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Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly

Report¹
Committee on Rules of Procedure, Immunities and Institutional Affairs
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Summary

¹ Reference to committee: Doc. 13621, Reference 4092 of 17 November 2014.

A. Draft resolution²

1. Even if it can rely on an age-old democratic tradition and stable institutions, no parliament of a Council of Europe member state can consider itself immune in absolute terms to possible attacks on its sovereignty and integrity or on the independence and freedom of expression of its members in the exercise of their mandate.
2. The Parliamentary Assembly recognises that, despite a common constitutional tradition, the system of parliamentary immunities is deeply steeped in the traditions and the political culture specific to each country and varies considerably in Europe, whether in terms of its nature, scope or existing parliamentary practices. Almost all Council of Europe member states grant their elected politicians parliamentary immunity deriving from the need to protect the very principle of representative democracy.
3. The Assembly reiterates that the primary purpose of parliamentary immunity, in its two forms – non-liability and inviolability – lies in the fundamental protection of the parliamentary institution and in the equally fundamental guarantee of the independence of elected representatives, which is necessary for them to exercise their democratic functions effectively without fear of interference from the executive or judiciary.
4. The system of non-liability is generally extremely stable in the member states. In theory and as a matter of principle, non-liability is absolute, permanent and perpetual in nature. It exempts members of parliament from legal proceedings for acts carried out, statements made, votes cast or opinions expressed in a parliament or in the discharge of their parliamentary duties.
5. Inviolability is a special form of legal protection enjoyed by members of parliament, whereby certain legal measures, such as arrest, detention or prosecution, may not be taken against them for acts unrelated to their parliamentary duties without the consent of the parliament of which they are members, except where they have been caught committing an offence or have been handed a final conviction. It is temporary in nature and applies only for the duration of the term of office, so that it can always be waived. There are significant differences between member states regarding the nature and degree of protection granted by the rules to members of parliaments in member States.
6. Since the adoption of Resolution 1325 (2003) on immunities of members of the Parliamentary Assembly, the political situation in Europe has changed and criticism has been voiced in civil society in the name of the principle of the equality of everyone before the law and calling into question some forms of immunity, which are condemned as granting members of parliament rules ensuring their virtual impunity.
7. The absolute protection of the acts and statements of members of parliament, especially as far as hate speech is concerned, does indeed pose a problem in the present situation in view of the rise of extremism and nationalism against the backdrop of an upsurge in terrorism and the migration crisis. The Assembly notes and welcomes the fact that in some states insulting or defamatory utterances, incitement to hatred or violence or, in particular, racist remarks are not covered by non-liability rules.
8. Similarly, parliamentary immunity may be open to misuse and the obstruction of justice, especially in connection with the fight against corruption under way in many states. The Assembly notes, like the European Commission for Democracy through Law (Venice Commission), that the existence of such a system of immunity may undermine public confidence in parliament and discredit politicians.
9. The Assembly welcomes the development and consolidation of the rule of law and democratic societies in Europe, which have reduced the need for parliamentary inviolability, which is now no longer considered an imperative form of protection and is restricted in scope by some member states. The establishment of the pan-European system of human rights protection combined with the effectiveness of the judicial system is today supposed to protect a member of parliament from any harassment, undue pressure or wrongful accusation.
10. The Assembly is concerned about the interpretation which could be given to the position taken by the Venice Commission in 2014 in which it called on states “that have rules on parliamentary inviolability” to revise them “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”. It wishes to emphasise that the entrenchment of a genuine and stable culture of democracy throughout the European continent presupposes the consolidation

² Draft resolution unanimously adopted by the Committee on 17 May 2016.

of a culture of political alternation, the transparency of political life and respect for the rights of the political opposition in all states. This stage has not yet been reached in some of the youngest democracies in Europe 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”. Moreover, in the abovementioned context, the desire of incumbent governments to stay in power is reflected in successive changes in the electoral laws and amendments to the constitution aimed at weakening the opposition.

11. The Assembly notes that parliamentary inviolability continues to fulfil its original fundamental role in countries that do not provide their parliamentarians with adequate means of protection, especially because their judicial and criminal justice system provides insufficient safeguards. In general terms, protecting members of parliament against any judicial action based on the intention to harm their political activities constitutes an important safeguard for the political minority and a means of protecting the opposition. Therefore, the Assembly condemns methods of exerting political pressure that take the form of opening or re-opening proceedings against members of parliament with no connection to their parliamentary mandate whatsoever, such as taxation matters, or instituting criminal proceedings against members of their family. Accordingly, it reaffirms the need to maintain a system of inviolability that, as the European Court of Human Rights has pointed out, makes it possible to prevent “*any possibility of politically motivated criminal proceedings (fumus persecutionis) and thereby protects the opposition from pressure or abuse on the part of the majority*”.

12. The Assembly calls on member states that are considering reviewing the system of immunities that protect members of parliament, or have already begun to review it in response to criticism, to take into consideration the following general principles:

12.1. immunity is a fundamental democratic safeguard born of the need to preserve the integrity and independence of parliaments, their operation and their acts as institutions; it is not a personal attribute available to the elected representative and its aim is not to protect his or her individual interests;

12.2. parliamentary immunity protects the free exercise of the parliamentary mandate and, whether it covers acts strictly bound up with or unrelated to their parliamentary duties, it must not be open to misuse and the obstruction of justice; the exercise of elective office involves compliance with ethical behaviour and the obligation to account for one’s acts; immunity is not a system of impunity;

12.3. the basic rules of parliamentary immunity must be enshrined in legal provisions with constitutional status, at least as far as its most important aspects are concerned, such as its scope and extent and the rules for waiving it; its recognition at the top of the hierarchy of legal rules enables the integrity of parliaments and the independence of their members in the exercise of their mandate to be permanently guaranteed in the case of political instability or any attempt by the executive to interfere;

12.4. a revision of the scope and extent of parliamentary immunity must be carefully examined with regard to its objectives, its criteria and its impact, be based on a rational approach free from any demagoguery or populism, be debated objectively and be open to wide-ranging public discussion; such a revision should avoid any disruptive change in the system of immunity by switching, for example, from a set of rules that provide a great deal of protection to the total elimination of parliamentary safeguards;

12.5. in this context, account must be taken of the crucial need to preserve the rights and integrity of members of the political minority during and after the end of the parliamentary mandate;

12.6. freedom of speech is an intrinsic part of parliamentary work and elected politicians must be able to debate without fear many different issues of public interest, including controversial or divisive subjects or matters relating to the operation of the executive or the judiciary; however, remarks and statements inciting hatred, violence or the destruction of democratic rights and freedoms can be excluded from the scope of non-liability; members of parliament who misuse the public forum could render themselves liable to internal disciplinary action in accordance with a transparent and impartial regulatory procedure, or even the withdrawal of their parliamentary mandate if they commit a serious and persistent violation;

12.7. the procedure for waiving parliamentary inviolability must comply with the principles of transparency, legal certainty and foreseeability and respect procedural safeguards relating to the rights of the defence, in order to prevent any possibility of a selective or arbitrary decision.

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13. Finally, the Assembly reminds its members that they are covered by specific rules of immunity that they share with the members of the European Parliament. This immunity is autonomous in nature as it is distinct from and independent of national parliamentary immunity, which members of parliament may enjoy in the territory of their own state. The Assembly recognises the validity of the criteria developed in the last few years by the European Parliament when considering requests for members' immunity to be waived.

14. In this connection, the Assembly urges Council of Europe member states to act in strict compliance with their obligations under Article 40 of the Statute of the Council of Europe and Articles 13, 14 and 15 of the General Agreement on Privileges and Immunities of the Council of Europe and its protocol and to guarantee their effective application. It strongly condemns the breaches by some states of the immunity status of Assembly members, and, in particular, of the principle of free movement, and reiterates that a violation of these statutory provisions falls within the scope of Rule 8 of the Assembly's Rules of Procedure.

B. Draft recommendation³

1. The Parliamentary Assembly reiterates that its members are covered by rules of immunity established by a set of provisions drawn from the Statute of the Council of Europe, the General Agreement on Privileges and Immunities of the Council of Europe and its protocol and the Assembly's Rules of Procedure.

2. Under the General Agreement on Privileges and Immunities of the Council of Europe, concluded in application of Article 40 of the Statute, the members of the Parliamentary Assembly enjoy three types of protection:

– parliamentary non-liability, guaranteed by Article 14 of the General Agreement, which makes them immune from any judicial proceedings – criminal, civil and administrative – in respect of an opinion expressed or a vote cast in the performance of their parliamentary duties, and is designed to protect the independence of members of the Assembly and ensure their freedom of judgment, expression and decision;

– parliamentary inviolability (Article 15 of the General Agreement), which protects them against any arrest, detention or judicial proceedings outside the national territory in the territory of any other member state, in addition to the national immunity they enjoy in their own state;

– and free movement (Article 13 of the General Agreement).

3. As stated in Rule 67 of the Assembly's Rules of Procedure and pointed out in its Resolution ... (2016) on parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly, these immunities are granted in order to preserve the integrity of the Assembly and to safeguard the independence of its members in exercising their European mandate.

4. The Assembly strongly condemns the breaches by some Council of Europe member states of the status of privileges and immunities of Assembly members, and especially of the principle of free movement, and expects the Committee of Ministers to call on member states to act in strict compliance with their obligations under the above-mentioned provisions of the Statute of the Council of Europe and the General Agreement on Privileges and Immunities and its protocol and to guarantee their effective application.

³ Draft recommendation unanimously adopted by the Committee on 17 May 2016.

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C. Explanatory memorandum by Ms Palihovici, rapporteur

1. Introduction

1. Parliamentary immunity, in its two forms – non-liability and inviolability – is an ancient and fundamental democratic safeguard, born of the need to preserve the integrity of parliaments, its operation and its acts, and to protect their members' independence in the performance of their duties. The rules on parliamentary immunity vary considerably between European countries in view of their traditions and political culture. In addition, and quite apart from the national immunities they may enjoy, members of the Parliamentary Assembly are covered in the performance of their duties in the Assembly by special rules on immunity at European level, laid down by the General Agreement on Privileges and Immunities of the Council of Europe of 1949 and its additional protocol of 1952. These rules establish the same twofold principle of non-liability and inviolability and provide in addition for the free movement of Assembly members within the territory of the member states.

2. Over the years, a number of institutions have contributed to the conceptualisation of and reflection on developments in parliamentary immunity. These include the following studies or reports:

– a major global comparative study on the parliamentary mandate (written by Marc Van der Hulst) published by the Inter-parliamentary Union (IPU) in 2000;⁴

– an extensive study by the European Parliament's Office for the Promotion of Parliamentary Democracy "*Non-labile? Inviolabile? Untouchabile? The Challenge of Parliamentary Immunities. An overview*", published in 2012;

– a report by the European Commission for Democracy through Law (Venice Commission) of March 2014 takes stock of the scope and lifting of parliamentary immunities at national level⁵ and proposes a number of criteria and guidelines for waiving parliamentary immunity.⁶

3. 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. 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.

4. However, in recent years, a number of cases have called into question the traditional scope of the privileges and immunities enjoyed by members of the Assembly at both national and European level. Certain member states have restricted immunity in order to combat parliamentary "impunity", often in connection with efforts to fight corruption.

5. These are the reasons why the Assembly has wanted to take a fresh look at the system of parliamentary immunities in Europe, as the last substantial report on this issue dates back to 2003.⁷ The

⁴ http://www.ipu.org/PDF/publications/mandate_e.pdf.

⁵ Study No. 714/2013, document CDL-AD(2014)011 of 14 May 2014.

⁶ Prior to the 2014 report, the Venice Commission also addressed the problem of parliamentary immunity in individual cases when delivering an opinion on national draft legislations. Most recent opinions at the request of countries are: a) Directorate of Human Rights of the Directorate General of Human Rights and Rule of Law (DGI), OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and Venice Commission Joint opinion on the draft Law on the Prosecution Service of the Republic of Moldova, adopted by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015); b) Joint opinion of the directorate of Human Rights of the Directorate General of Human Rights and Rule of Law (DGI) and Venice Commission on the Law on the Judicial System and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, adopted by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015); c) Opinion on draft constitutional amendments on the immunity of members of Parliament and Judges of Ukraine, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015); d) OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and Venice Commission Joint opinion on the draft law "On introduction of changes and amendments to the constitution" of the Kyrgyz Republic, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015).

⁷ See the report on Immunities of members of the Parliamentary Assembly (Doc. 9718 revised) of 25 March 2003 (rapporteur: Mr Olteanu, Romania, Socialist Group), Resolution 1325 (2003) and Recommendation 1602 (2003), and the report on the interpretation of Article 15.a of the General Agreement on Privileges and Immunities of the Council of Europe (Doc. 10840) of 20 February 2006 (rapporteur: Mr Jurgens, Netherlands, Socialist Group) and Resolution 1490 (2006).

Committee on Rules of Procedure should therefore take stock of the current rules – at both national and European level – governing the immunities enjoyed by its members. To this end, the rapporteur sent a questionnaire to the European Centre for Parliamentary Research and Documentation (ECPRD)⁸ and also asked national delegations for additional information.⁹

6. By studying recent developments in the rules governing parliamentary immunities in member states, it will be possible for the Committee on Rules of Procedure to assess current trends and to put forward recommendations.

2. Parliamentary immunities in flux?

7. By parliamentary immunity we mean all the provisions regarding the status of members of parliament providing them with a legal regime dispensing them in certain cases from the application of ordinary law in their relationship with the justice system in order to preserve their independence.

8. As summed up by a national member of parliament at a seminar organised by the Inter-parliamentary Union in 2005, *“in order to carry out our functions, we must be able to freely express ourselves without fear of reprisal from any quarter. That is a condition sine qua non for ensuring the independence of the parliament itself and the separation of powers. Parliamentary immunity serves this objective. (...) the various systems of parliamentary immunity (...) all provide for the absolute protection of statements delivered at the plenary or in committee, and also of the votes cast.”*¹⁰

2.1. General observations cornering the latest trends

9. There are a great number of systems of parliamentary immunity in member states, but almost all make a distinction between two main categories of immunities: non-liability and inviolability. As these two are quite distinct, they are regulated and applied in different ways. Almost all democratic countries have a system establishing the non-liability of members of parliament, although there are subtle variations. Inviolability in general has more numerous exceptions and can always be waived.

10. In theory and as a matter of principle, non-liability is absolute, permanent and perpetual in nature and cannot accordingly be waived. It exempts members of parliament from legal proceedings for votes or opinions expressed in a parliament or in discharge of parliamentary duties. It protects members of parliament against any criminal or civil law proceedings in relation to deeds or words which, outside the context of a parliamentary mandate, would be punishable under criminal law or could incur the liability of the person responsible for those words or deeds (for example defamation or abuse).

11. That being said, the absolute character of non-liability has also been called into question given the issue it raises with regards to the content of a statement or investigations into vote-buying.¹¹ Consequently the concept of relative non-liability has also emerged. Concerning freedom of expression it implies that the right to free speech must *“be balanced with other aspects of the public interest, such as the rights of others, in particular the right to honour, as well as respect due to certain state institutions”*.¹² Therefore, some countries have restricted the scope of the non-liability so as not to cover insults, defamation, hate speech and racist remarks, threats or incitement to violence or crimes. Some countries also exclude from the scope of protection insulting the head of state, criticism of judges, disclosure of state secrets or remarks that are considered treason.

12. Apart from the growing concern about the balance between the public interests and the rights of others, the need for absolute non-liability has also been reduced by the development of the general system of human right protection. To date, the substantive scope of the parliamentarians' non-liability is extensively

⁸ ECPRD requests No. 2815 and No. 3048. Replies from national parliaments to other requests are also relevant to this report – see, in particular, requests Nos. 2991 on lifting parliamentary immunity, November 2015, and 2498 on parliamentary immunities, March 2014.

⁹ 28 replies were received from Andorra, Austria, Belgium (Chamber of Representatives and Senate), Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Finland, France (Senate), Georgia, Greece, Hungary, Italy (Chamber of Deputies), Latvia, Liechtenstein, Lithuania, Luxembourg, Montenegro, Netherlands, Norway, Poland (Sejm), Portugal, Slovenia, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia”, Ukraine.

¹⁰ Seminar for chairpersons and members of parliamentary human rights bodies on freedom of expression, parliament and the promotion of tolerant societies, jointly organised by the Inter-parliamentary Union and Article 19 (Geneva, 25 to 27 May 2005), summary and recommendations presented by the rapporteur.

¹¹ For instance, support for a proposed legislation by a member in return for material benefits and political promotion.

¹² Venice Commission, Study No. 714/2013 on the lifting of parliamentary immunity, document CDL-AD(2013)059 of 28 November 2013, paragraph 58.

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protected by Article 10 of the European Convention on Human Rights and other international treaties as a part of the protection granted to a public political debate. However, for the moment the Venice Commission has maintained its stance in favour of maintaining national rules on parliamentary non-liability.

13. Inviolability is aimed at ensuring that the exercise of the parliamentary term of office is not obstructed by certain legal actions relating to acts carried out by members of parliament as mere citizens. It sets out the rules pertaining to legal action for words or deeds unrelated to their parliamentary duties. It is a special form of legal protection enjoyed by a member of parliament accused of having breached the law, protecting him or her against any arrest, detention or prosecution without the consent of the parliament of which he or she is a member, except where he or she is found committing, attempting to commit, or just having committed an offence, or has been handed a final conviction. Often, it also covers investigative measures such as searches or wiretapping or even criminal prosecution in general.

14. The Venice Commission generally considers that the 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.

2.2. *The calling into question of the scope of parliamentary immunity*

15. The traditional model of parliamentary immunity is currently called into question. Several countries (Estonia, the Slovak Republic, and Ukraine) have chosen the path leading to a significant reduction or even the repealing of the inviolability. By doing so, they will join a number of countries where traditional inviolability does not exist (the Netherlands, the United Kingdom) or is interpreted narrowly (Sweden). Moreover, the traditional absolute non-liability is also narrowing and therefore producing a new culture of parliamentary discussions.

16. The Venice Commission observes that the main argument against parliamentary immunity is the principle of equality of all citizens before the law, one of the foundations of the rule of law: "Any form of parliamentary immunity by 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 creating contempt for politicians and for the democratic system as such."¹³

17. Moreover, stronger links between the parliamentary majority and the government reduced the risk of harassment by the executive towards the parliamentary institutions as a whole. Rather, it was the parliamentary opposition which was in danger of undue pressure. The rules on parliamentary immunity today function primarily as a *minority guarantee*. In addition, the generally stronger independence of the judiciary has reduced the misuse of courts against political opponents by the executive. The extension of individual rights of all citizens decreased the need for special parliamentary protection too. Finally, there was a call for a greater transparency of political life which had led to a debate to reduce inviolability.

18. However, when it comes to the above arguments, a line is to be drawn between so-called "new" democracies and democracies which have reached a certain level of maturity and stability. If the parliamentarians of the latter were adequately protected in other ways, parliamentarians of "new" democracies still require immunities to be protected against false charges. At the same time, it is often new democracies that are most exposed to political corruption and the misuse of immunity by parliamentarians themselves.

3. **Developments in national immunity regime**

19. Concerning the scope of non-liability, the review of the immunity regime in the national parliaments of 31 States¹⁴ gives the following picture: 13 countries¹⁵ cover only opinions expressed during debates in the

¹³ Document CDL-AD(2014)011, op. cit., paragraph 38.

¹⁴ 28 EU member States (source: Handbook on the incompatibilities and immunity of the Members of the European Parliament, 2014, [http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/join/2014/493029/IPOL-JURI_ET\(2014\)493029_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/join/2014/493029/IPOL-JURI_ET(2014)493029_EN.pdf)), Norway, Republic of Moldova, Russian Federation and Ukraine (source: PARLINE database by the IPU).

¹⁵ Austria, Croatia, Cyprus, the Czech Republic, Estonia, Germany (defamation excluded), Lithuania (slander excluded), Malta, Norway, Slovenia, the Slovak Republic, Ukraine, United Kingdom.

chamber or committees and/or in written questions and 19 parliaments¹⁶ have defined the protection more extensively as to include opinions expressed in discharge of parliamentary duties, including outside the chamber. Inviolability varies from one country to another and provides either full protection against detention and the institution of criminal proceedings without the parliament's authorisation (18 states¹⁷) or partial protection, which does not cover members of parliament against wire-tapping or interceptions of communications, police investigations and/or questioning in the event of arrest and/or against civil actions, etc (14 states¹⁸). There is no provision for inviolability in the Netherlands.

3.1. *Modifications in national legislation*

20. In the last few years, the issue of systems of parliamentary immunities has been debated in the parliaments of several member states and sometimes led to amendments to national legislation or the national constitution. The debate is continuing in some of these countries and sometimes even features prominently in the news.

21. In **Austria**, an intensive debate was held over the past year on the abolition of Article 57 (3) of the Federal Constitutional Law which entitled the parliament to decide whether a connection existed between the alleged offence and parliamentary duties. In the end, the wording of the Article was retained. Instead, two exceptions to the immunity – calumny and offences punishable under the Information Acts - were removed from the scope of the immunity.

22. In **Bulgaria**, the institute of parliamentary immunity has not been amended since 2006, when the opportunity for MPs to give written consent for the removal of their immunity was provided.

23. In **Cyprus**, in March 2016 an amendment was tabled to the relevant constitutional provision with the aim of defining more accurately and restrictively the scope of parliamentary immunity so as to protect members of parliament from criminal and civil liability only in relation to the exercise of their parliamentary functions, and more specifically for votes or opinions expressed. For other offences unrelated to parliamentary duties, members would be subjected to the same proceedings as ordinary citizens. The amendment is still under consideration.

24. In **Georgia**, following the amendment to the Rules of Procedure of the Parliament adopted in 2012, a proposal to carry out investigations against a member of parliament shall be sent to the parliament by the Prosecutor General and not the Minister of Justice as had been the case earlier. Moreover, in 2014, an amendment to the Code of Criminal Procedure was passed deleting the provision making the institution of criminal proceedings against an MP conditional on the prior authorisation of parliament.

25. In **Estonia**, important changes to the immunity system were made in 2015. The following provisions were added to the Status of members of the Riigikogu Act: the explicit impossibility to invoke immunity in connection with acts that are not related to the exercise of the free mandate or in order to escape legal liability (Article 18§3), the possibility for a member to agree to be subjected to some procedures (Article 18§4), the suspension of the limitation period of the offence during a member's mandate (Article 18¹), and the possibility for a member to be subjected to direct coercion insofar as this is inevitably necessary for fixing the fact of the offence (Article 18²§1).

26. In **Latvia**, on 19 May 2016, the parliament amended the regime of parliamentary immunity aimed at repealing immunity without the chamber's consent in the case of imposition of administrative penalties.

27. In the **Republic of Moldova**, starting 2013, there have been several attempts to amend legislation with the aim of limiting the immunity of Members of Parliament. In 2013, a group of MPs submitted an initiative to amend Article 70 and Article 71 of the Constitution. Amendments to Article 70 aimed to exclude immunity for MPs. In this context, the draft bill proposed exclusion of the words "and immunities", and repeal paragraph (3), according to which "an MP cannot be detained, arrested, searched, except in cases of flagrant crime, or prosecuted without consent of the Parliament, after the hearing of the member." In the

¹⁶ Belgium, Bulgaria, Denmark, Finland (limited liability, no authorisation by the parliament is required if the criminal act is not connected to parliamentary duties), France, Greece, Hungary (civil law claims and a number of specific offenses are excluded), Ireland, Italy, Latvia (defamation excluded), Luxembourg, Netherlands, Republic of Moldova, Poland (defamation excluded), Portugal, Romania, Russian Federation (defamation excluded), Spain, Sweden.

¹⁷ Bulgaria, Croatia, Cyprus (amendments are being discussed), the Czech Republic, Finland (protection applies before the court begins proceedings), France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Republic of Moldova (amendments are being discussed), Poland, Portugal, Russian Federation, Slovenia, Spain, Ukraine.

¹⁸ Austria, Belgium, Denmark, Estonia, France, Ireland, Italy, Lithuania, Malta, Norway, Romania, the Slovak Republic, Sweden, United Kingdom.

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same time, the bill proposed to specify and define in Article 71, which states that “an MP cannot be prosecuted or held legally responsible for votes or opinions expressed in exercising an MP’s duty”, the methods of expression of opinions by inserting after the word "expressed" of the word "publicly". In 2014, this bill did not gain the necessary number of votes in Parliament and the legislation remained unchanged. In April 2016, a new draft bill to amend Article 70 of the Constitution of the Republic of Moldova was registered.

28. In **Poland**, following an amendment introduced in 2015 to the Act on the Exercise of the Mandate of a Deputy or Senator, parliamentarians can now accept tickets for traffic offences and pay related fines.

29. In **Romania**,¹⁹ in 2015 clarifications were made to the waiving procedure and the possibility for a parliamentarian to be called as a witness was added.

30. In the **Slovak Republic**, parliamentary inviolability has been significantly reduced. Since 1 March 2012 the immunity for administrative offences was repealed following the repealing of the immunity from criminal proceedings as from 1 September 2012. Currently MPs have no immunity from criminal proceedings. The consent of the National Council is still need when a parliamentarian is about to be taken into custody. To date, parliamentarians enjoy only non-liability.

31. In **Sweden**, two cases concerning criminal investigations against members of parliament for corruption in a commercial transaction (1994) and the alleged violation of a copyright law (2000) bring to light the position of the parliament according to which the lifting of immunity is not required if the offence is not closely linked to parliamentarian duties.

32. In **Turkey**, on 12 April 2016, a proposal to amend the constitution with a temporary clause was submitted by the governing Justice and Development Party (AKP). The proposal is intended to suspend the application of one of the provisions of Article 83 of the Constitution (“A deputy who is alleged to have committed an offence before or after the election shall not be arrested, interrogated, detained, or tried unless the Assembly decides otherwise”) to members of parliament involved in current cases. Even though the proposal applies without distinction to all requests to lift immunity under examination at the Great National Assembly, it would mainly concern the Peoples’ Democratic Party (HDP) which is the subject of half of some 667 dossiers and has been recently targeted for its alleged support to the outlawed Kurdistan Workers’ Party (PKK). The proposal was approved by the Committee on Constitution on 2 May 2016, and subsequently by the plenary Assembly on 20 May (by 376 votes, i.e. beyond the required two-thirds majority required to change the constitution). 138 parliamentarians are thus deprived of their immunity (a quarter of the 550 members of the Grand National Assembly). The measure will disproportionately hit members of the opposition, affecting 50 of the 59 members of the HDP and 51 of the 133 members of the Republican People’s Party (CHP). 27 AKP deputies (out of 316) and 9 members of the Nationalist Movement Party (MHP), both belonging to the governing majority, would also be deprived of their immunity.

33. In **Ukraine**, a new draft law under consideration suggests removing parliamentary inviolability. On this occasion the Venice Commission has stated that the inviolability was certainly an obstacle to fighting corruption. However, “the current state of the rule of law in Ukraine does not yet warrant a complete removal of inviolability of parliamentarians”.²⁰

34. In **Israel**, several members of the opposition have tabled an amendment aimed at increasing the majority requested to waive immunity.

35. In **Kyrgyzstan**, the Movement for the Abolition of Parliamentary Privilege, supported by the main political parties, was launched in 2015 prior to the October 2015 parliamentary elections. It tabled amendments to the constitution aimed at permitting proceedings to be opened without the approval of parliament and allowing the latter, on the initiative of two-thirds of MPs, to oppose criminal proceedings against an MP after the event. The Venice Commission has criticised these amendments, especially as it is impossible for the system proposed to prevent politically motivated persecutions because two-thirds of MPs will inevitably belong to the government majority²¹. The amendments have now been withdrawn. Only the proposal to dispense with the approval of parliament when criminal proceedings are opened for offences committed prior to the election remains.

¹⁹ It could be noted that, in 2014, the Parliament of Romania was put to a test. Out of 572 senators and deputies, 76 faced criminal charges which had been declared incompatible or were in a situation involving a conflict of interest.

²⁰ Opinion on draft constitutional amendments on the immunity of members of Parliament and Judges of Ukraine, op.cit., document CDL-AD(2015)013.

²¹ Joint opinion of the ODIHR and the Venice Commission, CDL-AD(2015)014, 22 June 2015, op.cit.

36. It stems from information provided that Estonia, the Slovak Republic, Ukraine (draft proposal) and Cyprus (draft proposal) have significantly reduced their scope of the inviolability or are planning to do so through revising relevant legal provisions. Latvia and Poland have slightly reduced inviolability too. In Romania, no authorisation of the Chamber is required to appear as a witness. On contrary, the Knesset seems to be wishing to strengthen the parliamentary protection guarantee though it remains at the level of a legislative proposal. Still, a slight trend in limiting the scope of inviolability in Europe could formally be established given that, out of 47 member States, there are almost 14 countries which either do not have any inviolability or have significantly reduced the scope of the inviolability.

37. In addition, the majority of parliamentary systems are enshrined in national constitutions. In very few cases, the sources of the two types of parliamentary immunity could be in legal instruments of varying types and scope. Examples of these cases are the Republic of Moldova and Switzerland, where non-liability is governed by constitutional provisions and inviolability by the ordinary law²². On the other hand, in the Russian Federation inviolability is defined by Article 98 of the constitution whereas non-liability is laid down in the laws relating to each chamber of parliament²³.

3.2. *Inviolability – what is at stake?*

38. It should be noted that a criminal conviction would have important implications on a parliamentarian mandate.

39. A conviction would lead to the revocation of the parliamentary mandate in almost all members States of the Council of Europe.²⁴

40. On the contrary the criminal conviction would not trigger the revocation of the mandate in Switzerland, in the Czech Republic and in the German Bundesrat.²⁵

41. Concerning the European Parliament, the exercise of the parliamentary mandate would in principle be compatible with a criminal conviction in the absence of any particular reference in the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976. The law of the European Union does not prevent a convicted person who becomes an MEP from retaining his or her seat. However, national law could do given that Article 7 (3) of the above Act allows Member States to extend national incompatibility rules to an MEP. Moreover, Article 13 mentions the withdrawing of parliamentary mandate in connection with national legislation. Accordingly, if incompatibility exists at the national level, MEPs' mandates can be revoked in accordance with such rules. For instance, a UK MEP mandate was not revoked following a 9-month prison sentence for fraud given that the national legislation requires a sentence of at least 12 months' imprisonment in order for the national mandate to be revoked.

42. In the United Kingdom, the *Recall of MPs Act 2015* introduced a recall process. If a recall petition process is triggered and at least 10% of eligible electors sign the petition, the Member's seat becomes vacant. The recall election process is triggered in three circumstances: if a Member is sentenced to a prison sentence of 12 months or less (MPs have to vacate their seats if they are sentenced to more than a year in prison); if a Member is suspended from the House of Commons (following a report from the Committee on Standards) for at least 10 sitting days or 14 days; or if a Member is convicted of an offence under section 10

²² See revised synoptic table on waiving parliamentary immunity, Venice Commission, 1 April 2014.

²³ Ibid.

²⁴ Albania (conviction for a crime), Andorra (given the nature of the offence and with the authorisation of the parliament), Austria (if a final sentence for a criminal offence exceeds one year imprisonment), Belgium (depending on the nature of the offence and the severity of sentence, usually a member would resign after the conviction has become final), Bulgaria (final sentence imposing imprisonment for an intentional criminal offence), Croatia (if sentenced to imprisonment exceeding six months), Denmark (the decision is left to the Parliament), Estonia (criminal law conviction), Finland (in case of final sentence and after the revocation by parliament), Georgia (a final conviction for a criminal offence), Germany (Bundestag, if sentenced for a felony to a term of imprisonment of not less than one year), Hungary (sentenced to imprisonment), Israel (a criminal conviction for an offence with moral turpitude), Ireland (a prison sentence exceeding six months), Latvia (a criminal conviction), Montenegro (if sentenced to imprisonment exceeding six months), the Netherlands (serious crime), Poland (final judgment for an intentional indictable offence), Portugal (in case of conviction for participation in organisations promoting racist or fascist ideology), the Slovak Republic (conviction for a wilful criminal offence), Slovenia (if sentenced to imprisonment exceeding six months and upon the revocation approval by the National Council), Spain (if a final judgment states so or when the execution of such a judgment entails the impossibility of discharging parliamentary duties), Turkey (criminal conviction).

²⁵ Concerning members of the German Bundesrat, who at the same time hold positions in federal states, a criminal conviction would not formally influence the mandate. That being said, a federal state government may recall a member following a criminal conviction.

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of the Parliamentary Standards Act 2009 (offence of providing false or misleading information for allowance claims).

3.3. *Analysis of waivers of immunity requests*

43. It appears from figures provided at my request by national parliaments of 23 countries that the parliaments of Bosnia and Herzegovina, Luxembourg, Liechtenstein, Georgia (since 2012), Finland (since 1979), "the former Yugoslav Republic of Macedonia" (in the past four years) and Norway have had no cases concerning the lifting of immunity. No case has been examined by the parliaments of the Netherlands given that no inviolability is granted to parliamentarians of these countries.

44. The waiver of immunity has been granted in all cases examined by the parliaments of Latvia (29 requests between 2012 and 2016), Portugal (172 requests in total out of which 14 concerned criminal accusations against parliamentarians and 158 requests to call them as witnesses) and Slovenia (21 requests since 2012 for offenses related to defamation, business fraud, false reporting of crime, abuse of position).

45. Only one case has ever been examined by the Parliament of Denmark which led to the waiver of immunity in the case of a driving offense. Since 2012 the Parliament of Switzerland has examined in substance 4 requests in case related to racist remarks or relations with lobbyists and upheld the immunity in all cases. In Sweden the question of immunity has been addressed twice: in 1994 (bribery) and in 2000 (violation of copyright law). In both cases, the offences were considered as being not in connection with parliamentary duties.

46. The procedures initiated have led to the lifting of immunities in almost all cases in Austria (22 out of 27), Cyprus (5 out of 6) and Lithuania (8 out of 10 cases between 2012 and 2016).

47. From 2001 to 2015, the Poland Sejm received 155 requests. In 115 cases parliamentarians have consented to being subjected to legal action. The examination of 23 requests has resulted in 5 waivers of immunity.

48. In the Republic of Moldova, in the past four years, only one procedure to waive immunity has been initiated. On 15 October 2015, the Parliament has adopted a decision to waive the immunity of one MP.

49. The following parliaments have waived members' immunity in approximately half the cases: Belgium, House of Representatives (since 1997 8 out of 15, 1 partially granted, 2 denied and 2 declared inadmissible due to procedural reasons and 1 still pending), Croatia (12 out of 30 requests between 2011 and 2015), Greece (78 out of 128 during the 15th parliamentary and 4 out of 9 during the 16th parliamentary term), the French Senate (14 out of 21 since 1995) and Ukraine (6 out of 12).

50. During the period from 2012 to 2016 the parliament of Montenegro lifted immunity only in 3 cases out of 9 requests and the Parliament of Hungary in 12 procedures out of 68. Since 2012, the Russian State Duma has stripped of the immunity of 6 MPs, mainly in cases related to embezzlement and related offenses.

51. Concerning the nature of legal actions related to the waiver's request, an important number concerns defamation and slander or road traffic offences. After these come various offences related to acceptance of benefits, embezzlement or abuse of position. Almost all actions which triggered requests to the French Senate concerned property related offences. One case of bribery was reported in Lithuania, Greece, Croatia and Ukraine. Sedition and attack on an official person were at the origin of four requests in Montenegro.

52. The request to waive national immunity has over time concerned Assembly members of the delegations of Austria (3 members), Lithuania (3 members), Latvia (2 members, both cases concerned driving offences), Hungary (1 member, though a legal action was initiated before the member's appointment to the PACE delegation), Poland (3 members, driving offence) and Portugal (10 members).

4. **Parliamentary immunity in a European context**

53. Members of the Parliamentary Assembly are covered by special rules on immunity which they share with members of the European Parliament. This system dates back to the era when the European Parliament was not directly elected but was composed, like the Parliamentary Assembly, by delegates from the national parliaments. Consequently, both institutions have set out a similar system of immunities. After direct elections were introduced in 1979, the European Parliament attempted to change the system. The proposal to revise the Protocol on Privileges and Immunities formulated in the 1980s failed. The wording of the

provisions has remained unchanged throughout subsequent revisions of the treaties and remains identical to the regime of immunity of Assembly members.

54. These provisions have made possible the establishing of a common European parliamentary body of law on immunities. This immunity is autonomous in nature and distinct from and independent of national parliamentary immunity which members of parliament may moreover enjoy on the territory of their own state.

4.1. Identical legal basis

55. The members of the Parliamentary Assembly are covered by a system of immunities established by a number of provisions taken from the Statute of the Council of Europe,²⁶ the General Agreement on Privileges and Immunities and its Protocol, and the Assembly's Rules of Procedure.

56. Under the terms of the General Agreement on Privileges and Immunities of the Council of Europe, concluded in application of Article 40 of the Statute, the members of the Parliamentary Assembly enjoy three forms of protection:

- parliamentary non-liability, guaranteed by Article 14 of the General Agreement, which makes them immune from any judicial proceedings – criminal, civil and administrative – in respect of an opinion expressed or a vote cast in the performance of their parliamentary duties, designed to protect the independence of members of the Assembly and to ensure their freedom of judgment, expression and decision;
- parliamentary inviolability (Article 15 of the General Agreement), which protects them against any arrest, detention or judicial proceedings on the territory of any other member state in addition to the national immunity they enjoy in their own state; this immunity cannot be waived except by the Parliamentary Assembly at the request of a “competent authority” of the member state concerned (Rule 67.2 of the Rules of Procedure);
- and protection of the free movement of members of the Parliamentary Assembly (Article 13).

57. As regards the European Parliament, the system is based on identical provisions embodied in the Protocol No. 7 of the Treaty on European Union: Article 8 provides for non-liability and Article 9 for a combination of national and European inviolability regimes.

4.2. Definition of the scope of European parliamentary immunity

58. If the number of cases dealt with by the Parliamentary Assembly does not allow the identification of any specific approach to the question, reports by the European Parliament's relevant committees allow the tracking of trends and principles which have emerged. These principles have been partly refocused by the Luxembourg and Strasbourg courts.

59. It is interesting to note that, in addition to the waiver of immunity, the European Parliament as well as the Parliamentary Assembly have introduced the possibility to defend members' immunity.²⁷

60. If the waiver of the immunity of a MEP is expressly provided for in the Protocol on the Treaty on the European Union, the possibility of defending the immunity of a member is a product of the internal regulation of the European Parliament. The Court of Justice of the European Union (CJEU) has acknowledged the defence of immunity but only in cases where, in the absence of a request for waiver, immunity is endangered, in particular by “the action of the police or judicial authorities”.²⁸ “Defence of the immunity is a tool whereby the European Parliament, at the request of a member, may intervene when national authorities violate the immunity of one of its members.”²⁹ As regards the Parliamentary Assembly, the Bureau has already requested the relevant committee to provide its opinion on cases where immunity or the free movement of Assembly members were violated³⁰ or was about to be violated.

²⁶ Article 40a of the Statute of the Council of Europe.

²⁷ Rule 67.6 of the Rules of Procedure.

²⁸ Judgment of the CJEU, *Bruno Gollnisch v. European Parliament*, T-346/11 and T-374/11, § 52.

²⁹ *Ibid.*, paragraph 55.

³⁰ See “Status of Ms Nadiia Savchenko with regard to Council of Europe immunity”, AS/Pro (2015) 04 def, opinion of the Committee on Rules of Procedure, Immunities and Institutional Affairs to the Bureau of the Assembly.

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61. Since 1974, the European Parliament has dealt with a number of requests to waive immunity. Statistics show that “between 1979 – when direct elections to the EP were held for the first time – and the 2009 elections, 157 immunity cases were discussed in the plenary. In 45 out of these 157 cases, immunity was waived or an MEP’s immunity not defended”.³¹

62. To date, out of 14 requests to waive immunity examined, only 2 have been rejected and both with reference to Article 8 of the Protocol 7 (non-liability) given that opinions expressed were within the scope of MEPs’ official duties.³²

4.3. Approach to immunities adopted by the Parliamentary Assembly of the Council of Europe

63. So far only two cases have been examined under Rule 67 of the Rule of Procedure (waiver of the immunity) by the Parliamentary Assembly. However, the Assembly has adopted in its ordinary reports a number of positions both on the system of immunities for its members³³ and on related issues.

64. Among the leading reports are “The discipline of the members of the Parliamentary Assembly”³⁴ and “Ensuring protection against attacks on a person’s honour and reputation”.³⁵ Both reports arise from incidents which took place in the Hemicycle and therefore aim at outlining the contours of members acceptable behaviour and statements in discharge of their duties as Assembly members and, therefore, determining whether such actions or remarks are or are not covered by their European immunity.

65. In April 2012, the European Rule of Law Mission in Kosovo, EULEX, sent the President of the Parliamentary Assembly an official letter requesting the waiver of the parliamentary immunity of Mr Dick Marty, a former member of the Parliamentary Assembly and Assembly rapporteur on the inhuman treatment of people and illicit trafficking in human organs in Kosovo, and his appearance as a witness in the so-called Medicus clinic trial. The Committee on Rules of Procedure, in an opinion to the President of the Assembly (document AS/Pro (2012) 10 def), considered that Mr Marty enjoyed the immunity guaranteed by Article 14 of the General Agreement on Privileges and Immunities, which was absolute, permanent and perpetual in nature and could accordingly not be waived either by the Parliamentary Assembly or by the national parliament. The previous request of this nature dated back to 2001 (Application to waive the immunity of Mr Berlusconi, at the request of the Spanish Supreme Court – document AS/Bur (2001) 028). No decision was taken owing to Mr Berlusconi’s prior resignation from the Parliamentary Assembly.

66. Moreover, the Committee on Rules of Procedure was consulted to treat certain individual cases of parliamentarians raising the question of the protection granted to them by the Council of Europe Statute and the General Agreement on Privileges and Immunities with regard to their freedom of movement in member States. The committee made it clear that, whatever their national regime of immunity, Assembly members are protected against prosecution and arrest in the exercise of their duties as members of the Assembly or when travelling on Assembly business, whether inside or outside their national territory (Article 15 of the General Agreement). If they are not exercising an activity as defined or travelling on Assembly business, in pursuance of a decision taken by a competent Assembly body, only their national regime of immunity applies (i.e. in their country). Assembly members enjoy their national parliamentary immunities, in their respective countries, and the immunity provided for in on Privileges and Immunities in the territory of any Council of Europe member State other than their own.³⁶ Moreover, under the General Agreement on Privileges and Immunities (Article 13), all Council of Europe member States committed themselves to guarantee freedom of movement for members of the Assembly; therefore, when hosting a meeting or official event organised by the Assembly, they shall facilitate the participation of Assembly members and issue the visas required for

³¹ “Non-liable? Inviolable? Untouchable? The Challenge of Parliamentary Immunities. An overview”, 2012, pp.32-33.

³² Reports on the requests to waive the immunity of, respectively, Florian Philippot of 28 January 2016 and Ana Gomes of 11 December 2014.

³³ Report on Immunities of members of the Parliamentary Assembly (Doc. 9718 revised), op. cit., report on the interpretation of Article 15.a of the General Agreement on Privileges and Immunities of the Council of Europe (Doc. 10840), op. cit.

³⁴ Resolution 1965 (2013) and Doc. 13339, rapporteur: Mr Christopher Chope (United Kingdom, EDG).

³⁵ Resolution 1854 (2011) and Doc. 12703, rapporteur: Ms Marie-Louise Bemelmans-Vidéc, (Netherlands, EPP/CD).

³⁶ A parliamentarian travelling to a member State but not as a member of the Parliamentary Assembly with a proper movement order will not be protected by the European system of immunity provided by the Council of Europe Statute and the General Agreement on Privileges and Immunities, and may be subject to legal sanctions for breaching national laws on the entry to the national territory.

See the report of the Committee on Rules of Procedure, Immunities and Institutional Affairs on the Introduction of sanctions against parliamentarians (Rapporteur: Mr Arcadio Díaz Tejera, Spain, Socialist Group), Doc. 13944, paragraphs 16 et seq., on parliamentarians’ freedom of movement and failure to comply with rules on entry to member states territories.

their admission to their territory. In accordance with the principles of international law, a State party to a treaty cannot derogate from the obligations it has entered into or invoke the provisions of its domestic law as justification for a failure to fulfil its international obligations.³⁷

4.4. Examination of requests to waiver of immunity by the European Parliament

67. The European Parliament has created its own rules and references which could constitute a kind of 'case law'. The CJEU has accepted that *"the parliament has a broad discretion when deciding whether to grant or to refuse a request for waiver of immunity or defence of immunity, owing to the political nature of such a decision"*.³⁸

68. These rules, which are derived from decisions adopted in respect of applications for immunity to be waived, create a consistent notion of European parliamentary immunity which, in general terms, is independent of the various national parliamentary procedures. Through the application of these principles, a constant factor has emerged in the European Parliament's decisions, which has become a basic criterion in its response to each request for waiver of immunity. One of these criteria is the existence of *fumus persecutionis*, i.e. the presumption that criminal proceedings have been brought with the intention of causing the member political damage. Another criterion has long been the link between a legal action and a member's political activity. It has though been clarified by the CJEU, which in turn was inspired by the case law of the European Court of Human Rights.

4.4.1. Scope rationae temporis

4.4.1.1. Non-liability

69. The language of both corresponding Articles (Article 14 of the General Agreement on Privilege and Immunities of the Council of Europe and Article 8 Protocol No. 7 of the Treaty on European Union) is clear. Even though the afforded protection can go beyond the duration of the mandate, still in order to benefit from it, members' votes or opinions shall be expressed during his or her mandate and in discharge of his or her functions. For the time being, the protection afforded to parliamentarians of both institutions covers all kinds of statements.

70. At the same time, it would be unthinkable to let parliamentarians misuse the immunity by making defamatory statements or statements which affront human dignity or incite to discrimination. In the absence of the possibility to launch an external action against an MEP or an Assembly member for their opinions and remarks, they may be, as is the case in most national parliaments, subject to internal disciplinary sanctions by the relevant institutions themselves. According to the Venice Commission, these sanctions are legitimate as long as they are relevant and proportional and not misused by the parliamentary majority to infringe the rights and liberties of political opponents.

71. Both institutions have relevant provisions requiring a conduct to be characterised by mutual respect and based on democratic value and principles.³⁹ Several sanctions could be imposed for the breach of these requirements.⁴⁰ For instance, in 2010, a UK MEP was fined for verbal attacks on the EU President.

4.4.1.2. Inviolability

72. Concerning inviolability, both the European Parliament and the Parliamentary Assembly provide protection during the whole length of the parliamentary year, including in between part-sessions, given the continuous nature of the parliamentary activities. It amounts, de facto, in the case of the Parliamentary Assembly to the duration of member's credentials⁴¹ and in the case of the European Parliament to the

³⁷ See the opinion of the Committee on Rules of Procedure, Immunities and Institutional Affairs to the Bureau of the Assembly on 21 November 2013 (document AS/Pro (2013) 20 def) on "the case of Mr Likhachev (Russian Federation, UEL), prevented from participating in the pre-electoral mission for the observation of the presidential election in Georgia (23-26 September 2013), as well as the committee's opinion to the Bureau of the Assembly on 6 October 2010 on the right of Assembly members to attend Assembly meetings in a Council of Europe member State (AS/Pro (2010) 16 def).

³⁸ Bruno Gollnisch, op. cit., paragraph 59.

³⁹ Rule 22 of the Rules of Procedure of the Parliamentary Assembly and the Code of Conduct for the Assembly's members. Rule 11 of the Rules of Procedure of the European Parliament.

⁴⁰ Articles 17-21 of the Code of Conduct for the Assembly's members; Rules 165-167 of the Rules of Procedure of the European Parliament.

⁴¹ Article 3 of the Protocol: *"The provisions of Article 15 of the Agreement shall apply to Representatives to the Assembly, and their Substitutes, at any time when they are attending or travelling to and from, meetings of committees and sub-committees of the Consultative (Parliamentary) Assembly, whether or not the Assembly is itself in session at such time."*

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duration of the member's term of office.⁴² If legislative elections take place in the course of a session, members of the Parliamentary Assembly concerned continue to enjoy the immunity granted by the General Agreement on Immunities and Privileges until a new delegation is appointed, which shall be made within six months after the elections. Equally, both institutions recognise that this type of immunity is applicable with regards to acts committed prior to the start of the mandate.⁴³

73. Even if inviolability applies to previous actions, the analysis of the latest cases shows that the EP would not necessarily uphold immunities in case when legal actions derive from statements or acts made before the taking of office even though they were made in the public interest⁴⁴ or in the capacity of a national politician,⁴⁵ provided that there is a lack of *fumus persecutionis*.

74. For instance, a statement on a matter of general interest made by a journalist about the probity of the prison staff before the MEPs election “*has nothing to do with the office of [...] as a Member of the European Parliament but is rather connected to his former position as a television reporter*”. Or it clearly makes a distinction between the position of an MEP and his previous political activities by saying that “*the charges are clearly unrelated to [the MEPs] position as a Member of the European Parliament and arise from his position as Chair of the National Democratic Party*”.

4.4.2. *Fumus persecutionis*

75. *Fumus persecutionis* is the presumption that a judicial action has been brought with the intention of causing the member political damage. There would be suspicions of *fumus persecutionis* when proceedings are based on anonymous accusations, requests made a long time after the alleged facts or when a case involving a parliamentarian is handled in a different way from how it would have been investigated against an ordinary citizen. In any case, additional arguments, the independence of the judiciary or media coverage, would be closely examined.

76. For instance, a French MEP's immunity in relation to criminal charges concerning, inter alia, illegal arms trading and influence peddling was upheld on the grounds that the competent authority did not provide enough information “*concerning places and persons involved*.”⁴⁶ A second request submitted on the occasion of the same legal action was also rejected on suspicions of *fumus persecutionis* given the case's media coverage and the fact that the examining magistrate had in the meantime become himself a subject of investigation.⁴⁷

77. In another case, the immunity of an Italian MEP was upheld in a legal proceeding initiated against him for statements accusing a former parliamentarian of belonging to a criminal organisation. The European Parliament found that, given the rapid acquittal of the latter without the MEP's statements being analysed, “*the complaint made against [the MEP] was [...] marred by fumus persecutionis*”.⁴⁸

78. A German MEP saw his immunity upheld in the course of criminal proceedings initiated against him for failing to declare EUR 5000. The European Parliament found that “*criminal charges have been brought against him in respect of a sum and in circumstances which would, in the case of an ordinary citizen, have attracted merely administrative proceedings*.” Moreover, the public prosecutor made sure that the case received great publicity in the media, thus inflicting the maximum amount of damage on the member. Consequently, it appeared that the case was one of *fumus persecutionis*.⁴⁹

⁴² “From the two judgments of the Court (*Wagner v Fohrmann and Krier* of 12 May 1964, 101/63, ECR 1964, p. 397, and *Wybot v Faure* of 10 July 1986, 149/85, ECR 1986, p. 2403), it may be inferred that Parliament holds an annual session during which its Members, even during the periods when the session is interrupted, enjoy the immunity provided for in the above Protocol.” Report of 3 May 1999 on the request for waiver of the immunity of Mr Fernando Moniz by the Committee on the Rules of Procedure, the Verification of Credentials and Immunities.

⁴³ See “Status of Ms Nadiia Savchenko with regard to Council of Europe immunity”, op. cit. See also the European Parliament report on the request for waiver of immunity of Theodoros Zagorakis of 9 March 2015 and the report on the waiver of immunity of Viktor Uspaskich of 11 May 2014. “This justification is based on the premise that the primary purpose of immunity is to protect the normal functioning of the parliamentary institution, the principle of which might otherwise be jeopardized by actions occurring both before [...] the commencement of a member's term of office”, Parliamentary Immunity in the Member States Of The European Community and in the European Parliament, Working paper, European Parliament, 1993.

⁴⁴ Report on the request for waiver of the immunity of Stelios Kouloglou of 7 December 2015.

⁴⁵ Report on the request for waiver of the immunity of Sergei Stanishev, 9 March 2015.

⁴⁶ Report on the request for waiver of the immunity of Jean-Charles Marchiani, 2 July 2002.

⁴⁷ Report on the request for waiver of the immunity of Jean-Charles Marchiani, 14 December 2003.

⁴⁸ Report on the request for waiver of the immunity of Giuliano Ferrara, 9 March 1992.

⁴⁹ Report on the request for waiver of the immunity of Elmar Brok, 3 March 2011.

79. *Fumus persecutionis* has also been found in a case where a private criminal prosecution was initiated against a Polish MEP by his political rival many years after the contested actions took place and having in mind the rival's explicit political aim of preventing the MEP being elected to the European Parliament.⁵⁰

80. However, recently the European Parliament has rejected *fumus persecutionis* in a case where a Hungarian MEP (under investigations for alleged spying for Russia) claimed that the 2013 law criminalising espionage against the EU institutions was passed with the unique objective to make his behaviour punishable. It has been stated that, at the time of the request no formal accusation was made with regard to the MEP and the guaranties of independent investigation were given by national authorities.⁵¹ Similarly, the Parliament has not defended the immunity of a Lithuanian MEP who alleged that the false accusation against him was a part of conspiracy by the government aimed at his departure from the country because of his ties with the Russian secret service. By stating so, the Parliament pointed, among others, to the possibility of effectively defending his claim before national courts.⁵²

81. To conclude on this issue, while examining whether *fumus persecutionis* is at stake, the European Parliament takes account of the overall state of the rule of law in a given country. Reading of the latest decision reveals that the European Parliament presumes the effective functioning of relevant institutions in EU member States.

4.4.3. Political activity

82. Immunity is normally not to be waived if a member is accused of actions that come under the sphere of political activity, with the exception of cases where the acts were regarded as constituting a threat to individuals or democratic society (support for persons guilty of terrorist acts; membership of criminal organisations; drug trafficking); cases of defamation where the injured party has been denigrated as individuals and cases involving a clear breach of criminal law or of rules or administrative provisions which were in no way connected with any political activity.⁵³ Political activity would therefore include "expressions of opinion [...] made at demonstrations, at public meetings, in political publications, in the press, in a book, on television, by signing a political tract and even in a court of law."⁵⁴

83. Particular attention is paid to a connection between a given member's activity or statement and the member's duties. For instance, in the case of Bruno Gollnisch, MEP immunity was waived in the course of the legal action brought against him for racial hatred given that the statements at stake were made in his capacity as regional councillor.

5. Judicial review: toward a functional approach to parliamentary immunities in Europe

84. The issue of parliamentary immunity has been addressed by both the Strasbourg court and the Luxembourg court. Even though the two jurisdictions have addressed the issue of parliamentary immunities within their own scope of competences and using their own scale of references, they have adopted a similar approach which requires a close link between immunity and core parliamentary duties.⁵⁵

5.1. The case law of the European Court of Human Rights

85. The European Court of Human Rights examines the issue of parliamentary immunity mainly from the viewpoint of obstacles it creates to the access to court (Article 6 of the European Convention on Human Rights). Since the previous Assembly report on parliamentary immunities, in 2003, the Strasbourg Court has further clarified in its case law the admissible scope of the immunities enjoyed by members of parliament.

86. The Court has held that "*the guarantees offered by both types of parliamentary immunity (non-liability and inviolability) serve the same need – that of ensuring the independence of Parliament in the performance of its task*" and pointed out that members of parliament enjoyed immunity which "*was absolute in nature and*

⁵⁰ Report on the request for waiver of the immunity of Marek Siwiec, 8 October 2009.

⁵¹ Report on the request for waiver of the immunity of Mr Béla Kovács, 12 October 2015.

⁵² Report on the request for defence of the immunity and privileges of Viktor Uspaskich, 25 November 2011.

⁵³ See, among others, the request for defence of the immunity and privileges of Mario Borghesio of 13 June 2007.

⁵⁴ Ibid.

⁵⁵ Very comprehensive analysis of both courts' case law is carried in the document "Parliamentary immunity in a European context" by Sascha Hardt, Assistant Professor of comparative constitutional law at the Maastricht University, prepared at the request of the Directorate General for Internal Policies of the European Parliament, 2015.

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applied to both criminal and civil proceedings” and was designed “*not to protect individual members but Parliament as a whole*”.

87. With regard to non-liability, the leading case law⁵⁶ reveals that the Court accepts the absolute nature of immunity granted to parliamentary speech in a legislative chamber as a constitutional tradition of almost all member States as well as privileges granted to Representatives of the Parliamentary Assembly and MEPs, and concludes that a rule of parliamentary immunity could not in principle be regarded as imposing a disproportionate restriction on the right of access to court. However, where the statements are made outside the parliamentary chamber,⁵⁷ including at an election meeting, it requires their clear connection with parliamentary activity in order for the non-liability to be proportioned.

88. In contrast to non-liability, inviolability applies only for the duration of the term of office. Despite its temporary nature, the Court has been critical of this form of immunity even though it recognised that it “*helps to achieve the full independence of Parliament by preventing any possibility of politically motivated criminal proceedings (fumus persecutionis) and thereby protects the opposition from pressure or abuse on the part of the majority.*”⁵⁸ In the case *Tsalkitzis v. Greece*,⁵⁹ the Court assessed the impossibility of suing an MP, former mayor of Kifisia, for a corruption offence which allegedly took place prior to his election to the Parliament. By assessing the limitation of access to court imposed by the parliamentary immunity, the Court observed that the alleged criminal act had taken place three years prior to the former mayor’s election to the parliament and had had no connection with the MP’s parliamentary function. Moreover, the alleged crime had been of particular immoral nature. The Court therefore applied its usual proportionality test before concluding that, given a lack of clear connection with parliamentary functions, the limitation due to parliamentary immunity was in violation of Article 6 § 1.

89. The Court’s approach has been confirmed in another case against Greece concerning a criminal proceeding brought by the applicant against his ex-spouse, a member of parliament, for denying access to his child.⁶⁰ This case has also pointed to another concern related to the equality of arms given that the possibility for an MP to bring a procedure against an ordinary citizen “created an imbalance in treatment”. With this case the Court in Strasbourg has consolidated its functional approach to parliamentary immunity: it is legitimate in principle for contracting parties to protect their legislatures by means of an immunity system which ensures that parliaments can discharge their constitutional functions free from any undue influence. But the further a member, through an act, is removed from this core function, the narrower the concept of proportionality must be interpreted.⁶¹

90. The Court has also developed extensive case law on the freedom of expression of political elected representatives in the exercise of their parliamentary duties, stating in several judgments that: “while freedom of expression is important for everybody, it is especially so for an elected representative of the people”, and underlining the principle that only “compelling reasons” can justify a violation of this freedom.⁶² Still, statements by a parliamentarian must contribute to a public debate. In the case *Keller v. Hungary*,⁶³ the applicant, a parliamentarian from the opposition, attacked a member of the government on the lack of investigation into matters of national security by arguing, inter alia, that the member’s father had relations with a national far-right movement. The member concerned has successfully sued for damages. The Court found the application manifestly ill-founded not least because of the comprehensive and balanced reasoning of domestic court. However, it also stated that the parliamentarian “did not limit himself to attacking his opponent in Parliament [...] Indeed, his statement during the parliamentary session was rather elusive, [...] such public insinuations no longer benefited from the privilege afforded to parliamentary debate.” Reading the above case in conjunction with the older case *Castells v. Spain*,⁶⁴ *Cordova (No. 2) v. Italy* and *Féret v. Belgium*⁶⁵ reveals that in addition to being a part of a political discourse, statements must be respectful of others people’s right should it be citizens, foreigners or fellow political opponents.

⁵⁶ See *A. v. the United Kingdom*, judgment of 17 December 2002 (Application No. 35373/97) – MPs enjoyed an immunity that “was absolute in nature and applied to both criminal and civil proceedings” – and *Zollmann v. United Kingdom*, decision of 27 November 2003 (Application No. 62902/00).

⁵⁷ See *Cordova v. Italy (No. 1)*, judgment of 30 January 2003 (Application No. 40877/98) and *Cordova v. Italy (No. 2)*, judgment of 30 January 2003 (Application No. 45649/99).

⁵⁸ See *Kart v. Turkey*, judgment of 3 December 2009 (Application No. 8917/05).

⁵⁹ See *Tsalkitzis v. Greece*, judgment of 16 November 2006 (Application No. 11801/04).

⁶⁰ See *Syngelidis v. Greece*, judgment of 11 February 2011 (Application No. 24895/07).

⁶¹ See “Parliamentary immunity in a European context”, Sascha Hardt, op. cit., p. 15.

⁶² See *Cordova (No. 2) v. Italy*, judgment of 30 January 2003 (Application No. 45649/99).

⁶³ *Keller v. Hungary*, decision of 13 May 2004 (Application No. 33352/02)

⁶⁴ *Castells v. Spain*, judgment of 23 April 1992 (Application No. 11798/85)

⁶⁵ *Féret v. Belgium*, judgment of 16 July 2009 (Application No. 15615/07)

91. Finally, it should be noted that granting or lifting of the immunity at a member's request remains within the national margin of appreciation.⁶⁶

5.2. *The case law of the Court of Justice of the European Union*

92. The leading cases could be summarised as follows.

93. In the *Marra* case, an Italian MEP circulated a number of pamphlets criticising the Italian justice system and individual judges. A civil claim was brought against him. The Italian Supreme Court of Cassation referred the matter to the CJEU for a preliminary ruling. The CJEU stated that it was for the national judge to rule on the scope of European non-liability without, however, defining the scope of the non-liability itself.⁶⁷

94. One had to wait until 2011 to receive more guidance on what the CJEU considered as an opinion expressed in the exercise of MPs' duties. In the *Patriciello* case,⁶⁸ an Italian MEP accused a police officer of wrong-doing and was consequently accused. The CJEU has stated that, in order to be covered by European non-liability, a connection between the opinion expressed and parliamentary duties must be *direct and obvious*.

95. The reasoning of the obvious link has been confirmed in a subsequent judgment *Bruno Gollnisch*⁶⁹ where the Court has confirmed that European immunity was not deemed to cover acts performed by a MEP in his capacity as regional councillor.

96. The above cases allow merely to identify the approach of the CJEU with regard to the non-liability. It seems that it would be up to the national court to decide whether the MEP non-liability could be invoked. However, in doing so, the CJEU encourages one to observe whether the statements at stake have "direct and obvious link" with a member's work in the European Parliament.

6. **Parliamentary immunity bordering on impunity**

97. Parliamentary immunity constitutes a guarantee of members of parliament being able to exercise the mandate they have been given by the citizens without hindrance and completely independently without fear of pressure, wrongful accusations or reprisals because of opinions expressed and votes cast. While parliamentary immunity has its origin, *raison d'être* and legitimacy in a political context in which the emerging or infant democracies had yet to fully develop and the judiciary itself had not come into its own as an independent branch of government, the present era, with firmly established and mature democratic institutions, places more emphasis on the other side of immunity: being potentially able to obstruct the course of justice, compromise the proper conduct of a criminal investigation or permit an abuse that cannot be challenged by a legal remedy, immunity appears to be one of the much criticised privileges of politicians, whose exceptional legal status places them above ordinary citizens. Parliamentary immunity as such is under the spotlight, and the current political situation in some member states has reignited the debate on the protection given to members of parliament.

6.1. *Hate speech and the popularity of nationalist parties*

⁶⁶ *Kart v. Turkey*, op. cit.

⁶⁷ *Alfonso Luigi Marra v. Eduardo De Gregorio and Antonio Clemente*, 21 October 2008, C-200/07 and C-201/07. The Court of Justice held that, as the parliament (national or European) had no authority to determine whether the conditions for the application of immunity (parliamentary privilege) were met, "*such an assessment is within the exclusive jurisdiction of the national courts which are called on to apply such a provision, and which have no choice but to give due effect to that immunity if they find that the opinions or votes at issue were expressed or cast in the exercise of parliamentary duties.*" (paragraph 33). "*Once the national court has established that the conditions for (...) absolute immunity (...) are met, the court is bound to respect that immunity, as is the Parliament. It follows that such immunity cannot be waived by the Parliament and that, as a result, that court is bound to dismiss the action brought against the Member of the European Parliament concerned*" (paragraph 44).

⁶⁸ *Aldo Patriciello*, CJEU, 6 September 2011, case C-163/10. The Court ruled that "immunity may not be waived by the European Parliament and the national court with jurisdiction to apply it is bound to dismiss the action brought against the Member of the European Parliament concerned" (paragraph 27) and that "*statements made by a Member of the European Parliament are not to lose this immunity merely because they were made outside the precincts of the European Parliament*" (paragraph 28), as they "*may amount to an opinion expressed in the performance of their duties, because whether or not it is such an opinion depends, not on the place where the statement was made, but rather on its character and content*" (paragraph 30).

⁶⁹ *Bruno Gollnisch v. European Parliament*, op. cit.

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98. In several European states, parliamentary elections have opened parliaments up to nationalist or extremist parties against a backdrop of public discontent fuelled by the economic crisis and the social situation, globalisation, the dilution of national identity and, more recently, the migrant crisis. Extreme right-wing or nationalist parties have entered parliament in at least twelve European countries. The backing of the European electorate varies considerably and ranges from 4% in Italy to 29% in Switzerland. In Denmark, the government coalition depends on the support of the Danish People's Party, which polled 21% of the votes at the last elections.⁷⁰ Even though these parties represent a broad range of political views, some of them, such as Golden Dawn or the "People's Party – Our Slovakia", actively contribute to the discriminatory rhetoric. Ten of these parties also have representatives in the Parliamentary Assembly.

99. In 2014, when the new European Parliament with several representatives of political parties from the far-right political spectrum was elected, several associations expressed their concern about a possible misuse by MEPs of their parliamentary immunities, in particular non-liability, to avoid legal actions, as was the case in 2009 when parliamentary immunity protected a French MEP from the far-right party from criminal charges with regard to the Holocaust denial. Recently, a member of the far-right Golden Dawn was expelled from the European Parliament for racist remarks targeting Turkish people. Voices have questioned the limited range of internal sanctions given the gravity of the statement. Consequently, one can imagine that the concept of parliamentary immunity can evolve in order to fit the current political context particularly sensitive to hate speech.

100. Both the Luxembourg and Strasbourg courts have already considered cases in which incitement for discrimination by parliamentarians was at stake. The European Court of Human Rights has found, after applying its usual proportionality test, that the limitation by a court of the freedom of expression of a campaigning politician who was distributing leaflets advocating anti-immigrant policies with generally xenophobic and discriminatory content, had not violated the Convention. "The fact that the applicant is a parliamentarian cannot be regarded as an attenuating circumstance. In this connection, the Court points out that it is crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance [...]. It considers that politicians have a particular duty to defend democracy and its principles because their ultimate aim is to govern".⁷¹ It also follows from the judgment of the CJEU in the case of *Bruno Gollnisch v. European Parliament* that the European Parliament's position of not upholding immunity under Article 9 (inviolability) when incitement to hatred was at stake was not to be put in question.

101. One possible solution would be not to apply the non-liability to certain statements, even when made in the context of political duties. A similar approach has been followed by the former European Commission on Human Rights which refused to apply Article 10 of the Convention on freedom of expression to "activities aimed at the destruction of any of the rights and freedoms set forth in the Convention" (in accordance with Article 17).⁷² The internal Notice No. 11/2003 of the European Parliament, a compilation of the relevant practice of the Committee on Legal Affairs and the Internal Market in taking decisions on the waiving of immunities, also states that "*the expression of opinion should not constitute an incitement to hatred, defamation or a violation of fundamental human rights or an attack on the honour or reputation of groups or individuals*".

102. Another avenue could be the setting up of a special procedure for the revocation of a mandate in the case of a constant breach of democratic principles and values. The Parliamentary Assembly already examined this question in 2005 when it decided that, if the procedure was to be introduced to allow the challenging of the "credentials of individual members of national parliaments who [were] accused of activities or statements persistently violating the basic principles of the Council of Europe, there would be a danger of abuse. The Assembly cannot have an interest in becoming the forum for political infighting." However, in 2013 it came back to this question on the occasion of the challenges of individual credentials of two members⁷³ and recognised that a solution should be found. However, after debating again the issue in the framework of the report on the "Evaluation of the implementation of the reform of the Parliamentary Assembly",⁷⁴ the Rules Committee decided, by a narrow majority, not to propose the establishment of such a procedure in the Rules.

⁷⁰ *Guide to nationalist parties challenging Europe*, BBC, 28 April 2016

⁷¹ *Féret v. Belgium*, op. cit, paragraph 75.

⁷² *Glimmerveen and Hagenbeek v. the Netherlands*, 11 October 1979, deciding that Article 10 cannot be used to spread ideas which are racially discriminatory. See also the European Court of Human Right fact sheet on hate speech: http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf

⁷³ Challenge on procedural grounds of the still unratified credentials of Ms Zaroulia (Greece, NR) and Mr Gaudi Nagy (Hungary, NR), opinion of the Committee on Rules of Procedure, Immunities and Institutional Affairs, AS/Pro (2013) 03 def.

⁷⁴ See the report by Ms Liliana Palihovici (Moldova, EPP/CD), 6 June 2014, paragraphs 50- 58.

6.2. *Fight against corruption*

103. In the current, political, economic and social environment, the system of parliamentary immunities ought to help promote strong and effective democratic institutions and, in particular, should not be an obstacle to the fight against corruption. This is a powerful argument in favour of restricting parliamentary inviolability. On the other hand, in the last few years the fight against corruption has been a favourite means of exerting pressure on political opponents when the judicial authorities take up individual cases.

104. In some member States, cases which have often received wide media coverage revealed that, notwithstanding the seriousness of allegations against them, whether proven to be well-founded or unfounded – and regardless of political affiliations of the defendants – , parliamentarians have been stripped of their parliamentary immunities in rather unusual circumstances, sometimes in violation of internal procedures. One example is that of Mr Igor Mosiychuk, a member of the (far right) Radical Party of Oleg Lyashko, whose immunity was withdrawn by the Ukrainian parliament in September 2015 in unusual circumstances.⁷⁵ Even if the facts described could appear to provide serious grounds for lifting his immunity, the failure to comply with domestic parliamentary procedure, including the fact that it was impossible for the individual concerned to comment on the matter, raised several concerns, especially as regards selective justice when efforts to combat corruption are directed exclusively against members of the opposition. Another example that may be mentioned is that of Vlad Filat, former Prime Minister of the Republic of Moldova, who was arrested by the police in October 2015 after his immunity had been lifted by the parliament for corruption, misappropriation of funds and influence peddling in a procedure that was unusual in that case too. This decision was criticised by some observers as flawed due to legal and procedural irregularities, thus increasing the suspicion that the action brought was based on political motives.⁷⁶

105. The temptation to reform the system of parliamentary immunity, sometimes in a radical way, occasionally seems an appropriate means of responding to a politico-financial scandal involving the misappropriation of public funds, abuse of power, conflicts of interest, influence peddling or the concealment of income. However, in some political systems in which democracy is weak and corruption in the judicial system is widespread, the abolition of parliamentary inviolability could, quite the contrary, jeopardise the parliament's democratic operation and autonomy.⁷⁷

106. The Venice Commission accordingly emphasises that inviolability “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”.⁷⁸

7. **Parliamentary immunity: rules that protect the political minority?**

107. The benefit of parliamentary immunity is accompanied by a very clear general principle: conceived as a guarantee of the independence of the parliamentary institution as such in the performance of its tasks, immunity does not aim to protect the interests of members of parliament as individuals or to cover their deeds in all circumstances. However, this statement needs to be qualified: the contemporary situation leads one to acknowledge that immunity plays (or should play) a role in practice as an element protecting the political activities of the parties represented in parliament and of their elected members when these parties belong to the political minority. What is at stake is the proper functioning of democracy, so the existence of a limited system of parliamentary non-liability and the attempts in some member states to reduce the inviolability of members of parliament are cause for concern.

7.1. *Prosecutions of members of the opposition or the political minority*

108. As the Venice Commission has emphasised, it is less often the parliament itself than the parliamentary opposition that risks being subjected to pressure by the executive and therefore might need special protection. In the past, the “French” model advocated the strict separation of powers and the special

⁷⁵ The vote took place in a plenary sitting as the last item on the agenda after the presentation of the case by the prosecutor general and the playing of a video recording showing Mr Mosiychuk offering to make speeches in parliament for money. After the vote, Mr Mosiychuk was immediately taken away by the police.

⁷⁶ The fact that his trial is currently being held in camera would seem to provide additional proof of this. See also the declassified information note by the committee's co-rapporteurs on their fact-finding visit to Chisinau (22-23 February 2016), AS/Mon(2016)07 of 14 April 2016.

⁷⁷ Opinion on draft constitutional amendments on the immunity of members of Parliament and Judges of Ukraine, document CDL-AD(2015)013, op.cit.

⁷⁸ CDL-AD (2014) 011, paragraph 159.

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protection of members of parliament against the executive, but today the parliamentary majority and the government are often of the same political complexion. Consequently, the system of parliamentary immunity functions today as a right of the political minority. This applies all the more to the new democracies, where sometimes the culture of political alternation is finding it hard to become established. The desire of incumbent governments to stay in power is reflected in particular in successive changes in electoral laws and amendments to the constitution aimed at weakening the opposition.

109. Aware of this problem, many new democracies have opted for relatively extensive inviolability, the aim clearly being to safeguard the effective autonomy of the parliamentary institution.

110. Abuses against members of parliament through the institution of criminal proceedings remain a reality in several European countries. It is not uncommon for legal measures to be taken to silence parliamentarians who are a little too critical. The opening and re-opening of proceedings against MPs or members of their family for tax-related or other matters are among the common methods of exerting political pressure. It should be added that in a number of countries a conviction can result in the loss of a mandate and/or ineligibility for election, and therefore the end of a political career.

111. Here are some examples. The immunity of the Russian MP Ilya Ponomaryov was waived in April 2015 to start a criminal probe into alleged embezzlement related to the state innovation hub Skolkovo, the Russian state-sponsored centre for innovations and technologies. However, due to the circumstances of the case (the main focus of attention was on the MP, pursued for complicity, and not on the alleged main perpetrator) as well as Mr Ponomaryov's personality (he was an active participant of 2011-2013 public actions by the opposition and the only Russian MP who voted against the annexation of Crimea), the stripping of immunity was seen by Kremlin critics as an attempt to stifle political dissent. Vladimir Markin, spokesman for the Investigative Committee, dismissed claims that the case against Mr Ponomaryov was politically motivated. The immunity of another Russian MP (from the Communist Party) was also stripped for having held an unauthorised meeting with voters before his election during which a clash with the police took place. The MP concerned claimed that the investigation was a "show-case" for the opposition.

112. In 2014, the Georgian parliament passed an amendment to the Code of Criminal Procedure deleting the provision making the institution of criminal proceedings against an MP conditional on the prior authorisation of parliament. The sole aim of the amendment in question is said to have been the institution of criminal proceedings against a member of the opposition, whose immunity was subsequently withdrawn. Although he was later acquitted by the courts, his trial damaged his political image.

7.2. Prosecutions of members of pro-autonomy or separatist parties

113. Self-determination movements that result in the creation of political parties and their emergence on the political stage are nothing new in the history of Europe. While some movements base their legitimacy and their hopes of attaining their objectives on democratic political processes, others are all about breaking with the constitutional order and sometimes resort to radical methods – violence, guerrilla tactics or terrorism – and focus on the destabilisation of populations and institutions. Members of parliament could well have proceedings brought against them because of their actual or alleged membership of such movements, hence the need to identify a number of principles.

114. As the European Court of Human Rights has emphasised, "one of the principal characteristics of democracy is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome". In a normal situation, "there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned".⁷⁹

115. The Court confirmed this position in its *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* judgment concerning the ban of a peaceful meeting of a Macedonian minority in Bulgaria.⁸⁰ In particular, the Court stated that "(d)emanding territorial changes in speeches and demonstrations does not

⁷⁹ This principle was set out in a judgment concerning statements by the Turkish Socialist Party urging the Kurdish population to rally together and assert certain political demands, but without calling for violence. It was on these statements that the Constitutional Court based its decision to dissolve the party – *Socialist Party and Others v. Turkey*, judgment of 25 May 1998, paragraph 45.

⁸⁰ *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Nos. 29221/95 and 29225/95, 2 January 2002

automatically amount to a threat to the country's territorial integrity and national security".⁸¹ The Court's subsequent position in its *Gorzelik and Others* judgment⁸² became more nuanced. In that case, which concerned the refusal by the Polish authorities to grant electoral advantages to an association that had been set up to promote a Silesian "nationality" and whose memorandum of association stated as its objective to "awaken and strengthen the national consciousness of Silesians", no violation of Article 11 was found.

116. This case law was developed several years ago. Since then, considerable changes have taken place, marked by the terrorist attacks in Paris, Brussels, Ankara and Istanbul, the conflict in Ukraine and the resumption of hostilities in Nagorno-Karabakh. As a result, the risks arising from the ideas and statements of certain political movements are being reconsidered. Moreover, the new communication media and the use of social networks have significantly altered the impact and weight of remarks made.

117. In this new context, it should be reiterated that it is up to each state, in accordance with Article 1 of the European Convention on Human Rights, to secure to everyone within their jurisdiction the rights and freedoms enshrined in the Convention and to safeguard them in an effective manner through the proper functioning of its internal structures. In seeking to maintain a fair balance between, on the one hand, the free expression of political ideas, especially by elected representatives - including the promotion of autonomist or separatist aspirations or calls for the right to self-determination - and, on the other, the constitutional order or the security of the country and its population, each state should therefore comply with the requirements of the Convention and abide by the decisions of the Court.

8. Conclusions

118. Almost all Council of Europe member states grant their national elected politicians two types of parliamentary immunity: non-liability and inviolability. However, in spite of a common constitutional tradition the system of parliamentary immunities is deeply steeped in the traditions and the political culture specific to each country. This system varies, sometimes considerably, depending on the state, whether because of its nature, its legal basis or existing parliamentary practices.

119. As a general rule, the system of non-liability is extremely stable in member states. Non-liability remains the indisputable pillar of parliamentary immunity, but there are differences: a number of states grant protection solely to remarks made during parliamentary debates, while others protect parliamentary work in the broad sense. Moreover, insulting or defamatory utterances, incitement to hatred or violence or racist remarks are not covered by non-liability rules in some states.

120. The absolute protection of the acts and statements of members of parliament poses a problem in the present situation – the upsurge in terrorism and the migration crisis, in particular – especially as far as hate speech is concerned. A possible solution would be to exclude from the scope of non-liability statements aimed at the destruction of democratic rights and freedoms, or withdrawal of the parliamentary mandate in the event of a persistent violation of democratic principles and values.

121. On the other hand, limiting the scope of non-liability by excluding remarks deemed insulting to the head of state or treasonous, criticism of judges or the disclosure of state secrets raises concerns to the contrary: these criminal offences are often invoked to prevent elected politicians from exercising their mandate.

122. As far as inviolability is concerned, it is no longer considered an imperative form of protection, and a slight trend can be seen in member states towards restricting its scope. However, it continues to play an important role in countries that do not provide their parliamentarians with adequate means of protection, especially because their judicial and criminal justice system provides insufficient safeguards. In general terms, it constitutes an important safeguard for the political minority

123. There are still significant differences between member states with regard to the nature and degree of protection granted to members of parliament through the rules on inviolability. The majority of countries have enshrined inviolability in their respective constitutions, although the parliament's rules of procedure sometimes support the procedure for waiving immunity.

124. The European Court of Human Rights accepts parliamentary immunity as a legitimate constitutional rule while at the same time acknowledging that it restricts the right enshrined in the Convention. When they actually serve to protect the free exercise of the duties of the parliament, immunities are a justified restriction

⁸¹ *Ibid.*, paragraph 97

⁸² *Gorzelik and Others v. Poland*, No. 44158/98, 17 February 2004

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on access to justice, but when they extend beyond this necessary protection their application violates the Convention. Consequently, since non-liability relates to acts carried out in connection with the immediate exercise of the parliamentary mandate, the Court considers this a legitimate restriction. On the other hand, inviolability concerning acts unrelated to the parliamentary mandate cannot in principle constitute a legitimate restriction. This last point more or less calls into question the very concept of inviolability; yet the explicit purpose of inviolability is to protect members of parliament against any politically motivated judicial action concerning activities outside parliament.

125. Finally, if a member state considers revising the system of immunities protecting its members of parliament, it would be desirable for that revision to be the subject of a wide-ranging public debate and for it to take into consideration all the variables and draw on good practices existing elsewhere in Europe, while bearing in mind the underlying principle of these immunities, which is, in particular, the need to preserve the rights and integrity of members of the political minority during and after the end of the parliamentary mandate.