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Extended abstract

Parliamentary immunities, human rights, and the separation of powers[1]

by

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Advertisement: The following text is a provisional summary of my ongoing research. It is thus subject to change in the future.

INTRODUCTION

1. In most legal systems, Members of Parliament (MPs) are protected by rules of parliamentary immunities against actions taken against them before law courts. Usually[3], a distinction is made between two different kinds of immunities. On the one hand, there is parliamentary non-accountability or non-liability ("*irresponsabilité*"), which gives parliamentarians extensive – and often even absolute – freedom of speech in the exercise of their functions. This allows them to speak out without having to fear that their words will lead to legal consequences, whether civil or criminal. On the other hand, there is parliamentary inviolability or immunity *stricto sensu* ("*inviolabilité"*), which in essence provides guarantees for MPs who are prosecuted under criminal law. The most important guarantee in this respect is the obligation in principle to obtain parliamentary authorisation for certain acts, including the arrest of the MP. In such cases, Parliament "lifts" parliamentary inviolability. In many cases, Parliament also has the possibility of suspending the prosecution (or certain acts of prosecution) concerning its members.

2. The purpose of parliamentary immunities is not to protect the MP as a person; they are not a personal privilege for MPs. Instead, these immunities have an institutional or functional purpose: they aim at protecting the free and regular exercise of the parliamentary function and, in so doing, ensure that the parliamentary institution as such functions properly. The latter is therefore protected through the protection of its members[4].

3. These immunities play an important role in the separation and balance of powers. They determine whether parliamentarians are accountable to the courts and tribunals and, if so, to what

[1] The title proposed in the original abstract was: "A new role for fundamental rights in the relationship between the judiciary and parliament? The case of criminal proceedings against members of parliament". However, the current title is a better reflection of the content of the research that will be presented at the WCCL.
[2] The opinions expressed in this contribution are personal to the author. They do not commit the institutions to which he belongs.
[3] There are, of course, differences in the applicable legal regimes around the world, which we cannot examine in the context of this contribution. For a more detailed overview of the different possible regimes (with a focus on Europe), see Venice commission, *Report on the scope and lifting of parliamentary immunities*, 2014.
[4] See for example E.Ct.H.R. (Grand chamber), 3 December 2009, *Kart v. Turkey*, §§ 92 and 95.

extent and under what conditions; *a contrario*, they determine the acts that cannot be referred to a judicial initiative and for which parliamentarians are accountable only to their institution (disciplinary accountability) or to the electorate (political accountability). Understood in this way, parliamentary immunities therefore primarily regulate the relationship between parliament and the judiciary[5]. Of course, given the potential influence that the executive can exert on the judiciary (especially in legal systems characterised by a lack of judicial independence[6]), immunities also remain important in the relationship between Parliament and the executive[7], which echoes their historical origin as a protection against the (absolute) monarch[8]. Finally, we will see that immunities are also important in the relationship between (opposition) parliamentarians and parliament[9].

4. In today's society, parliamentary immunities are often subject to considerable criticism. In the eyes of public opinion, they can appear as sources of impunity and undue privileges for MPs (even if this is not their purpose). They are therefore regularly criticised in the name of the equality of all citizens and the necessary responsibility of state officials[10]. Legal scholarship is also interested in these mechanisms and often submits them to critical scrutiny, particularly in terms of their compatibility with various human rights. There are also numerous cases in which parliamentary immunities are challenged in court, often because of their interference with human rights, among which above all the right to access to court[11].

5. The aim of this research is to link these two elements, namely the contribution of parliamentary immunities to the separation and balance of powers on the one hand and their interaction with human rights on the other. We will try to answer the following two questions: How do parliamentary immunities interact with human rights and what influence can these interactions have on the relationship between parliament, MPs, and the judiciary? In order to try to answer these questions, we will focus primarily on the case law of the European Court of Human Rights. As a "principle of organisation of political powers"[12] or a principle of "institutional and constitutional organisation of the member states of the Council of Europe"[13], the separation of powers could appear to fall outside the jurisdiction of the European Court of Human Rights. However, as various authors have shown, this has not prevented the Court from taking up this principle and, more importantly, from influencing the way in which the member states organise the interaction between the powers[14]. Moreover, the recent case law of this Court raises interesting and – at least for some legal systems – unprecedented considerations regarding the interaction between parliamentary immunities and human rights and the relationship between Parliament, MPs, and the judiciary.

Our reflections on the two above-mentioned questions are structured according to the three possible interactions that can, in our opinion, exist between human rights can and parliamentary immunities.

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[5] O. BEAUD, "L'immunité du chef de l'État en droit constitutionnel et en droit comparé", *in* J. VERHOEVEN (ed.), *Le droit international des immunités : contestation ou consolidation ?*, Paris, L.G.D.J., 2004, p. 166.
[6] Venice commission, *Report on the scope and lifting of parliamentary immunities*, 2014, §§ 154-155.
[7] M. SOLBREUX and M. VERDUSSEN, "Le statut pénal des parlementaires", *Courrier hebdomadaire du CRISP*, 2019, p. 97-98.
[8] K. MUYLLE, "Rechten van de mens en parlementaire immuniteiten : toont Luxemburg de weg aan Straatsburg ?", *in* A. REZSÖHAZY and M. VAN DER HULST (eds.), *Parlementair recht en grondrechten – Le droit parlementaire et les droits fondamentaux*, Bruges, die Keure, 2010, p. 49.
[9] See *infra*, II.
[10] See for example F. PONSOT, *Les immunités en droit constitutionnel dans la doctrine publiciste française de 1789 à aujourd'hui*, Thesis, Paris 1, 2020, p. 15-25.
[11] See a.o. Art. 6 § 1 of the European Convention on Human Rights (E.C.H.R.).
[12] L. MILANO, "La séparation des pouvoirs et la jurisprudence de la Cour européenne des droits de l'homme sur le droit à un procès équitable", *Titre VII*, 2019/2, p. 60 (free translation).
[13] N. LE BONNIEC, "L'appréhension du principe de la séparation des pouvoirs par la Cour européenne des droits de l'homme", *Revue française de droit constitutionnel*, 2016, p. 336 (free translation).
[14] N. LE BONNIEC, *op. cit.*, p. 335-356 ; L. MILANO, *op. cit.*, p. 60-69 and A. TSAMPI, *Le principe de séparation des pouvoirs dans la jurisprudence de la Cour européenne des droits de l'homme*, Pedone, Paris, 2019. This is true even if this organisation is fixed by constitutional norms (see E.Ct.H.R., 30 January 1998, *United Communist Party of Turkey a.o. v. Turkey*, § 29).

Human rights can be used to challenge (**I**), but also to consolidate parliamentary immunities (**II**). They can also compete with or, depending on the circumstances, (partially) substitute parliamentary immunities (**III**).

I. HUMAN RIGHTS AND THE CHALLENGE OF PARLIAMENTARY IMMUNITIES

6. This first type of interaction between human rights and parliamentary immunities is undoubtedly the one that is best known and most studied[15]. The parliamentary immunities are most often challenged by third parties who allege that their rights have been violated by the acts or words of a MP. If the former wish to take legal action against the latter, whether in civil or criminal proceedings, they come up against obstacles based on parliamentary immunity. This may give rise to criticism from the point of view of the right of access to court (or the right to an effective remedy[16]), the right to protection of reputation as part of the right to privacy[17], or the prohibition of discrimination[18].

The Court's case law focuses on the compatibility of immunities with the right of access to court. It does not always analyse the complaints made in the light of the other aforementioned human rights, and, to our knowledge these have in any case never led it to a different conclusion from that reached under Art. 6 § 1 of the E.C.H.R.

7. In general, the Court accepts the use of parliamentary immunities – sometimes even absolute immunities[19] – by Council of Europe member states on a broad basis. It has recognised that these immunities serve legitimate purposes, including the "maintaining [of] the separation of powers between the legislature and the judiciary"[20].

In its analysis of the proportionality of the interference with the right of access to a court caused by parliamentary immunities, the Court has mainly developed and utilized the criterion of the connection with a parliamentary activity in the strict sense[21]. In the absence of a clear connection between the (criticized) act of the MP and its parliamentary activity, the Court adopts "a narrow interpretation of the concept of proportionality between the aim sought to be achieved and the means employed. [...] To hold otherwise would amount to restricting in a manner incompatible with Article 6 § 1 of the Convention the right of individuals to have access to a court whenever the allegedly defamatory statements have been made by a parliamentarian"[22].

8. This criterion was initially developed in the context of different cases concerning parliamentary non-accountability enshrined in the Italian Constitution (Art. 68)[23]. In this context the Court considered, for example, that it was contrary to Article 6 § 1 to apply the non-accountability to

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[15] See a.o. K. MUYLLE, "Rechten van de mens...", *op. cit.*, p. 49-94; M. KLOTH, *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights*, Leiden/Boston, Nijhoff, 2010, p. 159-198 ; S. HARDT, *Parliamentary Immunity. A Comprehensive Study of the Systems of Parliamentary Immunity in the United Kingdom, France, and the Netherlands in a European Context*, Cambridge, Intersentia, 2013, p. 18-43.
[16] Art. 13 of the E.C.H.R.
[17] Art. 8 of the E.C.H.R.
[18] Art. 14 of the E.C.H.R.
[19] See for example E.Ct.H.R., 17 December 2002, *A. v. United Kingdom*.
[20] See a.o. E.Ct.H.R., 17 December 2002, *A. v. United Kingdom*, § 77.
[21] The Court also takes into account the existence (or absence) of "reasonable alternative means of effectively protecting his Convention rights" (see a.o. E.Ct.H.R., 30 January 2003, *Cordova v. Italy (No. 1)*, § 65).
[22] See a.o. E.Ct.H.R., 30 January 2003, *Cordova v. Italy (No. 1)*, § 63.
[23] E.Ct.H.R., 30 January 2003, *Cordova v. Italy (No. 1)*; E.Ct.H.R., 30 January 2003, *Cordova v. Italie (No. 2)*; E.Ct.H.R., 3 June 2004, *De Jorio v. Italie*; E.Ct.H.R., 6 December 2005, *Ielo v. Italie*; E.Ct.H.R., 20 April 2006, *Patrono, Cascini and Stefanelli v. Italie*; E.Ct.H.R., 24 February 2009, *C.G.I.L. and Cofferati v. Italie (No. 1)*; E.Ct.H.R., 6 April 2010, *C.G.I.L. and Cofferati v. Italie (No. 2)* ; E.Ct.H.R., 24 May 2011, *Onorato v. Italie*.

a MP who had sent letters with ironic content and toys to a magistrate[24]. The latter had been investigating a person with whom the MP had maintained a relationship[25]. In the Court's view, "[s]uch behaviour is more consistent with a personal quarrel. In such circumstances, it would not be right to deny someone access to a court purely on the basis that the quarrel might be political in nature or connected with political activities"[26]. Later, the Court has also applied this criterion in two cases where parliamentary inviolability was at stake[27]. This is much more problematic, given that this mechanism applies above all to acts performed outside parliamentary functions, which therefore lack per definition any clear connection to parliamentary activity. For this reason, the application of this criterion on these cases has been considered inappropriate[28].

9. In terms of the separation and balance of powers, it can be deduced from this case law that the European Court of Human Rights accepts that states regulate the relationship between parliament, parliamentarians and the judiciary by means of parliamentary immunities. In particular, it accepts that the judiciary may be restricted in its prerogatives with regard to MP, as long as this restriction is limited to what constitutes the core of parliamentary activity[29]. Injured third parties' human rights haven't yet been used to "crack open" this core protection in the case law of the Strasbourg Court.

10. Without going into detail here, it can be noted that this also appears to be true where the human rights of the MP himself are at stake [30]. Their proper right to access to court doesn't entitle them to give up their parliamentary inviolability to defend themselves before court and clarify criminal charges directed against them. This is due to the purpose of this protection[31] and the public policy character it receives in many legal systems. The MP therefore does not necessary have the possibility of defending himself in court like any other citizen. While parliamentary immunities may limit the action of the judiciary, they do not limit the action of the (non-state) "power" of public opinion. On the contrary, as we have suggested earlier[32], the existence of such immunities may even reinforce speculation and discussion about the guilt of a prosecuted MP, and contribute to a possible "pre-conviction" by the court of public opinion (with all the impact that this may have on the human rights of the MP).

II. HUMAN RIGHTS AND THE CONSOLIDATION OF PARLIAMENTARY IMMUNITIES

11. The case law of the European Court of Human Rights has recently been supplemented by a case in which it was not the *application*, but the *non-application* of parliamentary immunities that has been criticised[33]. In short[34], this (very complex) case concerns a Turkish political opposition leader, Selahattin Demirtaş, MP at the time, who was criminally prosecuted and deprived of his liberty for acts related to his political activity (especially his speeches). Of particular interest for our research is the fact that the national courts ruled on his deprivation of liberty and his continued detention without

[24] E.Ct.H.R., 30 January 2003, *Cordova v. Italy (No. 1)*.
[25] E.Ct.H.R., 30 January 2003, *Cordova v. Italy (No. 1)*, § 10.
[26] E.Ct.H.R., 30 January 2003, *Cordova v. Italy (No. 1)*, § 62.
[27] E.Ct.H.R., 16 November 2006, *Tsalkitzis v. Greece*, § 47-51; E.Ct.H.R., 11 February 2010, *Syngelidis v. Greece*, § 44-50.
[28] K. MUYLLE, "Rechten van de mens…", *op. cit.*, p. 82-85.
[29] It seems useful to recall here an observation made in footnote 21 above, according to which the existence of reasonable alternative means of effectively protecting the Convention rights may also play a role in favour of the acceptability of immunity with regard to the right to access to court. Among these alternative remedies are of course judicial remedies, as long as they are effective, including remedies directed against third parties, including the State (see E.Ct.H.R., 15 July 2003, *Ernst v. Belgium*, even if this case concerns the protection of magistrates and not MPs).
[30] E.Ct.H.R. (G.C.), 3 December 2009, *Kart v. Turkey*.
[31] See *supra*, No. 2.
[32] See *supra*, No. 4.
[33] E.Ct.H.R. (G.C.), 22 December 2020, *Selahattin Demirtaş v. Turkey (No. 2)*.
[34] Fore a more detailed analysis, see A. JOUSTEN and F. BOUHON, "Le musellement de l'opposition parlementaire en Turquie au regard des droits fondamentaux", *Revue Trimestrielle des Droits de l'Homme*, 2022, p. 29-62.

examining the applicability of his parliamentary non-accountability, even though this applicability had been plausibly invoked by the MP[35].

12. In its judgment, the European Court of Human Rights analyses this situation in particular in the light of Article 3 of Protocol No. 1, which protects not only the right to stand for election but also the right, once elected, to sit as a MP[36]. Following the Court, "the rule of parliamentary immunity [...] is crucial to this guarantee"[37]. In this context, the Court formulates a procedural guarantee that has to be respected by national courts: "if a State provides for parliamentary immunity from prosecution and from deprivation of liberty, the domestic courts must first ensure that the member of parliament concerned is not entitled to parliamentary immunity for the acts of which he or she has been accused"[38]. The Court appears to deduce a similar procedural guarantee from Article 10 E.C.H.R.[39] (as, in this case, it where mostly the MPs political speeches which were at stake). Failure to respect these safeguards may lead to (or at least contribute to) a finding of violation of the human rights concerned.

13. From a conceptual point of view, this judgment is particularly interesting, as it is, to our knowledge, the first time that the Court has linked the non-application of parliamentary immunities with the violation of human rights of the MP. One might ask whether this approach contradicts the view that such immunities serve an institutional or functional purpose[40]. This question requires in depth reflection. As a first intuition, it can be said that in the Court's reasoning, the non-respect of a parliamentary immunity can indeed lead to (or at least contribute to) an infringement of a human right which is recognized to the MP as a person. That being said, the human rights at issue here are rights which one enjoys by virtue of the specific function he or she performs (Article 3 of Protocol No. 1) or which are of particular importance to him or her and therefore apply more intensively than to the general public (Article 10 of the E.C.H.R.). From this point of view it is therefore not primarily his private interest that is at stake, but the general interest represented, in a democratic society, by the free and regular exercise of the parliamentary function and, ultimately, the proper functioning of the parliamentary institution[41]. In any case, it seems inevitable that the protection of this freedom and this regularity, as well as of the proper functioning of the parliamentary institution as a whole, is deployed concretely through that of the human beings who exercise the function of parliamentarian. If human rights play an important role in the context of the application or non-application of parliamentary immunities, this cannot, in our view, be considered as in contradiction to the institutional or functional purpose of these immunities.

14. Beyond this conceptual questioning, the judgment underlines that when parliamentary immunities exist in a member state of the Council of Europe, they have to be respected by the courts, which implies first of all that they verify their applicability. If the courts ignore their existence, this can lead to the infringement of the MP's human rights and, ultimately, to a conviction by the Strasbourg Court. It is in this sense that human rights consolidate parliamentary immunities and also the vision of the separation of powers that they reflect.

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[35] E.Ct.H.R. (G.C.), 22 December 2020, *Selahattin Demirtaş v. Turkey (No. 2)*, § 261-263.
[36] E.Ct.H.R. (G.C.), 22 December 2020, *Selahattin Demirtaş v. Turkey (No. 2)*, § 386.
[37] E.Ct.H.R. (G.C.), 22 December 2020, *Selahattin Demirtaş v. Turkey (No. 2)*, § 386.
[38] E.Ct.H.R. (G.C.), 22 December 2020, *Selahattin Demirtaş v. Turkey (No. 2)*, § 394.
[39] E.Ct.H.R. (G.C.), 22 December 2020, *Selahattin Demirtaş v. Turkey (No. 2)*, § 261. For further developments on this point, see A. JOUSTEN and F. BOUHON, *op. cit.*, p. 46-47.
[40] See *supra*, No. 2.
[41] As the Court itself points out: [41] E.Ct.H.R. (G.C.), 22 December 2020, *Selahattin Demirtaş v. Turkey (No. 2)*, § 394.

III. HUMAN RIGHTS AND THE COMPETITION WITH OR THE SUBSTITUTION OF PARLIAMENTARY IMMUNITIES

15. The starting point for this third category of interaction between human rights and parliamentary immunities is the same judgment of the European Court of Human Rights that we have just mentioned. In its judgment in *Selahattin Demirtaş v. Turkey (no. 2)*, the Court enshrined another procedural guarantee under Article 3 of Protocole No. 1 that has to be respected by national courts in the context of criminal proceedings against a MP. More specifically, it concerns the situation in which these courts must rule on a deprivation of liberty of a member of parliament, whether it concerns the initial arrest or the extension of the detention. This case was the first time that the Court had to rule on a complaint under Article 3 of Protocol No. 1 concerning the effects of the pre-trial detention of an elected MP on the performance of his or her parliamentary duties[42].

Following the Court, "in view of the importance in a democratic society of the right to liberty and security of a member of parliament, the domestic courts must show, while exercising their discretion, that in ordering a person's initial and/or continued pre-trial detention, they have weighed up the relevant interests, in particular those of the person concerned as safeguarded by Article 3 of Protocol No. 1 against the public interest depriving that person of his or her liberty where required in the context of criminal proceedings. *An important element in this balancing exercise is whether the charges have a political basis* [...]"[43]. Further on, the Court specifies the contours of this obligation: "[...] where a member of parliament is deprived of his or her liberty, the judicial authorities ordering that measure are required to *demonstrate that they have weighed up the competing interests*. As part of this balancing exercise, they must protect the freedom of expression of political opinions by the member of parliament concerned. *In particular, they must ensure that the alleged offence is not directly linked to his or her political activity. In this connection, the member States' legal systems must offer a remedy by which a member of parliament who has been placed in detention can effectively challenge that measure and have his or her complaints examined on the merits*. [...]"[44].

16. In many legal systems, when a MP is subject to criminal proceedings, the parliament has to carry out a control similar to that required by the Strasbourg Court, whether on the occasion of a request to lift parliamentary inviolability or a request to suspend the proceedings (or certain acts of prosecution)[45]. For example, one of the criteria taken into account by the Belgian House of Representatives' prosecution committee in refusing to lift the inviolability of a MP or to suspend acts of prosecution directed against him (in this case, his detention) is "that the offence is clearly politically motivated"[46]. Following the Belgian Court of Cassation, "[w]hen called upon to rule on a request for the waiver of parliamentary immunity, the prosecution committee must therefore ensure that the guilt is not *prima facie* implausible, *that the prosecution is not inspired by a partisan motive* and that it is not likely to disrupt the work of the assembly"[47].

In the context of the above-mentioned judgment, it seems clear that this parliamentary control cannot take the place of the "effective remedy" the Strasbourg Court requires under Article 3 of Protocol No. 1, which supposes the intervention of a court. Given the identity, or at least the proximity, of the controls carried out respectively by Parliament (in the context of inviolability) and the (national) courts (in the context of Article 3 of Protocol No. 1), the latter's assessment may compete with and eventually even contradict that of Parliament. This competition or contradiction is not only

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[42] E.Ct.H.R. (G.C.), 22 December 2020, *Selahattin Demirtaş v. Turkey (No. 2)*, § 389.
[43] E.Ct.H.R. (G.C.), 22 December 2020, *Selahattin Demirtaş v. Turkey (No. 2)*, § 389 (emphasis added).
[44] E.Ct.H.R. (G.C.), 22 December 2020, *Selahattin Demirtaş v. Turkey (No. 2)*, § 395 (emphasis added).
[45] These two notions have been mentioned *supra*, No. 1.
[46] Chambre des Représentants, *Précis de droit parlementaire : L'inviolabilité parlementaire*, 2015, p. 38 (free translation).
[47] Cass., 11 December 2019, P.19.0888.F (free translation, emphasis added). For a more general overview, see European Parliament, Office for Promotion of Parliamentary Democracy, *Non-liable? Inviolable? Untouchable?*, October 2012, p. 21.

conceivable in the case of direct judicial review of the parliamentary decision (which the European Court of Human Rights does not require). The hypothesis may be that Parliament accedes to a request from the public prosecutor's office to lift parliamentary inviolability and authorises the arrest of the MP and admits, at least implicitly, that the proceedings are not politically motivated. By subsequently carrying out the review required by the Strasbourg Court under Article 3 of Protocol No. 1, the national court deciding on the deprivation of liberty or continued detention could potentially reach a different conclusion on this matter.

17. In many legal systems, however, the separation of powers between parliament and the judiciary is understood in such a way that the judiciary cannot control or sanction a decision to lift parliamentary inviolability (or a decision not to suspend proceedings), not only directly, but *a priori* also indirectly. Referring once again to the Belgian legal system, the introduction of an appeal against a parliamentary decision to lift inviolability appears to be excluded on the basis of the principle of separation of powers and the resulting parliamentary autonomy[48] (the same seems to be true for a refusal to suspend proceedings). In this respect, we are not aware of any court decision that would rule on such an appeal[49]. However, such a decision has been challenged indirectly and incidentally in the course of judicial appeals in the context of criminal proceedings against a MP. On this occasion, the Court of Cassation has ruled that "[...] the principle of the separation of powers prohibits the judiciary from censoring the decision of a parliamentary assembly ruling on a request for authorisation to prosecute"[50]. The situation could possibly be different if the grievances from which the existence of a political basis for the prosecution is inferred constitute a cause of invalidity that can be sanctioned in accordance with the rules governing criminal proceedings[51].

This procedural guarantee derived from Article 3 of Protocol No. 1 and the protection of the MP's human rights thus could lead to a reflection on and a reconsideration of the conception of the separation of powers between the Parliament and the judiciary in legal systems in which acts of parliament (other than laws) remain largely immune from judicial review. Inspiration could possibly be found in systems in which parliamentary decisions concerning the lifting of inviolability (or the non-suspension of prosecution) may, under certain conditions, be subject to judicial review. This is the case, for example, in the German legal system, in the context of litigation between state bodies before the Federal Constitutional Court (*Organstreitigkeit* proceedings)[52].

18. More generally, the European Court of Human Rights places the judiciary here as the protector of the (human) rights of the MP, against the prosecuting authorities and, if necessary, even against

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[48] See K. MUYLLE, "Rechterlijke controle op niet-wetgevende handelingen van een wetgevende vergadering: democratie versus rechtsstaat, of toch maar scheiding der machten" *in Leuvense Staatsrechtelijke Standpunten*, Bruges, die Keure, 2008, p. 156-157.

[49] See also K. MUYLLE, "Rechterlijke controle...", *op. cit.*, p. 153.

[50] Cass., 14 April 2021, P.20.1060.F.

[51] See Cass., 11 December 2019, P.19.0888.F. In summary, in this case, the prosecuted MP was alleging bias on the part of the investigating judge handling his case. In support of his argument, he invoked, in particular, the assessment of the investigation by the prosecution committee of the House of Representatives, which had found that "the investigation was clearly conducted solely to the detriment of the MP". The Court of Cassation deduced from the criteria to be taken into consideration by this committee (*supra*, No. 16) "that it is not for the said committee to appropriate the judgement of the causes of invalidity of the information or the preparatory investigation" and that "the statement [...] that 'the investigation was clearly conducted solely to the detriment of the MP' does not constitute an element that obliges the judge to consider as objectively justified the apprehensions that the MP claim to harbour in this respect" (free translation). In other words, the Court of Cassation considers that this statement by the prosecution committee does not prevent the courts from having a different assessment in the context of the judgment of the causes of invalidity that would affect the proceedings against the MP. It should be added, however, that this case is different from the general case under consideration here, in that Parliament in this case *refused* to lift parliamentary inviolability.

[52] See a.o. D. WIEFELSPÜTZ, "§13. Indemnität und Immunität" *in* M. MORLOK, U. SCHLIESKY and D. WIEFELSPÜTZ (eds.), *Parlamentsrecht*, Baden-Baden, Nomos, 2016, p. 473. Of course, we are well aware that the review carried out by the Constitutional Court does not entirely correspond to that required by the European Court of Human Rights in the judgment referred to here. Without going into this issue in greater detail here, we believe that this possibility of appeal may nevertheless be a source of inspiration when thinking about the (judicial) protection of the (human) rights of MPs.

parliament. This is particularly the case for opposition MPs, who are often exposed to pressure not only from the executive, but also from the political majority as a whole, consisting of the government and the majority in Parliament[53].

19. A final word on the (partial) substitution of parliamentary immunities that we announced in our introduction[54]. Of course, for MPs, the procedural guarantee at issue here does not represent an equivalent protection to the parliamentary inviolability. It comes rather close to *a part* of the control that Parliament may have to carry out in the context of a deprivation of liberty of one of its members. In addition, the controlling authority is different in the two cases (the Parliament in one case, a court in the other).

That being said, it seems that, in the mind of the Strasbourg Court, this procedural guarantee applies irrespective of the existence or the applicability of parliamentary immunity in the legal order concerned[55]. This means that even if – for whatever reason – parliamentary inviolability should not apply in a particular case or if there is no such inviolability in the legal order concerned, the MP may nevertheless benefit from a minimum protection inferred from Article 3 of Protocol No. 1. It is in this sense that we can speak of a substitution or compensation.

CONCLUSION

20. What is new in the relationship between parliamentary immunities, human rights and separation of powers? First of all, the research topic itself is quite rarely studied. When the influence of the case law of the European Court of Human Rights on the separation of powers is discussed, it is often in the area of the independence of the judiciary. In our research, the studied case law does not concern the protection of judges, but the protection *against* the action of the judge, or the protection that *they can provide* to a MP.

The case law on the compatibility of the application of parliamentary immunities with the human rights of injured third parties is already quite well known and it is above all recent case law that contains some novelties. It shows that the interaction between parliamentary immunities and human rights are not only of conflictual nature. Human rights can serve to consolidate parliamentary immunities and thus the separation and balance of powers between Parliament and the judiciary by fortifying the limits imposed on the judiciary. This same case law also reaffirms the judge's role as defender of human rights, including a MP's, even if the court's assessment could, to some extent, compete with that of a parliament in the context of parliamentary immunities. If it is therefore accepted that certain acts carried out in the context of the core of parliamentary activity are not subject to judicial control, there is nonetheless a need to reflect on the degree of restraint that the judiciary should show with regard to what is said and decided in parliament.

Of course, at this stage, one should be cautious about the above because of the material we have mobilised. The case law of the European Court of Human Rights is casuistic. Furthermore, the *Selahattin Demirtaş v. Turkey (No. 2)* judgment was handed down in very particular political circumstances. It is therefore necessary to keep an eye out for possible confirmations of the above in the case law of the Strasbourg Court[56] and to complete the research with other sources. This is our intention, working in the coming months primarily on the situation in the Belgian legal system.

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[53] This point joins the opinion expressed by some authors that today, there is a confrontation between the majority and the opposition rather than a separation of powers between the legislative and executive branches (K. MUYLLE, "Rechterlijke controle…", *op. cit.*, p. 157-158 and 171).
[54] *Supra*, No. 5.
[55] A. JOUSTEN and F. BOUHON, *op. cit.*, p. 53, footnote 122.
[56] In this context, we will carefully examine the recent judgment E.Ct.H.R., 8 November 2022, *Yüksekdağ Şenoğlu v. Turkey*, which has yet to be included in our reflexions.