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(VENICE COMMISSION)

REPORT

ON

THE SCOPE AND LIFTING OF PARLIAMENTARY IMMUNITIES

Adopted by the Venice Commission at its 98th plenary session (Venice, 21-22 March 2014)

on the basis of comments by

Mr James HAMILTON (Substitute Member, Ireland)
Ms Maria Fernanda PALMA (Member, Portugal)
Mr Fredrik SEJERSTED (Substitute Member, Norway)
Mr Jørgen Steen SØRENSEN (Member, Denmark)
Mr Yves-Marie DOUBLET (GRECO expert, France)

Contents

I. Introduction

1. On 13 February 2013, the Secretary General of the Council of Europe invited the Venice Commission, in co-operation with an expert of the Group of States against Corruption (GRECO),[1] to develop criteria and guidelines on the lifting of parliamentary immunity in order to avoid the misuse of immunity as well as selective and arbitrary decisions, and in order to ensure adequate transparency of the procedure.

2. The present report was drawn up on the basis of comments from Mr Hamilton, Ms Palma, Mr Sejersted and Mr Sørensen, with the co-operation of Mr Yves-Marie Doublet, GRECO expert.

3. This report takes into account the previous work of the Venice Commission in the field, which led to the adoption of the 1996 Report on the regime of parliamentary immunity (CDL-INF(1996)007). The Venice Commission has also drawn up a "Comparative table on the lifting of parliamentary immunity" (CDL(2013)043).

4. The main aspect of the request is the *lifting* of parliamentary immunity, but the report will also deal with the nature and scope of such immunity, since these issues are closely linked. The report furthermore builds on the basic distinction between the two main forms of parliamentary immunity, which are usually referred to as "*non-liability*" (freedom of speech) and "*inviolability*" (protection against arrest, detention, prosecution and etcetera). The report is structured in such a way that the two are for the most part treated separately.

5. Most of the report is about describing, analysing and assessing rules on the scope and lifting of parliamentary immunity. Drawing up common European criteria and guidelines is a more challenging task, since there is great variety in national rules and traditions. Towards the end of the report there are however proposals for such criteria and guidelines, which are inspired by rules and practices already developed at the European level by the Parliamentary Assembly of the Council of Europe as well as the European Parliament of the EU.

6. After being discussed in the Sub-Commission on Democratic Institutions on 5 December 2013 and 20 March 2014, the present report was adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014).

II. General remarks

A. The two forms of parliamentary immunity

7. The concept of parliamentary immunity is an integral part of the European constitutional tradition, as demonstrated by the fact that all European countries have some form of rules on this, which often date back a long time in history. The main feature is that members of parliament are given some degree of protection against civil or criminal legal rules that otherwise apply to all citizens. The basic idea is that the elected representatives of the people

[1] The Group of States against Corruption (GRECO) was established in 1999 on the basis of an enlarged partial agreement in order to monitor compliance of members States with the various anti-corruption instruments adopted in pursuance of the Program of Action against Corruption of 1996. The membership rose over the years and it currently includes all the 47 Council of Europe Member States as well as Belarus and the United States of America. Consultations have been initiated for the accession/participation of Kazakhstan and the European Union (situation as of 14 November 2013).

need certain guarantees in order to effectively fulfill their democratic mandate, without fear of harassment or undue charges from the executive, the courts or political opponents.

8. Within this common tradition there is great variety in how parliamentary immunity is regulated in different countries, both in Europe and elsewhere in the world. In some countries there are very wide rules, in others hardly any. There is also great variety in how these rules are regarded and applied. In some countries they are seen as problematic, and seldom invoked in practice. In other countries they are applied more often, and form part of the operative constitution.

9. Although there is no single model, there is a clear distinction to be found in almost all constitutional systems between the two main categories of parliamentary immunity, which are of a different nature and which are usually regulated and applied in a quite different manner.

10. The first category is usually referred to as "*non-liability"*, meaning immunity against any judicial proceedings for votes, opinions and remarks related to the exercise of parliamentary office, or in other words, a wider freedom of speech than for ordinary citizens.

11. The second category are rules on "*inviolability*", or immunity in the strict sense, meaning special legal protection for parliamentarians accused of breaking the law, typically against arrest, detention and prosecution, without the consent of the chamber to which they belong.

12. Rules on *non-liability* (special freedom of speech) for members of parliament are to be found in almost all democratic countries, although the details differ quite a bit. Non-liability is closely linked to the parliamentary mandate, and protects the representatives when acting in their official capacity – discussing and deciding on political issues. It is often absolute and cannot be lifted, although there are some parliaments that can do this.

13. Although the concept of parliamentary non-liability is common, the terminology differs. In English-speaking countries it is also sometimes referred to as "non-accountability", "parliamentary privilege", or simply "freedom of speech". In France and Belgium it is referred to as "irresponsabilité", in Italy as "insindacabilità", in Germany as "Indemnität" or "Verantwortungsfreiheit", in Austria as "berufliche Immunität", in Spain as "inviolabilidad", and in Switzerland as "absolute Immunität" and "immunité absolue".

14. Rules on *inviolability* for members of parliament are to be found in a number of countries, although they are less widespread than rules on non-liability. Inviolability is usually more narrowly construed, with more exemptions, and it can always be lifted, usually by parliament itself. It is also more complex and controversial. There is no common model and great variety both as to what kind of legal offences are covered and as to what legal reactions the members are protected against. Amongst the states that have such rules there is also great differences in how these are applied in practice, and in some countries they are considered outdated and not invoked. This is also the aspect of immunity which has caused the most debate, and the greatest concern in practice, inter alia in the work of GRECO on fighting corruption.

15. Inviolability is also sometimes referred to by other names, such as "immunity in the strict sense" or "freedom from arrest". In France and Belgium it is called "inviolabilité", in Germany "Immunität" or "Unverletzlichkeit", in Austria "ausserberufliche Immunität", in Spain "inmunidad" and in Switzerland "relative Immunität" or "immunité relative".

B. Historical background and current context

16. In the literature on parliamentary immunity a line is sometimes drawn back to ancient Rome, where the tribunes of the people were held to be sacrosanct, and where it was strictly forbidden, on the pain of death, to attack them or hinder them in the exercise of their functions.

The influence of this tradition can still be seen in some immunities of Heads of State and monarchs.

17. In somewhat more recent history it is usual to trace the origins of parliamentary immunity back to the early days of the Parliament of England, where a tradition started to develop as early as in the 14th century that members of parliament should be free to discuss and deliberate without interference from the Crown. In 1689 this principle was affirmed in the Bill of Rights, which states in Article 9 "That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament". There was also a tradition developed quite early on that members of parliament should have at least some "freedom from arrest", in particular in civil cases. Protection from the monarch was more limited in scope, although the members enjoyed special protection on their travels to and from parliament, so that the Crown could not stop parliament from meeting.

18. In 1789 the English tradition was reflected in Article 1 section 6 of the Constitution of the United States, which states the immunity of members of Congress (Senators and Representatives); this provision includes however also an element of inviolability:

> *They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.*

19. The "Anglo-Saxon" model, conceived as a mere protection of the freedom of opinion of deputies against the executive power, which influenced a number of countries with common law systems, but also several others, including the Nordic ones. The model is strong on non-liability (freedom of speech) but weak on inviolability, which is often reserved mainly for civil offences (of which there are few today). Apart from that, there is often just protection on the way to and from parliament, and only from arrest, not from other legal proceedings, such as investigation and prosecution. In practice there is little or no inviolability today for members of parliament in most countries that adhere to this model.

20. The contrast can be called the French model, which originated when the French National Assembly on 23 June 1789 declared that "the person of each deputy shall be inviolable". This reflected the superiority of the National Assembly over other organs of the state under the revolution, a doctrine of strict separation of powers, as well as the perceived need for special protection for the representatives of the people against the executive in a time of great turmoil. The concept of "inviolability" was very wide, although some modifications were introduced as early as in 1791, making an exemption for cases of in flagrante delicto, and giving the Assembly the competence to lift immunity.

21. The French model in time was adopted by a number of other countries on the Continent and later on in other parts of the world. This is also the model that was chosen by most of the new democracies of Central and Eastern Europe in the early 1990s. The model protects both elements of parliamentary immunity – non-liability (freedom of speech) and inviolability. However, even within this model the two are often regulated quite differently, so that non-liability is much more absolute, while inviolability is open to exemptions and can be lifted by parliament itself. There is a great variety between states in the way the model has developed as to the details, and in later years there has been a tendency in many countries (including France itself) to limit the scope of inviolability.

22. A common perception in both main models of parliamentary immunity is that this is seen as a way of protecting parliament itself, as an institution, against undue pressure or harassment from external actors, including both the executive, the courts and political opponents. It is not

seen as a personal privilege for the individual members of parliament, but as a way of ensuring the effective democratic workings of the representative assembly.

23. As the historical background illustrates, the concept of parliamentary immunity was an integral part of the European constitutional tradition that developed in the late 18th and early 19th century, which later on spread to most of the rest of the world, and which is still dominant today. At the same time, it is important to note that the rules on immunity were originally formulated in a historical and political context that is very different from that of today. There are a number of later institutional and democratic developments, especially in parliamentary systems, that have influenced the evolution of rules on immunity, and which are important to take into account when assessing their role and function in a contemporary context.

24. One such important development is that of modern democracy, which in many countries has more or less eliminated the threat of undue harassment of parliament by the executive power. 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. Thus rules on parliamentary immunity today function primarily as a minority guarantee.[2] This applies even to presidential and semi-presidential systems, although with some variations, since the president will have a direct popular mandate, and sometimes cannot rely on majority support in parliament.

25. Another important development is in the independence and autonomy of the judiciary, which means that the possibility of the executive branch misusing the courts against political opponents in parliament is in most democratic countries today far less than it was two hundred years ago, thus reducing the need for special rules on parliamentary immunity.

26. A third factor is the development in modern times of individual political rights, including freedom of speech and protection against arbitrary arrest, which apply to all individuals, including of course members of parliament, and which therefore sharply reduces the need for special parliamentary protection. Such individual rights have long since been guaranteed both at the national constitutional level and at the international and European level, inter alia through the European Convention on Human Rights (ECHR).

27. Alongside these developments there is in modern politics in most countries today a far greater emphasis than before on transparency in political life, and a greater awareness of the potential negative effects of parliamentary immunity, in particular in the fight against political corruption.

28. These developments are part of the reason why in recent years there has been increased debate in many countries on the role and function of rules on parliamentary immunity in general and on "inviolability" in particular – in some cases leading to reforms, which most often has served to limit the scope of immunity or to make it easier to lift.

29. In recent debates on parliamentary immunity a distinction is sometimes drawn between old and new democracies. The argument is that such immunity is less necessary in democratic systems that have reached a certain level of maturity and stability, where the political functions of members of parliament are adequately protected in other ways, and where there is little or no reason to fear undue pressure against members of parliament from the executive and the courts. In contrast, it is argued that rules on parliamentary immunity are still necessary in new

[2] See the 2010 report of the Venice Commission "On the role of the opposition in a democratic parliament", CDL-AD(2010)025.

and emerging democracies, that are not yet wholly free from their authoritarian past, and where there is real reason to fear that the government will seek to bring false charges against political opponents and that the courts may be subject to political pressure. At the same time, it is often new democracies that are most exposed to political corruption and the misuse of immunity by extremist parliamentarians to threaten democracy itself. Thus the paradox of parliamentary immunity – that it can serve both to foster and to undermine democratic development.

C. European standards for assessing national rules on parliamentary immunity

30. When adopting reports and opinions the Venice Commission bases its assessments on common European standards, which can be of different types. The most important are common rules of binding international or European law, such as the ECHR. Another basis is general principles of law, which can be deducted from the common European tradition. A third basis is common European "soft law", such as resolutions and recommendations from the institutions of the Council of Europe and other important bodies. Finally the Venice Commission sometimes takes a "best model" approach, basing its reports and opinions on comparative overviews as well as its own assessments of what constitutes the best and most sensible solutions.

31. All four of these categories are of relevance when assessing national rules on parliamentary immunity, and in particular when formulating criteria and guidelines for lifting of such immunity.

32. The starting point is that there are no international or European rules that explicitly regulate parliamentary immunity at the national level. This is first and foremost a matter for the national legislator to decide. In almost all countries the basic rules on such immunity are to be found in the national written constitution, with more detailed rules laid down in the parliamentary rules of procedure, and sometimes in statutory law.

33. The ECHR does not regulate parliamentary immunity, and in general sets few restrictions on the application of such rules at the national level. However, the exercise of immunity may in some specific cases come into conflict with rights protected by the Convention. So far this has come up with regard to Article 6 on the right of access to court, in situations where a third party has been the alleged victim of statements or acts by a member of parliament, but where rules on privilege have stopped the case from being brought to court. In 2002 the Court held that national rules on parliamentary immunity may pursue "the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary", and that they may therefore justify an interference with Article 6.[3] National rules on immunity are however not as such exempted from the Convention, even if there is a margin of appreciation, and they must still be applied in a way that is proportional and necessary in a democratic society. In another case in 2003 the Court found that the behaviour of the representative in question was "not connected with the exercise of parliamentary functions in the strict sense" and that it was therefore a violation of Article 6 to deny access to court.[4]

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[3] See *A. v. United Kingdom*, 35373/97, 17 December 2002, para 77. The Court also gave several statements of a more general nature on parliamentary immunity, including that "the broader an immunity, the more compelling must be its justification in order that it can be said to be compatible with the convention" (78), and that "The absolute immunity enjoyed by MPs is moreover designed to protect the interest of Parliament as a whole as opposed to those of individual MPs" (85).

[4] See ECtHR *Cordova v. Italy* 40877/98 and 45649/99, 30 January 2003. See also *Kart v. Turkey*, 8917/05, of 3 December 2009, where the Court held that the member concerned did not have a right under Article 6 to insist that immunity was lifted and the case brought before the courts. For a full analysis of the case law of the ECtHR with regard to parliamentary immunity, see Sascha Hardt, *Parliamentary Immunity. A Comprehensive Study of the Systems of Parliamentary Immunity in the United Kingdom, France, and the Netherlands in a European Context* (2013) pp. 18-54.

34. While the ECHR does not restrict parliamentary immunity as such, it does therefore set some limits on how such rules can be applied, and it can also serve as inspiration for a more general argument that use of parliamentary immunity must always be justified and not extend beyond what is proportionate and necessary in a democratic society.

35. Furthermore there are *basic principles of law and democracy* that are part of the common European tradition and that are of relevance when assessing rules on parliamentary immunity.

36. The existence of rules on parliamentary immunity is first and foremost based on the need to protect *the principle of representative democracy*. Such immunity can be justified to the extent that it is suitable and necessary in order to ensure that the elected representatives of the people are effectively able to fulfil their democratic functions, without fear of harassment or undue interference from the executive, the courts and political opponents. This is particularly important with regard to the parliamentary opposition and political minorities.

37. Historically the idea of parliamentary immunity is linked to *the principle of separation of powers*. The argument is that there should be a strict separation, so that the executive and the judiciary cannot unduly interfere with the democratic workings of the legislature. Today this argument might be debated. There are very few, if any, democratic systems that apply an absolute separation of powers, in the sense that the main state organs are wholly independent of each other. In parliamentary systems the government is dependent on a majority in parliament, and in presidential systems there is always a set of checks and balances. The idea that members of parliament can be brought before the courts to answer for alleged breaches of the law can today hardly be seen as contrary to the principle of separation of powers. However this principle can still be of relevance when it comes to determining the details of how parliamentary immunity should best be regulated, as for example to justify the widespread practice that it is for parliament itself to decide on whether immunity should be lifted.

38. The main argument against parliamentary immunity is *the principle of equality before the law*, which is also element of *the rule of law*. Any form of parliamentary immunity per definition means that members of parliament are given a special legal protection that other citizens do not have. For democracy to function it is particularly important that the members of the legislature themselves stick strictly to the laws that they make for others and that they can be held both politically and legally accountable for their actions. Rules on parliamentary immunity are an obstacle to this, and they are open to misuse and the obstruction of justice. By their very existence they may also contribute to undermining public confidence in parliament and to create contempt for politicians and for the democratic system as such.

39. For these reasons the basic normative position of the Venice Commission is that national rules on parliamentary immunity should be seen as legitimate only in so far as they can be justified with reference to overriding public requirements. They should not extend beyond what is proportional and necessary in a democratic society. This is the main normative basis on which the assessments in this report are made.

40. As regards the issue of *lifting* of parliamentary immunity, the Venice Commission will also refer to basic *principles of procedural law*, such as transparency, legal certainty, predictability, impartiality and rights of contradiction and defence.

41. Furthermore the Venice Commission will also draw upon existing European “soft law” and in particular on the rules and practices on parliamentary immunity developed over the years at the European level by the two most important European parliamentary institutions – the European Parliament of the EU (EP) and the Parliamentary Assembly of the Council of Europe (PACE).

42. As for relevant "soft law" the institutions of the Council of Europe have so far not made any resolutions or recommendations that directly address the issue of parliamentary immunity at the national level. However there are several resolutions that are of some relevance. The most important of these is Resolution (97) 24 from the Committee of Ministers "On the Twenty Guiding Principles for the Fight against Corruption", which is also a main reference for the work of GRECO. The resolution addresses the problem of corruption in general, but as Guiding Principle 6 it states the need "to limit immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society".[5] This clearly also covers parliamentary immunity, even if this is not explicitly stated. GRECO has evaluated all its 49 member States against this Guiding Principle in the context of the First Evaluation Round. All the reports which are made public can be found on GRECO's website. The observations made in respect of GRECO's findings in the present report are based on these evaluation reports, and occasionally on findings from the Third Evaluation Round during which immunities was an incidental subject addressed in connection with the topic "political financing". Readers interested may also refer to the Fourth Evaluation Round reports, in which the issue of immunities is briefly addressed in connection with the prevention of corruption of judges, prosecutors and parliamentarians.[6]

43. There are also several resolutions and recommendations of the institutions of the Council of Europe on the need to fight special forms of criminal behaviour, such as crimes against humanity, incitement to hatred, racism and discrimination, that may arguably be seen as relevant also to rules on parliamentary immunity, even if this is not stated. One example is Resolution 1675 (2009) by the Parliamentary Assembly on the "State of human rights in Europe and the need to eradicate impunity", where the Assembly stresses that all perpetrators of serious human rights violations must be held to account for their actions. While members of parliament are not explicitly mentioned, it is clear from the context that they must also be covered by this resolution, and that parliamentary immunity should not be invoked against such crimes.

44. The Venice Commission has previously considered parliamentary immunity on two occasions. In 1996 it adopted a general "Report on the Regime of Parliamentary Immunity", which included normative reflections.[7] In 2006 it adopted an opinion on the rules on parliamentary immunity in Albania, which included several recommendations.[8]

45. On the European level both the European Parliament and the Parliamentary Assembly of the Council of Europe were designed with relatively wide rules on parliamentary immunity, both

[5] See Resolution (97) 24, adopted by the Committee of Ministers on 6 November 1997. A similar provision exists in the United Nations Convention against Corruption of 2003.

[6] For most countries: see http://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/reports(round1)_en.asp (the column "evaluation reports" refers to the original report with substantive findings, the columns "compliance reports" and "Addenda to compliance reports" refer to the assessments of the follow-up given to an "evaluation report" ; for each country report in the first evaluation round, there is a chapter on immunities, with a descriptive part and then an analytical part. Countries which joined after the closure of the first round (for instance Andorra, Armenia, Austria) are nonetheless covered by a "joint first and second evaluation round report" which can be found at http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/reports(round2)_en.asp ; the logic is the same as above. The countries concerned are marked with a red asterisk next to their name. The Third Evaluation Round reports which dealt i.a. with "political financing" (theme II) can be found at http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/ReportsRound3_en.asp (reports on theme II) and the Fourth Evaluation Round reports are available at http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/ReportsRound4_en.asp.

[7] See Report on the Regime of Parliamentary Immunity, CDL-INF (96) 7.

[8] See Opinion on the draft decision on the limitation of parliamentary immunity and the conditions for the authorization to initiate investigation in relation with corruption offences and abuse of duty of Albania, CDL-AD(2006)oo5.

as regards non-liability and inviolability.[9] Both institutions have later on put considerable effort into developing more detailed rules and guidelines on how this should be regulated and applied.

46. This in particular goes for the European Parliament. Since the rules on immunity for the MEPs are relatively wide, the EP has over the years had to decide on a large number of requests for lifting of such immunity. In order to come to grips with this, and to reflect the common traditions of the member states, the EP has done several in-depth comparative reviews resulting in extensive reports on parliamentary immunity.[10] On this basis the EP has developed quite detailed rules for itself on the scope and application of the rules on parliamentary immunity and in particular on the lifting of immunity,[11] as well as a handbook for the MEPs on the Committee on Legal Affairs, which handles requests for lifting of immunity.[12]

47. In 2001 the Parliamentary Assembly received its first request for lifting of immunity. Based on this the Assembly decided that time had come to review its rules on this matter and to lay down better guidelines for the future. An extensive report was drawn up, which to a large extent drew inspiration from the EP, and which led to the adoption of Resolution 1325 (2003) and to the amendment of Rule 64 in the Rules of Procedure, which introduced a detailed procedure for handling requests for lifting of immunity.[13]

48. It is the view of the Venice Commission that the rules and practices developed by the European Parliament and the Parliamentary Assembly should today 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 inspiration also at the national level.

49. A number of other international organisations and institutions have also over the years contributed to the understanding and development of parliamentary immunity. Of particular importance is the work of the Inter-Parliamentary Union (IPU), which has published several reports on the subject.[14] The same goes for the work of the Association of Secretaries General of Parliaments (ASGP).[15] Several national parliaments have also in recent years undertaken studies on parliamentary immunity, including the UK Parliament, which reviewed its rules both in 1999 and 2013.[16]

50. In recent years there has also been a growing academic literature on the issue of parliamentary immunity. Some of these contributions defend the principle of immunity, but most

[9] See Protocol (No 36) on the privileges and immunities of the European Communities Articles 8 to 10 and the General Agreement on privileges and immunities of the Council of Europe Articles 14 and 15.

[10] See «Parliamentary immunity in the member states of the European Community and in the European Parliament» (Working Paper, Legal Affairs Series 1993), "Parliamentary immunity in the member states of the European Union and in the European Parliament" (Working Paper, Legal Affairs Series 1999), "Rules on Parliamentary Immunity in the European Parliament and the Member States of the European Union" (ECPRD 2001), "Parliamentary Immunity in the European Parliament" (Internal Study, Directorate-General Internal Policies 2005, updated 2007), and most recently "Non-liable? Inviolable? Untouchable? The Challenge of Parliamentary Immunities. An overview" (Office for Promotion of Parliamentary Democracy, 2012).

[11] See the Rules of Procedure of the European Parliament, Rules 5 to 7.

[12] See *Handbook on the incompatibilities and immunity of Members of the European Parliament*, by the Directorate General for Internal Affairs (2012).

[13] See Resolution 1325 (2003) on «Immunities of Members of the Parliamentary Assembly», adopted on 2 April 2003, based on a report with the same title by Mr. Olteanu (rapporteur) of 25 March 2003 (Doc. 9718 rev.).

[14] See inter alia «Parliamentary Immunity" (Background Paper prepared by the Inter-Parliamentary Union in cooperation with the UNDP 2006) and Marc Van der Hulst "The Parliamentary Mandate. A Global Comparative Study" (Inter-Parliamentary Union 2000) pp. 63-94.

[15] See Robert Myttenaere «The immunities of members of parliament», report to the ASGP 1998, and «Privileges and immunities in parliament», presentation by Mrs Hélène Ponceau, Const. Parl. Inf. 55 (2005), 190.

[16] See the «Report on Parliamentary Privilege» by the Joint Committee on Parliamentary Privilege (2013).

of them are of a more critical nature, reflecting a growing tendency to question to what extent parliamentary immunity is still necessary and legitimate in a modern democracy.[17]

51. This is the background against which the Venice Commission has assessed the request from the Secretary General to give a general report developing criteria and guidelines on the lifting of parliamentary immunity in order to avoid the misuse of immunity as well as selective and arbitrary decisions, and in order to ensure adequate transparency of the procedure.

III. Non-liability

A. Comparative overview of rules on non-liability

52. The basic principle of parliamentary non-liability (freedom of speech) is to be found in almost all democratic parliaments of the world and the core of these rules is roughly the same, although there are substantial differences with regard to the scope of protection. This has been a stable principle for a long time, and in most countries there have not been any recent amendments to the relevant rules.

53. As a rule, this type of immunity essentially relates to "opinions expressed and votes cast in the discharge of parliamentary duties". It is perpetual in the sense that the protection enjoyed by the parliamentarian regarding the opinions stated in the performance of an electoral mandate is usually not extinguished when the mandate ends.

54. Non-liability normally protects parliamentarians against all sorts of external legal action, including criminal prosecution by state bodies as well as civil lawsuits. The law of some countries contains more specific provisions extending freedom from liability to all civil, criminal or administrative action or states that a member of parliament may not be subsequently pursued, arrested, detained or tried. In some countries, however, non-liability only applies to penal procedures.[18]

55. Rules on non-liability must be distinguished from rules on *internal disciplinary measures* within parliament itself, which are of a different nature, and which are usually not included in the concept of parliamentary immunity. Most parliaments have internal rules of procedure or codes of conduct (house rules) under which the members can be silenced or disciplinary sanctioned for certain forms of remarks or behaviour, although the nature of such sanctions vary greatly, from a call to order or curtailment of speaking time to reduction of remuneration, temporary exclusion, or in a few cases even stricter sanctions of a more penal nature. However there are also some parliaments where the rules on non-liability (freedom of speech) provide protection even against all or most forms of internal disciplinary measures.

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[17] See for example Frédéric Krenc «La règle de l'immunité parlementaire à l'épreuve de la Convention européenne des droits de l'homme», Revue trimestrielle de droits de l'homme, 55, 2003; Simon Wigley "Parliamentary Immunity: Protecting Democracy or Protecting Corruption?, The Journal of Political Philosophy 2003 pp. 23-40; Joseph Maingot and David Dehler "Politicians Above the Law. The case for the abolition of parliamentary inviolability" (2010); and Sascha Hardt "Parliamentary Immunity. A Comprehensive Study of the Systems of Parliamentary Immunity in the United Kingdom, France, and the Netherlands in a European Context" (2013).

[18] Bulgaria (Article 69 and 71 of the Constitution); Croatia (Article 75 paragraph 2 of the Constitution); Republic of Korea; Kyrgyzstan (Article 72 paragraph 1 of the Constitution); Lithuania (Article 62 paragraph 3 of the Constitution); Malta (Article 65 paragraph 3 of the Constitution); Slovakia (Article 78 paragraph 2 of the Constitution); Slovenia (Article 83 paragraph 1 of the Constitution); "the former Yugoslav Republic of Macedonia" (Article 64 paragraph 2 of the Constitution).

56. Internal disciplinary measures fall outside of the scope of the present study, and will not be covered in this report, though they are of course of relevance when assessing the actual freedom of speech of members of parliament.[19]

57. The scope of parliamentary non-liability can be addressed from different angles: the personal scope (protection for whom?), the temporal scope (when does the protection start and end?), and the substantive scope (what kind of acts and remarks are protected?).

Personal scope

58. The main beneficiaries of parliamentary non-liability are of course the parliamentarians themselves. This normally includes ministers who are also members of parliament (immunity for ministers who are not parliamentarians fall outside of this study). When there are two Chambers, non-liability normally applies to both, though an exception can be found in Germany for the Bundesrat. It may also be extended to members of parliaments of federate entities, such as for example the Landtage in Austria, Community and Regional Councils in Belgium.

59. In some countries rules on non-liability also apply to other persons taking part in parliamentary proceedings, thus protecting parliamentary activity as such, rather than just the elected parliamentarians. In Ireland, the Netherlands and the United Kingdom, non-liability for example also applies to persons taking part in parliamentary activities such as parliamentary inquiries or hearings of parliamentary committees, and in France it covers reports or documents printed by the National Assembly and the Senate. In general, when the personal scope of non-liability is broad, its material scope is limited: in the Netherlands and the United Kingdom, it applies only to parliamentary procedures. On the other hand, countries which provide for a broad material scope of non-liability generally limit its personal scope.

Temporal scope

60. In most countries, non-liability will take effect from the time of the beginning of the exercise of parliamentary duties, but in some countries it may take effect even from the proclamation of election results or the acceptance of the mandate (Greece, Italy). In Lithuania non-liability starts even earlier, and candidates for election to parliament enjoy non-liability even during the electoral campaign.

61. Parliamentary non-liability usually ends with the expiry of a member's term of office or the dissolution of parliament. However it will remain in force for words spoken and votes cast during the exercise of the mandate, so that no later legal action can be brought. In this sense non-liability is perpetual, in contrast to rules on inviolability, which normally just mean a suspension of immunity until after the expiry of the mandate.

Acts covered by non-liability

62. Non-liability always means that parliamentarians have absolute protection as regards the ballots in which they participate, whether in the chamber or in the parliamentary committees or sub-committees. It normally also extends to opinions expressed, whether orally or in writing, in parliament or in a parliamentary committee, or for acts performed on business assigned by the parliament in connection with their mandate.

63. The exact scope of non-liability and the acts which it covers may differ from country to country depending on the national rules and interpretation. The definition of what falls within the

[19] Rules on parliamentary non-liability and disciplinary measures do not in principle contradict each other. Non-liability has an outward focus, protecting the members against outsiders. Disciplinary measures are internal rules, applied by parliament itself. A combination of wide rules on non-liability with a strict internal regime may however create tension, and give a misleading impression of the actual level of freedom of speech enjoyed by the MPs.

scope of "performance of the mandate" or "parliamentary functions" varies from one state to another.

64. As a general rule non-liability will apply only to opinions and statements expressed in the exercise of the parliamentary mandate, but the precise scope of this limitation varies. In many countries, the place in which the contested statements were made is not relevant and it is sufficient that the expression takes place within the context of parliamentary activity., The privilege of special freedom of speech is therefore not limited in space, and applies to all remarks made by the member of parliament that are in some way related to the exercise of the parliamentary mandate, whether inside or outside of parliament, including appearances in the media or in public meetings and debates. On the contrary, in other countries, opinions must actually be expressed in Parliament, including in committees.

65. In countries such as Italy, the Netherlands and Portugal, non-liability extends to political opinions expressed also outside parliament. The same goes for Argentina, Belarus, Bulgaria, Israel, Latvia and Moldova, as well as other countries where non-liability protects parliamentary functions in a broad sense, such as Algeria, Andorra, Armenia, Bosnia and Herzegovina, Estonia, Finland, Georgia, Greece, Hungary, Portugal and Peru.

66. In other countries non-liability is only a special freedom of speech within the confines of the parliamentary buildings, including the plenary as well as committee rooms and other places of work. This is for example the case in Ireland and Norway, as well as in the UK, where the acts covered by non-liability are "proceedings in Parliament" as defined over the years by parliamentary jurisprudence. In Spain, non-liability does not apply to statements made in the context of meetings of parties or with constituents, private encounters or journalistic activities.

Substantive scope of non-liability

67. In some countries the freedom of speech guaranteed by non-liability is absolute, in the sense that it protects any kind of statement made in the course of parliamentary functions from external legal action.[20] This is the case, for example, in Brazil, Italy, Malta, Norway, Slovakia, Peru, Portugal and Switzerland.

68. In other countries parliamentary non-liability is relative and subject to certain restrictions, in the sense that some forms of remarks or behaviour are not wholly covered and may still be open to external legal proceedings. This typically applies to remarks that are considered to be particularly offensive, or which must be balanced against other interests, either of an individual or public nature. There is however no common model as to which categories are exempted, and there is great variety from country to country.

69. In many countries non-liability protects parliamentarians against charges of defamation or insult, but in some countries this is exempted, allowing for members to be sued on this basis in the same way as other citizens.[21] In other countries the protection offered does not cover hate speech and racist remarks, or threats, or incitement to violence or crime. In some countries

[20] Particularly offensive statements may however still often be subject to internal disciplinary measures.

[21] This is the case, inter alia, in Argentina (Article 66 of the Constitution); Belarus (Article 102 of the Constitution); Bulgaria (Article 107 of the Rules of Organisation and Procedure of the National Assembly); Germany (Article 46 paragraph 1 of the Basic Law, only for defamatory insults); Japan (Article 119/120 of the Diet Law).; Liechtenstein (Rule 22 (2) of the Rules of Procedure; Luxembourg (regarding the insults to the Parliament or its President); Mexico (Rules 105 and 107 of the Congress Internal Rules; the United Kingdom (in case of use of disorderly or unparliamentary expressions, Standing Orders 42 and 43 of the House of Commons Relating to Public Business; Ukraine (Article 80 of the Constitution) and Uruguay (Rules 73, 104 (H), and 106 (2) No. 6 of the Rules of Procedure of the Chamber of Representatives. The exception is valid only for defamation in Albania (Article 73 paragraph 1 of the Constitution); Greece (Article 61 of the Constitution); Latvia (Article 28 of the Constitution).

insult to the head of state is exempted, and in others criticism of judges. Some countries exclude disclosure of state secrets, or remarks that are considered treason. In most countries, however, such important categories are primarily protected by way of the internal regime of parliament, which opens up for disciplinary sanctions, but not for external legal action.

70. In some countries certain categories of remarks are in principle not covered by non-liability, but outside legal action may still only be brought with the consent of parliament, meaning in effect that non-liability has to be lifted.

Lifting of non-liability

71. In some countries non-liability is absolute and cannot be lifted, neither by parliament itself nor by any other institution. This applies, inter alia, to Belgium, the Netherlands, Norway, Portugal, Romania, Slovenia and Spain.

72. In other countries parliamentary non-liability can be lifted, usually by a decision of parliament itself. This is the case, in certain matters, in countries such as the Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Malta, the Netherlands, Poland and Ukraine.

73. In Denmark the proposal to lift non-liability may be made by the private individual who feels wronged by a statement made by a parliamentarian outside parliament, in the private sphere, although in practice the Folketing invariably withholds its consent to lifting non-liability in such cases. In Finland, the proposal to lift non-liability is made by the person competent to do so depending on the circumstances, such as a police officer, a prosecutor or a plaintiff, and the decision to lift non-liability is taken by a majority of 5/6 of votes cast in parliament. In Greece, the decision to lift non-liability is taken by the Chamber, which must decide within 45 days. In Hungary, the proposal to lift non-liability is submitted to the President of the National Assembly by the Prosecutor General, or by the competent court. The request is considered within 30 days by the Committee on Parliamentary Immunities and Incompatibilities. The decision is taken by the National Assembly without debate and requires a two-thirds majority of the votes of members present. In Malta, where, according to the common law system, there is no lifting of non-liability in the strict sense, the Speaker of the House refers to the Committee of Privileges any cases of "breach of privilege" or contempt committed "prima facie" against the Parliament. The Committee of Privileges was set up in order to investigate in each case whether a member had committed contempt or acts in excess of or in breach of his/her privileges. The Committee then refers the matter to the House, which has competence to either bring the person concerned to justice or impose its own disciplinary measures. In Germany, when "defamatory insults" are made, non-liability can be lifted in accordance with the rules on lifting inviolability.

74. While the competence to lift parliamentary non-liability normally rests with parliament itself, there are also some countries where this is decided by the courts. This includes the Netherlands, where such cases are decided by the Supreme Court of Cassation (Hoge Raad der Nederlanden).

75. In most countries parliamentary non-liability is considered a public privilege, which protects parliament as an institution, and which the individual members are therefore not at liberty to waive or renounce. In some countries, however, they may do so. In the United Kingdom a reform was adopted in 1996 allowing individual MPs the right to waive their privilege in cases of alleged slander or defamation. In countries where non-liability only applies to remarks made within parliament itself, such as for example Ireland, non-liability can in effect easily be waived by repeating the remarks outside of the building.

76. The various ways in which rules on parliamentary non-liability may be construed makes for three main models:

a) Unconditional non-liability, which covers all forms of expressions (within the exercise of the mandate), which it is not limited in any way and which cannot be lifted.

b) Non-liability limited by law (or by constitution), which does not, for example, apply to certain types of expressions that are deemed to be particularly reproachable. This may be libel, defamation, hate speech, treason, disclosure of state secrets, etc. There is no right for parliament, in specific cases, to moderate these limitations.

c) Non-liability that may be lifted by parliament itself, either based on established criteria or subject to parliamentary (majority) discretion.

77. Model (a) implies an absolute conception of non-liability, whereas models (b) and (c) imply a relative one. The difference is that under model (b) the case can be brought by outside actors (public or private) before the courts, which will then have the competence to decide on the scope of immunity, whereas under model (c) the decision whether or not to lift immunity rests with parliament itself.

78. Based on the overview, the substantive scope of freedom of expression for parliamentarians can be said to rest on three "pillars":

a) The substantive rules on freedom of expression in a particular country, including both national rules and Article 10 of the ECHR, which today offers all over Europe a wide protection of freedom of expression, particularly in the political sphere.

b) The substantive scope and content of national rules on non-liability.

c) The rules on lifting of non-liability.

B. Assessment of rules on non-liability

79. The Venice Commission considers that the freedom of opinion and speech of the elected representatives of the people is a key to true democracy. It is therefore appropriate that rules on parliamentary non-liability are to be found in all democratic parliaments, and that the basic principle is more or less the same in all countries, although with considerable variations as to the details of how it is construed and regulated.

80. The Venice Commission further notes that the core principle of parliamentary non-liability appears to be more or less uncontroversial and uncontested in most countries, although there may be discussions as to the exact scope and criteria. It is furthermore recognized in the case law of the European Court of Human Rights (ECtHR) that parliamentary non-liability pursues "the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary", and that such rules "cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court" for third parties under Article 6.[22]

81. On this basis the Venice Commission considers that there is little reason to question whether the core principle of parliamentary non-liability as such is sound and legitimate. It clearly is. It is however still of interest to discuss what the role and function of such a form of immunity is today, and how it should best be regulated in detail.

82. The principle of parliamentary non-liability was originally developed in historic times, as described above, when general freedom of speech was not necessarily guaranteed, and when

[22] See *A. v. United Kingdom*, 35373/97, 17 December 2002.

the members of parliament were often in particular need of protection both from the executive and the courts. Today the context is different, at least in modern democracies. Freedom of speech is today normally well protected both under national constitutional law and under international treaties. For the member states of the Council of Europe freedom of speech is covered by Article 10 of the ECHR. Since it was first formulated six decades ago, Article 10 has gradually been developed and extended so that it now offers very wide protection for freedom of speech, and in particular for any opinions voiced as part of public political debate.

83. On this basis one might question whether the main rationale behind national constitutional rules on parliamentary non-liability has now been covered by common standards of European law that national courts are bound to respect and apply.

84. The Venice Commission however considers that national rules on parliamentary non-liability are still a legitimate element of constitutional law, justified by the need to effectively ensure the particular needs for freedom of political debate in a democratically elected representative assembly.

85. First, it may be argued that parliamentary freedom of speech is so essential that it may legitimately extend substantively even beyond the protection offered by ECHR Article 10.

86. Second, the purpose behind parliamentary non-liability is to protect the democratic functioning of parliament itself, not that of the individual members. This differs somewhat from the protection offered by Article 10, which is an individual right. This means that in a given case the assessment of the legitimate scope of protection may differ somewhat.

87. Third, even if the ECHR had been widely recognised and effectively implemented as part of national law in most of the member states of the Council of Europe it can still not be taken for granted that it enjoys the same force and authority as national constitutional rules. Guaranteeing parliamentary non-liability at the constitutional level may therefore in practice ensure a more effective protection than that offered by Article 10.

88. Finally, Article 10 does not protect parliamentarians against legal proceedings being initiated. It is legitimate to protect parliamentarians against being involved in potentially endless legal disputes, whether initiated by the executive or by members of the public. The threat of such disputes may *de facto* limit the freedom of parliamentarians to express their views and therefore to exercise their mandate. Rules on parliamentary non-liability may in other words have the added effect of giving members of parliament a procedural protection against civil and criminal legal actions, and may thus protect them against legal harassment from political opponents, the executive and members of the public.

89. On this basis the Venice Commission considers that there is still a need for national rules on parliamentary non-liability even if the substantive scope of protection is today for the most part also covered by Article 10 of the ECHR.

90. Such parliamentary non-liability should however not extend beyond the purpose of protecting the democratic functions of parliament. In particular it should not extend to the private behavior and remarks of the member concerned. This distinction was laid down by the ECtHR in 2003 in the case of *Cordova v. Italy*, in which the Court found that it was in violation of Article 6 to deny an injured third party right of access to court in a case where a member of parliament had sent him ironic and derisive letters accompanied by toys. The Court found that such behaviour was “more consistent with a personal quarrel”, and that it would “not be right to deny someone access to court purely on the basis that the quarrel might be political in nature or

connected with political activities".[23] The decision by the Italian Senate to uphold immunity for the member concerned therefore "did not strike a fair balance between the requirements of the general interest of the community and the need to safeguard the fundamental rights of individuals".

91. The Venice Commission agrees with the functional approach taken by the Court in *Cordova* and other cases, which serves to limit the scope of parliamentary non-liability to opinions and remarks that are directly linked to the exercise of the parliamentary mandate.

92. This functional approach should also apply to the *personal* scope of non-liability in countries where this does not only cover the parliamentarians themselves but also other persons engaged in parliamentary activities. Such persons should only if at all be protected to the extent that this is strictly linked to parliamentary functions.

93. As for the *substantive* scope of non-liability, the Venice Commission notes that there are some countries in which protection is absolute and covers all forms of statements, while in others certain categories are exempted. There are however so many variations as to what kind of statements are covered or not that it is not easy to identify any main models. The Venice Commission considers that this is an issue which should primarily be left to the margin of appreciation of the national (constitutional) legislator. In countries where parliamentary non-liability protects particularly offensive remarks (such as for example hate speech or incitement to violence) against external legal action, there should however be a particular responsibility for parliament itself to censure and sanction this through internal house rules and disciplinary sanctions, in order to protect public and individual interests as well as international obligations.

94. In contrast to remarks and behaviour, the protection of non-liability for *votes* cast in parliament is usually absolute, as it should be. In recent years there has been increased awareness in many countries of the dangers of "vote-buying" and other forms of corruption linked to votes and decisions in parliament. This has also been an area of particular concern to GRECO. The Venice Commission would like to emphasize that the principle of absolute freedom of vote should of course not be seen as an obstacle to criminalizing such forms of corruption. In such cases the criminal offence is not the vote as such but the taking of the bribe, for which there is certainly no reason to protect the member concerned. This therefore falls under the category of "inviolability" (see below), and should not be seen as a question on non-liability.

95. The Venice Commission notes that parliamentary non-liability may in principle be absolute and unlimited. If however it is to be limited, this can be done in two different ways. One is to regulate specific exemptions. The effect is that legal action may be initiated before the courts, which will then have to decide whether the facts of the individual case apply to the stipulated exemptions (and, if so, to decide on it in accordance with relevant legislation, including ECHR Article 10). The alternative model is to have general non-liability as the main rule, but with a possibility for parliament itself to lift it.

96. The Venice Commission notes that both models are found in European countries in various forms, and sometimes in combination. For its part, the Commission considers that even though both models are legitimate, the better is the one under which limits to non-liability are laid down by law and subject to judicial review. If Parliament is to decide on whether or not to lift immunity, then this will necessarily be – or be seen as – a politicised process. It is preferable that any limits to the freedom of speech of parliamentarians are laid down in law and subject to judicial review. This should then obviously be a strictly judicial decision like all other decisions made by

[23] See ECtHR *Cordova v. Italy* 40877/98, 30 January 2003.

the judiciary, and it should be the task of the judge to examine whether the facts under consideration fall under non-liability as defined in the relevant legislation.

97. In countries where parliament has the competence to lift the non-liability of its members this should be exercised with great restraint, respecting the overriding concern of protecting the democratic functioning of parliament, and following the same procedural rules and principles as outlined below for cases of inviolability. The criteria for lifting (or not lifting) should be clear and concise and they should be laid down in law or in the parliamentary rules of procedure.

98. The Venice Commission considers that rules on parliamentary non-liability should by their nature not be limited in time (as long as the statement in question is made during the mandate). If non-liability is granted, it would be undermined if it were possible to bring legal charges against the parliamentarian once he or she has left office.

99. The Venice Commission notes that in most countries the individual member concerned does not have the right to waive the protection provided by non-liability, since this is seen as an institutional privilege for parliament as such. In other countries, such as the UK, it is however possible for a member to waive non-liability, at least in some cases. The Venice Commission considers that both models are legitimate. If however there is procedure under which parliament may lift non-liability, then at least the member concerned should have to right to request such lifting, even if the decision remains with parliament itself.

100. The Venice Commission notes that even if members of parliament are protected from external legal action for their opinions and remarks, they may still be subject to internal disciplinary sanctions by parliament itself. This is so in most national parliaments, and it is llegitimate as long as the sanctions are relevant and proportional and not misused by the parliamentary majority to infringe the rights and liberties of political opponents.

IV. Inviolability

A. Comparative overview of rules on inviolability

101. The concept of parliamentary “inviolability”, or immunity in the strict sense, covers all rules that in one way or the other protect parliamentarians from legal consequences following from alleged breaches of the law. In general it protects members of parliament from all forms of arrest and prosecution unless parliament consents.

102. Such rules are to be found in many European countries, although they are less wide-spread than rules on non-liability. They are also usually more narrowly construed and easier to waive or lift, usually by parliament itself. In some countries they are no longer used in practice, or they are very narrowly interpreted and applied. But in other countries they are still invoked in actual cases and form part of the operative constitution. Such cases are then often quite controversial.

103. In some countries there are no rules on parliamentary inviolability at all. In other countries there are only rules on inviolability in civil cases, while in criminal cases parliamentarians enjoy no special protection and are treated on equal terms with other citizens. This is the main rule in countries following the Anglo-Saxon model of parliamentary immunity, although with some modifications. In most European countries, however, members of parliament have at least some kind of special protection in some kinds of criminal cases. But there is no common model, and there is a great variety both as to what they are protected against and as to what kind of crimes this protection covers.

104. National rules on inviolability most often only apply to members of parliament, but in some countries they also extend to other holders of public office.[24] When members are appointed as government ministers they often (though not always) retain their immunity as parliamentarians, which in some cases may lead to complexity and uncertainty.

105. Rules on inviolability may cover protection against:

- arrest and detention
- investigation and searches
- prosecution
- criminal sanctions
- civil proceedings
- administrative actions

106. There are countries in which parliamentarians are protected against all of these potential consequences, at least for some offences. But in others they are only protected against some of them, in various combinations.

107. In the common law tradition there is often a long-standing rule that parliamentarians are protected against arrest and detention on their way to and from parliament or while attending parliament. The idea is that the executive should not be able to stop parliament from meeting by detaining the members. But this form of "immunity" is very limited in scope, and does not give protection against criminal investigations or prosecution or punishment.

108. In many countries the rules on inviolability provide protection for members of parliament against arrest, detention, prosecution and sanctions. But it might still be possible for the authorities to *investigate* alleged offences, including house or office searches, and to gather evidence for later prosecution after the end of the period of immunity. Countries in which the rules on immunity do not prohibit preliminary investigations include France, Portugal and Japan.

109. Countries where parliamentarians are immune also from investigation, including preliminary enquiries and house and office searches, include Albania, Austria, Belarus, Georgia, Russia, Italy and Ukraine.

110. In countries that have parliamentary inviolability as the main rule, there are often exemptions to this, stating that some acts are not covered. The three most common exemptions are:

- where the member of parliament is caught *in flagrante delicto*
- where the alleged breach of law is of a certain gravity (serious crimes)
- where the alleged breach of law is of a certain pettiness (minor offences).

111. These exemptions come in different forms. In some countries they apply directly, so that the public prosecutor may start investigations and proceedings in such cases. Whether the exemptions apply or not, for example whether there is actually a case of *in flagrante*

[24] GRECO has come across several national situations where a large number of holders of public office enjoyed similar inviolability as members of parliament. In one extreme case, this included most members of the judiciary, members of the State and regional executive power, members of the national and regional/local elected councils, members of several State administrations etc. In some cases, GRECO has recommended to reduce the categories of the holders of public offices benefiting from such immunities as no valid reason could be identified to maintain such situations.

delicto, will then be for the prosecutor to assess and for the courts to decide. In other countries the exemptions are for parliament to decide, in which case they function as criteria for the lifting of immunity.

112. The principle that parliamentarians should not be protected in cases where they have been caught *in flagrante delicto* is common to most countries that have rules on inviolability. This concept can however be interpreted and applied more or less broadly, and the criteria for what constitutes *in flagrante delicto* varies considerably.

113. Countries that have special rules on the situation where a member of parliament is caught *in flagrante delicto* include Austria, Bulgaria, France, Hungary, Portugal and Spain. In Germany, this rule even applies until the day after the offence was committed. Whether or not an act can be classified as "*in flagrante delicto*" usually rests with the courts, as for example in France and Spain. In these countries parliament may however suspend criminal proceedings before the courts if it considers that wrongful recourse has been had to the exemption.

114. In Hungary, Austria and Bulgaria, even if a member is arrested "in flagrante delicto" the subsequent proceedings nonetheless require the consent of the chamber concerned. In Azerbaijan, a deputy could see his or her immunity lifted by decision of the Parliament only if he/she has been caught at a place of crime.

115. GRECO has in the course of its work come across several situations where inviolability has been granted even if the offender was caught in flagrante delicto, which it has then criticised. The Inter-Parliamentary Union has on the other hand reported a case where this exemption was used as a loophole for arresting parliamentarians merely because they had participated in a demonstration that started peacefully but degenerated into violence.

116. In countries where exemptions to inviolability are related to the gravity of the alleged offence this can work both ways – either to exempt particularly serious crimes or on the contrary to exempt minor offences.

117. Countries in which rules on inviolability do not extend to serious crimes include Albania, Bulgaria, Croatia, Cyprus, Finland, Portugal, Slovenia, Brazil and Turkey. The threshold varies, and so do the way in which these exemptions are formulated, and how detailed the regulation is. But the basic idea is the same – that inviolability should not cover really serious crimes.

118. In other countries the rules on inviolability do not cover minor offences. In France, for example, offences resulting in administrative fines are not covered. In Luxembourg immunity does not prevent action being taken against a parliamentarian for petty offences for which the law does not prescribe detention and which do not constitute dishonourable offences. In other countries, such as Hungary and Portugal, petty offences are also covered by immunity even if they do not come under criminal procedure, in Romania only if they are of a criminal nature. In Germany, Kyrgyzstan, Latvia, Russia, Czech Republic, and Slovakia, immunity also extends to "any other restriction" or "administrative action" without any further clarification.

119. Another distinction as to the scope of inviolability that can be found in some countries is between:

- criminal offences related to the exercise of parliamentary functions
- "private" offences, that have no bearing on parliamentary functions.

120. Again, this distinction can be directly applicable, or just a criterion when assessing whether to lift immunity. In Norway, for example, the public prosecutor may start proceedings in any case against parliamentarians where the alleged offence does not cover the breach of a

"constitutional duty". In Austria, on the other hand, it is for parliament to lift immunity if the offence charged is manifestly unrelated to activities as a representative.

121. In contrast to non-liability, rules on parliamentary inviolability are almost always of a *temporal* nature. The idea is that justice should be merely delayed, not denied, and that legal proceedings may be instituted once the period of immunity is ended. The extent of this period varies. In some countries it is the parliamentary session in which the alleged offence is discovered. In other countries it depends on the period of office of the parliamentarian concerned, and will last as long as he or she is re-elected. If investigations and proceedings are delayed for a long time, it might of course later on be difficult to take up the case. GRECO has also observed some cases where the general rules on temporal limitations for bringing charges are not aligned with the rules on parliamentary inviolability, making it difficult or impossible to hold a parliamentarian that has served for a long time responsible. GRECO has recommended in such cases that the calculation of the time limit be suspended during the period in office of the mandate-holder concerned.

122. In a few countries inviolability may also cover parliamentarians after the end of their parliamentary mandate, which may in effect amount to life-long protection. This has been a cause of particular concern for GRECO, which has always criticised such practice.

123. In the last few decades there have been some main trends as regards the scope of parliamentary inviolability in Europe.

124. One trend is that many of the new democracies of Central and Eastern Europe opted for a relatively wide concept of parliamentary inviolability when they constructed their constitutional systems in the 1990s. In several of these countries inviolability has been widely applied in practice, and this has led to criticism, inter alia, that it hinders the fight against corruption.

125. In contrast, the trend has gone the other way in some of those Western European countries that have traditionally had wide rules on inviolability, including Austria, Belgium, France and Italy. In Italy article 68 of the Constitution was changed in 1993, making it possible to open criminal proceedings against members of parliament without prior authorization from parliament.[25] A similar reform took place in France in 1995, when Article 26 of the Constitution was changed, limiting the scope of inviolability to freedom of arrest, and opening up for investigations and criminal proceedings, as well as rationalising the lifting procedure. In Belgium authorisation is no longer required for ordinary investigative measures.

B. Comparative overview of rules on lifting of inviolability

126. Where there are rules on parliamentary inviolability, there are almost always also rules regulating how this can be *lifted*. The only exemptions to this are countries where the scope of inviolability is very limited, and for example only applies to freedom from arrest on the way to and from parliament, such as in Malta, Norway and Ireland. But in countries where the substantive scope of inviolability is wider it is always possible to lift it.

127. The competence to lift immunity in criminal cases almost always lies with *parliament itself*. This is a reflection of the underlying historical justification for immunity, which is to protect parliament against undue pressure from the executive and the courts. As long as this rationale is accepted and valid it is natural that only parliament itself can decide on the lifting of immunity.

[25] When an Italian magistrate opens a prosecution against a parliamentarian, he has to inform the Assembly concerned. The Assembly can then stop the proceedings, but only on the ground that the case is covered by the first provision of article 68 (non-liability), and the magistrate may bring this before the Constitutional Court, claiming that the Assembly unconstitutionally affects and prevents the exercise of his judicial functions.

128. Of the countries examined there are only a few in which the competence to lift immunity is not with parliament itself. In Andorra immunity (inviolability) can be lifted by the Penal Court sitting in plenary. In Chile the Court of Appeal of the relevant jurisdiction is in charge of the matter, and in Cyprus it is for the Supreme Court to decide.

129. In some countries the competence of parliament to lift immunity is laid down in the constitution, in others only at a lower level. To the extent that there is more detailed regulation, this is usually to be found in the parliamentary Rules of Procedure, which may cover both the substantive criteria and the procedure for lifting inviolability. In some parliaments these rules are very rudimentary, and leave a lot of discretion to the parliamentary bodies. This has been a cause of concern to GRECO, which has estimated that in approximately half of 49 countries examined there were either no rules on the criteria and procedures for lifting of inviolability, or these rules were clearly inadequate. The introduction of better guidelines at the national level has been a consistent recommendation of GRECO in a number of cases. It has often been specified that these guidelines need to provide for *specific, clear and objective criteria*; regulating inter alia the grounds for the lifting of the immunity, main elements of the procedure to be followed, timelines, guarantee of transparency and motivation etcetera. GRECO has never advocated any particular legal form, as the guidelines are normally part of the general internal rules of procedure of the assembly concerned. The important point has been to stress that the guidelines should have sufficient authority and stability to ensure over time a fair, objective and equal treatment of requests and individual cases concerned.

130. In some countries, however, the rules on lifting of parliamentary immunity are quite extensive, laying down in detail the criteria and procedures to be followed. This applies also to the Parliamentary Assembly of the Council of Europa and the European Parliament of the EU, which both have detailed rules on how to handle requests for lifting of immunity.

131. The basic feature when lifting inviolability is that parliament can decide *to give consent* to the instigation of investigations, arrest, detention or proceedings against a member. While this model is common to most parliaments in Europe, the further details vary significantly, both as regards the procedures and the criteria for lifting of parliamentary immunity.

132. The proposal or request to lift immunity most often comes from the prosecuting services, but in some countries it may also come from the injured party, the member concerned, or other parliamentarians (or party groups). In some countries such proposals have to be passed to the president of the assembly through the minister of justice or even the prime minister.

133. How parliament then deals with the request also varies considerably. In most countries this will be for an ad hoc or specialised parliamentary committee whose membership may vary in size and composition and whose function is to give an opinion after examining the case concerned. Parliament will then consider the proposal of the committee in a plenary session after (or without) debate, in closed (or public) session, followed by a secret (or open) ballot, decided by a simple (or qualified) majority.

134. In some countries parliament is required to deliberate cases of immunity within a prescribed time limit. If this time limit is exceeded without an explicit decision, this may in some systems be considered as a suspension of proceedings and therefore akin to a refusal.

135. The criteria for the lifting of parliamentary immunity also vary a lot.[26] In many countries this is in principle seen and treated as a mainly political decision, on which parliament has wide discretionary powers, and which cannot be overruled by any other institution.

[26] In a 1999 study on parliamentary immunity in the national parliaments of the member states of the European Union, the Directorate-General for Research of the European Parliament noted that there is “an extreme diversity

136. In practice, a number of criteria have nonetheless been established in a number of countries, in order to guard against making the decision of the majority appear entirely arbitrary. Such criteria may be of a more general or a more specific nature. As for general criteria, these can for example be that immunity should as a main rule be lifted if this is necessary in order not to manifestly obstruct the course of justice. As for more specific criteria these are often related to the distinctions described above – the seriousness and character of the alleged crime, whether there is a case of *in flagrante delicto* or not, and whether the alleged crime is in any way connected to parliamentary functions.

137. The criteria for lifting inviolability can be explicitly regulated in parliamentary rules of procedure, or they can be developed through case law or parliamentary practice. In France, for example, the Constitutional Court held in 1962 that a request for the lifting of immunity must be "serious, fair and sincere" and that the decision on lifting shall be based on no consideration other than the underlying facts presented in the request.

138. In many countries there is an explicit or underlying principle that requests for the lifting of immunity should be accepted in all cases except where there is cause to suspect the existence of *fumus persecutionis*, meaning an intention by someone to misuse the criminal legal system for political reasons and to prosecute the member unjustly.

139. In some countries the parliamentary committee handling the request for lifting of immunity will be expected to go into the merits of the case and to examine and decide in a preliminary way whether or not there is sufficient evidence against the parliamentarian concerned. In other countries there is a reluctance to do so, in order not to breach the principle of the presumption of innocence, as protected by national law and the European Convention on Human Rights.

140. In Turkey, parliamentary decisions on the lifting of the immunity can be appealed to the Constitutional Court within one week by the member concerned or any other member, in which case the Constitutional Court makes a ruling within 15 days.

141. Whether or not to lift parliamentary immunity is almost always considered specifically in each individual case, even though there may be established parliamentary practices for either granting or refusing such requests. However, it is also possible to envisage that parliamentary immunity may be *lifted on a general basis*, in advance of any specific cases, and with effect for all parliamentarians for a given period of time. This is an established practice in the German *Bundestag*, which regularly passes a decision at the start of each parliamentary period to partially lift the immunity of all members for the entire electoral period for any kind of criminal investigation and proceedings for all alleged crimes and offences, except for defamations of a political character. The stated purpose of this practice is to protect the reputation of the individual members of parliament, as it is considered that this might be negatively affected if each case of potential lifting of immunity has to be assessed on the merits of the case. The German Bundestag, however, retains the right to reinstate immunity in the individual case.

142. The formal rules on lifting of inviolability do not necessarily say anything about how this works *in practice*. Here again there appears to be great diversity from country to country, both as regards the number of requests made and the ratio between requests that are granted or denied. The Venice Commission does not have a full empirical overview. But data collected by the European Parliament shows that there are great differences in the approach taken by

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of criteria and interpretations used in making decisions on immunity, which are sometimes contradictory and not always properly worked out or systemised. In some cases, the absence of fixed criteria is even presented as a demonstration of the sovereignty of parliament, which is thus seen as entitled to look at each specific case on a discretionary basis, without being subject to rigid, predetermined principles", cf. p. 149.

various national parliaments.[27] In the Czech Republic, Slovakia and Lithuania, for example, the number of granted requests tends to approach the number of requests made. In Spain there is also a fairly liberal practice for granting requests to lift inviolability – while practice in Portugal and Slovenia is more strict, with more requests denied than granted. Greece stands out as the most restrictive country – in the period 2000-2009 only 31 requests to lift immunity were granted out of a total of 220.

143. The European Parliament has over the years had to decide on a number of requests for lifting of immunity for the MEPs. Between 1979 and 2009 a total of 157 such cases were discussed in the plenary, out of which immunity was lifted in 45. The number of cases where immunity is lifted is however on the rise. In the period 2004-2009 the EP lifted immunity in 24 of the 44 cases where this was requested.[28] This extensive case load has led the EP to develop quite detailed procedures and criteria for handling requests for lifting of immunity, and there is even a special handbook on the subject for the members of the Committee on Legal Affairs.[29]

C. Assessment of rules on inviolability

144. The Venice Commission notes that inviolability against arrest, detention, investigation and prosecution in cases where there is an alleged criminal offence is the most problematic and controversial part of the concept of parliamentary immunity.

145. On the one hand, there are rules on this in a number of European countries, and this is clearly an established part of the European constitutional tradition. These rules for the most part go back a long time in history, and even if they are today rarely invoked in most countries, they still form part of constitutional law. There are no common international or European rules that prohibit such inviolability.

146. On the other hand, such rules on inviolability are problematic for several reasons. First, any kind of criminal inviolability is per se a breach of the principle of equality before the law, which is a core element of the rule of law. The maxim “Be you ever so high, the law is above you” becomes “If you are a Member of Parliament, the law cannot touch you”.

147. Second, rules on parliamentary inviolability are clearly open to misuse by persons who have broken the law and seek shelter behind their parliamentary status. At worst, such rules can function as an incentive for persons who have committed crimes to seek parliamentary election, as confirmed in evaluations done by GRECO.

148. Third, such rules may by their very existence contribute to undermining public confidence in Parliament as an institution and to create contempt for politicians and for the democratic political system as such.

149. Fourth, parliamentary procedures for lifting immunity may give rise to problems of principle. It is difficult for a parliamentary committee to assess such lifting without going into the details of the specific case. One problem with this is that it may give political opponents in Parliament the chance to investigate and look into private information of the member concerned. Another even more problematic aspect is that it is difficult to assess whether immunity should be lifted without going into the merits of the criminal charges and forming at least a preliminary opinion. In practice this may come into conflict with the principle of presumption of innocence, as protected by the ECHR, and it may be perceived by the public

[27] Cf. “Non-liable? Inviolable? Untouchable? The challenge of parliamentary immunities. An overview” (OPPD 2012) p. 20.
[28] Ibid p. 33.
[29] Cf. “Handbook on the incompatibilities and immunity of members of the EP” (2009).

and the media as a kind of political judgment on the question of guilt. This is also in breach of fundamental principles of separation of powers, under which it is for the courts alone (and certainly not for a political assembly) to assess individual cases of criminal responsibility.

150. Finally, a parliament is a political institution composed of representatives of political parties, and parliamentary procedures for lifting immunity may always be subject to political considerations that are not consistent with an objective and impartial approach. Depending on the political circumstances, this may lead both ways – either that inviolability is lifted in cases where the allegations are clearly unfounded, or that inviolability is maintained in cases where the member concerned has clearly broken the law. The latter has been a particular concern of GRECO, which has observed in several cases a clear reluctance of parliamentarians to expose a member of their chamber to proceedings even in case of allegations of serious misbehaviour such as related to bribery, trading in influence or other mechanisms used in practice to prosecute such offences (abuse of power, breach of duties, (accessory to) embezzlement).

151. This does not mean that national constitutional rules on parliamentary inviolability are contrary to general principles of the rule of law and the separation of powers. Such rules clearly exist in a number of countries, where they form part of national constitutional law and are seen as part of the system of "checks and balances", and more precisely of the protection of Parliament against intrusions of the other branches of government

152. The main historical justification for having rules on parliamentary inviolability is to protect the workings of parliament as an institution from undue pressure from the executive (the King), including pressure from the public prosecutor, as a part of the executive power. This justification also extends to protecting the parliamentary opposition, usually in a minority, against undue pressure from the ruling majority. It furthermore protects members of parliament from political harassment from other parties, for example in the form of unsubstantiated criminal complaints from political opponents.

153. The Venice Commission notes that in most modern European democracies these justifications for parliamentary inviolability do not appear to be unproblematic. In an established democratic system it is not very likely that the government would try to attack the workings of parliament as an institution by bringing unsubstantiated criminal charges against the members, and if this should happen, then parliament as an institution normally has far better and more effective means of defence than relying on criminal inviolability. Furthermore there are also legal and political norms and standards in any well-functioning democracy that effectively hinder the political majority from misusing the criminal legal system against individual political opponents. Rules and principles on the independence and impartiality of the judiciary and the public prosecuting authorities are much more important and relevant in this regard than old rules on parliamentary immunity.

154. At the same time, the Venice Commission recognises that not all democratic systems always function like this, and that there might still in some countries be a pressing need of the protection offered by rules on parliamentary inviolability against misuse of the legal system. In some countries that are still in transition towards real democracy, or where democracy is still relatively new and fragile, there are experiences with cases in which the police or prosecutorial powers have been used to discredit, punish or destroy political opponents, including members of parliament. Nor is it always the case that in every state the judicial power can be trusted to act independently and not be unduly influenced by the executive. Members of parliament, and especially of the opposition, may, in some countries, be vulnerable to political harassment in the form of unfounded legal allegations, in a way that ordinary citizens are not.

155. In such circumstances, the Venice Commission believes that there might still be some justification for maintaining the institution of parliamentary inviolability, and for invoking this in particularly problematic cases. However, such rules on immunity should be construed in a

restrictive manner, and they should not be applied in practice unless there are compelling reasons to do so in the individual case.

156. However, the Venice Commission would emphasise that rules on inviolability are *not a necessary part* of national constitutional law. There are many well-functioning democratic systems in which there are no such rules at all, or where at least they have not been applied for a long time. It is certainly possible, and indeed even perhaps preferable, for a national parliament *not* to have such rules – as the negative aspects may easily outweigh the potential benefits. The Commission notes that the tradition in the German Bundestag of collective lifting of immunity for the entire electoral period illustrates this point.

157. Furthermore, the Venice Commission considers that in countries that do have rules on inviolability for parliamentarians in criminal cases, these rules should not go beyond what is strictly justified for legitimate purposes. Consequently they should be construed, interpreted and applied in a restrictive manner. The criteria both for establishing and lifting immunity should be regulated in a clear and precise manner, and the procedures should be as transparent and open as possible, so as to ensure that they are not misused for political purposes.

158. Rules on inviolability should however always be construed in a restrictive manner, and they should not be applied in practice unless there are compelling reasons to do so in the individual case. Under no circumstances should there be absolute and unconditional inviolability for all kinds of criminal offences. Such rules should always be subject to exemptions, and there should always be the possibility of lifting immunity, following clear and impartial procedures.

159. While rules on inviolability may protect against arrest, detention and prosecution, the Venice Commission considers that they should under no circumstances protect against preliminary *investigations*, as long as these are conducted in a way that does not unduly harass the member concerned. Indeed investigations may be crucial to establishing the facts of the case, and they have to be conducted while the case is still fresh, and not years later, after the expiry of the period of immunity.

160. The Venice Commission also supports the general principle that parliamentary inviolability should always be of a temporal nature, and function as a suspension, not as an absolute obstacle. In general it should be sufficient that immunity only lasts throughout the parliamentary term in which the allegations are made. A rule that a member may keep his or her immunity as long as he or she has a seat in Parliament may have the negative effect of creating an incentive to stay in parliament in order to escape prosecution.[30]

161. The Venice Commission considers that it should always be possible to lift parliamentary inviolability. The wider the scope of inviolability, the greater the need for this. Under no circumstances should there be absolute and unconditional parliamentary inviolability for all kinds of criminal offences. Rules on inviolability should always be subject to exemptions, and there should always be the possibility of lifting, following clear and impartial procedures.

162. The Venice Commission in general considers that there should be a basic presumption that inviolability *should be lifted* in all cases in which there is no reason to suspect that the charges against the member concerned has been politically motivated. Inviolability should only apply in cases where there is reason to suspect a partisan-political element in the decision to prosecute the parliamentarian concerned. The Venice Commission agrees with the statement made by the late Professor Sir Neil MacCormick that:

[30] On the other hand, if parliament has adopted a decision to *lift* immunity, then this should stay in effect even if the member concerned is elected for a new term.

> *… immunity should not be a shield that protects any MEP from exposure to the general criminal law in its bearing on his/her private or business activities. This latter qualification can itself only be negated where there is some real, serious and demonstrated partisan-political element in the decision to prosecute, aimed at disabling the MEP from effectively carrying out her/his mandate.*[31]

163. As for other substantive criteria for lifting inviolability, the Venice Commission considers that these should be regulated in more detail and clarity than often appears to be the case in many countries. Such criteria should include the lifting of protection for cases where the member concerned has been caught in flagrante delicto. Furthermore it should be possible to lift inviolability in cases concerning particularly *serious crimes*, as is the case in a number of countries. It should also be possible to lift immunity in cases where the alleged offence is unrelated to any kind of parliamentary function.[32]

164. The Venice Commission also considers that it should preferably be possible for the member concerned to *waive* inviolability and to insist on having the case considered by the ordinary public prosecutor and if need be by the courts. Even if this is not a legal requirement under Article 6 of the ECHR, as pointed out by the Court in Kart v. Turkey,[33] it is still preferable from a best model perspective to give the person concerned the possibility to have the allegations examined by the judicial system.

165. The Venice Commission recognises that under the European constitutional tradition it is almost always for *parliament itself* to assess and decide on the issue of lifting, most often by majority voting in the plenary, prepared in committee. There are reasons for this. But there are also disadvantages. Even if the parliamentary procedures are applied as neutrally as possible, parliament is still a political institution, and the members are politicians, not impartial judges. It is inescapable that a parliamentary procedure will be more politicised than a judicial one.

166. The Venice Commission therefore considers that it might be an idea to construe the parliamentary procedures for lifting of immunity in such a way that politically neutral and competent *outside experts* are brought in to assist in the assessment (though not with voting rights). Such experts may for example be chosen from academia, retired judges or other people of undoubted integrity and independence. It is granted that such a mechanism does not appear to exist at present in any of the countries studied. But it might be something to consider. It could be done in various ways, and in most countries it would be sufficient to regulate this in the parliamentary rules of procedure.

167. Furthermore the Venice Commission takes the view that the parliamentary *procedures for lifting* of immunity should in any case always be regulated in some detail, and that they should respect basic procedural principles, such as clarity, transparency, predictability, objectivity, non-arbitrariness and rights of both parties to be heard. As for transparency, the decision should be

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[31] Cf. written note by Professor Sir Neil MacCormick (MEP) "On parliamentary immunity in the European Parliament", presented at a public hearing by the Committee on Legal Affairs, 29 November 2005. MacCormick had himself served as a member of this committee, and had extensive experience with handling requests for lifting of immunity.

[32] GRECO has observed on occasions that it can be difficult to distinguish acts committed in relation to parliamentary functions from those committed in connection with other official duties, for example as a member of a local elected body or as a locally elected executive. In such situations, GRECO has pointed to the need to clarify with appropriate criteria the extent to which an act is connected to official functions of a parliamentarian and thus whether the inviolability of that member applies and can/needs to be lifted. Such criteria can be useful for the prosecutorial bodies themselves, to prevent lengthy hesitations and consultations.

[33] Application no. 8917/05, 3 December 2009.

publicly available, and it should indicate the grounds on which it is based, while at the same time respecting the confidentiality of the criminal investigations and the persons concerned.

168. The Venice Commission furthermore considers that the parliamentary body handling a request to lift inviolability should not make a legal examination of the case as such. In particular it should not under any circumstances pronounce itself on the guilt or otherwise of the member concerned, or on whether there is justification for criminal prosecution. The decision should be based on the facts and merits of the case as submitted by the authorities and the member concerned, and not on other political and outside considerations. The procedures should be simple enough to be applied consistently and to be understood by the public at large,[34] and the decision should be adopted without undue delay.[35] Furthermore there should preferably be one single decision whether to uphold or lift immunity in a given case, so that the prosecuting authorities should not have to apply repeatedly for every step of the proceedings.[36]

169. In some national systems there is a rule that if parliament has not decided on a request for lifting immunity within a certain deadline, then it should be considered to be denied. While this may guarantee a swift procedure, and ensure against deadlock, the Venice Commission considers that this is still not a good solution, as it may easily contradict other basic procedural requirements, such as transparency, rights of defence, impartial treatment and etcetera.

170. When regulating the criteria and procedures for lifting parliamentary inviolability at the national level, the Venice Commission considers that particular attention should be paid to the rules and guidelines developed by the European Parliament. There are several reasons for this. First, these rules and guidelines are qualitatively better than those found at the national level in most European countries. Second, they are the result of quite extensive practice, as the EP has over the years had to assess a large number of requests for the lifting of inviolability. Third, the rules and guidelines of the EP can today be seen to reflect a certain level of consensus at the European level on how inviolability should be handled, as confirmed also by the fact that the Parliamentary Assembly introduced similar rules in 2003.

V. Criteria and guidelines for lifting parliamentary immunity

171. This report is the response to a request by the Secretary General of the Council of Europe that the Venice Commission should "develop criteria and guidelines on the lifting of parliamentary immunity in order to avoid the misuse of immunity as well as selective and arbitrary decisions and in order to ensure adequate transparency of the procedure".

172. The Venice Commission agrees with the implied argument in the request that the time has come for the institutions of the Council of Europe to draw up and promote criteria and guidelines for regulating the scope and lifting of parliamentary immunity at the national level. The basic aim of such common European standards should be to strengthen democratic

[34] GRECO has come across several examples in practice that the national parliamentary procedures for lifting immunity have been very complex, involving a number of actors, and creating unnecessary obstacles and confusion. In such cases it has recommended review with view to simplification. In particular it has considered ineffective a system under which the prosecuting authorities have had to apply repeatedly for the lifting of immunity for every single step in the proceedings

[35] GRECO has sometimes had misgivings about lengthy proceeding. It has however never gone so far as to determine an ideal timeline, as this depends on the specific circumstances (the way sessions are planned and the way decision-making processes are organised etc.).

[36] GRECO has come across several examples of the prosecuting authorities having to apply for the lifting of immunity for every step of the proceedings (the preliminary investigation, the subsequent judicial investigation, the application of custodial measures, the prosecution, the detention). This can clearly hinder the effective and consistent treatment of the case.

legitimacy and transparency as well as the rule of law, and to prevent misuse of immunity. Such criteria and guidelines can to a large extent be based on the rules and practices already in place at the European level in the European Parliament and the Parliamentary Assembly.

173. Rules on parliamentary immunity should build on the basic distinction between non-liability and inviolability.

A. Criteria and guidelines for non-liability

174. Freedom of opinion and speech for the elected representatives of the people is a key to true democracy. It is therefore appropriate that rules on parliamentary non-liability for votes cast and opinions expressed in the performance of parliamentary duties are to be found in all member states of the Council of Europe, as well as in all other democratic parliaments in the world.

175. There are some countries in which parliamentary non-liability is *absolute*, in the sense that it covers all statements made by the members with relation to their parliamentary functions, and that it cannot be lifted, even by parliament itself. This is a legitimate model, which does not require detailed criteria or guidelines.

176. In other countries parliamentary non-liability is subject to certain *limitations*. This may also be legitimate, provided that the freedom of speech and opinion enjoyed by the members of parliament is still wide enough to ensure that they can faithfully and fearlessly exercise their democratic functions. The freedom of vote should be absolute, provided that it does not limit the power and the duty to hold members of parliament liable for acts of corruption.

177. Parliamentary non-liability may be limited (a) through specific exemptions (substantive limitation) or (b) through a possibility for parliament to lift it (procedural limitation).

178. The Venice Commission considers that both models are legitimate but model (a) is preferable since it means that limits to non-liability will be laid down by law and subject to judicial review.

179. Substantive limits on the freedom of speech of parliamentarians should apply only if at all to statements of a particularly grave nature, and should always be weighed against the overriding requirement of ensuring free political debate in parliament.

180. If parliament is given the competence to lift the non-liability of its members, then this should be exercised with great restraint, and following the same procedural rules and principles as outlined below for cases of inviolability.

181. The protection of parliamentary non-liability should by its nature not be limited in time, but remain in place after the parliamentarian has left office.

182. The non-liability of members of parliament should not extend to opinions or behaviour that does not have a direct link to their parliamentary functions.[37]

183. Non-liability should not exclude internal disciplinary sanctions in parliament, as long as these are clear and proportional, and not misused by the parliamentary majority.

[37] Cf. the case law of the ECtHR in Cordova vs. Italy (2003) and other cases.

B. Criteria and guidelines for inviolability

184. The Venice Commission considers that rules on parliamentary inviolability are not a necessary part of modern democracy. In a well-functioning political system, members of parliament enjoy adequate protection through other mechanisms, and do not need special immunity of this kind.

185. The Venice Commission however recognises that rules on inviolability may in some countries fulfil the democratic function of protecting parliament as an institution, and in particular the parliamentary opposition, from undue pressure or harassment from the executive, the courts or from other political opponents. Rules on parliamentary inviolability may therefore be justifiable where other means of protection of members of parliamentary are not adequate. But they should always be construed and applied in a restrictive manner. Such rules should be subject to limitations and conditions, and there should always be the possibility of lifting immunity, following clear and impartial procedures.

186. Countries that have rules on parliamentary inviolability should assess these, in order to evaluate how they function and whether they are still justified and appropriate in a present day context, or whether they should be reformed. If a country chooses to maintain such rules, then these should preferably be revised to take into account the following criteria and guidelines.

Criteria for regulating the scope of parliamentary inviolability

187. National rules on parliamentary inviolability should:

- be subject to limitations laid down in law or parliamentary rules of procedure
- be of a temporal nature, so that proceedings can be brought at a later stage
- be possible to lift, following clear and impartial procedures
- not protect against preliminary investigations of the case concerned
- not apply if the member is caught *in flagrante delicto*
- not apply to particularly serious criminal offences
- not apply to minor or administrative offences.

Criteria for assessing whether parliamentary inviolability should be lifted:

188. When determining whether parliamentary inviolability should be lifted or not in a given case the following criteria should be taken into consideration.

Criteria for maintaining inviolability:

- when the allegations are clearly and obviously unfounded
- when the alleged offence is an unforeseen consequence of a political action
- when the allegations are clearly brought for partisan-political motives (*fumus persecutionis*) in order to harass or intimidate a member of parliament or interfere with his or her mandate
- when legal proceedings would seriously endanger the democratic functions of parliament or the basic rights of any member or group of members.

189. *Criteria for lifting inviolability:*

- when the request for lifting is based on sincere, serious and fair grounds
- when the member concerned is caught in flagrante delicto
- when the alleged offence is of a particularly serious nature
- when the request concerns a criminal conduct which is not strictly related to the performance of parliamentary functions but concerns acts committed in relation to other personal or professional functions
- when proceedings should be allowed in order not to obstruct justice
- when proceedings should be allowed in order to safeguard the authority and legitimacy of parliament
- when the member concerned requests that immunity be lifted

190. In any given case the relevant considerations should be weighed against each other. If the request is based on sincere and serious grounds, and if there is no reason to suspect *fumus persecutionis*, then there should be *a strong presumption in favour of lifting inviolability*. The basic test should be that inviolability should only be maintained in cases where this is justified with reference to specific considerations and proportionate and necessary in order to safeguard the effective democratic workings of parliament or the rights of any member or group of members.

Guidelines for regulating the procedure for lifting parliamentary inviolability

191. Rules on parliamentary inviolability should always include procedures prescribing how this may be lifted. Such procedures should be clearly regulated and should comply with general principles of procedural law, including rights of both parties to be heard. They should be comprehensive, clear and predictable, and the procedure should be transparent and known to the public. At the same time, such procedures should not be made to resemble judicial proceedings, and under no circumstances should they assess the question of guilt, which is for the courts alone to decide. The procedures should always respect the principle of the presumption of innocence, as protected by the ECHR.

192. Countries revising their rules on inviolability should consider whether the competence to lift such immunity should remain with parliament, or whether such cases may preferably be subject to judicial review, leaving it to the courts (or to the constitutional court) to determine wholly or partially the scope and application of parliamentary inviolability.

193. If the competence to lift inviolability remains with the national parliament, then the procedures for this should be reviewed, in order to evaluate how they function and whether they live up to present day requirements, or whether they should be reformed. Inspiration in this regard may be drawn from Rule 7 of the Rules of Procedure of the European Parliament[38] and Rule 66 of the Rules of Procedure of the Parliamentary Assembly of the Council of Europe. [39]

[38] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20140203+RULE-007+DOC+XML+V0//EN&language=EN&navigationBar=YES.
[39] http://assembly.coe.int/nw/xml/RoP/RoP-XML2HTML-EN.asp?id=ENtoc_N0A29C3B0N13FA46F0#Format-It.

194. National procedures on lifting of inviolability by parliament may include the following elements:

- the right to request lifting of inviolability should be given to the ordinary prosecution services, to the member concerned, and to those that are directly and individually affected by the alleged offence,
- the request should be announced in the plenary and referred to the committee responsible,
- the request should be assessed either by an appropriate standing committee or by a special committee, reflecting the political composition of parliament,
- the committee responsible should if possible seek assistance from outside experts that are of undoubted integrity and independence. Such experts should preferably be chosen on a general basis, at the start of each parliamentary period,
- the committee should consider the request for lifting inviolability without any delay, but with regard to the relative complexity of each case,
- the committee should have the right to ask the competent authorities for any information or explanation that it deems necessary in order to assess the case,
- the member concerned should have the right to be represented, either by another member or by outside counsel,
- the member concerned should have access to the documents of the case, and should have the opportunity to be heard and to present any document or other form of evidence deemed by the member to be relevant,
- the committee should consider the request for lifting inviolability behind closed doors, and without the member concerned present,
- the committee should respect the need for confidentiality both with regard to information of a personal nature and information which if made public may obstruct the course of justice,
- the committee should assess the case on the basis of the relevant and established criteria, the arguments put forward by the parties, and the facts of the case, and not on any other considerations,
- the committee should not make any examination of the merits of the case in question and should not, under any circumstances, pronounce on the guilt or otherwise of the member concerned, or on whether or not the allegations made justify prosecution,
- the committee should make a proposal for a reasoned decision on whether to lift or maintain inviolability, making clear the criteria on which the conclusion is based,
- the proposal of the committee should include all aspects of the request, and should consider whether inviolability may be lifted partially, and from what sorts of legal action the member should be immune (arrest, detention, prosecution or punishment), as well as the duration of any form of inviolability. In the event of a request relating to more than one alleged offence, each of these should assessed separately,
- the proposal of the committee should be considered and decided by the plenary at the earliest opportunity and without any delay. The plenary session should be open and discussions should be confined to the arguments for and against the proposal,

- the decision on whether or not to lift inviolability should be legally binding on all parties.

VI. Concluding remarks

195. The Venice Commission agrees with the position implied in the request from the Secretary General that time has come for the institutions of the Council of Europe to formulate and promote criteria and guidelines for regulating parliamentary immunity at the national level. The basic aim of such common European standards should be to strengthen democratic legitimacy and transparency as well as the rule of law, and to prevent misuse of immunity.

196. Parliamentary immunity is a very old and traditional institution, which to some extent is based on considerations that no longer apply in modern well-functioning democracies. To the extent that such rules are kept today, they should be based on present day requirements and they should comply with the requirements of the ECHR and common European principles and standards.

197. On this basis the Venice Commission in general recommends that all countries of the Council of Europe take a fresh look at their rules and practices with regard to parliamentary immunity in the light of the criteria and guidelines set out in this report.

198. The Venice Commission considers that rules on parliamentary *non-liability* (freedom of speech and opinion) are in general well-founded, and that there appears to be little need for reform of such rules in most of the countries that have been examined. Non-liability should however only apply to opinions expressed and votes cast in the exercise of parliamentary functions, and should not extend to private statements and behaviour of the members.

199. In contrast, the Venice Commission considers that national rules on parliamentary *inviolability* and its lifting should be subject to critical review and reassessment. Such rules may still be legitimate, but they are not a necessary part of a well-functioning modern democracy, and they can be misused in ways that may undermine democracy, infringe the rule of law and obstruct the course of justice.

200. To the extent that national rules on inviolability are maintained, they should therefore be regulated in a restrictive manner, and it should always be possible to lift such immunity, following clear and impartial procedures. Inviolability, if applied, should be lifted unless when this is justified with reference to the case at hand and proportional and necessary in order to protect the democratic workings of parliament and the rights of the political opposition.

201. The Venice Commission considers the detailed rules and procedures on the scope and lifting of parliamentary immunity in the European Parliament and the Parliamentary Assembly of the Council of Europe to be of particular interest, as they reflect a common European consensus on how these difficult issues may best be regulated. These rules and procedures should therefore serve as an inspiration also at the national level.

202. On this basis the Venice Commission has set out its proposals for criteria and guidelines on the scope and lifting of parliamentary immunity, which may be of assistance to the Council of Europe as well as to the member states, if and when they should attempt to revise their rules.

203. The Venice Commission remains available for further consultations on this important subject, whether on a general level or on a country-specific basis.