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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT OPINION**

**ON DRAFT CONSTITUTIONAL AMENDMENTS  
ON THE IMMUNITY OF THE MEMBERS OF THE PARLIAMENT  
AND JUDGES**

**OF UKRAINE**

**on the basis of comments by**

**Mr Sergio Bartole (Substitute Member, Italy)**  
**Ms Hanna Suchocka (Member, Poland)**  
**Mr Kaarlo Tuori (Member, Finland)**

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*\*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.*

## I. Introduction

1. In a letter dated 14 May 2014, the Speaker of the Ukrainian Parliament (*Verkhovna Rada*), Mr Volodymyr Groysman, requested an opinion of the Venice Commission on draft constitutional amendments with respect to the immunity of members of parliament and judges in Ukraine (hereinafter, “the draft amendments” - CDL-REF(2015)006).
2. The Commission invited Mr Bartole, Ms Suchocka and Mr Tuori to act as rapporteurs on this issue.
3. At its 102<sup>nd</sup> plenary session (Venice, 20-21 March 2015), the Venice Commission held an exchange of views on the draft amendments with Ms Oksana Syroyid, Vice-Speaker of the Verkhovna Rada and with Mr Oleksiy Filatov, Deputy Head of the Presidential Administration of Ukraine.
4. *This opinion was adopted by the Venice Commission at its ... plenary session (Venice, ...).*

## II. Preliminary Remarks

5. On 5 February 2015, The *Rada* submitted the draft amendments to the Constitutional Court for an opinion on their conformity with the Constitution. On 4 April 2015 [tbc], the Court found the draft amendments to be in conformity with the Constitution.
6. On 3 March 2015, the President of Ukraine established a Constitutional Commission which set up three sub-commissions (on decentralisation, the judiciary and on human rights). The work of the sub-commission on the judiciary is likely to overlap with the provisions of the draft amendments on judicial immunity. The Venice Commission has been invited to participate in the work of the Constitutional reform Commission and is represented there by one of the rapporteurs of this opinion, Ms Suchocka.
7. The present opinion is based on the English translation of the draft amendments and the, which may not accurately reflect the original version on all points. Some of the issues raised may therefore find their cause in the translation rather than in the substance of the provisions concerned.

## III. Parliamentary immunity

8. The draft amendments would repeal Article 80.1 and 80.3 on parliamentary immunity. Article 80.1 states that “People’s Deputies of Ukraine are guaranteed parliamentary immunity”, while Article 80.3 lays down that “People’s Deputies of Ukraine shall not be held criminally liable, detained or arrested without the consent of the Verkhovna Rada of Ukraine”. Article 80.2 would remain in force, however. According to this provision, “People’s Deputies of Ukraine are not legally liable for the results of voting or for statements made in Parliament and in its bodies, with the exception of liability for insult or defamation”.
9. In its Report on the Scope and Lifting of Parliamentary Immunities (CDL-AD(2014)011), the Venice Commission employed the distinction between the non-liability and inviolability of members of parliament. ‘Non-liability’ refers to “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”.

10. In turn, ‘inviolability’ (or ‘formal immunity’) means “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”<sup>1</sup>. In respect of this distinction, the present Article 80.2 of the Ukrainian Constitution, which would remain in force after the proposed amendment, addresses non-liability, while Article 80.3, which would be repealed, focuses on inviolability.

11. The Report of the Venice Commission explains that both forms of parliamentary immunity aim to safeguard the working conditions of the Parliament. Historically, their purpose was to ward off harassment, notably from the executive power but also from the judiciary when it was not impartial.

#### **A. Non-liability**

12. Non-liability focuses on guaranteeing the freedom of opinion and speech of members of parliament in order to facilitate free parliamentary debate. Provisions on non-liability can be found in most constitutions and are part of the European constitutional heritage. The Venice Commission argued that despite general provisions on freedom of speech in national constitutions and international human rights instruments, “national rules on parliamentary non-liability are still a legitimate element of constitutional law, justified by the need to effectively ensure the particular needs for freedom of political debate in a democratically elected representative assembly”<sup>2</sup>, “even if the substantive scope of protection is today for the most part also covered by Article 10 of the ECHR”<sup>3</sup>.

13. Therefore, the remaining Article 80.2 on non-liability does not give rise to critical comments from the point of view of European standards or previous assessments of the Venice Commission.

#### **B. Inviolability**

14. Parliamentary inviolability, on the other hand, is a more controversial issue than non-liability. In established democracies, possible harassment from the side of the executive power – including prosecutors – has lost much of its former weight as a justification for such an exemption from the principle of equality which inviolability necessarily entails. In a well-functioning political system, built on an established system of the rule of law, members of parliament enjoy adequate protection through other mechanisms and do not need special immunity of this kind.

15. Many new democracies opted in their constitutions for a relatively wide concept of parliamentary inviolability. It was understood as a clear sign of guaranteeing a real autonomy of parliament within the system of separation of powers. As the Venice Commission points out in its Report, in some new democracies in Central and Eastern Europe inviolability may still count as a valid rationale for constitutional provisions on inviolability.<sup>4</sup> In countries where the rule of law is not yet consolidated, there can be real reason to fear that the government will seek to bring false charges against political opponents and that the courts give in to political pressure.

16. However, in several of these countries inviolability has not been lifted even in cases when this should have been done and this has led to criticism, *inter alia*, because it is an obstacle in the fight against corruption. The Commission pointed out that “it is often new democracies that

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<sup>1</sup> CDL-AD(2014)011, par. 11.

<sup>2</sup> CDL-AD(2014)011, par. 84.

<sup>3</sup> CDL-AD(2014)011, par. 89. The Report shows some variation in the exact scope of parliamentary non-liability. Exceptions concerning defamation or insults are not uncommon, par. 69.

<sup>4</sup> CDL-AD(2014)011, par. 29.

are most exposed to political corruption and the misuse of immunity by extremist parliamentarians to threaten democracy itself. Thus the paradox of parliamentary immunity – that it can serve both to foster and to undermine democratic development.”<sup>5</sup> Inviolability may thus impede the fight against corruption in the very same States for which the harassment argument could still be relevant.

17. There are no established European standards requiring either non-liability or inviolability. The States have a choice in this field and advantages and disadvantages of inviolability require country-specific analysis and consideration, notably taking into account the state of development of the rule of law in the country concerned.

18. Fighting corruption is indeed a major justification for restricting parliamentary inviolability. However, in a political system, with a fragile democracy such as in Ukraine, where, as the Venice Commission was informed, judicial corruption is widespread, a complete removal of inviolability can be dangerous for the functioning and the autonomy of Parliament.<sup>6</sup>

19. To prevent the possibility of politically motivated indictments or arrests, other procedural safeguards could be envisaged. One possibility would be to follow the Italian model. Parliament could be entitled to complain against the detention of and prosecution against one of its members to the Constitutional Court, as part of a competence to settle conflicts between State powers, in this case between Parliament and the Judiciary. Prosecutors and ordinary judges would be obliged to inform Parliament about the institution of prosecution against a Member of Parliament and about the issuance of an arrest warrant. Within a given deadline, Parliament could then appeal to the Constitutional Court against these measures, which would remain suspended until the decision of the Constitutional Court.

20. In any case, inviolability “should under no circumstances protect against preliminary investigations, as long as these are conducted in a way that does not unduly harass the member concerned. Indeed investigations may be crucial to establishing the facts of the case, and they have to be conducted while the case is still fresh, and not years later, after the expiry of the period of immunity.”<sup>7</sup>

#### **IV. Judicial immunity**

21. The draft amendments also change the body empowered to lift immunity of judges. According to the current Article 126.3 of the Ukrainian Constitution, “a judge shall not be detained or arrested without the consent of the Verkhovna Rada of Ukraine, until a verdict of guilty is rendered by a court”. This provision would be replaced by the following one: “A judge cannot be detained without the consent of the High Council of Justice; and he / she cannot be subjected to the measure of restraint in the form of arrest till delivering judgment of conviction by the court, except for detention when committing or directly committing a capital offence or felony against a person’s life and health”.

22. In addition, the following provisions would be added to Article 129 as a new paragraph 2: “Judges are brought to legal liability on a common basis. Judges cannot be brought to legal liability for the acts committed due to administration of justice, except for consideration of knowingly unjust decision, violation of the oath of the judge or committing an offence.”

23. There are no rigid European standards on judicial immunity. This leaves the State concerned a large margin of appreciation. Defining legal liability for acts of administration of

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<sup>5</sup> CDL-AD(2014)011, par. 29.

<sup>6</sup> in two earlier opinions on Ukraine the Commission pointed out that inviolability for members of Parliament should not be removed in Ukraine CDL-INF(2000)014, par. 14-17, CDL-INF(2001)011, p. 3.

<sup>7</sup> CDL-AD(2014)011, par. 159.

justice thus also depends on country-specific considerations.

24. The shifting of the power to lift judges' immunity from a political organ – Parliament – to the High Council of Justice is welcome. Even though the Venice Commission has insisted in several opinions that the composition of the High Council of Justice needs to be changed, entrusting the High Council, as a body of judicial -governance, with the competence to lift immunity is a solution clearly preferable to the present one. The on-going work of the Constitutional Reform Commission will hopefully settle the problem of the Council's independence. The proposed amendments to Article 126.3 would in principle enhance the independence of the judiciary.

25. The Venice Commission consistently pointed out that judges should not benefit from a general immunity but that judges should only have functional immunity, i.e. immunity for acts committed in the course of their judicial function. "While functional safeguards are needed to guarantee judicial independence against undue external influence, broad immunity is not. Judicial independence does not depend on wide immunity and judges should answer for any alleged crimes on the presumption that normal procedures of defence, appeal and other elements of the rule of law are at their full disposal."<sup>8</sup>

26. This principle might be reflected in the the term "common basis" in Article 129.2. This term could be interpreted in the light of the second sentence, which limits the scope of non-liability of judges to acts committed in the administration of justice. As a consequence, judges are not treated in a privileged way for criminal offences not related to judicial decision making for which they are held responsible like any other person, i.e. on a "common basis". This, however, is not clear in the current formulation.

27. Furthermore, the Venice Commission repeatedly criticised "violation of oath" as a ground for dismissal of judges.<sup>9</sup> It is an excessively vague ground and could, together with the elevation any offense whatsoever to a ground of legal liability, annul the protective effect pursued by the restriction of legal liability.

28. Finally, the entry into force of the constitutional amendment should not be made dependent on the entry into force of a legislative amendment on the powers of the High Council of Justice. The legislation has to follow the Constitution and if there is no legislative basis, the High Council of Justice has to directly apply the Constitution.

## **V. Conclusion**

29. The Venice Commission welcomes that the draft amendments to the Constitution of Ukraine shift the power to lift judges' immunity from Parliament to the High Council of Justice. The Commission strongly hopes that the on-going constitutional reform will turn the High Council of Justice into a truly independent body of judicial -governance.

30. However the draft amendments should be formulated in a clear manner and the vague term of "violation of the oath" should be removed not only from the provision on the lifting of immunity but also as a ground for the dismissal of a judge.

31. The Commission considers that the current state of the rule of law in Ukraine does not yet warrant a complete removal of inviolability of members of Parliament. However, the Commission acknowledges that inviolability can be an obstacle to the fight against corruption. Therefore, it recommends the establishment of other mechanisms, which can prevent

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<sup>8</sup> CDL-AD(2013)008, par. 54.

<sup>9</sup> CDL-AD(2015)007, par. 52; CDL-AD(2013)014, par. 24, CDL-AD(2013)014, par. 52.

interference in the activity of Parliament.

32. Finally, the entry into force of the constitutional amendment should not be made dependent on the entry into force of a legislative amendment on the powers of the High Council of Justice. The legislation has to follow the Constitution and if there is no legislative basis, the High Council of Justice should directly apply the Constitution.

33. The Venice Commission remains ready for any further assistance the Ukrainian authorities may request.