Parliament Immunity and Building Democracy in Kosovo

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Abstract: This research aims to study the parliamentary immunity and its relation with principles of democracy, by providing concrete explanations on how this matter is regulated in Kosovo. This work does not insist on classical interpretations, but it rather aims for better understanding of the conceptual history of the parliamentary immunity, intending to leave aside its abstract dimensions and analyzing it as an institution with strict and applicable rules and practices. This research examines the close relationship between parliamentary immunity and human rights as seen under the light of interpretations of European Court for Human Rights (ECHR) and Kosovo's Constitutional Court. It is argued further that parliamentary immunity is essentially a national phenomenon which belongs to constitutional norms that regulate national institution's competences and functions. However, as with many other law institutes, even the parliamentary immunity has not been immune to "law internationalization". Despite the fact that European countries have different approaches to parliamentary immunity, they are all subjects of norms deriving from the European system of human rights.

Keywords: Parliamentary immunity; democracy; human rights; ECHR; concept

1. What does Parliamentary Immunity Contain?

The question of what constitutes parliamentary immunity has more than one answer. The plurality and variety of answers comes from the plurality and variety of legal systems and constitutions that exist today in the world. But despite these differences, there is a definition and a content that is applied in all constitutional and legal systems of democratic states (Inter-Parliamentary Union, 2000, p. 77).

The main feature is that members of parliament have been given a degree of protection against legal, civil or criminal rules that otherwise apply to all citizens.

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The basic idea is that the elected representatives of the people need certain guarantees in order to effectively fulfill their democratic mandate without the fear of court charges imposed by the executive or the political opponents (European Commission for Democracy Through law, 2014). Thus, immunity is the protection of the deputy (member of parliament) against legal responsibility, any kind of prosecution, civil lawsuit or dismissal for actions and decisions taken, held speeches, expressed opinions, votes given and the like, within the scope as a deputy. The word immunity comes from the old Latin immunis that in free translation means of purging the load, releasing, dismissed. The English Model of Immunity preserves the Latin sense of privilege[1] and refers to a special status of the representative within the parliament (Hardt, 2013, p. 56).

The basis of this immunity lies in the principle of popular sovereignty. Since the deputy is a representative of the people, the expression of popular sovereignty, he is as exhilarating as the popular sovereignty itself. Parliamentary immunity also finds strong support in the principle of power sharing, as legislative power is exercised by parliament consisting of deputies, this principle includes the independence and inviolability of the deputy in relation to the executive and judicial powers (European Commission for Democracy Through law, 2014).

In legal literature and in constitutional practice, it is generally accepted that the protection afforded by immunity is “necessary for the functioning of democracy” (A.v. The United Kingdom, ECHR 17 December 2002). On the other hand, the purpose of this protection is often perceived as excessive. Parliamentary immunity has been criticized as facilitating corruption among parliamentarians and as an undeserved defense tool for defamations and insults coming from the ranks of parliament (Wigley, 2013, pp. 23-40). It has been argued that parliamentary immunity allows representatives to pursue their personal and political interests and not state interests[2], an opportunity which is seen as non-democratic and often leads to calls for a pattern of limited immunity.

[1] The word “privilege” is derived from Latin privilegium which consists of the words “privus” (separated or separately) and “lex” (the law).

[2] It is insignificant whether a deputy performs his / her function in the parliament building or in any other place, the opinion and the vote have significance regarding the cases that are in the competence of the parliament.

2. Parliamentary Immunity and the European Court of Human Rights

Parliamentary immunity essentially belongs to the constitutional norms governing the powers and functioning of the central state institutions. This made it mainly a national phenomenon (Hardt, 2013, p. 17). However, as many other legal institutes and parliamentary immunity have not escaped a wave of "internationalization of the law". Thus, European states, despite distinct immunity systems at national level, are also subject to norms deriving from the European human rights system that are mandatory[1]. Their immunity systems should therefore comply with the provisions of the European Convention on Human Rights (hereafter "ECHR") and the standards developed in the case law of the European Court of Human Rights (hereafter "ECtHR") (Hardt, 2013, p. 17). ECHR does not regulate parliamentary immunity. However, the exercise of immunity in certain specific cases may conflict with the rights protected by the Convention (European Commission for Democracy Through law, 2014). More concretely, there are two categories of cases in which the rights guaranteed by the Convention are under discussion (Directorate General for Internal Policies Policy Department c, 2015). The first and most important category relates to the right of access to court under Article 6(1) of the Convention. This article states: "Everyone has the right to be heard fairly, publicly and within a reasonable time by an independent and impartial tribunal established by law. (...)".

It is estimated that parliamentary immunity in any form gives much potential for conflict with this right, as immunity protects parliamentarians from legal actions against them and thus forbids or restricts access to court of others. Thus, citizens can be denied the possibility of (legal or civil) action against a deputy. This can happen, for example, in defamation cases where the statements in question are protected by non-liability. Secondly, it may happen that MPs themselves may be deprived of the opportunity to be involved in a court case in which they want to be involved, but parliament refuses to lift immunity. Also, immunity can create trouble in the sense of the right to an independent and impartial trial, since the right to remove or not the immunity of its members seems to come to parliament with powers of criminal (material or procedural) nature (Directorate General for Internal Policies Policy Department c, 2015).

Despite these dilemmas, it is clear that MPs should have absolute freedom of declarations made during parliamentary sessions in the sense that parliamentarians

[1] With the exception of Belarus, Kosovo and the Vatican State which are not contracting parties European Convention on Human Rights.

cannot be held accountable before the law. The main case of the ECtHR in the matter of parliamentary immunity (or privilege) as an obstacle to the right of access to court is Av. the United Kingdom (A.v. The United Kingdom, ECHR 17 December 2002, Xv. Austria, Commission Decision of 6 February 1969; Agee v. the United Kingdom, Commission Decision of 17 December 1976). In this case, during the British parliament session, Michael Stern, a British MP, made some remarks on antisocial behavior, drug taking and prostitution, to his neighbors by mentioning people by names. Thereafter, neighbors were contacted by journalists and television reporters. Meanwhile they decided to take legal action against Stern, eventually, the case ended in Strasbourg. Neighbors argued that Stern's parliamentary immunity prevented them from taking legal actions in relation to statements made to them in Parliament, and therefore violated their right to access to court under Article VI of the Convention.

The main question that the Court faced in A.v. UK was whether parliamentary immunity constituted an excuse for limiting the right of access to court. The court clarified that the right of access to the court is not absolute, but may be subject to limitations. So states enjoy a certain margin of appreciation regarding its limitation, although the final decision on whether or not to comply with the ECHR requirements belongs to the Court. Of course, the restriction made by the state must in any case preserve the essence of the law. Moreover, a restriction will not be consistent with Article VI of the ECHR if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means used and the purpose sought to be achieved. By respecting the internal rules on immunity, the court finally concluded that there was no violation of Article 6 in this case.

Along with cases relating to the right of access to court under Article VI of the Convention, a second important category of judicial practice in the context of parliamentary immunity also relates to Article 10 of the Convention on Freedom of Expression. This Article defines:

"Everyone has the right to freedom of expression. This right includes freedom of opinion and the freedom to receive or to provide information and ideas without the intervention of public authorities and regardless of the boundaries. (...)"

In the parliamentary immunity report with freedom of expression under Article 10 of the ECHR there are two important issues. The first issue is whether parliamentarians when they speak outside the parliament generally enjoy a broader margin of freedom of expression than ordinary citizens. If so, this can be interpreted as a special status, privileged for parliamentarians under the ECHR, a

form of immunity under the Convention. The second question is whether there are special restrictions on the freedom of expression of parliamentarians (Hardt, 2013, p. 36)? Depending on whether we have a positive answer or not, this will be decisive for the fact whether they will give an additional degree of parliamentary defense. Both of these issues have been dealt in the ECtHR jurisprudence. The most important case in the ECtHR regarding freedom of expression outside parliament is Castells v. Sapin (Castells v. Spain, 23 April 1992). The applicant, an opposition member of parliament, published an article in which he accused the Spanish government of being inactivated by attacks and murders that had taken place in Basque (Spain's region). The article further claimed that police had collaborated with the guilty parties by doing so indirectly the government responsible for the events.

The applicant in this case was accused of insulting the government, a crime punishable under Spanish law. The Supreme Court finally sentenced the applicant to one year in prison, he was also disqualified from public posts at the same time. The sentence was subsequently confirmed by the Constitutional Court.

The applicant complained to the ECtHR for a violation of his right to freedom of expression under Article 10 of the Convention. Castells was a member of the Spanish Senate at that time, the Court's obligation was not simply to determine whether his sentence violated Article 10 even if, as an elected representative, he enjoyed a broader freedom of expression than others.

The Court recalled that freedom of expression, sanctioned in paragraph 1 of Article 10, constitutes one of the basic foundations of a democratic society and one of the basic conditions for its progress. It noted that freedom of expression is applicable not only to “information” or “ideas” that are favorably received or considered as harmless or irrelevant, but also to those who insult, denigrate or worry. Such are the demands of this pluralism, tolerance and broad perspective, without which there is no “democratic society”, the court argued (Castells v. Spain, 23 April 1992). The court further emphasized the importance of freedom of expression, in particular for elected representatives (MPs):

“Freedom of expression is important to everyone, especially to the elected representatives of the people. He represents his electorate, expresses care for their concerns and defends their interests. Consequently, freedom of expression for a member of the parliamentary opposition is like a plain submitter of a request for review to the court” (Castells v. Spain, 23 April 1992).

On the basis of this finding of the court and in the fact that the complainant had denied the opportunity to prove the authenticity of his claims against the Spanish Government, the court found a violation of Article 10 (Castells v. Spain, 23 April 1992). However, it remained unclear whether MPs enjoy a wider freedom of expression than other citizens. In this case the ECHR found that the determining factor for the court is not so much the status of an individual as a deputy or other representative of the people, but the importance of words in warning the public political debate (Directorate General for Internal Policies Policy Department c, 2015).

The second aspect of freedom of expression is to what extent the immunity of a member of parliament restricts the freedom of others to disseminate information about this person. This case was addressed in Karhuvaara and Iltalehti v. Finland (Karhuvaara and Iltalehti v. Finland, 16 November 2004). In this case, newspaper "Iltalehti" reported on a case of attack on a police officer. The title of the relevant article mentioned that the author was the husband of a member of the Finnish parliament. According to Finnish criminal law, dissemination of information about a person's private life is punishable if it is likely to cause damage or suffering to the person, unless the information concerned relates to the person's position in politics, business or public office other public and affects its activity in that position.

At that time, a provision in the Finnish Parliament's Law (which was later abolished by a constitutional amendment in 2000) stipulated that when the victim of the abuse was a member of parliament, this constitutes a serious aggravating circumstance. Chief Editor Karhuvaara was convicted under the aforementioned criminal provision. He was imposed on him with a heavy fine, as required by the Act on Parliament, from the status of the victim as a member of parliament. The complainants complained to the European Court of Human Rights that their sentence, and in particular the deterioration of their sentence with the status of the victim as a parliamentary, had violated their freedom of expression. The issue here was the increase in the sentence because the question was a member of parliament was a restriction of a right that was regulated by law. The court had to assess whether this restriction was "necessary in a democratic society" (Tümay, 2011)[1]. And the court found that this was not a necessary restriction in a democratic society. Moreover it estimated that the case decided by the national court was not

[1]The concept "Necessary in a democratic society" was developed by the European Court of Human Rights. It determines the degree of state intervention in human rights that are protected by convention. We have determined that this intervention always needs to have a legitimate aim and that interference is subject to international oversight.

related to parliamentary immunity. In the absence of any connection to the fundamental goals of parliamentary immunity, the use of Mrs E A. parliamentary status as an aggravating factor of the offenses concerned was seen as problematic by the court (Karhuvaara and Iltalehti v. Finland· 16 November 2004).

Similarly to its approach to parliamentary immunity in cases involving the right of access to court, the court was not ready to accept a higher degree of protection for parliamentarians than was necessary in the light of their parliamentaryfunctions. This approach is important not only for issues of freedom of expression, but for all (hypothetical) cases in which the status of a person as a parliamentarian adversely affects the legal position of a third party (Directorate General for Internal Policies Policy Department c, 2015).

3. Parliamentary Immunity in Kosovo

Parliamentary immunity in Kosovo should in any case be explained in conjunction with the constitutional principle of free (Inter-Parliamentary Union, 2000, pp. 6-23), mandate set by Article 70 of the Constitution: "Members of the Assembly are representatives of the people and not subject to any binding mandate".

The indispensable bond of parliamentary immunity with the principle of free mandate does not mean that it is a personal privilege of the deputy. Rather, it is all intended and in function of proper functioning and for the benefit of the citizens of parliament. The basis of parliamentary immunity in Kosovo is found in Article 75.1 of the Constitution: "Members of the Assembly enjoy immunity from prosecution, civil lawsuit or dismissal for their actions and decisions within the scope of their responsibilities as deputies of the Assembly. Immunity does not impede the prosecution of Assembly deputies for actions taken outside the scope of their responsibilities as deputies of the Assembly."

Paragraph 1 of Article 75 guarantees members of the Assembly of the Republic of Kosovo for immunity from irresponsibility or otherwise known as material immunity. This means that MPs are protected from any kind of criminal prosecution, all kinds of civil lawsuits or dismissal for parliamentary acts and decisions (speech delivered, expressed opinion, vote given and similar) during the exercise of the function of the deputy (Hasani & Čukalovic, 2013). It results that parliamentary immunity does not protect MPs from prosecution for acts done outside the exercise of their MPs' functions. What the term "scope of the deputy" expresses this issue has clarified the Constitutional Court in the case no. K098/11

of 2011. The Court found that: “The Constitution clearly defines the scope of MPs’ responsibilities. They are actions and decisions that are undertaken to carry out the competencies of the Assembly of Kosovo, as defined in Article 65 of the Constitution. As a result, MPs enjoy immunity for actions or decisions taken concerning:

(1) The adoption of laws, resolutions and other general acts;

(2) The decision to amend the Constitution by two-thirds (2/3) of the votes of all its deputies, including two-thirds (2/3) of all deputies holding the seats reserved and guaranteed to the representatives of communities that are not in the majority in Kosovo;

(3) Announcing a referendum, in accordance with the law;

(4) The ratification of international treaties;

(5) The approval of the Budget of the Republic of Kosovo;

(6) Election and dismissal of the President and Vice-Presidents of the Assembly;

(7) Election and dismissal of the President of the Republic of Kosovo in accordance with this Constitution;

(8) The election of the Government and the expression of mistrust to it;

(9) Supervising the work of the Government and other public institutions, which, according to the Constitution and laws, report to the Assembly;

(10) Election of members of the Kosovo Judicial Council and the Kosovo Prosecutorial Council, in accordance with this Constitution;

(11) The proposal of the judges of the Constitutional Court;

(12) Overseeing foreign and security policy;

(13) Giving consent to the President's Decree on the Announcement of the State of Emergency;

(14) Deciding on (issues of general interest, as defined by law) (Constitutional Court of the Republic of Kosovo, Judgment in Case no. K098/11, 20 September 2011).

Meanwhile, paragraph 2 of Article 75 guarantees immunity of inviolability or procedural immunity, as follows: “A Member of the Assembly cannot be arrested

or detained while performing his/her duties as a deputy of the Assembly without the consent of the majority of all deputies of the Assembly".

The immunity stipulated in this paragraph protects from arrest, prosecution, trial and taking other measures against their personal freedom. Otherwise, material immunity, i.e. immunity from irresponsibility, the effect of this immunity is relative and it can be removed, under the terms set forth by the Constitution and the Rules of Procedure of the Assembly (Hasani & Čukalovic, 2013).

Thus, the General Prosecutor of Kosovo may make a request for the removal of the immunity of a deputy in cases when a lawsuit has been filed against him under the Code of Criminal Procedure of Kosovo, the request for suspension of immunity of a deputy may be submitted by the court which has the case under investigation (Law no. 03/l-111, Article 9, paragraph 3). The request for the removal of immunity shall be addressed to the President of the Assembly who shall immediately send it to the Mandate and Immunity Commission, which shall review the recommendation for the next session of the Assembly within thirty (30) days of the receipt of the request. For the removal of the deputy's immunity, the majority of the votes of all deputies of the Assembly of the Republic of Kosovo are needed (Law no. 03/l-111, Article 9, paragraph 7).

In cases when the deputy commits a serious criminal offense punishable by five (5) years or more imprisonment, the detention or arrest measure may be taken against him even without the prior removal of the immunity from the Assembly (Rules of the Assembly of the Republic of Kosovo, Article 22, paragraph 5 & Law no. 03/l-111, Article 9, paragraph 9).

Where this protection offered to MPs is related to those actions that MPs take outside their function and when they perform them, they do not appear as deputies but as ordinary citizens. Therefore, if those actions are unlawful, they will respond as all other persons. This privilege is not recognized to the people's representatives so that they are released from responsibility, but only to be protected from "tendentious accusations" (Hasani & Čukalovic, 2013).

The MP has immunity while he is in his post as a deputy. So the immunity of the MP begins on the day of the verification of the mandate and ends with the termination of his mandate.

4. Conclusion

Despite debates and disagreements, parliamentary immunity is considered essential for the proper functioning of parliaments everywhere in democratic countries. Deputies have a special status while they exercise their mandate, because of this special status they enjoy the immunity that gives them greater freedom, security and greater independence in relation to the executive and judicial powers. This only to the extent that the actions and decisions they take fall within the scope and responsibilities of the parliamentary mandate they have.

In this paper it has been proven that the protection provided by the immunity is necessary for the functioning of democracy. On the other hand, the purpose of this protection is often perceived as excessive. Parliamentary immunity has been criticized as facilitating corruption among parliamentarians and as an undeserved defense tool for defamations and insults coming from the ranks of parliament. Finding a balance in this middle seems to be an inevitable obligation.

Exercise of immunity in some specific cases may come into conflict with human rights. More concretely, there are two categories of cases in which the human rights guaranteed by the Convention are under discussion. The first and most important category relates to the right of access to court under Article 6(1) of the Convention. Whereas, the second category with Article 10 of the Convention on Freedom of Expression.

The rules of parliamentary immunity in Kosovo are clearly defined, and as explained by the Constitutional Court, parliamentary immunity protects deputies for actions and decisions taken solely on issues related to the exercise of the function of the deputy and not for other actions.

5. References

Directorate General for Internal Policies Policy Department c (2015). Citizens' Rights and Constitutional Affairs, Llegal Affairs, "Parliamentary Immunity in a European Contextin.

Hasani, E & Čukalovic, I (2013). *Commentary of the Constitution of the Republic of Kosovo*. Prishtina.

European Commission for Democracy Through law (Venice Commission) (2013). Reporton The scope and lifting of parliamentary immunities, Adopted by the Venice Commission, at its 98th plenary session.

Hardt, Sascha (2013). Parliamentary Immunity A Comprehensive Study of the Systems of Parliamentary Immunity of the United Kingdom, France, and the Netherlands in a European Context. Maastricht.

Inter-Parliamentary Union (2000). *The Parliamentary Mandate-A global comparative study. Geneva*.

Tümay, Murat (2011). The concept of Necessary in a democratic society. *Human Rights Review*, Vol. I, Issue: 2.

Wigley, Simon (2013). Parliamentary Immunity: Protecting Democracy or Protecting Corruption? 7 *The Journal of Political Philosophy*, Volume 11.

*** A.vs. The United Kingdom, ECHR 17 December 2002 App. No. 35373/97.

*** European Court of Human Rights, (17 December 2002), A.v. United Kingdom, appl. no. 35373/97, NederlandsJuristenblad, 2003, pp. 330-331.

*** The issue of access to court was first addressed by the European Commission on Human Rights. See, X v. Austria, Commission Decision of 6 February 1969, App. No. 3374/76;

*** Agee v. the United Kingdom, Commission Decision of 17 December 1976 App. No. 7729/76.

*** Castells v. Spain, 23 April 1992;

*** European Court of Human Rights, (16 November 2004), Karhuvaara and Iltalehti v. Finland, App. No. 53678/00.

*** Constitutional Court of the Republic of Kosovo, (20 September 2011) Judgment in Case no. K098/11 Applicant The Government of the Republic of Kosovo Regarding the immunity of the Members of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo, and the members of the Government of the Republic of Kosovo, Pristina;

*** Law no. 03/l-111 on the rights and responsibilities of the MP, Article 9, paragraph 3.

*** Rules of the Assembly of the Republic of Kosovo, Article 22, paragraph 5.