



Strasbourg, 28 November 2013

Study No. 714 / 2013

CDL(2013)059*
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

PRELIMINARY DRAFT REPORT

ON

THE LIFTING OF PARLIAMENTARY IMMUNITIES

on the basis of comments by

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

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

Contents

I.	Introduction	3
II.	General remarks	3
A.	Non-liability	3
B.	Historical background and current context	4
C.	Parliamentary immunity and the rule of law	5
III.	Non-liability.....	6
A.	Comparative overview	6
B.	Qualification of the principle of non-liability	11
IV.	Inviolability.....	20
A.	Comparative overview of rules on “inviolability”	20
B.	Comparative overview of rules on lifting of inviolability	23
C.	Assessment.....	26
V.	Summary and conclusions (preliminary)	31
VI.	Draft Guidelines	34

I. Introduction

1. On 13 February 2013, the Secretary General of the Council of Europe invited the Venice Commission, in co-operation with an expert of the Group of States against Corruption (GRECO),¹, to develop criteria and guidelines on the lifting of parliamentary immunity in order to avoid the misuse of immunity as well as selective and arbitrary decisions, and in order to ensure adequate transparency of the procedure.
2. The present report was drawn up on the basis of comments from Mr Hamilton, Ms Palma, Mr Sejersted and Mr Sørensen, with the co-operation of Mr Yves-Marie Doublet, GRECO expert.
3. This report takes into account the previous work of the Venice Commission in the field, which led to the adoption of the Report on the regime of parliamentary immunity (CDL-INF(1996)007).
4. It will successively deal with the two aspects of parliamentary immunity.: non-liability (linked to legislative activity) and inviolability (defence of members of Parliament against external political pressure).
5. *After being discussed in the Sub-Commission on Democratic Institutions on 5 December 2013, the present report was adopted by the Venice Commission at its XX Plenary Session (Venice, XX).*

II. General remarks

A. Non-liability

6. The concept of “parliamentary immunity” has two main components, which are of a different nature and which are usually regulated in a different manner. The first is “*non-liability*”, meaning immunity against any judicial proceedings for votes, opinions and remarks related to the exercise of parliamentary office, or in other words, a wider freedom of speech than for ordinary citizens. The second is “*inviolability*”, or immunity in the strict sense, meaning special legal protection for parliamentarians accused of breaking the law, typically against arrest, detention and prosecution, without the consent of the chamber to which they belong.
7. *Non-liability* is encountered in most national legal regimes for protecting parliamentarians. Amongst the states under consideration, only Kazakhstan excludes it completely. Non-liability is procedural as it concerns the suspension of legal proceedings during the parliamentary mandate. It ensures a qualified protection of the parliamentarians’ freedom of expression.

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

8. "Non-liability" is termed, for instance, "berufliche Immunität" in Austria, "Indemnität" in Germany, "freedom of speech" in Ireland, Malta, Canada, the Netherlands and the United Kingdom, "insindacabilità" in Italy, "inviolabilidad" in Spain and "Immunität/Irresponsabilité" in Switzerland.

9. *Inviolability* certainly appears more complex in essence and occasions a far wider variety of legal arrangements for its application. Its justification seems more disputed than non-liability, so much so that in several states inviolability has long since vanished or is not contemplated in the system of protection established for parliamentarians.

10. This form of immunity is called, for instance, "ausserberufliche Immunität" in Austria, "Immunität" in Germany, "freedom from arrest" in Ireland, Malta, Canada and the United Kingdom, "inmunidad" in Spain, "Sessionsteilnahmegarantie" in Switzerland.

11. In the context of country evaluations carried out in the First Evaluation Round (2000-2002) in respect of the implementation of Guiding Principle 6 of Resolution (97) 24, GRECO focused on inviolability, which was by far, at that time, the main source of concerns in practice.

B. Historical background and current context

12. Parliamentary immunity has its historical origins in two models:² the English model, which finds its expression in the Bill of Rights of 1689,³ Article 9 of which provides "that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament" and the French model of 1789, which, under the influence of Mirabeau, stressed the will of the people against the royal authority, inviting the National Assembly to ensure its protection against the power of the bayonet and asserted complete inviolability of the members of Parliament.⁴

13. In both cases, the parliamentary immunities assert the overall protection of the legislature against the power of the king. The inviolability referred to an absolute protection of members from the executive branch, including the judiciary, which at that time was effectively an emanation of the royal power.

14. It is important to note the difference between both approaches: the first one derives from a tradition of a protection of the power of Parliament, including the power to legislate and control taxation, which for its exercise necessitated full freedom of speech and expression of Parliament and its members; the second one is related to a tradition of general immunity of members of Parliament, in the context of an absolute separation of powers, including separation from the judicial power. This difference in traditions is reflected in the distinction between the absolute or material immunity, that is to say, non-liability linked to the exercise of parliamentary functions, and relative or procedural immunity, or inviolability in line with the defence of members of Parliament against external pressure exerted by the executive or the judiciary.

15. Today, the distinction between non-liability and inviolability is recognised by almost all constitutions. This distinction implies a differentiation between the nature of parliamentary activity, concentrated in the expression of votes and opinions, which is the core of

² On the existence of both models, see Wisley, Simon, « Parliamentary Immunity: Protecting Democracy or Protecting Corruption ? », *Journal of Political Philosophy*, vol. 11, n. 1, 2003, pp. 23-40.

³ On the previous tradition, which dates back to the XIVth century, see Wisley, Simon, *op.cit.*, p. 23 and « Report on the regime of parliamentary immunity », CDL-INF (96) 7, Strasbourg, 4 June 1996, p. 5.

⁴ « Je bénis la liberté de ce qu'elle mûrit de si beaux fruits dans l'Assemblée nationale. Assurons notre ouvrage, en déclarant inviolable la personne des députés aux États généraux ». Cf. [http:// www.assemblee-nationale.fr/connaissance/collection/7.asp](http://www.assemblee-nationale.fr/connaissance/collection/7.asp).

parliamentary activity, and protection of the status of the member as an instrument of the political safeguard of Parliament against pressure from the executive and judicial powers.

16. These historical elements no longer express the full contemporary context of immunities,⁵ even if some form of functional parliamentary immunity exists in almost all states. Some form of functional Parliamentary immunity exists in almost all states. Its function is to protect the institution itself, rather than to benefit the individual member of Parliament in any personal way. Some aspects resulting from historical evolution have to be taken account of where those aspects are present, including in particular:

- a) Internal divisions within Parliament itself, of which the struggle between the majority and the opposition is the most important, giving rise to the need to protect members of the minority from the parliamentary majority itself, which may for all practical purposes be indistinguishable from the executive.
- b) The tendency towards greater independence of the judiciary from the executive branch, which may be accompanied by an increase in judicial activism which may be manifested in a less literal interpretation of the law.
- c) The distribution of representative democratic powers between Parliament and the elected executive bodies (such as the President of the Republic, in presidential and semi-presidential systems), withdrawing from Parliament the exclusivity of a popular mandate.

C. Parliamentary immunity and the rule of law

17. Parliamentary immunity should not allow parliamentarians to be above the law. In order to avoid such a risk, and to ensure respect for the rule of law, the following principles should be taken into account:

- a) It is the necessity to allow parliamentarians to fulfil their functions as legislators and as representatives of the people which alone can justify parliamentary immunities; there is therefore a need for a clear functional connection between the nature and the scope of the parliamentary immunities which are necessary and the need to ensure the proper functioning of Parliament.
- b) The need for protection of parliamentary minorities is an essential dimension of the protection of Parliament against other powers.
- c) Confrontation between the legislature and the judiciary should be avoided, in order to prevent either from exercising supremacy over the other. This is the justification for the exercise of supervision by Parliament over the conditions for lifting (or limiting) immunities, in order for the judiciary not to be in a position to interfere in the action of the political power.
- d) The régime of parliamentary immunity should be harmonious with the principles of the rule of law and in particular should, to the maximum extent possible, be in accordance with the principle of equality before the law.

18. The fact that immunities should not be construed in such a way as to shield criminal offences was explicitly translated into Council of Europe standards by the Committee of Ministers, when it adopted on 6 November 1997, Resolution (97) 24 on the Twenty Guiding Principles for the fight against corruption. One of these principles recognises the need “*to limit*

⁵ See Wisley, Simon, *op.cit.*, loc. cit.

immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society" (Guiding Principle 6).⁶

19. The need for a strict functional link between parliamentary immunities and the powers of parliamentarians was recognised by the European Court of Human Rights in the Cordova cases⁷ under Article 6 ECHR.⁸ In particular, the Court considered "that, while freedom of expression is important for everybody, it is especially so for elected representatives of the people; they represent the electorate, draw attention to their preoccupations and defend their interests. In a democracy, the parliament and comparable bodies are the essential fora for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein".⁹ Parliamentarians' freedom of expression may therefore be protected by immunity. However, in order to benefit from parliamentary immunity, behaviour has to be connected with the exercise of parliamentary functions in their strict sense,¹⁰ as was the case when a member of the United Kingdom's House of Commons made statements in the House which were considered as defamatory by Ms A., who then applied without success to the Strasbourg Court.¹¹

20. The Court thus recognises the critical importance of parliamentary immunity for the protection of the people's representation, justifying in particular a higher protection of freedom of expression for members of Parliament. However, this function is interpreted narrowly.

21. In addition, the Parliamentary Assembly of the Council of Europe¹² has made clear that the main *raison d'être* of the European immunity is to contribute effectively to the protection of the missions of the Parliamentary Assembly. Consequently, immunity is not intended as a personal privilege of parliamentarians, but primarily as a guarantee for the institution.¹³

22. Recent cases in the European Parliament concerning the lifting of immunities have shown that immunities, or at least the special protection of freedom of expression, presuppose a strict functional connection with a Member of Parliament's activity.¹⁴

III. Non-liability

A. Comparative overview

1. Scope of the principle of non-liability

⁶ A similar provision exists in the United Nations Convention against Corruption of 2003.

⁷ ECtHR Cordova v. Italy (No. 1), 40877/98, 30 January 2003; Cordova v. Italy (No. 2), 45649/99, 30 January 2003.

⁸ Cf. Krenc, Frédéric, « La règle de l'immunité parlementaire à l'épreuve de la Convention européenne des droits de l'homme », *Revue trimestrielle de droits de l'homme*, 55, 2003.

⁹ Cordova v. Italy (No. 2), par. 60; cf. Cordova v. Italy (No. 1), par. 59.

¹⁰ Cordova v. Italy (No. 1), par. 62; Cordova v. Italy (No. 2), par. 63.

¹¹ A. v. United Kingdom, 35373/97, 17 December 2002.

¹² See Resolution 1325 (2003) of the Parliamentary Assembly of the Council of Europe and Report of the Committee on Rules of Procedure and Immunities of 25 March 2003, Doc. 9718rev, available at <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=17103&lang=EN&search=MTMyNXxjYXRIZ29yeV9zdHJfZW46IkFkb3B0ZWQgdGV4dCI=>.

¹³ The members of the Assembly shall enjoy the privileges and immunities provided in the General Agreement on Privileges and Immunities of the Council of Europe (2nd September 1949) and the Additional Protocol (6 November 1952). See Article 40 of the Statute of the Council of Europe and Articles 13 to 15 of the interim agreement, and 3 and Article 5 of the Additional Protocol.

¹⁴ See in particular the Report of the Committee on Legal Affairs of the European Parliament on the request for the waiver of the immunity of Marine Le Pen.

a. In general

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

24. It protects parliamentarians against any sanction ordered by the State or by state bodies, as well as against private individuals and attempted unlawful influence. This affords them exemption from all court proceedings – civil, penal or even disciplinary. The law of certain countries contains more specific provisions extending freedom from liability to all civil, criminal or administrative action or stipulating that a member of parliament may not be subsequently pursued, arrested, detained or tried.

25. In some countries, non-liability only applies to penal procedures (Bulgaria,¹⁵ Republic of Korea, Lithuania,¹⁶ Slovakia,¹⁷ Slovenia,¹⁸ Kyrgyzstan,¹⁹ "the former Yugoslav Republic of Macedonia",²⁰ Croatia)²¹ or to civil ones (United Kingdom);²² in general, however, it applies to both.²³ For example, in France²⁴, Malta²⁵ or Norway,²⁶ parliamentarians are not liable and are not compelled to make redress even where "the acts charged constitute an offence or cause damage".

26. Even disciplinary sanctions to be taken by Parliament are excluded in Portugal and Germany, even if non-liability is not absolute and does not cover defamatory insults (Article 46 paragraph 1 of the Constitution; item 10 of the Principles governing matters relating to immunity contained in the Annexe 6 of the Rules of procedure of the Bundestag (disciplinary proceedings). On the other hand, in countries such as Slovakia, Slovenia or the Republic of Korea, members of Parliament may be submitted to the same sanctions as public servants. In Slovakia,²⁷ members remain subject to the disciplinary authority of the National Council of the Slovak Republic.

27. In Latvia, disciplinary measures can be taken arising from defamatory statements which the speaker knows to be false, or defamatory statements about private or family life.²⁸

28. In Austria, a member is accountable only to the Chamber to which he or she belongs, and may be subject to disciplinary measures at the discretion of the Speaker. In Poland,²⁹ a Deputy can only be held accountable before the Sejm and, in a case where he or she has infringed the

¹⁵ Article 69 and 71 of the Bulgarian Constitution.

¹⁶ Article 62 paragraph 3 of the Constitution.

¹⁷ Article 78 paragraph 2 of the Constitution.

¹⁸ Article 83 paragraph 1 of the Constitution.

¹⁹ Article 72 paragraph 1 of the Constitution.

²⁰ Article 64 paragraph 2 of the Constitution.

²¹ Article 76 paragraph 2 of the Constitution.

²² Parliamentary Privilege Act.

²³ Malta (article 65 (3) of the Constitution); Brazil (article 53 of the Constitution); Portugal (article 157 paragraph 1 of the Constitution); Italy (article 68 paragraph 1 of the Constitution); Bosnia and Herzegovina (Article IV Procedure item j); Cyprus (article 83 paragraph 1 of the Constitution); Czech Republic (article 27 paragraph 1).....the overwhelming majority of Constitutions.

²⁴ Article 26 paragraph 1 of the French Constitution.

²⁵ Article 65 paragraph 3 of the Maltese Constitution.

²⁶ Article 66 of the Norwegian Constitution.

²⁷ Article 78 paragraph 2 of the Slovakian Constitution.

²⁸ Article 28 of the Constitution.

²⁹ Article 105 paragraph 1 of the Constitution.

rights of third parties, may only be proceeded against before a court with the consent of the Sejm.

29. Disciplinary sanctions vary from one country to another: they range from call to order or curtailment of speaking time (Austria) to reduction of the monthly remuneration of the MP (Greece),³⁰ temporary suspension from membership or expulsion (Spain,³¹ Turkey,³² Switzerland,³³ Greece,³⁴ Belgium, and in theory may even entail imprisonment (United Kingdom).³⁵

30. In some countries parliament has added powers in this respect and even performs judicial functions. In the United Kingdom³⁶ for instance, the Houses are entitled to hold inquiries and to examine witnesses, to penalise persons (members and others) guilty of abuse of privilege or contempt, and to publish documents without fear of libel action. The House alone may impose penalties or take decisions in this matter.

31. The same used to apply in Malta until the legislation was brought into line with the requirements of Article 6 paragraph 1 of the European Convention on Human Rights as interpreted in the Demicoli case by the European Court of Human Rights in Strasbourg.³⁷

32. In Malta, members are subject to the disciplinary authority of the House of Representatives for infringing its Rules or vexatiously interrupting the conduct of its business.

33. Provisions governing possible disciplinary sanctions vary in their extent and in their degree of precision. Most constitutional texts are however silent on disciplinary responsibility, which could put into question the individual independence of members of Parliament.

34. *In short*, concerning the legal consequences of non-liability, in some countries, non-liability only protects the individual in relation to external legal remedies (prosecution, civil lawsuits etc.) whilst *internal* disciplinary measures within Parliament may be instigated. In other countries, even such internal measures are excluded.

35. The functional immunity concerning statements in Parliament is similar to the immunity accorded to statements made in a court of law by a judge, a lawyer or a prosecutor acting in good faith in the course of their functions. Of course, judges may be liable for actions which on the face of it look as if they were taken in the course of duty but which are improper for some other reason. For example, where a judge gives a corrupt judgement as a result of taking a

³⁰ Article 80 of the Standing Orders of the Parliament.

³¹ Sections 21 paragraph 1, 101 paragraph 1 and 104 paragraph 2 of the Standing Orders of the Congress of deputies.

³² Article 162 paragraph 1 of the Rules of Procedure of the Grand National Assembly of Turkey.

³³ Article 13 paragraphs 1 and 2 of the Federal Act of the Federal Assembly and article 39 paragraph 2 of the Standing Orders of the National Council.

³⁴ Article 81 of the Standing Orders of the Parliament.

³⁵ In 2010, in relation to Damian Green MP's arrest, the Committee on Issues of Privilege (Police Searches on the Parliamentary Estate) made the following comment and recommendation: "In our view the current law on misconduct in public office remains unsatisfactory, not least because it is punishable with up to a life sentence. We recommend that the Law Commission re-visit its 1997 recommendation that misconduct in public office be made a statutory offence, in the light of developments of the past dozen years."
The Law Commission is due to undertake a review of the offence of misconduct in public office, starting in early 2014, aiming to open a consultation in early 2015 and produce a final report in summer 2016.

Available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79390/consultation.pdf

³⁶ Available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79390/consultation.pdf

³⁷ Case of Demicoli v. Malta, 13057/87, judgment of 27 August 1991.

bribe functional immunity should not apply to his action. However, although a parliamentarian's political choice, including his or her vote in Parliament, may be the consequence of an illegal act (corruption, conflict of interest) not covered by non-liability, this will not necessarily imply that non-liability does not cover his or her speech or votes even though the act of corruption itself does not benefit from non-liability.

b. Personal scope

36. Concerning the personal scope of immunity, the following can be said: it usually applies only to members of Parliament, but there may be exceptions.

37. When there are two Chambers, immunity applies in general to both (an exception can be found in Germany for the Bundesrat). It may also be extended by rules of the central state to members of parliaments of federate entities (Landtage in Austria, Community and Regional Councils in Belgium) or the European Parliament (Hungary). In Turkey,³⁸ the Constitution extends the scope of parliamentary immunity to ministers who are not parliamentarians. In Albania,³⁹ members of the Council of Ministers enjoy the same immunity as a deputy. Immunity has extraordinarily wide scope in Montenegro⁴⁰ where the President of Montenegro, the Prime Minister and members of the Government, the President of the Supreme Court, the President and the judges of the Constitutional Court, and the Supreme State Prosecutor enjoy the same immunity as the Members of the Parliament.

38. In some countries immunity also applies to other people taking part in parliamentary proceedings.

39. For example, in Ireland, the Netherlands and the United Kingdom, non-liability also applies to persons taking part in parliamentary activities such as parliamentary enquiries or hearings of parliamentary committees, and in France, it covers reports or documents printed by the National Assembly and the Senate. In general, when the personal scope of non-liability is broad, its material scope is limited: in the Netherlands and the United Kingdom, it applies only to parliamentary procedures. On the other hand, countries which provide for a broad material scope of non-liability generally limit its personal scope.

40. *This leads to the following conclusion:* two alternative approaches are possible. According to the objective-functional one, it is the parliamentary activity which is protected, – the protection is ensured to Parliament as an institution. According to the subjective-functional one, parliamentarians themselves are protected, inside and outside Parliament – however, not in their own interest, but of Parliament's.

41. A subjective conception of non-liability may lead to the right of parliamentarians to waive their immunity. Whereas this is not possible in Belgium or France, in Ireland, a Member of Parliament can act in a manner which is tantamount to a waiver by repeating the statement outside Parliament where non-liability does not apply

c. Temporal scope

42. In most countries, immunity will take effect from the time of the beginning of the exercise of parliamentary duties, but in some countries, it may take effect even from the proclamation of election results or the acceptance of the mandate (Greece, Italy). In Lithuania,⁴¹ candidates for

³⁸ Article 112 paragraph 4 of the Constitution.

³⁹ Article 103 paragraph 3 of the Constitution.

⁴⁰ Article 86 paragraph 4 of the Constitution.

⁴¹ Article 49 paragraph 1 of the Law on Elections to the Seimas; the same principle applies to candidates for representatives to the European Parliament (article 48 paragraph 1 of the Law on Elections to the European

election to the Seimas enjoy immunity within a period between the announcement of the names of candidates and lists of candidates by the Central Electoral Commission and the first meeting of the newly elected Seimas, and after re-run elections or by-elections, until the taking of the oath of office of the new Seimas member. Candidates may not be held criminally liable or arrested and their freedom may not be restricted in any other way without the consent of the Central Electoral Commission. The immunity will usually end at the termination of the mandate. However, immunity will usually continue to apply as regards opinions expressed within the mandate even though legal action is only taken after expiry.

43. A different system whereby protection applies only during the mandate or even only during parliamentary sessions can be found in Austria, Luxembourg, Sweden and Switzerland. The emphasis is then put more on activity in Parliament than on membership of it, but all these solutions are nevertheless based on the existence of a link with representative functions.

2. Acts covered by non-liability (functional delimitation)

44. Parliamentarians have absolute privilege of non-liability as regards the ballots in which they participate, whether in the chamber or in the parliamentary committees or sub-committees.

45. Nor are they held accountable for opinions expressed, whether orally or in writing, in parliament or in a parliamentary committee, or for acts performed on business assigned by the parliament in connection with their mandate.

46. The exact breadth of immunity and the acts which it covers have been specified by parliamentary practice and by jurisprudence. However, the definition of the acts or circumstances which would come within the ambit of "performance of the mandate" or "parliamentary functions" varies from one state to another.

47. For many states, the functions which are covered are only those performed in parliament, *i.e.* in the session chamber or in the committees or bodies set up for session purposes. In the United Kingdom⁴² the acts covered by immunity are "proceedings in Parliament" as defined over the years by parliamentary jurisprudence. The same opinions expressed outside parliament (except, for example, in Luxembourg), or sometimes the same written statements (Belgium),⁴³ generally do not come within the scope of immunity. In Turkey⁴⁴, the same statements repeated outside parliament also enjoy immunity, unless the Bureau of the Grand National Assembly decides otherwise. In Moldova and Belarus,⁴⁵ deputies enjoy immunity in the expression of their views and execution of their powers both within and outside Parliament. In Moldova,⁴⁶ immunity concerns the "acts which a parliamentarian and nobody else may perform in parliament"; such a restrictive definition is also followed by Austria⁴⁷ and Germany.⁴⁸ In Armenia,⁴⁹ MPs are not held liable for actions arising from their status. In Bosnia and

Parliament) and to candidates for President of the Republic (Article 43 paragraph 1 of the Law on Presidential elections).

⁴² [Companion to the Standing Orders and guide to the Proceedings of the House of Lords](#), Chapter 12 Parliamentary Privilege and related matters, Freedom of Speech.

⁴³ Article 58 of the Belgian Constitution only refers to the immunity of opinions inside the Parliament.

⁴⁴ Article 83 of the Turkish Constitution.

⁴⁵ Article 102 paragraph 1 of the Constitution.

⁴⁶ [Article 9 \(1\) and \(2\) of the Law on the Statute of Deputies \(1994\)](#)
<https://www.agidata.org/pam/ProfileIndicator.aspx?c=135&i=11110>

⁴⁷ Article 10 of the Austrian Federal Law on Rules of Procedures of National Council.

⁴⁸ Article 46 paragraph 1 of the German Basic Law. Available online at <https://www.btg-bestellservice.de/pdf/80060000.pdf>

⁴⁹ Article 66 paragraph 2 of the Constitution.

Herzegovina,⁵⁰ a delegate may not be held responsible in either criminal or civil procedures for any actions he or she has taken in the course of duty during his or her term in office.

48. Non-liability sometimes extends to the activity and behaviour of members of parliament which, while not constituting acts specific to parliamentary office, are in some way related to it. In countries such as Italy, the Netherlands, Norway and Portugal, it extends to political opinions expressed even outside parliament. Consequently, parliamentarians' enhanced freedom of expression extends to their public non-parliamentary activities, in particular in the media, in election declarations and in public debates. Non-liability goes further than just specific activities in Parliament in Argentina, Belarus, Bulgaria, Israel, Latvia and Moldova, as well as in other countries where it concerns parliamentary functions in a broad sense, such as Algeria, Andorra, Estonia, Finland, Georgia, Greece, Hungary, Portugal and Peru.

49. In Spain,⁵¹ acts of violence against persons or property are excluded from non-liability even if committed inside the parliament. So are statements made in the context of meetings of parties or with constituents, private encounters or journalistic activities. This is also the case for "political and partisan activity" in Italy.⁵²

50. In Ireland,⁵³ certain offences such as treason, serious crimes and public order offences are excluded from the coverage of immunity.

51. *In short*: as a general rule immunity will apply only to opinions and statements expressed in the exercise of the parliamentary mandate, but the precise scope of this limitation varies. For example, in some countries opinions must actually be expressed in Parliament, including in committees, whilst in other countries it is sufficient that the expression takes place within the context of parliamentary activity.

B. Qualification of the principle of non-liability

1. Absolute or relative non-liability?

52. Non-liability can be absolute or relative (limited). Non-liability is absolute if it prevents votes and opinions expressed in Parliament from being subject to any legal proceedings. It is relative if some types of offences can be subject to legal proceedings.

53. As already said, the protection of the parliamentary institution and the democratic system itself imply that votes, even when not secret, are covered by non-liability. However, two concepts can be found concerning opinions expressed in Parliament. The first one (absolute non-liability) is rooted in the absolute value of parliamentary independence and representation, combined with freedom of expression. The second one (relative non-liability) is more instrumental, and addresses the contents of the parliamentary function.

54. The absolute concept of non-liability implies that the freedom of expression of parliamentarians cannot be restricted since it is intrinsically linked with the democratic will whose submission to the judicial power would go against the separation of powers. This

⁵⁰ Article 14 of the Rules of Procedure of the House of People of the Parliamentary Assembly of Bosnia and Herzegovina.

⁵¹ Article 71 paragraph 3 of the Spanish Constitution.

⁵² Article 68 of the Italian Constitution. Available online at http://www.diritto.it/osservatori/scienze_criminali/dottrina/musacchio4.html

⁵³ Article 15 paragraph 3 of the Irish Constitution.

principle is followed, for example, in Brazil, Italy,⁵⁴ Malta,⁵⁵ Slovakia,⁵⁶ Peru,⁵⁷ Portugal⁵⁸ and Switzerland.⁵⁹

55. The relative concept of non-liability implies that the fundamental subjective rights of parliamentarians to freedom of speech can be dissociated from their objective function as people's representatives. It is followed in Germany.

56. According to the relative concept of non-liability, some areas are excluded from the scope of immunity. In such cases, members can be sued and subjected to compensation in the same way as other citizens. This is first the case concerning defamatory or insulting remarks. A similar exception can be extended to speech contrary to the legal values of human dignity - through racist and more generally hate speech for example -, incitement to war or violence or crime, or contrary to national independence and security – including through disclosure of state secrets (Hungary)⁶⁰ - and contrary to the dignity of Parliament, namely through corrupt practices (Israel).⁶¹

57. For example, insult and defamation are not covered by non-liability in Albania,⁶² Argentina,⁶³ Armenia,⁶⁴ Belarus,⁶⁵ Bulgaria,⁶⁶ Chile,⁶⁷ Germany,⁶⁸ Greece,⁶⁹ Japan,⁷⁰ Latvia,⁷¹ Liechtenstein,⁷² Luxembourg (regarding the insults to the Parliament or its President, Mexico,⁷³ Poland and the United Kingdom⁷⁴(in the restrictive cases listed in the Defamation Act of 1996),

⁵⁴ Article 68, paragraph 1 of the Constitution. However, the freedom of expression of MPs could be limited by disciplinary measures (Chapter XI of the Rules of Procedure of the Chamber of Deputies); MPs immunity could be lifted in cases of contempt of Parliament (article 18 of the Rules of Procedure of the Chamber of Deputies; Rules 72 and 135 paragraph 6 of the Rules of the Senate).

⁵⁵ Article 65 paragraph 3 of the Constitution. The procedure of contempt of Parliament derogates to the absolute conception (Paragraph 11 of Chapter 113 of the Laws of Malta, House of Representatives (Privileges and Powers) Ordinance).

⁵⁶ Article 78 paragraphs 1 and 2 of the Constitution (in terms of paragraph 2 of article 78 the principle of non-liability does not cover disciplinary proceedings).

⁵⁷ Article 93 paragraph 2 of the Constitution.

⁵⁸ Article 157 paragraph 1 of the Constitution; article 10 of the Statute governing Members of the Assembly of the Republic. The principle of non-liability covers even disciplinary proceedings.

⁵⁹ Article 162 paragraph 1 of the Constitution. Nevertheless, by means of the procedure of "call to order", the President of the National Council may order that disciplinary measures be taken which result in restricting freedom of expression of parliamentarians (article 39 of Section III of the Standing Orders of the National Council and article 34 of Chapter 3 of the Standing Orders of the Council of States).

⁶⁰ In Hungary, the immunity is not applicable in case of violation of State secret, of defamation or libel and in connection with the accountability of MPs under civil law (Section 4, Chapter II of the Law on the Legal Status of Members of Parliament).

⁶¹ Knesset Members Immunity, Rights and Duties Law.

⁶² It concerns only defamation: Article 73 paragraph 1 of the Albanian Constitution.

⁶³ Article 66 of the Argentinian Constitution.

⁶⁴ Article 66 of the Armenian Constitution.

⁶⁵ Article 102 of the Constitution of Belarus.

⁶⁶ Article 107 of the Rules of Organisation and Procedure of the National Assembly.

⁶⁷ Article 90 (1), No. 5, Article 273, No. 5 of the Standing Orders available online at http://www.ipu.org/parline/reports/2063_D.htm

⁶⁸ Article 46 paragraph 1 of the German Basic Law.

⁶⁹ Article 61 of the Greek Constitution foresees only defamation, not insult.

⁷⁰ Article 119/120 of the Diet Law.

⁷¹ Article 28 of the Latvian Constitution foresees only defamation, not insult.

⁷² Rule 22 (2) of the Rules of Procedure available online at http://www.ipu.org/parline/reports/2187_D.htm

⁷³ Rules 105 and 107 of the Congress Internal Rules available online at http://www.ipu.org/parline/reports/2212_D.htm

⁷⁴ Use of disorderly or unparliamentary expressions (Standing Orders 42 and 43 of the House of Commons Relating to Public Business) available online at http://www.ipu.org/parline/reports/2335_D.htm

Ukraine⁷⁵ and Uruguay.⁷⁶ In Morocco,⁷⁷ non-liability does not apply to the offences of disrespect to the King, the monarchy and the Muslim religion.⁷⁸

58. The relative concept of non-liability implies that the freedom of speech of parliamentarians is not unlimited, but 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. However, it admits that freedom of speech in Parliament needs a special protection and should be limited only in exceptional cases.

59. *In short*, in some countries, any statement or opinion is protected, whilst in other countries some statements are exempt from immunity because they have (or may have) a particularly reproachable character.

60. Non-liability can be a serious obstacle to the investigation and prosecution of corruption-related acts concerning a parliamentarian. For instance, the French Senate⁷⁹ has pointed out that the protection awarded to freedom of speech and vote “*makes all repressive steps difficult (at least under criminal law) in respect of conflicts of interest involving parliamentarians, which is the reason why a preventive system was put in place for the management of such conflicts.*”⁸⁰ The same could theoretically apply to vote-buying. Almost all countries evaluated by GRECO criminalise bribery of members of elected assemblies more broadly than just by criminalising vote-buying and in a manner that allows them to prosecute the bribe-taker and that makes the accomplishment of the conduct expected from the recipient of the bribe irrelevant. In an increasing number of European countries, anti-corruption measures are being introduced specifically in respect of parliamentarians in the form of rules on gifts and other benefits, on the management of conflicts of interest, on the publication of income, assets, interests and other activities (these are being evaluated in the context of the current Fourth Evaluation round launched in 2012). It seems reasonable to assume that issues such as those pinpointed by the French Senate may become relevant in an increasing number of countries.

2. Lifting of non-liability

61. Intermediary approaches admit non-liability in general but also provide that it can be *lifted*. Lifting by a *parliamentary institution* is possible in a number of countries such as the Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Malta, the Netherlands, Poland, Switzerland, Ukraine and the United Kingdom, where Parliament decides on requests of individuals which consider themselves as victims of insult or defamation.

62. In Denmark,⁸¹ the proposal to lift immunity may be made by the private individual who feels wronged by a statement made by a parliamentarian outside parliament, in the private sphere,

⁷⁵ Article 80 of the Ukrainian Constitution

⁷⁶ Rules 73, 104 (H), and 106 (2) No. 6 of the Rules of Procedure of the Chamber of Representatives available online at <http://www.ipu.org/parline/reports/2341.htm>

⁷⁷ Article 64 of the Moroccan Constitution, available online at <http://www.ipu.org/parline/reports/2221.htm>

⁷⁸ In 3 countries, the immunity is waived for offences of defamation. In the case of Portugal: Art. 97, al. 3 du Règlement de l'Assemblée de la République available online at <http://www.ipu.org/parline-f/reports/1257.htm>

Regarding Turkey: <http://www.ipu.org/parline/reports/2323.htm>

In Norway, Rules 38 and 50 (2) of the Rules of Procedure available at <http://www.ipu.org/parline/reports/2239.htm>

⁷⁹ Information Report n°518 of the French Senate (<http://www.senat.fr/rap/r10-518/r10-5181.pdf>), dated 11 May 2011, page 13.

⁸⁰ The vote of parliamentarians as well as any activity within the House accomplished in relation to the regular exercise of the mandate cannot be used as evidence.

⁸¹ Article 57 of the Constitution; Sections 25 and 29 (2) to (4) of the Standing Orders of the Folketing.

although in practice the Folketing invariably withholds its consent to lifting immunity in such cases.

63. In Finland,⁸² the proposal to lift immunity is made by the person competent to do so depending on the circumstances, such as a police officer, a prosecutor or a plaintiff, and the decision to lift immunity is taken by a majority of 5/6 of votes cast in parliament.

64. In Greece,⁸³ the decision to lift immunity is taken by the Chamber, which must decide within 45 days.

65. In Hungary,⁸⁴ the proposal to lift immunity is submitted to the President of the National Assembly by the Prosecutor General, or by the competent court. The request is considered within 30 days by the Committee on Parliamentary Immunities and Incompatibilities. The decision is taken by the National Assembly without debate and requires a two-thirds majority of the votes of members present.

66. In Malta,⁸⁵ where, according to the common law system, there is no lifting of immunity in the strict sense, the Speaker of the House refers to the Committee of Privileges any cases of "breach of privilege" or contempt committed "prima facie" against the Parliament. The Committee of Privileges was set up in order to investigate in each case whether a member has committed contempt or acts in excess of or in breach of his privileges. The Committee then refers the matter to the House, which has competence to either bring the person concerned to justice or impose its own disciplinary measures.

67. In Romania,⁸⁶ immunity may be lifted only by the Chamber to which the parliamentarian belongs. The decision is taken by the Senate by a vote of the majority of members⁸⁷ and by the Chamber of Deputies by a majority of the members present.⁸⁸ The proposal to lift immunity is submitted to the President of the Chamber of Deputies or Senate by the Minister of Justice.

68. In Switzerland,⁸⁹ only "relative exemption from criminal liability" may be lifted, subject to the consent of both houses, which may bring the member before the Federal Tribunal. This exemption concerns offences committed in connection with the member's official activity or position, so as to exclude acts such as defamation, abuse of authority, dishonest management of public interests, acceptance of bribes, breach of the duty to fulfil the parliamentary mandate, and disclosure of military secrets. Lifting of a parliamentarian's privilege of secrecy regarding correspondence and telephone and telegraph messages⁹⁰ also requires the consent of the chambers. In this case, the act or the opinion expressed is held to be unconnected with the member's official activity or position.

⁸² Section 30 of the Constitutional Act; Sections 13 and 58 of the Parliament Act.

⁸³ Article 61 paragraph 2 of the Constitution.

⁸⁴ Sections 4 and 5, Chapter II of the Law on the Legal Status of Members of Parliament.

⁸⁵ Paragraph 11 of Chapter 113 of the Laws of Malta, House of Representatives (Privileges and Powers) Ordinance.

⁸⁶ Article 72 (2) of the Constitution; Article 191, Chapter IV, of the Rules of Procedure of the Chamber of Deputies, Articles 172 and 173 Chapter IV, of the Rules of procedure of the Senate.

⁸⁷ Article 173, Chapter IV, of the Rules of procedure of the Senate.

⁸⁸ Article 193 paragraph 8, Chapter IV, of the Rules of Procedure of the Chamber of Deputies.

⁸⁹ Article 14 of Chapter 3 of the Federal Law on the liability of the Confederation, members, the authorities and officials (5 December 2011).

⁹⁰ Articles 14bis and 14ter of Chapter 3 of the Federal Law on the liability of the Confederation, members, the authorities and officials (5 December 2011); Article 18 of Chapter 3 of the Federal Act on the Federal Assembly.

69. In Germany,⁹¹ when "anti-constitutional defamation" or "contempt of the Bundestag" are committed the requests of the prosecution are made in accordance with the rules of criminal procedure and administrative fines to the Federal Minister of Justice and submitted by the latter to the Bundestag for a ruling whether to authorise prosecution. By prior decision, the Committee on Electoral Scrutiny, Immunities and the Rules of Procedure may authorise prosecution for "anti-constitutional defamation" or "contempt of the Bundestag".⁹²

70. On the other hand, *the lifting of non-liability is decided by courts* in the Netherlands⁹³ (by the Supreme Court of Cassation, Hoge Raad der Nederlanden). Courts have to take account of the facts and the extent of immunity.

71. In the United Kingdom, it rests with the court to suspend proceedings when it considers that parliamentary privilege is involved. Nonetheless, it is often the disciplinary authority of the chambers⁹⁴ which censures a member for conduct or statements which are unreasonable "having regard to his office and status".

1. Main findings

72. The factual background of non-liability includes, in general, acts in connection with the parliamentary function. There are systems with a wider inclusion, where non-liability includes activities outside Parliament, but performed on the basis of the parliamentary function, and more restrictive systems that include only votes and opinions in Parliament. In both cases, the compatibility with the principle of the rule of law, which excludes pure privileges, depends on the connection with the parliamentary function.

73. Non-liability can be explicitly excluded for human rights violations, such as insults, defamation and offences in connection with violence, violation of parliamentary rules or particularly serious crimes, such as treason. The delimitation of non-liability can be external – infringement of rights - or internal and functional - connection with the parliamentary function.

74. The personal scope of non-liability includes, as a rule, only members of Parliament. In some cases, a functional and objective reading of non-liability leads to its extension to persons assisting the Parliament or taking part in its activities.

75. The legal effect of non-liability is the exclusion of any legal responsibility. However, in some cases, only civil liability, criminal liability, or both can be excluded, with or without a disciplinary accountability to Parliament. For example, Parliament itself may discipline a parliamentarian who abuses his power such as by launching a gratuitous and scurrilous attack on a person who is unable to defend himself.

76. Non-liability applies in general to speech expressed during the mandate. In some cases, it only applies to speech during parliamentary sessions. There are systems where immunity is effective from the announcement of election results or the acceptance of the mandate. As a rule however, it starts with the beginning of the functioning of Parliament. In order to exclude political revenge, immunity goes on after the end of the mandate for speech expressed during the mandate: speech made during a specific period (the mandate) is therefore covered by immunity without any time limit.

⁹¹ Article 46 of the Basic Law; Article 107 and annex 6 of the Rules of procedure of the Bundestag.

⁹² Moreover, a debate has been opened in this country on the question of the influence, whether or not politically admissible, wielded by political leaders and a new law has come into force for the prevention of corruption, buying and selling votes and trading in influence.

⁹³ Article 119 of the Constitution.

⁹⁴ Sections 42 and 43 of the Standing Orders of the House of Commons relating to Public Business; section 83 of the Standing Orders of the House of Lords relating to Public Business.

77. The lifting of parliamentary immunity can be seen as part (and only part) of the more general issue of whether immunity should be limited at all

78. Looking at this issue, there are in principle three options:

a) Parliamentary immunity may be unconditional: it covers all types of expressions (within the exercise of the mandate), it is not limited in any way and it cannot be lifted.

b) Parliamentary immunity is limited by law (or by the constitution). It does not, for example, apply to certain types of expressions which are deemed to be particularly reproachable. This could be libel, defamation, hate speech, treason, disclosure of state secrets etc. There is no right for Parliament, in specific cases, to moderate these limitations.

c) Parliamentary immunity may be lifted by Parliament.

79. Option (a) implies an absolute conception of non-liability, whereas options (b) and (c) imply a relative one.

2. Assessment under the rule of law and international standards

a. On non-liability in general

80. The foregoing information shows a big variety of solutions. It is not easy to identify common European standards and principles beyond the fact that almost all countries examined operate some sort of non-liability scheme.

81. Is it however possible to envisage common European principles? The following questions should be addressed:

a) What are the functions and values that justify immunities today? What is the meaning of the protection of members of Parliament, as holders of the legislative power, other authorities and the society itself?

b) Is it appropriate to maintain freedom of speech (or even of vote), in itself, as a basis for absolute non-liability, in view of the always more complex nature of parliamentary activity (see for example hate/discriminatory speech) and of the positive evolution of integrity standards (see the above considerations concerning anti-corruption rules for parliamentarians and specially conflicts of interests)?

c) What is the legitimacy of Parliament's role when authorising proceedings against parliamentarians suspected of committing offences?

82. Before answering these questions, a few fundamental points have to be reminded. In the first place, the principle of members' non-liability constitutes a special form of the protection which is arranged in order to guarantee independence and freedom of expression for parliament and its members, especially vis-à-vis the executive. It is therefore a consequence of the principle of separation of powers.

83. In the second place, the principle of non-liability progressively acquires the further quality of an additional surety for parliamentarians vis-à-vis the majority opinion expressed in parliament itself in conformity with the democratic representation principle.

84. As representatives of the people who placed them in office, by holding even minority opinions they still express a portion of popular and/or national sovereignty, respect for which

is central to the principles of pluralist democracy. This would imply that the real function of the institution of parliamentary immunity is to protect the expression of the common will and the composition of parliament as elected by the citizens. So, non-liability covers all MPs, but it is of particular importance for members of the opposition, and especially for those holding unpopular minority opinions.

85. The answer to the above questions implies that the following fundamental principles are respected:

a) The principle of equality before the law. No one, including parliamentarians, should have legal privileges before others, unless required by very compelling reasons.

b) The principle of very wide right to freedom of expression for parliamentarians. No democratic Parliament can function if parliamentarians should constantly fear for legal actions due to their votes cast and statements made. This also follows from the fact that parliamentarians represent the people and must be able to echo their views – with the exception of racist and hate speeches, narrowly defined.

c) The principle of legal clarity. Not only should it be clear which substantial legislation applies to the liability of parliamentarians for their votes cast and statements made. It should also be clear to which extent (if any) they are protected by immunity.

d) The principle of separation of powers. Issues of legal liability are matters for the courts and the parties to the case. Parliament is, as a very fundamental principle, not to be involved in matters concerning individual legal disputes. On the other side the judicial treatment of political issues is in conflict with separation of powers (courts should not be involved in political disputes).

86. On this basis, both absolute and relative conceptions of non-liability may be subject to critics. If the absolute conception is followed, it implies a privilege for parliamentarians: no public interest, be it a fundamental right (such as the right to honour and dignity) or an essential feature of the state's functioning, can be opposed to the rights of parliament(arians). If the relative conception is followed, it implies that judges can limit parliamentary independence and the exercise of the function of members of Parliament, through sanctions which could go up to forfeiture of office.

87. Equality before the law implies that legal privileges can only be accepted if compelling reasons so dictate. This applies not least to parliamentarians, and there is a healthy tendency to increasingly look critically at parliamentary privileges (and even privileges for heads of state).

88. For those privileges that still exist, it is important to examine whether they rest on assumptions and views that are no longer sustainable (or as sustainable as they were in previous times). In other words, is a specific protection of freedom of expression for parliamentarians justifiable?

89. Freedom of expression for parliamentarians rests on three "pillars":

a) The substantial rules on freedom of expression in a particular country. Here it should be noted that jurisprudence under Article 10 ECHR today offers all over Europe a wide protection of freedom of expression, particularly in the political sphere.

b) The substantial scope and content of constitutional rules on immunity.

c) The rules on lifting of immunity.

90. a) The case-law on Article 10 ECHR is very developed and will not be detailed here. Its trend is to ensure a more and more extensive protection.

91. b) However, it may still be legitimate to ensure a higher protection due to the specific situation of parliamentarians, without contradicting the principle of equality: notwithstanding a very substantial protection under Art. 10 ECHR, this provision would not protect against legal proceedings being initiated as such. They should also be protected against being involved, at all, in more or less endless legal disputes which could limit their freedom to express their views and therefore to exercise their mandate.

92. This is probably today one of the most important arguments for non-liability. More generally, the issue of separation of powers is not outdated.

93. This implies that there should be some parliamentary context in which an expression must be made in order to be protected. On the one side, it would not be acceptable if immunity applied simply because the person in question is a parliamentarian, without regard to whether the expression has been made in the context of exercising the mandate or not. On the other side, in order for non-liability to fulfil its purpose, there are strong arguments in favour of it lasting also after the termination of mandate (as regards votes cast and statements made during the mandate). This is also the situation in most countries examined.

94. In order for the principles of equality – and proportionality - to be respected, the scope of immunity should not go beyond what can reasonably be said to follow from its purpose. This is true in particular *ratione personae*: while there is no common standard as to the exact definition of the group of persons to whom immunity should apply, it is obvious that it should only apply to those to whom it is considered necessary for the proper functioning of Parliament. The existence of a functional link between the behaviour under consideration and immunity is also central, as underlined in the Cordova cases quoted above.⁹⁵

b. On the lifting of non-liability

95. The problem of lifting seems to be a problem of “bottom line balance”: as all other privileges, the privilege of non-liability may be misused, and there may be situations where certain expressions (hate speech, defamation, treason etc.) have been made in contexts where it is not considered reasonable that parliamentarians should be outside the reach of the ordinary legal sanctions system.

96. The question is whether there should be a mechanism to “catch” such incidents and, if so, how it should be construed. Or put in more traditional terms: what is the balance between the proper functioning of Parliament, on the one hand, and parliamentarians not being (unnecessarily) above the law, on the other hand?

97. As already said,⁹⁶ three models are possible: (a) unconditional non-liability; (b) non-liability limited by law; (c) non-liability may be lifted by Parliament. Of course, models (b) and (c) may be combined, in the sense that, on the basis of a legal definition, immunity may not apply to certain types of expression, and immunity in relation to expressions which are protected may then be lifted by Parliament.

98. In all models, non-liability should protect statements and votes expressed during the mandate, but protection against legal action should be extended beyond the end of the mandate and without any time limit, in order to be really effective.

⁹⁵ See above par. X.

⁹⁶ Par. X.

99. Technically speaking, lifting is a decision by a competent body to the effect that an immunity which would otherwise apply, does not apply in a specific case – it is “lifted”. In this terminology, only model (c) is a model of lifting. Under this terminology, model (b) is not about lifting (here, “lifting” has been done once and for all by the legislator).

100. Leaving the possibility to lift non-liability to Parliament (model c) is intended at safeguarding the autonomy of Parliament, and therefore of democratic representation. However, there are arguments against a system of parliamentary lifting of non-liability. Regardless of what criteria for lifting are laid down in legislation, the fact remains that it is a decision made by parliamentarians whether a case should be allowed to go before the courts or not and there is inevitably a risk that this be in fact a decision motivated by political considerations. Whatever the procedure, Parliament’s decision may be perceived as an assessment of the legality of the statements under consideration.

101. This seems to be true regardless of specific voting requirements. For example, lifting by simple majority may facilitate more or less arbitrary decisions by a small majority in Parliament, leaving members of the opposition at risk. On the other hand, a requirement for qualified majority (or even unanimity) in Parliament may effectively block legal proceedings which may actually be reasonable.

102. *In short*, the general possibility for Parliament to lift non-liability (model c) may appear as more problematic than unconditional non-liability (model a) or non-liability limited by law (model b).

103. Unconditional non-liability (model a) is not contrary to European standards but may leave behind cases, such as excessive hate speech, where it could be unreasonable for the parliamentarian to be protected by immunity without being considered as above the law.

104. A system with some limitations prescribed in the law or constitution itself (model b) looks acceptable too. Under this model, it would be up to the courts (and not Parliament) to consider whether the stipulated limitations apply to the case in question.

105. Evidently, such limitations would need to be carefully aligned with Art. 10 ECHR since it would make no sense to allow for legal proceedings in cases where the statement in question is (clearly) protected by that provision. This would mean that limitations would need to concentrate on types of statements enjoying no or at least only moderate protection under Article 10 (treason, certain types of hate speech etc.).

106. It must be clear that, in order to be in full conformity with the principles of separation of powers and equality before the law, such model is not intended at substituting the right to lift immunity by the judiciary to a similar right of Parliament. The judge does not lift immunity but examines whether the facts under consideration fall under immunity as defined in legislation.

107. Whatever its exact status in the hierarchy of norms, the rule defining the scope of immunities needs the approval of Parliament, which is therefore directly involved.

108. Model (b) protects parliamentarians from legal proceedings connected to their votes cast or statements made while exercising their mandate. This is a crucial purpose of the institute of parliamentary immunity.

109. As opposed to model (a), it leaves a possibility for legal proceedings in situations of certain types of statements generally considered to be particularly reproachable. In any event, the parliamentarian in question would be protected both by an independent judiciary and by Art. 10 ECHR when it comes to the decision in the case.

110. Giving up non-liability should in principle not be possible, since it corresponds to a functional power exercised in the public interest and not to a subjective right. If such waiver is

provided for, it must be justified on the basis on the fundamental rights of the Member of Parliament (such as his/her honour).

IV. Inviolability

A. Comparative overview of rules on “inviolability”

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

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

113. At this point, one can underline that inviolability is also often enjoyed by categories of officials other than parliamentarians, whereas non-liability is rather specific to members of elected assemblies. There have been national situations examined by GRECO where a large number of holders of public office enjoyed inviolability. In one extreme case, this included most members of the judiciary, members of the State and regional executive power, members of the national and regional/local elected councils, members of several State administrations etc. The variety of national situations and democratic transition stages makes it difficult to draw a clear line. Nevertheless, in a few cases, GRECO has recommended to reduce the categories of the holders of public offices benefiting from such immunities as no valid reason could be identified to maintain such situations.

114. In some countries there are no rules on parliamentary inviolability at all. This is for example the case in the Netherlands and GRECO has welcomed such situations where elected officials are placed on an equal footing with ordinary citizens. In other countries there are only rules on inviolability in civil cases (Malta),⁹⁷ while in criminal cases parliamentarians enjoy no special protection and are treated on equal terms with other citizens. This is the main principle in common law countries, although with some modifications. In most European countries, however, members of parliament have at least some kind of special protection in some kinds of criminal cases. But there is no common model, and there is a great variety both as to what they are protected against and as to what kind of crimes this protection covers.

115. Rules on inviolability may cover protection against:

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

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

⁹⁷ Article 65 paragraphs 4 and 5 of the Constitution.

117. In the civil law tradition there is often an old rule that parliamentarians are protected against arrest and detention on their way to and from parliament or while attending parliament. The idea is that the King should not be able to stop parliament from meeting by detaining the MPs. But this is not “immunity” as such, and it does not give protection against criminal investigations or prosecution or punishment. Furthermore the idea that the executive power could hinder parliamentary meetings by arresting and detaining a sufficient number of parliamentarians is today seen as outdated in all modern parliamentary democracies.

118. In many countries the rules on inviolability provide protection for members of parliament against arrest, detention, prosecution and sanctions. But it might still be possible for the authorities to *investigate* alleged offences, including house or office searches, and to gather evidence for later prosecution after the end of the period of immunity. Countries in which the rules on immunity do not prohibit preliminary investigations include for example France,⁹⁸ Portugal,⁹⁹ and Japan.¹⁰⁰

119. Countries where parliamentarians are immune also from investigation, including preliminary enquiries and house and office searches, include Albania,¹⁰¹ Austria,¹⁰² Belarus,¹⁰³ Georgia,¹⁰⁴ Russia,¹⁰⁵ Italy,¹⁰⁶ and Ukraine.¹⁰⁷

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

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

121. These exemptions come in different forms. In some countries they apply directly, so that the public prosecutor may start investigations and proceedings of such cases. Whether the exemptions apply or not, for example whether there is actually a case of in flagrante delicto, will then be for the prosecutor to assess and finally for the courts to decide. In other countries the exemptions are for parliament to decide, in which case they function as a criteria for the lifting of immunity. Article 68 paragraphs 2 and 3 of the Constitution.

122. Countries in which rules on inviolability does not extend to serious crimes include Albania,¹⁰⁸ Bulgaria,¹⁰⁹ Croatia,¹¹⁰ Cyprus,¹¹¹ Finland,¹¹² Norway,¹¹³ Portugal,¹¹⁴ Slovenia,¹¹⁵ Brazil¹¹⁶ and Turkey.¹¹⁷

⁹⁸ Article 26 of the Constitution; article 80 paragraphs 1 and 8 of the Règlement de l'Assemblée Nationale; Article IIIbis of the General Instructions of the Office of the Senat.

⁹⁹ Article 157 paragraphs 3 and 4 of the Constitution; article 11 paragraphs 3, 4 and 5 of the Statute governing Members of the Assembly of the Republic.

¹⁰⁰ Article 34 of the Diet Law.

¹⁰¹ Article 73 (2) of the Constitution.

¹⁰² Article 57 paragraph 2 of the Constitution; Section II, § 10 (2) of the Federal Law on the Rules of procedure of the National Council.

¹⁰³ Article 47 paragraph 1, Chapter IV of the Law on the Status of deputies of the Council of the Republic; Article 47, Chapter IV of the Law on the Status of deputies of the House of Representatives.

¹⁰⁴ Article 52 paragraph 2 of the Constitution.

¹⁰⁵ Article VIII paragraph 6 of the Rules of Procedure of the Council of the Federation.

¹⁰⁶ Article 68 paragraphs 2 and 3 of the Constitution.

¹⁰⁷ Article 27 of the Law of Ukraine on the Status of the People's Deputy of Ukraine.

¹⁰⁸ Article 73 paragraph 3 of the Constitution.

¹⁰⁹ Article 70 paragraph 1 of the Constitution.

¹¹⁰ Article 76 paragraph 4 of the Constitution.

¹¹¹ Article 83 paragraph 2 of the Constitution.

123. The threshold varies, and so do the way in which these exemptions are formulated, and how detailed the regulation is. But the basic idea is the same – that parliamentary immunity should not cover really serious crimes.

124. In some countries the rules on inviolability do not cover minor offences. In France, for example, offences resulting in administrative fines are not covered. In Luxembourg immunity does not prevent action being taken against a parliamentarian for petty offences for which the law does not prescribe detention and which do not constitute dishonourable offences. In other countries, such as Hungary¹¹⁸ and Portugal, petty offences are also covered by immunity even if they do not come under criminal procedure, in Romania only if they are of a criminal nature.¹¹⁹ In Germany,¹²⁰ Kyrgyzstan,¹²¹ Latvia,¹²² Russia,¹²³ Czech Republic,¹²⁴ and Slovakia,¹²⁵ immunity also extends to "administrative action" without any further clarification.

125. Countries that have special rules on the situation where a member of parliament is caught *in flagrante delicto* include Austria, Bulgaria, France, Hungary and Spain. In Germany there is an exemption if the member is caught on the day after the crime. Whether or not an act can be classified as "*in flagrante delicto*" usually rests with the courts, as for example in France¹²⁶ and Spain.¹²⁷ In these countries parliament may however suspend criminal proceedings before the courts if it considers that wrongful recourse has been had to the exemption. In other countries, including Austria, Bulgaria and Hungary, the decision whether or not to lift immunity because of *in flagrante delicto* rests with parliament, which has to consent to criminal proceedings even in such cases.

126. In Hungary,¹²⁸ Austria¹²⁹ or Bulgaria,¹³⁰ even if a member is arrested "*in flagrante delicto*" the subsequent proceedings nonetheless may require the consent of the chamber concerned.

127. In Azerbaijan,¹³¹ a deputy could see his or her immunity lifted by decision of the Parliament only if he/she has been caught at a place of crime. In Slovenia,¹³² the National

¹¹² Article 30 paragraph 3 of the Constitution.

¹¹³ Article 66 of the Constitution (public crimes).

¹¹⁴ Article 157 paragraph 3 of the Constitution.

¹¹⁵ Article 83 paragraph 3 of the Constitution.

¹¹⁶ Article 53 paragraph 2 of the Constitution.

¹¹⁷ Article 83 paragraph 2 of the Constitution.

¹¹⁸ Chapter II Section 5 of the Law on the Legal Status of members of Parliament.

¹¹⁹ Article 69 of the Constitution.

¹²⁰ Article 46 paragraph 3 of the Fundamental Law.

¹²¹ Articles 232 to 236 of the Law of the Kyrgyz Republic on Standing Orders of the Jogorku Kenesh of the Kyrgyz Republic.

¹²² Article 30 of the Constitution; Article 17 paragraph 4 of the Law on the Rules of Procedure of the Saeima.

¹²³ Article VIII paragraph 6 of the Rules of Procedure of the Council of the Federation.

¹²⁴ Article 27 paragraph 3 of the Constitution.

¹²⁵ Article 78 paragraph 3 of the Constitution. However, the constitutional act n° 232/2012 Coll. which came into force on September 01, 2012, has abolished the consent of Parliament with criminal prosecution of its members and the new wording of article 78 sets out the consent of the Parliament with detention of its members.

¹²⁶ *Connaissance de l'Assemblée Nationale*, n° 7, Chapitre 2, Section II, §2, Septembre 2002, document officiel de l'Assemblée parlementaire.

¹²⁷ Article 71 paragraph 3 of the Constitution; Sections 11 and 12 of Chapter II of the Standing Orders of the Congress of deputies.

¹²⁸ Section 5 paragraphs 1 and 2 of the Law on the Legal Status of members of Parliament.

¹²⁹ Article 57 paragraph 5 of the Constitution.

¹³⁰ Article 70 paragraph 1 of the Constitution and article 132 paragraph 2 of the Rules of Procedure of the National Assembly provide only for that "National Assembly, shall be notified forthwith".

¹³¹ Article 90 paragraphs 1 and 2 of the Constitution.

¹³² Article 83 paragraph 3 of the Constitution.

Assembly may grant immunity to a Deputy notwithstanding that such immunity has not been claimed by him or notwithstanding that he has been found committing a criminal offence for which normally the consent of the National Assembly is not required.

128. Besides, GRECO did come across situations where inviolability applies also where the offender is apprehended in flagrante delicto. In such situations, it has recommended to abolish this arrangement which appears to be unusual in comparison to other countries.

129. Another interesting distinction that can be found in some countries is between:

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

130. Again, this distinction can be directly applicable, or just a criterion when assessing whether to lift immunity. In Norway, for example, the public prosecutor may start proceedings in any case against parliamentarians where the alleged offence does not cover the breach of a “constitutional duty”. In Austria, on the other hand, it is for parliament to lift immunity if the offence charged is manifestly unrelated to activities as a representative.

131. In contrast to non-liability, rules on parliamentary inviolability are almost always of a *temporal* nature. The idea is that justice should be merely delayed, not denied, and that legal proceedings may be instituted once the period of immunity is ended. The extent of this period varies. In some countries it is the parliamentary session in which the alleged offence is discovered. In other countries it depends on the period of office of the parliamentarian concerned, and will last as long as he or she is reelected. If investigations and proceedings are delayed for a long time, it might of course later on be difficult to take up the case.

132. GRECO has come across a variety of problematic areas, including an excessively broad scope *ratione personae* (where too many categories of officials enjoy immunities), *ratione materiae* (typically where immunities prevent any judicial response even to acts unrelated to the official’s functions – sometimes under both the civil and criminal law), and *ratione temporis*. GRECO had particular misgivings about inviolability regimes which apply to actions performed before or after the taking-up of official duties. It was found in particular that *the inviolability enjoyed by former parliamentarians (or members of government), amounted ultimately to a life-long protection which is not justifiable* and is clearly incompatible with article 6 of Resolution (97) 24.

133. Since sometimes ministers retain their status as parliamentarians (where ministers are appointed among MPs) it can create a complex situation characterised by a duality of rules and procedures. A separation of functions (or at least of the applicable procedures) is clearly preferable.

134. Finally, GRECO has also occasionally observed that statutes of limitation applicable to criminal prosecution do not always address adequately the situation where the presumed offender is a mandate-holder who enjoys immunities and GRECO recommended in such cases that *the calculation of the time limit be suspended during the period in office of the mandate-holder* concerned.

B. Comparative overview of rules on lifting of inviolability

135. Where there are rules on parliamentary inviolability, there are almost always also rules regulating how this can be *lifted*.

136. There are however some countries where parliamentary inviolability cannot be lifted. This is notably the case in Malta, Norway and San Marino.¹³³ In Ireland, the members of each House of the Oireachtas are privileged from arrest while in or travelling to or from the House. However, this does not apply to the most serious offences. No special procedure is foreseen in the Irish constitution for lifting this limited parliamentary inviolability.¹³⁴

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

138. Of the countries examined there are only a few in which the competence to lift immunity is not with parliament itself. This includes Andorra, Chile and Cyprus. In Andorra immunity (inviolability) can be lifted by the Penal Court sitting in plenary.¹³⁵ In Chile the Court of Appeal of the relevant jurisdiction is in charge of the matter,¹³⁶ and in Cyprus it is for the Supreme Court to decide.¹³⁷

139. In some countries the competence of parliament to lift immunity is laid down in the constitution, in others only at a lower level. But to the extent that there is more detailed regulation, then this is usually to be found in the parliamentary Rules of Procedure. The basic feature is that parliament can decide *to give consent* to the instigation of investigation, arrest, detention or proceedings against a member.

140. While this basic model is common to most parliaments in Europe, the further details vary significantly, both as regards the procedures and the criteria for lifting of parliamentary immunity.

141. The proposal or request to lift immunity may come from different parties – the injured party, the parliamentarian concerned, other parliamentarians (or party groups) or from the competent public authorities, most often the public prosecutor. In some countries such proposals have to be passed to the president of the assembly through the minister of justice or even the prime minister.

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

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

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

¹³³ Article 3 paragraph 1 of the Constitutional Law of 16 December 2005 no. 185 on the Captains Regent (San Marino).

¹³⁴ Article 15 para. 13 of the Constitution of Ireland.

¹³⁵ Article 53 paragraph 3 of the Constitution of Andorra.

¹³⁶ Article 58 paragraphs 2 and 4 of the Constitution of Chile.

¹³⁷ Article 83 paragraphs 2, 3 and 4 of the Constitution.

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

146. Depending on the countries, a combination of various criteria can stem from case law or parliamentary practice, for instance. Below are two examples:

France – principles laid down by the Constitutional Court in a decision of 1962:

The request for the lifting must be “serious, fair and sincere” and the decision on a waiver shall be based on no consideration other than the underlying facts presented in the request

Belgium – principles laid down by the constant practice of the Parliament (its Prosecution Committee):

“a waiver to lift the immunity presupposes that:

- either the facts announced lead *prima facie* to conclude that the claim is based on obviously unfounded, unjustified, time-bared, arbitrary or remote elements
- or the facts are the unforeseen consequence of a political action
- or it is a criminal act with clear political motives”

147. In some countries there is an underlying principle that requests for the lifting of immunity should be accepted in all cases except where there is cause to suspect the existence of *fumus persecutionis*, meaning an intention by someone to misuse the criminal legal system for political reasons and to prosecute the member unjustly. The two examples given above illustrate this.

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

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

150. Whether or not to lift parliamentary immunity is almost always considered specifically in the individual case, even though there may be established parliamentary practices for either granting or refusing such requests. However, it is also possible to envisage that parliamentary immunity may be lifted on a general basis, in advance of any specific cases, and with effect for all parliamentarians for a given period of time.

151. This is an established practice in the German *Bundestag*, which regularly passes a decision at the start of each parliamentary period to partially lift the immunity of all members for the entire electoral period for any kind of criminal investigation and proceedings for all alleged

crimes and offences, except for defamations of a political character. The stated purpose of this is to protect the reputation of the individual members of parliament, as it is considered that this might be negatively affected if each case of potential lifting of immunity has to be assessed on the merits of the case. The German Bundestag, however, retains the right to reinstate immunity in the individual case.

152. GRECO has come across issues connected with the quality of legislation and rules, including their unclear coverage and in a very few instances, the lifting of immunities not being provided for at all. Overall, the absence of adequate or sufficiently precise rules on the lifting of immunities was observed in approximately half of the 49 countries examined. The introduction of guidelines at national level to fill the gaps was often a standard improvement recommended by GRECO.

153. It has often specified that these guidelines need to provide for *specific, clear and objective criteria*; these criteria concern the grounds for the lifting of the immunity, elements of the procedure to be followed, timelines, guarantee of transparency and motivation etc (see below)

154. GRECO has never privileged any particular legal form: guidelines would normally be part of the general internal rules of procedure of the assembly concerned, *i.e.* be provided in form of a specific section or appendix to the internal or procedural rules where a consolidated text exists, or just a separate text or regulation adopted by the assembly/its Bureau and which forms part of the general rules regulating the functioning of the assembly; sometimes, it can take the form of an information or other document which is part of a compendium of rules and practices with a regulatory value; in a few instances, where the subject was partly addressed in a rule, law or regulation, GRECO – sticking to the legal approach followed by the country – has recommended that this specific text be amended along the lines suggested by the evaluation. *What is important is that the guidelines have sufficient authority and stability to ensure over time a fair, objective and equal treatment of requests and individual cases concerned.*

C. Assessment

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

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

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

158. Second, rules on parliamentary inviolability are clearly open to misuse by persons who have broken the law and seek shelter behind their parliamentary status. At worst, such rules can function as an incentive for persons who have committed crimes to seek parliamentary election. GRECO’s evaluations have confirmed the existence of such practices in a few instances. More frequently, it was the practice followed by parliament which had led to unnecessary hindrance of criminal proceedings in respect of serious criminal offences.

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

159. Fourth, parliamentary procedures for lifting immunity may also be problematic. GRECO has indeed often come across inadequate or cumbersome procedures – in rare cases even a total absence of procedures. It is of course difficult for a parliamentary committee to assess such lifting without going into the details of the specific case. One aspect of this is that it may give political opponents in Parliament the chance to investigate and look into private information of the member concerned. Another even more problematic aspect is that it is very difficult to assess whether immunity should be lifted without going into the merits of the criminal charges and form at least a preliminary opinion. In practice this may easily come into conflict with the principle of presumption of innocence, as protected by the ECHR, and it may be perceived by the public and the media as a kind of political judgment on the question of guilt. This is also in breach of fundamental principles of separation of powers, under which it is for the courts alone (and certainly not for a political assembly) to assess individual cases of criminal responsibility.

160. GRECO observed that certain parliamentary chambers would not be in a position at all to lift the immunity, as a result of inadequate or overly complex rules, or to guarantee an impartial and swift decision. Occasionally, GRECO also observed a clear reluctance of parliamentarians to expose a member of their chamber to proceedings even in case of allegations of serious misbehaviour such as related to bribery, trading in influence or other mechanisms used in practice to prosecute such offences (abuse of power, breach of duties, (accessory to) embezzlement).

161. It is not for the Venice Commission to hold that national constitutional rules on parliamentary inviolability are as such contrary to general principles of the rule of law and the separation of powers. Such rules clearly exist in a number of countries, where they form part of national constitutional law and are seen as part of the system of “checks and balances”.

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

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

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

165. The Venice Commission notes that in most modern European democracies these justifications for parliamentary inviolability appear to be more or less outdated. In a democratic system it is not very likely that the government would try to attack the workings of parliament as an institution by bringing unsubstantiated criminal charges against the members, and if this should happen, then parliament as an institution normally has far better and more effective

means of defence than relying on criminal inviolability. Furthermore there are also legal and political norms and standards in any well-functioning democracy that effectively hinder the political majority from misusing the criminal legal system against individual political opponents. Rules and principles on the independence and impartiality of the judiciary and the public prosecuting authorities are much more important and relevant in this regard than any old rules on parliamentary immunity.

166. At the same time, the Venice Commission notes that not all democratic systems necessarily always work like this, and that there might still in some countries be an actual need of the protection offered by rules on parliamentary inviolability against misuse of the criminal legal system. In some countries that are still in transition towards real democracy, or where democracy is still relatively new and fragile, there are experiences with cases in which the police or prosecutorial powers have been used to discredit, punish or destroy political opponents, including members of parliament. Nor is it always the case that in every state the judicial power can be trusted to act independently and not be unduly influenced by the executive.

167. On this basis the Venice Commission holds that there might still be some justification for maintaining the institution of parliamentary inviolability, and for invoking this in particularly problematic cases. However, such rules on immunity should be construed in a restrictive manner, and they should not be applied in practice unless there are compelling reasons to do so in the individual case.

168. As for the construction of national rules on this, the Venice Commission holds that under no circumstances should there be an absolute and unconditional inviolability for all kinds of criminal offences. Rules on inviolability should preferably always be subject to exemptions, and there should always be the possibility of lifting immunity, following clear and impartial procedures.

169. As for the range of offences that may be covered by rules on immunity, the Venice Commission holds that the exemptions found in many countries against particularly serious offences is well-founded. The same goes for the exemption that immunity does not cover cases where the member concerned is found *in flagrante delicto*.

170. While rules on immunity may protect against arrest, detention and prosecution, the Venice Commission holds that they should not 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.

171. The Venice Commission also supports the general principle that parliamentary inviolability should always be of a temporal nature, and function as a suspension, not as an absolute obstacle. In general it should be sufficient that immunity only lasts throughout the parliamentary term in which the allegations are made. A rule that a member may keep his or her immunity as long as he or she has a seat in Parliament may have the negative effect of creating an incentive to stay in parliament in order to escape prosecution. From the perspective of GRECO, if the member of Parliament is re-elected or becomes a member of another chamber, it is thus good practice to allow the waiver of immunity to continue producing its effects, without requiring a further authorisation of the assembly.

172. As for *lifting* parliamentary inviolability, the Venice Commission holds in general that there should always be such an option. The wider the scope of immunity the greater is the need for such a mechanism.

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

174. The Venice Commission therefore holds that it might be an idea to construe the parliamentary procedures for lifting of immunity in such a way that politically neutral and competent *outside experts* are brought in to assist in the assessment. It is granted that such a mechanism does not appear to exist at the moment in any of the countries studied. But it might be something to consider. It could be done in various ways, and in most countries it would be sufficient to regulate this in the parliamentary rules of procedure. One option would be to draw on the expertise of existing institutions (the public prosecutor or the courts). Another option might be to use other kinds of politically neutral experts, for example from academia.

175. Furthermore the Venice Commission holds that the parliamentary *procedures for lifting* of immunity should in any case always be regulated in some detail, and that they should respect basic procedural principles, such as clarity, transparency, predictability, objectivity, non-arbitrariness and rights of contradiction. As for transparency, GRECO has pointed out during evaluations that once a parliament has taken a decision, this decision should be known and *it should indicate the grounds for the decision to lift or not the immunity* in a given case (in order to further limit risks of arbitrary decisions). At the same time, it is of course crucial *to preserve the confidentiality of the details of the case and to apply to this end, standards similar to the confidentiality of criminal investigations* (if not the criminal law standards themselves) since any on-going or yet-to-be initiated criminal proceedings could otherwise be jeopardised. These rules would normally apply to the parliamentary bodies (Bureau, special committee, parliamentarian him/herself if auditioned) entrusted with the content of the matter. Compliance with these requirements needs to be strict. GRECO has indeed come across situations where prosecutorial bodies have had to adapt to risks of leakages and the alerting of possible accomplices of the suspected parliamentarian; they sometimes avoid applying for the lifting of immunity (or they chose the least inappropriate moment in regard to risks for their proceedings).

176. The problem is that the more detailed and well-regulated such procedures are, the more they will resemble judicial proceedings, and thereby risk crossing the line into a substantive assessment of the merits of the case, which might contradict the principle of presumption of innocence and the principle that criminal responsibility is for the courts alone to determine (separation of powers). GRECO has indeed stressed that decisions on the waiving of immunities should be based on the merits of the request submitted by prosecutorial/judicial authorities to Parliament. In other words, parliaments should not look at factors or elements other than those submitted by the requesting authority. This is a challenge that is structural and inherent, and that the parliamentary organs handling cases of immunity will have to be aware of and seek to handle. In GRECO's experience, guidelines can usefully spell out *what kind of information needs to be provided to enable the parliament to examine the merits of the request*. The amount of information should be reasonable.

177. GRECO had also misgivings about the fact that complex procedures could lead to new problems (mistakes, inconsistent application and dissimulation of biased decisions). These procedures should therefore remain simple enough to be applied consistently by parliamentarians and to be understood by the public at large. The procedure may involve a variety of actors (speaker of the assembly, Bureau, special committee entrusted specifically with this matter and thus subjected to specific rules including confidentiality): their roles should be defined so as to ensure that the preparatory steps (analysis of the request) and the final decision (approval or rejection of the request) take place swiftly and remain with the body

normally responsible, without possibilities for undue interference. GRECO has also come across situations where different procedures are applicable in respect of parliamentarians (and other categories of officials) for the institution of criminal proceedings, and for the authorisation of detention and search, combined with a variety of different actors responsible for the initiation and decision-making in each case. The complexity of such arrangements has led GRECO to recommend a thorough review with a view to their simplification.

178. As for the *timeline for decisions*, GRECO had sometimes misgivings about lengthy proceedings. It never went so far as to determine an ideal timeline; as this depends a lot on many specific circumstances (the way sessions are planned and the way decision-making processes are organised etc.). Within a given country, a period of one month was found to be lengthy by practitioners met on-site by the evaluation team. On the other hand, GRECO considered that *a deadline-based approach in which, eventually, the absence of a decision amounts to a denial of the request by parliament is not an adequate way of providing guarantees for a swift procedure* as it contradicts other requirements (general fairness and transparency, guarantees of impartial treatment of a case, need for grounded decisions).

179. GRECO also considered *ineffective a system or practice requiring the prosecutorial authority to apply repeatedly for the lifting of immunity* for every step undertaken in the proceedings (in the context of a preliminary investigation and the subsequent judicial investigation, the application of custodial/semi-custodial measures, the prosecution, the detention). This could be problematic where the inviolability has a broad scope and covers all the procedural steps, especially where several measures need to be applied in the context of an investigation (it could hinder the effective and consistent treatment of the case). In principle, the request for the lifting should indicate precisely enough the object and purpose of the waiver but it is reasonable to assume that there should be a possibility for the application to address various investigative and prosecutorial steps covered by the immunity.

180. As for substantive *criteria* for lifting of immunity, the absence of such criteria was frequently observed and thus a particular source of concern from GRECO's perspective.. Moreover, the Venice Commission holds that these should be regulated in more detail and clarity than what appears to be normally the case in most countries. Such criteria should include the lifting of immunity for particularly *serious crimes* or cases of *in flagrante delicto* (unless this is already exempted). It should also be possible to lift immunity in cases where the alleged offence is unrelated to any kind of parliamentary function and of a purely private nature. GRECO has also observed on occasions that it can be uneasy to dissociate acts committed in relation to parliamentary functions and those committed in connection with other official duties, for instance as a member of a local elected body or as a locally elected executive (moreover, parliamentarians are not meant statutorily to only represent in parliament national interests but also local interests of their constituency or delegating local assembly. In such situations, *GRECO has pointed to the need to clarify with appropriate criteria the extent to which an act is connected to official functions of a parliamentarian and thus whether the inviolability of that member applies and can/needs to be lifted*. It appears that such criteria are useful for the prosecutorial bodies themselves, to prevent lengthy hesitations¹³⁸ and consultations.

181. The Venice Commission in general holds that there should be a basic presumption that immunity should be lifted in all cases in which there is no reason to suspect that the charges against the member concerned has been politically motivated.

182. Finally the Venice Commission holds that it should in principle be possible for the member concerned to *waive* immunity and to insist on having the case considered by the ordinary public prosecutor and if need be by the courts.

¹³⁸ In the case of one country, hesitations and consultations lasted for about one year.

V. Summary and conclusions (preliminary)

1. *In general*

183. The Venice Commission notes that rules on parliamentary immunity are a part of the European constitutional tradition, as demonstrated by the fact that almost all countries have some form of rules on this. The basic feature is that members of parliament are given protection against civil or criminal legal rules that otherwise apply to all citizens. Apart from this there is great variety as to how such rules are construed, and there is no single common model.

184. There is also great variety in how these rules are regarded and applied. In most mature democracies they are seen as more or less outdated, and seldom invoked in practice. In other countries they are applied more often, and form part of the operative constitution. The cases in which they are invoked are then often quite controversial, especially if there is reason to believe that the parliamentarian concerned might have committed a criminal offense.

185. The Venice Commission notes that rules on parliamentary immunity are *per se* an exemption from the principle of equality before the law, which is a core element of the rule of law. Such rules are also open to misuse, and may have the negative effect of fostering contempt against politicians. Rather than protecting parliament they may as well undermine the legitimacy and authority of the democratic system. They should therefore be subject to critical review. They should have to be justified with reference to overriding public concerns and they should go no further than what is necessary and proportional. The justification should be with reference to the concerns of the present, and not just to old traditions and customs.

186. In most countries the basic rules on parliamentary immunity are laid down in national constitutional law. The Venice Commission notes that with the possible exception of offenses falling under international criminal law there are no rules under international or European law that directly regulate or restrict national rules on immunity. They can however be assessed on the basis of established general principles of law, and that is the main normative basis for this report.

187. The concept of “parliamentary immunity” has two main components, which are of a different nature and which are usually regulated in a different manner. The first is “*non-liability*”, meaning immunity for votes, opinions and remarks related to the exercise of parliamentary office, or in other words, a wider freedom of speech than for ordinary citizens. The second is “*inviolability*”, or immunity in the strict sense, meaning special legal protection for parliamentarians accused of breaking the law, typically against arrest, detention and prosecution. The report is structured in such a way that the two are treated separately, although there is a certain overlap.

2. *Non-liability*

188. The Venice Commission recognises that the freedom of opinion and speech of the elected representatives of the people is a key to true democracy. Historically it was therefore essential to guard this freedom by giving members of parliament special constitutional protection against all form of legal reactions to the votes cast and the opinions expressed in the discharge of their parliamentary duties.

189. The need to ensure and protect the freedom of political debate in a democratically elected representative assembly is certainly no less today. However, in Europe this pressing concern is now to a large extent covered by European law, in particular Article 10 of the ECHR, but also other common rules and regulations. Since it was first formulated six decades ago, Article 10 has gradually been developed and extended so that it now offers very wide protection for freedom of speech, and in particular for any opinions voiced as part of public political debate.

190. On this basis the Venice Commission holds that in Europe the main rationale behind national constitutional rules on parliamentary non-liability has now been covered by common standards of European law that national courts are bound to respect and apply. In countries outside Europe that are not effectively bound by similar legal obligations the situation is different. But in Europe today the Venice Commission holds that there is no pressing need to protect parliamentary freedom of speech by special national rules on immunity.

191. The Venice Commission therefore holds that rules on parliamentary non-liability are not anymore to be seen as a necessary element of national constitutional law in Europe. But that is not to say that they may not still be legitimate. First, it may be argued that parliamentary freedom of speech is so essential that it should substantively extend even beyond the protection offered by ECHR Article 10. Second, rules on parliamentary non-liability have the added effect of giving parliamentarians a procedural protection against civil and criminal legal actions, and may thus protect them against legal harassment from political opponents.

192. The Venice Commission would point out that if national rules on non-liability are to give members of parliament a substantively wider freedom of speech than that already offered by ECHR Article 10, then that per definition has to extend to sensitive and controversial categories such as for example defamation, racist remarks, hate speech, incitement to violence, treason and etcetera.

193. The Venice Commission holds that it should primarily be for the national constitutional legislator to assess and decide whether parliamentary freedom of speech should extend to such categories, and if so, how far it should go.

194. The Venice Commission notes that parliamentary non-liability may in principle be absolute and unlimited. If however it is to be limited, then this can be done in two different ways. One is to regulate specific exemptions. The effect is that such cases may be brought before the courts, which will then have to decide whether the limits of non-liability are breached or not. The alternative model is to have general non-liability as the main rule, but with a possibility for parliament itself to lift it.

195. The Venice Commission notes that both models are found in European countries in various forms, and sometimes in combination. For its part, the Commission holds that even though both models are legitimate, the better is the one under which limits to non-liability are laid down by law and subject to judicial review. If Parliament is to decide on whether or not to lift immunity for a given remark made by a member, then this will necessarily be a politicised process. It is preferable that any limits to the freedom of speech of parliamentarians are laid down in law beforehand in a clear and precise manner and subject to judicial review.

196. The Venice Commission holds that rules on parliamentary non-liability should by their nature not be limited in time. The question should be whether or not a member of parliament should have a special freedom of speech, and how far this should go. But if such freedom is granted, then this will be undermined if it is possible to bring legal charges against the parliamentarian once he or she has left office.

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

3. Inviolability

198. The Venice Commission notes that constitutional provisions on “inviolability” for members of parliament are to be found in many European countries, although they are less widespread than rules on non-liability. They are also usually more narrowly construed and easier to waive or lift by parliament itself. They are also more controversial and more difficult to justify. There is no common model and great variety both as to what kind of legal offenses are covered and as to what legal reactions the parliamentarians are protected against.

199. It is not for the Venice Commission to hold that national constitutional rules on parliamentary inviolability are as such contrary to general principles of the rule of law and the separation of powers. Such rules exist in a number of countries, where they clearly form part of national constitutional law and are seen as part of the system of “checks and balances”.

200. However, the Venice Commission holds that rules on inviolability are not a necessary part of national constitutional law. There are many well-functioning democratic systems in which there are no such rules at all, or where they have not been applied for a very long time. It is certainly possible, and indeed even perhaps preferable, for a national parliament *not* to have such rules – as the negative aspects may easily outweigh the potential benefits.

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

202. On this basis the Venice Commission holds that under no circumstances should there be an absolute and unconditional parliamentary inviolability for all kinds of criminal offenses. Such rules should preferably always be subject to exemptions, and there should always be the possibility of lifting immunity, following clear and impartial procedures.

203. As for the range of offenses that may be covered by rules on immunity, the Venice Commission holds that the exemptions found in many countries against particularly serious offences is well-founded. The same goes for the exemption that immunity does not cover cases where the member concerned is found *in flagrante delicto*.

204. While rules on immunity may protect against arrest, detention and prosecution, the Venice Commission holds that they should not protect against preliminary *investigations*, as long as these are conducted in a way that does not unduly harass the member concerned.

205. The Venice Commission also supports the general principle that parliamentary inviolability should always be of a temporal nature, and function as a suspension, not as an absolute obstacle. In general it should be sufficient that immunity only lasts throughout the electoral period in which the allegations are made.

206. As for *lifting* parliamentary inviolability, the Venice Commission holds that there should always be such an option. The wider the scope of immunity the greater is the need for such a mechanism.

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

208. The Venice Commission would therefore suggest that it might be an idea to construe parliamentary procedures for lifting of immunity in such a way that politically neutral outside experts are brought in to assist. One option would be to bring in the public prosecutor or the courts. Another would be to use politically neutral experts, for example from academia.

209. The Venice Commission also holds that the parliamentary *procedures for lifting* of immunity should in any case always be regulated in some detail, and that they should respect basic procedural principles, such as clarity, transparency, predictability, objectivity, non-arbitrariness and rights of contradiction. At the same time, such procedures should not be made to resemble judicial proceedings, and under no circumstances should they assess the question of guilt, which is for the courts alone to decide. The danger that such procedures infringe the principle of presumption of innocence (as protected by the ECHR) is a structural problem with lifting of immunity that the parliamentary institutions have to be keenly aware of.

210. As for substantive *criteria* for lifting of immunity the Venice Commission holds that these should be regulated in more detail and clarity than what appears to be normally the case in most countries. Such criteria should include the lifting of immunity for particularly *serious crimes* or cases of *in flagrante delicto* (unless already exempted). It should also be possible to lift immunity in cases where the alleged offense is unrelated to parliamentary functions.

211. The Venice Commission in general holds that there should be a basic presumption that immunity should be lifted in all cases in which there is no reason to suspect that the charges against the member concerned has been politically motivated.

212. Finally the Venice Commission holds that it should in principle be possible for the member concerned to *waive* immunity and to insist on having the case considered by the ordinary public prosecutor and if need be by the courts.

VI. Draft Guidelines

1. Non-liability

213. The freedom of opinion and speech of the elected representatives of the people is a key to true democracy. Political debate in a democratically elected representative assembly should therefore be protected.

214. In Europe this concern is to a large extent covered by European law, in particular Article 10 of the ECHR. There is therefore no stringent need any more for national rules on non-liability.

215. Rules on parliamentary non-liability are legitimate, in particular since they give parliamentarians a procedural protection against legal harassment from political opponents.

216. It should primarily be for the national constitutional legislator to decide about parliamentary non-liability and its scope.

217. Parliamentary non-liability should in principle be absolute. It may however be limited (a) through specific exemptions (substantive limitation) - (b) through a possibility for parliament to lift it (procedural limitation).

218. Both models of limitation are legitimate but model (a) is preferable since it implies that limits to non-liability are laid down by law and subject to judicial review.

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

220. Non-liability does not exclude internal disciplinary sanctions, which should be relevant, proportional and not misused by the parliamentary majority.

2. Inviolability

221. Rules on inviolability should be conceived as procedural rules meant to avoid situations whereby the exercise of parliamentary office is hindered by certain criminal proceedings dealing with deeds carried out by Members of Parliament acting as ordinary citizens. These rules should govern the conditions for the implementation of criminal proceedings concerning acts outside the remit of the inviolability.

222. Rules on inviolability should be comprehensive, clear, simple and predictable.

223. Rules on inviolability should concern only the person of the parliamentarian and apply in matters concerning serious and less serious crimes.

224. Rules on inviolability should not apply in case of *flagrante delicto* but should apply to every act not connected to the parliamentary duties of the Member of Parliament.

225. Rules on inviolability should be provided for in the Rules of procedure of the parliamentary assembly concerned, which should make these available to the public including any possible case law or elements from the practice related to the procedure applicable to the waiving of inviolability.

226. The request for waiving the inviolability should be based on precise facts and should not involve any political consideration.

227. Requests for lifting the inviolability should be examined in the light of criteria (including for instance, impartiality, objectivity, seriousness, fairness, sincerity).

228. The relevant parliamentary body called upon to examine the request should base its appreciation of the merits of the case only on these criteria.

229. The request should be presented during the parliamentary session.

230. A decision made by the majority of the registered members of the relevant parliamentary body should be based on no consideration other than the underlying facts presented in the request and be limited to the arguments put forward by the Prosecution service.

231. The decision made by the relevant parliamentary body should be taken in a reasonable time and made public.

232. A decision of the relevant parliamentary body should be made without any interference of the Executive and it should be motivated.

233. A decision of the relevant parliamentary body should be binding on both the judicial and administrative authorities involved in the procedure.