



UvA-DARE (Digital Academic Repository)

MPs' Pay under the Parliamentary Standards Act 2009: Approaching the Moment of Truth

Michel, B.

Publication date

2013

Document Version

Final published version

Published in

Edinburgh Student Law Review

[Link to publication](#)

Citation for published version (APA):

Michel, B. (2013). MPs' Pay under the Parliamentary Standards Act 2009: Approaching the Moment of Truth. *Edinburgh Student Law Review*, 2(1), 83-86.
<http://www.heinonline.org/HOL/Page?page=83&handle=hein.journals%2Fedinslr2&collection=journals94&id=94>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

MPS' PAY UNDER THE PARLIAMENTARY STANDARDS ACT 2009: APPROACHING THE MOMENT OF TRUTH

*Bastian Michel**

- A. INTRODUCTION**
- B. SOURCES OF LEGITIMACY**
 - (1) Input**
 - (2) Process**
 - (3) Output**
- C. CONCLUSION**

A. INTRODUCTION

The Independent Parliamentary Standards Authority (IPSA), established in the wake of the 2009 expenses scandal, will shortly issue its first decision on a new arrangement for MPs' salaries.¹ Whichever pay level is fixed upon, the decision will probably not put an end to the controversy around this issue. Quite the opposite could happen. If IPSA does not get it exactly right, the decision might put an end to IPSA. In anticipation of that moment of truth, this brief note takes a look at the Parliamentary Standards Act 2009,² which defines the regulator's precarious position. Why should MPs accept IPSA's decision, and why should the broader public? What could convince them of the decision not only being legal, but legitimate as well?

B. SOURCES OF LEGITIMACY

(1) Input

In a democratic state legitimacy may be understood to derive exclusively from the will of the people and, according to a rather mechanistic view, only through elections. Public policy decisions are legitimate when taken by elected representatives or at least by those accountable to elected representatives.³ The five board members of IPSA⁴ are accountable to the House of Commons. It is of course somewhat ironic that IPSA is supposed to regulate the Commons—or more accurately, the financial facilities of its members—and is, at the same time,

* PhD candidate at the University of Amsterdam, preparing a dissertation on comparative constitutional law through the prism of remuneration for members of the legislature.

¹ The decision is expected to be published in the autumn of 2013; see Administration Committee, uncorrected transcript of oral evidence 25 March 2013 (to be published as HC 2012–2013, 1022-ii) under Q64.

² PSA 2009, as amended by the Constitutional Reform and Governance Act 2010. For a legislative comment on the PSA 2009 before the 2010 changes, see N Parpworth, "The Parliamentary Standards Act 2009: A constitutional dangerous dogs measure?" (2010) 73 *The Modern Law Review* 262.

³ IPSA as an example of the broader problem of "constitutional watchdogs" and their accountability: R Hazell, "Constitutional Reform in the United Kingdom: Past, Present and Future", in C Morris and others (eds), *Reconstituting the Constitution* (2011) 83 at 95.

⁴ Of whom one must be a former judge, one a qualified auditor and one a former MP; PSA 2009 sch 1 para 1.

answerable to the Commons.⁵ The obvious danger that MPs could have too much control over their controller is diffused by a remarkably complicated institutional setup. Members of the board of IPSA are appointed by the Queen on an address of the House of Commons, but MPs cannot make their own choice. An address can only concern a candidate selected by the Speaker on the basis of open competition and with the agreement of the Speaker's Committee for the IPSA.⁶ That special statutory committee is composed of not just MPs, but also three lay persons, i.e. people who do not sit in Parliament and never have.⁷ The power of MPs to dismiss board members of IPSA is limited by the rule that a resolution to that effect must be passed by both Houses: the Commons needs the agreement of the House of Lords.⁸ The influence of MPs on the composition of IPSA is, therefore, very limited. That fact, in turn, has an impact on IPSA's legitimacy. Imagine, for a moment, the position of backbench MPs who are told what their salary will be for the years to come. Such MPs saying "well, it is the people we put there to make that decision, so we will accept it" does not seem a very probable scenario. And the broader public saying "well, it is the people our elected representatives put there to make that decision, so we will accept it" seems even more improbable. In short: IPSA does not have much input legitimacy to rely upon.

(2) Process

Another source of legitimacy might be the decision-making process. If the decision on a new pay level for MPs is prepared thoroughly—all options examined, all factors weighed, all views considered—then MPs and the broader public might tend to accept it even if they had not themselves arrived at the same pay level. The 2009 Act does lay down process rules. In particular it prescribes whom IPSA must consult: the Review Body on Senior Salaries, anybody speaking on behalf of MPs, the Minister for the Civil Service, the Treasury and any other persons IPSA thinks fit to consult. The ultimate decision must then be published with an explanation of how it was reached.⁹ In fact IPSA consulted everybody—they held an open consultation.¹⁰ This attracted 100 answers, with a parallel online survey delivering 600 reactions.¹¹ It remains to be seen whether this is so convincing that MPs and the public will think "I have had my say (or I could have had, had I bothered), they have derived some figure, I understand why, fair enough."

(3) Output

Decisions can be legitimate simply because they work: they fulfil the aim of the whole project. The aim here, IPSA's very *raison d'être*, was independence. Members of the public might think—quite logically—that the old system of MPs' voting for their own pay award led to unjustifiably high salaries. If the independent assessment does not result in a lower pay level, it must be because IPSA is not sufficiently independent from Parliament. Amongst MPs there is another view. True, they voted for their pay themselves, but they could do so only on

⁵ cf Committee on Members' Expenses, *The Operation of the Parliamentary Standards Act 2009* (HC 2010-12, 1484-I) para 68.

⁶ PSA 2009 sch 1 para 2. For a significant conflict between IPSA and the Speaker about reappointment of sitting board members, see the published correspondence available at parliamentarystandards.org.uk/transparency/.

⁷ PSA 2009 sch 3 paras 1, 2A.

⁸ PSA 2009 sch 3 para 2(3), (4).

⁹ PSA 2009 s 4A(7), (8).

¹⁰ In the autumn of 2012; see IPSA, *Reviewing MPs' Pay & Pensions: A Consultation* (October 2013) available at parliamentarystandards.org.uk.

¹¹ IPSA, *Reviewing MPs' Pay and Pensions: A First Report* (January 2013) available at parliamentarystandards.org.uk, para 10.

government initiative, never being able to increase their salary by more than the figure proposed by the executive.¹² And the executive—so the argument runs—did not propose adequate increases, because it had too much regard for undue pressure from an ill-informed public.¹³ If the independent decision-making process does not result in a figure substantially higher, it must be because IPSA is not sufficiently independent from popular opinion. It is very difficult, therefore, to see how independence in itself could legitimize a decision on a subject as controversial as MPs' pay.

C. CONCLUSION

None of the three potential sources of legitimacy provides much reassurance for IPSA. On the input side, IPSA will be asked who they are to make such a decision; on process, how they arrived at it; and on the output side their independence will be questioned. All they can do is explain over and over again. Whether the decision will, in the end, be accepted, will largely depend on whether it is right. But, of course, nobody knows what is “right” here. The margin for a broadly acceptable decision might be quite narrow. It might be just a fine line that IPSA has to hit exactly. The margin even might not be there at all, because expectations are so inconsistent.¹⁴ IPSA's chair has already dubbed the decision on MPs' pay “the big exam question”.¹⁵ So what if they fail the exam?

If IPSA gets it wrong on either side—too high or too low—there will be pressure to change the decision-making procedure or even abolish IPSA. In case politicians are unhappy with the decision but the public is not, small but effective changes might occur silently.¹⁶ If the public is unhappy, we can expect a major fuss. The public will, quite rightly, hold Parliament to account for setting up a system that produces bad results, and Parliament would have to change that system. Politicians are not responsible for deciding their own pay anymore, but they are fully responsible for who does instead.

All in all, these are not very encouraging prospects for IPSA. But it is very interesting to look and see what will happen, particularly from a continental perspective. After all, there is a real constitutional dilemma here. Something was indeed inherently improper about MPs' voting on their own pay. The general rule that nobody should be judge in his or her own cause holds in any state adhering to the rule of law. Equally, nobody should legislate in his or her own cause or, for that matter, take any decision on public policy that is connected too closely with his or her own interest.¹⁷ MPs' voting on their own pay was an extreme example in that it was

¹² This was not only due to the government's agenda-setting power in the Commons, but is even a strict constitutional rule: a charge upon public funds can only be debated if a minister certifies the Monarch's recommendation and can only be amended downwards; *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 24th edn, by M Jack et al (LexisNexis 2011) 716 ff and 753. This rule is not applicable to the funding of IPSA; PSA 2009 sch 1 para 22.

¹³ cf Committee on Members' Expenses (n 5) para 60; Committee on Standards in Public Life, *MPs' Expenses and Allowances* (Cm 7724, 2009) para 13.71 ff.

¹⁴ D Judge, “The politics of MPs' pay” (1984) 37 *Parliamentary Affairs* 59 at 59.

¹⁵ I Kennedy, “Hansard Society Speech” (delivered 5 January 2010) available at parliamentarystandards.org.uk, para 10.

¹⁶ Compare the changes to the Electoral Commission in 2009, when four persons nominated by political parties were added to its board; Political Parties, Elections and Referendums Act 2000, s 3A; Constitutional Affairs Committee, *Party Funding* (HC 2006-07, 163i) paras 62-64; Committee on Standards in Public Life, *Review of the Electoral Commission* (Cm 7006, 2007) paras 3.20-3.34 and recommendation 29.

¹⁷ For an extensive elaboration on these notions: H Lang, *Gesetzgebung in eigener Sache* [Legislating in one's own cause] (Mohr Siebeck 2007) part 3.

exclusively in their own cause. This is still the standard in most continental European countries. And there are good reasons for that. There is simply no-one better placed than parliamentarians themselves to decide parliamentarians' pay. Anybody else would be less legitimate and could not very well tell them what is just and proper with much authority. Members of the legislature can at least be held accountable directly by the people. And any public body that cannot be held accountable at all, not even indirectly, is totally out of order in a democracy.

This tension between the proper distance demanded by the rule of law and democratic legitimacy is not a circle to be squared by some magic trick. It poses a real dilemma. But legal thinking is quite accustomed to dilemmas and has developed mechanisms to deal with them responsibly. We might for instance try the proportionality rule: if considering a delivery on democratic accountability, we should be sure of a gain in distance demanded by the rule of law; we should be sure that the gain on the one side cannot be achieved without the loss on the other; and we should ensure that gain and loss are at least—and in some measure—proportionate to each other, with some indication that a net gain may be achieved.¹⁸

Such a conscious approach might be, in the long run, the only way to bring together constitutional thinking and practice in Europe that, at the moment, is highly divergent. In Britain the extreme step of completely outsourcing the contentious topic of MPs pay was mainly justified by the simple rule of law argument: MPs must not decide themselves.¹⁹ In Germany, to take the other extreme, legislators and the Constitutional Court refuse, on the very same logic, to recognize any alternative to that improper situation. Members of the Bundestag still vote on their own remuneration, and that cannot possibly be avoided because any other system would weaken democratic accountability.²⁰ The British and the Germans cannot, surely, accuse each other of doing something *absolutely* improper. Any explanation as to why the national decision-making systems are *relatively* proper, given the differences in constitutional and political culture, would have to be phrased exactly in terms of an explicit weighing of competing ideals.

A discourse that limits itself to stating absolutes is not helpful at the national level. On the European level it dashes any hopes of even understanding one another when discussing the problem of MEPs' pay. It must be possible, with some effort, to overcome that state of conceptual deadlock.

¹⁸ The author picked up this idea in an inspiring key note speech by Bernard Manin, delivered at the Leiden Conference on Political Legitimacy and the Paradox of Regulation (University of Leiden, 23-25 January 2013). Along similar lines, see A Vermeule, "Contra Nemo Iudex in Sua Causa" (2012) 122(2) *Yale Law Journal* 384.

¹⁹ Committee on Members' Expenses (n 5) paras 59-62.

²⁰ Gemeinsame Verfassungskommission von Bundestag und Bundesrat, "Bericht" [Report of the Joint Constitution Commission of Bundestag and Bundesrat], BT-Drs 12/6000, 89. Bundesverfassungsgericht 5 November 1975 *Abgeordnetendiäten* [Delegates' remuneration], BVerfGE 40, 296 at 372 [author's trans.]: "In a parliamentary democracy it cannot be avoided that Parliament decides in its own cause when determining the amount and further modalities of financial facilities connected with the status of its members." Compare H H Klein, "Art. 48", in T Maunz and G Dürig (eds), *Grundgesetz-Kommentar* (CH Beck, loose leaf edn, delivery 34, June 1998) margin numbers 198-206.