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TECHNICAL PAPER

**IMMUNITIES IN COUNCIL OF EUROPE MEMBER STATES:
LEGISLATIVE, EXECUTIVE AND JUDICIAL OFFICE HOLDERS**

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1. Overview

Legal immunity is generally defined as

“exemption from normal legal duties, penalties, or liabilities, granted to a special group of people”¹.

The following office holders enjoy this legal privilege (states in brackets are examples and no exhaustive enumeration) in Council of Europe (CoE) member states:

Category	CoE-States
Parliamentarians	43
Head of State	40
Prime Minister	19
Ministers	16
Other executive (Ombudsman etc.)	10
Judges	16
Prosecutors	4
Other judicial (Council etc.)	3

This paper will not deal with diplomatic immunity as it is predefined by international law (Vienna Convention on Diplomatic Relations 1961, signed by 187 States and customary international law) and not subject to change by the national legislator.

¹ The American Heritage Dictionary of the English Language, Fourth Edition, updated in 2009.

2. Immunity in Parliament

2.1. Non-liability and inviolability

The constitutions of the world today apply two major systems of **parliamentary immunity**²: one is based on the Westminster model and is commonly known as the privilege of freedom of speech or parliamentary non-liability; the other derives from the French model, which offers members of parliament wider protection, as it comprises not only non-liability but also “parliamentary inviolability”. In short, **non-liability** (also known as “non-accountability”) affords parliamentarians special protection for their freedom of expression and entitles them to say what they feel (freedom of speech) and to discuss what they wish (freedom of debate). It means that they cannot be held accountable, except by parliament itself and by the people at elections, for anything they say in the exercise of their parliamentary duties and for any vote they cast in parliament. In addition to the above, parliamentary **inviolability** protects parliamentarians against any civil, administrative or criminal proceedings for statements or acts unrelated to the exercise of their parliamentary mandates. It implies, generally speaking, that they may only be arrested and/or prosecuted with the assent of the parliament.

Non-liability	exemption from criminalization (speech/votes)
Inviolability	(temporary) exemption from prosecution

For an act covered by non-liability, a parliamentarian can never be prosecuted, as this act is not punishable at all; an act covered by inviolability, however, is punishable, and a parliamentarian can be prosecuted once his mandated has ended.

As for their parliaments, Council of Europe member states apply the two principles as follows:

Netherlands	Anglo-America	Continental Europe
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² Parliamentary Immunity, Background Paper prepared by the Inter-Parliamentary Union, 2006, p. 3.

Non-liability	Non-liability	Non-liability
-	Civil inviolability	Civil inviolability
-	-	Criminal inviolability

2.2. Non-liability

In the context of corruption, non-liability is only of very limited interest: As far as criminal offenses of corruption are concerned (bribery, trading in influence, illicit enrichment, embezzlement, money laundering etc.), the punishable act, or at least an essential part of it, will not be a speech or vote in Parliament, but some sort of “trade” with a third party or another act outside office. The only corruption offense that could be committed solely through a vote (or even speech) in parliament would be abuse of function.

2.3. Inviolability

Inviolability on the other hand can easily be an obstacle to the prosecution of any corruption offence. When comparing inviolability one has to look at the following points (states in brackets are examples and no exhaustive enumeration):

- **Which** acts does it cover?
 - i. In duty (*Austria, Bosnia*)
 - ii. Off duty (incl. double mandate as minister): *most states*

- **From** what does it protect?
 - i. Criminal Proceedings (*France, Belgium: only criminal, not civil*)
 1. Arrest/detention (*Norway, UK, U.S.*)
 2. Investigations (*Germany*)
 3. Indictments (*Germany*)
 4. Trials (*Germany*)
 5. Enforcement (*Germany, Turkey*)
 6. Amnesty (*Germany*)
 7. Resumption of Proceedings (*Germany*)

- ii. Civil Proceedings (*UK, U.S.:* only civil, not criminal)
 - 1. Trials
 - 2. Enforcement of Judgments
 - 3. Temporary Seizure
 - 4. Coercive detention (*Germany, UK*)
 - iii. Administrative Proceedings
 - 1. Trials
 - 2. Sanctions (*Germany*)
 - iv. Disciplinary Proceedings (*Germany*)
 - v. Ethical Proceedings (*Germany*)
 - vi. Deputy not part of proceedings
 - 1. Search and seizure
 - 2. Testimony
 - vii. Foreign procedures/Letters rogatory (*Germany*)
 - viii. Preventive measures
 - 1. Infection Protection Act
 - 2. Commission to a mental institution (*Germany*)
 - 3. Observation by domestic intelligence service
 - a. covert (*Germany:* unclear, no case law)
 - b. open (*Germany:*
- **How long** does inviolability apply?
 - i. Throughout duration of parliamentary term (*Denmark, Spain, Greece, Italy, Germany, and Portugal*)
 - ii. Period of sessions (*Belgium and Luxembourg*).
 - iii. Period between dissolution of former and formation of new Chamber (*Italy, Greece – political crimes*).
 - iv. Only acts after entering into office (*France*)
 - v. Period of parliamentary mandate; legal action is only postponed
 - **Where** does inviolability apply?
 - i. In Parliament and on the way to it (*Norway, U.S.*)
 - ii. Anywhere (within territory) – *most states*

- What are possible **exemptions**?
 - i. Caught in act of committing – „flagrante delicto“ (*most states*); in *Italy* and *Finland* a „vital need“ is necessary for detention; Turkey: only if “heavily punishable”.
 - ii. Serious crimes (*U.S.* – treason, crime or disturbance of peace; *France* – minor criminal offences; *Sweden* – minimum two years of imprisonment, *Ireland* – treason)
 - iii. Minor offences (*Serbia* – fines as punishment)
 - iv. Final verdict (*France*)
 - v. Plea of guilt by deputy (*Sweden*)
 - vi. Immunity not raised by deputy (*Slovenia, Serbia*)

- **How** does inviolability apply?
 - i. In all cases by law? (*most states*)
 - ii. Only if evoked by Parliament? (German states *Hamburg*, German State *Brandenburg*)

- **Procedure** for lifting/invoking inviolability
 - i. Right of **motion** (*France* – Attorney General; *Germany* – various bodies)
 - ii. **Deciding** body: presidium (*France*); plenary (*France* in delaying procedures, *Spain*); court (*Cyprus* – Supreme Court); Committee (*Germany*: in some cases)
 - iii. Decision by fair **discretion** (*Bundestag*) or bound by **law** (German State *Brandenburg*)?
 - iv. **Minority** opinion of committee members (*Italy*)
 - v. Right of **deputy** or his/her attorney to be present (*Ukraine*: deputy is present at hearing; *Germany*: no right of deputy to speak on merits of the case)
 - vi. **Timeframe**: *Austria* (no decision by Parliament within eight months, immunity is lifted), *Spain* (no decision by Parliament within 60 days, request cancelled)
 - vii. **Publicity** of deliberation (*Germany, France* – secret deliberation, public decision; *Spain* – „in camera“)
 - viii. **Vote**: secret (*Albania, Spain, Greece, Italy*) or open (*Germany*)

- ix. **Quorum**: simple majority (*Germany*) or specific majority (*Poland* – 2/3, *Sweden* – 5/6 of those present)
- x. Possibility to **challenge** decision at Constitutional Court (*Turkey*; *Germany* to some extent)

2.4 Limiting inviolability

- Netherlands, Anglo-America: **“Non-liability only”**
 - i. Non-liability for opinions and votes in official duty

Article 71 Constitution of the Netherlands

“Members of the Parliament, Ministers, State Secretaries, and other persons taking part in deliberations may not be prosecuted or otherwise held liable in law for anything they say during the sittings of the Parliament or of its committees or for anything they submit to them in writing.”
 - ii. Right is absolute and unlimited
 - iii. No inviolability – no procedures necessary
- Similar: Bosnian Constitution

Article IV Parliamentary Assembly

Paragraph 3 Procedures

(j) Delegates and Members shall not be held criminally or civilly liable for any acts carried out within the scope of their duties in the Parliamentary Assembly.
- Norway, Ireland: **“Free from arrest in Parliament”**
 - i. Non-liability for opinions and votes in Parliament
 - ii. Immunity only from arrest and only when in Parliament or on way to it

Art. 66 Norwegian Constitution

“Representatives on their way to and from the Parliament, as well as during their attendance there, shall be exempt from personal arrest, unless they are apprehended in public crimes [= flagrante delicto], nor may they be called to account outside the meetings of the Parliament for opinions expressed there.”
- Portugal: **“Inviolability for small offences < 3 years prison”**

- i. Offences with maximum imprisonment penalty of more than three years (Art. 157 par. 3 and 4 Constitution):
 - 1. No freedom from arrest
 - 2. Obligation for parliament to lift immunity for all other aspects of criminal proceedings.
 - 3. Bribery: maximum penalty of five to eight years (Articles 372 to 374 Criminal Code as amended by Law no. 32/2010, of 2 September 2010).

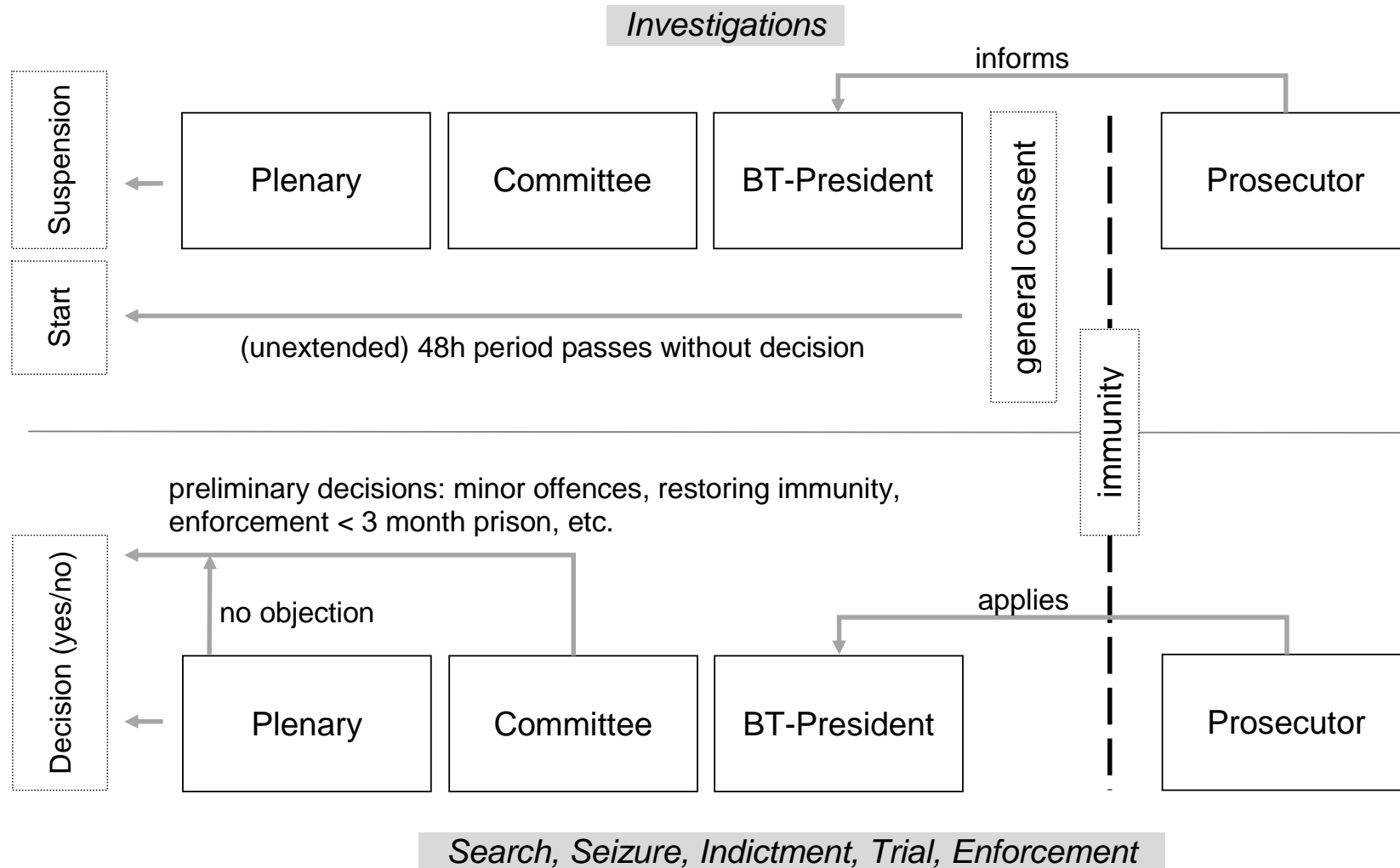
- Two German regional parliaments: **“Inviolability needs evocation”**
 - i. Inviolability only, if evoked by Parliament (with sufficient ground)
 - ii. Easy procedure:
 - 1. Right to file motion: each lawmaker or political group
 - 2. Decision by committee and plenary

Art. 58 (Immunity) Constitution of Brandenburg

“Each measure of criminal prosecution against a deputy, each arrest or other restriction of his personal freedom has to be suspended if the Parliament so requests and if it disturbs the work of the Parliament.”

- German Bundestag: **“General Consent for Investigations”**
 - i. General consent at beginning of term for Investigations
 - ii. Possibility to withdraw consent at any time
 - iii. Condition: information of Parliament

2.5 Excursus: Inviolability in the German Bundestag (Rules of Procedure)



a. Adoption of Immunity Resolution

With the acquisition of existing rules in the inaugural meeting of a newly elected Bundestag (currently: 17th Term) the resolution on “Lifting Immunities” is adopted, a tradition going back to the 5th Term. This means, up to the end of each term investigations of offences can be carried out, except those for political insult. Within the scope of the resolution individual approval by Parliament is not required.

This is considered to be constitutional, even though Article 46 paragraph 2 Constitution only allows decisions on a case-by-case basis: In the parliamentary practice immunity matters are considered without delay and therefore the working and functioning of the Bundestag is ensured. There is no case law on this question: During the 15th Term, a complaint against the resolution on “Lifting Immunities” brought before the Federal Constitutional Court has been rejected as inadmissible because of missing of term (Decision 2 BvE 2/00 of 17. December 2001).

b. Investigations

i. Notification by the Public Prosecutor

Notification of a public prosecutor of his intention to initiate a general investigation is filed with the President of Parliament. The input is confirmed with the date and time to the prosecution to allow the calculation of the relevant 48-hour period before investigations can start. The prosecution is being informed that for calculating the period weekends and public holidays are not to be taken into account and that there is opportunity for the Parliament to extend the period appropriately (see paragraph 3 of Decision No 1).

Then the notification is sent to the secretariat of the Immunity Committee (1st Committee). The chairman and the speakers of the political groups are informed immediately to clarify if immediate action is needed or whether putting the matter on the agenda of the next committee meeting is sufficient. If certain aspects still need clarification, additional information is requested from the competent public

prosecutor. Likewise, as mentioned, should the 48-hour deadline be extended, the President is writing – in consultation with the Chairman of the Immunity Committee – to the competent public prosecutor.

ii. Decision by the Immunity Committee

In the next session of the Immunity Committee the chairman is presenting the matter. Where necessary, the Committee is deliberating on the transparency of the notification, any procedural irregularities, requesting the competent judicial authority to answer questions at the next meeting, or – rarely (about one case every 10 years) – immunity is restored under Article 46 paragraph 4 Constitution.

iii. Position of the Deputy in Question

The public prosecutor has to inform the deputy of the intended investigations at the same time as the Parliament's President, unless this would endanger the success of the investigations (1 paragraph 2 of the resolution). Participation of the deputy in questions is not foreseen, apart from contacts with the chairman or the speakers of political groups. According to No. A 3 of the principles the deputy in question is not to be granted the word on the matter. However, in 2002, No. 3 has been amended that the Committee may – at the request of one political group – allow the deputy to respond to the motion. It is disputed, whether the deputy is prohibited from taking part in decisions in the committee or the plenary; this dispute has not much practical value though.

iv. Special Measures

If the intended investigation foresees certain coercive measures, such as searches, the lifting immunity procedure is adapted in an appropriate manner in order not to jeopardize the success of the investigation.

c. Indictment, Trial, Search, Seizure etc.

The consent to investigations does not cover coercive measures, such as search and seizure, or further procedures such as indictments. If the prosecutor is applying for such measures, the procedure is similar to the one described above at No. b.

The Committee's deliberations do not include any appraisal of evidence nor findings of right or wrong, guilt or innocence (No. A 4 of the Principles). However, the correctness of the process, the transparency of the application and any factors that could speak for an arbitrary action by the prosecutor, may be considered. The person concerned may only require that the Bundestag's decision is not guided by irrelevant, arbitrary motives of a criminal prosecution. Other interests, such as to avoid adverse consequences for an election campaign or a sought political office have to be ignored. Generally, a mature decision application is granted.

The draft resolution to the plenary is to “permit the implementation of criminal proceedings” or “enforcement of search and seizure” decisions.

3 Immunity in the Executive

Historically, executive immunity derives from the King's immunity. Today, the King is still immune in all European Monarchies (*Belgium, Denmark, Luxembourg, Netherlands, Norway, Spain, Sweden, UK*).

3.1 Non-liability and inviolability

With regards to executive immunity, only very few constitutions distinguish clearly between non-liability and inviolability, as is done in the *Serbian Constitution*:

Article 134 Immunity [and indemnity] of the President and member of the Government

(1) The Prime Minister and the member of the Government may not be held accountable for opinions expressed at sittings of the Government and sessions of the National Assembly, or for the cast vote at the sittings of the Government.

(2) The Prime Minister and the member of the Government enjoy immunity as a deputy. The Government decides on the immunity of the Prime Minister and the member of the Government.

Mostly, constitutions refer for the executive immunity to the immunity of deputies or simply state that the president or prime minister is “immune” or “shall not be held liable” (*Bulgaria*).

3.2 Non-liability

In the context of corruption, non-liability of executive officials is only of limited interest: As far as criminal offenses of corruption are concerned (bribery, trading in influence, illicit enrichment, embezzlement, money laundering etc.), the punishable act, or at least an essential part of it, will not be a speech or vote in Parliament or in an executive council, but some sort of “trade” with a third party or another act outside office. The only corruption offense being committed solely through a vote in parliament or within the government would be abuse of function, an offense not foreseen in the Albanian Criminal Code. Besides, countries that foresee abuse of function in their criminal code, often apply it only to civil servants, but not political office holders (see e.g. *Austria* § 302 Strafgesetzbuch “Missbrauch der Amtsgewalt”).

3.3 Inviolability

Inviolability on the other hand can easily be an obstacle to the prosecution of any corruption offence. When comparing inviolability one has to look at the following points (states in brackets are examples and no exhaustive enumeration):

- **Who** is covered?
 - i. Head of state (*39 out of 47 CoE member states*)
 - ii. Prime minister/ministers (*15/13 out of 47 CoE member states; 8/7 out of 27 EU member states*) – but ministers are often parliamentarians (except *Belgium, France, Netherlands, Norway, Sweden*)
 - iii. Other bodies such as court of audit, commissioners, ombudspersons (*9 out of 47 CoE member states*)

- **Which** acts are covered?
 - i. In duty (*Cyprus, Switzerland*)
 - ii. Off duty (often: “like a parliamentarian”) – *Austria, Azerbaijan*

- Possible **exemptions**
 - i. Serious crimes (imprisonment > three years) – *Portugal*
 - ii. Flagrante delicto (*Azerbaijan, Portugal*)
 - iii. High treason (*Georgia, Greece*)
 - iv. Willful violation of the Constitution (*Georgia, Greece*)

- How **long** does inviolability apply?
 - i. During term (*Azerbaijan, Armenia* – acts unrelated to status)
 - ii. After term (*Armenia* – acts related to status, *Bulgaria*)

- **Who** lifts immunity?
 - i. Parliament (*Montenegro, Estonia* – “on proposal by the Legal Chancellor, with the consent of the majority of the Parliament.”)
 - ii. President (*Azerbaijan, Lithuania* – if Parliament is not in session)
 - iii. Government (*Serbia* – for Prime Minister and Ministers)
 - iv. Constitutional Court (*Croatia, Georgia* – Constitutional Court needs to confirm reason for lifting immunity by Parliament)

3.4 Limiting inviolability

- No inviolability at all for executive officials (*majority of EU member states*)

- Inviolability only for head of state and only for acts in duty (*Ireland, Italy, Romania*)
- Exemption for certain crimes (*Portugal: imprisonment > three years*)

4 Immunity in the Judicative

Historically, judicial immunity derived from King's immunity – judges are the King's delegates for dispensing justice.

4.1 Non-liability and inviolability

With regards to executive immunity, only very few constitutions distinguish clearly between non-liability and inviolability, as is done in the *Croatian Constitution*:

Article 121 [Judicial Indemnity, Judicial Immunity]

(1) Judges shall enjoy immunity in accordance with the law.

(2) Judges and lay assessors who take part in the administration of justice shall not be called to account for an opinion or a vote given in the process of judicial decision-making unless there exists violation of law on the part of a judge which is criminal offence.

(3) A judge may not be detained in criminal proceedings initiated for a criminal offence committed in performance of his judicial duty without prior consent of the National Judicial Council.

Mostly, constitutions refer for the judicial immunity to the immunity of deputies or simply state that judges or prosecutors are “immune”.

4.2 Non-liability

In the context of corruption, non-liability of judicial officials is only of limited interest: As far as criminal offenses of corruption are concerned (bribery, trading in influence, illicit enrichment, embezzlement, money laundering etc.), the punishable act, or at least an essential part of it, will not be a speech or vote in court, but some sort of “trade” with a third party or another act outside office. The only corruption offense being committed solely through a vote in parliament or within the government would be abuse of function. Besides, countries that foresee abuse of function in their criminal code, often apply it only to civil servants, but not judicial office holders (see e.g. *Austria* § 302 Strafgesetzbuch “Missbrauch der Amtsgewalt” – applies to civil servants, but not public officials, such as judges).

4.3 Inviolability

Inviolability on the other hand can easily be an obstacle to the prosecution of any corruption offence. When comparing inviolability one has to look at the following points (states in brackets are examples and no exhaustive enumeration):

- **Who** is covered?
 - i. Constitutional Court Judges (*Slovenia*)
 - ii. High Court Judges (*Estonia*)
 - iii. All Judges (*Armenia, Switzerland*)
 - iv. Chief Prosecutor (*Macedonia*)
 - v. Prosecutors (*Lithuania*)
 - vi. Members of Judicial Council (*Macedonia, Montenegro*)

- **Which** acts are covered?
 - i. Judicial acts (*Cyprus, Montenegro* – “functional immunity”)
 - ii. Acts off duty (often: “immunity like a parliamentarian”) – *Bulgaria*

- Possible **exemptions**
 - i. Traffic offences (*Switzerland*)
 - ii. Flagrate delicto (*Armenia, Czech, Georgia*)

- How **long** does inviolability apply?

The wording of the constitutions of all CoE member states suggests that immunity applies only while a judicial official is in service. Few constitutions make this explicit, as the *Estonian* Constitution:

Article 153 [Immunity of Judges]

(1) A judge may be charged with a criminal offence during his or her term of office only on proposal by the National Court and with the consent of the President of the Republic.

- **Who** lifts immunity?
 - i. Parliament (*Czech* – Senat)
 - ii. President (*Estonia* – “proposal by the National Court and with the consent of the President of the Republic”)

- iii. Judicial Council (*Bulgaria, Croatia*)
- iv. Constitutional Court (*Armenia*)

4.4 Limiting inviolability

- No inviolability at all for judicial officials (*majority of EU and CoE member states*)
- Inviolability only for members of Constitutional Court (*Czech*), Supreme Court (*Cyprus*) or for Chief Prosecutor (*Montenegro, Macedonia*)
- Inviolability only for acts in duty (*Cyprus, Montenegro, Serbia, Switzerland*)
- Exemption for certain crimes (*Bulgaria: "grave crime"*)