



Joint IPU-ASGP conference  
**Managing conflict between  
parliament and the courts**

Geneva, 10 October 2013

**ASGP**  
ASSOCIATION OF SECRETARIES  
GENERAL OF PARLIAMENTS

## Summary report

23 October 2013

The conference took place on the morning of Thursday 10 October 2013. It was co-organized by the IPU and the ASGP, and followed the 129<sup>th</sup> IPU Assembly (7-9 October 2013). 63 participants from 29 countries took part, including 15 parliamentarians and 26 Secretaries General.

### Introductory remarks

In his opening remarks, Sir Jeffrey Jowell QC observed that “no-one who exercises power is pleased when that power is challenged”. Some degree of conflict between parliament and the judiciary is therefore inherent, as indeed with the executive branch of government.

“What are the proper respective roles of parliament and the courts”, asked Sir Jeffrey. In response, he drew on the work of the philosopher Ronald Dworkin, who argued that:

- Legislatures must be free to make *policy*, which is a utilitarian calculation of the greatest good for the greatest possible number
- The courts must be free to define *principle*, which is a moral claim on the state in the form of rights.

As an example of the difficulty in establishing the boundaries between the respective powers, Sir Jeffrey gave an example from the United Kingdom: the government wants to cut the legal aid budget, to save money at a time of economic hardship; meanwhile, the courts worry about access to justice, and the possibility of diminishing the rule of law. Where does the cursor lie?

Sir Jeffrey discussed mechanisms of dialogue and conflict resolution. He noted that there are different views on the extent to which contact and interaction between the judiciary and parliament or the executive should take place. ‘Purists’ would consider that there should be ‘clear water’ between parliamentarians and judges, while others would consider it necessary to have some degree of dialogue.

He offered two examples of conflict resolution mechanisms from the United Kingdom. Both are placed within parliament, and are designed to bring parliament’s attention to any problems before they arise.

- When introducing a bill, the Minister is required to issue a statement that the bill is compatible with human rights. This forces bill drafters to be attentive to compatibility with human rights from the outset
- The Joint Committee on Human Rights<sup>1</sup> is a cross-party committee with six members appointed by each House. It conducts enquiries, for example into government policy on terrorism. It scrutinizes the governmental response to human rights court judgments, and human rights treaty processes.

Sir Jeffrey pointed out that parliaments and the courts act within a wider framework, which includes the press and non-governmental organizations (NGOs). He also argued that the role

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<sup>1</sup> <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/>

of government lawyers is an under-researched but vital issue, as they are at the origins of the majority of legislation that is considered by parliament. Is their role only to achieve government objectives, or also to uphold the rule of law? Do they need an international code to guide or protect them in their duties?

Sir Jeffrey also highlighted the question of judicial appointments, and the role of politicians in making appointments. He noted a trend across Commonwealth countries to set up independent judicial appointment commissions, therefore reducing political involvement. Sir Jeffrey asked whether this enhances the legitimacy of the courts, or whether parliamentarians would be more likely to accept a decision by a judge that had been independently appointed?

### Examples

During the discussion that followed, participants noted the differences in the legal framework across national contexts. For example, countries such as Germany, Spain and South Africa have a constitutional court with the power to scrutinize the constitutionality of laws. Others do not, for example in the Netherlands where this is the role of parliament, particularly the upper chamber.

Participants also gave a range of examples of conflicts that have been observed between parliaments and the courts.

One Senator from **Pakistan** argued that by nature, power is encroaching. Institutions and individuals always want more power, in order to protect their base. Pakistan is currently experiencing an “evolutionary phase” where the courts see themselves to be responding to public appeal, and have an eye on public approval, whereas parliament is the institution that is accountable to the public vote. He suggested that parliament should limit the powers of the courts to review the constitutionality of laws. Creating a constitutional court could be a solution, which would itself require a political consensus that is hard to find.

In the **Netherlands**, the House of Representatives approved a government proposal to increase court fees. However the Senate rejected the proposal, after consultation with a professional association of judges that opposed it.

In **Lesotho**, the issue of setting minimum sentences for criminal offences has led to conflict between parliament and the courts. Sir Jeffrey agreed that this is a classic conflict in the rule of law. The rule of law requires legal certainty, but also flexibility. This is a different balance to achieve, and raises the question of whether the courts can intervene to seek this balance.

**Spain** has clearly defined procedures for reviewing acts of parliament. The problem, however, is that decisions can take a long time, up to eight years in some cases.

In the **United Kingdom**, parliament recently had to intervene to prevent the proceedings of a parliamentary committee from being used as evidence in court, in line with the 1689 Bill of Rights. Another recent example upheld the principle of immunity for words spoken, thereby confirming parliamentarians’ right to freedom of speech in parliament.

In **Chad**, parliament passed a constitutional law that would have allowed judges to be removed. The Constitutional Court invalidated this part of the law. On the advice of the Secretary General, parliament did not seek to reinstate the provision, and the rest of the law was validated.

In **Zimbabwe**, the Minister for Local Government recently obtaining a court ruling to prevent parliament from debating a private member’s bill, arguing that parliament had misinterpreted the constitution.

In conclusion, Sir Jeffrey observed that wherever there are grey areas in the interpretation of the law, an authoritative decision needs to be taken. Usually, it is the role of the courts to do so, not parliament.

## Recommendations

Participants broke into working groups to consider ways in which conflict could be prevented, mitigated or managed in such a way that it does not escalate further. Below is a summary of their recommendations.

- Require the minister introducing a bill to certify that it is in conformity with the constitution.
- Assign responsibility to a parliamentary committee to verify that bills are in conformity with the constitution, to reduce the risk of legislation being struck down by the courts at a later stage. Provide support to build the capacity of parliamentary committees to carry out this function.
- Establish an independent office of the Attorney General who can give an opinion on issues of conflict and play an intermediary role between parliament and the courts. The Attorney General is not trusted as an independent player in all countries.
- Avoid political interference in the appointment of judges, including from the executive branch of government. Consider the creation of Judicial Councils, whose members would be nominated by parliament, the judiciary and the executive, to oversee the administration and effective working of the justice system while respecting the independence of judges.
- Develop a code or principles governing relations between parliament and the courts. Establish a mediation body to monitor and advise on the application of these principles.
- Where a law infringes provisions of the Constitution, courts should issue a declaratory order. Where it strikes down the law, it must give reasons and the formulation of a new law/amendment is responsibility of Parliament.
- Provide training for parliamentarians in understanding the constitution.
- Recognize that parliamentarians are not always faultless, and consider developing a morally binding code of deontology for parliamentarians.
- Examine the problems that can arise when parliament is requested to lift the immunity of one of its members. It may be problematic when parliamentarians have to decide the fate of one of their peers. An advisory body may be able to provide impartial advice.
- Request the IPU to carry out missions to report on relations between parliament and the courts and forestall conflict; where necessary, issue a restraining statement.
- Request the IPU to publish a handbook for parliamentarians on managing conflict between parliament and the courts, cataloging examples of conflict and identifying good practices in preventing and mitigating conflict.

## Agenda

09.00-09.15	<p><b>Opening of the conference</b></p> <ul style="list-style-type: none"> <li>➤ Abdelwahad Radi, IPU President</li> <li>➤ Marc Bosc, ASGP President</li> </ul>
09.15-10.30	<p><b>Experiences in managing conflict between parliament and the courts</b></p> <ul style="list-style-type: none"> <li>➤ Moderator: Dr Ulrich Schöler, Deputy Secretary General of the German Bundestag</li> <li>➤ Opening remarks: Sir Jeffrey Jowell QC</li> </ul> <p>The conference will open with a brief presentation of the triangular relationship between the executive, parliaments and the judiciary as a means of setting the context for the discussions. The presentation will mention certain key areas where problems can be observed between parliaments and the courts.</p> <p>Participants will be invited to contribute by briefly describing a situation that they have experienced, and the lessons they learned from it. In this way, the conference will hear of a range of different types of conflict, from different regions and systems of government.</p> <p>Experiences may cover, for example, areas such as:</p> <ul style="list-style-type: none"> <li>• Examples of judicial interference in the workings of parliament</li> <li>• Examples of parliamentary interference in the workings of the judiciary</li> <li>• Situations when legislation is annulled by constitutional courts, or interpreted differently to the legislator's intention,</li> <li>• Tensions that can arise when parliament carries out reform of the judiciary</li> <li>• Situations in which the courts or parliament decide to directly question the legal status of each other as an institution or each other's members (eg. dissolution of constitutional court by parliament – or vice versa, dismissal or impeachment by parliament of individual judges of the Supreme or Constitutional Court, criminal investigation of individual members of parliament by the court).</li> <li>• Situations in which parliamentary decisions affecting one or more of its members, for instance to suspend a member, are subsequently challenged in court.</li> </ul>
10.30-11.00	<i>Coffee</i>
11.00-13.00	<p><b>Case study</b></p> <ul style="list-style-type: none"> <li>➤ Moderator: Mr Austin Zvoma, Clerk of Parliament, Zimbabwe</li> </ul> <p>Participants will work in groups to analyze one or more of the real-life situations described in the previous session. Participants will consider questions such as:</p>

	<ul style="list-style-type: none"><li>• What was the situation, and why did it emerge?</li><li>• Who was involved? What were their different perspectives?</li><li>• What issues did the situation raise?</li><li>• How could the conflict have been managed effectively?</li><li>• What lessons can be learned?</li></ul> <p>After a period of group work, participants will return to the plenary setting to pull together their conclusions. The discussions should help to develop a shared understanding of how conflicts emerge, how they can be managed and resolved.</p>
13.00	<p><b>Closing of the conference</b></p> <p>The organizers will try to summarize the learning points from the morning's discussion, which will be captured and shared with participants in writing.</p>

## List of participants

<b>Name</b>	<b>Country</b>	<b>Role / function</b>
Mr. Mourad Mokhtari	Algeria	Secretary General, National People's Assembly
Mr. Noureddine Si-Bachir	Algeria	Secretariat
Ms. Fouzia Aljeeb	Bahrain	Acting Secretary General
Mr. Hugo Hondequin	Belgium	Secretary General of the Senate
Mr. Martin Peleman	Belgium	Senior Advisor
Mr. Marc Bosc	Canada	Deputy Secretary General
Mr. Gali Massa Harou	Chad	Deputy Secretary General
Mr. Petr Guziana	Czech Republic	Senator
Mr. Jirí Uklein	Czech Republic	Secretary General of the Senate
Mr. Jirí Krbec	Czech Republic	Secretary of IPU national group
Mr. Helgi Bernódusson	Iceland	Secretary General
Mr. P.J. Kurien	India	Deputy Chairman of the Rajya Sabha
Mr. Bal Shekar	India	Secretary General, Lok Sabha
Ms. Sharada Subramaniam	India	Joint Secretary, Rajya Sabha
Ms. Nanae Kaneko	Japan	Secretariat
Ms. Rachel Kairu	Kenya	Clerk Assistant
Mr. Lekhetho Rakuoame	Lesotho	Deputy Speaker
Mr. Ntsime Jafeta	Lesotho	Counsellor
Mr. Claude Frieseisen	Luxemburg	Secretary General
Ms. Isabelle Barro	Luxemburg	Deputy Secretary General
Mr. Calvin Randriamahafanjary	Madagascar	Secretary General
Ms. Emmeline Ramangalahy	Madagascar	Director
Ms. Jeraldine Pérez	Mexico	Advisor
Mr. Theo-Ben Gurirab	Namibia	Speaker of Parliament
Mr. Moses Amweelo	Namibia	Member of Parliament
Mr. Jakes Jacobs	Namibia	Secretary of the National Assembly
Mr. P.N. Shimutwiken	Namibia	Secretary General
Mr. Willem Isaak	Namibia	Secretary of IPU national group
Mr. Geert Jan Hamilton	Netherlands	Secretary General
Mr. Abdulaziz Usman	Nigeria	Senator
Mr. Lawal GARBA	Nigeria	Deputy Director
Ms. Anne Laila Høge	Norway	Senior Advisor

<b>Name</b>	<b>Country</b>	<b>Role / function</b>
Mr. Said Al-Mashani	Oman	Advisor
Mr. Raja Rabbani	Pakistan	Senator
Mr. Farhatullah Babar	Pakistan	Senator
Mr. Karamat Hussain Niazi	Pakistan	Secretary General, National Assembly
Mr. Amjed Pervez Malik	Pakistan	Secretary General, Senate
Mr. Marek Ziolkowski	Poland	Senator
Mr. Franciszek Stefaniuk	Poland	Member of the Sejm
Mr. Wojciech Gruba	Poland	Secretary of IPU delegation
Ms. Agata Karwowska-Sokolowska	Poland	Director, Analysis and Documentation Office, Chancellery of the Senate
Mr. Masibulele Xaso	South Africa	Secretary, National Assembly
Mr. Manuel Alba	Spain	Secretary General, Congress of Deputies
Ms. Ana Alvarez	Spain	Deputy Secretary General, Senate
Mr. Mohamed El Hassan Al Amin	Sudan	Member of the National Assembly
Mr. Abdelgadir Abdalla	Sudan	Advisor
Ms. Thana Fadul	Sudan	Secretary to the delegation
Ms. Tana Wiboonpanuvej	Thailand	Secretariat
Mr. Emmanuel Dombo	Uganda	Member of Parliament
Ms. Jane Kibirige	Uganda	Secretary General
Mr. Paul Gamusi Wabwire	Uganda	Deputy Secretary General
Mr. Ignatius Kasirye	Uganda	Secretary of IPU national group
Mr. Rhodri Walters	United Kingdom	Reading Clerk, House of Lords
Mr. Greyford Monde	Zambia	Member of Parliament
Mr. Luxon Kazaba	Zambia	Member of Parliament
Ms. Iréné Manda	Zambia	Secretary to the delegation
Mr. Jacob Mudenda	Zimbabwe	Speaker of the National Assembly
Mr. Austin Zvoma	Zimbabwe	Clerk of Parliament
Mr. Cleophas Gwakwara	Zimbabwe	Secretariat
Ndamuka Marimo	Zimbabwe	Secretariat
Pangani Munkombwe	Zimbabwe	Secretariat
Mr. Said Mokadem	Maghreb Consultative Council	Secretary General
Ms. Ana Cristina Thorlund	UNISDR	Programme Officer
Sir Jeffrey Jowell	United Kingdom	Director of the Bingham Centre for the Rule of Law; Barrister, Queen's Counsel