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Immunities of Representatives and Substitutes to the Assembly, with proposals for the modification of the Rule relating to the Waiver of Immunity

Report
Committee on Rules of Procedure, Immunities and Institutional Affairs
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A. Explanatory memorandum

1. 1. Reference Articles 14 and 15 of the General Agreement on Privileges and Immunities.

The immunities enjoyed by the Representatives to the Consultative Assembly and their Substitutes are set out in Articles 14 and 15 of the General Agreement on Privileges and Immunities, signed at Paris on 2nd September, 1949.

This Agreement, which was concluded in accordance with the terms of Article 40 of the Statute of the Council of Europe, has so far been ratified by the following five Member States : Norway (1st December, 1949), Netherlands (15th March, 1950), United Kingdom (29th August, 1950), Sweden (7th September, 1950), Belgium (5th April, 1951).

Under its Article 22, however, the Agreement took provisional effect from the date of signature.

Article 14 is worded as follows :

" Representatives to the Consultative Assembly and their substitutes shall be immune from all official interrogation and from arrest and all legal proceedings in respect of words spoken or votes cast b y them in the exercise of their functions. "

and Article 15 as follows :

" During the sessions of the Consultative Assembly the representatives to the Assembly and their substitutes, whether they be Members of Parliament or not, shall enjoy :

a. on their national territory, the immunities accorded in those countries to Members of Parliament;

b. on the territory of all other Member States, exemption from arrest and prosecutions.

This immunity also applies when they are travelling to and from the place of meeting of the Consultative Assembly. It does not, however, apply when Representatives and their Substitutes are found committing, attempting to commit, or just having committed an offence, nor in cases where the Assembly has waived the immunity. "

2. 2. Immunity granted under Article 14 of the Agreement.

The immunity from official interrogation and from arrest and all legal proceedings in respect of words spoken or votes cast in the Assembly is simply the application to the Council of Europe of thé immunity granted by the Member States of the Council to members of their own Parliaments acting in their official capacities. It is the Parliamentary immunity which in continental parliaments is generally (though improperly) known as " non-responsibility ".

The protection which Representatives and Substitutes are thus assured is less in their personal interest than in that of the prestige of the Assembly itself. Its object is to ensure an atmosphere of independence and free expression of opinion. This is confirmed in Article 25 (b) of the Statute which states that : " No Representative shall be deprived of his position as such during a Session of the Assembly... "

The immunity thus granted is absolute in the sense that a Representative cannot at any time, even after the expiry of his term as such, be legally convicted by any judicial authority on the grounds of opinions expressed or votes cast in the Assembly.

Owing to the absolute nature of this immunity, the Assembly cannot be required to withdraw this immunity from one of its members. Thus it is not necessary to provide for such a case in the Rules of Procedure.

3. 3. Immunity granted under Article 15 of the Agreement.

This immunity is of a different character from the foregoing. It is in the direct interest of the Representatives themselves. It is not designed to safeguard the independence of the Assembly but rather to ensure that it is not hampered in its work. It provides personal protection against prosecutions on grounds unconnected with the activities proper of the Assembly and so corresponds to the second aspect of parliamentary immunity, usually known as " inviolability " . While " non-responsibility " only applies to the acts of Representatives in the

performance of their functions in the Assembly and is unconditional, " inviolability " extends beyond actions connected with the Representative's functions but is subject to the limitations laid down in Article 15 of the Agreement.

(a) Period for which the immunity remains valid.

The immunity only remains valid " during the sessions of the Consultative Assembly " . The interpretation of this phrase is complicated by the division of the Sessions into two (or possibly several) parts so that, theoretically, the Session is spread over several months, whereas the Statute stipulates that the effective Session may not exceed a total of one month. In view of the personal nature of " inviolability " and of the exception which it makes to the law of the land, the above text can only be interpreted in the narrow sense, that is only from the point of view of the purpose to be achieved, which is to prevent the work of the Assembly being in any way disturbed. This would be adequately ensured by an " inviolability " limited in duration to the periods when the Assembly is effectively in Session. If a prosecution is started before the opening or the resumption of a Session it will have to be suspended b y the judicial authority in order to enable the Representative concerned to take part in the work of the Assembly.

This interpretation is supported by the fact that the vast majority of the Member States of the Council which grant such immunity to their members of parliament strictly limit its duration to parliamentary sessions. France is the only country to have extended the immunity (in its Constitution of 27th October, 1946) to the whole period of office. The constitution of the Italian Republic (of 22nd December, 1947) and the Fundamental Law of the German Federal Republic (of 8th May, 1949) do not mention this point.

Your Committee likewise points out that no immunity is granted for meetings of Assembly committees when the Assembly is not in session. This omission should be made good by the inclusion of a special clause in the Protocol to the Agreement which is at present being studied by the Committee of Ministers.

(b) Extent of the immunity.

Article 15 distinguishes between two separate cases.

Under paragraph (a) Members of the Council of Europe grant to their nationals who are Representatives to the Council of Europe exactly the same immunity as they grant to their members of parliament. Since national legislations vary, all Member States are not under the same obligation in this respect. Four states, viz. the United Kingdom, the Netherlands, Ireland and, to a certain extent, Sweden, in which there is no parliamentary " inviolability " , have virtually no obligations in this matter. On the other hand, the other eleven Members grant immunity against judicial prosecution to their parliamentarians and as a consequence to their Representatives and Substitutes in the Council of Europe.

Under the terms of paragraph (b) foreign nationals who are Representatives/to the Assembly or their Substitutes are granted " inviolability " on the territory of all Member States without exception. In this respect the legal position does not vary from country to country.

(c) Sphere of the immunity.

The immunity, where it exists, only covers criminal proceedings. It does not, moreover, apply, when Representatives and their Substitutes ; are found committing, attempting '• to commit or just having committed an offence an exception which is to be found in the various national constitutions and is incorporated in Article 15 of the Agreement.

Thus the immunity, as so defined, is essentially relative.

4. 4. Procedure for waiving the imminuty.

" Non-responsibility " is a " real " and permanent immunity, a complete guarantee which cannot be withdrawn. " Inviolability " is " personal " and temporary, a simple measure of procedure to ensure that the work of the Assembly is not hampered and one which the Assembly may at any time withdraw for reasons of expediency. It is only in respect of the latter immunity, the one accorded b y Article 15 of the Agreement, that it is possible to draw up regulations stipulating the terms and conditions for the examination of a request from a judicial authority which wishes to take proceedings against a Representative or a Substitute covered by the immunity.

Your Committee proposes that an amendment be made to the Rules of Procedure fixing the procedure to be followed when the Assembly receives a request for the waiving of immunity. To this end it submits to the Assembly the following draft Resolution, which has been unanimously agreed to.

B. Draft Resolution

The Rule relating to the waiving of the immunity of Representatives and Substitutes is modified as follows :

Waiver of the imminuty of Representatives and Substitutes.

1. Any request addressed to the President by the competent authority of a Member State for the M'aiver of immunity shall be transmitted to the Assembly and then referred without prior discussion to the Committee on the Rules of Procedure and Privileges.

2. The Committee shall immediately consider the request but shall not make any examination of the merits of the case in question. The Representative or Substitute concerned may, if he so wishes, be heard by the Committee. The report of the Committee shall conclude in a Draft Resolution for the retention or the waiver of the immunity.

3. The report of the Committee shall automatically be included as the first item of the Orders of the Day for the first day on which the Assembly sits after the report has been laid upon the Table of the Assembly.

The debate on the report shall be confined to arguments for or against the waiver of the immunity.

4. The President shall immediately inform the authority which submitted the request of the decision of the Assembly.