of the assembly). Therefore there are no more than two cases in which the lifting of immunity is still necessary: committal or direct summons before a court and the arrest of a member of parliament.

In Austria, development has been somewhat different. Initially immunity covered both criminal and civil cases. In 1979 it was limited to criminal cases relating to the political activities of the member of parliament. Since 1996 proceedings are in practice authorised in the case of proceedings taken on account of differentiation.

11. Very exceptionally, we observe a reverse process. Thus in 1987 in the Philippines, immunity was extended to the protection against arrest on the grounds of criminal offences whereas previously it only protected the member of parliament against arrest in civil matters.

### *Application "ratione personae"*

12. With regard to application "ratione personae" we note that immunity in the vast majority of cases only applies to members of parliament.
13. However, in countries with a federal structure, it applies in principle both to members of the federal assembly (assemblies) and to those in the parliaments of the federal entities (this is the case, for example, in Belgium where a federal constitutional provision regulates this protection). In Germany, by

contrast, the immunity of the members of the regional parliaments is determined by the constitution of the Länder.

14. Countries in which immunity extends to persons other than members of parliament divide broadly into two groups. In countries with a British parliamentary tradition, immunity protects both people who give evidence before a parliamentary committee or a chamber (Australia, India, Kenya, New Zealand, Zambia) as well as to certain officials of the parliamentary institution (South Africa, Australia, Bangladesh, India, Zambia).

Officials of the British parliament do not enjoy any immunity in their own right but the fact of instigating proceedings against, or summoning before a court a person - be they a parliamentary official or witness - directly in the parliamentary service or the service of a committee would be considered an offence against parliament.

In some other countries immunity extends to the holders of other official positions such as the President (FYR of Macedonia, Romania, Switzerland (chancellor)), ministers (FYR of Macedonia, Belgium) and the judges of certain courts and tribunals (FYR of Macedonia, Slovenia, Switzerland (federal councillors, judges of the Federal Court)). In Spain it also covers to some degree the *defensor del pueblo* (ombudsman).

### *Application "ratione temporis"*

#### *Commencement of protection*

15. If one takes as a criterion the moment when parliamentary immunity begins, countries which have responded to the questionnaire can be subdivided into several categories.
16. In a large number of countries, the member of parliament enjoys immunity from the day of his election (or in countries where all members of parliament are not elected, for example in Egypt - from the day of his appointment).

This means that in these countries, those elected enjoy parliamentary immunity even before having taken the oath (moreover in certain countries such as Italy and Finland members of parliament do not take the oath).

It should be noted, however, that in some countries members of parliament enjoy immunity during the period between their election and their taking of the oath subject to any invalidation of their election, at least during the session (this is the case in Belgium).

17. In other countries, immunity does not begin on the day of election but on the day of the taking of the oath (or occasionally on the validation of their appointment, cf. in Croatia).
18. It is difficult to detect any logic in the preceding distinctions. Thus certain countries in the Anglo-Saxon parliamentary tradition had opted for the day of election (Australia, India ...) and others the day of the taking of the oath (Bangladesh). The same is also true for that group of countries whose parliamentary system derives more from the French tradition.

### *Duration of protection*

19. A similar statement must be made with regard to the relationship between immunity and the concept of the parliamentary session. In certain cases immunity lasts for the duration of the session. This means that there are, during the same parliament, several periods ("vacations" or "intersession") during which members of parliament do not enjoy any immunity (Philippines, Thailand, Czech Republic, Switzerland, Republic of Korea).

In certain countries, however, there is not in practice any hiatus between the end of one session and the beginning of the next session so that it is a relatively theoretical distinction (cf. Belgium, United Kingdom).

Some countries have taken this to its conclusion: thus in France, since the constitutional revision of 1995, the duration of protection is no longer linked to the system of sessions.

20. In most countries immunity applies without interruption during the whole of the mandate. Sometimes it is extended even to a certain period before or after the session (the life of the parliament). This is the case in New Zealand and India, where protection against arrest in civil cases extends for 40 days before and ceases 40 days after the session, whereas in Bangladesh it commences 7 days before and ends 7 days after the session.
21. The Czech Republic goes even further. With the issue of the parliamentary mandate, immunity applies to all criminal offences committed by the deputy or senator and for which the relevant assembly has not authorised proceedings!

### *What happens to proceedings already begun ?*

22. In a very large number of countries immunity is not suspended if proceedings have already begun against a member of parliament when he acquires his immunity.

23. In many countries (Philippines, Finland, Sri Lanka, United Kingdom, Zambia) proceedings continue and the interested party is tried under the general law. The same rule is applicable in some countries, but only to the extent that a certain stage of the proceedings has been reached. In Estonia, for example, the following distinction applies: if the relevant person has already been indicted for a criminal offence, proceedings continue as for any other citizen; if he had not been indicted before the day of his election he benefits from immunity.
24. In other countries proceedings in progress continue, unless the assembly demands their suspension (Poland). In certain cases, however, the assembly cannot ask for suspension except at an advanced stage of proceedings, more precisely to put an end (temporarily) to the detention of a member of parliament or to proceedings against him before a court or tribunal (Belgium).
25. In most cases, however, judicial proceedings cannot be pursued without the explicit approval of the Assembly (Denmark, Egypt, Greece, Mozambique, Spain, Czech Republic, Hungary, Germany, Switzerland ...). Moreover, certain constitutions explicitly provide that the assembly must be informed at the beginning of the session of any proceedings against one or more of its members (Kuwait).

Here also 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 election all proceedings are absolutely prohibited.
26. In general, the approval of the assembly takes the form of a decision to "lift" immunity (for the manner in which this decision is taken, see below no. 52 and following).

*Application "ratione loci"*

27. It appears from the responses which we have received that the place where the offence has been committed by the member of parliament has no relevance to the application of parliamentary immunity.
28. In certain countries of the Anglo-Saxon and Scandinavian tradition, the question of place has, however, a role with regard to the extent of the protection. In Ireland, for example, immunity does not protect against legal proceedings but only against arrest on the way to parliament or within the

parliamentary precinct ... (similar provisions in Norway, Zambia) (see below no. 47).

### *Parliamentary immunity and flagrante delicto*

29. Almost all countries which have responded to the questionnaire confirm that a member of parliament does not enjoy immunity in cases of flagrante delicto. The concept of flagrante delicto was even on occasion interpreted more widely. In Germany, for example, the member of parliament does not enjoy immunity if he is arrested the next day.
  
30. Certain countries make, however, a distinction with regard to the nature or the gravity of flagrante delicto.

In Estonia, for example, immunity remains in principle in application, even if the member of parliament is taken in flagrante delicto. However, if the criminal offence is a serious one, certain actions can be put into effect before parliament suspends the immunity.

In Greece, a member of parliament does not enjoy immunity when he is discovered committing a serious felony. It follows that preliminary authorisation from parliament is required in the case of offences or misdemeanours other than a felony, even in instances of flagrante delicto.

In Portugal, a member of parliament only loses his immunity in case of flagrante delicto for a felony punishable by at least three years imprisonment (Finland: at least six months; Philippines: at least six years; FYR of Macedonia: at least five years).
  
31. It is noticeable, but not illogical, that certain countries where the protection conferred by immunity is in itself more minimalist (for example in Australia where members of parliament cannot be obliged to give evidence nor be arrested in civil cases), immunity remains applicable in cases of flagrante delicto....
  
32. In certain countries the arrest of a member of parliament is possible when he is caught in flagrante delicto but the authorisation of the assembly is then necessary to maintain that person in detention (Hungary, Czech Republic). Swiss legislation provides that in cases of arrest in flagrante delicto, besides the assembly, the interested party himself can authorise his own detention.

*Does immunity prevent any proceedings?*

*Distinction between criminal, civil and disciplinary matters*

33. Among those countries which responded to the questionnaire, there are only two in which immunity prevents any proceeding, be it in criminal, civil or disciplinary matters (Guinea and Hungary).
34. In many other countries, either civil matters (Egypt, Greece, Portugal, Romania) or criminal matters (Kenya, Thailand) do not enjoy the protection of parliamentary immunity.
35. One group of countries is fundamentally distinct in this regard from others, that is certain countries of the Anglo-Saxon tradition in which immunity never applies to criminal matters or disciplinary matters, but only offers a certain degree of protection in civil matters (for example, a protection against arrest and detention in civil matters in Australia and New Zealand).
36. The application of parliamentary immunity is generally limited, however, to criminal matters (for example, in Burkina Faso, Spain, Czech Republic, Republic of Korea, France, Belgium ...) and does not even apply to all criminal matters.

*Limitations in the nature of the offence*

37. If we set aside cases of flagrante delicto (see above nos. 29-32) and concentrate solely on the nature of the offence, we can see a wide range of responses.
38. There are first of all those states which make no distinction in the nature of the offence. This group of countries does not only include a number of parliamentary systems in the French tradition (Belgium, France, Italy, Spain, Uruguay and Chile) but also another range of countries (Finland, Estonia, Croatia, Malaysia, Mozambique, Czech Republic and Germany).
39. Amongst those countries where certain offences are not covered by parliamentary immunity, one can make a distinction according to the nature/gravity of the offence.

Certain countries clearly hold to the principle that certain offences are so grave that the person who commits them cannot benefit from immunity.

Thus criminal offences are an exception in many countries of the Anglo-Saxon parliamentary tradition (Bangladesh, Kenya, New Zealand).

In other cases, an exception is made for certain offences which are probably perceived as being particularly shocking, for example, high treason in Belarus and in Ireland (where the same applies for a serious felony and an attack on public order). Slander/libel and defamation also sometimes constitute an exception (Belarus).

A distinction is sometimes made on the basis of the number of years of imprisonment for which the offence is punishable (Philippines: no protection for offences punishable by more than six years imprisonment; Sweden: protection only if the offence is punishable by less than two years imprisonment and on condition that the member of parliament has not acknowledged his guilt).

40. Other countries follow exactly the opposite reasoning and consider that immunity must apply in serious cases and not for minor infractions. No doubt it is considered that it is above all in these cases that proceedings risk having an effect on the exercise of the member of parliament's function. In these countries, civil offences (civil proceedings) constitute the exception (Denmark, Gabon, Mali, Mozambique, Portugal, Slovenia, Republic of Korea) and/or petty offences are not covered by immunity (Mali, Portugal).

Thus, for example, in Portugal, immunity does not hinder proceedings for petty offences, at least in cases where a member of parliament need not be present in court, "since they are not of a slanderous nature, do not hinder the free exercise of his mandate and do not harm the honour of the deputy".

In Mali also, immunity applies to felonies and offences, but not to minor infractions.

In Poland, on the other hand, all civil violations and offences of a lesser criminal and administrative nature are excluded.

### *The range of immunity*

41. In instances where parliamentary immunity applies (in criminal, civil or disciplinary matters, see above) it is possible to divide countries which have responded to the questionnaire according to the degree of protection offered by immunity.
42. In certain countries, immunity prevents any proceeding. Thus the constitution of Romania provides that a member of parliament "cannot be detained, arrested, searched or brought to court on either a criminal or minor matter without the authorisation of the chamber to which he belongs, and after having been heard, except in cases of *flagrante delicto*". In this instance,

even minor proceedings, such as a public hearing with the relevant person, are thus impossible (for example, Egypt).

43. Most countries do not go so far, parliamentary immunity only protecting the person against arrest (or the removal of liberty in its various forms) and/or against the committal or summons before a court or tribunal.
44. The case of Belgium should be mentioned in this regard, which is amongst all the countries which have responded to the questionnaire, the only one where measures of investigation require the presence of a representative of the assembly: searches or the seizure of goods cannot take place except in the presence of the President/Speaker of the assembly concerned or a member designated by him (it should be noted that this does not only concern searches and seizure of goods taking place within the precincts of parliament but any search or seizure instituted as part of an investigation against a member of parliament).

Amongst that group of countries where immunity only protects a member of parliament against arrest and indictment or summons before a tribunal, Belgium also distinguishes itself in that constraining measures requiring the intervention of a judge cannot be ordered except by a judge especially designated for this purpose (the first president of the court of appeal).

*Protection only against arrest*

45. The "minimal degree of protection" is that which only protects against arrest. It is also the most widespread protection because, in most countries, parliamentary immunity prevents all forms of arrest, save in cases of *flagrante delicto*.

In a good number of countries, it does not go further than this. A good example is Argentina where any form of arrest of a member of parliament is impossible without the approval of the assembly, but where immunity does not absolutely prevent the possibility of legal proceedings being conducted and concluded against a member of parliament (up to conviction).

46. The definition of arrest can vary significantly from one country to another. Germany is the most explicit in this context: immunity makes impossible any measure restraining liberty, including all forms of detention such as the warrant to bring the suspect immediately before court, the provision of a compulsory residence order, civil imprisonment, police custody or the alternatives to imprisonment such as house arrest or any limitation on movement.

In Belgium, "arrest" is understood solely as judicial arrest which includes both arrests resulting from a court decision and detention on remand ("détention préventive"). This term does not therefore include arrest undertaken in execution of a warrant to bring a person immediately before a magistrate, nor administrative arrest where police can proceed in the exercise of preventive missions and in the context of the maintenance order. The police therefore have the right, for example, to arrest within a period of twelve hours, a member of parliament who causes disruption on the public highway.

There is a comparable regulation in Slovenia where immunity protects against arrest and detention but not against other forms of the privation of liberty which can be applied in the context of an inquiry.

In Finland, immunity protects against arrest, detention and travel ban.

47. In certain countries, protection is limited to arrest in civil matters (Australia, India, Kenya, New Zealand, United Kingdom, Zambia), in others it is limited to arrest on the way to parliament and in the parliamentary precincts (Norway, Ireland).
48. Sometimes, immunity does not protect the member against arrest as such but only against detention as a punishment.

### *Protection against committal or summons before a court or tribunal*

49. Responses to the question as to whether immunity offered also protection against committal or summons before a court or tribunal were very far from being homogeneous in character.
50. In certain countries, committal to or summons before a court is possible without the authorisation of the assembly, but only in criminal matters (Germany, Austria, Belgium, Croatia, Egypt, Gabon, Poland, Romania, Uruguay).
51. In Belgium, not only can a member of parliament only be brought before a court or tribunal with the preliminary approval of the assembly, but this can only happen at the initiative of the office of the public prosecutor. A member of parliament cannot therefore be brought directly before a court by a party claiming damages during a session.

In Poland, immunity concerns all stages of criminal proceedings. It also covers all preliminary actions (including actions such as the hearing of the suspect, summons, detention or the delivery of a search warrant), all stages

of judicial proceedings and measures of execution (execution of punishment).

*Lifting of immunity*

52. Countries in which immunity cannot be lifted are few in number.

It is not surprising that one finds them precisely amongst those countries in which immunity is the most limited. We are thinking in particular of countries in the Anglo-Saxon tradition in which effective immunity is limited to the removal of the obligation to testify and/or to protection against arrest in civil matters (South Africa, Australia, Bangladesh, India, New Zealand, United Kingdom) or even only protection against arrest on the way to work and within the precincts of parliament (Ireland, Norway).

These countries appear to consider that given that immunity is limited to its simplest expression it cannot then allow for the least exception.

Only the FYR of Macedonia applies a more extended form of immunity (protection against detention) without allowing for the possibility of it being lifted.

By contrast, immunity can be lifted in most countries. On the whole procedures for the lifting of immunity present great similarities. Differences concern principally the competent authority for formulating the request for the lifting of immunity, the possibility or impossibility for the member of parliament to renounce his immunity and the possibility of appeal against the decision to lift immunity.

*Who is competent to lift immunity ?*

54. Amongst those countries who have responded to the questionnaire only two depart from the rule according to which parliament alone is competent to lift the immunity of its members.

In Chile, the parliament (Congreso nacional) has no competence with regard to the lifting of immunity. Authorisation to prosecute or arrest a member of parliament is given by a judicial organ known as the *Tribunal de Alzada*.

The constitution of the Republic of Cyprus provides that legal proceedings, arrest or detention must be authorised by the Supreme Court

55. In all other countries where preliminary approval is required in order to be able to continue with certain legal proceedings, this competence belongs to the assembly

56. In certain cases this authorisation is, however, given by the Bureau of the assembly (France, Gabon and in Burkina Faso only outside the session) or even by the President/Speaker of the assembly (Zambia).

*Who can ask for the lifting of immunity?*

57. In many countries, the lifting of immunity must be asked for by the public prosecutor.

A typical example in this case is that of France, where the request is made by the public prosecutor before the competent court of appeal. We find a similar provision in Belgium and in countries of francophone Africa such as Gabon or Mali, and also in Poland and the Russian Federation. Sometimes the request of the assembly is made by the minister of justice (in as much as he is senior to the public prosecutor, for example in France). In other cases, the state prosecutor addresses parliament directly (Belgium).

58. In certain countries, it is the competent court which must request the lifting of immunity (Uruguay, Switzerland) and sometimes even the Supreme Court (Spain). In these cases, the courts address the assembly directly.

59. In other countries, the request must come from one or a number of members of parliament (Burkina Faso) or from the minister of justice (Burkina Faso, Romania). Also, the assembly may be competent to formulate such requests (Denmark, Austria, Thailand).

60. It is Germany which goes furthest in this context. In this country the request can come from:

- the office of the public prosecutor, courts, authorities charged with control of conduct in the field of general law, such as courts charged with control of professional conduct;
- from a tribunal/court with regard to actions in private law;
- from a creditor with regard to proceedings involving execution by force;
- from the Committee for the Scrutiny of Elections, Immunity and the Rules of Procedure, with regard to matters concerning immunity and the regulations of the Bundestag.

The public prosecutor and the courts address their requests to the President/Speaker of the Bundestag through administrative channels (the federal ministry's department of justice). Creditors can address their requests directly to the President/Speaker of the Bundestag.

*Can the member of parliament himself renounce his immunity?*

61. In most countries (and in all cases in those countries which belong to the French legal tradition) immunity is a matter of public policy, which means that a member of parliament cannot renounce it himself.
62. This is not the case in other countries (Greece, Poland, Thailand) where a member can himself ask for the lifting of his immunity. In Switzerland a member of parliament cannot renounce on his own behalf his immunity when it concerns criminal proceedings relating to offences to do with his official activity or position. However, for crimes or offences which are not related to the exercise of his functions he can renounce his immunity.

In the Philippines, this is taken to the furthest extent, immunity being considered as a personal privilege which the member of parliament, and him alone, can renounce either explicitly or in not invoking it at the opportune moment.

*Procedure*

63. It does not come within the scope of this report to give details of all the differences in matters of procedure. In fact, despite all the apparent differences, a general similarity can be noted.
64. In the great majority of cases, the request to lift immunity must be addressed to the President/Speaker of the assembly, who informs the assembly of the request. The request is examined either by a special committee of the assembly (for example, the Commission des Poursuites of the Chamber of Representatives of Belgium, the Immunitätsausschuss in Germany, and the Rules Committee in Poland, etc.) or by a permanent committee with legal competence (the Justice Committee of the Belgian Senate) or by the Bureau of the assembly. In the French Assemblée nationale, for example, it is the Bureau which authorises the lifting of immunity. A delegation from the Bureau conducts an investigation and places proposals before the Bureau.
65. In the great majority of cases also, the body previously mentioned meets in private and makes a report to the plenary of the assembly, which comes to a decision by a vote.
66. It should be noted that in France, it is not the assembly but the Bureau of the assembly which decides on the lifting of immunity. However, when one or more members of parliament ask for the suspension of proceedings, the decision is not made by the Bureau but by the assembly.

67. Sometimes, the decision is in some way delegated with reservations to a committee, thus the Immunitätsausschuss of the Bundestag can be explicitly given powers to take a provisional decision which is communicated by writing to the members of the Bundestag. If this decision of the committee does not receive any opposition for seven days, it acquires the validity of a decision of the Bundestag. In the contrary case, it is for the plenary of the assembly to rule explicitly.
68. There are, however, clear differences with regard to the majority necessary to lift immunity of a member in the plenary of the assembly.  
In most countries (in France and in Belgium, for example) the assembly decides by a majority of voices.  
In Burkina Faso it is sufficient for a third of members to decide on the lifting of immunity for it to be effectively lifted (outside the session in Burkina Faso it isn't the plenary of the assembly but the Bureau which comes to a decision).  
In certain countries, an increased majority is necessary to decide on the lifting of immunity (for example, a two-thirds majority in Uruguay, Romania and Poland).
69. The Greek constitution explicitly provides that the lifting of immunity is considered to be refused if parliament does not come to a decision within three months of the transmission of the request by the public prosecutor to the President/Speaker.
70. In certain countries, the member concerned is automatically heard by the competent committee and he can be assisted by another member (Poland) or by a lawyer. In other countries, the member concerned can ask to be heard (for example, in Belgium). In France, convention provides for the member concerned to be heard by the delegation from the Bureau.
71. In Spain, reasons must be given for the decision not to lift immunity, in conformity with the jurisprudence of the Constitutional Court (Tribunal Constitucional).
72. Appeal against the decision to lift immunity is provided for only in very rare cases. In Austria, the member concerned can appeal before the constitutional court.
73. The request to lift immunity does not generally lapse after a certain time period

It appears, however, from certain responses that the prescribed time limit provided for in criminal matters applies also in cases involving members of parliament (Austria).

In several countries, the request to lift immunity lapses at the end of the life of the parliament (Romania, Poland, Thailand). In the case of the re-election of a member it would be necessary in the majority of cases to recommence proceedings.

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

74. Almost all those asked responded with a negative to the question as to whether in the case of the lifting of immunity the assembly could impose certain conditions on legal proceedings. Once immunity was lifted, the principle of the separation of powers in effect impeded the legislative power from going on to fix conditions which the judicial power would have to respect in the exercise of its competences. The assembly accepts or rejects the putting into effect of the proposed measures of investigation but it does not impose conditions on their accomplishment.

75. Taking account of the above it is hardly surprising that in almost all countries the assembly which lifts immunity cannot submit the detention of one of its members to certain conditions.

The answers received only appear to have a single exception: Guinea, where the assembly can order a "discharge" for felonies and in cases of *flagrante delicto* (but the response does not give a sense of the range of this measure...).

76. Even if the assembly cannot as a general rule fix any condition on the exercise of legal proceedings or on arrest, there is nevertheless possible in certain countries a "partial" lifting of immunity. Thus in Belgium the assembly can partially grant an application to lift immunity, for example in authorising committal before a court but not arrest. It also appears from the French response that the Bureau rejects or authorises, on a case by case basis, specific measures of investigation for which authorisation has been demanded.

77. The case of Switzerland should also be mentioned. In this country, immunity uniquely offers the guarantee that the member of parliament will be able to attend sittings. The member can ask the Council to which he belongs to set aside summons for important court processes.

*Can the assembly suspend proceedings or detention?*

78. In most countries, proceedings or detention of a member of parliament cannot be suspended by the assembly of which he is a member.
79. Such a suspension is, however, possible in a series of countries in the French legal tradition (France, Belgium, Burkina Faso, Gabon, Guinea, Mali), as well as in Germany, Austria and Croatia.

In the French Assemblée nationale, one or more members can request the suspension (of proceedings or of detention) by a letter addressed to the President/Speaker. The decision is not taken by the Bureau but by the assembly itself.

The request for suspension is passed to a committee which hears the author of the request as well as the member concerned. This committee makes a report to the plenary of the assembly which, at the conclusion of a time-limited debate, decides by simple majority whether or not to suspend proceedings or the detention for the duration of the session.

The German Bundestag can also suspend by simple majority any legal proceedings and any detention or any action aiming at restraining the liberty, and thus prevent any legal proceeding for the remainder of the life of the parliament.

In Belgium, two possibilities for suspension are provided for.

On the one hand, the assembly can - at whatever stage of the investigation - order, at the request of the member of parliament concerned and by a majority of two-thirds of votes cast, the suspension of an investigation for which no preliminary authorisation is required.

On the other hand, the assembly can decide on its own initiative and by a simple majority to suspend the detention of a member or proceedings against him before a court or tribunal (on the hypothesis that he has been placed in detention or prosecuted outside the session or after having been discovered in flagrante delicto).

*Right of a member of parliament placed in detention to attend sittings of his assembly*

80. In most countries, a member of parliament who is serving sentence for an offence, or who is on remand while waiting the judgement of a court, is not authorised to attend meetings of his assembly.

81. This is the case in a number of countries being given that this hypothesis has not been provided for and that the general law applies from that time onward (for example, Belarus, Finland, Italy, Poland ...)
82. In other countries, sentence to a term of imprisonment of a determined period (in Ireland, for example, more than six months) has automatically as a consequence that the person concerned is no longer eligible and he is forced to resign as a member of parliament.

In the United Kingdom, a member who is imprisoned for a criminal act, not only cannot attend meetings, but also automatically loses his seat in the event of a sentence of imprisonment of more than one year.

83. Only a few countries allow a member of parliament who is serving a sentence of imprisonment or is placed on remand to be able to attend meetings (Greece, Thailand, Mali, Guinea).

In Greece, the problem has not as yet arisen but one starts from the principle that in as much as a member of parliament has not been deprived of his political rights he could be allowed to leave prison to attend meetings of his assembly.

In Mali, the person concerned retains his status as a member of parliament while he has not been definitively judged. Up to that point he can fully exercise his prerogatives as a member of parliament.

It is in Guinea that one sees this taken the furthest, since a member of parliament who is serving a sentence of imprisonment or who is placed on remand can be placed at liberty under caution to participate in meetings of the assembly.

## CONCLUSION

1. Parliamentary privilege (*freedom of speech*) is a concept recognised in all the countries which have contributed to this inquiry. Furthermore the concept of *freedom of speech* seems to be very stable and to have been changed only slightly in the recent past. This contrasts somewhat with the conclusions on parliamentary immunity (see below).
2. One can, *grosso modo*, draw a distinction between two principal trends in the application of *freedom of speech*. In a first group of countries (Belarus, Burkina Faso,...) this privilege is considered to be a protection accorded to members of parliament whether it be in the exercise of their mandate or not.

Thus the member of parliament is protected whether or not parliament is sitting, and whatever the place or circumstances in which he made his statements.

3. In another group of countries (which are often in the Anglo-Saxon legal tradition, as for example the United Kingdom, South Africa, Bangladesh, Zambia ...) this protection only applies during parliamentary sittings. It should also be noted that in this latter group of countries the application *ratione personae* is also more extensive. Whereas in the first group protection is limited to members of parliament, *freedom of speech* applies, in the second group, also to other persons such as witnesses, petitioners, officials, who participate in the parliamentary sittings. It is moreover characteristic of some countries in the Anglo-Saxon legal tradition that parliamentary immunity also applies to witnesses and officials.
4. The degree of protection against civil, criminal and disciplinary proceedings resulting from *freedom of speech* is very varied. In some countries (Guinea, Hungary ...) protection is absolute and excludes any legal proceedings. In others proceedings can be begun in civil (Egypt, Greece ...) or in criminal (Kenya, Thailand) cases. Some countries recognise a "qualified privilege": unlike absolute privilege (which deprives courts and tribunals of any jurisdiction), qualified privilege is simply a defence which the member of parliament can use during a trial.
5. Despite the differences existing in the degree of protection, *freedom of speech* generally appears to be clearly more homogeneous than parliamentary immunity.
6. It is in addition striking that the system of parliamentary immunity has in the recent past been significantly changed on many more occasions than that of *freedom of speech*.
7. Generally speaking one can state that in the great majority of countries (France, Italy, Belgium, Austria ...) which have recently modified their system of parliamentary immunity the tendency has been to accord a less absolute protection and to move more towards general law. This trend is most clearly evident in those states of Western Europe which belong to the French parliamentary tradition.
8. Some countries (Malaysia, Namibia, Netherlands ...) only recognise *freedom of speech* and not parliamentary immunity.

9. In others (Australia, Canada, New Zealand ...) the protection of parliamentary immunity has been reduced, over time or straightaway, to a minimum (for example, to a waiving of the obligation to appear as a witness, protection against arrest in civil matters, protection against arrest en route to parliament). It is not surprising that from then on these countries are in general less willing to grant exceptions to immunity (in some countries immunity protects, for example, the member of parliament, even in a case of flagrante delicto, in others it is impossible to lift immunity). One could state that as a general rule the more the protection offered is restricted, the more it is interpreted in an absolute manner.
10. It is above all the degree of protection which allows a distinction to be drawn amongst those countries where the principle of parliamentary immunity still applies in its classic sense. Thus a first group of countries can be distinguished (Argentina, Finland ...) where immunity protects only from arrest and/or other forms of loss of liberty, and a second group of countries where immunity protects additionally against summons or committal before a court (Germany, Croatia ...).
11. In the two groups of countries it is, however, always possible to lift the immunity of a member of parliament following procedures which differ less than one might think at first glance. In most countries, the request to lift immunity must come from the Office of the Public Prosecutor and be addressed to the President/Speaker of the assembly. It is only very exceptionally (the Philippines, Greece, Poland ...) that the member himself can request the lifting of immunity. The request to lift immunity is almost always referred to a committee specially authorised for this function, which meets in private and reports to the plenary of the assembly.
12. It is almost always the plenary which makes the decision but the nature of the majority required to take the decision can vary considerably. With a few exceptions the decision to lift immunity does not need to be accompanied by reasons and there is no appeal. In general the assembly which lifts immunity cannot impose conditions on legal proceedings or arrest but, in some countries (Belgium, France ...) a "partial" lifting of immunity is possible. In this situation the assembly partially allows an application for the lifting of immunity, for example, by authorising committal before a court but not arrest (Belgium), or the assembly authorises, on a case by case basis, particular measures of investigation for which authorisation has been requested (France).
13. There are only a limited number of countries - essentially those countries with a legal tradition derived from French law, as for example Belgium,

Gabon, Mali..., - in which legal proceedings and detention can be suspended by the assembly. The procedure followed in this regard is analagous to that for the lifting of immunity.

14. Finally, there are only a very small number of countries (Guinea, Greece, Thailand ...) where a member of parliament who is imprisoned or placed in detention retains the right to attend sittings of the assembly to which he belongs. Sometimes (United Kingdom) the sentence automatically results in the loss of mandate.

### **List of countries replying to the questionnaire** (72 Assemblies, 58 countries)

Argentina  
Australia (House + Senate)  
Austria  
Bangladesh  
Belarus (Council of the Republic + House of Representatives)  
Belgium (Senate)  
Bulgaria  
Burkina Faso  
Canada (House + Senate)  
Chile (Senate)  
Colombia (House)  
Croatia  
Cyprus  
Czech Republic (House + Senate)  
Denmark  
Egypt (Shoura + Assembly)  
Estonia (Senate + Chamber)  
Finland  
France (Assemblée nationale + Senate)  
FYR of Macedonia  
Gabon  
Germany (Bundestag + Bundesrat)  
Greece

Guinea  
Hungary  
India  
Ireland  
Italy (Chamber + Senate)  
Kenya  
Kuwait  
Malaysia  
Mali  
Mongolia  
Mozambique  
Namibia  
New Zealand  
Nepal  
Netherlands  
Norway  
Philippines (House + Senate)  
Poland (Sejm + Senate)  
Portugal  
Republic of Korea  
Romania (Chamber + Senate)  
Russian Federation  
Slovenia  
South Africa  
Spain (Congress of Deputies + Senate)  
Sri Lanka  
Sweden  
Switzerland  
Thailand  
United Kingdom (House of Commons + House of Lords)  
United States \*  
Uruguay (Senate + Chamber)  
Zambia

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\* general documents

# **ASSOCIATION OF SECRETARIES GENERAL**

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