

# **Political immunities in Europe: the scope and lifting of parliamentary immunities**

## **INTRODUCTION**

The agenda for this workshop proposes “Political Immunities in Europe” as the title for this introductory talk. In fact, I intend to confine myself to a rather narrower topic than political immunities in general. I do not intend to say anything about the immunities enjoyed by heads of state or in some states by other members of the executive branch of government. I shall confine myself to the subject of immunities which apply to members of parliament. I intend to approach the subject principally by reference to the Venice Commission’s report on the scope and lifting of parliamentary immunities of 21– 22 March, 2014 (CDL – AD(2014)011) for which I was one of the rapporteurs and to the criteria and guidelines for the lifting of parliamentary immunities proposed by the Commission which I believe provide a good basis for reform in this field.

## **THE VENICE COMMISSION REPORT ON PARLIAMENTARY IMMUNITIES**

The Venice Commission report deals primarily with the lifting of parliamentary immunities, but as the report points out this issue is closely linked with the nature and scope of parliamentary immunity which must first be understood. The report builds on the basic distinction between the two main forms of parliamentary immunity which need to be kept clearly in mind in any discussion. Unfortunately, the terminology which is used to discuss these questions is not always consistent<sup>1</sup> and at times can be somewhat confusing. In this talk I shall stick to the terminology used in the Venice Commission report.

## **NATURE AND SCOPE OF IMMUNITY: NON-LIABILITY**

The first form of immunity is what is usually referred to as “ non-liability”. By this is meant the special increased protection for parliamentary activity given to parliamentarians. Typically this means that a member of parliament cannot be answerable to any person, either criminally or civilly, for what he or she says in parliament or for how he or she votes. As a general rule this non-liability does not come to an end when a person ceases to be a member of parliament

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<sup>1</sup> Report, paragraphs 13-15

and the absence of liability for what was said or done by him or her in the course of parliamentary activities continues into the future.

The scope of non-liability can and does vary enormously from one national system to another. In some cases its scope extends not only to speeches but documents and other material. Or the scope may extend to speeches or communications made by a parliamentarian outside the parliament itself but which are made in the course of parliamentary duties. It is beyond the scope of this short introductory talk to discuss all the possible variations. The question is discussed in more detail at paragraphs 52 to 78 of the Venice Commission report. Among the differences which exist between different countries are the questions of whether non-liability can be waived. In some countries this is not possible, but in other countries waiver is possible, usually by a decision of the parliament itself, sometimes by a court of law, and in other cases where the individual member chooses to waive the privilege.

Differences also exist between the extent to which speech is covered by non-liability. It may apply to all speech, or it may exclude certain types of expression such as hate speech or the disclosure of state secrets. In some countries a member may be subject to disciplinary liability for speech which is regarded as an abuse of his or her freedom of speech. The freedom of the vote does not necessarily mean that a member of parliament might not be made amenable in some systems for a corrupt act consisting of a bought vote in parliament although in some systems even this would not be possible. Of course the problem of how to do this while respecting the parliamentarian's non-liability for how he or she votes may be solved if one considers that the act which is punishable is the acceptance of the bribe rather than the casting of the vote.

## NATURE AND SCOPE OF IMMUNITY:- INVIOABILITY

The second form of parliamentary immunity is that of "inviolability", sometimes referred to as immunity in the strict sense. By this is meant a special legal protection for parliamentarians accused of breaking the law, typically a protection against arrest, detention or prosecution without the consent of the parliament itself. The protection may also extend to investigation and searches, criminal sanctions, civil proceedings or administrative action. In some states authorities may carry out investigations even though prosecution may have to await the ending of the period of immunity.

In countries where inviolability exists there are some exceptions. It is common to exclude offences committed *in flagrante delicto*, as well as offences which are either particularly serious or particularly trivial. Some countries distinguish between criminal offences related to the exercise of parliamentary functions, in

which case inviolability exists, and private offences which have no bearing on parliamentary functions to which no inviolability applies.

Typically inviolability exists only during the period when a person remains a member of parliament and in principle criminal proceedings can be maintained once this ceases. In practice, of course, efflux of time can make a prosecution impractical or impossible and the possibility of a prosecution at a later date may be theoretical only.

Not every country has a system of inviolability for members of Parliament. Where such systems exist their scope can vary enormously. In some cases they cover only certain types of offence or only offences of a certain gravity. In countries following the English tradition inviolability typically extends only to prevention of the arrest of a member of parliament on his or her journey to or from the parliament or in its precincts. Even that protection can be quite limited and not extend to the more serious categories of offence.

In countries which have a system of inviolability the rules are usually more narrowly construed and subject to more exceptions than rules on non-liability. Invariably the theory behind inviolability is that it is for the protection of the parliament itself and not the individual member and therefore it is a matter for parliament to waive this form of immunity.

Again, it is beyond the scope of a short introductory talk to give a detailed history of inviolability even if I was competent to do so. Suffice it to say that countries whose parliamentary tradition derives from the French rather than the Anglo-Saxon model traditionally had a much wider concept of inviolability than merely protecting members of parliament from arrest going to and from parliament. However, in the older democracies of Western Europe there has been a tendency to limit inviolability so that while it may remain in place in principle, in practice waiver is virtually certain except in a case where there is reason to believe that a prosecution or investigation is politically motivated and an abuse of the rights of a parliamentarian. In some countries such as Germany it has become the practice, despite the fact that inviolability has a constitutional basis, to waive inviolability at the beginning of each parliamentary session. France, which was the mother country of the system of inviolability, changed its rules in 1995 to limit the scope of inviolability to freedom from arrest.

On the other hand, many of the newer democracies in central and eastern Europe have enthusiastically embraced the concept of inviolability. In many cases there may have been very good reason for this given a history of politically inspired and motivated prosecutions. However, there are some countries which rarely if ever waive inviolability. The potential for abuse in such

cases is obvious. It is even the case that in some states – and I am not necessarily confining myself to member states of the European Union – persons have sought and paid large sums for nominations to party lists in elections for the sole purpose of obtaining inviolability from criminal pursuit.

Furthermore, it is not unknown, where decisions on waiver are made in parliaments, for the decisions to be made along political lines. Where this is the case the effect may well be to protect politicians from the ruling party while enabling prosecutions of members of the opposition or of independent members. In many states there are no clear guidelines as to the circumstances in which inviolability should be waived or the criteria for• doing so.

As the Venice Commission pointed out in its report “the rules on immunity were originally formulated in a historical and political context that is very different from that of today... The rise of party politics also means that, at least in parliamentary systems, there will be a strong link between the government and the members of the governing party in parliament. This means that it is usually not parliament itself, but rather the parliamentary opposition (most often in minority) that might be in danger of undue pressure from the executive, and which might therefore be in need of special protection”.<sup>2</sup>

The Venice Commission also draws attention to the increased independence and autonomy of the judiciary in Europe today which has reduced the possibility of the executive branch misusing the courts against political opponents, which was the original justification for this form of immunity.<sup>3</sup> Other factors are the increased emphasis by the courts on individual political rights, including freedom of speech and protection against arbitrary arrest, which sharply reduce the need for special parliamentary protection. The emphasis on transparency in political life also militates against the potential negative effects of parliamentary immunity which impede the fight against political corruption.<sup>4</sup> All of these factors have led to increased debate in many countries on the role and function of rules on parliamentary immunity in general and inviolability in particular leading in some cases to reforms which often have served to limit the scope of immunity or to make it easier to lift.

## APPLYING EUROPEAN STANDARDS TO THE IMMUNITY ISSUE

In arriving at its conclusions the Venice Commission acknowledged that there were no international or European rules that explicitly regulate parliamentary immunity at the national level and that the issue is primarily for the national legislature to decide. Rules concerning parliamentary immunity are usually

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<sup>2</sup> Report paragraphs 23-24

<sup>3</sup> Ibid paragraph 25

<sup>4</sup> Ibid paragraph 27

found in the national constitution supplemented by parliamentary rules of procedure and statute law.

The Venice Commission referred to the common European standards which it uses to base its assessments. The first of these are common rules of binding international or European law such as the ECHR. As our next speaker, Professor Sascha Hardt, is the author of a full analysis of the case law of the ECtHR with regard to parliamentary immunity I will not address this subject other than to observe that the Venice Commission concluded that while the ECHR does not restrict parliamentary immunity as such it does set some limits on how such rules can be applied and conserve as inspiration for a more general argument that the use of parliamentary immunity must always be justified and not extend beyond what is proportionate and necessary in a democratic society.<sup>5</sup>

Secondly, the Venice Commission referred to a number of basic principles of law and democracy. The first of these, by which systems of parliamentary immunity are justified, is the need to protect the principle of representative democracy by ensuring that members of parliament are able to fulfil their democratic functions without fear of harassment or undue interference from the executive, the courts or political opponents. The principle of the separation of powers is also used to justify parliamentary immunity, although nowadays the idea of a strict separation in the sense of the main state organs being wholly independent from each other might be debated.

On the other hand, the idea of parliamentary immunity does not sit easily with the principle of equality before the law which is an element of the rule of law. Rules on parliamentary immunity may serve as an obstacle to members of parliament being held politically and legally accountable for their actions and are open to misuse and the obstruction of justice and may lead to the undermining of public confidence in parliament and to bringing politicians and the democratic system into contempt. The existence of tension between these basic principles so far as the justification for parliamentary immunity is concerned tends to support the view that rules on parliamentary immunity should not extend beyond what is proportional and necessary in a democratic society.

With regard to the issue of lifting of parliamentary immunity the commission considered that the basic principles of procedural law relating to transparency, legal certainty, predictability, impartiality and rights of contradiction and defence were all relevant.

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<sup>5</sup> Ibid at paragraph 34

Thirdly, the Venice Commission refers to existing “soft law” and in particular the rules and practices developed over the years by the European Parliament and the Parliamentary Assembly of the Council of Europe. It also referred to a number of resolutions of the Committee of Ministers of the Council of Europe, notably guiding principle 6 of the Twenty Guiding Principles for the Fight against Corruption<sup>6</sup> which refers to the need “to limit immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society”. The Commission considered that the rules and practices developed by the European Parliament and the Parliamentary Assembly should be seen to reflect a certain degree of common European consensus on the subject of parliamentary immunity in general and lifting of immunity in particular which should serve as an inspiration also at the domestic level.<sup>7</sup>

The Venice Commission then proceeded to apply these principles to the assessment of current rules on immunity and proposed a series of criteria and guidelines which might apply.

## CRITERIA AND GUIDELINES ON IMMUNITY: NON-LIABILITY

Firstly, with regard to non-liability, the Venice Commission observed that as a general rule, while the scope of non-liability varies greatly its existence and justification is generally speaking not disputed. It appeared to be generally recognised that for parliaments to operate effectively some additional protection for the freedom of speech of parliamentarians is justified over and above that available to citizens generally. The Venice Commission considered that the freedom of opinion and speech of the elected representatives of the people was a key to true democracy and that it was therefore appropriate that rules on parliamentary non-liability were to be found in all democratic parliaments and the basic principle was more or less the same in all countries, although with considerable variations in its details.

The Commission referred to the recognition by the ECtHR that non-liability pursues “the legitimate aim of protecting free speech in parliament and maintaining the separation of powers” and that “such rules cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court”.<sup>8</sup> There is some discussion in the report of whether the protection of

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<sup>6</sup> Resolution (97) 24, adopted by the Committee of Ministers on 6 November, 1997. See also the United Nations Convention against Corruption 2003

<sup>7</sup> Report, paragraph 48

<sup>8</sup> Ibid, at paragraph 80, citing *A v United Kingdom*, 35373/97, 17 December 2002

freedom of expression in Article 10 ECHR should be sufficient on its own without needing special rules but for the reasons set out in paragraphs 85 to 89 of the report the Commission concluded that such special rules were justified.

The Commission, however, concluded that parliamentary non-liability should not extend beyond the purpose of protecting the democratic functions of parliament and in particular should not extend to the private behaviour and remarks of members of parliament.<sup>9</sup>

As to the substantive scope of non-liability, the Commission, noting the variations between different systems, concluded that this was a matter which should be left to the margin of appreciation of the national legislator. Both the model of absolute non-liability and the model of limited non-liability could be legitimate.<sup>10</sup>

With reference to the principle of absolute freedom of the vote by members of parliament, the Commission took the view that this did not mean that a member of parliament might not be made criminally responsible for a corrupt act consisting of a bought vote in parliament although the solution could be to make the act which is punishable the acceptance of the bribe rather than the casting of the vote.<sup>11</sup>

Non-liability might be either absolute or limited. Limits to the freedom of speech of parliamentarians should apply only to statements of a particularly grave nature.<sup>12</sup> In the latter case the limitations might arise either from a decision by a court of law that the facts of the case found within the stipulated exemptions or as a result of a decision by parliament to waive the non-liability. The Commission expressed a preference for the model under which the limits to non-liability are laid down by the law and subject to judicial review. This has the advantage of avoiding a decision by parliament whether to lift the immunity which will necessarily be or be seen to be a politicised process.<sup>13</sup> The Commission also expressed its support for the proposition that both waiver by the parliament or by the individual concerned are legitimate models but where the parliament has the power of waiver the individual concerned should have the right to request this. Protection of non-liability should not be limited in

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<sup>9</sup> Ibid, at paragraph 90, citing *Cordova v Italy*, 40877/98 and 45649/99, 30 January 2003 in support

<sup>10</sup> Ibid, paragraph 175 and 176

<sup>11</sup> See *ibid* paragraph 94. In such a case, however, the punishable act would relate not to a matter covered by non-liability but to an issue which might be subject to inviolability. See also *ibid* paragraphs 177-180

<sup>12</sup> Ibid, paragraph 179

<sup>13</sup> Ibid, paragraphs 95-96

time<sup>14</sup>, should not extend to opinions or behaviour that do not have a direct link to parliamentary functions<sup>15</sup>, and should not exclude internal disciplinary sanctions which are clear and proportionate and are not misused by the parliamentary majority<sup>16</sup>.

## CRITERIA AND GUIDELINES ON IMMUNITY:- INVIOABILITY

Where there are rules providing for parliamentary inviolability there are almost always rules providing for its waiver. The competence to waive inviolability nearly always lies with parliament itself reflecting the underlying principle that the rationale for the rule is the protection of parliament rather than the individual member. In a small number of cases competence lies with the courts.

The rules for waiver may be laid down in the constitution or at a lower level. These may be in statute but are frequently contained in the rules of parliamentary procedure. In some cases rules may be quite detailed and in other cases may be very rudimentary. GRECO has estimated that for roughly half of its member states there are no rules on the criteria for waiving inviolability or the rules are very inadequate<sup>17</sup>.

The procedures for waving immunity vary greatly. Usually there is an ad hoc or specialised parliamentary committee which gives an opinion which is then considered by the whole parliament in plenary session. There may or may not be a debate; the session may be closed or public; the vote may be secret or open; the matter may be decided by simple or qualified majority. The decision being one for a vote in parliament is rarely motivated.

The criteria for lifting immunity also vary. As already noted in practice decisions in some countries are very often taken on essentially political grounds. The actual practice varies considerably from state to state. As already noted in Germany a decision is taken at the start of every parliamentary session to lift immunity except in cases of political defamation. There are countries where requests to wave inviolability are invariably granted but at the other end of the spectrum there are some where such requests rarely or never succeed.

In assessing rules on inviolability the Venice Commission noted that this was the most problematical and controversial part of the concept of parliamentary immunity. While such rules in many countries are an established part of the constitutional tradition they nonetheless contradict the principal of equality

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<sup>14</sup> Ibid, paragraph 181

<sup>15</sup> Ibid, paragraph 182

<sup>16</sup> Ibid, paragraph 183

<sup>17</sup> Ibid paragraph 129

before the law, are open to misuse by criminal elements, and contribute to undermining public confidence in the democratic process, as well as giving rise to other problems. In particular, the assessment of whether to waive inviolability may of necessity involved the parliament in evaluating the merits of a criminal charge which may conflict with the principle of the presumption of innocence as well as offending against the principle that the assessment of guilt or innocence is a function for courts rather than parliaments.

As noted above, it may be argued that the development of genuinely independent courts and effective mechanisms for the enforcement of individual rights renders redundant the use of the system of inviolability to protect parliament and its members against abusive legal process. However, these developments have not achieved their full effectiveness in every system and there are still fragile democracies where abuse of the legal processes for political purposes may take place with the result that the protection of inviolability may still have some legitimate role.

Having looked at both these conflicting arguments the Venice Commission concluded that rules on inviolability should not go beyond what is strictly justified for legitimate purposes and should be construed, interpreted and applied in a restrictive manner<sup>18</sup>. They should never protect against preliminary investigations. For parliamentary inviolability exists it should almost be of a temporary nature and function as a suspension only. There should always be a possibility to waive inviolability following clear and impartial procedures<sup>19</sup>. There should also be a presumption in favour of lifting inviolability in all cases where there was no reason to suspect that the charges were politically motivated<sup>20</sup>. The Commission supported the regulation of criteria for lifting inviolability in greater detail and clarity than exists at present in many countries which criteria should include the possibility to lift immunity in cases concerning particularly serious crimes, crimes committed *in flagrante delicto* as well as crimes unrelated to the exercise of parliamentary functions.

The proposed detailed criteria and guidelines for inviolability are set out in paragraphs 184-194 of the report. They deal with criteria for regulating the scope of parliamentary inviolability, criteria for assessing whether it should be lifted, criteria for maintaining it as well as guidelines for regulating the procedure for lifting inviolability. I do not propose to refer to each and every matter contained in the criteria and guidelines and I have already referred to many of the key principles. Among other important recommendations not already referred to are those which would entitle a member of parliament to waive inviolability and opt for trial, which would suggest the use of outside

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<sup>18</sup> Ibid, paragraphs 157-8

<sup>19</sup> Ibid, paragraph 161.

<sup>20</sup> Ibid, paragraph 162.

experts by parliament to help it make any necessary assessments, and which would require procedures to respect the principles of clarity, transparency, predictability, objectivity, non-arbitrariness and the rights of parties to be heard, and which might provide for the possibility of judicial review before the courts of decisions relating to proposed waivers. Finally, the Venice Commission drew attention to the rules and guidelines developed by the European Parliament which is considered to be qualitatively better than those found at the national level in most European countries and which had resulted from extensive practice and experience as well as reflecting a degree of consensus at the European level on how inviolability should be handled.

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