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COMPILATION

OF VENICE COMMISSION OPINIONS AND REPORTS

ON PARLIAMENTARY AUTONOMY

This document will be updated regularly. This version contains all opinions/reports adopted up to and including the Commission's 145th Plenary Session (12-13 December 2025).

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I. INTRODUCTION

The present document is a compilation of extracts taken from selected relevant opinions and reports/studies adopted by the Venice Commission. The aim of this Compilation is to give an overview of the doctrine of the Venice Commission on parliamentary autonomy, highlighting the tensions with the principle of separation of powers and the possible judicial review of measures arising from parliamentary autonomy, on parliamentary inquiry committees and on parliamentary immunity. It is not meant to cover all aspects of parliamentary autonomy exhaustively, in particular it does not address budgetary and administrative autonomy.

This Compilation is intended to serve as a source of reference for drafters of constitutions and of pieces of legislation on recurring topics concerning parliamentary autonomy, in particular parliamentary inquiry committees and parliamentary immunity, researchers, as well as the Venice Commission's members, who are requested to prepare comments and opinions concerning legislation dealing with such issues. When referring to elements contained in this draft compilation, please cite the original document but not the compilation as such.

Venice Commission reports and studies quoted in this compilation seek to present general standards for all member and observer states of the Venice Commission. Recommendations made in the reports and studies will therefore be of a more general application, although the specificity of national/local situations is an important factor and should be taken into account adequately. Each citation in the compilation has a reference that sets out its exact position in the opinion or report/study (paragraph number, page number for older opinions), which allows the reader to find it in the opinion or report/study from which it was taken. In order to shorten the text, most of further references and footnotes are omitted in the text of citations; only the essential part of the relevant paragraph is reproduced. The compilation is not a static document and will be regularly updated with extracts of recently adopted opinions by the Venice Commission. The Secretariat will be grateful for suggestions on how to improve this draft compilation (venice@coe.int).

II. PARLIAMENTARY AUTONOMY: GENERAL REMARKS

1. In general

11. The principle of separation of powers shapes primarily the regulation of legislative initiative. It implies the division of the institutions of government into three branches: legislative, executive and judicial. The legislature makes the laws; the executive puts the laws into operation; and the judiciary interprets the laws. Power thus divided should prevent absolutism and dictatorship where all branches are concentrated in a single authority.

12. A purist approach to the principle of separation of powers would require not allowing anybody but the legislative body to initiate the adoption of new laws. Whereas this restriction is strictly observed in the Constitution of the United States, most European States grant constitutionally the right of legislative initiative to the executive power as well.

13. On the contrary, the judicial power is generally excluded from the legislative process from the very beginning. For example, the Venice Commission stated, in its opinion CDL-AD(2005)022 (para 37) regarding the Republic of Kirgizstan, that 'the Supreme Court has the task of interpreting legislation following its adoption and should not be involved in the political process of adopting legislation.'

> CDL-AD(2008)035, Report on legislative initiative, §§ 11-13

14. The principles of 'separation of powers' and 'balance of powers' demand that the three functions of the democratic state should not be concentrated in one branch, but should be distributed amongst different institutions.

15. The concept of the separation of powers is most clearly achieved with respect to the judiciary, which must be independent from the two other branches.

19. In a democracy, one key aspect is a properly functioning and directly elected legislature. Democracy and the rule of law require that, in principle, all of the important legislation be adopted by this legislature. Article 3 of the First Protocol to the ECHR requires that for a body to be regarded as a legislature ('corps legislatif'), it needs to have primary rulemaking power.

20. In order to adequately represent the people, legislatures must be free to organise their work. This means that the legislature should be able to adopt and amend its own rules of procedures on an independent basis. Also, the legislature should be free to schedule its sessions, to set its own pace and to determine how much time is needed to draft, review or amend proposed legislation.

> CDL-AD(2013)018, Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco, §§ 14-15, 19-20

28. A basic element of the Rule of Law is that the powers of public authorities are defined by law. Insofar as legality addresses the actions of public officials it also requires that they have authorisation to act and that they act within the limits of the powers that have been conferred upon them and respect both procedural and substantive law.

78. The separation of powers, especially as reflected in judicial independence, is a basic principle of constitutional democracy. In turn, checks and balances are a necessary guarantee for the functioning of democratic institutions, for the protection of minorities and for the Rule of Law. This system of checks and balances should include not only institutional arrangements and relationships but also non-institutional mechanisms, in the form of a robust and adequately protected civic space […].

79. A well-functioning system of checks and balances does not undermine the effectiveness of state institutions. Effectiveness and 'checks and balances' are, rather, to be seen as mutually reinforcing one another. Checks and balances also do not contradict the political obligation of loyal co-operation of state institutions, as it merely ensures that there is a proper allocation of responsibility between different branches of the state. The principle of loyal co-operation may serve as a useful mechanism to solve conflicts between different constitutional bodies. However, as there is a risk of this principle not being respected, with one constitutional body blocking the work of another, the legislation should provide for appropriate anti-blockage mechanisms.

80. The choice between a parliamentarian, semi-presidential and presidential political system is a political decision, falling under the discretion of the constitutional legislator. However, the independence of judiciary and the availability of effective constitutional review is an essential element in all systems of checks and balances, regardless of the choice of the political regime.

81. In addition to the judiciary and constitutional review, checks and balances may include other independent, non-majoritarian bodies, which may monitor risks of abuse of political power and may contribute to safeguarding the interests of minorities, especially in the field of human rights monitoring, electoral law, the regulation of media. […]

132. As the supreme legal norm, the constitution requires a guardian capable of upholding its principles, preserving the separation of powers, and protecting the rights it guarantees. Some form of judicial review of constitutionality - whether concentrated or diffuse - is widely regarded as an effective means of ensuring respect for the constitution and protecting human rights. In this regard, constitutional justice remains a central feature of constitutional democracy and a determining criterion of the Rule of Law, ensuring that all public authorities act in conformity with the constitution and that decisions taken by the Constitutional Court or an equivalent body are binding on all branches of power.

135. In addition to ex post constitutional review, a mechanism for ex ante constitutional review should also be in place. Ex ante constitutional review can take place either in the executive at the law-drafting phase or in a parliamentary committee, assisted by constitutional experts.

144. The jurisdiction of constitutional courts typically extends to a broad range of normative acts and institutional matters. These commonly include the review of ordinary and organic laws, constitutional laws, regulations, internal rules of legislative assemblies and other bodies, as well as the compatibility of international agreements with the constitution. Constitutional courts may also adjudicate disputes concerning the distribution of normative competences among branches of government, including conflicts between the central government and local authorities, or between the executive and legislative branches. Electoral disputes likewise fall within the jurisdiction of many constitutional courts. Additional areas may include questions related to the status of elected representatives, the protection of fundamental rights, and the legality of political parties. In some systems, constitutional courts also exercise advisory functions, such as mandatory consultation prior to declaring a state of emergency or dissolving legislative chambers. Moreover, shielding potentially unconstitutional laws from review (through exclusivity or ouster clauses) can be considered as a direct attack on the supremacy of the constitution.

150. The legal consequences of constitutional court decisions annulling normative acts may vary across jurisdictions and often depend on legislative provisions governing their scope. A strict application of the ex tunc effect (i.e. retroactive invalidity) may, in certain cases, have significant societal consequences.

CDL-AD(2025)002, The Updated Rule of Law Checklist, §§ 28, 78-81, 132, 135, 144, 150

124. Every State has the right to choose its own political system, be it presidential or parliamentary, or a mixed system. This right is not unconditional, however. The principles of the separation of powers and of the rule of law must be respected, and this requires that sufficient checks and balances be inbuilt in the designed political system. Each constitution is a complex array of checks and balances and each provision, including those that already exist in the constitution of another country, needs to be examined in view of its merits for the balance of powers as a whole.

CDL-AD(2017)005, Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, § 124

21. Each state body is autonomous by the virtue of the relevant constitutional provisions. The degree of this autonomy depends on the way in which it is established. It can be argued that an elected body has more “potential” autonomy as compared to one which is appointed by an elected assembly. This is particularly true in the case of any assembly which “represents” the people and is invested with the power to adopt laws.

CDL-AD(2017)026, Ukraine - Opinion on the amendments to the Rules of Procedure of the Verkhovna Rada of Ukraine, § 21

19. As to the second limb of the question put by the Constitutional Court of the Republic of Moldova– concerning the extent of the parliamentary autonomy – it is difficult to give a short answer to it. Parliamentary autonomy means essentially the power of Parliament to set its own rules (the doctrine of interna corporis), implement them and resolve disputes resulting from their application internally, without involvement of any external body. The extent of this autonomy is defined differently in different countries.

20. Some countries with old democratic tradition continue to follow, with some variations, the tradition of a near absolute parliamentary autonomy (United Kingdom, Belgium and Denmark, for example). This near absolute approach to parliamentary autonomy is manifested inter alia in the impossibility for the courts to review the internal rules of Parliament. In Belgium, the latter do not have the status of law, since a law requires the consent of the King (and his ministers) and it is considered that judicial review of these internal rules would cause an interference with the autonomy of Parliament.

21. The parliamentary autonomy is less absolute in other legal orders. In France the Constitution of the Fifth Republic, in contrast to the preceding constitutions, provided that internal regulations of parliamentary assemblies have to be subjected to the judicial review of the Conseil Constitutionnel. The aim of this approach was clear: the founders of the regime wanted to prevent the assemblies from escaping the new constitutional restrictions applicable to them by manipulating their internal regulations. Other legal orders where internal rules of parliament are subject to some constitutional review are, for example, Italy, Latvia and Moldova.

24. The Venice Commission recalls that the division of powers is not a mere theoretical concept, but rather a practical device for implementing the premise “power to stop power”, i.e. to achieve checks and balances among the state powers. Therefore, no “autonomy” can be absolute. As with every general principle, its limits are set by logic and common sense in every particular situation, as well as by the specific constitutional documents through which the principle is specified in each particular national context. Parliaments set their rules of

procedure autonomously; however, if those rules diverge from constitutional principles, they can certainly be an object of constitutional review, at least indirectly, as it will be shown below.

> CDL-AD(2021)016, Republic of Moldova - Amicus curiae brief for the Constitutional Court of the Republic of Moldova on three legal questions concerning the constitutional review of the law-making procedures in Parliament, §§ 19-21, 24

2. Dimensions of autonomy

a. Internal organisation and rules of procedure

i. Principle

22. In most modern constitutional and democratic regimes, it is considered that Parliament's "essential property" is its normative and organisational autonomy (as well as the resulting budgetary autonomy). Parliament itself fixes and approves its rules of procedure without interference from any other state body (save the judicial control of compliance of its acts with the Constitution, when necessary).

50. The first affirmation of parliamentary autonomy is the capacity of an assembly to define its own rules for its work without outside interference. However, it is clear that it is not enough to have a detailed text of Rules of procedure. Traditions and customs developed by the MPs together are also extremely important. In this way the parliamentary autonomy is permanently under construction, which cannot but reaffirm the significance of the principle of separation of the powers. This process is not "against" other powers – which are also invested by the Constitution, but is rooted in the fact that MP's have a special role in representing the people. They have the duty to find the best solutions for the common welfare of citizens through legislative acts and to be also the "eyes" of the people in scrutinising the government and public administration.

60. It is clear that the Rules of procedure of the parliament are not only a set or rules or a technical description of its attributions. They have an important symbolic value as the expression of the autonomy and independence of the assembly as a representative and legislative power.

> CDL-AD(2017)026, Ukraine - Opinion on the amendments to the Rules of Procedure of the Verkhovna Rada of Ukraine, §§ 22, 50, 60

ii. Level of regulation, stability of the law

23. The Constitution of Ukraine provides that the Rules of Procedure are adopted as a law. It is undisputable that the law is higher in the hierarchy of norms than, for example, a by-law. However in the case of the internal regulation of parliament, regulation by a Law in fact limits the autonomy of the Parliament itself. This happens because a law is elaborated with a certain degree of participation of other "legislative actors", notably the President and the Cabinet of Ministers. In the general framework of the Constitution, Parliament should have an exclusive right to regulate its internal organisation, the role of MP's, its own internal procedure and structure. In this context there is an additional aspect that should be taken in consideration: norms and regulations in Ukraine are very complex. The law cannot and should not regulate all aspects of the parliamentary activity. If the parliament wishes to be more efficient, flexible and less rigid in the adoption of its internal regulation, the Ukrainian authorities should take into consideration a differentiated system of regulations. Some issues which concern the right of external subjects should be regulated by a law, but the whole internal procedure of the Rada should be regulated by an internal act of Parliament (regulation). It would be advisable to address this issue in the framework of any next revision of the Constitution.

CDL-AD(2017)026, Ukraine - Opinion on the amendments to the Rules of Procedure of the Verkhovna Rada of Ukraine, § 23

31. In principle, and particularly in the younger democracies the constitutional entrenchment of the rights of the opposition is positive (CDL-AD(2014)037, § 19), but, at the same time, it should be possible to adapt procedural rules to changing circumstances. Only the most fundamental principles should be set out in the Constitution or in an organic law (CDL-AD(2011)016, § 24) – such as the principle of proportionate representation in committees, reasonable opportunity to make legislative proposals, rules on qualified majorities required for taking certain decisions, etc.

32. As to more detailed regulations, these are better left to ordinary laws, rules of Parliament, standing orders or constitutional conventions. In certain situations, it is better not to regulate certain areas at all; for example, overly strict rules on coalition-building in Parliament may be counter-productive (CDL-AD(2017)026, § 43), and surely should not be regulated at the constitutional level.

36. In some countries, the Rules of Procedure are not laid down in a law but in an autonomous regulation sui generis adopted by Parliament. This is explained by the fact that the adoption of a law involves external institutional actors, such as the President, and it may be possible to challenge the law before the Constitutional Court, which may be seen as incompatible with the parliamentary autonomy (CDL-AD(2010)025, 2010 Report, § 94; CDL-AD(2017)026, § 23).

37. Although it is not the case for all countries, the Venice Commission recommends that those matters are regulated in the Rules of Procedure, rather than in a law, out of respect for parliamentary autonomy.

39. Constitutional custom is another method of regulating the rights of the opposition, especially in older democracies. Unwritten “constitutional conventions” and best practices complement legal rules and contribute to the development of a constructive political culture in general. In time, such practices and conventions can gain the status of customary norms. Sudden and drastic diminution of the procedural rights of the opposition in parliamentary procedures may be avoided if the Speaker and other governing bodies of the legislature follow customs formed in more peaceful periods of its history. Indeed, to amount to a custom the practice should be consistently followed and obeyed for a prolonged period of time, and be regarded as binding. The practice of the governing bodies of the legislature should be consistent irrespective of who is in the majority and who is in the opposition and should be taken into account in resolving internal disputes.

CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, §§ 31-32, 36-37, 39

iii. Adoption and amendment requirements

95. In some countries the constitution states that the parliamentary Rules of Procedure must be adopted by qualified majority. This applies for example in Austria, where according to Article 30 of the Constitution ‘the Federal Law on the National Council’s Standing Orders can only be passed in the presence of a half the members and by a two third majority of the votes cast.’ According to Article 8:6 of the Swedish Constitution the Rules of Procedure of the Parliament (Riksdagsordningen) can only be changed either according to the procedures for constitutional amendment or by a 3/4 majority.

96. The Venice Commission is of the opinion that parliamentary Rules of Procedure should preferably be regulated so as to make it difficult for a simple majority to set aside the legitimate interests of the political minority groups.

> CDL-AD(2010)025, Report on the Role of the Opposition in a Democratic Parliament, §§ 95-96

33. In sum, the most fundamental rules on parliamentary opposition and minority rights should preferably be regulated in a form that the majority cannot alter at its own discretion (CDL-AD(2010)025, 2010 Report, § 88).

35. It is important to ensure the stability of those regulations (laws or the RoP). So, in some countries a heightened majority for their amendment is required, or there is an external check by the Constitutional Court on the amendments to those regulations. It is also possible to introduce a delay for the amendments to take effect, so that the incumbent majority cannot be the immediate beneficiary of the measures it proposes. That being said, it is difficult to exclude changes with immediate effect altogether.

37. In any event, any regulations in this area should be amendable with a qualified majority (while the Commonwealth Parliamentary Association, in Recommended Benchmarks for Democratic Legislatures, § 2.1.4, insists that changes to the Rules of Procedure shall be adopted with “near unanimity”).

38. It is necessary to ensure that the Rules of Procedure are not changed implicitly on an ad hoc basis, even if the qualified majority (necessary for the amendments to the RoP) is in favour of a particular course of action in a particular case. Every change of the Rules should be properly discussed and adopted – preferably by a qualified majority – as a formal amendment to the Rules before a specific action in a particular case is taken. The Rules of Procedure should enjoy some stability and not be routinely changed to the detriment of the minority at the beginning of every mandate of the legislature, by the standing orders or otherwise.

> CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, §§ 33, 35, 37-38

37. Needless to say, the very attempt to define the scope of parliamentary autonomy by formulating in advance which particular rules of the law-making procedure can be violated and which of them should not be violated leads to the paradoxical distinction between rules-to-keep and rules-to-neglect. The Venice Commission has previously called for the entrenchment and stability of the procedural rules: ideally, the RoP should be adopted by a qualified majority and must not be “changed implicitly on an ad hoc basis, even if the qualified majority (necessary for the amendments to the RoP) is in favour of a particular course of action in a particular case. Every change of the Rules should be properly discussed and adopted – preferably by a qualified majority – as a formal amendment to the Rules before a specific action in a particular case is taken. […]”. However, while “essential” rules can be enforced externally, by the Constitutional Court, with reference to the constitutional principles which they reflect, “non-essential” provisions of the RoP cannot be invoked by the Constitutional Court. The application of those provisions, and the examination of any disputes related to them, must remain within the competency of the internal bodies of Parliament.

> CDL-AD(2021)016, Republic of Moldova - Amicus curiae brief for the Constitutional Court of the Republic of Moldova on three legal questions concerning the constitutional review of the law-making procedures in Parliament, § 37

iv. Judicial review of disputes over the interpretation and application of parliamentary rules of procedures

98. The fact that parliamentary opposition and minority interests are formally protected through provisions in the Rules of Procedure does not automatically mean that the opposition will have the possibility of recourse to judicial review in cases of dispute. In many countries there will not be any procedural possibility for judicial review of disputes over the interpretation and application of the parliamentary rules of procedure, and this would as a matter of principle be regarded as contrary to the procedural independence and autonomy of the parliament.

99. In other constitutional systems there is legal remedy. In the German constitution there is a special complaint procedure before the Federal Constitutional Court called "Organstreitverfahren" as provided for in Article 93.1 of the constitution. In the Turkish constitution Article 148 allows for judicial review of constitutionality over the rules of parliamentary procedure (Standing orders). In France the Constitutional Council has several times ruled on the rules of procedures of both houses of parliament. Likewise, the Constitutional Court of Hungary in 2006 examined the constitutionality of provisions relating to the duration of sittings and the time frames for parliamentary speeches. Two judges did not agree with the majority opinion, which pointed to the lack of minority protection in the provisions of the Standing Orders relating to the right to speak.

100. There is no common European model when it comes to regulating parliamentary opposition and minority rights, and the Venice Commission does not consider it necessary or appropriate to try to formulate one. The Commission would however emphasize that on closer analysis most national constitutions implicitly and indirectly protects the opposition far better than what they appear to do. The Commission furthermore considers that the most important thing is not the form in which this is done, but that the basic legal requirements for effective parliamentary opposition are protected in such a way that it cannot be overruled or set aside by a simple majority at its own whim.

CDL-AD(2010)025, Report on the Role of the Opposition in a Democratic Parliament, §§ 98-100

22. The idea of parliamentary autonomy is reflected in some of the provisions of the Constitution of the Republic of Moldova. Article 64 (1) of the Constitution states that "the structure, organisation and functioning of Parliament is established by internal regulations." At the same time, these regulations take the form of law, and even of organic law (Article 72 (3) c)), the voting of which is more difficult than ordinary law (Article 74 (1) and (2)). How far this autonomy goes in the Moldovan constitutional order is a question for the Constitutional Court to decide. From a purely legalistic perspective, if the rules of procedure of parliament are considered as a "law", and if the Constitutional Court has the power to assess the constitutionality of the laws, the Constitutional Court must have the power to examine the constitutional validity of the rules of procedure as well, as any other law submitted to it.

23. However, in some legal orders the rules of procedure of Parliament are often considered to "have the power of a law" without being a "law" (meaning "statute") strictu sensu. This is the reason why they generally are voted in a different way (from statutes). This special status of the rules of procedures in some countries has led to their express withdrawal from the reviewing competency of the Constitutional Courts.

24. The Venice Commission recalls that the division of powers is not a mere theoretical concept, but rather a practical device for implementing the premise "power to stop power", i.e. to achieve checks and balances among the state powers. Therefore, no "autonomy" can be absolute. As with every general principle, its limits are set by logic and common sense in every particular situation, as well as by the specific constitutional documents through which the

principle is specified in each particular national context. Parliaments set their rules of procedure autonomously; however, if those rules diverge from constitutional principles, they can certainly be an object of constitutional review, at least indirectly, as it will be shown below.

25. Construing parliamentary autonomy as absolute may lead to Parliament to become a "judge in its own case". That may be detrimental to the rights of the parliamentary minorities. The Venice Commission noted this paradox in an opinion on Romania (2012): "If only the majority can decide on the observance of parliamentary rules, the minority has nowhere to turn for help if these rules are flouted". That being said, subjecting all internal regulations and disputes with Parliament to an external judicial scrutiny (by a Constitutional Court or another similar institution) and not setting any limits to this review also presents certain drawbacks, since it replaces parliamentary autonomy with judicial supremacy.

26. The Venice Commission has previously acknowledged that both approaches – with a stronger or weaker autonomy of parliament – are possible, from a comparative perspective. In particular, the Venice Commission noted that disputes about parliamentary procedures may be resolved internally i.e. by the bodies of parliament, but another solution may also be designed, which "would be to entrust the function of the dispute resolution to an external body – a Constitutional Court or another similar high judicial authority. This model is less respectful of the autonomy of Parliament, but better guarantees the independence of the adjudicative body. Certainly, it is important to make clear which measures of Parliament may be reviewed by the Court or other external body, and which are not subject to such review". In sum, mechanisms of internal dispute resolution in Parliament, not involving any external review, are acceptable.

> CDL-AD(2021)016, Republic of Moldova - Amicus curiae brief for the Constitutional Court of the Republic of Moldova on three legal questions concerning the constitutional review of the law-making procedures in Parliament, §§ 22-26

b. Agenda setting and legislative initiative

61. Even though direct implication of the judicial power, such as those mentioned above, is rare, the indirect role of the judicial power cannot be underestimated, and more specifically the role of Constitutional courts in the legislative process is to be taken into consideration.

62. The influence of Constitutional court decisions, particularly those declaring the unconstitutionality of laws, is often described as an indirect form of legislative initiative. Constitutional court decisions will not only influence any law-making institution but might include, as, for instance, in German constitutional Court decisions, an order to the legislator to enact new regulations and replace unconstitutional regulations within a certain period of time.

63. The indirect power of the Constitutional court in initiating laws is even more salient when considering the issue of legislative omission. The Constitutional Court of Hungary may for instance acknowledge inaction in the area of legislation as contravening the Constitution—it will declare that the legislative institution failed to execute its obligations as a legislator. The inaction of this institution i.e., the failure to enact a certain legal act, contravenes the constitution. Therefore the Constitutional court obligates the institution to execute its obligation and determines the term for doing so.

> CDL-AD(2008)035, Report on legislative initiative, §§ 61-63

94. According to the principle of parliamentary autonomy in the field of the internal organisation, Parliament generally is the master of its order of business (CDL-AD(2008)035, § 112). The right to set the agenda is linked to the right of legislative initiative. The latter may

belong to each individual MP (which is the case in most European parliaments, CDL-AD(2010)025, 2010 Report, § 57), or to a qualified minority of MPs (CDL-AD(2008)035, Report on Legislative Initiative, § 42), in addition of course to the Government.

> CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, § 94

c. Control over membership

i. Electoral disputes, ineligibility to be elected and incompatibility

Electoral disputes

a. The appeal body in electoral matters should be either an electoral commission or a court. For elections to Parliament, an appeal to Parliament may be provided for in first instance. In any case, final appeal to a court must be possible.

> CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, II.3.3

92. If the electoral law provisions are to be more than just words on a page, failure to comply with the electoral law must be open to challenge before an appeal body. This applies in particular to the election results: individual citizens may challenge them on the grounds of irregularities in the voting procedures. It also applies to decisions taken before the elections, especially in connection with the right to vote, electoral registers and standing for election, the validity of candidatures, compliance with the rules governing the electoral campaign and access to the media or to party funding.

93. There are two possible solutions:
- appeals may be heard by the ordinary courts, a special court or the constitutional court;
- appeals may be heard by an electoral commission. There is much to be said for this latter system in that the commissions are highly specialised whereas the courts tend to be less experience with regard to electoral issues. As a precautionary measure, however, it is desirable that there should be some form of judicial supervision in place, making the higher commission the first appeal level and the competent court the second.

94. Appeal to parliament, as the judge of its own election, is sometimes provided for but could result in political decisions. It is acceptable as a first instance in places where it is long established, but a judicial appeal should then be possible.

> CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, Explanatory Report, §§ 92-94.

43. However, the system of appeals in electoral matters does diverge from international commitments and standards, as well as good practice. Norwegian citizens are left without an option of timely appeal to independent courts in matters regarding the exercise of the right to choose their local government, their national Parliament and, indirectly, their national government. Similarly, the courts do not play a role in the final validation of elections.

44. In order to meet international standards and commitments, Norway should include the judiciary in the process of electoral dispute resolution. It should provide for final appeal on all election-related complaints to a court. Furthermore, the final validation of the election should include a possibility of appeal to a high judicial body, such as the Supreme Court. This solution would entail the need for a constitutional amendment.

45. Allowing for final appeal on all electoral complaints can be achieved through various approaches: by using for appeals relevant bodies from the existing court structure, as is the case in Switzerland; by using an ad-hoc system of judicial bodies for all stages of the complaints and appeals process, as is the case in the United Kingdom; or by creating a standing specialised legal structure for complaints, as in Mexico. But international standards and commitments call for the final right of appeal to a court from decisions on all electoral matters made by the National Election Committee and Parliament of Norway, in the case of national elections, or the Ministry, in the case of local elections.

CDL-AD(2010)046, Joint Opinion on the electoral legislation of Norway, §§ 43-45

11. This system of verification of credentials by the elected assembly itself was therefore introduced in European countries as they moved to parliamentary systems in the course of the 19th century. [..].

12. The retention of solutions under which parliaments themselves have the power to “verify credentials” is consistent with a particular approach to the role of parliaments and the separation of powers. It is based on the theory of the omnipotence of the legislature (or at least the pre-eminence of parliament) as a sovereign body under the parliamentary system with special rights that no judicial authority may impinge upon. Many jurists in continental Europe have defended this position. In France, it was set out in detail by the great legal thinker, Carré de Malberg, in the 1920s. Although the mechanism was much older, it had not been theorised so authoritatively until then. In France, it was employed both for the initial verification of credentials and for all decisions regarding the eligibility of the relevant members of parliament, up to and including the Fourth Republic. The same system still applies in Italy, where the Constitutional Court itself has ruled that the verification of parliamentarians’ credentials is not covered by the system of judicial protection concerning elections. Conversely, some scholars have said that in following this approach parliaments are acting as courts, which is an intrusion into the powers of the judiciary.

16. 20th-century European constitutions generally abolished the power of parliaments to be the judge over elections, at least at the last instance.[…]

17. Recent developments in longstanding democracies and in states with more recent constitutions almost all tend towards systems in which the rights of petitioners, in particular candidates, are recognised and dealt with according to procedures which ensure their right to the strict enforcement of electoral legislation. The standards for examining complaints in these cases are more “modern”, with the involvement of bodies outside the legislature which may be either courts or non-judicial bodies that have adopted judicial methods.

18. The decision to leave the power with the legislature is therefore firmly rooted in the constitutional history of various countries. In the French case, this principle of autonomy was applied in full, as there was no organised complaint mechanism and parliament could examine any election on its own initiative, without successful or unsuccessful candidates having any particular right of review.

19. There are, however, many variants which leave the relevant parliaments themselves varying powers. For instance, while the European Parliament does exercise this power, this only comes in addition to administrative reviews and contentious proceedings conducted in the member countries: its scope is limited and is based on the explicit desire to give precedence to uniformity of treatment of cases of ineligibility and incompatibility. In Germany, final appeals against parliament’s decisions may be lodged with the Constitutional Court (with the risk of delays).

20. In short, while in the 19th century, the verification of credentials by parliaments themselves was a means of asserting their position in relation to the executive, in the 20th century most European states assigned the power to a judicial body, at least at the last instance, in order to ensure the impartiality of the relevant decisions. Nevertheless, there are still great differences between the remedies in the various countries in Europe.

30. The Code of Good Practice in Electoral Matters does not prevent appeals being made in parliaments concerning their own election, but final appeals to a court must be possible (II.3.3.a). More broadly, this means that a legislature may rule on the election of its members (even in the absence of disputes), subject to judicial appeal. The court concerned may be ordinary, administrative, special (electoral court) or constitutional (as in Germany). What matters is for the decision to be taken by a "body … that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature" and therefore affords sufficient institutional and procedural safeguards against arbitrary and political decisions. Where electoral appeals do not concern political issues outside the supervision of the courts, the protection of the right to free elections, as enshrined in Article 3 of Protocol No. 1 to the European Convention on Human Rights, implies the existence of a judicial remedy.

> CDL-AD(2019)021, Amicus curiae brief for the European Court of Human Rights in the case of *Mugemangango v. Belgium* on the procedural safeguards which a state must ensure in procedures challenging the result of an election or the distribution of seats, §§ 11-12, 16-20, 30

Ineligibility

d. Deprivation of the right to vote and to be elected:
i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:
ii. it must be provided for by law;
iii. the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;
iv. The deprivation must be based on mental incapacity or a criminal conviction for a serious offence.
v. Furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.

> CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, I.1.d.

24. Following the recent case-law of the European Court of Human Rights, the just mentioned paragraph I.1.1.d.v of the Code of Good Practice in Electoral Matters should not be taken literally, as imposing a specific judgment in each case.

25. The Venice Commission also stated that "[i]t is not uncommon that due to a criminal conviction for a serious offence, individuals are deprived of the right to stand for election. However, it can be regarded as problematic if the passive right of suffrage is denied on the basis of any conviction, regardless of the nature of the underlying offence. Such a blanket prohibition might not be in line with the European Convention for the Protection of Human Rights and Fundamentals Freedoms[…] On the other hand, it might be not appropriate not to include (or not to implement) any restriction to eligibility to be elected for criminals at all[…]".

26. A more thorough study on restrictions to stand in local elections has been carried out by the Congress of Local and Regional Authorities of the Council of Europe but differences with law applicable to parliamentary elections are not unacceptable, as Article 3 of the First Additional Protocol to the ECHR is not applicable to these elections.

27. The Congress recommended that the Committee of Ministers invite the governments of member States to review their domestic legislation with regard to local and regional elections, in order to ensure that those countries that currently apply an automatic ban on standing for election following certain criminal convictions, review their legislation in order that any decision of ineligibility require a specific judicial decision of limited duration, and proportionate to the seriousness of the offence committed, in conformity with the case-law of the European Court of Human Rights.

CDL-AD(2015)036cor, Report on Exclusion of Offenders from Parliament, §§ 24-27

139. Legality is the first element of the Rule of Law and implies that the law must be followed, by individuals and by the authorities. The exercise of political power by people who seriously infringed the law puts at risk the implementation of this principle, which is on its turn a prerequisite of democracy, and may therefore endanger the democratic nature of the state: a person who is not eager to recognise the standards of conduct in democratic society, may be unwilling to obey the constitutional or international standards on democracy and the Rule of Law. The basis for the restriction on such a person's right to be elected or to sit in Parliament is inter alia the occurred violation of democratically adopted criminal law, i.e. of generally recognised standards of conduct.

140. According to the case-law of the European Court of Human Rights on Article 3 of the First Additional Protocol to the European Convention on Human Rights, restrictions on the right to be elected should be limited to what is necessary to ensure the proper functioning and preservation of the democratic regime. This functioning would be more seriously endangered by an elected officer than by a simple voter exercising his active electoral rights. The restrictions under consideration should not be considered as limiting democracy, but as a means of preserving it.

141. The vast majority of if not all the states addressed in this report recognise the public interest in excluding offenders from Parliament and most of them have adopted legislative measures in order to achieve this result.

142. The question whether it is admissible to provide for ineligibility to be elected or loss of mandate for crimes committed before the entry into force of the relevant legislation is now pending before the Italian Constitutional Court and the European Court of Human Rights. Its solution depends in particular on whether such measures have to be considered as of a criminal nature in the sense of Article 7 ECHR.

143. Deprivation of the right to be elected and exclusion from elected bodies first aims at protecting the integrity of these bodies, but may also be an accessory punishment of individuals who committed offences. This is at least the case when a judge sentences an individual to ineligibility as an accessory penal sanction.

[…] In which kind of legislation and how should the issue be addressed?

165. In the Commission's opinion, since this matter concerns the restriction of fundamental rights and the organisation of public power, which are constitutional issues par excellence, it is justified to address it in a constitutional provision, as this is the case in more than 40 % of the states under consideration. It is however also legitimate to deal with it in ordinary legislation. Most legislative provisions made available to the Venice Commission are electoral law ones.

166. It may be suitable for legislation to provide in a general way in which cases the right to be elected must be restricted, at least for the most serious offences and convictions. Most

countries under consideration provide for such a rule, which the case-law of the European Court of Human Rights does not find in contravention with the Convention as long as it respects the principle of proportionality. In less serious cases – as in some of the states under consideration -, a margin of discretion of the judge would be more appropriate.

> CDL-AD(2015)036cor, Report on Exclusion of Offenders from Parliament, §§ 139-143, 165-166

Incompatibility

83. Incompatibility is different form the ineligibility principle, although the basis of both these legal principles lies in the principle of the separation of powers. Incompatibility is a much broader concept than ineligibility, while the first is viewed as part of parliamentary law, the second is viewed as part of electoral law.

> CDL-AD(2012)027, Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions, § 83

24. In this section, the Venice Commission provides for general international standards on incompatibility. As reflected in the questions asked by the Speaker of the Albanian Assembly, the interest lies foremost with standards determining the incompatibility of the mandate of the MP, the role of the legislative body and the standards of (parliamentary or judicial) review.

25. In general, the principle of separation of state powers imposes that certain offices (functions, mandates) cannot be held by one person at the same time, thus ensuring the integrity and proper functioning of each power (legislative, executive or judiciary). While ineligibility to be elected prevents one from standing for election and has to be assessed before the election, an incompatibility forbids holding two positions simultaneously. Thus, if the position of MP is incompatible with another position, be it private of public, the MP has to choose between taking (keeping) his or her seat, or that other position.

29. There are no clear standards on the procedure of deciding on incompatibility. As practice shows (see below section IV.B.2), questions regarding incompatibility may be raised by Parliament (or MPs) and then referred to a Constitutional or ordinary court. However, this cannot be seen as a generalised practice.

30. It is nevertheless clear that the protection of the parliamentary minority is essential in a democracy governed by the rule of law, not least in questions related to the mandate of an MP. With regard to decisions on the withdrawal of an MP's mandate, it is therefore crucial that the opposition is involved in the decisions. Apart from being involved in the process and decision-making, the rights of the parliamentary minority should be protected by clearly regulating access to judicial review. When a constitution enshrines the right of a parliamentary minority to refer certain matters to a higher authority, this is based on the principle of safeguarding the interests of the minority against potential abuses by the majority. As interpreted by the case-law of the Albanian Constitutional Court, the Albanian Constitution enables a parliamentary minority to ask the Assembly to submit to the Constitutional Court an incompatibility question in the sense of Article 70(3). The Constitution also compels the Assembly to refer the case to the Constitutional Court if the requirements of Article 70(3)-(4) of the Constitution are fulfilled. This may be seen as a way to protect the parliamentary minority, in conformity with international standards.

41. Regarding the judicial control over alleged or declared incompatibilities of an MP, Constitutional Courts have partial or full jurisdiction in Austria, Czechia, France (Constitutional Council), Germany, Poland (Supreme Court), Spain and Türkiye (annulment of decisions of the Grand National Assembly). In some countries, the judicial review can consist of a mere

formal validation of the incompatibility, in others it involves a substantial evaluation (Austria and Norway). In some instances, access to Court occurs by appealing the Parliament's decision (Germany).

42. In some states there is judicial control by other courts than the Constitutional Court or the equivalent body. In Ukraine, the matter of loss of mandate of an MP because of incompatibility is decided by an ordinary court. In Spain, the annulment of the election of an MP is done by a judgment of the Supreme Court, which can be appealed before the Constitutional Court. In the United Kingdom, the Judicial Committee of the Privy Council has jurisdiction to decide matters in relation to jurisdiction under the House of Commons Disqualification Act 1975.

43. In other states, no judicial review is provided for. For instance, in Italy, the principle of self-jurisdiction of the Chambers of the Parliament prevents a judicial review of their decisions.

44. As for locus standi, in most states the subjects with the right to refer such cases to courts are political bodies: Austria (the Incompatibility Committee, Unvereinbarkeitsausschuss), Czechia (inter alia the President of one of the Chambers, a group of at least 10 senators or 20 deputies), France (the Bureau of the National Assembly, the Minister of Justice), Germany (one-tenth of the MPs of the Bundestag), Norway (the Parliament), Poland (the Chamber, after motion by the Marshal), Türkiye (another MP) and Ukraine (the Chairperson of the Parliament). In Spain, amparo proceedings may be brought before the Constitutional Court both by parliamentary groups and by other individual MPs if they consider (as would be the case) that the parliamentary decision may affect their rights to hold office under equal conditions. In some states, the MP herself or himself may appeal an incompatibility decision in front of a judicial body. This is the case in the Czechia, France, Germany and Türkiye. In the United Kingdom however, any person who claims that an MP in the House of Commons should be disqualified may bring a complaint for proceedings in front of the Privy Council. In other words, there is a big variety in the procedures through which the incompatibility is identified and addressed.

47. In conclusion, there is no uniform approach to the issue of incompatibilities and states' practice differs depending on various factors, such as the structure of government, the number of chambers and other country specific parameters. The questions of the Speaker of the Albanian Assembly regarding state practice may therefore, with some caution, be addressed as follows. Based on the material that the Venice Commission has examined for this Opinion, the determination of an incompatibility with the mandate of an MP is – on a constitutional level – in most cases done based on what other offices the MP holds. In some countries, the activities (such as profit-making activities) of the MP may be found incompatible with the office of an MP (although this is not always regulated on a constitutional level). In most states the subjects having standing to refer a case to a judicial body are political bodies or persons part of a political body; and most often the review is made by a Constitutional Court or an ordinary court. Only in a few countries, the issue of incompatibility is decided by the legislative body as a final instance.

58. On the questions regarding standards on incompatibility provisions and the role of the legislative and judiciary bodies (questions 2 and 4, part 1) the following may be concluded. In general, the principle of separation of state powers imposes that certain offices cannot be held by one person at the same time, thus ensuring the integrity and proper functioning of each power (legislative, executive or judiciary). In some of these cases, the international standards provide for an absolute incompatibility (for example being an MP while being a judge). In other instances, exceptions are allowed (for example an MP being part of the Government). Normally, when a person is found to have two functions which are incompatible with each other, this situation can be repaired by the person – usually by her or him choosing one of the offices and ending the other. However, in cases where the situation is not repaired, the usual

consequence is that the person concerned loses her or his mandate. With regard to the procedure of deciding on incompatibility, there are no clear standards.

59. Regarding to state practice on incompatibility provisions and the role of the legislative and judicial bodies (questions 2 and 4, part 2), the Venice Commission has collected information on constitutional provisions on incompatibility in 12 of its member states and the European Union (EU). The findings of the analysis show that there is no uniform approach to the issue of incompatibilities and states' practice differs depending on various factors, such as the structure of government, the number of chambers and other country specific parameters. The questions of the Speaker of the Albanian Assembly regarding state practice may therefore, with some caution, be addressed as follows. Based on the material that the Venice Commission has examined for this Opinion, the determination of an incompatibility with the mandate of an MP is – on a constitutional level – in most cases done based on what other offices the MP holds. In some countries, the activities (such as profit-making activities) of the MP may be found incompatible with the office of an MP (although this is not always regulated on a constitutional level). In most states the subjects having standing to refer a case to a judicial body are political bodies or persons part of a political body; and most often the review is made by a Constitutional Court or an ordinary court. Only in a few countries, the issue of incompatibility is decided by the legislative body.

> CDL-AD(2024)040, Albania - Opinion on the implementation by Parliament of Constitutional Court decisions, §§ 24-25, 29-30, 41-44, 47, 58-59

ii. Disciplinary powers in general

153. There is a need to maintain good order in Parliament and resolve disputes related to the rights and behaviour of individual MPs or groups. Even if members of parliament are protected from external legal action for their opinions and remarks, they may still be subject to internal disciplinary sanctions (CDL-AD(2014)011, § 100), devised and implemented within Parliament. At the same time, internal bodies dealing with disciplinary and other procedural matters should not become a tool of political manipulations in the hands of the majority.

154. In countries with a strong tradition of parliamentary autonomy (which means, inter alia, that the decisions of internal bodies of Parliament are not susceptible to any external review), disputes related to internal procedures and ethical breaches are usually decided within Parliament itself (the CPA Benchmarks, § 1.4.4). Most parliaments have internal rules of procedure or codes of conduct (House Rules) under which the members can be silenced or disciplinary sanctioned for certain remarks or behaviour, although the nature of such sanctions vary greatly (CDL-AD(2014)011, § 55).

155. It is necessary that the opposition has a very strong presence in the composition of such bodies, that the procedures before them satisfy basic requirements of due process, and that disciplinary measures imposed are proportionate and do not affect the essence of the parliamentary mandate of the MP.

156. Another option would be to entrust the function of dispute resolution to an external body – a Constitutional Court or another similar high judicial authority. This model is less respectful to the autonomy of Parliament but better guarantees the independence of the adjudicative body. It is important, however, to make clear which measures of Parliament may be reviewed by the Court or other external body, and which are not subject to such review. Constitutional Courts in many countries may examine the process of the law-making, when analysing constitutionality of the laws. A serious breach of the rights of the opposition may, at least in theory, lead to the invalidation of the law by the Constitutional Court. At the same time, resolution of disputes related to the internal organisation of Parliament and its working procedures may be left to Parliament itself and to its internal bodies, provided that the

opposition is adequately represented in such bodies, or that they are formed on the basis of the cross-party consensus.

157. As to the substantive rules applied in these proceedings, MPs have a duty of orderly behaviour and should show respect to the institution they represent. The use of clearly obscene language or personal verbal (and a fortiori physical) attacks on fellow MPs and guests in Parliament may and must be discouraged by a variety of sanctions. A useful comparative review of the range of possible sanctions was conducted by the ECtHR in the case of Karácsony and Others v. Hungary ([GC], 17 May 2016, §§ 56 – 61). However, those internally imposed sanctions will be subjected to the closest scrutiny by the ECtHR, and the MPs' freedom of expression (which includes the freedom to choose forms and intensity of expression) enjoys elevated protection. The ECtHR makes an important distinction between the substance of a parliamentary speech (where limitations are almost never justified) and, on the other hand, the time, place and manner in which political message is conveyed (ibid, § 140). The ECtHR is likely to focus on the procedural safeguards which must accompany the imposition of a sanction and which must include (for the ex post sanctions, i.e. those which are not imposed immediately to discontinue a disorderly behaviour) the right to be heard, and the obligation to hold a debate and give reasons for any decision (ibid., § 159).

158. It belongs, in the first place, to Parliament itself or to its designated bodies to decide what speech or behaviour are inadmissible within Parliament. A lot would depend on the predominant political culture, which may be more expressive in some countries and more tempered in others. Since not everything can be clearly regulated in the codes of behaviour, it is important to ensure foreseeability of any sanction imposed and show respect to the tradition and the precedent. Thus, for example, in countries where "filibustering" was customarily regarded as a legitimate practice, it would be wrong to punish a minority MPs for using this tool just because the current majority does not like to be constrained by it. Similarly, vestimentary limitations are also largely a matter of tradition.

> CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, §§ 153-158

iii. Loss of mandate

[…] Loss of mandate

162. In case the conviction enters into force after the elections and the person has already assumed office, those who voted were not necessarily aware of the pending of the proceedings and of the nature of the offences, in particular if those offences were committed or the criminal proceedings started after the elections. The democratic nature of the elections is therefore not hampered if the mandate is terminated, even if the effects of the restriction are more severe for a member of an elected body than for a person standing for election. This could make the termination of a mandate following a criminal conviction more easily admissible than the ineligibility to be elected.

163. In case an MP is accused of having committed a severe crime, there may be a public interest to avoid participation of that person in parliamentary proceedings. An impeachment procedure could be provided. The Finnish Constitution provides for such a kind of dismissal procedure for MPs who have essentially and repeatedly neglected their duties as representatives. There is no restriction for those persons to stand at the next elections.

164. The Venice Commission considers that the termination of the mandate of an MP who has been sentenced and whose conviction entered into force after elections is justified if this was a cause of ineligibility to be elected. This should in particular happen when the sentence was passed abroad, and national authorities did not know about it.

[…] In which kind of legislation and how should the issue be addressed?

167. Still more discretion is suitable in cases where sitting MPs are convicted for criminal offences (whether for offences committed before or during their membership). In such cases – where there is a specific need to decide on the right to remain as MP and the issue may be particularly contentious – it would seem more appropriate that the question of ineligibility be decided as part of the court decision in the actual case.

> CDL-AD(2015)036cor, Report on Exclusion of Offenders from Parliament, §§ 162-164, 167

6. Disqualification voiding a member's election may appear as contrary to the very notion of elections to Parliament, if it is considered that the mandate given by the people may only be withdrawn by the people, while no other authority, especially not the judiciary, is allowed to interfere. However, as the debate in France underlined, the voters of a certain constituency are only a part of the voters who have enabled the formation of Parliament. It belongs to Parliament as a collective body to decide the manner in which each individual may participate in the exercise of such power as a voter or as an elected representative. Within the limits of the Constitution, it is therefore within the power of Parliament to define these conditions.

7. Article 3 of the First Additional Protocol to the European Convention on Human Rights (hereinafter "the ECHR") implies the (active) right to vote as well as the (passive) right to be elected. This was made clear by the ECtHR. The principles and values discussed in the ECtHR's case-law on the right to vote have to be observed. Ineligibility must first be based on clear norms of law. It must pursue a legitimate aim. However, a "wide range of purposes may be compatible with Article 3".

8. According to the case-law of the European Court of Human Rights on Article 3 of the First Additional Protocol to the ECHR, restrictions on the right to be elected should be limited to what is necessary to ensure the proper functioning and preservation of the democratic regime. This functioning is more likely to be compromised by an elected official with a criminal record than by the exercise by an ordinary voter of his or her right to vote.

9. In particular, the democratic nature of the elections is not hampered if the mandate is terminated when the conviction enters into force after the elections and the person has already assumed office, even if the effects of the restriction are more severe for a member of an elected body than for a person standing for election. Through their vote, voters express their trust in the chosen representative. Trust is based on the elements which were in the voters' knowledge before the elections. Subsequently revealed and criminally sanctioned acts by the elected representative are relevant for the voters' trust. On the other hand, as long as disqualification is coupled with ineligibility to be elected which goes beyond the end of the mandate, voters would not have the possibility to express their trust in this representative through another vote.

10. This could make disqualification from office following a criminal conviction more easily admissible than ineligibility to be elected. This is reflected in the law of countries such as Finland and Sweden, which provide for the loss of mandate but not for ineligibility to be elected following a criminal conviction. In fact, it could be argued that it goes against the principle of democracy that a representative retains his or her mandate despite being convicted after the elections for a serious offence. This is particularly true in the case when, due to misuse of administrative resources or corruption, the candidate has gained an undue advantage in the elections.

11. In the Commission's view, in conclusion, disqualification voiding an electoral mandate should not be considered as limiting democracy, but as a means of preserving it.

12. The Venice Commission also stated that "[i]t is not uncommon that due to a criminal conviction for a serious offence, individuals are deprived of the right to stand for election. However, it can be regarded as problematic if the passive right of suffrage is denied on the basis of any conviction, regardless of the nature of the underlying offence. Such a blanket prohibition might not be in line with the European Convention for the Protection of Human Rights and Fundamentals Freedoms[…] On the other hand, it might be not appropriate not to include (or not to implement) any restriction to eligibility to be elected for criminals at all[…]".

13. There is no codified standard as concerns the level of regulation of disqualification from holding an elective office (see Code of good practice in electoral matters, II.2.a).9 However, as the universal right to vote is one of the main cornerstones of democratic government, the Commission is of the view that disqualification should preferably be laid out in the constitution or – possibly organic - legislation adopted by parliament. The question arises whether a legislative decree adopted by the Executive upon detailed mandate of Parliament in a specific law is an appropriate level of regulation. Shielding the Parliament and the individual MPs from interference by the Executive is an important requirement of the separation of powers. In the Commission's view, therefore, even when the delegation is sufficiently precise, regulation through a law adopted by the parliament itself is preferable.

32. The European Court of Human Rights has previously stated that the States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied. In this latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction. This possibility applies a fortiori to disqualification voiding an elective mandate, because stricter requirements may clearly be imposed on the eligibility to stand for election to Parliament (and in the Commission's opinion, even more in case of disqualification voiding the electoral mandate), as distinguished from voting eligibility, as also the Court has accepted.

33. Statutory disqualification should take into account such factors as the gravity and nature of the offence committed and the conduct of the offender. Disqualification should therefore only be provided in connection with certain types of offences or with particularly long sentences. It would also appear appropriate that the law adjust the duration of the measure to the sentence imposed and thus, by the same token, to the gravity of the offence.

34. In States where disqualification does not operate automatically but requires an implementing decision by Parliament, its decision does not represent an autonomous interference with the representative's right to be elected. For this reason, only limited procedural requirement apply, in particular the right of the MP to submit arguments, to appear before the Parliament in person and to be assisted by an attorney, the holding of a public hearing, the public character of the decision. An appeal to the Constitutional Court against the decision by Parliament appears to be a logical additional guarantee in countries where direct access to the Constitutional Court is already provided, but should not be regarded as necessary.

> CDL-AD(2017)025, Amicus curiae brief for the European Court Of Human Rights in the case of *Berlusconi v. Italy* on the Minimum Procedural Guarantees which a state must provide in the framework of a procedure of disqualification from holding an elective office, §§ 6-13, 32-34

23. In many constitution systems, only the Parliament can decide on ending/suspending the mandate of an MP, and even in the Parliament a qualified majority would often be needed. Against the background of the constitutional protection of the MPs' mandate, it is questionable whether an ordinary law may establish a system of sanctions which would remove MPs from the voting process, by a decision of an external authority, or require them to recuse themselves. It may be constitutionally problematic even to define incompatibilities of MPs through ordinary legislation. In the specific context of Bosnia and Herzegovina, establishing those rules at the constitutional level could be difficult to achieve. That being said, the Venice Commission stresses that parliamentary immunity does not exempt MPs from criminal liability for ordinary crimes and penal sanctions defined by the Criminal Code. Furthermore, there should be rules on conflict of interest applicable to MPs, but such rules have to be, first, adapted to the constitutional role of the MPs, and, second, adopted and enforced in such a manner as to preserve the constitutional role of MPs and the autonomy of Parliament.

> CDL-AD(2021)024, Bosnia and Herzegovina – Opinion on the draft Law on the prevention of conflict of interests in the institutions of Bosnia and Herzegovina, § 23

III. PARLIAMENTARY INQUIRY COMMITTEES

1. Purpose and function

7. Parliamentary committees of inquiry are an instrument for what is usually referred to as the "control", "supervisory" or "oversight" function of parliament, the essence of which is to oversee and scrutinise the work of the executive branch. The main purpose of this supervision is to ensure democratic political accountability and to improve the transparency and efficiency of the government and the administration. But the supervisory function may also provide parliament with information of relevance to its own legislative and budgetary procedures.

8. This basic democratic function is common to all parliamentary systems, as well as to most presidential ones. There are however great variations as to the nature and scope of parliamentary control and supervision in different countries, including as to the institutions and procedures used, as well as to the constitutional and legal framework.

15. The country's history and experience in the field of parliamentary committees of inquiry clearly play a big role. In France, for example, the limited role initially given to the parliamentary committees of inquiry in the parliamentary practice of the Fifth Republic (before the constitutional revision of 23 July 2008) can be partially explained by the abuses committed by these commissions in previous French political history.

16. Despite this heterogeneity, most countries use the technique of parliamentary committees of inquiry. The justifications for these committees, especially in countries where they have quasi-judicial investigative powers, are broadly comparable. Firstly, it is to strengthen parliamentary control over the government and the administration. The main focus is usually the supervisory function of parliament on the executive branch. Alongside this main justification, parliamentary inquiries may in some countries also be used as part of the legislative function by collecting data of use for new legislation, or checking whether existing legislation functions as intended. If so, this may significantly broaden the substantive scope of the inquiry – so that it does not only concern itself with the relationship between parliament and the executive but all sorts of issues concerning society at large. Examples to be found in recent years include parliamentary committees of inquiry looking into such diverse issues as that of religious sects, the presence of animal flour in fodder and its impact on human health, the heat wave and the bankruptcy of a large bank. The usual question in such inquiries is whether the government has correctly responded to the problem at hand. The potential scope of parliamentary inquiries may therefore in many countries be very wide.

17. Through the creation of a committee of inquiry, parliament presents itself as the first of the state powers, the one which ultimately takes care of the concerns of citizens. This symbolic (and sometimes very real) position of power of parliament is further enhanced by the publicity of some committees of inquiry, in particular if their proceedings are broadcast. In some cases this can stir the whole society. It can be a powerful tool, but also a dangerous one.

> CDL-AD(2014)013, Amicus curiae brief in the case of *Rywin v. Poland* (Applications Nos 6091/06, 4047/07, 4070/07) pending before the European Court of Human Rights (on Parliamentary Committees of Inquiry), §§ 7-8, 15-17

2. Legal basis, models, establishment and composition

a. Legal basis

12. In some countries there are constitutional and statutory rules that lay down in detail the competences and mandate of the committee, while in others this is just regulated in the parliamentary rules of procedure, and sometimes only in a very rudimental way.

CDL-AD(2014)013, Amicus curiae brief in the case of *Rywin v. Poland* (Applications Nos 6091/06, 4047/07, 4070/07) pending before the European Court of Human Rights (on Parliamentary Committees of Inquiry), § 12

b. Models

9. Parliamentary committees of inquiry are to be found in most European countries – albeit not in all of them – but they appear in many different forms, and there is no single main model.

10. Some parliaments have standing committees on control (or "supervision"), which differ from the other (sectorial) standing committees in that they may scrutinise the whole of the administration. Other parliaments leave the day-to-day scrutiny of the executive to the ordinary standing committees but may appoint special committees (or "commissions") of inquiry on an ad hoc basis to look into a specific case (or "scandal"). In some countries such special committees are composed of MPs, while in others they are composed of outside experts, acting on behalf of and reporting back to parliament.

CDL-AD(2014)013, Amicus curiae brief in the case of *Rywin v. Poland* (Applications Nos 6091/06, 4047/07, 4070/07) pending before the European Court of Human Rights (on Parliamentary Committees of Inquiry), §§ 9-10

c. Establishment

121. For more intensive parliamentary oversight of specific cases, however, there remains in most parliaments the problem that launching inquiries, demanding information, calling hearings and other important measures require a majority decision, which in effect means agreement with the government faction.

122. For this reason there are some political systems in which the parliamentary opposition, usually in the form of a certain qualified minority, have been granted not only rights of procedural participation, but also the legal competence to adopt decisions to initiate inquiries, demand information, set up special committees or commissions etcetera. This is not a common European tradition. There are many parliaments without such instruments, and for those that have it, it is regulated in different ways. But there are important examples. One of the oldest and best known is Article 44 of the German Constitution, which gives 1/4 of the representatives of the Bundestag the right to demand a commission of inquiry. Other examples include Article 115 of the Finnish Constitution, which gives ten members of parliament the right to demand that the Constitutional Committee initiates an inquiry into the conduct of a government minister, and a recent reform of the Rules of Procedure of the Norwegian Parliament, which gives 1/3 of the members of the Committee on Constitutional Control the right to initiate inquiries and call hearings. According to Article 76 of the "The former Yugoslav Republic of Macedonian" Constitution a proposal for setting up a commission of inquiry may be submitted by 20 representatives (out of 120).

124. The Venice Commission in principle endorses the idea of giving a qualified minority of MPs special powers of inquiry with regard to the oversight function of parliament. At the same time, it should be pointed out that there is no common European tradition for this, that such rules are still relatively rare, and that the threshold of 1/4 recommended by the Assembly in most political systems would be regarded as rather low. The exact reach and contents of such rules should be carefully tailored to the national constitutional and political tradition and context.

CDL-AD(2010)025, Report on the Role of the Opposition in a Democratic Parliament, §§ 121-122, 124

22. In unicameral systems, the power to establish Inquiry Committees usually lies with parliament. In bicameral systems, this may rest with both chambers (e.g. Brazil) or with only one, sometimes with the right of a chamber to request to have an Inquiry Committee established by the other chamber (e.g. Slovenia). Joint committees may be formed where both chambers are empowered to form Inquiry Committees (e.g. Brazil). The Commission underlines that only parliament should be competent to initiate parliamentary inquiries; the involvement of the executive in the establishment of Inquiry Committees risks obstructing the parliamentary supervisory function.

23. Thresholds and quorums for establishing Inquiry Committees reflect national balances between majority rule and minority rights, taking into consideration the specific national political system. The Venice Commission has noted earlier that in most countries the opposition has the right to request the creation of an Inquiry Committee or a similar body. Some constitutions empower qualified minorities either through a certain number of sponsors (Algeria – 20 out of 407 members of the National Assembly or 20 out of 174 members of the National Council) or through a certain proportion of the members of the respective Chamber (e.g. Austria – one fourth, Brazil – one third, Chile - two fifths, Germany – one fourth). The Venice Commission has observed that the threshold of one fourth in most political systems would be regarded as rather low and that if the power to create an Inquiry Committee is not limited, it may paralyse the work of Parliament. Some countries combine a lower threshold for the sponsorship of the initiation of the procedure and a higher one for the establishment of Inquiry Committees (e.g. Greece). The Commission has noted earlier that the exact reach and contents of such rules are normally carefully tailored to the national constitutional and political tradition and context.

> CDL-AD(2025)033, Urgent amicus curiae brief for the European Court of Human Rights in the case of *Grande Oriente d'Italia v. Italy* on Procedural Guarantees in the exercise of powers by Parliamentary Inquiry Committees, §§ 22-23

d. Composition

30. In most systems, membership reflects the proportional distribution of parliamentary groups, ensuring minority representation (e.g. France and Japan). Some go further: in Georgia, opposition factions must represent at least half of the members. In bicameral systems, the seats accorded to one chamber on a joint committee of both chambers shall also be allocated among the parliamentary groups (e.g. Switzerland).

31. Over-representation of minorities may conflict with majority rule, but many systems safeguard minority influence by granting them certain roles in an Inquiry Committee or special rights during the investigation (e.g. US and Japan). The Commission considers it good practice that both the majority and the minority may present their views, including in final reports.

> CDL-AD(2025)033, Urgent amicus curiae brief for the European Court of Human Rights in the case of *Grande Oriente d'Italia v. Italy* on Procedural Guarantees in the exercise of powers by Parliamentary Inquiry Committees, §§ 30-31

3. Nature and scope of the inquiry

19. Parliamentary committees of inquiry conduct processes that are essentially of a political nature and which should not be confused with criminal investigations and proceedings. Such committees should not assess or pronounce themselves on the question of criminal responsibility of the persons covered by the inquiry, which should be for the public prosecutor and the courts alone to assess.

20. At the same time, it is in the nature of (alleged) political “scandals” that they may give rise to parallel processes, so that a case which is under parliamentary inquiry may at the same time be subject both to administrative inquiries and to legal investigations or proceedings. There is in itself nothing unusual or illegitimate in this. But it does put extra responsibility on all parties involved to ensure that proper distance is kept between the parliamentary (political) inquiry and the criminal investigations and legal proceedings before the courts. This is further discussed below with regard to question 1.

> CDL-AD(2014)013, Amicus curiae brief in the case of *Rywin v. Poland* (Applications Nos 6091/06, 4047/07, 4070/07) pending before the European Court of Human Rights (on Parliamentary Committees of Inquiry), §§ 19-20

25. Parliamentary autonomy requires parliaments to determine the subject and scope of inquiries. In most systems, the scope is intentionally broad, reflecting the principle that parliament should have the means not only to scrutinise the executive but in general matters of public concern. Comparative constitutional law practice illustrates a variety of approaches, ranging from inquiries into a “particular matter” or “a given fact” (e.g. Brazil), to broad “matters of public interest” (e.g. Algeria, Costa Rica and Peru). Certain constitutions explicitly link inquiries to the control of government action (e.g. Chile).

29. In many systems, parliament may broaden the mandate during the inquiry, though safeguards exist in some countries to protect the minority from majority alteration. In Germany, the initiating minority defines the subject of inquiry, which cannot be changed without its consent. However, as noted above, it is not a common European tradition to foresee such rights for the parliamentary minority and such rules are rare.

> CDL-AD(2025)033, Urgent amicus curiae brief for the European Court of Human Rights in the case of *Grande Oriente d’Italia v. Italy* on Procedural Guarantees in the exercise of powers by Parliamentary Inquiry Committees, §§ 25, 29

4. Powers of inquiry

11. The competences and powers of investigation of parliamentary committees of inquiry also differ widely. Some are provided with the same powers of investigation as other parliamentary committees. In other countries – the majority of those examined – these committees of inquiry may be provided with some or all of the usual powers of investigating judges. Some will have the formal power to summon witnesses and demand documents and other forms of evidence that are similar to a judicial procedure, while others merely have the possibility to ask for information, without the formal power to enforce their demands.

13. Parliamentary committees of inquiry will usually have the possibility of conducting hearings, which will then most often be open to the public, and sometimes be directly transmitted by the media. However, it is not uncommon that such committees may wholly or partially conduct their hearings and inquire behind closed doors, depending on the nature of the case and the sensitivity and confidentiality of the information sought.

14. There are also differences with regard to the persons who may be subject to a parliamentary inquiry. Committees of inquiry can always look into (and summon) persons holding public power, such as government ministers and (most often) civil servants. This is the core function. To what extent private individuals can be made to appear before a committee of inquiry differ somewhat more from country to country, although in all countries under consideration but one the inquiry may also apply to such persons. The relationship between parliamentary commissions of inquiry and judicial authorities are also settled in rather different ways.

CDL-AD(2014)013, Amicus Curiae Brief in the case of *Rywin v. Poland* (Applications Nos 6091/06, 4047/07, 4070/07) pending before the European Court of Human Rights (on Parliamentary Committees of Inquiry), §§ 11, 13-14

32. For Inquiry Committees to be effective, they must be vested with adequate investigative powers to perform their functions. While some systems confine them only to the competences inherent to parliament (e.g. Cyprus), the majority of countries regulate broader powers for Inquiry Committees: Some constitutions grant them powers equivalent to those of judicial authorities (e.g. Brazil), others apply criminal procedure rules mutatis mutandis (e.g. Germany). Typical powers include requesting documents, summoning officials, and requiring cooperation from the executive and judiciary.

33. In Brazil, while the Constitution grants Inquiry Committees powers equivalent to those of judicial authorities, the statutory law foresees that the process and investigations of inquiries shall comply with the rules of criminal procedure. Inquiry Committees can summon persons and witnesses in accordance with the requirements established in criminal legislation. These persons can be accompanied by a lawyer. In Germany, the procedure for Inquiry Committees, including the gathering of evidence, is laid down in a specific law which provides for the way in which the competences of the committee should be exercised. Coercive measures must be authorised by the Federal Supreme Court. The task of the committee is to collect information and to deliberate; it is not entitled to conduct criminal proceedings and to decide on criminal (or other) matters like a court.

CDL-AD(2025)033, Urgent amicus curiae brief for the European Court of Human Rights in the case of *Grande Oriente d'Italia v. Italy* on Procedural Guarantees in the exercise of powers by Parliamentary Inquiry Committees, §§ 32-33

5. Relationship to prosecutorial and judicial authorities

a. Political inquiry parallel to criminal investigation

27. When discussing this question it is important to distinguish between ethical, political and legal dimensions. It may well be argued from a political or ethical perspective that the suspicion of a criminal offence should make the parliamentary committee more cautious in its approach and that it may be wise and prudent to leave those parts of the case tinged with criminal suspicion to the prosecutor and the courts. But this certainly does not mean that the parliamentary committee has any legal duty, either under international or European law, to pull back. However, some countries prohibit the coexistence of a committee of inquiry and prosecution on the same object (France, Romania). Others, such as Poland, explicitly allow the committee of inquiry to suspend its work until the judicial inquiry comes to an end.

28. A basic premise for the Venice Commission is that parliaments as autonomous institutions distinct from the judiciary cannot be impeded from carrying out their own inquiries. The composition of a parliamentary committee is always the result of a political choice. Its mandate is meant to be temporary. Even when they look into the possibly criminally relevant conduct of individual persons, parliamentary committees of inquiry conduct processes that are essentially of a political nature, and which should not be confused with criminal investigations and proceedings. The result of these activities does not alter the legal order. The report which closes its work is in itself only an incentive to parliamentary discussion. The ultimate aim of the committees' investigations is transparency with a view of ensuring that the public is informed of matters which affect the res publica (the public good).

30. Even if identical items may be subject to both criminal proceedings and a parliamentary inquiry, the aim should always be different. The criminal investigation should lead to an

individual legal measure, the conviction or acquittal of the accused. The committee of inquiry has no power over individuals, except to call them to testify.

31. The Venice Commission considers that the following standards should be observed, as representing best practices, by a parliamentary committee that during the course of its inquiries discovers elements which would suggest that a criminal offence has been committed:

- First, the committee should inform the public prosecutor, and it should hand over to the prosecuting authorities the relevant information and documentation, to the extent that it is allowed to do so under national law.
- Second, the discovery of possible criminal offences should not in itself stop an otherwise legitimate parliamentary process of inquiry. The inquiry should go on, and the committee should continue to look into the case and to make its own (political) assessments. It should in particular be free to continue to examine the facts of the case, even if these facts may also be of relevance to the criminal proceedings.
- Third, proper procedures should be established for co-operation and exchange of information and evidence between the committee and the public prosecutor, while respecting the differences between the two processes as well as the procedural rights of the person suspected of having committed a criminal offence,and other persons appearing in front of the committee.
- Fourth, the parliamentary committee should during its inquiries, hearings and deliberations take into proper account the pending criminal investigations or proceedings, and the members should exercise caution so as not to make assessments or statements on the issue of guilt or in other ways infringe the principle of presumption of innocence. The committee should take great care so that its inquiries do not obstruct or in any other way unduly interfere with the criminal investigations or proceedings.
- Fifth, when formulating its report, the parliamentary committee should take great care not to make any assessments of a criminal legal nature or pronounce itself on the criminal responsibility of the persons concerned. It should however remain free to describe and analyse all facts of the case and to assess these from a political perspective.
- Finally, the fact that persons not holding public powers are involved, should not restrain a parliamentary committee from enquiring into the behaviour of such persons to the effect that this is of relevance. Therefore if a public scandal is being scrutinised, the fact that a person is a private person and does not occupy any public role should not exempt such person from being summoned to appear in front of such a Commission.

CDL-AD(2014)013, Amicus curiae brief in the case of *Rywin v. Poland* (Applications Nos 6091/06, 4047/07, 4070/07) pending before the European Court of Human Rights (on Parliamentary Committees of Inquiry), §§ 27-28, 30-31

b. Regulation

42. An additional issue concerns the legal regulation of the relationship between inquiry committees and the authorities tasked with authorising or implementing coercive measures against private persons. Where such measures are executed by judicial or executive authorities, those authorities remain bound by their own constitutional and statutory obligations to respect the Rule of Law and to safeguard fundamental rights. Comparative practice shows divergence: in some systems the relationship is clearly regulated (as in Austria for a failure to comply with summons), in other jurisdictions, there are no detailed statutory provisions governing cooperation with such authorities. In the absence of clear rules, uncertainty may arise as to the legal basis, scope and limits of enforcement, with risks both to

the authority of the committee and to the rights of individuals concerned. In the light of these considerations, the Venice Commission considers it useful that national law provides explicit regulation of this relationship, in order to guarantee legal certainty, proportionality and respect for fundamental rights.

> CDL-AD(2025)033, Urgent amicus curiae brief for the European Court of Human Rights in the case of *Grande Oriente d'Italia v. Italy* on Procedural Guarantees in the exercise of powers by Parliamentary Inquiry Committees, § 42

6. Duty of cooperation

a. Duty of cooperation of the executive and public administration

34. Many systems impose a duty of cooperation on the executive and public administration, requiring officials to appear and provide documents, records, and information, as well as facilitating the appearance of public officials for testimony.

35. Constitutional frameworks and practice vary as to the limitation of this duty of cooperation: The scope may be subject to limitations grounded in national security or confidentiality or what has been termed the "core decision-making within the government". Instead of limiting the duty to cooperate altogether, some systems allow Inquiry Committees to address these concerns by e.g. excluding the public from sittings in which these questions are discussed to reconcile effective oversight with the protection of sensitive information or require the justifications for non-disclosure to be provided in a certain procedure. In Japan, the government may withhold information only with a formal justification to parliament; in this case the IC or the Parliament may demand a declaration by the Cabinet or the agency that the production of the reports and records would be gravely detrimental to the national interest. The Commission considers that the obligation of the executive and public administration to cooperate with Inquiry Committees serves to ensure the effectiveness of democratic oversight and can be regarded as an essential condition for accountability and the proper functioning of democratic institutions. Limitations to such an obligation to cooperate should be construed narrowly.

> CDL-AD(2025)033, Urgent amicus curiae brief for the European Court of Human Rights in the case of *Grande Oriente d'Italia v. Italy* on Procedural Guarantees in the exercise of powers by Parliamentary Inquiry Committees, §§ 34-35

b. Duty of cooperation of judicial authorities

36. Judicial authorities may also be required to cooperate (e.g. Germany), for example by providing documentation, while preserving the independence of criminal proceedings. The Commission again stresses that, while the political investigation must remain institutionally separate from any judicial proceedings, judicial cooperation - particularly through the provision of documentation and information - may be required, on the condition that the autonomy and integrity of each investigative process are duly safeguarded.

> CDL-AD(2025)033, Urgent amicus curiae brief for the European Court of Human Rights in the case of *Grande Oriente d'Italia v. Italy* on Procedural Guarantees in the exercise of powers by Parliamentary Inquiry Committees, § 36

c. Duty of private persons

37. The comparative practice shows that in many jurisdictions there is an obligation for private persons or entities to cooperate with Inquiry Committees. Most systems impose on private persons a duty to cooperate with parliamentary inquiries, notably by testifying or providing

documents (e.g. France and Portugal). The scope of this duty is limited to truthful testimony and production of evidence, but professional secrecy (e.g. lawyers, doctors) and protection of journalistic sources (e.g. France) remain safeguarded. Concerning limits, fundamental rights constrain the exercise of such powers: private persons cannot be compelled to self-incriminate and privacy must be respected; sanctions for refusal vary. Coercive measures against private persons usually require judicial involvement to safeguard rights (see also below).

> CDL-AD(2025)033, Urgent amicus curiae brief for the European Court of Human Rights in the case of *Grande Oriente d'Italia v. Italy* on Procedural Guarantees in the exercise of powers by Parliamentary Inquiry Committees, § 37

7. Enforcement powers and sanctions

38. The effectiveness of Inquiry Committees depends on the enforceability of their not self-executing orders. The enforcement of compliance and available sanctions vary considerably. Some systems provide only for voluntary cooperation (e.g. Chile), while others foresee sanctions for non-compliance, including contempt of parliament (e.g. Canada) or referral to the criminal judge (e.g. Brazil).

39. In particular for searches and seizures, the Venice Commission notes diverging approaches but also a broad trend: where Inquiry Committees are constitutionally endowed with certain investigative powers, direct authority to order searches and seizures is rare. Most systems require either judicial authorisation (judicial authorisation model) or referring findings to the prosecutorial or judicial authorities that then decide whether judicial action is warranted or not (full judicial execution model). In Brazil, the Federal Supreme Court has held that the investigative powers of Inquiry Committees are limited to evidence investigation and does not include the powers ordinarily assigned to judges, such as punishment for crimes, arrest or assets seizure orders. In addition, Inquiry Committees are required to justify the investigative measures that can restrict one's basic rights. This comparative practice confirms that the separation of powers generally prevents legislatures from exercising investigative coercive functions directly without passing through the judicial or prosecutorial authorities.

40. Some countries foresee criminal penalties for false testimony (e.g. Japan) or obstructing an Inquiry Committee. The sanctions ranging from fines or criminalisation of failure to comply or to give false testimony or obstruction of the investigation by an Inquiry Committee may reinforce the investigative powers of an Inquiry Committee.

45. Traditionally, some parliaments had the right to summon individuals in front of the House in particular for contempt of parliament or breach of privilege and to adjudicate by Parliamentary Resolution on the case itself. This function was not accepted as compliant with the European Convention of Human Rights in Demicoli v. Malta, in particular as the applicant was not a Member of the Parliament and as acts of this sort done outside the House are to be distinguished from other types of breach of privilege proceedings which may be said to be disciplinary in nature in that they relate to the internal regulation and orderly functioning of the House. However, penalties given by Parliament to third parties in other jurisdictions have been upheld in the past.

> CDL-AD(2025)033, Urgent amicus curiae brief for the European Court of Human Rights in the case of *Grande Oriente d'Italia v. Italy* on Procedural Guarantees in the exercise of powers by Parliamentary Inquiry Committees, §§ 38-40, 45

8. Publicity of sessions and decisions

a. Publicity of sessions

21. The procedures of parliamentary committees of inquiry clearly do not fall under Article 6 of the ECHR, as stated by the Court in Montera v. Italy (2002) and other cases. For such procedures to unduly interfere with the rights protected under Article 6 they would have to interfere with and in some way unduly influence the proceedings before the courts, which is in principle a very different test, and which can only be assessed on the basis of the individual case at hand.

22. A general principle to be taken into consideration is moreover that the proceedings of a parliament should as a matter of principle be open to the public, unless there are specific considerations such as for example national security or the right of privacy that would justify proceedings to take place behind closed doors and subject to confidentiality.

44. From a 'best model' perspective, it may well be argued that persons entrusted with public authority should be prepared to accept a higher degree of openness and transparency than private individuals. This at least goes for government ministers and other politicians, if not necessarily for civil servants. Restricting publicity regarding these people should be exceptional and meet specific objectives, such as national security or the protection of secret or confidential information. This however does not mean that the parliamentary committee is under any legal obligation, under international or European law, to treat such cases differently. Furthermore, to the extent that private individuals are summoned to testify before parliamentary committees, it will usually be in order to give information about their relations and dealings with government figures. In such cases the public may well have a legitimate interest in full openness and transparency. At the same time, private individuals' right to respect for private and family life may more easily justify or necessitate proceedings to be held behind closed doors. Indeed there may be circumstances when this is necessary to ensure conformity with the ECHR, in particular Article 8. The "best model" is clearly one under which a balance of interests is maintained on the basis of the case at hand, by the members of the committee. This should preferably be regulated explicitly in the procedures for the inquiry, whether laid down in statutory law or in parliamentary rules of procedure.

> CDL-AD(2014)013, Amicus curiae brief in the case of *Rywin v. Poland* (Applications Nos 6091/06, 4047/07, 4070/07) pending before the European Court of Human Rights (on Parliamentary Committees of Inquiry), §§ 21-22, 44

b. Decisions of the inquiry Committee

18. The result of the work of parliamentary committees of inquiry will always be a report to parliament, which will then usually be debated in the plenary. It will then be for parliament to decide whether the process should lead to political sanctions (such as a vote of no-confidence) or legislative or budgetary reforms.

> CDL-AD(2014)013, Amicus curiae brief in the case of *Rywin v. Poland* (Applications Nos 6091/06, 4047/07, 4070/07) pending before the European Court of Human Rights (on Parliamentary Committees of Inquiry), § 18

43. The IC may have rules of procedure specifying, in particular how the decisions regarding attendance and questioning of witnesses and discovery of other evidence are made. When certain majorities are required to induce the taking of evidence, the lower the minority required, the more empowered the parliamentary minorities are. The requirement of a simple majority or more to request the taking of evidence would counteract the empowerment.

CDL-AD(20w25)033, Urgent amicus curiae brief for the European Court of Human Rights in the case of *Grande Oriente d'Italia v. Italy* on Procedural Guarantees in the exercise of powers by Parliamentary Inquiry Committees, § 43

9. Limitations of powers of inquiry committees and judicial review

a. General remarks

49. Parliamentary committees do not operate in a legal vacuum. Respect of the Rule of Law does not allow exemptions in the name of principles such as parliamentary autonomy, unless such exemptions are clearly provided ex ante by the law (namely by the constitution itself) in exceptional circumstances. The establishment and functioning of ICs rest on constitutional, legislative or jurisprudential bases. The Commission recalls that parliaments and their organs are bound by constitutional guarantees and international human rights obligations; in a democratic society, no authority stands above the law.

71. The principle of parliamentary autonomy is firmly embedded in the constitutional traditions of the member States of the Council of Europe and has been acknowledged by the European Court of Human Rights. Within the limits of the constitutional framework, Parliament is entitled to regulate its internal affairs independently from the other state powers. This principle operates as a structural guarantee, safeguarding the proper functioning of representative democracy.

72. An essential aspect of parliamentary autonomy is Parliament's authority to ensure the orderly conduct of its proceedings. The effective functioning of a legislative assembly depends on its capacity to prevent disruptions and to maintain conditions for meaningful debate. For this reason, Parliament is considered best placed to assess whether the conduct of one of its members disrupts the orderly functioning of debate and to impose proportionate disciplinary sanctions where required. The European Court of Human Rights has recognised that such internal measures serve not individual or partisan interests, but the collective interest of preserving Parliament's ability to perform its constitutional functions.

73. Another essential element is the freedom of parliamentary speech or parliamentary non-liability. While the principle of parliamentary non-liability is universally recognised, comparative experience shows that its scope varies considerably across Europe. As the Venice Commission has noted earlier, some States extend immunity to all statements made "in the exercise of parliamentary duties," while others confine it strictly to speeches delivered "in Parliament."

74. The same rationale supports, in principle, the ability of parliamentary inquiries to determine the necessity and appropriateness of obtaining information, including through measures of compulsion, without the possibility of judicial review. Oversight powers of the Parliament would otherwise risk remaining ineffective.

75. However, the situation changes once coercive measures extend beyond the internal sphere of Parliament and begin to affect the rights of third parties. At that point, the rationale of parliamentary autonomy loses much of its force: Parliament's prerogatives cannot shield acts that intrude upon constitutionally protected individual rights. In the same vein, the U.S. Supreme Court has recently reaffirmed that if the investigatory powers of Congress are justified solely as adjunct to the legislative process, they cannot be unlimited; rather, they are subject to constitutional constraints, including the fundamental rights of third parties and established privileges.

76. In this respect, the Commission notes that, while sanctions on parliamentary members might fall within the logic of autonomy as they are internal to the institution and aim to protect

its proper functioning, coercive measures such as searches or seizures directed at third parties have an external dimension. For those affected, it makes no difference whether the interference stems from a criminal investigation ordered by a judicial authority or from a measure executed with judicial authorisation on behalf of a parliamentary inquiry. In both scenarios, the individual should have the same guarantees of legality and the possibility of judicial review.

77. Such review strengthens constitutional democracy by ensuring that parliaments do not exercise powers of an executive nature (e.g. search and seizure) without a legal remedy for affected individuals. However, in order to safeguard Parliament autonomy and the effective exercise of the power of its inquiry committees, states may limit the judicial review to questions of legality and protection of fundamental rights.

78. While there have been some instances where cases of parliamentary non-liability judicial review was denied previously as a matter of principle, there is a trend in comparative jurisprudence and practice underlining that parliamentary autonomy is not absolute; no authorities nor sector of public action stand above the law. Systems however differ on whether judicial review of specific IC measures is expressly provided by law or has developed through case-law.

79. In sum, the prevailing view in comparative practice and jurisprudence is that parliamentary autonomy and judicial oversight can be balanced. Judicial review is consistent with the separation of powers and essential to ensuring legality, proportionality and rights protection. States may limit the judicial review to questions of legality and protection of fundamental rights. While judicial review, especially constitutional one, remains an important safeguard, it must be exercised with deference to the political nature and temporal limits of these bodies.

87. […]Judicial review, properly limited to questions of legality and protection of fundamental rights, is consistent with the Rule of Law, which does not allow for out of bound areas. Ex ante judicial filters and ex post remedies represent effective ways of reconciling democratic legitimacy and parliamentary autonomy with the Rule of Law.

Accordingly, in the Commission's view, there are no compelling reasons to exclude judicial scrutiny of coercive measures of Inquiry Committees against third parties altogether. Carefully framed review procedures are indispensable to ensuring that committees remain both independent in their oversight role and accountable under constitutional and human rights standards.

CDL-AD(2025)033, Urgent amicus curiae brief for the European Court of Human Rights in the case of *Grande Oriente d'Italia v. Italy* on Procedural Guarantees in the exercise of powers by Parliamentary Inquiry Committees, §§ 49, 71-79, 87

b. Limitation of powers

47. The Venice Commission notes that even while exercising their autonomy in setting their own Committees and their own procedures, Parliaments are subject to limitations set by the country's constitution, and by its international obligations.

49. Parliamentary committees do not operate in a legal vacuum. Respect of the Rule of Law does not allow exemptions in the name of principles such as parliamentary autonomy, unless such exemptions are clearly provided ex ante by the law (namely by the constitution itself) in exceptional circumstances. The establishment and functioning of Inquiry Committees rest on constitutional, legislative or jurisprudential bases. The Commission recalls that parliaments and their organs are bound by constitutional guarantees and international human rights obligations; in a democratic society, no authority stands above the law.

59. Where the powers of an Inquiry Committee conflict with non-absolute human rights, neither parliamentary oversight nor individual rights have predetermined priority. Both must be balanced in such a way that each is realised as fully as possible within the constitutional order and in line with the principle of proportionality. The German Federal Constitutional Court has underlined that the importance of the Parliament's right of oversight cannot generally allow the right to access documents to be curtailed in favour of the protection of general personal rights and property rights, if Parliament and the government have taken precautions to ensure secrecy that guarantees the unimpeded cooperation of both constitutional bodies in this area, and if the principle of proportionality is upheld.

> CDL-AD(2025)033, Urgent amicus curiae brief for the European Court of Human Rights in the case of *Grande Oriente d'Italia v. Italy* on Procedural Guarantees in the exercise of powers by Parliamentary Inquiry Committees, §§ 47, 49, 59

c. Internal and judicial review

62. However, the Commission notes that a parliamentary review procedure might not be an appropriate forum for such an internal review of Inquiry Committees' coercive measures. Such matters entail the examination of evidence and the legal characterisation of facts, which are more appropriately reserved to the judiciary, where proceedings are subject to a range of procedural safeguards in the decision-making process, including the requirements of independence and impartiality.

64. In some countries, certain measures (e.g. searches or seizures) require prior judicial authorisation, especially where third-party rights are affected (e.g. Germany). This filter both safeguards respect for fundamental rights and enables Inquiry Committees to obtain relevant evidence.

65. In several systems, measures adopted by Inquiry Committees are subject to ex post judicial scrutiny. Practices diverge, however, as to which court is competent to conduct such judicial review. Some countries, like Austria, may decide to concentrate all proceedings with regard to Inquiry Committees with the constitutional court. Other countries, like Germany, may decide to involve the constitutional court only for the control of public authorities and entrust ordinary jurisdiction with the legal scrutiny of procedural rights of individuals. Individuals may challenge committee acts before the Federal Court of Justice, while only inter-organ disputes are decided by the Constitutional Court. In Israel, the Supreme Court has reviewed Knesset committee decisions where equality or constitutional rights were implicated. In Brazil, the Supreme Federal Court has intervened to uphold the privilege against self-incrimination and to protect parliamentary minority rights in establishing inquiries.

66. External guarantees thus act as a necessary counterbalance to broad parliamentary investigatory powers: parliaments may exercise robust oversight, while individuals retain access to judicial remedy where their rights are threatened or infringed.

67. In sum, proportionate internal procedural guarantees help prevent abuse within IC proceedings, if aligned with the committee's powers. External procedural guarantees - through prior authorisation and ex post judicial review - ensure legality, proportionality and effective remedies, thereby reconciling parliamentary autonomy with the Rule of Law.

79. In sum, the prevailing view in comparative practice and jurisprudence is that parliamentary autonomy and judicial oversight can be balanced. Judicial review is consistent with the separation of powers and essential to ensuring legality, proportionality and rights protection. States may limit the judicial review to questions of legality and protection of fundamental rights.

While judicial review, especially constitutional one, remains an important safeguard, it must be exercised with deference to the political nature and temporal limits of these bodies.

87. […T]he Venice Commission finds that, while arguments are made in favour of excluding judicial scrutiny of Inquiry Committees' decisions in order to protect parliamentary independence and the principle of separation of powers, comparative experience demonstrates that parliamentary autonomy cannot justify unchecked powers regarding coercive measures against third parties.

Judicial review, properly limited to questions of legality and protection of fundamental rights, is consistent with the Rule of Law, which does not allow for out of bound areas. Ex ante judicial filters and ex post remedies represent effective ways of reconciling democratic legitimacy and parliamentary autonomy with the Rule of Law.

Accordingly, in the Commission's view, there are no compelling reasons to exclude judicial scrutiny of coercive measures of Inquiry Committees against third parties altogether. Carefully framed review procedures are indispensable to ensuring that committees remain both independent in their oversight role and accountable under constitutional and human rights standards.

CDL-AD(2025)033, Urgent amicus curiae brief for the European Court of Human Rights in the case of *Grande Oriente d'Italia v. Italy* on Procedural Guarantees in the exercise of powers by Parliamentary Inquiry Committees, §§ 62-67, 79, 87

IV. PARLIAMENTARY IMMUNITIES

1. European constitutional tradition

7. The concept of parliamentary immunity is an integral part of the European constitutional tradition, as demonstrated by the fact that all European countries have some form of rules on this, which often date back a long time in history. The main feature is that members of parliament are given some degree of protection against civil or criminal legal rules that otherwise apply to all citizens. […].

9. Although there is no single model, there is a clear distinction to be found in almost all constitutional systems between the two main categories of parliamentary immunity, which are of a different nature and which are usually regulated and applied in a quite different manner.

10. The first category is usually referred to as “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.

11. The second category are rules on “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.

32. The starting point is that there are no international or European rules that explicitly regulate parliamentary immunity at the national level. This is first and foremost a matter for the national legislator to decide. In almost all countries the basic rules on such immunity are to be found in the national written constitution, with more detailed rules laid down in the parliamentary rules of procedure, and sometimes in statutory law.

33. The ECHR does not regulate parliamentary immunity, and in general sets few restrictions on the application of such rules at the national level. […].

34. While the ECHR does not restrict parliamentary immunity as such, it does therefore set some limits on how such rules can be applied, and it can also serve as inspiration for a more general argument that use of parliamentary immunity must always be justified and not extend beyond what is proportionate and necessary in a democratic society.

35. Furthermore there are basic principles of law and democracy that are part of the common European tradition and that are of relevance when assessing rules on parliamentary immunity.

> CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, §§ 7, 9-11, 32-35

2. Basic normative position

39. For these reasons the basic normative position of the Venice Commission is that national rules on parliamentary immunity should be seen as legitimate only in so far as they can be justified with reference to overriding public requirements. They should not extend beyond what is proportional and necessary in a democratic society. This is the main normative basis on which the assessments in this report are made.

> CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, § 39

3. Rationale and democratic function of immunities

a. Rationale

58. A common European parliamentary tradition is to give the representatives special protection or “immunity”, which is usually laid down in the national constitution. This typically includes a particular level of freedom of speech (non-liability), but may also to varying degrees cover immunity from civil and/or criminal prosecution. Such rules may function both as a collective protection for parliament as an institution, and as individual protection for the MPs, against the executive, the legislature or the parliamentary majority – as was pointed out by the Venice Commission in its 1996 “Report on the regime of parliamentary immunity”.

138. Special protection of individual MPs in the form of rules on “parliamentary immunity” is not as such regulated at the European level. However, this is so widespread at the national constitutional level as to form a common parliamentary tradition, which dates back to notions of sacrosanctity of representative office in the Roman Republic (tribunes) through the 1689 UK Bill of Rights and the French Revolution all the way to modern parliaments.

139. Today rules on parliamentary immunity for MPs are to be found in various forms in the parliaments of all the member states of the Council of Europe, usually regulated in the constitutions themselves. Such rules may serve both as collective protection of parliament as an institution (against the executive) and as protection of the individual MPs against both the executive and the parliamentary majority.

145. The Venice Commission in general endorses the basic principle that special legal protection should exist for the exercise of legitimate opposition functions of the parliamentary minority, both in the form of protection against prohibition of parties and in the form of parliamentary immunity for the individual MPs. This should however not go further than required in order to protect legitimate political opposition and minority interests, and should not be used as an instrument in order to obstruct justice.

> CDL-AD(2010)025, Report on the Role of the Opposition in a Democratic Parliament, §§ 58, 138-139, 145

19. The “Anglo-Saxon” model, conceived as a mere protection of the freedom of opinion of deputies against the executive power, which influenced a number of countries with common law systems, but also several others, including the Nordic ones. The model is strong on non-liability (freedom of speech) but weak on inviolability, which is often reserved mainly for civil offences (of which there are few today). Apart from that, there is often just protection on the way to and from parliament, and only from arrest, not from other legal proceedings, such as investigation and prosecution. In practice there is little or no inviolability today for members of parliament in most countries that adhere to this model.

20. The contrast can be called the French model, which originated when the French National Assembly on 23 June 1789 declared that “the person of each deputy shall be inviolable”. This reflected the superiority of the National Assembly over other organs of the state under the revolution, a doctrine of strict separation of powers, as well as the perceived need for special protection for the representatives of the people against the executive in a time of great turmoil. The concept of “inviolability” was very wide, although some modifications were introduced as early as in 1791, making an exemption for cases of in flagrante delicto, and giving the Assembly the competence to lift immunity.

21. The French model in time was adopted by a number of other countries on the Continent and later on in other parts of the world. This is also the model that was chosen by most of the new democracies of Central and Eastern Europe in the early 1990s. The model protects both

elements of parliamentary immunity – non-liability (freedom of speech) and inviolability. However, even within this model the two are often regulated quite differently, so that non-liability is much more absolute, while inviolability is open to exemptions and can be lifted by parliament itself. There is a great variety between states in the way the model has developed as to the details, and in later years there has been a tendency in many countries (including France itself) to limit the scope of inviolability.

> CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, §§ 19–21

11. […B]oth 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.

> CDL-AD(2015)013, Opinion on Draft Constitutional Amendments on the Immunity of Members of Parliament and Judges of Ukraine, § 11

Non-liability

82. The principle of parliamentary non-liability was originally developed in historic times, as described above, when general freedom of speech was not necessarily guaranteed, and when the members of parliament were often in particular need of protection both from the executive and the courts. Today the context is different, at least in modern democracies. Freedom of speech is today normally well protected both under national constitutional law and under international treaties. For the member states of the Council of Europe freedom of speech is covered by Article 10 of the ECHR. 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.

84. The Venice Commission however considers that 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.

> CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, §§ 82-84

Inviolability

152. 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 a 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.

153. The Venice Commission notes that in most modern European democracies these justifications for parliamentary inviolability do not appear to be unproblematic. In an established 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 old rules on parliamentary immunity.

154. At the same time, the Venice Commission recognises that not all democratic systems always function like this, and that there might still in some countries be a pressing need of the protection offered by rules on parliamentary inviolability against misuse of the 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. Members of parliament, and especially of the opposition, may, in some countries, be vulnerable to political harassment in the form of unfounded legal allegations, in a way that ordinary citizens are not.

155. In such circumstances, the Venice Commission believes 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.

156. 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.

157. Furthermore, the Venice Commission considers 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.

158. Rules on inviolability should however always 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. Under no circumstances should there be absolute and unconditional inviolability for all kinds of criminal offences. Such rules should always be subject to exemptions, and there should always be the possibility of lifting immunity, following clear and impartial procedures.

159. While rules on inviolability may protect against arrest, detention and prosecution, the Venice Commission considers that they 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.

> CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, §§ 152–159

b. Democratic Function

22. A common perception in both main models of parliamentary immunity is that this is seen as a way of protecting parliament itself, as an institution, against undue pressure or harassment from external actors, including both the executive, the courts and political opponents. It is not seen as a personal privilege for the individual members of parliament, but as a way of ensuring the effective democratic workings of the representative assembly.

23. As the historical background illustrates, the concept of parliamentary immunity was an integral part of the European constitutional tradition that developed in the late 18th and early 19th century, which later on spread to most of the rest of the world, and which is still dominant today. At the same time, it is important to note that the rules on immunity were originally formulated in a historical and political context that is very different from that of today. There are a number of later institutional and democratic developments, especially in parliamentary systems, that have influenced the evolution of rules on immunity, and which are important to take into account when assessing their role and function in a contemporary context.

24. One such important development is that of modern democracy, which in many countries has more or less eliminated the threat of undue harassment of parliament by the executive power. The rise of party politics also means that, at least in parliamentary systems, there will be a strong link between the government and the members of the governing party in parliament. This means that it is usually not parliament itself, but rather the parliamentary opposition (most often in minority) that might be in danger of undue pressure from the executive, and which might therefore be in need of special protection. Thus rules on parliamentary immunity today function primarily as a minority guarantee. This applies even to presidential and semi-presidential systems, although with some variations, since the president will have a direct popular mandate, and sometimes cannot rely on majority support in parliament.

25. Another important development is in the independence and autonomy of the judiciary, which means that the possibility of the executive branch misusing the courts against political opponents in parliament is in most democratic countries today far less than it was two hundred years ago, thus reducing the need for special rules on parliamentary immunity.

26. A third factor is the development in modern times of individual political rights, including freedom of speech and protection against arbitrary arrest, which apply to all individuals, including of course members of parliament, and which therefore sharply reduces the need for special parliamentary protection. Such individual rights have long since been guaranteed both at the national constitutional level and at the international and European level, inter alia through the European Convention on Human Rights (ECHR).

29. In recent debates on parliamentary immunity a distinction is sometimes drawn between old and new democracies. The argument is that such immunity is less necessary in democratic systems that have reached a certain level of maturity and stability, where the political functions of members of parliament are adequately protected in other ways, and where there is little or no reason to fear undue pressure against members of parliament from the executive and the courts. In contrast, it is argued that rules on parliamentary immunity are still necessary in new and emerging democracies, that are not yet wholly free from their authoritarian past, and where there is real reason to fear that the government will seek to bring false charges against political opponents and that the courts may be subject to political pressure. At the same time, it is often new democracies that 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.

CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, §§ 22-26, 29

147. Although immunity is a general safeguard for all MPs, it has a specific meaning for the opposition, especially in countries where law-enforcement bodies may be subservient to the majority. Indeed, if the MPs enjoy privileges and immunities, they should be applied equally to all MPs, irrespective of the fact whether they belong to the majority or to the opposition. The core of parliamentary immunity protects the freedom of speech (expressed in votes and in opinions) of an MP in Parliament (the CPA Benchmarks, § 1.4.1). It is important to define in the law the scope of any immunities enjoyed by the MPs and devise procedural safeguards which would make lifting of the immunity and subsequent prosecution harder.

149. Parliamentary immunity relating to parliamentary rights (opinions and votes expressed in Parliament) should apply not only during a member's term of office, but should be perpetual and final (CDL-AD(2013)032, § 99), as is the case in some countries.96 While the speech uttered within Parliament and on parliamentary business enjoys very strong protection, other forms of expression (outside of Parliament's work or inside Parliament but on purely private matters) may give rise to liability.

150. Substantive immunity (as opposed to non-violability – see the next question) means that the voting of the MP in the plenary session or in the parliamentary committees, or opinions expressed during the discussions enjoys very strong protection and, in many countries, cannot give rise to liability at all.97 This is the basic principle of European political tradition (ECtHR, A. v. the United Kingdom (no. 35373/97)). However, there are substantial differences with regard to the scope of protection: it normally protects MPs against all sorts of external legal action, including criminal prosecution as well as civil lawsuits, but in some countries it only applies to penal procedures (CDL-AD(2014)011, §§ 52 and 54). In many countries MPs are immune from charges of defamation or insult, but in some countries such expressions are exempted from immunity, allowing members to be sued on this basis in the same way as other citizens (CDL-AD(2014)011 § 69).

CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, §§ 147, 149-150

4. Non-liability (freedom of speech / vote)

12. Rules on non-liability (special freedom of speech) for members of parliament are to be found in almost all democratic countries, although the details differ quite a bit. Non-liability is closely linked to the parliamentary mandate, and protects the representatives when acting in their official capacity – discussing and deciding on political issues. It is often absolute and cannot be lifted, although there are some parliaments that can do this.

13. Although the concept of parliamentary non-liability is common, the terminology differs. In English-speaking countries it is also sometimes referred to as "non-accountability", "parliamentary privilege", or simply "freedom of speech". In France and Belgium it is referred to as "irresponsabilité", in Italy as "insindacabilità", in Germany as "Indemnität" or "Verantwortungsfreiheit", in Austria as "berufliche Immunität", in Spain as "inviolabilidad", and in Switzerland as "absolute Immunität" and "immunité absolue".

53. 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 usually not extinguished when the mandate ends.

54. Non-liability normally protects parliamentarians against all sorts of external legal action, including criminal prosecution by state bodies as well as civil lawsuits. The law of some countries contains more specific provisions extending freedom from liability to all civil, criminal or administrative action or states that a member of parliament may not be subsequently pursued, arrested, detained or tried. In some countries, however, non-liability only applies to penal procedures.

55. Rules on non-liability must be distinguished from rules on internal disciplinary measures within parliament itself, which are of a different nature, and which are usually not included in the concept of parliamentary immunity. Most parliaments have internal rules of procedure or codes of conduct (house rules) under which the members can be silenced or disciplinary sanctioned for certain forms of remarks or behaviour, although the nature of such sanctions vary greatly, from a call to order or curtailment of speaking time to reduction of remuneration, temporary exclusion, or in a few cases even stricter sanctions of a more penal nature. However there are also some parliaments where the rules on non-liability (freedom of speech) provide protection even against all or most forms of internal disciplinary measures.

100. The Venice Commission notes that even if members of parliament are protected from external 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 legitimate as long as the sanctions are relevant and proportional and not misused by the parliamentary majority to infringe the rights and liberties of political opponents.

> CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, §§ 12-13, 53-55, 100

a. Personal scope

58. […] The main beneficiaries of parliamentary non-liability are of course the parliamentarians themselves. This normally includes ministers who are also members of parliament (immunity for ministers who are not parliamentarians fall outside of this study). […].

59. In some countries rules on non-liability also apply to other persons taking part in parliamentary proceedings, thus protecting parliamentary activity as such, rather than just the elected parliamentarians. […].

92. This functional approach should also apply to the personal scope of non-liability in countries where this does not only cover the parliamentarians themselves but also other persons engaged in parliamentary activities. Such persons should only if at all be protected to the extent that this is strictly linked to parliamentary functions.

> CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, §§ 58-59, 92

b. Temporal scope

60. In most countries, non-liability 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). […].

61. Parliamentary non-liability usually ends with the expiry of a member's term of office or the dissolution of parliament. However it will remain in force for words spoken and votes cast during the exercise of the mandate, so that no later legal action can be brought. In this sense non-liability is perpetual, in contrast to rules on inviolability, which normally just mean a suspension of immunity until after the expiry of the mandate.

CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, §§60-61

c. Acts covered by non-liability

63. The exact scope of non-liability and the acts which it covers may differ from country to country depending on the national rules and interpretation. The definition of what falls within the scope of "performance of the mandate" or "parliamentary functions" varies from one state to another.

64. As a general rule non-liability will apply only to opinions and statements expressed in the exercise of the parliamentary mandate, but the precise scope of this limitation varies. In many countries, the place in which the contested statements were made is not relevant and it is sufficient that the expression takes place within the context of parliamentary activity., The privilege of special freedom of speech is therefore not limited in space, and applies to all remarks made by the member of parliament that are in some way related to the exercise of the parliamentary mandate, whether inside or outside of parliament, including appearances in the media or in public meetings and debates. On the contrary, in other countries, opinions must actually be expressed in Parliament, including in committees.

89. On this basis the Venice Commission considers that there is still a need for national rules on parliamentary non-liability even if the substantive scope of protection is today for the most part also covered by Article 10 of the ECHR.

90. Such parliamentary non-liability should however not extend beyond the purpose of protecting the democratic functions of parliament. In particular it should not extend to the private behavior and remarks of the member concerned. […].

91. The Venice Commission agrees with the functional approach taken by the Court in Cordova [ECtHR Cordova v. Italy 40877/98, 30 January 2003] and other cases, which serves to limit the scope of parliamentary non-liability to opinions and remarks that are directly linked to the exercise of the parliamentary mandate.

CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, §§ 63-64, 89-91

d. Substantive scope

67. In some countries the freedom of speech guaranteed by non-liability is absolute, in the sense that it protects any kind of statement made in the course of parliamentary functions from external legal action. […].

68. In other countries parliamentary non-liability is relative and subject to certain restrictions, in the sense that some forms of remarks or behaviour are not wholly covered and may still be open to external legal proceedings. This typically applies to remarks that are considered to be particularly offensive, or which must be balanced against other interests, either of an individual or public nature. There is however no common model as to which categories are exempted, and there is great variety from country to country.

69. In many countries non-liability protects parliamentarians against charges of defamation or insult, but in some countries this is exempted, allowing for members to be sued on this basis in the same way as other citizens. In other countries the protection offered does not cover hate speech and racist remarks, or threats, or incitement to violence or crime. In some countries insult to the head of state is exempted, and in others criticism of judges. Some

countries exclude disclosure of state secrets, or remarks that are considered treason. In most countries, however, such important categories are primarily protected by way of the internal regime of parliament, which opens up for disciplinary sanctions, but not for external legal action.

70. In some countries certain categories of remarks are in principle not covered by non-liability, but outside legal action may still only be brought with the consent of parliament, meaning in effect that non-liability has to be lifted.

93. As for the substantive scope of non-liability, the Venice Commission notes that there are some countries in which protection is absolute and covers all forms of statements, while in others certain categories are exempted. There are however so many variations as to what kind of statements are covered or not that it is not easy to identify any main models. The Venice Commission considers that this is an issue which should primarily be left to the margin of appreciation of the national (constitutional) legislator. In countries where parliamentary non-liability protects particularly offensive remarks (such as for example hate speech or incitement to violence) against external legal action, there should however be a particular responsibility for parliament itself to censure and sanction this through internal house rules and disciplinary sanctions, in order to protect public and individual interests as well as international obligations.

94. In contrast to remarks and behaviour, the protection of non-liability for votes cast in parliament is usually absolute, as it should be. In recent years there has been increased awareness in many countries of the dangers of “vote-buying” and other forms of corruption linked to votes and decisions in parliament. This has also been an area of particular concern to GRECO. The Venice Commission would like to emphasize that the principle of absolute freedom of vote should of course not be seen as an obstacle to criminalizing such forms of corruption. In such cases the criminal offence is not the vote as such but the taking of the bribe, for which there is certainly no reason to protect the member concerned. This therefore falls under the category of “inviolability” (see below), and should not be seen as a question on non-liability.

> CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, §§ 67-70, 93-94

5. Inviolability (arrest, detention, prosecution)

14. Rules on inviolability for members of parliament are to be found in a number of countries, although they are less widespread than rules on non-liability. Inviolability is usually more narrowly construed, with more exemptions, and it can always be lifted, usually by parliament itself. It is also more complex and controversial. There is no common model and great variety both as to what kind of legal offences are covered and as to what legal reactions the members are protected against. Amongst the states that have such rules there is also great differences in how these are applied in practice, and in some countries they are considered outdated and not invoked. This is also the aspect of immunity which has caused the most debate, and the greatest concern in practice, inter alia in the work of GRECO on fighting corruption.

15. Inviolability is also sometimes referred to by other names, such as “immunity in the strict sense” or “freedom from arrest”. In France and Belgium it is called “inviolabilité”, in Germany "Immunität" or “Unverletzlichkeit”, in Austria "ausserberufliche Immunität", in Spain "inmunidad" and in Switzerland "relative Immunität" or "immunité relative".

101. 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.

102. Such rules are to be found in many European countries, although they are less wide-spread 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 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.

103. In some countries there are no rules on parliamentary inviolability at all. In other countries there are only rules on inviolability in civil cases, while in criminal cases parliamentarians enjoy no special protection and are treated on equal terms with other citizens. This is the main rule in countries following the Anglo-Saxon model of parliamentary immunity, 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.

160. 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.

> CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, §§ 14-15, 101-103, 160

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. 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 are most exposed to political corruption and the misuse of immunity can threaten democracy. It is the paradox of parliamentary immunity that it “can serve both to foster and to undermine democratic development.”5 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.

19. To prevent the possibility of politically motivated indictments or arrests, other procedural safeguards could be envisaged. One possibility would be to introduce safeguards resembling those existing in Italy. A minority of Members of Parliament (for instance, one third) could be entitled to complain against the detention of and prosecution against a Member of Parliament to the Constitutional Court. 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, a parliamentary minority 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."

> CDL-AD(2015)013, Opinion on Draft Constitutional Amendments on the Immunity of Members of Parliament and Judges of Ukraine, §§ 15-20

6. Limitations of on immunity and procedures for lifting immunity

44. At the same time, a good alternative for future consideration could be to introduce a system similar to the Italian model involving the judiciary. Under this system, prosecutors and ordinary judges would be obliged to inform Parliament about the arrest of, and the institution of criminal proceedings against a Member of Parliament. A minority of the members of Parliament (maybe one-third of its members) would then be entitled to complain against the arrest of and prosecution against one of its members to the Constitutional Chamber within a given deadline. The measures taken against the Member of Parliament would remain suspended until the Chamber decides on the matter.

> CDL-AD(2015)014, Joint Opinion on the draft law "On introduction of changes and amendments to the constitution" of the Kyrgyz Republic, § 44

146. 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".

147. 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, as confirmed in evaluations done by GRECO.

148. 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.

149. Fourth, parliamentary procedures for lifting immunity may give rise to problems of principle. It is difficult for a parliamentary committee to assess such lifting without going into the details of the specific case. One problem with 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 difficult to assess whether immunity should be lifted without going into the merits of the criminal charges and forming at least a preliminary opinion. In practice this may 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.

> CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, §§ 146-149

151. The Venice Commission considers that there should be procedural safeguards which would protect members of the minority from politicised prosecutions. At the same time, those procedural safeguards should not make criminal prosecution impossible. Several legal mechanisms can be devised: the requirement of a qualified majority in Parliament to lift immunity (which is, however, not a universal rule), involvement of an external judicial authority (CDL-AD(2014)011, § 96), or involvement of an internal parliamentary committee composed on the representatives of the majority and opposition in equal parts. As a good practice, the Venice Commission recommended a model where prosecutors and ordinary judges would be obliged to inform Parliament about the arrest of, and the institution of criminal proceedings against an MP, in which case a minority of the MPs (maybe one-third of its members) would then be entitled to complain against the arrest and prosecution to the Constitutional Chamber within a given deadline. The measures taken against the MP would then remain suspended until the Chamber decides on the matter (CDL-AD(2015)014, § 44).

152. That being said, immunity should not give protection to MPs for common criminal offences, not linked to the normal exercise of their mandate. In some countries in transition the misuse of immunity regulations constitutes a widespread problem, and the lifting of the immunity by Parliament becomes virtually impossible, as the majority tends to protect corrupt MPs irrespectively of their political colours due to an otherwise rare instinct of cross-party solidarity (CDL-AD(2010)015, § 43). Immunity should not apply to preliminary investigations, for cases where a deputy is caught in flagrante delicto, or for minor or administrative offences (e.g. traffic violations) (CDL-AD(2015)014, § 44).

> CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, §§ 151-152

a. Limitations of non-liability

76. The various ways in which rules on parliamentary non-liability may be construed makes for three main models:

a) Unconditional non-liability, which covers all forms of expressions (within the exercise of the mandate), which it is not limited in any way and which cannot be lifted.
b) Non-liability limited by law (or by constitution), which does not, for example, apply to certain types of expressions that are deemed to be particularly reproachable. This may 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) Non-liability that may be lifted by parliament itself, either based on established criteria or subject to parliamentary (majority) discretion.

77. Model (a) implies an absolute conception of non-liability, whereas models (b) and (c) imply a relative one. The difference is that under model (b) the case can be brought by outside actors (public or private) before the courts, which will then have the competence to decide on the scope of immunity, whereas under model (c) the decision whether or not to lift immunity rests with parliament itself.

95. The Venice Commission notes that parliamentary non-liability may in principle be absolute and unlimited. If however it is to be limited, this can be done in two different ways. One is to regulate specific exemptions. The effect is that legal action may be initiated before the courts, which will then have to decide whether the facts of the individual case apply to the stipulated exemptions (and, if so, to decide on it in accordance with relevant legislation, including ECHR Article 10). The alternative model is to have general non-liability as the main rule, but with a possibility for parliament itself to lift it.

96. The Venice Commission notes that both models are found in European countries in various forms, and sometimes in combination. For its part, the Commission considers 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, then this will necessarily be – or be seen as – a politicised process. It is preferable that any limits to the freedom of speech of parliamentarians are laid down in law and subject to judicial review. This should then obviously be a strictly judicial decision like all other decisions made by the judiciary, and it should be the task of the judge to examine whether the facts under consideration fall under non-liability as defined in the relevant legislation.

97. In countries where parliament has the competence to lift the non-liability of its members this should be exercised with great restraint, respecting the overriding concern of protecting the democratic functioning of parliament, and following the same procedural rules and principles as outlined below for cases of inviolability. The criteria for lifting (or not lifting) should be clear and concise and they should be laid down in law or in the parliamentary rules of procedure.

98. The Venice Commission considers that rules on parliamentary non-liability should by their nature not be limited in time (as long as the statement in question is made during the mandate). If non-liability is granted, it would be undermined if it were possible to bring legal charges against the parliamentarian once he or she has left office.

99. The Venice Commission notes that in most countries the individual member concerned does not have the right to waive the protection provided by non-liability, since this is seen as an institutional privilege for parliament as such. In other countries, such as the UK, it is however possible for a member to waive non-liability, at least in some cases. The Venice Commission considers that both models are legitimate. If however there is procedure under which parliament may lift non-liability, then at least the member concerned should have to right to request such lifting, even if the decision remains with parliament itself.

100. The Venice Commission notes that even if members of parliament are protected from external 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 llegitimate as long as the sanctions are relevant and proportional and not misused by the parliamentary majority to infringe the rights and liberties of political opponents.

> CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, §§ 76-77, 95-100

b. Criteria and guidelines for lifting non-liability

175. There are some countries in which parliamentary non-liability is absolute, in the sense that it covers all statements made by the members with relation to their parliamentary functions, and that it cannot be lifted, even by parliament itself. This is a legitimate model, which does not require detailed criteria or guidelines.

176. In other countries parliamentary non-liability is subject to certain limitations. This may also be legitimate, provided that the freedom of speech and opinion enjoyed by the members of parliament is still wide enough to ensure that they can faithfully and fearlessly exercise their democratic functions. The freedom of vote should be absolute, provided that it does not limit the power and the duty to hold members of parliament liable for acts of corruption.

177. Parliamentary non-liability may be limited (a) through specific exemptions (substantive limitation) or (b) through a possibility for parliament to lift it (procedural limitation).

178. The Venice Commission considers that both models are legitimate but model (a) is preferable since it means that limits to non-liability will be laid down by law and subject to judicial review.

179. Substantive limits on the freedom of speech of parliamentarians should apply only if at all to statements of a particularly grave nature, and should always be weighed against the overriding requirement of ensuring free political debate in parliament.

180. If parliament is given the competence to lift the non-liability of its members, then this should be exercised with great restraint, and following the same procedural rules and principles as outlined below for cases of inviolability.

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

182. The non-liability of members of parliament should not extend to opinions or behaviour that does not have a direct link to their parliamentary functions.

183. Non-liability should not exclude internal disciplinary sanctions in parliament, as long as these are clear and proportional, and not misused by the parliamentary majority.

> CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, §§ 175-183.

c. Limitations of inviolability

161. The Venice Commission considers that it should always be possible to lift parliamentary inviolability. The wider the scope of inviolability, the greater the need for this. Under no circumstances should there be absolute and unconditional parliamentary inviolability for all kinds of criminal offences. Rules on inviolability should always be subject to exemptions, and there should always be the possibility of lifting, following clear and impartial procedures.

162. The Venice Commission in general considers that there should be a basic presumption that inviolability 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. Inviolability should only apply in cases where there is reason to suspect a partisan-political element in the decision to prosecute the parliamentarian concerned. The Venice Commission agrees with the statement made by the late Professor Sir Neil MacCormick that: … immunity should not be a shield that protects any MEP from exposure to the general criminal law in its bearing on his/her private or business activities. This latter qualification can itself only be negated where there is some real, serious and demonstrated partisan-political element in the decision to prosecute, aimed at disabling the MEP from effectively carrying out her/his mandate.

163. As for other substantive criteria for lifting inviolability, the Venice Commission considers that these should be regulated in more detail and clarity than often appears to be the case in many countries. Such criteria should include the lifting of protection for cases where the

member concerned has been caught in flagrante delicto. Furthermore it should be possible to lift inviolability in cases concerning particularly serious crimes, as is the case in a number of countries. It should also be possible to lift immunity in cases where the alleged offence is unrelated to any kind of parliamentary function.

164. The Venice Commission also considers that it should preferably be possible for the member concerned to waive inviolability and to insist on having the case considered by the ordinary public prosecutor and if need be by the courts. Even if this is not a legal requirement under Article 6 of the ECHR, as pointed out by the Court in Kart v. Turkey, it is still preferable from a best model perspective to give the person concerned the possibility to have the allegations examined by the judicial system.

169. In some national systems there is a rule that if parliament has not decided on a request for lifting immunity within a certain deadline, then it should be considered to be denied. While this may guarantee a swift procedure, and ensure against deadlock, the Venice Commission considers that this is still not a good solution, as it may easily contradict other basic procedural requirements, such as transparency, rights of defence, impartial treatment and etcetera.

170. When regulating the criteria and procedures for lifting parliamentary inviolability at the national level, the Venice Commission considers that particular attention should be paid to the rules and guidelines developed by the European Parliament. There are several reasons for this. First, these rules and guidelines are qualitatively better than those found at the national level in most European countries. Second, they are the result of quite extensive practice, as the EP has over the years had to assess a large number of requests for the lifting of inviolability. Third, the rules and guidelines of the EP can today be seen to reflect a certain level of consensus at the European level on how inviolability should be handled, as confirmed also by the fact that the Parliamentary Assembly introduced similar rules in 2003.

> CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, §§ 161-164, 169-170.

d. Criteria and guidelines for lifting parliamentary inviolability

184. The Venice Commission considers that rules on parliamentary inviolability are not a necessary part of modern democracy. In a well-functioning political system, members of parliament enjoy adequate protection through other mechanisms, and do not need special immunity of this kind.

185. The Venice Commission however recognises that rules on inviolability may in some countries fulfil the democratic function of protecting parliament as an institution, and in particular the parliamentary opposition, from undue pressure or harassment from the executive, the courts or from other political opponents. Rules on parliamentary inviolability may therefore be justifiable where other means of protection of members of parliamentary are not adequate. But they should always be construed and applied in a restrictive manner. Such rules should be subject to limitations and conditions, and there should always be the possibility of lifting immunity, following clear and impartial procedures.

186. Countries that have rules on parliamentary inviolability should assess these, in order to evaluate how they function and whether they are still justified and appropriate in a present day context, or whether they should be reformed. If a country chooses to maintain such rules, then these should preferably be revised to take into account the following criteria and guidelines.

Criteria for regulating the scope of parliamentary inviolability

187. National rules on parliamentary inviolability should:

- be subject to limitations laid down in law or parliamentary rules of procedure
- be of a temporal nature, so that proceedings can be brought at a later stage
- be possible to lift, following clear and impartial procedures
- not protect against preliminary investigations of the case concerned
- not apply if the member is caught in flagrante delicto
- not apply to particularly serious criminal offences
- not apply to minor or administrative offences.

Criteria for assessing whether parliamentary inviolability should be lifted:

188. When determining whether parliamentary inviolability should be lifted or not in a given case the following criteria should be taken into consideration.

Criteria for maintaining inviolability:

- when the allegations are clearly and obviously unfounded
- when the alleged offence is an unforeseen consequence of a political action
- when the allegations are clearly brought for partisan-political motives (fumus persecutionis) in order to harass or intimidate a member of parliament or interfere with his or her mandate
- when legal proceedings would seriously endanger the democratic functions of parliament or the basic rights of any member or group of members.

189. *Criteria for lifting inviolability*:

- when the request for lifting is based on sincere, serious and fair grounds
- when the member concerned is caught in flagrante delicto
- when the alleged offence is of a particularly serious nature
- when the request concerns a criminal conduct which is not strictly related to the performance of parliamentary functions but concerns acts committed in relation to other personal or professional functions
- when proceedings should be allowed in order not to obstruct justice
- when proceedings should be allowed in order to safeguard the authority and legitimacy of parliament
- when the member concerned requests that immunity be lifted

190. In any given case the relevant considerations should be weighed against each other. If the request is based on sincere and serious grounds, and if there is no reason to suspect fumus persecutionis, then there should be a strong presumption in favour of lifting inviolability. The basic test should be that inviolability should only be maintained in cases where this is justified with reference to specific considerations and proportionate and necessary in order to safeguard the effective democratic workings of parliament or the rights of any member or group of members.

Guidelines for regulating the procedure for lifting parliamentary inviolability

191. Rules on parliamentary inviolability should always include procedures prescribing how this may be lifted. Such procedures should be clearly regulated and should comply with general principles of procedural law, including rights of both parties to be heard. They should be comprehensive, clear and predictable, and the procedure should be transparent and known to the public. 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 procedures should always respect the principle of the presumption of innocence, as protected by the ECHR.

192. Countries revising their rules on inviolability should consider whether the competence to lift such immunity should remain with parliament, or whether such cases may preferably be subject to judicial review, leaving it to the courts (or to the constitutional court) to determine wholly or partially the scope and application of parliamentary inviolability.

193. If the competence to lift inviolability remains with the national parliament, then the procedures for this should be reviewed, in order to evaluate how they function and whether they live up to present day requirements, or whether they should be reformed. Inspiration in this regard may be drawn from Rule 7 of the Rules of Procedure of the European Parliament and Rule 66 of the Rules of Procedure of the Parliamentary Assembly of the Council of Europe.

194. National procedures on lifting of inviolability by parliament may include the following elements:

- the right to request lifting of inviolability should be given to the ordinary prosecution services, to the member concerned, and to those that are directly and individually affected by the alleged offence,
- the request should be announced in the plenary and referred to the committee responsible,
- the request should be assessed either by an appropriate standing committee or by a special committee, reflecting the political composition of parliament,
- the committee responsible should if possible seek assistance from outside experts that are of undoubted integrity and independence. Such experts should preferably be chosen on a general basis, at the start of each parliamentary period,
- the committee should consider the request for lifting inviolability without any delay, but with regard to the relative complexity of each case,
- the committee should have the right to ask the competent authorities for any information or explanation that it deems necessary in order to assess the case,
- the member concerned should have the right to be represented, either by another member or by outside counsel,
- the member concerned should have access to the documents of the case, and should have the opportunity to be heard and to present any document or other form of evidence deemed by the member to be relevant,
- the committee should consider the request for lifting inviolability behind closed doors, and without the member concerned present,
- the committee should respect the need for confidentiality both with regard to information of a personal nature and information which if made public may obstruct the course of justice,
- the committee should assess the case on the basis of the relevant and established criteria, the arguments put forward by the parties, and the facts of the case, and not on any other considerations,
- the committee should not make any examination of the merits of the case in question and should not, under any circumstances, pronounce on the guilt or otherwise of the member concerned, or on whether or not the allegations made justify prosecution,
- the committee should make a proposal for a reasoned decision on whether to lift or maintain inviolability, making clear the criteria on which the conclusion is based,
- the proposal of the committee should include all aspects of the request, and should consider whether inviolability may be lifted partially, and from what sorts of legal action the member should be immune (arrest, detention, prosecution or punishment), as well as the duration of any form of inviolability. In the event of a request relating to more than one alleged offence, each of these should assessed separately,

- the proposal of the committee should be considered and decided by the plenary at the earliest opportunity and without any delay. The plenary session should be open and discussions should be confined to the arguments for and against the proposal,
- the decision on whether or not to lift inviolability should be legally binding on all parties.

CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, §§ 184-194

65. The Commission is of the opinion that Articles 83 and 85 of the Constitution leave sufficient leeway for simplifying the procedure before the Parliament. In fact, these articles do not impose a detailed procedure. It is the Rules of Procedure of the National Assembly that provide for a preliminary committee that reports to the Joint Committee that in turn reports to the plenary of the Assembly. Such a procedure is certainly immunity-friendly and provides ample guarantees for the deputy concerned but its complexity resulted in the fact that often it was not applied in practice and the National Assembly simply let the mandate of the deputies expire instead. A simplified procedure, where there is only one hearing for the deputy, could be envisaged and would not be unconstitutional as long as the framework of Article 83 is respected.

66. Even assuming that the procedure for lifting the immunity could not be simplified, a complete removal of the guarantees for the deputies concerned was not warranted. At the very least, by way of the same constitutional amendment an appeal to the Constitutional Court against prosecution could easily have been maintained. The workload of the National Assembly cannot justify removing the appeal to the Constitutional Court.

67. Instead of seeking a milder solution, the National Assembly proceeded with the most radical measure of complete removal of immunity for the 139 deputies. The Venice Commission therefore concludes that the total removal of all guarantees for the lifting of parliamentary immunity for 139 Members of Parliament contradicts the principle of proportionality.

78. Nevertheless, the inviolability of these Members of Parliament should be restored. The Venice Commission is of the opinion that, in the current situation in Turkey, parliamentary inviolability is an essential guarantee for the functioning of parliament. The Turkish Grand National Assembly, acting as the constituent power, confirmed this by maintaining inviolability for future cases. The current situation in the Turkish Judiciary makes this the worst possible moment to abolish inviolability.

79. Moreover, most of the files concerned by this abrogation relate to freedom of expression of Members of Parliament. Freedom of expression of Members of Parliament is an essential part of democracy. Their freedom of speech has to be a wide one and should be protected also when they speak outside Parliament. The non-violent pursuit of non-violent political goals such as regional autonomy cannot be the subject of criminal prosecution. Expression that annoys (speech directed against the President, public officials, the Nation, the Republic etc.) must be tolerated in general but especially when it is uttered by Members of Parliament. Restrictions of the freedom of expression have to be narrowly construed. Only speech that calls for violence or directly supports the perpetrators of violence can lead to criminal prosecution. The case-law of the European Court of Human Rights shows that Turkey has a problem with safeguarding freedom of expression, not least with respect to cases considered as propaganda for terrorism. This is partly due to the fact that, as explained in the Opinion CDL-AD(2016)002 on Articles 216, 299, 301 and 314 of the Penal Code of Turkey of March 2016, the scope of several provisions of the Penal Code is too wide. This endangers freedom of expression in general but notably also freedom of expression of members of the National Assembly.

80. The constitutional amendment of 12 April 2016 was an ad hoc, “one shot” ad homines measure directed against 139 individual deputies for cases that were already pending before the Assembly. Acting as the constituent power, the Grand National Assembly maintained the regime of immunity as established in Articles 83 and 85 of the Constitution for the future but derogated from this regime for specific cases concerning identifiable individuals while using general language. This is a misuse of the constitutional amendment procedure.

> CDL-AD(2016)027, Turkey – Opinion on the suspension of the second paragraph of Article 83 of the Constitution (parliamentary inviolability), §§ 65-67, 78-80

7. Judicial review of parliamentary acts related to immunity

36. The existence of rules on parliamentary immunity is first and foremost based on the need to protect the principle of representative democracy. Such immunity can be justified to the extent that it is suitable and necessary in order to ensure that the elected representatives of the people are effectively able to fulfil their democratic functions, without fear of harassment or undue interference from the executive, the courts and political opponents. This is particularly important with regard to the parliamentary opposition and political minorities.

37. Historically the idea of parliamentary immunity is linked to the principle of separation of powers. The argument is that there should be a strict separation, so that the executive and the judiciary cannot unduly interfere with the democratic workings of the legislature. Today this argument might be debated. There are very few, if any, democratic systems that apply an absolute separation of powers, in the sense that the main state organs are wholly independent of each other. In parliamentary systems the government is dependent on a majority in parliament, and in presidential systems there is always a set of checks and balances. The idea that members of parliament can be brought before the courts to answer for alleged breaches of the law can today hardly be seen as contrary to the principle of separation of powers. However this principle can still be of relevance when it comes to determining the details of how parliamentary immunity should best be regulated, as for example to justify the widespread practice that it is for parliament itself to decide on whether immunity should be lifted.

38 The main argument against parliamentary immunity is the principle of equality before the law, which is also element of the rule of law. Any form of parliamentary immunity per definition means that members of parliament are given a special legal protection that other citizens do not have. For democracy to function it is particularly important that the members of the legislature themselves stick strictly to the laws that they make for others and that they can be held both politically and legally accountable for their actions. Rules on parliamentary immunity are an obstacle to this, and they are open to misuse and the obstruction of justice. By their very existence they may also contribute to undermining public confidence in parliament and to create contempt for politicians and for the democratic system as such.

144. 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.

145. 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.

146. 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”.

165. 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.

166. The Venice Commission therefore considers 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 (though not with voting rights). Such experts may for example be chosen from academia, retired judges or other people of undoubted integrity and independence. It is granted that such a mechanism does not appear to exist at present 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.

167. Furthermore the Venice Commission takes the view 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 both parties to be heard. As for transparency, the decision should be publicly available, and it should indicate the grounds on which it is based, while at the same time respecting the confidentiality of the criminal investigations and the persons concerned.

168. The Venice Commission furthermore considers that the parliamentary body handling a request to lift inviolability should not make a legal examination of the case as such. In particular it should not under any circumstances pronounce itself on the guilt or otherwise of the member concerned, or on whether there is justification for criminal prosecution. The decision should be based on the facts and merits of the case as submitted by the authorities and the member concerned, and not on other political and outside considerations. The procedures should be simple enough to be applied consistently and to be understood by the public at large, and the decision should be adopted without undue delay. Furthermore there should preferably be one single decision whether to uphold or lift immunity in a given case, so that the prosecuting authorities should not have to apply repeatedly for every step of the proceedings.

> CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities, §§ 36-38, 144-146, 165-168

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