Parliamentary Assembly
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

**Resolution 2392 (2021)[1]**

# Guidelines on the scope of the parliamentary immunities enjoyed by members of the Parliamentary Assembly

Parliamentary Assembly

1. In addition to national regimes, members of the Parliamentary Assembly benefit from a supranational regime of parliamentary immunity conferred by the Statute of the Council of Europe (ETS No. 1) and the General Agreement on Privileges and Immunities of the Council of Europe of 1949 (ETS No. 2), which could be described as "European" parliamentary immunity. This regime offers functional protection beyond national borders and opens up the scope of parliamentary action, in line with the mission that the Parliamentary Assembly is called upon to fulfil.

2. The Parliamentary Assembly recalls that it regularly reviews the mechanism for the protection of its members, taking into account the changes or challenges faced by national parliaments in the various aspects of parliamentary immunity, with a view to ensuring effective protection of its members and thus of the Assembly, in particular in the light of new political risks.

3. Notwithstanding the fact that the 70-year-old system of immunities has not evolved in the statutory and conventional texts, the Assembly has sought to improve it through successive resolutions in order to adapt it to the reality of the work of its members and to take account of activities linked to parliamentary diplomacy. It still has a solid legal basis to ensure effective protection of its members and the institution and, at the same time, to avoid abuses.

4. However, the Assembly notes that, in implementing the system of protection for its members, it is now essential to clarify the scope of the current provisions and to lay down clear and objective criteria enabling privileges and immunities to serve their institutional purpose while preventing the possible misuse of privileges by parliamentarians for personal purposes.

5. The Assembly recalls that both the Group of States against Corruption (GRECO) in 2017 and the Independent Investigation Body on the allegations of corruption within the Parliamentary Assembly in 2018 recommended that the immunity regime be supplemented and clarified by a set of criteria, in order to prevent immunities and privileges from being invoked in cases where there are real suspicions of corrupt activity.

6. The Assembly therefore considers it appropriate to adopt guidelines on the scope of parliamentary immunities enjoyed by members of the Assembly with a view to clarifying the application of existing rules under the Statute of the Council of Europe and under the General Agreement on Privileges and Immunities of the Council of Europe and its Additional Protocol (ETS No. 10). These guidelines do not create new rights and privileges. They summarise domestic practice, introduce the principles and interpretation established by the European Courts and provide practical information to make the handling of immunity-related claims smoother and provide safeguards against abuse. They will ensure the consistent application of the regime of privileges and immunities in all member States.

1. *Assembly debate* on 27 September 2021 (24th sitting) (see Doc. 15364, report of the Committee on Rules of Procedure, Immunities and Institutional Affairs, rapporteur: Mr Tiny Kox). *Text adopted by the Assembly* on 27 September 2021 (24th sitting).

7. Furthermore, the Assembly considers that, in view of the absolute and perpetual nature of the immunity guaranteed by Article 14 of the General Agreement on Privileges and Immunities, Rule 73.6 of the Assembly's Rules of Procedure should be supplemented in order to allow former members of the Assembly to make a request for the defence of their immunities and privileges in relation to an opinion expressed or a vote cast in the exercise of their functions as members of the Assembly.

8. Therefore, the Assembly decides to:

8.1. adopt guidelines on the scope of parliamentary immunities enjoyed by members of the Assembly and, accordingly, to add the following new sub-paragraph *d*. to Rule 73.6:

*"The guidelines on the scope of parliamentary immunities enjoyed by members of the Parliamentary Assembly shall be appended to these Rules of Procedure as a complementary text";*

8.2. replace the second sentence of Rule 73.6 with the following:

*"A member or former member may address a request to the President of the Assembly to defend his or her immunity and privileges".*

9. Furthermore, the Assembly notes that the vast majority of its members are unaware of the protection regime from which they benefit and the scope of the immunities granted to them, and considers it essential to promote the existing instruments and mechanisms both among Assembly members and in national parliaments.

10. Finally, the Assembly recalls the importance of the immunity enjoyed by its members in the exercise of their functions for the unhindered functioning of the Parliamentary Assembly and, referring to its Resolution 1325 (2003) "Immunities of Members of the Parliamentary Assembly", and its Resolution 2087 (2016) and Recommendation 2083 (2016) "Introduction of sanctions against parliamentarians", reminds member States of their existing obligations; it calls on them to ensure scrupulous compliance with their commitments under the Statute and the General Agreement on Privileges and Immunities of the Council of Europe and its Additional Protocol.

*Guidelines on the scope of parliamentary immunities enjoyed by members of the Parliamentary Assembly*

1. The following principles pursue the objective of clarifying the application of the existing rules under the Statute of the Council of Europe and under the General Agreement on Privileges and Immunities of the Council of Europe and the Additional Protocol thereto.

2. Members of the Parliamentary Assembly enjoy privileges and immunities which serve to preserve the integrity of the Assembly and ensure the independence of its members in the discharge of their office. These privileges and immunities are granted by Article 40 of the Statute of the Council of Europe and by Articles 13 to 15 of the General Agreement on Privileges and Immunities of the Council of Europe and Article 3 of the Additional Protocol thereto.

3. Their practical implementation is further detailed in the Rules of Procedure and relevant Assembly resolutions[2] bearing in mind:

– the need to protect the independence of the Assembly;

– the functional purpose underlying the concept of immunities;

– existing precedents.

4. Parliamentary immunity is not a member's personal privilege but an institutional privilege which members enjoy in their individual capacity.

*Absolute immunity in respect of words spoken and votes cast (Article 14 of the General Agreement on Privileges and Immunities of the Council of Europe)*

5. Freedom of expression is the most valuable tool enabling members to exercise their duties and it enjoys enhanced protection.

2. In particular Resolution 1325 (2003), Resolution 1490 (2006) and Resolution 2127 (2016).

6. Therefore, the immunity guaranteed by Article 14 of the General Agreement on Privileges and Immunities:

6.1. is absolute, permanent and perpetual in nature; it continues to apply after the end of a member's mandate; it cannot be waived by the Parliamentary Assembly or a national parliament;

6.2. is an institutional privilege; a member or a former member has no liberty to waive or to renounce it;

6.3. applies to all legal proceedings (criminal, civil or administrative) which may arise in relation to words spoken and votes cast. As a corollary, no parliamentarian covered by such an immunity should be heard, including as a testifying witness, with regard to information obtained confidentially in the performance of their parliamentary duties which they do not see fit to disclose;

6.4. has an autonomous scope, which could be different from the scope of the absolute immunity that protects national parliamentarians, to be established bearing in mind relevant statutory provisions, the case law of the European jurisdictions and relevant Assembly practices;

6.5. given the exceptional protection, covers merely what is strictly necessary to allow the Assembly members to perform their duties, engage in respectful debate or express critical positions while precluding the misuse of the privileges and immunities for personal benefit. With this in mind, immunity does not cover activities prohibited by the Code of Conduct, such as paid advocacy;

6.6. covers words spoken and votes cast by the members of the Parliamentary Assembly "in the exercise of their functions", bearing in mind the present-day definition of core functions of the Assembly members;

6.7. could, in addition to covering statements made by members during a debate in the plenary or during meetings of the committees and sub-committees, be also extended to verbal and written statements made by members outside official premises as well as to other activities performed by them in their capacity as Assembly members if there is an obvious and direct connection between these statements or activities and the exercise of their functions as Assembly members;[3]

6.8. does not cover an inquiry into bribery-related offences (for example, offering or requesting undue advantages in return for certain voting behaviour), given that those offences do not pertain to words spoken or/and votes cast.

7. It is the responsibility of competent national courts to recognise that a member or a former member enjoys absolute immunity owing to the direct and obvious link to his or her parliamentary functions. By doing so, the relevant Council of Europe bodies and national courts must co-operate so as to avoid any conflict in the interpretation and application of the provisions of the Statute and the General Agreement on Privileges and Immunities.[4]

8. Where a request for waiver of immunity is submitted to it by a national authority, the Assembly must first of all ascertain whether the facts giving rise to the request for the waiver are covered by Article 14 of the General Agreement, in which case immunity cannot be waived.

*Immunity from detention and prosecution (Article 15 of the General Agreement on Privileges and Immunities of the Council of Europe)*

9. The purpose of this immunity is to protect a parliamentarian from undue pressure which could be exercised against him or her in respect of acts which do not constitute a part of typical parliamentary activities and applies as follows:

9.1. members of the Parliamentary Assembly enjoy the immunity provided for in Article 15 during the Assembly sessions. The term "during the sessions" covers the whole parliamentary year in view of the continuous activity of the Assembly and its bodies;

9.2. members of the Assembly enjoy the immunities secured by this provision when they are no longer members of their national parliament, and do so until their replacement as members of the Assembly or until the opening of the next session;

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3. For instance, when a member carries out duties following an official decision by a competent Assembly body (election observation, visits in the context of a monitoring procedure or a fact-finding visit of a committee rapporteur to a member State, etc.).

4. Consequently, where the national authority is informed of the fact that a member has made a request for defence of that immunity, it should stay the judicial proceeding.

9.3. according to the Statute, protection afforded to members of the Assembly applies during their Assembly mandate. It could also cover proceedings initiated prior to becoming a member of the Assembly as long as those proceedings contain evidence of *fumus persecutionis*. This position, which intends to make protection fully effective, is in line with practices existing in several member States and does not contradict the Statute in that it links the acquisition of immunity to the beginning of the term of office. Nor does it contradict the principle of the functionality of parliamentary immunity in that the protection will only be granted if factual elements indicate that the intention underlying the legal proceeding predating the mandate of an Assembly member is to damage a member's political activity and thus the Assembly. In all other cases if the prosecution is for no other reason than the proper administration of justice, immunity must be lifted at the request of the national authority;

9.4. immunity cannot be invoked in cases of *in flagrante delicto.* As the objective of this provision is to quickly restore public order and reduce the risk of evidence disappearing, its use by national authorities shall not be inspired by concerns unrelated to the proper administration of justice;[5]

9.5. at all stages when parliamentary immunity is waived the presumption of innocence must be respected;

9.6. when considering a request to waive immunity, the Assembly must consider the following elements: legal proceedings initiated against the member should not jeopardise the proper functioning of the Parliamentary Assembly; the request must be serious, that is, not inspired by reasons other than that of dispensing justice.[6] If neither of these elements can be established, the Assembly should normally propose waiving immunity;

9.7. immunity cannot be waived except by the Assembly at the request of a "competent authority" of the member State concerned. The competent authority is normally the judge in charge of the case, but it could also be the public prosecutor or the Minister of Justice. The request to waive immunity may be submitted by an authority of a member State other than the one of which the member in question is a national;

9.8. where members are required to appear as witnesses or expert witnesses, there is no need to request a waiver of immunity provided that they will not be obliged to appear on a date or at a time which prevents them from performing their parliamentary duties or which makes it difficult for them to perform those duties, or if they are able to provide a statement in writing or in any other form which does not make it difficult for them to perform their parliamentary duties;

9.9. detention of an Assembly member requires very serious grounds as it prevents him or her from taking up his or her seat or representing voters and in this way jeopardises the independence of the legislative power and the effectiveness of the electoral process designed to determine the will of the people. Where there are no indications that the suspect is likely to evade justice, the proper conduct of the investigation shall be ensured, if possible, by other security measures (release on bail, for example).

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5. In cases where there is a strong assumption that a member was groundlessly deprived of his or her privileges by the application of the provision *in flagrante delicto*, the President could take the initiative to assert the privileges and immunities of the member concerned. The member could also petition the President to defend his or her immunity.

6. To consider whether there may be reasons behind legal proceedings, the following elements could be taken into account: the broader political and legal context in which the legal proceedings against a member were launched; the timing of the prosecution; any indication of specific and personal targeting; a member's specific status and activities, even though the absence of a particular political status does not rule out political motivation being behind the legal proceedings; the gravity of charges compared to those that an ordinary citizen would face for the same acts and a sufficient connection with the objectives of criminal justice; uncertainty as to the weight and sources of the evidence presented as a basis for charges; the reasoning and the elements upon which the request for a waiver of immunity is based; the means to defend him or herself.