



Immunity for politicians is as old as politics itself. It is a generally accepted form of protection for senior public figures and judges.¹ But the debate over the extent of these immunities is highly polarized. For some, the immunity principle safeguards the freedom of expression in the legislature, at the heart of the democratic system. For others, immunity actively undermines democracy's very foundations of equality before the law.

THE URGENT NEED FOR REFORM

As frustration increases world wide with political bribery, corruption and conflict of interest scandals, so, too, has frustration with the fact that suspected politicians can often enjoy *de facto* immunity from such crimes. In a recent survey undertaken by Gallup International, 63 percent of respondents considered public officials' immunity from prosecution to be the main cause of an increase in corruption in their country.² [.] Thus, in many parts of the world, the very idea of political immunity is considered anachronistic and in contravention of the most basic principles of constitutionality and equality before law. It recalls the popular Orwellian maxim that "all animals are equal, but some animals are more equal than others."

Indeed, it seems that many investigations into high-level corruption allegations have been significantly impeded by claims of political immunity. The scope of political immunity can be extended further than intended, and in such cases politicians enjoy *de facto* immunity from even serious crimes.

In many countries, senior public officials are shielded by immunities to such an extent that criminals often seek public office simply to avoid prosecution. In such cases, there is a very high risk for a vicious cycle of corruption; parliament, by virtue of its privileged protection, attracts unethical individuals who then perpetuate and augment corrupt conduct. Some individuals in need of legal protection have even bribed their way onto party election lists in order to secure immunity.

Even if a corrupt entrepreneur is unable to attain a public office, he may try to attach himself to a political patron who, using his shield of immunity, is able

to protect him. The exchange of favors and bribes is highly likely in such situations. Through excessive political immunity, politicians can be rendered virtually untouchable.

THE ELEMENTS OF IMMUNITY

Any discussion of immunity raises four questions:

- *Who is given protection from prosecution?*
- *What acts are covered by immunity?*
- *How long does an official's or politician's immunity from prosecution last?*
- *How far does the protection extend (e.g. to the legislature only)?*

The immunities and privileges refer to instances whereby selected officials are specifically shielded from public prosecution or from civil action. The category of an official who is granted this immunity and the level of the immunity can be defined either in a country's constitution or in its legislation.

Such protection is designed not to bestow a personal favor on the office-holder, but to facilitate his or her ability to perform the functions of office. It is not meant to enable a senior public official to conduct private business without having to pay rent or creditors or perform contractual obligations of a personal nature.

Rather, immunity from prosecution is meant:

- *To ensure that the elected representatives of the people can speak in the legislature without fear of criminal or civil sanctions and a host of claims for defamation*
- *To protect elected representatives from being arbitrarily detained and so prevented from attending the legislature*
- *To act as a shield against malicious and politically-motivated prosecutions being brought against them*

Immunity for politicians should, therefore, be seen as intended to protect the democratic process – not to establish a class of individuals who are above and beyond the reach of the law.

Although the **principle of non-accountability or freedom of speech** is generally subscribed to and is non-controversial, the so-called “**inviolability principle**” (or freedom from arrest) is increasingly contested. In Ancient Rome, to obstruct the tribunes in their work was to invite immediate execution, but in more recent times, parliamentary immunity has been called anachronistic, contrary to the fundamental principles of modern constitutional law. Such criticisms have been countered by those who argue that, despite existing anomalies, the reasons which originally lay behind the introduction of parliamentary immunity into modern constitutions are still valid. The debate has resulted in some countries reforming their legal procedures and changing the practices followed by their legislatures, so that restrictions are imposed on the scope of inviolability.

THE GRECO REVIEWS

Immunity from arrest has been a cause for concern for the Group of States Against Corruption (GRECO), made up of member states of the Council of Europe, in their reviews of transition countries’ anti-corruption legislation.³

Among the countries where the subject of immunity has been openly debated is Slovenia. In its review, GRECO recommended that guidelines be established to provide criteria for deciding on requests to lift parliamentary immunity. The guidelines are meant to ensure that in the case of judges, decisions concerning immunity are free from political consideration and are based on the merits of the request submitted by the public prosecutor.⁴

The guidelines being considered in Slovenia read:

I. As a rule, immunity shall not be granted if:

a) the deputy is placed into custody or a criminal proceeding is instituted against him/her before his/her mandate is confirmed; or

b) the deputy is caught in the act of committing a crime punishable by imprisonment of more than five years; or

c) the deputy does not claim immunity.

II. In all of the above cases and in any other, the following procedures will be followed:

a) each of the alleged criminal offences shall be dealt with separately, on the basis of a notice or request from the competent body;

b) functions of the deputy in question shall be determined;

c) it shall be estimated whether granting of immunity is essential for the deputy to perform his/her function; and

d) as a rule, immunity shall not be granted and therefore each decision on granting the immunity shall be well grounded.⁵

In its review of Romania, the GRECO team of experts noted that the Romanian Constitution grants deputies and senators immunity from prosecution, not only for opinions expressed during the exercise of their mandate, but also from arrest, detainment, search and prosecution for any criminal offence or transgression. Such immunity prevails unless the minister of justice submits an application for the removal of immunity, and parliament authorizes prosecution by a two-thirds majority in the Chamber of Deputies and by a simple majority of the Senate. The case is then heard by the Supreme Court of Justice. Immunity is automatically restored if the member is re-elected. As GRECO noted, “This situation has an undeniable potential for permanent obstruction of the judicial system.”

In cases of being caught *in flagrante delicto* (in the act of committing an offence), a deputy or senator may be detained and searched, but not prosecuted. The respective chamber must be promptly informed and may order the cancellation of the detainment.⁶ According to one prosecutor from the Romanian Anti-Corruption Section, “We have problems with parliamentary immunity. In my opinion, it is not normal that an MP who plundered a bank or who

engages in smuggling benefits from immunity. These are some of the reasons why the judiciary is often powerless.” The Romanian government’s National Anti-Corruption Plan includes a commitment to limit immunity in general.

THE HEAD OF STATE AND GOVERNMENT

In addition to legislators, a head of state is generally immune for the period of his or her office (as confirmed in a recent decision in France). Constitutions usually provide for the impeachment of a president, and serious criminal acts would provide those grounds. There is, therefore, a remedy, but it lies with the legislature rather than with the judiciary.⁷

OTHER SENIOR OFFICIALS

There are also classes of officials who enjoy personal immunity for their official actions. This simply means that they cannot be sued personally for mistakes that they may have made during their employment. The remedy for the wronged citizen is to sue their employer, the state. However, there is no valid reason why any such immunity should extend to cover the personal life and the private business dealings of such persons.

JUDGES

Judges present a special difficulty. They are generally immune from being sued personally for errors they may have made in their judgements (for example, for exceeding their jurisdiction) and to protect them from political pressures they are generally immune from criminal prosecution unless the immunity is lifted.

In the case of Estonia, the GRECO review recommended that any decision to lift the inviolability of judges should be free from political influence. It should be a decision based on a request from the prosecutor, supported by the Supreme Court.⁸

Under the Estonian Constitution, the procedure for lifting judges’ immunity involves either the president of the republic or the Riigikogu (the legislature). The Courts Act of 2002 established rules for bringing

criminal charges against judges in both cases. These are meant to guarantee that no political influence is brought to bear on any decision to lift immunity and that it be based on a request from a prosecutor, supported by the Supreme Court. However, there is still a need to obtain the consent of parliament in order to bring charges against the chief justice and justices, or the consent of the president in order to bring charges against a senior judge.

The position of judges, their independence and their accountability is discussed in Chapter 16.

PROSECUTORS

Attention should be paid also to the risks of immunity of prosecutors. In a number of countries, prosecutorial immunity has been too broadly defined. This undermines prosecutors’ ability to function as defenders of the public interest and in some cases led to a corrupt partnership between prosecutors and leading figures of the underground.

In some countries, like Bulgaria until recently, prosecutors were virtually untouchable, which fuelled widespread public criticism and international pressure to reform. Leading NGOs in this country recommended limiting such an immunity by structural reform, as well as by strengthening internal controls, and expanding transparency within the judiciary in general (See Corruption Assessment Report 2003, Sofia, 2004, p.32-33).

IMMUNITY LEGISLATION AND PRACTICES

As we have seen, certain principles can be observed which are relevant to all countries on the question of political immunity. Generally speaking, there are two separate categories of immunity:

- **The principle of non-accountability or non-liability:** *This is the original, basic protection afforded to politicians, and refers mostly to the freedom of speech and expression.*
- **The principle of inviolability:** *This refers to a broader, more flexible protection which gives the politician freedom from arrest.*

The **non-liability principle** is recognised around the world, and is originally based on the notion that politicians should be protected from unfair charges levelled against them by superiors. Thus, members of parliament are not held accountable for accusations or comments that they make in a highly charged and politicized environment. Non-liability also refers to casting votes and other similar official declarations in which the interests of the people the parliamentarian represents must be safeguarded.

The non-liability principle, generally narrowly defined, is usually absolute; there are, in most cases, no time limits and no possibility of lifting the immunity. Closely related to the principle of unconditional freedom of speech, it is generally based on the tacit understanding that accusations and defamatory statements will be kept at an absolute minimum. It is felt that if protection is not guaranteed by non-liability privileges, then members of parliament would feel constrained, compromised and unable to speak and vote freely on behalf of the people they represent.

Without this immunity, the very independence of the parliamentary institution would be called into question, as well as its ability to function in light of potential politically motivated investigations into defamation allegations. Where the right to speak freely is abused, the institution itself generally has rules of accountability and is in a position to suspend a member from the legislature for a given period.

The same principle applies to the judiciary, which is also accorded a similar level of immunity. It would compromise the effectiveness of the judiciary as an institution if a judge could be held personally liable for honest mistakes of law made during a trial. The principle does not apply to judges who acted corruptly in their rulings. It is more effective for the state to be held liable in such instances and for judges to be removed only if they are proven incompetent or unfit for duty. Special procedures should exist to protect judges from politically motivated requests for removal.

By contrast, the **principle of inviolability** is far more controversial, and depends largely on the definition and the political environment. In the Netherlands, politicians do not enjoy any parliamentary inviolabil-

ity whatsoever. In the United Kingdom, parliamentarians are given very little protection on this question. They are immune from arrest for civil actions, but since there are now very few civil causes on which a person can be detained, the privilege offers little meaningful protection. Often, if parliamentary involvement is required, it is a matter of authorizing an investigation.

In Belgium, the police can investigate the activities of parliamentarians without political interference – including searches, seizures and questioning – but authorization is required for a member of parliament to be committed to trial. By that stage, such authorization meets little resistance. The accused still has certain rights such as the guarantee of having a representative of the assembly present during any potential search.

This compares with Nicaragua where in 2002 it took a public petition signed by more than half a million citizens before a reluctant legislature cleared the way for the former president to be prosecuted (and convicted) for embezzling over \$100 million in public funds.⁹

On the issue of non-liability, the scope of immunity generally refers to acts committed in the performance of the politician's duty, either in parliament or on official occasions. Thus, it generally does not extend to statements made during non-official public speaking or in newspaper articles. The parliament building is the bricks-and-mortar manifestation of the boundaries of this form of immunity, outside of which the politician becomes an ordinary citizen again.

Some countries have particular provisions which allow for persons other than parliamentarians to enjoy the immunity privilege of absolute free speech. In the United Kingdom, for example, all those who attend parliamentary debates and proceedings – including civil servants and expert witnesses – are covered by the non-liability principle.

However, it is generally accepted that when parliamentarians are caught *in flagrante delicto* – in other words, if he or she is caught during or soon after committing the punishable offence – **inviolability**, the second category of immunity, offers no protec-

tion. There are different interpretations of *in flagrante delicto*, however, and some countries extend it to a full 24 hours after a crime was committed.

In terms of the acts covered under inviolability, there is little international harmony. Some countries define which crimes are not covered by immunity; others set limits on the length of the potential term of imprisonment for the crime. Thus, the Swedish Constitution states that the inviolability principle does not cover criminal offences that are punishable by two years or more in jail. In Finland, the provisions are more severe: Parliamentarians are only protected if the potential investigation relates to a crime where the maximum penalty is less than six months. This is generally deemed to be a best practice.

Certainly, it is illegal for politicians to bribe or accept bribes, although the ability to prosecute such offences depends largely on the political environment and how strictly the inviolability principle is enforced. While a country may nominally forbid bribery among politicians and citizens alike, politicians are often protected not only by the vague lettering of the immunity provisions, but also by public officials who are supposed to prosecute serious offences, yet prefer to protect their colleagues.

Legislation differs from country to country on how long the principle of inviolability can be applied to parliamentarians and officials. The time limit for inviolability is a particularly important question to be considered in drafting any legislation on immunity. In some countries, the principle is only relevant for the length of the parliamentary session. In other countries, however, immunity practices allow for a legislator to have his or her immunity automatically restored if he or she is re-elected to office. Politicians elsewhere are granted immunity that pre-dates their term of office, a provision which can have the dangerous effect of attracting criminals who want to avoid prosecution. This type of provision can corrupt an entire series of politicians, and should be avoided in any political immunity legislation.

Certainly, life-long immunities of inviolability are indefensible. The privilege must be given up upon leaving office, in all cases. Limits should be imposed on the length of time that a president and/or prime minister can hold office. Some form of regulation must hold

officials and politicians accountable for their actions, even if they are immune from prosecution while on official duty. Naturally, this still makes any investigation difficult, since the investigators may be inquiring about events which happened several years earlier. Immunity is given not as an honor or a privilege, but, rather, is a sacred trust that enables an individual to discharge his or her public duties effectively. Upon leaving office, the official must answer for any criminal conduct that he or she may have been involved in during his or her time in office.¹⁰

PROCEDURES FOR WAIVING PARLIAMENTARY IMMUNITY

Procedures for waiving parliamentary immunities can vary widely. Indeed, in many countries, there is no procedure provided at all, either because there have been no cases to set a standard procedure or because there is a distinct lack of political will to clarify such delicate matters. In some instances, the procedures for lifting immunity are deliberately made complicated in order to discourage such requests.

Nonetheless, it is particularly important to establish a firm set of principles to deal with requests for waivers. As a general rule, such principles should take into consideration that:

- *The request concerns a grave crime, in which the reputation of the parliament itself is at stake.*
- *The request does not unfairly impinge upon the politician's freedom of speech and freedom to carry out his or her mandate to represent voters.*
- *The purpose of the request is not to unfairly single out and discriminate against a politician.*
- *The facts of the case are not clouded by obvious political machinations.*

Often, when considering a request to waive parliamentary immunity, a specific parliamentary committee is established to hear the particular case. Depending on the conclusions of this committee, parliament will vote to decide on the immunity status of the member of parliament in question. The initial request to lift immunity for a given parliamentarian

is usually made by state prosecutors, a special prosecutor, or the minister of justice. In most cases, the relevant committee, the parliamentary speaker, and one or two ministers are notified of the request. Once the special committee has made its decision on the matter, the parliament tends to follow its recommendations. The level of majority required to authorize waiving political immunity is often two-thirds. This requirement, however, varies from country to country.

In France, the Bureau of the National Assembly is endowed with the power to deprive a parliamentarian of his or her immunity rights. Initially, this body decides only on whether a request to restrict a deputy's freedom is genuine, truthful and made in good faith. No consideration is given to the merits of the case. To waive the immunity – usually at the request of the Ministry of Justice – a rapporteur and ad hoc committee are appointed and their conclusions are debated by the National Assembly or Senate at a public sitting.¹¹

The issue of political immunity transcends borders. Many allegations of corruption deal with international arms trade, personal wealth in a foreign country and the like. Also, the privilege of political immunity extends to a large corps of foreign diplomatic representatives. Thus, it is particularly important that elected public officials are also subject to extradition. This should carry with it the requirement that the countries concerned have an agreement that recognizes each other's criminal charges.

AN EXAMPLE OF GOOD PRACTICE

In the Netherlands, there is very little scope for parliamentary immunity. Since 1884 Dutch legislators have been placed on the same basis as ordinary citizens in respect to criminal and legal proceedings. Privilege extends only to the non-liability principle, and this covers only acts which are explicitly linked to the parliamentary mandate. Thus, Dutch parliamentarians are protected only for opinions expressed and votes cast in the performance of official duties. This right is absolute and unlimited.

The parliament has no role in waiving its members' immunity. – Instead, for over 150 years, the Supreme Court has adjudicated in such matters. Today, there is no need for legal procedures for the privilege to be waived.¹²

The establishment of a clear and enforceable standard of political immunity is an essential component of any national anti-corruption campaign, especially in countries where important investigations are impeded by privileges and protection. The curtailment of excesses and abuses related to political immunity is an initiative that builds confidence in a democratic system. It demonstrates trust in the objective capability of its institutions and demonstrates a high degree of political will in favor of accountability.

Certainly, it is essential that immunities and privileges are defined narrowly and do not deviate too far from the principle of equality before the law. Worryingly, the trend across many countries has been precisely the opposite; instigating legislation to increase the scope of political immunity in order to avoid or divert investigations into the nefarious activities of political leaders.

By contrast, the closing declaration of the 11th International Anti-Corruption Conference in 2003 proclaimed that "immunities are afforded to far too many people and in a needlessly wide and general fashion... We believe that governments must review the scope of any immunities as a matter of urgency, and then take any action necessary to restrict these to legitimate and justifiable limits."

Any law on political immunity must strike a delicate balance between protecting the work of democratically elected officials against politically-motivated trials on the one hand. At the same time, in any democratic society which values the principle of equality before the law, it would be absurd to have a situation in which those who make the laws are also those who are exempted from complying with them. Political immunity ought never be allowed to become total impunity.

ENDNOTES

- 1** Resources: “Rules On Parliamentary Immunity In The European Parliament And The Member States Of The European Union,” European Centre For Parliamentary Research And Documentation (ECPRD): 2001. <http://www.ecprd.org/Doc/publica/OTH/RulesParlImmu.pdf>; GRECO reports series (see below)
- 1** A total of 48,038 people were surveyed in 47 countries for the Voice of the People survey, conducted by Gallup International in July 2002.
- 2** GRECO: <http://www.greco.coe.int/>
- 3** GRECO Evaluation Report on Slovenia, 28 March 2003 <http://www.greco.coe.int/evaluations/cycle1/Eval1Reports.htm> (scroll down)
- 4** GRECO, Compliance Report on Slovenia: [http://www.greco.coe.int/evaluations/cycle1/GrecoRC-I\(2003\)1E-Slovenia.pdf](http://www.greco.coe.int/evaluations/cycle1/GrecoRC-I(2003)1E-Slovenia.pdf)
- 5** GRECO, Evaluation Report on Romania, 8 March 2002 <http://www.greco.coe.int/evaluations/cycle1/Eval1Reports.htm> (scroll down)
- 6** There have, in fact, been very few cases of Romanian MPs being stripped of their immunity, and none concerning corruption cases. For example, in 1997 the Chamber of Deputies refused to cancel Deputy Gabriel Bivolaru’s immunity in connection with an alleged 2.425m fraud. The Anti-Corruption Section has unsuccessfully requested that the minister of justice waive another MP’s immunity.
- 7** For documents related to the impeachment of U.S. Presidents Andrew Johnson, Richard Nixon and Bill Clinton, see: <http://www.lib.auburn.edu/madd/docs/impeach.html>
- 8** GRECO Evaluation Report on Estonia, 9 July 2003 <http://www.greco.coe.int/evaluations/cycle1/Eval1Reports.htm>
- 9** Transnationale.org, “Nicaraguan ex-leader loses his immunity,” December 18, 2002: <http://forums.transnationale.org/viewtopic.php?t=765&view=previous>
- 10** Non-liability for official acts would, of course, continue.
- 11** Article 26 of the French Constitution
- 12** Article 71 of the French Constitution