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

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A. Draft Resolution

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 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 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 equality before the law calling into question the legitimacy of 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

Amendment 1

Tabled by Mr Vladyslav GOLUB, Mr Leonid YEMETS, Ms Olena SOTNYK, Ms Kristýna ZELIENKOVÁ, Ms Svitlana ZALISCHUK, Mr Sergiy VLASENKO, Mr Georgii LOGVYNSKYI

In the draft resolution, paragraph 5, at the end of the first sentence, delete the following words: "or have been handed a final conviction".

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 or the obstruction of justice, especially in connection with the fight against corruption underway 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 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 above-mentioned 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

Amendment 2

Tabled by Mr Vladyslav GOLUB, Mr Leonid YEMETS, Ms Olena SOTNYK, Ms Kristýna ZELIENKOVÁ, Ms Svitlana ZALISCHUK, Mr Sergiy VLASENKO, Mr Georgii LOGVYNSKYI

In the draft resolution, paragraph 11, in the third sentence, delete the following words: "such as taxation matters".

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 or 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.
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.

Amendment 3

Tabled by Mr Vladyslav GOLUB, Mr Leonid YEMETS, Ms Olena SOTNYK, Ms Kristýna ZELIENKOVÁ, Ms Svitlana ZALISCHUK, Mr Sergiy VLASENKO, Mr Georgii LOGVYNSKYI

In the draft resolution, after paragraph 13, insert the following paragraphs: "The Assembly emphasises that the immunities provided for its members by the Council of Europe Statute and Articles 13, 14 and 15 of the General Agreement on Privileges and Immunities are inherently unconditional and irrevocable, as well as the fact that the aforementioned immunities extend to an Assembly member immediately on becoming a member of the Assembly and cover the whole period of his or her activity as a member of the respective national delegation to the Assembly. These immunities apply equally to both representatives and substitutes of the delegation. The Assembly stresses that the arrest, detention and following prosecution, which was politically motivated (see Assembly Resolutions 2034(2015), 2063(2015), 2077(2015), 2087(2016), 2112(2016)) in respect of a member of Ukraine's delegation to the Assembly, Ms Nadiya Savchenko, is one of the most vivid examples of the breach of the immunity stipulated for an Assembly member, an infringement committed by a Council of Europe member State, notably Russia. Taking into account the autonomous nature of the immunities of an Assembly member distinct from immunities provided to members of Parliament at national level, Russia was obliged to immediately provide for the free movement as well as for the release from arrest and prosecution of the member of the delegation of Ukraine, Ms Nadia Savchenko, the moment she became an Assembly member."

Amendment 5

Tabled by Ms Chiora TAKTAKISHVILI, Mr Mart van de VEN, Mr Valeriu GHILETCHI, Mr Volodymyr ARIEV, Mr Tiny KOX, Mr Giorgi KANDELAKI, Mr Egidijus VAREIKIS

In the draft resolution, after paragraph 13, insert the following paragraph:

"The Assembly invites member States to take all necessary measures to ensure compliance with obligations under the General Agreement on Privileges and Immunities of the Council of Europe and its Protocol, on which they have not

expressed reservation or made an interpretative declaration. It is concerned about the changes to national systems of parliamentary immunity, in particular by means of amending or suspending constitutional provisions, which lead, in practice, to render ineffective Article 15.a of the General Agreement on Privileges and Immunities, and to remove de facto protection accorded to members of the Assembly on the territory of their own State, as defined by the Assembly in its Resolution 1490 (2006)."

Amendment 6

Tabled by Ms Chiora TAKTAKISHVILI, Mr Volodymyr ARIEV, Mr Tiny KOX, Mr Pieter OMTZIGT, Mr Giorgi KANDELAKI, Mr Egidijus VAREIKIS

In the draft resolution, after paragraph 13, insert the following paragraph:

"The Assembly reminds Member States that it must decide on the lifting of the immunity of its members in cases where national law requires authorisation from a national parliament prior to the criminal prosecution of its members. It considers that the need to ensure respect for the rule of law and to prevent any disguised attempt to cause political damage to a member (fumus persecutionis) requires the Assembly to consider lifting the immunity which members enjoy under Article 15.a of the General Agreement on privileges and immunities, regardless of the procedure that could take place at national level."

14. In this connection, the Assembly urges member States to act in strict compliance with their obligations under Article 40 of the Statute of the Council of Europe (ETS No.1) and Articles 13, 14 and 15 of the General Agreement on Privileges and Immunities of the Council of Europe and its Protocol (ETS Nos. 2 and 10) 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 (challenge of still unratified credentials on substantive grounds).

Amendment 7

Tabled by Ms Chiora TAKTAKISHVILI, Mr Mart van de VEN, Mr Carles JORDANA, Mr Pieter OMTZIGT, Mr Florian KRONBICHLER, Mr Tiny KOX

In the draft resolution, after paragraph 14, insert the following paragraph:

"The Assembly decides to request the opinion of the Venice Commission on the suspension by a provisional clause of Article 83 of the Constitution of Turkey, which guarantees the parliamentary inviolability of members of the Grand National Assembly."

B. Draft Recommendation

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 ((ETS No.1), the General Agreement on Privileges and Immunities of the Council of Europe and its Protocol (ETS No.2 and 10) 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:
 - 2.1. 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;
 - 2.2. 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;
 - 2.3. 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.

Amendment 4

Tabled by Mr Vladyslav GOLUB, Mr Leonid YEMETS, Ms Olena SOTNYK, Ms Kristýna ZELIENKOVÁ, Ms Svitlana ZALISCHUK, Mr Sergiy VLASENKO, Mr Georgii LOGVYNSKYI

In the draft recommendation, paragraph 4, after the words "by some Council of Europe member States", insert the following words: "notably, by the Russian Federation,".