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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION
ON THE DRAFT DECISION ON THE LIMITATION
OF PARLIAMENTARY IMMUNITY AND THE CONDITIONS
FOR THE AUTHORISATION TO INITIATE INVESTIGATION
IN RELATION WITH CORRUPTION OFFENCES
AND ABUSE OF DUTY

OF ALBANIA

adopted by the Venice Commission
at its 66th plenary session
(Venice, 17-18 March 2006)

on the basis of comments by

Mr Sergio BARTOLE (Substitute Member, Italy)
and Mr Georg NOLTE (Substitute Member, Germany)

Introduction

1. *In a letter received on 19 December 2005, Mr Rusmali, Deputy Prime Minister of Albania, transmitted to the Venice Commission a request for an opinion on a "Draft Decision on the limitation of parliamentary immunity and the conditions for the authorisation to initiate investigation in relation with corruption offences and abuse of duty" (CDL(2006)002; hereafter: the draft decision).*
2. *The present opinion is based on comments by Mr Sergio Bartole (substitute member, Italy) and Mr Georg Nolte (substitute member, Germany). It was adopted by the Venice Commission at its 66th plenary session (Venice, 17-18 March 2006).*

General remarks

3. The draft submitted to the Venice Commission is aimed at introducing new rules on the limitation of the parliamentary immunity of the incumbent members of the Assembly of the Republic of Albania. It envisages a limited lifting of the immunity of all members of the Albanian parliament for the whole duration of the mandate. It forms an integral part of the Assembly's Regulation (Article 5) and amends its Article 118.
4. It should be noted at the outset that the translation of the Draft Decision does not always appear to be precise. The term "waiver", for example, is normally only used in the context of state immunity (under international law). In the present context, "lifting" or "limitation" of immunity are better expressions.
5. It should also be noted that, to date, there has been only one case in which the lifting of parliamentary immunity was discussed in Albania on the basis of the present Constitution. The case did not concern corruption and it did not lead to a lifting of immunity. This background casts a shadow of doubt whether there indeed exists a pressing need for this reform, as it has been put forward in the Albanian Explanatory Note.
6. According to the Explanatory Note, the Assembly intends to introduce a temporary limitation of the parliamentary immunity "for the duration of the mandate", that is that it intends to give up the privilege of the immunity for all the members of the Assembly until the next elections for the renewal of the Assembly itself, as far as criminal offences related to corruption and abuse of duty are at stake (Article 1). Moreover new rules will be provided for the lifting of the immunity "when after limitation from immunity", "investigation is not sufficient" both in case of corruption or abuse of duty and for all other types of criminal offences (Article 4). While these novelties are apparently dealing with the immunity of the incumbent parliamentarians, Article 6 is drafted in view of a permanent amendment of the parliamentary regulation allowing the general lifting of immunity for the investigation/prosecution at the beginning of the (NB, or better, each) legislature term in case of offences of corruption and abuse of duty: the decision adopted on the basis of the new rules shall become integral part of the regulation of the Assembly.
7. As far as the provisions allowing both the general lifting of the parliamentary immunity during this term of the legislature and a decision of giving up the immunity of all the members of the Assembly at the beginning of the future terms in case of corruption or abuse of duty are considered, it is evident that they are envisaging a substitution of a general and abstract

deliberation of the Assembly to the adoption case by case of individual decisions dealing with the personal positions of the concerned members of the Assembly, who are affected by criminal investigations.

8. The restriction of the lifting to the criminal offences related to corruption and abuse of duty does not make any quotation of the relevant provisions of the criminal code, and, therefore, it is not clear whether reference is made to the legal definition of corruption and abuse of duty in the Albanian law or to a more general concept of the two offences as it is accepted by the European practice.

9. As a matter of fact, the powers of the investigating authorities are very restricted with regard to the position of the members of the Assembly who are interested by the investigative procedure. If more coercive measures, the search of the residence, arrest or trial are necessary (Article 3), the legislator provides for a proper lifting – and not a mere limitation - of immunity "when after limitation from immunity", "investigation is not sufficient" (Article 4 of the draft decision). Then, the Assembly is required to adopt a case by case authorisation taking into consideration the requests submitted by the Prosecutor general, the relevant exigencies of the investigation and the possible existence of the *fumus persecutionis*.

General Principles and Comparative Law

10. The right of Parliaments to lift the immunity of their members is an unquestioned part of the European parliamentary tradition. The main purpose of the rules on parliamentary immunity is the protection of the Parliament itself, and in particular its proper functioning. Parliamentary immunity is not a personal privilege of individual members of Parliament. This explains why Article 73.2 of the Albanian Constitution, like other European constitutions, provides for a right of parliament to lift the immunity of its members.

11. It is more difficult to know whether the lifting of immunity by Parliament must take place as the need arises in each individual case, or whether this may also be done in advance for all members of Parliament. What can be learned on this issue from on the basis of a comparative analysis?

12. A number of European countries provide for a restricted scope of parliamentary immunity. The provisions defining the limits of parliamentary immunity may appear in constitutional provisions, like in France or Italy, or in infra-constitutional provisions, like in Germany. The same result is thus achieved through different procedures.

13. In France, Article 26.2 of the Constitution restricts the scope of parliamentary immunity to measures which restrict the liberty of the person, and does not include the need to authorise criminal proceedings. It should be noted, however, that this restriction is based on an amendment to the constitution itself (from 1995).¹ The Italian Constitution allows also in a specific constitutional provision for the prosecution of the members of the two Chambers without a specific authorisation of the assembly interested (Article 68). In the United Kingdom, Members of the House of Commons only enjoy immunity from arrest in connection with civil procedures, but not from criminal prosecution.² As debtors are no longer arrested in the United

¹ Cf. Loi constitutionnelle no. 95-880, 4 August 1995.

² Cf. Alder, Constitutional and Administrative Law, 5th ed., Houndmills et al. 2005, p. 239 (reference to corruption charges).

Kingdom, parliamentary immunity has lost much of its importance.³ Due to the absence of a written Constitution in the United Kingdom, the situation of this country is similar to the one of the above-mentioned countries as long as it provides for the immunity and its limitations at the same level of norms. However, the case of the United Kingdom is not fully comparable from a substantive point of view as the British Parliament itself possesses reserved powers of criminal punishment for contempt of Parliament.^{4,5}

14. Germany is the European country whose norms apparently inspired the Albanian draft. There is indeed a practice of the *Bundestag* to partially lift the immunity of all members of parliament for the entire electoral period.⁶ The German example may even go further than the Albanian Draft Decision insofar as it extends not only to crimes “related to corruption and the abuse of duty” but to investigations for all crimes (except defamations of a political character). However, since the term “abuse of duty” in the Albanian Draft Decision is imprecise, it is not clear whether the Draft decision is indeed narrower than the German model.

15. The German Constitutional Court has not yet decided whether the German parliamentary practice is indeed constitutional. Doubts have been voiced in the legal literature.⁷ These doubts are based in part on the concern that a general lifting of immunity might affect the working of the Parliament as a whole as it could enable selective, arbitrary, or even politically motivated investigations to take place.

16. Such considerations must be taken seriously, but they must also be put into their context. The above-mentioned dangers are minimised if the Parliament retains the right to reinstate the immunity and if the lifting of the immunity does not include the authorisation to apply restrictive measures against the person, the rooms and the belongings of the Member of Parliament concerned. Since the German Decision on the (general) lifting of immunity of members of parliament contains such safeguards, the majority opinion in the German legal literature considers the decision on the general (but limited) lifting of immunity to be constitutional.⁸

17. It should also be noted that, in Germany, the original purpose of the decision to generally lift immunity at the beginning of a electoral period was to protect the reputation of individual members of Parliament. It is thought that Members of Parliament would be protected from

³ Ibid. at p. 229.

⁴ Ibid. at p. 230.

⁵ See also the report on the regime of parliamentary immunity adopted by the Venice Commission, CDL-INF(1996)007.

⁶ Beschluss des Deutschen Bundestages betreffend die Aufhebung der Immunität von Mitgliedern des Bundestages, Anlage 6 zur Geschäftsordnung des Bundestages (Sartorius I, no. 35).

⁷ Cf. *Magiera*, in Sachs (ed.), Grundgesetz-Kommentar, 3rd ed., München 2003., Article 46, para. 20; *Trute*, in von Münch/Kunig (eds.), Grundgesetz-Kommentar, Band 2: Articles 20-69, 5th ed., München 2001, Article 46, para. 29

⁸ Cf. *Jarass/Pieroth*, Grundgesetz für die Bundesrepublik Deutschland, 7th ed., München 2004, Article 46, Rn. 8; *Schulz*, Neue Variationen über ein Thema: Abgeordnetenimmunität und Zwangsmaßnahmen im strafrechtlichen Ermittlungsverfahren, Die Öffentliche Verwaltung 1991, 448 et seq., at 455; *Wiefelspütz*, Die Immunität und Zwangsmaßnahmen gegen Abgeordnete, Neue Zeitschrift für Verwaltungsrecht 2003, 38 et seq., at 39.

media exposure (which happens in every individual case of lifting of immunity by Parliament) in cases where the suspicion for which the procedures were initiated later turn out to be unsubstantiated.

18. Against this background it appears to be permissible for a parliament to lift the parliamentary immunity of all its members beforehand, provided that certain procedural and substantive conditions ensure that this arrangement does not create the danger that the working of the Parliament as a whole may be affected by selective, arbitrary or even politically motivated investigations.

19. The draft does not provide for the fulfilment of all these conditions. The following problems have to be underlined.

Application of the General Principles to the Albanian Draft Decision

Procedural issues

20. The Albanian Draft Decision provides for a procedure to be followed by the prosecution before investigations are actually started. A written notice must be given to the Speaker of the Parliament who then submits the information to the competent parliamentary committee. However, the Albanian Draft Decision does not provide that notice must be given also to the Member of Parliament directly concerned (as far as the purpose of the investigation permits). Article 2 provides that "the initiation of the investigation... may be effected not earlier than 48 hours after a written notice has been served/submitted by the Prosecutor General to the Speaker of the Parliament", who has to inform the interested member of the Assembly within the same space of time of 48 hours following the receipt of the written notice. The concerned parliamentarians do not have the right of opposing the decision of starting the investigation even when they could put into question - for instance – the very *fumus persecutionis*. The Albanian legislation should at least provide for notice to be given also to the Members of Parliament directly concerned (as far as the purpose of the investigation permits) and allow them to claim that the prosecutorial initiative does not have any justification; the Assembly or one of its committees should be required to take a decision on this matter in a few days.

21. According to the Albanian Draft Decision, the "waiver" of immunity does not include the power of the executive to apply certain restrictive measures. There is one important point in this context which merits attention: The Albanian Draft Decision speaks of "search of the residence of the person". It is unclear whether the term "residence" also includes the parliamentary offices of the Member of Parliament concerned. For example, in Germany, the parliamentary offices are not subject to restrictive measures on the basis of the general decision to lift immunity. This should be the case also in Albania since the offices of a Parliamentarian most directly affect the working of the Parliament as a whole.

22. A way to safeguard the essential purpose of parliamentary immunity would be to provide for a right of Members of Parliament, who have been duly notified of the intention to start an investigation, to seize the Parliamentary Committee on Immunities of their case, to present their position, and to apply to the Committee to terminate the investigation.

Substantive issues

23. It is also not clear what the lifting of parliamentary immunity in relation to “abuses of duty” entails. This term is rather vague and might allow the initiation of investigations in many circumstances. Legal duties of the greatest variety can be abused or disrespected. The Albanian Draft Decision should make it clear which situations are covered by this expression or choose a different one.

24. From a more general point of view, the acceptability of a general lifting of parliamentary immunity can only be judged in the context of the constitutional and legal system as a whole. In Germany, for example, there are the following additional rules in place which ensure against arbitrary or politically motivated investigations against members of parliament.

25. The German Constitutional Court has recently pronounced that individual members of parliament have an enforceable right that the parliament does not exercise its power to lift immunity for arbitrary motives.⁹ German Members of Parliament can enforce this right by way of complaining to the Constitutional Court. It appears that Article 131.ç of the Albanian Constitution would give the Albanian Constitutional Court the same power, but such an important safeguard for the fundamental rights should be provided for in an express provision and effectively implemented.

26. Another set of rules which protects against arbitrary or politically motivated investigations are those which protect the independence of the public prosecutor from political influence and special instructions from the political level. In addition, in Germany, prosecutors are normally organs of one of the different component states (Länder) which means that they are not dependent on the governing majority on the federal level.

On the interpretation of the Constitution

27. International standards imply the respect of the principle of the hierarchy of norms and, in particular, of the supremacy of the Constitution. Therefore, the question of the conformity of the Draft Decision to specific provisions of the Constitution has to be raised.

28. According to Article 73.2 of the Albanian Constitution, “a deputy may not be criminally prosecuted without the authorisation of the Assembly”.

29. The Venice Commission does not intend to provide for an authoritative interpretation of the Constitution. However, it reminds that, when basic principles of the parliamentary system and the proper functioning of the institutions are at stake, constitutional provisions should be interpreted in a way which safeguards their purpose. Therefore, it would be difficult to interpret Article 73.2, which uses the terms “a deputy”, otherwise than as asking for an individual decision in each case. The Assembly would seem to have to examine the personal situation of the concerned MP in the light of the accusations which are brought against him or her, and with regard to the possible existence of a *fumus persecutionis*.

30. However, it must be reminded that, in Germany, in presence of a similar constitutional provision, the majority – but not the unanimity – of the legal literature admits a general limitation of the parliamentary immunity, upon the conditions that sufficient guarantees against abuses are provided. The issue was not brought to the German Constitutional Court up to now.

⁹ *BVerfGE* 104, 310, at 325 (Pofalla).

31. In short, there are arguments for the unconstitutionality of the limitation of parliamentary immunity through a legal act such as the “decision” submitted to the opinion of the Venice Commission.

A way out of the controversy? The search for a consensual solution on the basis of the Albanian Constitution

32. Parliamentary immunity is primarily designed at avoiding the executive power and/or the parliamentary majority to hinder Parliament in its proper functioning, in particular by weakening the opposition by selective proceedings. Therefore, the participation of the opposition in the adoption of the relevant rules could be a strong guarantee that the proposed text is not politically motivated.

33. What procedure should then be followed? The Albanian Constitution offers a possible solution on this point since it provides for a special procedure for the approval of laws for the organisation and operation of the institutions contemplated by the Constitution: they have to be adopted by three-fifths of all members of the Assembly (Article 81.2). Parliamentary immunity is certainly an important element of the organisation of the institutions contemplated by the Constitution: it regards at the same time the position of the Parliament in the constitutional frame and its relations with the other powers of the State. If we accept that the “waiver” of the immunity can be adopted by the Assembly in the exercise of its competence in the matter, the requirement of a majority of three-fifths of all members of the Assembly can be considered as satisfying the interest of the opposition that a decision is adopted with its participation. The qualified majority definitely guarantees the position of the minority in the Assembly while this guarantee is not offered by the ordinary rules concerning the approval of the parliamentary statutes, which can be adopted by a majority of votes in presence of more than half of the members (Article 78.1), and the approval of the internal regulations of the Assembly, which needs the majority of all the members of the Assembly (Article 75.2).

34. It should be noted, from a comparative point of view, that the German rules are not the result of the decision of a mere parliamentary majority, but were accepted by all major parties, be they in the majority or in the opposition.

Conclusion

35. International standards include the principle of hierarchy of norms and are applicable to the interpretation of the Constitution. Therefore, the constitutionality of any infra-constitutional legal text which runs counter to the apparent meaning of the Constitution is dubious. At any rate, when basic principles of the parliamentary system are at stake, constitutional provisions should be interpreted in a way which safeguards their purpose. Therefore, if the Assembly were to adopt general provisions on the limitation of parliamentary immunity, they should very likely obtain the qualified majority provided for by Article 81.2 of the Constitution relating to the approval of laws for the organisation and operation of the institutions contemplated in the Constitution. This does not prevent the question concerning the need for an individual decision in each case to be raised. This issue has to be settled by the competent Albanian authorities.

36. Furthermore, the Draft Decision of the Albanian Parliament is, subject to necessary clarification concerning the terms “residence” (which should include parliamentary offices) and “abuse of duty”, and the inclusion of a rule that the Member of Parliament concerned should be

notified simultaneously along with the Speaker of Parliament or as soon as possible. Much also depends whether the procedures and rules which are designed to protect against arbitrary and politically motivated investigations actually work in practice. It is the responsibility of all organs of the Albanian state, in particular the Albanian Constitutional Court, to ensure that this is the case.