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Michel, B.

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# Oxford Constitutional Law



## **Remuneration of Legislative Body Members**

**Bastian Michel**

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## A. Constitutional Context and Forms of Remuneration

**1** Membership in a legislative assembly comes with financial remuneration, paid by the state, in most of today's constitutional systems (→ *legislative bodies*; → *legislative body members*). Payments fall into two broad categories: compensation for costs incurred in the exercise of the → *mandate*, and an income plus other forms of living sustenance like pension rights and health insurance.

**2** In liberal representative democracies, remuneration of the members of legislative assemblies serves the constitutional aim of keeping the political processes and institutions accessible to all citizens, including those not of independent means. Payment of members by the state is, therefore, a concrete measure that complements the universal → *right to participate in elections* and equal eligibility for public office. Once members are elected, remuneration ensures their material independence from outside influences, along with the free mandate and free-speech → *immunity of legislative body members* that are the defining features of representation in the liberal tradition. In the socialist tradition, more specifically that of Marxism-Leninism, a different logic underlies the payment of legislative assembly members, one that is intertwined with the general task of the state to guarantee the material sustenance of all citizens and which emphasizes members' duties in fulfilling their representative function (→ *socialism*).

**3** The legal instruments that regulate the members' remuneration are typically, but not always, a guarantee enshrined in the constitution; an ordinary law or a higher-ranking instrument like an organic law on the precise forms of remuneration and their modalities; and often lower-ranking instruments specifying concrete amounts that can be adjusted periodically. The day-to-day administration of payment regimes is mostly performed by the legislature itself, by its secretariat or by another internal administrative service, but it is sometimes the responsibility of an independent agency. Payment by a ministry or other department of the executive branch is generally avoided, which reflects the institutional autonomy of parliamentary assemblies, an aspect of the → *separation of powers*.

**4** The option not to pay members of the legislative body has comparably little tradition, with the important exception of the Westminster Parliament, which in turn influenced nineteenth-century conservatism in continental Europe. Today, the institution of payment for members is firmly established and to be found in most constitutional systems. If the remuneration of members of the legislative body is uncontroversial in this basic sense, the same cannot be said of the modalities and amounts of pay, which are a matter of recurrent political controversy in many constitutional systems. From the perspective of constitutional design, such controversies come with a peculiar allocation-of-powers problem and a lack of → *checks and balances*: the modalities and amounts of remuneration of legislative body members are set by law, thus usually by members of the legislative body themselves (on the phenomenon of legislating in one's own cause, see Lang; Vermeule (2012)). Constitutional systems around the world have developed several different institutional design strategies to temper the problem.

**5** This entry focuses on the remuneration of members of the directly elected legislative body or its directly elected parts. Legislative assemblies that are composed through selection in the lower echelons of the representative hierarchy—like the National People's Congress in → *China*—raise problems differing from those discussed here, as do second chambers comprising delegates from sub-federal executives—like the German *Bundesrat*—

or where mandates are personal rather than representative—like in the United Kingdom ('UK') House of Lords.

## B. History

**6** The medieval parliaments of England encompassed the representation of commoners from the thirteenth century onwards. The representatives of counties, boroughs, and cities received wages paid by their constituencies, albeit on a command from the centre in the form of writs *de expensis* issued in the royal chancery (Kleineke 17). But this system fell into disuse during the fifteenth through to the seventeenth centuries (Seaward 39).

**7** In pre-1800 continental Europe, remuneration existed in a great variety of forms: payment from the state's coffers or by those being represented, in-kind compensation such as lodging and food or payment in money, and facilities or payment for travel to and from where the respective diets, estates, or councils met (examples for the German States in Moser 865 ff). The United States ('US') Articles of Confederation (1781) provided for the payment of delegates to Congress by their respective states. The US Constitution then shifted to payment of representatives by the federal treasury (Constitution of the United States of America: 17 September 1787, Art. I, Sec. 6, Cl. 1 (US)). The French revolutionary *Assemblée nationale* of 1789 could rely on the compensation for travel and lodging traditionally granted to the *tiers état* and paid by the constituencies at the command of the crown; the *Assemblée* itself added to this an income for its members that was to be paid from the central state coffers (Pierre 1324).

**8** In the decades after the Napoleonic wars, most German states resumed compensation of delegates to the Land diets in their varying forms (Hospach 93ff). The → *Belgian Constitution (1831)*, which was distinctly progressive and influential internationally due to the strong position of the legislature vis-à-vis a monarch with limited powers, fixed a salary of 200 guilders per month while the Chamber was in session, save for those members living where it met (Constitution of Belgium: 7 February 1831, Art. 52 (Belg); → *monarchical constitutions*).

**9** In Britain, in contrast, the lack of payment for members of parliament was seen as a desirable feature (cf Mill 209 ff). Continental conservatives then discovered that non-payment was a useful weapon against the emancipation of the masses and the push for democratization of the old pre-democratic representative structures. In France, as the country repeatedly shuttled back and forth between → *republic* and monarchy throughout the nineteenth century, equal → *suffrage* and payment of members alternated with → *census* suffrage and non-payment (Pierre 1325 ff). The new German Constitution of 1871 contained an express prohibition of remuneration for Reichstag members (Law regarding the Constitution of the German Reich (*Gesetz, betreffend die Verfassung des Deutschen Reiches*): 16 April 1871, Art. 32 (Ger)), something that Bismarck, the conservative architect of German unification, had insisted on: if universal and equal suffrage for adult men could not be avoided, then at least non-payment of members would temper its egalitarian effects by ensuring only the rich could be elected and attend the Reichstag (Hospach 171 ff). Pressure from the political left and the members themselves ultimately prevailed, leading to the introduction of payment in Germany and the UK: the amount of 3,000 Mark per annum for members of the Reichstag was introduced in 1906, and a salary of £400 per annum for members of the UK House of Commons in 1911.

**10** Pitamic provides a snapshot of the landscape in 1913, listing some 60 jurisdictions that remunerated their assembly members: Austria and 19 of its nations and territories, except for the city council of Trieste; Germany and 23 of its states, though not the free cities of Bremen and Hamburg; a further 15 sovereign states in Europe, including → *Russia*, and Turkey; the US and Pennsylvania; Japan, Mexico, Brazil, South Africa, and Australia. *Per diem* allowances for each sitting day attended and compensation for the costs of travel are the most common forms of remuneration in this list (Pitamic 588 ff).

**11** By the second half of the twentieth century, the income aspect of remuneration was fully realized and conceptually acknowledged. This development was closely connected to the growth of the state and the sheer amount of legislation needed, with the accompanying development toward continuous parliamentary sessions throughout the year, and membership in the legislative body approximating a full-time occupation.

## **C. Comparative Analysis**

### **1. Formal Aspects: Instruments and Procedure**

**12** A brief global overview of constitutional provisions on legislators' remuneration shows how the problem of legislative self-dealing in remuneration decisions is met with differing strategies and procedural requirements. For a more in-depth analysis, a small selection of countries can be grouped into two families: countries where regulation and decision-making is firmly centred at the legislature itself, albeit often with special requirements or limitations; and the family of countries that rely on independent decision-making by an external body. Checks and balances in the classic form of intervention by the executive or oversight by the judiciary are much weaker than in other contexts, often entirely absent.

#### **(a) Constitutional Provisions: A Global Overview**

**13** The database of the Constitute Project (Elkins, Ginsburg, and Melton) points to some 89 constitutions, out of a total of 193 indexed, with a provision on the remuneration of legislative body members. The most common feature of these provisions is a requirement for regulation through law, ie rules adopted by the legislative body itself in the form of statute law. Regulation by the government is unique to Thailand ('royal decree', Constitution of the Kingdom of Thailand: 6 April 2017, Section 183 (Thai)), and decision by resolution of each parliamentary chamber for its own members is highly exceptional (Constitution of the Kingdom of Spain: 6 December 1978 (as Amended to 27 September 2011), Art. 71(4) (Spain)). Although the provisions are often phrased in a way that guarantees members' remuneration, they sometimes merely grant legislative competence to provide for it.

**14** The form of an organic law is required in France (Constitution of the French Republic: 28 September 1958 (as Amended to 23 July 2008), Art. 25 para. 1 (Fr); → *organic/cardinal laws*), several African States (→ *Burundi*, Chad, → *Côte d'Ivoire*, Gabon, Mauritania, Niger, → *Rwanda*, Senegal (per Elkins, Ginsburg, and Melton)); also in the Constitution of the People's Democratic Republic of Algeria: 28 November 1996 (as Amended to 30 December 2020), Art. 123 (Algeria)) and in Romania (Constitution of Romania: 21 November 1991 (as Amended to 29 October 2003), Art. 73(3)(c) (Rom)). In Hungary, the similar form of a cardinal act is required (Constitution of the Republic of Hungary: 18 April 2011 (as Amended to 26 September 2013), Art. 4(5) (Hun)). The two-thirds → *majority* requirement for adoption of an act on parliamentary remuneration in the Dutch constitution boils down

to the same thing (Constitution of the Kingdom of the Netherlands: 24 August 1815 (as Amended to 21 December 2018), Art. 63 (Neth)).

**15** One prominent institutional design strategy to temper the problem of legislative self-dealing is a *pro futuro* rule: changes in remuneration will only take effect in the next legislative term, ie after a general election. In the US, this rule is enshrined in the 27th Amendment to the Constitution. It is also found in the constitutions of countries as diverse as Bahrain, Egypt, Estonia, Kuwait, Lesotho, → *Liberia*, Micronesia, Panama, Palau, the Philippines, and the Republic of China (→ *Taiwan*) (per Elkins, Ginsburg, and Melton).

**16** A mechanism for automatic adjustments is codified in the constitution itself in only two countries: Chile has pegged the remuneration of members of the National Congress to that of ministers (Political Constitution of the Chilean Republic: 8 August 1980 (as Amended to 28 April 2021), Art. 62 (Chile)); and Colombia applies an index based on changes in official pay scales to adjust the amounts annually (Political Constitution of Colombia: 5 July 1991 (as Amended to 22 July 2020), Art. 187 (Colom)). Automatic adjustments laid down in ordinary legislation are much more common.

**17** Outside commissions are mentioned in the constitutions of several countries, albeit with differing roles. In → *Bhutan* and Kiribati, the commission plays an advisory role; in South Africa, the constitution empowers the legislature to lay down the broader legislative framework and obliges it to consider recommendations by an independent commission before legislating on the amounts and details. In Kenya, Nigeria, and the Solomon Islands, the commission decides, and the constitution of the Solomon Islands provides detailed rules on what criteria the commission has to take into account (per Elkins, Ginsburg, and Melton). An outside body with legislative competence on the remuneration of members has also been set in place in New Zealand (Members of Parliament (Remuneration and Services) Act 2013, Part 2 (NZ)) and the UK (Parliamentary Standards Act 2009 (as Amended to 24 May 2011), ss 4ff (UK)).

### **(b) The Legislative Body at the Centre of Decisions: India, the US, Germany, and Uruguay**

**18** The defining feature of this first family of countries is the clear allocation of rulemaking powers to the legislative body itself. Some interesting variations within this family can be seen. These appear, first, as different safeguards that are designed to meet the problem of legislative self-dealing and which flow from the constitution itself, and, second, as steps that take a portion of the decisions away from the legislature, for instance delegation of decision-making on some details or automatic changes of amounts through an index mechanism, or similar changes; the question there is whether the constitution puts any limits on the legislature when delegating or enacting automatic changes.

**19** The constitutional texts of this family of countries typically point to statute law as the form in which to lay down detailed rules: ‘salaries and allowances as may from time to time be determined by Parliament by law’, ‘Compensation ... to be ascertained by Law’, ‘Details shall be regulated by a federal law’ (respectively Constitution of India: 26 November 1949 (as Amended to 10 August 2021), Art. 106 (India); Constitution of the United States of America: 17 September 1787 (as Amended to 7 May 1992), Art. I, Sec. 6, Cl. 1 (US); and Basic Law for the Federal Republic of Germany: 23 May 1949 (as Amended to 19 December 2022), Art. 48, para. 3 (Ger)). In Uruguay, likewise, the constitution assigns the power to make rules to *the Asamblea General*, in a common meeting of both chambers, but seems to

leave open the possibility for the *Asamblea* to do so by resolution rather than statute law (Constitution of Uruguay: 15 February 1967 (as Amended to 2004), Art. 117 (Uru)).

**20** One concrete limitation on the legislature, when deciding on legislators' pay, is the *pro futuro* rule. In the US it reads 'No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened' (Constitution of the US, 27th Amendment (effective 5 May 1992) (US)). This provision is famous for having been proposed by James Madison in 1789 and for the curious fact that it secured ratification by a sufficient number of states only in 1992 (→ *amendment or revision of constitutions*). The rule is intended to put some distance between rule-makers and their direct interest in the matter; and to open a window of influence for voters. But both elements must be relativized in the sense that many Representatives involved in decisions will also be members after the next intervening election, and the Senate only partially comes up for re-election (Vermeule (2012) 406 fn. 68).

**21** In Uruguay, the *pro futuro* limitation is combined with two other procedural constraints, namely the requirement for the *Asamblea General* to decide by enhanced majority of two-thirds and to take these decisions late in the electoral term, which puts Uruguay in the globally unique position of having a triple procedural limit on remuneration decisions.

**22** The Constitutions of India and Germany put no such procedural constraints on the legislature.

**23** The Indian, German, and US legislatures have adopted systems for the automatic periodic adjustment of salaries, based on outside indices, and have partially delegated the power to set amounts of expenses allowances.

**24** Salaries of the members of the Indian lower house, the *Lok Sabha*, are adjusted every five years on the basis of the official Cost Inflation Index (The Salary, Allowances and Pension of Members of Parliament Act, 1954 (as Amended to 11 May 2022), Section 3(2) (India)). In the US, adjustments are equal to change in an index of private industry salaries or the percentage change in federal pay scales, whichever is lower (US Code: 2020, Title 2, s 4501(2) (US)). In Germany, the overall national salary change index is used. The mechanism in Germany is not entirely fixed by law, but subject to a → *sunset clause* under which it ceases to apply after each election unless it is re-activated by a simple resolution of the newly elected *Bundestag* (Members of the Bundestag Act (*Abgeordnetengesetz*): 18 February 1977 (as Amended to 8 October 2021), s 11 (4)-(5) (Ger)). Automatic salary adjustments can, at any point in time, be stopped by fresh legislation, and this frequently happens.

**25** On expenses, the Indian legislation delegates the power to set amounts and regulate details to a Joint Committee of both houses (The Salary, Allowances and Pension of Members of Parliament Act, 1954 (as Amended to 11 May 2022), Section 9 (India)). Similarly, the amount available for US Representatives is set each year by the Committee on House Administration, which is empowered to do so by an Act of Congress (US Code: 2020, Title 2, s 5341(d) (US)). In Germany, it is less clear whether one can speak of 'delegation', as the amount of the expenses lump sum is set in the annual budget law, hence by the legislature itself; but permanent legislation contains an explicit basis for this (Members of the Bundestag Act, s 12(2) (Ger)).

**26** The question of constitutional limits on rulemaking and the setting of amounts revolves around the explicit stipulation that statute law is to be used: the ‘Compensation ... to be ascertained by Law’ in the US Constitution, and the ‘Further details are to be regulated by federal statute law’ in Germany. Do such constitutional provisions include limits on delegating decision-making or introducing automatic changes, or do they not? There is some case law on this from Germany, and to a lesser extent from the US.

**27** In 1975, the → *Federal Constitutional Court of Germany (Bundesverfassungsgericht)* handed down a judgment on parliamentary remuneration, *Abgeordnetendiäten* (1975) (Ger). The judgment laid down far-reaching requirements on the decision-making process for setting amounts: parliaments were not allowed to delegate decisions to a committee or an officer like the presiding member but had to decide themselves by a plenary vote; decisions had to specify explicit amounts and they could not be made dynamic by, for instance, pegging them to an official pay scale. This was because, in the view of the Court, the very principles of → *democracy* and the → *rule of law* as enshrined in the Basic Law demanded that the entire process of legislative choices had to be open to the public and a decision had to be taken in plain sight for the public to see: ‘For this is the only effective control mechanism’ (*Abgeordnetendiäten* (1975) (Ger) 327).

**28** These standards were adhered to in the years after, with some 20 changes to the amount of the base salary for members of the *Bundestag* up to 2013, all brought about by primary legislation that specified a concrete amount in marks or euros. From the 1990s onwards, several Land parliaments began to automatically index those amounts. In 1995, the *Bundestag* adopted a proposal to amend the Basic Law to peg those amounts to federal judges’ salaries in the Basic Law itself; this was widely regarded as an attempt to overrule the Constitutional Court, but after a public outcry and intervention by more than 80 professors of constitutional law, the proposal was rejected by the *Bundesrat* (von Arnim (1996) 1237 ff).

**29** In 2013, an advisory committee of external experts recommended that the *Bundestag* adopt an automatic mechanism for making index-based changes to the amounts. In the commission’s view, a clear mechanism for periodic changes to the amounts, based on outside objective data, would suffice to ensure the transparency and accountability that the Constitutional Court had demanded in 1975, and separate votes on each change of amount were not needed (Bericht und Empfehlungen der Unabhängigen Kommission 18). This led to today’s semi-permanent mechanism for automatic changes. Whether the Constitutional Court would agree with the reading of the advisory commission and the legislature and would be inclined to effectively abandon its 1975 approach has not been tested.

**30** In the US, courts up to the Court of Appeal level have been lenient in answering the same question: for compensation to be ‘ascertained by Law’ it was sufficient that a procedure for the setting of amounts is laid down by law, so amounts needed not to be set by legislation itself; even external recommendations and a legislative role for the US President were held permissible, as was the case between 1967 and 1992 (Vermeule (2002) 514 ff, with a discussion of *Humphrey v Baker* (1988) (US)). The system in place since 1992 and still in effect today was found to conform to the *pro futuro* rule in the 27th Amendment, even though automatic yearly adjustments and the occasional ad hoc legislation preventing them can affect not just the aftermath of the next election but also the run-up to it (Vermeule (2002) 518 ff, with a discussion of *Boehner v Anderson* (1994) (US)). There is no → *Supreme Court of the United States* authority on these points.



### **(c) *Outside Decision Makers: South Africa and the UK***

**31** Decisions on legislators' remuneration taken by others than legislators themselves are comparatively seldom. In South Africa, the President is competent to set members' salaries and allowances, in the UK it is an independent commission.

**32** The Constitution of South Africa obliges the legislature to establish, by Act of Parliament, a framework for determining the salaries, allowances and benefits of members of the National Assembly—the lower house of the Parliament—and to set up an independent commission. Legislation on the framework and any amendments to it can only be passed after consultation of the independent commission (Constitution of the Republic of South Africa: 18 December 1996 (as Amended to 2012), Section 219(1-3) (S Afr)).

**33** The commission set up under the relevant legislation is the Independent Commission for the Remuneration of Public Office Bearers. It determines the salaries of judges and other officials, but only has an advisory role as far as members of the legislature are concerned (Independent Commission for the Remuneration of Public Office Bearers Act, 1997 (S Afr)).

**34** Another and more far-reaching element of independence in decision making in South Africa lies in the fact that it is the President who has been vested with the power to determine the salaries and allowances of members of the National Assembly. The President is obliged to take into consideration the recommendations of the Independent Commission, amongst other factors. The system also works in the other direction: the National Assembly determines the President's salary and allowances, and the Assembly is under the same obligation to consider the Commission's recommendations (Remuneration of Public Office Bearers Act 1998 (S Afr), Sections 3 and 2 respectively). Looking at the independence (or interdependence) of this institutional set-up, it is important to point out that the President is elected by the National Assembly, not by the people directly.

**35** Remuneration of members of the UK House of Commons is guaranteed by statute law (Parliamentary Standards Act 2009 (as Amended to 24 May 2011), Sections 4 ff (UK)), which also sets out a few main legal features. The competence to lay down a comprehensive legal regime with detailed rules, conditions, modalities, procedures, and relevant amounts is delegated to an outside body, the Independent Parliamentary Standards Authority. The Authority has chosen a system of automatic periodic adjustment of amounts. It also administers the remuneration regimes and makes the payments.

**36** Members of the Independent Parliamentary Standards Authority are elected by the House of Commons, after a pre-selection procedure that is intended to prevent too direct influence of MPs. The Authority is controlled by a Speaker's Committee composed of seven MPs and three lay members; this control is largely institutionally formal, eg on correct budgeting and accounting, not substantively political about the decisions it takes.

**37** The rule-making process laid down in the Parliamentary Standards Act 2009 is a decision by the Independent Parliamentary Standards Authority: it 'determines' the salary amounts and 'prepares' the scheme for expense refunds. The Act stipulates whom the Authority must consult in preparing its decisions, that it must give reasons, and that it must publish its decision. The decisions may be revised as the Authority sees fit but, regarding salaries, a new determination must, at any rate, be made in the first year of each Parliament or a decision not to make a new determination published, with reasons. The Act expressly

authorizes the Authority to lay down a 'formula or mechanism for adjusting salaries from time to time' (Parliamentary Standards Act 2009, Section 4A(4)).

**38** Properly understood, the Independent Parliamentary Standards Authority makes law. This is problematic in so far as it has no clear democratic → *legitimacy*, the flip side of its relatively well-secured independence vis-à-vis the House of Commons.

**39** The previous system in the UK, before adoption of the Parliamentary Standards Act 2009, was similar to what is still the case in most other systems worldwide: decisions on legislators' pay taken by legislators themselves. However, it did differ from the systems in other jurisdictions due to its low degree of formalizing decisions in recognised legislative instruments. Salaries were paid to the members of the House of Commons without any legislative authority other than the annual Appropriation Acts, and the amounts were de facto set by a simple resolution of the House of Commons. Without an underlying substantive Act on members' remuneration, there was a lack of rules on modalities and conditions (see Pitamic 584 ff). For instance, the precise starting and endpoints had been fixed by a ruling of the Speaker. Even a decision as politically significant as the one not to pay a salary to the Irish republican abstentionists came about in such an informal way (see also, on *in natura* facilities, the judgment issued by the High Court of → *Northern Ireland in McGuinness, Re Application for Judicial Review* [1997] NI 359 (UK)). The system more closely resembled the internal distribution of an institution's budget than a matter of public law. This has now been remedied by the adoption of the Parliamentary Standards Act 2009.

#### **(d) Checks and Balances**

**40** Broader institutional checks and balances might seem particularly important in a situation of legislative self-dealing. But checks by the other two classic branches of the state are to a large degree absent in the context of remuneration of legislative body members. The German Constitutional Court was right, in this sense, in pointing to public opinion and the power of the electorate as the 'only effective control mechanism' (*Abgeordnetendiäten* (1975) (Ger) 327). However, the international comparison shows exceptions, and control by the public and the electorate can be moulded, enabled or encouraged by legal rules to some limited degree.

**41** Exceptions to the absence of the executive are the pivotal, decision-making role of the President in South Africa and formerly the role that the UK government played pre-2009. Both are → *parliamentary systems* of government. To spell out more concretely what this means in the UK, the executive's involvement was based on two institutional features. Firstly, the political leadership role of ministers, who lead the majority side of the House of Commons with no separate parliamentary group leadership as is the case for instance in Germany, let alone a complete separation of political personnel as in the US. And secondly the executive's monopoly on financial proposals, which means that an increase in remuneration could not be put on the agenda and be debated without a ministerial fiat. There were examples in the 1970s, and again in 2007, where the UK government blocked increases in base salaries. Whenever increases were decided, ministers were prominent participants in the debate (for a discussion and references, see Michel). The new decision maker under the Parliamentary Standards Act 2009, the Independent Parliamentary Standards Authority, is freed from the executive's monopoly on increasing expenditures and from the constraints of parliamentary debate and vote, although when making a determination it must consult, amongst others, the Treasury (Parliamentary Standards Act 2009, Section 4A(7)). In the US, there are examples of presidential vetoes on congressional remuneration, but these all seem to concern appropriation of the necessary money, not the legislation that reflects political choices on rules and amounts (cf Sutin 242 ff; → *veto*). As far as the executive branch in Germany is concerned, the Federal Government has never formulated a policy on the remuneration of members of the *Bundestag* and no minister has

even ever spoken about the matter in a debate. In Uruguay, the Constitution itself stipulates that payments are made ‘in absolute independence from the Executive Power’ (Constitution of Uruguay, Art. 117, third paragraph, second sentence).

**42** Courts have played a minor role as a constitutional check. The German Constitutional Court has, over the past several years, developed a doctrine entailing the especially strict monitoring of instances of political self-dealing, stemming from cases on political party financing and electoral law (von Arnim (2015); very recently *Stiftungsfinanzierung* (2023) (Ger)). The Court might, in this sense, appear keen to intervene. But the lack of plaintiffs is a problem: the only individuals with sufficient → *standing* (*locus standi*) in a constitutional complaint procedure are the members themselves. The federal bodies entitled to put an abstract constitutional review case to the Court have not done so. The Federal President can refuse to promulgate a law, with the *Bundestag* then able to sue him before the Constitutional Court; that has not happened either, although that scenario was briefly considered by some in 2014, as the *Bundestag* had adopted the new mechanism for automatic changes and the President was expressing some doubt about its constitutionality. In the US, case law up to court of appeal level has been lenient on the constitutional requirement of decision through law, and the Supreme Court has not spoken on the matter.

**43** Uruguay, with its triple procedural limit, is an example of how law can facilitate a check by the public and the electorate. The enhanced two-thirds majority requirement might be thought to aim at partial de-politicization of the question. But the *pro futuro* role, and requirement for decisions to be taken late in the electoral term, put the question of legislators’ pay squarely before the electorate. The most classic way to engage the public is of course the mere requirement for regulation through positive law, prepared, debated, and decided upon in public session, and decision by legislators in their own cause is often thought to be the best way of guaranteeing public influence (Pérez-Muñoz and Rustom 325).

**44** The example furthest away from this classic approach is probably the UK, where modalities and amounts are not set by legislation but by decision of the independent authority, and where the overarching legislative framework demands revisions not shortly before but shortly after a general election (Parliamentary Standards Act 2009, Section 4A(6)(a)), both of these aspects going into the direction of shielding the question of parliamentary remuneration from public controversy and scrutiny.

## **2. Substantive Aspects: Amounts and Modalities**

**45** The amounts of base salaries often form the focus of public scrutiny and criticism and some legal regimes try to meet this challenge by using outside comparators as an objective yardstick. The different expenses regimes attract public attention mainly in the context of misuse and scandal, hence as problematic in terms of administration and regulation in practice. But their design, what precisely is subsidised or refundable in the first place, also provides an interesting reflection of how the function of member of the legislative body is perceived—the tasks it involves, its working methods and the workload—with some noteworthy differences between countries.

### **(a) Base Salaries and Comparators**

**46** US representatives and senators receive a base salary of \$174,000 annually (unchanged since January 2009). This is roughly 25 per cent more than the base salary of members of the German *Bundestag*, which is €10,323 per month (last changed in July 2022), and some 60 per cent higher than the £86,584 per annum paid to members of the UK House of Commons (last changed in April 2023). Uruguay’s representatives earn roughly half of their US colleagues’ base salary; South African Assembly members roughly a third (R1,216,610 yearly per 1 April 2022); members of the Indian Lok Sabha less than one-tenth (₹100,000

per month since 2018). Given the differences in income structures and price levels in these countries, such a direct comparison of nominal amounts through mere currency conversion is of course of limited value.

**47** One technique to arrive at more meaningful comparisons is to express legislators' income as a multiple of some accepted measure in the respective country, for instance as a multiple of the median income. This can also help compare through time, as inflation and other changes are accounted for. A comparison of the UK and Germany, for instance, shows that since the mid-1990s the salaries of House of Commons and *Bundestag* members have fluctuated around three times the median income (Michel, graph). In countries with a higher degree of inequality throughout society this factor is likely to be much larger, for instance in Chile parliamentary salaries stand at the 17-fold of median income (Pérez-Muñoz and Rustom 321). The expression of legislators' salaries in terms relative to the rest of the population often underlies, explicitly or implicitly, the political choice on which point of the national income scale to locate members of the legislative body. This becomes visible at the moment the procedure to set members' salary amounts changes from simple legislation adopted by legislatures themselves to a system of automatic pay rises, for example, through an index: a first step in this process is typically to set the salary to the 'correct' amount, before then applying the periodic index change. If the idea behind an index might be to keep salaries stable in real terms, it has been shown for the UK House of Commons and several other Westminster-style legislatures that transition to such indexed systems tends to inflate parliamentary pay in terms relative to average incomes in the respective countries over time (Dickinson 138).

**48** A valuation of legislators' position in the broader society can also take the form of direct comparison with one or several other occupations. In Germany, the law stipulates that *Bundestag* members' pay should be similar to the salary of a judge in one of the highest federal courts (Members of the Bundestag Act, s 11(1) (Ger)). Originally introduced into the law in 1995, a justification for this benchmark was provided ex post by the 2013 independent advisory commission. In its view, *Bundestag* members were comparable to judges in the highest federal courts because both occupations benefitted from constitutional guarantees to be free from instructions by others, and both were empowered to take decisions affecting the entire country (Bericht und Empfehlungen der Unabhängigen Kommission 17–18). Such a reasoning is unlikely to sway public opinion in favour of higher legislative salaries and the benchmark was not adhered to even by the legislature's own decisions in setting amounts during the twenty years up to 2016. A more sceptical view was expressed by the UK's regulator, the Independent Parliamentary Standards Authority: comparison to other occupations can provide some context, 'but it is difficult to make direct comparisons because MPs have an unusual role' (Independent Parliamentary Standards Authority (2012) 54).

**49** Another aspect of legislators' financial position compared to broader society is outside income, earned next to the parliamentary salary. The practice of 'moonlighting' alongside the primary occupation of member of the legislative body has recently been the subject of controversies in Germany and in the UK. Both systems regard outside income primarily as a problem of potential undue influence on members, to be tackled by transparency, and have introduced systems for public declarations. The US goes much further than this and limits outside income to 15 per cent of congressional base salaries, whilst entirely prohibiting certain forms of outside income, for example, as board members for companies or in the form of honoraria for speeches and similar (Brudnick 'In Brief' 2 ff).

## **(b) The Expenses Regime as a Regulatory Problem: The UK and Germany**

**50** Covering costs connected to the exercise of the mandate is a classic part of the overall remuneration provided to members of the legislative body. Payments can be made either by refunding costs incurred upon submission of proof, usually limited to certain maximum amounts per category of costs, or in the form of lump sums that are presumed to cover reasonably necessary expenditure without the need for detailed proof.

**51** The UK expenses regime is one of refund upon proof. Costs for employing staff can be refunded up to £236,170 per annum, which under typical pay scales means that three to five full-time staff can be employed. The costs for a constituency office are reimbursable up to £30,570 per annum. Members can claim the costs either of a residence or hotel stays in London up to £26,840 annually, or up to £19,090 for constituency residence or hotel stays outside London. Members representing one of the 96 London area constituencies cannot claim accommodation expenses but, to reflect the higher cost of living in the capital, they receive an extra payment of £4,435 per annum and can claim higher expenses for staff (£252,870) and office rental (£33,840). Travel expenses between London and the constituency, as well as other travel on parliamentary business, are reimbursable. Costs continue to be claimable up to two months beyond membership for outgoing members. This system is established, and revised from time to time, by the Independent Parliamentary Standards Authority (Independent Parliamentary Standards Authority (2023)).

**52** The Independent Parliamentary Standards Authority also administers the expenses regime, receives claims and makes payments on a day-to-day basis. In addition to the Authority's own checks on claims, there is a separate Compliance Officer within the Authority who can investigate expenses refunds ex-post. Providing for such scrutiny of members' claims was the main reason the Authority was set up: the 2009 expenses scandal in Westminster had shown that the Fees Office, part of the House of Commons' internal bureaucracy, was not capable of providing a sufficiently robust check, so the task had to be allocated to a new outside body (Morris). The Authority publishes members' expenses claims on a regular basis.

**53** The expenses regime for members of the German *Bundestag* involves some in-natura facilities, direct payments on members' behalf or refunds of specific costs upon proof, but most importantly comprises a monthly lump-sum payment. An amount of €23,205 per month is available for staff, who are paid directly by the *Bundestag* administration. Members receive a free-travel rail pass; travel costs not covered by this are refunded upon proof. Members can charge small office items to an expense account up to €12,000 annually. All other expenditure, for example, for renting a constituency office and lodging expenses in Berlin, are covered by a €4,725 monthly lump sum that members receive for expenses. That lump sum is not taxable. No proof of expenditure is required. Members are not expected to pay back amounts that go unspent; they are, in fact, expressly barred from doing so by law (Members of the *Bundestag* Act, s 12 and s 31 (Ger)). The expenses regime is run by the *Bundestag* administration. Claims submitted and payments made are not publicly accessible.

**54** The lump-sum element of the expenses regime puts *Bundestag* members in a position significantly different from other occupations in wider society, especially in view of no proof being required and the payment being free of income tax. An alternative system has been introduced a few years ago in the Land North Rhine-Westphalia: members of its *Landtag* receive a much higher base salary than before, from which they pay all costs incurred in connection with their parliamentary mandate. These costs are then tax-deductible upon

proof submitted to the tax authorities. This puts members of the *Landtag* much in the same position as self-employed persons in Germany.

### **(c) Travel and Personnel Costs Reflecting the Practical Sides of the Job: The US and India**

**55** In some cases the regimes for expenses reflect aspects of legislators' functioning that are specific to one country. Large parts of the Indian legislation are dedicated to members' travel: free first-class rail travel in the entire country, reimbursement of air and ship journeys to and from the capital and on other legs for a limited number of trips. These facilities and payments are made not just for members themselves but also their spouses or other companions (Kaul and Shakhder 365 ff). Combined with the fact that the *Lok Sabha* sits during three sessions per year, with intermittent pauses of between one and two months (at 189), these travel subsidies might indicate members move their household between the capital and their constituency home.

**56** The allowances for US representatives and senators stand out in that they can be used to cover significantly larger staff numbers than would be usual or permitted elsewhere. For representatives there is a limit of eighteen full-time employees, plus four interns or part-time staff. The typical representative spends about three-quarters of his or her overall allowance, so around \$1.35 million per year on personnel (Brudnick 'History and Usage'). This is more than four times the amounts available to a member of the UK House of Commons or of the German *Bundestag*, which indicates that the job of a member of the US Congress is fulfilled quite differently from how their counterparts elsewhere work, with an office resembling a small enterprise.

### **3. A Distinct Tradition in Marxist-Leninist Constitutions**

**57** The Constitution of → *Cuba* stipulates that while membership in the National Assembly comes with no economic benefits, members will continue to receive remuneration from their place of work (Constitution of the Republic of Cuba: 10 April 2019, Art. 115 (Cuba)). This provision logically presupposes the existence of a place of paid work and therefore seems to depend upon the socialist state's central tenet that every citizen must be able to earn a living through work, hence the state policy of full employment.

**58** The provision sits alongside rules imposing duties and limitations on the office of the representative. The Cuban Constitution imposes a duty on members of the Assembly to exercise their function in the interest of the people and, more concretely: to keep close contact with their voters, take into consideration pleas and criticisms, explain the policy of the state and give an account to their voters on how they fulfil their mandate; the legislature is empowered to lay down more detailed rules for these purposes (Art. 113). Members enjoy immunity from arrest and criminal investigation unless this protection is revoked by the Assembly (Art. 114), but no special free-speech immunities. Members of the Cuban Assembly can be recalled, ie have their mandate revoked, under conditions laid down in legislation (Art. 116).

**59** Historically, the Constitution of East Germany of 1968 contained almost identical provisions (Constitution of the German Democratic Republic: 6 April 1968, Arts 56 and 57 (East Ger)), as did the Brezhnev Constitution of 1977 (Constitution of the Union of Soviet Socialist Republics: 7 October 1977, Arts 94, 103, and 107 (USSR)). The picture that appears is one of an own, distinct tradition around the legislative mandate in socialist constitutionalism of the Marxist-Leninist variant (→ *socialism*).

**60** Traces of this tradition can also be found in today's Constitution of Vietnam, particularly on the duties to maintain close ties with voters, to explain the Constitution and the laws to the people and to mobilise them (Constitution of the Socialist Republic of Vietnam: 31 November 2013, Art. 79 (Viet)), although its provision '[t]he State shall ensure the expenditure for the activities of representatives to the National Assembly' (Art. 82(3)) is less conclusive about what forms remuneration takes than what we find in the Cuban or the historical examples. The Constitution of Laos contains no provisions on the functioning of the members of the National Assembly or their remuneration (Constitution of the Lao People's Democratic Republic: August 1991 (Laos)).

## **D. Conclusion: The Futile Quest for De-Politicization**

**61** Democratic representative systems generally struggle with the problem of remuneration of legislative body members, especially because of the involvement of legislators in setting their own pay. The mechanisms for automatic changes, like those fixed in the laws of the US, Germany, and India, are intended to absolve members of the burden of having to vote on their salaries while still receiving pay increases, or to at least keep salaries stable in real terms. But these mechanisms cannot truly absolve members of responsibility for their salary levels: if it is not an amount in dollars, euros, or rupees that they vote on and are politically accountable for, then it is the mechanism chosen by them and set by ordinary statute law, including the results that such a mechanism produces.

**62** In fact, since the introduction of the index mechanism in the US in 1990, its effects have been overruled by ad hoc provisions in legislation 14 times to prevent a salary increase; the salary has not changed since 2009 (Brudnick 'In Brief'). In Germany, the mechanism was introduced in 2014, took effect in 2016, duly extended by resolution in 2017. But in view of the COVID-19 crisis it was overruled in 2020 so no change took place that year (Law on deferral of the adjustment procedure 2020 (*Anpassungsverfahrensaussetzungsgesetz 2020*): 27 May 2020, Art. 1, s 1 (Ger)). The Indian statute on members' remuneration contains a similar provision, reducing the base salary by 30 percent, 'to meet the exigencies arising out of Corona Virus (COVID-19) pandemic' (The Salary, Allowances and Pension of Members of Parliament Act, 1954 (as Amended to 11 May 2022), s 3(1A) (India)).

**63** In the UK, too, the choice to externalize decisions and give the power to set amounts to an outside body was motivated by the will to depoliticize the matter. But public opinion cannot ultimately be silenced. The decision to cancel the automatic salary increase in 2021, in light of the COVID-19 crisis, came about under the political pressure of public opinion and the call, by members on both the government side and the opposition side in the House of Commons, to pass legislation that would stop an increase (Elgot). Members of the legislative body in the UK are not directly competent to set their salary levels any longer, but they remain responsible for who does instead, and, ultimately, what that decision-maker decides or even the results that ensue from an automatic mechanism.

**64** Remuneration of members of the legislative body is the norm globally and is basically an uncontroversial institution of the modern representative political system. But the modes of payments, and especially amounts paid, are far from uncontroversial. Stable mechanisms for periodic changes, based on outside objective criteria, or even the outsourcing to an independent decision-making body, can play a role in the context of members' remuneration. However, they cannot ultimately depoliticize the matter. It is true, in this

sense, that for members of the legislative body '[t]here is no escape from politics' (Judge 75).

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