

## OPINION OF ADVOCATE GENERAL

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delivered on 26 June 2008<sup>1</sup>

1. In the present reference from the Corte Suprema di Cassazione (Supreme Court of Cassation) (Italy), the Court of Justice is asked about the correct interpretation of the provisions of the Protocol on the Privileges and Immunities of the European Communities and the Rules of Procedure of the European Parliament in relation to the immunity from suit and prosecution that Members of the European Parliament enjoy.

tion to defend the immunity of the Member concerned.

### **I — Factual background**

2. The two cases that gave rise to this preliminary reference concern defamation claims brought against an Italian Member of the European Parliament (MEP). The national courts found him liable and awarded damages to the claimants. The Court is asked, first, whether a national court dealing with civil proceedings against an MEP is under an obligation to request the European Parliament to waive his immunity, in the event that the MEP has not himself asked the Parliament to defend his immunity, and, second, whether the national court itself has the power to rule whether the MEP's conduct is covered by immunity, should the European Parliament not have communicated its inten-

3. The defendant in the main proceedings, Mr Alfonso Luigi Marra, was a Member of the European Parliament between 1994 and 1999. While an MEP, he circulated a number of pamphlets criticising the Italian justice system and individual judges. Mr Antonio Clemente and Mr Eduardo De Gregorio, who were named in the pamphlets, issued defamation claims against Mr Marra. When the court of first instance found in their favour and awarded them damages, Mr Marra appealed to the Corte d'appello di Napoli (Naples Court of Appeal). In its judgments of 23 January and 6 March 2002 (in the case of Mr Clemente) and of 22 February 2002 (in the case of Mr De Gregorio) the Corte d'appello di Napoli upheld the judgments of the court of first instance holding that the statements in question were not covered by the Protocol on the Privileges and Immunities of the European Communities. Mr Marra appealed on points of law to the Corte Suprema di Cassazione, arguing, *inter alia*, that the Corte d'appello di Napoli had

<sup>1</sup> — Original language: English.

misapplied Rule 6 of the Rules of Procedure of the European Parliament which specifies the process to be followed in relation to requests for waiver of immunity of an MEP.

the performance of their duties and that the competent courts should be invited to stay proceedings pending a final determination by Parliament;

4. In the meantime, Mr Marra had written to the President of the European Parliament on 16 February 2001, asking for the Parliament to intervene in accordance with Rule 6 in order to defend his immunity. His request was transmitted to the Committee on Legal Affairs and the Internal Market by letter of the President dated 11 April 2001. At its meeting of 23 January 2002, the Committee decided to intervene in favour of Mr Marra and a relevant recommendation was made in the Report on the Immunity of Italian Members and the Italian authorities' practices on the subject of 30 May 2002.<sup>2</sup> On 11 June 2002 the European Parliament adopted a Resolution on parliamentary immunity in Italy and the Italian authorities' practices in the matter,<sup>3</sup> which concludes as follows:

2. Instructs its President to forward this decision and the report of its committee to the Italian Permanent Representative marked for the attention of the appropriate authority of the Italian Republic.'

## II — The questions referred

5. By order dated 20 February 2007, the Corte Suprema di Cassazione referred two questions to the Court of Justice in relation to the provisions on immunity of MEPs.

'1. [The Parliament] decides that the cases of ... and Alfonso Marra raise a *prima facie* case of absolute immunity and that the competent courts should be put on notice to transmit to Parliament the documentation necessary to establish whether the cases in question involve absolute immunity under Article 9 of the Protocol in respect of opinions expressed or votes cast by the members in question in

'1. In the event that a Member of the European Parliament does not act by exercising the powers granted him under Rule [6(3)] of the Rules of Procedure of the European Parliament directly to request the President to defend privileges and immunities, is the court before which a civil action is pending in any event required to request the President

2 — (2001/2099(REG)), A5-0213/2002, Rapporteur: Sir Neil MacCormick.

3 — (2001/2099(REG)), P5\_TA (2002)0291.

to waive immunity for the purposes of pursuing proceedings and adopting a decision?

or

2. In the absence of a communication by the European Parliament that it intends to defend the immunities and privileges of the Member concerned, may the court before which that civil action is pending rule as to the existence or otherwise of that privilege, regard being had to the specific circumstances of the case?

6. Given the way in which the questions are formulated, the national court appears to assume that Mr Marra has not requested the President of the European Parliament to defend his immunity and that the Parliament has not communicated an intention to do so. However, there is no doubt that Mr Marra has submitted such a request and that the Parliament has indicated that his statements may be covered by immunity, that it has asked for the competent national court to be put on notice to transmit the relevant documents and has instructed its President to

forward its decision to the Italian Permanent Representative.<sup>4</sup> At the hearing, counsel for the Parliament confirmed that the Resolution was communicated not to the national court directly but to the Italian Permanent Representative. The order for reference mentions the Report of the Committee on Legal Affairs and the Internal Market of 30 May 2002 but not the actual Resolution of the European Parliament of 11 June 2002, which adopted the recommendations made in the Report. When asked for clarification at the hearing, counsel for the Italian Government referred us to those points in the order where the Report of 30 May 2002 is mentioned and submitted that the national court phrased its questions in this manner because it treated the Report as being the provisional, and not the final, position of the Parliament. Yet, the Parliament did adopt a final position in its Resolution of 11 June 2002, which, counsel for the Parliament told us, was communicated to the Italian Permanent Representative.

7. In any case, since both Mr Marra and the European Parliament have taken action, I think the two questions may be reformulated as follows:

4 — A possible explanation may be that when the court of first instance heard the cases against Mr Marra the European Parliament had not yet issued its Resolution, so that the Corte Suprema di Cassazione, in reviewing the decisions of the lower courts, was actually focusing on the question whether their judgments were correct in the absence of action on the part of Mr Marra or the European Parliament. In any case, I think that the answers I shall give in the following pages will provide sufficient guidance as to the interpretation of the relevant provisions of the Protocol to allow the national court to decide the case, even if the facts were as described in the order for reference.

‘Where a civil action is brought against a Member of the European Parliament, is the court before which the action is pending required to request the opinion of the Parliament as to whether the conduct complained of is covered by parliamentary immunity or can that court rule itself as to the existence or otherwise of that privilege?’

‘Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.’

9. Article 10 reads:

### **III — Parliamentary immunity in European law**

‘During the sessions of the European Parliament, its members shall enjoy:

(a) in the territory of their own State, the immunities accorded to members of their Parliament;

#### *Principles*

(b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.

8. The relevant provisions can be found in Articles 9 and 10 of the Protocol on the Privileges and Immunities of the European Communities. Article 9 provides as follows:

Immunity shall likewise apply to members while they are travelling to and from the place of meeting of the European Parliament.

Immunity cannot be claimed when a member is found in the act of committing an offence and shall not prevent the European Parliament from exercising its right to waive the immunity of one of its members.'

it is in the interest of every member of the community that those elected to represent us should enjoy this privilege in order to be able to do so properly and effectively. Thus, there should be no doubt that the object of parliamentary immunity is to protect both the institution of the Parliament as such, as well as its members as individuals.

10. The first point to note is that those two articles are not mutually exclusive; they function in a cumulative manner, and should be read together. Therefore, it is possible that the same conduct may fall within the scope of and benefit from the protection offered by both articles.

11. Second, in interpreting those provisions, it is important to bear in mind their aim and object. As the Parliament and the Commission rightly submit, parliamentary immunity is an institutional arrangement which aims to guarantee the independence of the European Parliament and its members and facilitate its functioning as a collective body which plays a vital role in the context of a free and democratic society. At the same time, though, it must be accepted that specific individuals, the Members of that Parliament, are also beneficiaries of this arrangement. By its very nature, parliamentary immunity grants to certain individuals, because of their institutional function, which is instrumental to Parliament's democratic role, a privilege which is not granted to other citizens who do not perform such a function. The underlying idea is that as members of the political community we have agreed that, in the context of representative democracy,

12. The dual aspect of parliamentary immunity is discernible in the wording and structure of Articles 9 and 10 of the Protocol. Article 10 sets out the circumstances in which a Member may benefit from immunity during the sessions of the Parliament in the territory of his or her own Member State, another Member State or when travelling to and from the place of meeting of the Parliament, and then stipulates that immunity may be waived by the Parliament and cannot be claimed at all if the Member is found in the act of committing an offence. Here, the concern of the Community legislature appears to be to protect MEPs from measures that could interfere with their ability to participate in the sessions of the Parliament and perform their parliamentary duties. However, the Parliament can always waive this privilege if it takes the view that a Member's conduct does not relate to his role as Member of Parliament and thus cannot benefit from parliamentary immunity. For instance, if a Member is accused of fraud or murder the Parliament should, in principle, waive his immunity despite the fact that his conviction will make it impossible for him to perform his parliamentary duties, as these are acts totally unrelated to the nature of the office of MEP, unless, of course, it has reasons

to believe that the charge is devoid of any substance and is aimed at interfering with the MEP's political functions and preventing him from exercising his parliamentary duties. By contrast, Article 9, which applies to opinions and votes cast by MEPs in the performance of their duties, is primarily aimed at protecting the integrity of political discourse and thus the integrity of the European Parliament and its processes as such. Taking measures against a Member in respect of an opinion he has expressed or a vote he has cast in his capacity as an MEP would offend against the institution of Parliament itself, since it would undermine its place as the forum *par excellence* of open debate and democratic deliberation. Of course, in Article 9, as in Article 10, individual Members also benefit from the immunity, in the sense that they are spared the trouble of answering a case in court; but the reason for this arrangement is that to allow legal proceedings in respect of opinions or votes would strike at the essence of deliberative, representative democracy.

absolute protection: once an opinion or vote is found to be relevant to a Member's parliamentary duties, the privilege may not be waived in any way. In this sense, it could be said that Article 9 constitutes the hard core of parliamentary privilege as it cannot be waived and may be invoked by MEPs even for proceedings that were initiated after their term had finished, while Article 10 offers additional protection (as it is wider in scope than Article 9), which, however, may be waived by the Parliament and covers only proceedings brought during the MEP's mandate.

### *The case of Mr Marra*

13. This difference of emphasis is evidenced by the fact that it is possible for the European Parliament to waive immunity under Article 10, but not under Article 9. Article 10 is wider in scope than Article 9 as it covers not only opinions and votes but also other conduct; yet, the protection it offers is qualified, since immunity may be waived by the Parliament. On the other hand, Article 9 is narrower in scope — it protects only opinions and votes in the performance of a Member's parliamentary duties — but offers

14. Mr Marra is an Italian citizen who wishes to benefit from immunity in Italy for events that took place while he was a Member of the European Parliament. He had circulated the pamphlets in question between 1996 and 1997 and Mr De Gregorio issued his defamation claim on 8 June 1998.<sup>5</sup> Since the proceedings were initiated while he was still an MEP he was entitled, first of all, to the protection of Article 10 of the Protocol; under Article 10(1)(a) he should be granted

5 — The order for reference in the case of Mr Clemente does not state the date on which he issued his claim against Mr Marra.

the same privileges that Members of the Italian Parliament enjoy.

in question or challenge this decision before the Constitutional Court.

15. Article 68(1) of the Italian Constitution protects statements made by Members of the Italian Parliament in the following terms: ‘Members of Parliament may not be called to answer for opinions expressed or votes cast in the exercise of their office’. It is clear from the order for reference that an Italian court before which civil or criminal proceedings are initiated against a Member of the Italian Parliament is under no obligation to seek the prior authorisation of that Parliament before entertaining proceedings against the defendant MP or to seek its opinion as to whether the immunity provided for in Article 68(1) of the Italian Constitution applies. The latter grants Italian MPs protection in relation to opinions and votes in terms which are identical to those of Article 9 of the Protocol, and, as the European Parliament observed in its Resolution of 11 June 2002, both provisions offer the same type of absolute privilege.<sup>6</sup> It is for the court itself to assess whether this privilege applies to the facts of a specific case and proceed accordingly. It seems, however, that if the Italian Parliament has expressly decided that the case falls within the ambit of Article 68(1) of the Constitution, and is thus covered by absolute immunity, the court must either comply and discontinue all proceedings against the MP

16. The Italian Parliament’s prior authorisation, though, is necessary if a court intends ordering one of the measures listed in Articles 68(2) and 68(3) to be taken against an MP; these include search, arrest or other deprivation of liberty, interception of communications and seizure of correspondence. These provisions offer Italian MPs a form of qualified privilege: they are in principle protected from such measures unless Parliament decides to allow them following a request from a judicial authority.

17. Accordingly, if Mr Marra were threatened with arrest or another measure depriving him of his liberty as a result of the defamation claims brought against him, the court would be under an obligation to request the European Parliament to waive his immunity under Article 10(3) of the Protocol and to refrain from taking any action before Parliament’s decision on the request. Yet, Mr Marra never came under such a threat; the claimants in the main proceedings

6 — Resolution (2001/2099(REG)), P5\_TA (2002)0291, point C. I

brought a civil action against him and he was ordered to pay damages. The Italian courts were under no obligation to ask for a waiver of immunity before making an award of damages and Article 10(3) of the Protocol is not applicable in such a case.

19. In its first question the Corte Suprema di Cassazione refers to a request to 'waive immunity'. As explained earlier, no such possibility exists in relation to the absolute immunity of Article 9 of the Protocol. What is meant, essentially, here, is whether the national court should ask for the European Parliament's *opinion* or *recommendation* as to whether the facts of a particular dispute raise a case of absolute immunity in cases in which the European Parliament has not expressed an opinion on the issue.

18. Mr Marra claims that his statements were covered by the absolute privilege of Article 9 of the Protocol, which, in essence, guarantees for Members of the European Parliament the same protection in relation to opinions that Article 68(1) of the Italian Constitution guarantees for Members of the Italian Parliament.<sup>7</sup> What is the process that national courts must follow when faced with such a claim? This is the central question in relation to which the referring court asks the Court of Justice for guidance. Under the corresponding provision on absolute immunity of the Italian Constitution (Article 68(1)), the courts may form their own view as to the existence or not of the privilege in a particular case without asking for Parliament's opinion where the latter has remained silent. Can they do the same when interpreting Article 9 of the Protocol? Or, is it necessary to ask the European Parliament to decide this point?

20. In answering this question, the starting point must be the wording of Article 9. This provision grants a substantive privilege — absolute immunity from any form of proceedings — but does not impose on national courts the procedural obligation to consult with the European Parliament about the existence of the privilege in a particular case. If the Community legislature intended to limit the powers of national courts in this respect, it would have done so explicitly; in the absence of such a rule, Article 9 of the Protocol cannot be interpreted as meaning that national courts are required to request the opinion of the European Parliament as to whether or not the privilege exists.

<sup>7</sup> — Thus, the relationship of equivalence required by Article 10(1)(a) of the Protocol is, in this case, between the immunity enjoyed by Members of the Italian Parliament under Article 68(1) of the Constitution and that enjoyed by Members of the European Parliament under Article 9 of the Protocol.

21. A similar conclusion may be deduced from Article 6(3) of the Rules of Procedure

of the European Parliament which reads as follows: ‘any request addressed to the President by a *Member* or a *former Member* to defend privileges and immunities shall be announced in Parliament and referred to the committee responsible’ (emphasis added). Here it is made clear that the initiative rests with the Member or former Member concerned. He or she should bring his or her case to the attention of the President and ask for the Parliament to intervene in defence of his or her immunity. There is nothing in Article 6(3) or any other provision in the Rules of Procedure which could support the view that national courts are requested to initiate this process themselves. Moreover, such an obligation for national courts could not have been included in the Rules of Procedure. While the Protocol on Privileges and Immunities constitutes part of primary Community law, the Rules are merely an internal document produced by the European Parliament to regulate the conduct of its own affairs; they do not have legal effects in the legal orders of the Member States and cannot impose obligations on national courts.

22. Therefore, I think that if the European Parliament has not indicated that a specific case is covered by immunity, following a request from a Member or a former Member, the national court is not obliged to initiate the process itself and seek the opinion of the Parliament as to whether or not the immunity exists.

23. Let us now take the opposite scenario and suppose that the Parliament has actually spoken. In this case, the Member or former Member who wishes to benefit from immunity has requested the President to defend his privilege in accordance with Article 6(3) of the Rules of Procedure and the Parliament has decided that his case is covered by immunity. Is this decision binding on the national court?

24. In principle privileges and expresses a view as to whether immunity applies to a specific case are the Rules of Procedure. As I mentioned earlier, these are internal rules for the organisation of the Parliament’s internal affairs and cannot be the source of obligations for national authorities. This is clearly implied in Rule 7(6) which reads: ‘in cases concerning the defence of immunity or privileges ... [the Parliament] shall make a proposal to invite the authority concerned to draw the necessary conclusions’. Here, the Parliament itself takes the view, and rightly so, that the outcome of the process of defence of privilege is an invitation to the national authority to draw the necessary conclusions about how to deal with a particular case.

25. However, the Parliament's views on absolute immunity, their lack of binding effect notwithstanding, should be taken seriously into account and attributed considerable persuasive force by the national court. This is a requirement that flows from the principle of loyal cooperation enshrined in Article 10 EC and repeated, in relation to the Protocol on Privileges and Immunities, in Article 19 thereof.<sup>8</sup> If the national court is unable to agree with the Parliament, it should give reasons. In fact, were such a disagreement to arise, it would be an indication that the case was an appropriate one for a reference to the Court of Justice, from which the national court may seek guidance as to the correct interpretation of the relevant provisions.

26. I said in the preceding paragraphs that when the European Parliament has stated its views as to the existence or not of the absolute privilege under Article 9 in a particular case, national courts are not 'in principle' bound to follow the Parliament and, should they disagree with its opinion, they 'may' (but are not obliged to) refer the case to the Court of Justice. However, such an obligation could on occasion arise as a result of the combination of the relevant provisions of national law and Article 10(1)(a).

27. We saw that Article 10(1)(a) requires that a Member of the European Parliament enjoy, in his home country, exactly the same privileges that Members of the national Parliament enjoy. This is a requirement of strict equivalence. Suppose now that in a particular Member State there is a provision of national law according to which, when the national Parliament has expressed a view that a Member's statement is covered by privilege, national courts must either follow Parliament's view or refer the case to a superior court, such as a constitutional or supreme court. A Member of the European Parliament from that State is entitled to exactly the same treatment. That means that if the European Parliament has expressed a view about his case, the national courts should either follow it or refer the case to the Court of Justice. The basis for such an obligation is Article 10(1)(a) of the Protocol, which requires strict equivalence between the privileges accorded to the Members of the national Parliament and those accorded to the Members of the European Parliament within their own States.<sup>9</sup> Thus, a national court before which proceedings against an MEP are pending should, first, ask what its obligation would have been under national law if the person concerned were not a member of the European but of the national Parliament. If the point could have been decided in a manner which ran contrary to the opinion of the national Parliament, then it can do the same in relation to the opinion of the European Parliament, but should seriously consider whether a reference to the Court of Justice is appropriate. If, on

8 — 'The institutions of the Communities shall, for the purpose of applying this Protocol, cooperate with the responsible authorities of the Member States concerned.'

9 — Naturally, the view of the European Parliament will be relevant only if it decides that a current MEP benefits from immunity under Article 10(1)(a). If Parliament were to waive immunity under Article 10, the national court could still grant the privilege if it believed that a particular statement was covered by the immunity arising under Article 9, which the Parliament itself cannot waive. The apparent complexity that arises from the cumulative application of Articles 9 and 10 results from the fact that their interpretation is dependent on two different institutions (the European Parliament and the courts) and that a decision on immunity in a specific case may depend on decisions made by both of them.

the other hand, it would have been bound to follow the opinion of the national Parliament or to refer the case to a superior court, then it should also either follow the opinion of the European Parliament or make a reference for a preliminary ruling to the Court of Justice. In this way, Members of the European Parliament will enjoy exactly the same immunity as that enjoyed by Members of the national Parliament. Of course, it is a matter for the national court to interpret domestic law and ascertain what it requires.

Parliament, the national courts would have been under an obligation to follow the opinion of the national Parliament or to refer the case to a superior court, then they have the same obligation in relation to the opinions of the European Parliament and they should either follow them or refer the case to the Court of Justice.

28. To recapitulate: there is nothing in the Protocol on Privileges and Immunities which, in cases where the Member concerned has not asked the Parliament to defend his privilege, could be interpreted as requiring national courts to initiate this process themselves and to ask the European Parliament for an opinion or recommendation as to the existence or not of the privilege in a given case. Where the Member has asked the Parliament to defend his privilege and the latter has expressed its opinion, this opinion is not, in principle, binding on the national court, but should be taken seriously into consideration. If the national court reaches a different conclusion from the European Parliament, a reference to the Court of Justice may be appropriate. If, however, under national law, in a similar situation involving a Member of the national

29. In the light of the above, I think that the Court should answer the question as follows: A national court before which a civil action against a Member of the European Parliament is pending is not required to request the opinion of the Parliament as to whether the conduct complained of is covered by parliamentary immunity, if the Member concerned has not himself initiated the process under Article 6(3) of the Rules of Procedure of the European Parliament concerning Members' requests to the Parliament to defend their privileges. If the Member concerned has initiated the process and the Parliament has expressed an opinion concerning his immunity, this opinion is not binding on the national court but should be taken seriously into account. If the national court takes a different view from the Parliament, a reference for a preliminary ruling to the Court of Justice may be appropriate. If, however, in a similar situation involving a Member of the national Parliament, the national courts would have been under an obligation to follow the opinion of the national Parliament

or to refer the case to a superior court, then they have the same obligation in relation to the opinions of the European Parliament and they should either follow them or refer the case to the Court of Justice, that being a matter for the national court to assess.

offer at least some guidance in relation to this issue.<sup>10</sup>

#### **IV — The scope of Article 9 of the Protocol: ‘in the performance of their duties’**

30. Although the referring court did not ask the Court of Justice for guidance in relation to the scope of Article 9 of the Protocol, a considerable part of the order for reference deals with this very question: which expressions of opinion should be considered as falling within a Member’s duties and thus covered by the absolute privilege provided for in this article? To repeat, such an issue may appropriately constitute the subject of a reference for a preliminary ruling, especially if the national courts have been unable to agree with the European Parliament as to the availability or not of the privilege in a specific case. In the present case, the Corte Suprema di Cassazione will eventually need to decide whether the lower courts have correctly applied Article 9, so it is not only reasonable, but also desirable, for the Court of Justice to

31. It is true that, when a citizen who feels aggrieved by a statement made by a Member of Parliament is prevented from seeking redress before a court because the latter relies on parliamentary privilege, his right to access to justice is compromised. In order to avoid the creation of two classes of citizens — Members of Parliament, on the one hand, who are not amenable to the courts for the statements they make, and ordinary citizens, on the other, who may be subject to the limitations imposed on free speech by civil and criminal law — virtually all legal orders restrict reliance on privilege to situations where the Member was exercising his parliamentary duties. Parliamentary immunity is not a weapon which Members of Parliament can use to resolve personal differences, but an institutional arrangement to support the democratic functioning of the political community. As such, it does not constitute, in principle, a disproportionate restriction of the right to access to justice.<sup>11</sup>

10 — It may be argued that the Corte Suprema di Cassazione may make a second reference in the present case if it requires information on the substantive interpretation of Article 9 of the Protocol. However, considerations of procedural economy, the need for a speedy resolution of the dispute and the desirability of economising on the Court’s time and resources point in the direction of discussing this issue here. Of course, even if the Court does so, the national court is not precluded from making a further reference if it considers it necessary.

11 — See the discussion in, *Cordova v. Italy* (no. 1), no. 40877/98, §§ 58 to 61, ECHR 2003-I.

32. When a court needs to assess whether an opinion expressed by a Member of Parliament falls within the concept of parliamentary duties the starting point of the inquiry should be the principle justifying parliamentary immunity, namely that Members should be free to engage in debates on matters of public interest without being obliged to tailor their opinions in a way that makes them acceptable or inoffensive for the listener out of fear that otherwise they may be sued or prosecuted.<sup>12</sup> This means, inevitably, that the views expressed by an MEP will on occasion be considered by some people to be excessive, irritating or offensive. However, in a liberal, democratic State the importance of an uninhibited dialogue on public issues is such, that, in principle, even offensive or extreme views should not be silenced. This applies with particular force to Members of Parliament who, because of the very nature of their office, play a central role in the scheme of representative governance.

33. The origins of the parliamentary privilege of freedom of speech can be traced back to the periods of Tudor and Stuart rule in England. The privilege developed progressively as a reaction by Parliament

against attempts by the Crown to intervene in parliamentary debate and restrict Parliament's right to initiate business on its own.<sup>13</sup> It found legislative expression in Article 9 of the Bill of Rights: 'that the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament'. The privilege started its life as a spatially restricted institutional arrangement because, at the time, political discourse was concentrated within Parliament. The power of Parliament was antagonistic to that of the monarch, who saw parliamentary activity as a threat to his own status; hence the effort to intervene in what was taking place inside Parliament and the latter's reaction which led to the establishment of the privilege.

34. Nowadays, though, the forum in which political discourse and debate on matters of public relevance takes place is considerably wider. There exists now a much broader public arena, which includes printed and electronic media and the Internet, within which individuals interact and participate in public dialogue. The role of Members of Parliament as channels and instigators of

12 — As the European Court of Human Rights noted in *A. v. the United Kingdom*, no. 35373/97, § 75 ECHR 2002-X, '[the] underlying aim of the immunity accorded to [MPs] ... [is] to allow [them] to engage in meaningful debate and to represent their constituents on matters of public interest without having to restrict their observations or edit their opinions because of the danger of being amenable to a court or other such authority'.

13 — Limon, D., and McKay, W.R., *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, Butterworths, 1997, p. 69 et seq.; Blackburn, R. and Kennon, A., *Griffith and Ryle on Parliament Functions, Practice and Procedures*, Sweet and Maxwell, 2003, p. 126.

political debate in this broad public arena is as important as their role within the strict confines of Parliament; it is a feature of modern democracy that we expect them to engage in dialogue with the civil society and present their ideas not only on the floor of Parliament but also in the fora that civil society provides. Indeed, I venture to suggest that a very significant part of contemporary political discourse takes place outside Parliament altogether. This is a reality which we cannot ignore; and we would be doing exactly that if we were to take the view that parliamentary privilege protects only statements made within Parliament itself.

*nature* of what the Members of Parliament say and not *where* they say it that matters.<sup>14</sup>

35. Therefore, the criterion determining which statements were made in the exercise of a Member's duties cannot be spatial. It would be too narrow to say that only statements made in parliamentary proceedings within the European Parliament enjoy the protection of Article 9 of the Protocol. For members of the European Parliament, to be able to participate in debates on the floor of Parliament without fear of legal proceedings is as important as their being able to participate in wider public dialogue without such a fear. In other words, in determining whether Article 9 of the Protocol applies, it is the

36. This approach is, in my view, consistent with the case-law of the European Court of Human Rights on the importance of political speech. It is an established principle that such speech enjoys the highest level of protection under Article 10 of the European Convention on Human Rights and that national measures which affect the expression of political opinions will be subjected to strict scrutiny by the Strasbourg Court.<sup>15</sup> The latter has extended this strong protection of political speech to other issues of public concern.<sup>16</sup> The logic justifying this approach is that we need to secure a safe space for public discourse to take place; within that space even offensive or outrageous speech may be protected as it has, very often, a 'unique power to focus attention, dislocate old assumptions and shock its audience into the recognition of

14 — Both the European Parliament and the Commission submitted that a spatial criterion is inappropriate and that statements made outside Parliament should also enjoy the protection of Article 9 of the Protocol if they are linked to the activities of the Member of Parliament *qua* Member.

15 — *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103; *Barfod v. Denmark*, judgment of 22 February 1989, Series A no. 149; *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236; *Schwabe v. Austria*, judgment of 28 August 1992, Series A no. 242-B; *Oberschlick v. Austria* (No 1), judgment of 23 May 1991, Series A no. 204; *Lehideux and Isorni v. France*, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII. See further the discussion in Loveland, L., *Political Libels: A Comparative Study*, Hart Publishing, 2000, p. 107 et seq.

16 — *Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, § 64: 'there is no warrant in the case-law for distinguishing ... between political discussion and discussion of other matters of public concern'.

unfamiliar forms of life'.<sup>17</sup> This is exactly the kind of public discourse that Article 9 of the Protocol was intended to protect and foster, especially in relation to opinions expressed by MEPs.

37. The rule that Article 9 should be interpreted broadly and offer wide protection to Members of the European Parliament is subject to two qualifications. First, the opinion at issue in any given case must be about a genuine matter of public interest. While a statement on an issue of general concern will be covered by the absolute privilege guaranteed by Article 9 regardless of whether it is made inside or outside the premises of the European Parliament, this privilege may not be relied upon by MEPs in the context of cases or disputes with other individuals that concern them personally but have no wider significance for the general public. A similar view has been adopted by the European Court of Human Rights in relation to the level of protection that different types of speech enjoy. A statement that does not contribute to a debate of general interest, although falling within the scope of the right to freedom of expression, will not attract the very high level of protection enjoyed by political speech and speech on other issues of general importance.<sup>18</sup> I want to be clear in this respect: the question whether or not such a statement contributes to a public

debate is not to be determined by the style, accuracy or correctness of the statement but by the nature of the subject-matter. Even a possibly offensive or inaccurate statement may be protected if it is linked to the expression of a particular point of view in discussing a matter of public interest. It is not the role of courts to substitute their own views for those of the public in judging the correctness and accuracy of political statements.

38. Second, a distinction must be drawn between factual allegations against particular individuals and opinions or value judgments.<sup>19</sup> As the European Court of Human Rights has held 'while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10'.<sup>20</sup> When a Member of Parliament makes a value judgment about a matter of general importance, no matter how upsetting or offensive some people may find it, he should, in principle, be able to avail himself of absolute privilege. However, Article 9 of the Protocol, which expressly refers to 'opinions', does not cover statements made by MEPs which contain factual allegations against other individuals. For instance, to say of someone that he is incompetent and should resign his job is a form of criticism which, although offensive

17 — Post, R., *Constitutional Domains: Democracy, Community, Management*, Harvard University Press, 1995, p. 139.

18 — For example, in *von Hannover v. Germany* (2005) 40 EHRR 1 the Strasbourg Court held that the publication of photographs showing Princess Caroline of Monaco engaging in various everyday activities, such as having dinner or going shopping, enjoyed limited protection under Article 10 of the Convention compared to publications of a political nature.

19 — It is true that it will not always be easy to distinguish between a value judgment and a statement of fact, and a number of analytical approaches have been adopted to this effect by different judges and scholars. It remains, however, the best distinction possible. See the discussion in Post, R., cited in footnote 17, p. 153 et seq.

20 — *Feldek v. Slovakia*, no. 29032/95, § 75, ECHR 2001-VIII.

for the person concerned, constitutes an expression of opinion and falls within the ambit of Article 9 of the Protocol. In the same way, statements which are not addressed to specific individuals but constitute, instead, institutional characterisations should benefit from a broad protection. Without meaning to enter into the questions of fact surrounding the present case, it seems to me that there is a relevant difference between statements that have been addressed to individual judges and statements that concern the judicial system in general. The latter is an important aspect of public life whose discussion is certainly relevant in terms of the political debate. By contrast, to say that someone, be it a judge or anyone else for that matter, has embezzled public money or is corrupt is a factual allegation and the person about whom the statement was made must be able to take recourse to courts to clear his name and the speaker should be called upon to prove the truth of his allegations, irrespective of whether he is a Member of Parliament.

39. This distinction between a statement containing general criticism and a factual allegation against an individual was at the heart of the Strasbourg Court's judgment in *Patrono, Cascini and Stefanelli v Italy*<sup>21</sup> to which the Corte Suprema di Cassazione refers in the order for reference. The case concerned statements made by two MPs against a number of judges in relation to their professional conduct while working at the legislative bureau of the Ministry of Justice. The Strasbourg Court emphasised

that the defendant MPs had not expressed general political opinions on the relationship between the judiciary and the executive, but had attributed to the claimant judges specific acts of wrongful conduct and had suggested that they were criminally liable.<sup>22</sup> It is true that the Court also referred to the fact that the statements were made in a press conference and not in a legislative chamber but this is a secondary consideration. The European Court of Human Rights has never held that a statement is not covered by parliamentary privilege merely because it was made outside parliamentary premises.

40. To conclude, Article 9 of the Protocol, which guarantees to MEPs an absolute privilege in relation to opinions expressed in the performance of their duties, should be interpreted broadly. It covers statements of opinion and value judgments on issues of public and/or political relevance whether they are made inside or outside the European Parliament. This includes statements that may upset or offend the public at large or the specific individuals whom they, directly or indirectly, concern. On the other hand, it may not be invoked in relation to factual allegations about an individual or in the context of private matters unrelated to issues of public relevance or issues that constitute part of the political debate.

22 — Ibid. paragraph 62: '[the defendants] were not expressing political opinions on the relationship between the judiciary and the executive, or on the draft legislation on letters rogatory, but rather attributed specific and wrongful conduct to the applicants. In such a case, it is not possible to justify a denial of access to legal redress on the sole ground that the dispute might be political in nature or connected to political activity'.

21 — Application Number 10180/04, judgment of 20 April 2006.

## V — Conclusion

41. For the reasons given above, I think that the Court should give the following answer to the Corte Suprema di Cassazione:

A national court before which a civil action against a Member of the European Parliament is pending is not required to request the opinion of the Parliament as to whether the conduct complained of is covered by Parliamentary immunity, if the Member concerned has not himself initiated the process under Article 6(3) of the Rules of Procedure of the European Parliament concerning Members' requests to Parliament to defend their privileges. If the Member concerned has initiated the process and the Parliament has expressed an opinion concerning his immunity, this opinion is not binding on the national court but should be taken seriously into account. If the national court takes a different view from the Parliament, a reference for a preliminary ruling to the Court of Justice may be appropriate. If, however, in a similar situation involving a Member of the national Parliament, the national courts would have been under an obligation to follow the opinion of the national Parliament or to refer the case to a superior court, then they have the same obligation in relation to the opinions of the European Parliament and they should either follow them or refer the case to the Court of Justice, that being a matter for the national court to assess.