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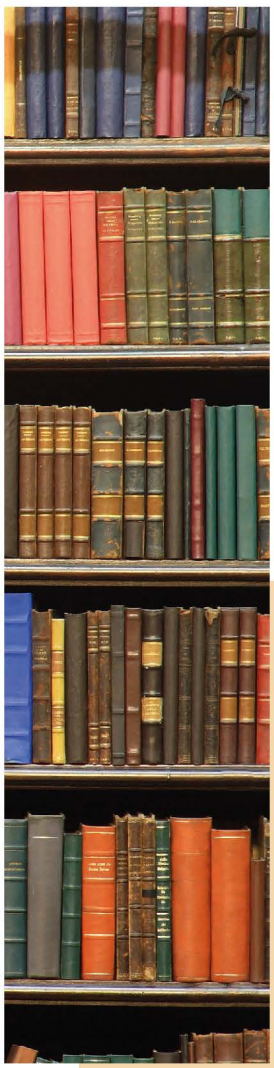

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In-depth analysis for the JURI Committee

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DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Parliamentary immunity in a European context

IN-DEPTH ANALYSIS

Abstract

This in-depth analysis was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI committee. It examines the case law of the European Court of Human Rights and the Court of Justice of the European Union on the matter of parliamentary immunity. From this case law, it derives the conclusion that both courts are developing a 'functional approach' towards parliamentary immunity. It explains the meaning of this approach both for national systems of parliamentary immunity and for that of the European Parliament.

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LIST OF ABBREVIATIONS

ECHR European Convention on Human Rights and Fundamental Freedoms

ECtHR European Court of Human Rights

TEU Treaty on European Union

EXECUTIVE SUMMARY

This in-depth analysis examines the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) with regard to the question whether a certain trend can be established in the evaluation of the instrument of parliamentary immunity by these courts and, if so, which effects this has on the concept and legitimacy of parliamentary immunity in Europe.

The analysis acknowledges that parliamentary immunity is a ubiquitous phenomenon throughout the High Contracting Parties to the ECHR and the Member States of the European Union. While its general purpose is to protect the independent functioning of parliaments, parliamentary immunity exists in very different forms and degrees.

The two main forms of immunity are non-accountability and inviolability. Non-accountability is an absolute immunity for acts and utterances in the exercise of the parliamentary mandate. Inviolability is a non-absolute immunity for extra-parliamentary acts and utterances.

This analysis finds that both the ECtHR and the CJEU, in their case law, are moving towards an evaluative approach, which assesses the legitimacy of immunity according to a functional criterion, namely immunity serves, in an individual case, to protect the core tasks of parliament.

While non-accountability is generally likely to pass this test, inviolability is not, as it mainly relates to extra-parliamentary acts and utterances *not* covered by non-accountability. Therefore, the approach found in the case law of the ECtHR and (less clearly) in that of the CJEU, if maintained, creates a degree of pressure to abolish or mitigate inviolability for members of parliament.

1. INTRODUCTION

KEY FINDINGS

- Parliamentary immunity is a legal instrument, which temporarily or permanently inhibits legal action, measures of investigation, and/or measures of law enforcement in criminal and/or civil matters against members of parliament.
- Its purpose is to ensure the proper functioning of parliament and to guarantee its independence.
- Immunity is not a personal privilege of members of parliament, but an institutional privilege of parliament as a body.
- Two forms of immunity must be distinguished:
  - *non-accountability* – absolute immunity from any legal action for parliamentary votes and utterances in the exercise of the mandate;
  - *inviolability* – limited immunity from arrest, detention, prosecution, and other matters.

1.1 General Background: parliamentary immunity

1.1.1 Definition

Broadly defined, parliamentary immunity is a legal instrument, which temporarily or permanently inhibits legal action, measures of investigation, and/or measures of law enforcement in criminal and/or civil matters against members of parliament.[1]

In all immunity systems, one or more elements of this definition are implemented. Nevertheless, there are large differences between parliaments with regard to the individual characteristics and the scope of immunity. These differences concern both the outward effects of immunity – who is protects, and from what – but also its legislative design and legal nature.

Where a member of parliament is 'immune', this can be the result of different legal causes. For instance, a constitutional immunity clause may provide that the courts lack jurisdiction to hear civil claims or criminal complaints against parliamentarians. This results in a procedural bar, which prevents the enforcement of the law, but in principle it does not affect the validity of a civil claim or take away the criminal nature of an act. Another possibility is that parliamentary immunity affects the legal status of the acts or utterances of a member of parliament, so that, for instance, statements made during a parliamentary debate are generally deemed not to be insulting or otherwise of a criminal nature and therefore cannot give rise to legal proceedings.

[1] In this definition, the term 'parliament' carries a broad meaning, including national parliaments as well as other representative bodies from municipal, provincial, and regional councils to international and supranational assemblies like the Parliamentary Assembly of the Council of Europe (PACE) and the European Parliament.

1.1.2 Purpose

While different legislative options are used to achieve immunity, its general purpose is always to enable parliament to carry out its tasks without undue external interference. It is generally recognised in scholarly literature, case law, and the practice of most national parliaments and many other representative bodies that the protection which immunity affords is 'indispensable to the operation of democracy'.[2]

Historically, parliamentary immunity as a legal institution has been introduced to shield the legislature from, in particular, the executive. This was necessary at times when the role and powers of parliaments was still frequently a matter of fierce – and sometimes violent – dispute. However, the independence of parliament also had to be asserted *vis-à-vis* the judiciary, which often was (and in some legal systems still is) institutionally linked to the executive, or can be instrumentalized in politically motivated legal action.

While in well-functioning modern democracies the likelihood of political trials against members of parliament is significantly lower than at the various points in time at which parliamentary immunity developed in different European legal systems, there is still consensus that that parliamentary immunity is an important element of the separation of powers and part of a system of checks and balances.

There is general consensus that parliamentary immunity is not a personal privilege of parliamentarians, but an institutional privilege that accrues to parliaments as corporate bodies. Nevertheless, parliamentarians benefit from immunities in their personal capacity, in that immunity presents an obstacle – temporary or permanent – to attempts of holding members of parliament accountable for their actions. The fact that this is at odds with the principle of equality lies at the root of most criticism voiced against parliamentary immunity.

1.1.3 Two forms of immunity

There are two main forms of parliamentary immunity, *non-accountability* and *inviolability*. Non-accountability (also referred to as 'freedom of speech in parliament') is usually an absolute immunity that shields members of parliament from all legal action relating to utterances in parliament or in the exercise of the parliamentary mandate, and to the parliamentary vote. In most systems, parliamentary non-accountability applies perpetually and cannot be lifted or renounced. Inviolability, on the other hand, is a form of immunity which – depending on the particular system – may protect members of parliament from legal action, sometimes including measures of detention, prosecution, and investigation, for acts and utterances outside the scope of non-accountability – thus outside the exercise of the parliamentary mandate.

The European Commission for Democracy Through Law (Venice Commission) has recently concluded, in its Report on the Scope and Lifting of Parliamentary Immunity, that non-accountability is "usually well-founded" and bears "little need for reform", while inviolability is "not a necessary part of a well-functioning modern democracy and […] can be misused in

[2] *Cf.* observations of the Dutch Government, annexed to the judgment in *A. v. The United Kingdom*, ECHR 17 December 2002, App. No. 35373/97.

ways that undermined democracy, infringe on the rule of law and obstruct the course of justice."[3]

It is in the light of these findings that this analysis examines the approach of the European Court of Human Rights and the Court of Justice of the European Union towards parliamentary immunity.

[3] European Commission for Democracy Through Law, *Report on The Scope and Lifting of Parliamentary Immunities*, (Study No. 714/2013) Strasbourg, 14 May 2014, paras. 98 and 99.

2. PARLIAMENTARY IMMUNITY IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

KEY FINDINGS

- The ECtHR accepts parliamentary immunity as a legitimate and ubiquitous constitutional norm.
- However, it recognises that immunity is a limitation of Convention rights, in particular of the right to access to court under article 6 ECHR.
- The ECtHR has developed a functional approach with regard to parliamentary immunity: where it actually serves to protect the free discharge of the constitutional tasks of parliament, immunity constitutes a justified limitation to access to justice. Where it goes beyond this necessary protection, its application violates the Convention.
- Since non-accountability relates to acts in the immediate discharge of the parliamentary mandate, the Court treats it as a legitimate limitation of the right to access to justice. Conversely, inviolability relates to acts with no material connection to the parliamentary mandate. Therefore, it does in principle not constitute a legitimate limitation, except when
- additional reasons (e.g. *fumus persecutionis*) are present.

2.1 Types of cases

There are essentially two categories of cases in the context of parliamentary immunity in which Convention rights are at issue. The first and most important category relates to the right of access to court under Article 6(1) of the Convention:

> In the determination of his civil rights and obligations or of any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. […]

Any form of parliamentary immunity bears much potential for conflict with this right, since immunity protects parliamentarians from legal action and thus bars access to court.

Within the category of cases relating to Article 6, three sub-categories can be found. First, citizens may be denied the possibility of (civil or criminal) legal action against a parliamentarian. This may happen, for instance, in defamation cases where the statements in question are protected by non-accountability. Second, and much less frequently, parliamentarians themselves may not be able to have their rights or criminal charges against them determined in court. This can be the case where a member of parliament is protected by inviolability without the possibility of an individual waiver and where parliament refuses to lift the member's immunity. The third sub-category of cases under Article 6 concerns the penal powers of parliament and their potential conflict with the requirement of an independent and impartial tribunal established by law.[4]

Along with cases concerning the right of access to court under Article 6 of the Convention, a second main category of case law in the context of parliamentary immunity concerns

[4] This category of cases is left out of consideration in this note.

Article 10 of the Convention on freedom of expression. The main issue here is the question whether members of parliament, when speaking outside of actual debates in parliament, enjoy a wider freedom of expression than 'ordinary' citizens.

2.2 Cases under article 6 ECHR

2.2.1 Non-accountability under article 6 ECHR

The issue of access to court was first dealt with by the old European Commission of Human Rights in three admissibility decisions on applications complaining that parliamentary immunity had violated the applicants' rights under Article 6 of the Convention. In taking these decisions, the Commission applied very different lines of reasoning:

- In *X v. Austria* (1969),[5] the Commission decided that the application was manifestly ill-founded, considering that all contracting states regarded parliamentary immunity as an important constitutional principle from which they could not have wished to derogate by ratifying the Convention.
- In *Agee v. UK* (1976),[6] the Commission did not argue that parliamentary privilege constituted a justified exception to Article 6. Instead it held that, due to parliamentary privilege, the applicant had no 'civil right' under UK law to defend his reputation against statements made in parliament, and that Article 6 was therefore not applicable.
- In *Young v. Ireland*, the Commission held that it was immaterial whether privilege constituted a procedural bar and therefore had to be assessed under Article 6(1) of the Convention or whether it limited a civil right and had to be assessed under Article 8; either way, privilege had to stand the test of legitimacy of aim and proportionality. Finding that parliamentary privilege aimed at facilitating free speech in parliament, and that it was proportional in the circumstances of the case, the Commission declared the application inadmissible.

The 'leading case' of the European Court of Human Rights on the issue of parliamentary immunity as an impediment to the right of access to court is *A v. the United Kingdom*.[7] The case was brought by A., a former resident of a building owned by a public housing association in Bristol, against a member of parliament who had made highly injurious statements about the applicant and disclosed her full name and address in a parliamentary speech in 1996. The publication of A.'s name and address in conjunction with the allegations made against her had severe adverse consequences for the applicant. However, there was no avenue of legal recourse open to the applicant to bring charges of libel or defamation against her MP, due to absolute parliamentary privilege (non-accountability).

The principal question with which the Court was confronted in *A. v. UK* was whether or not the applicant's lack of access to legal recourse constituted a breach of Article 6(1) of the Convention or whether the necessity, in the public interest, of a solid scheme of parliamentary immunity constituted a justification for the limitation of the right of access to court. Before turning to this question directly, the Court briefly addressed the question of whether the matter at hand touched upon Article 6 at all, as UK domestic law does not provide for a civil right to the protection of a person's reputation in so far as it might be affected by statements made in Parliament. The Court noted that Article 6 could nonetheless be violated since parliamentary privilege constitutes a procedural bar to defamation claims, rather than a material defence to such claims. The Court thus dismissed the Commission's argumentation in *Agee*, which the Commission itself had already

5 *X v. Austria*, Commission Decision of 6 February 1969, App. No. 3374/76.
6 *Agee v. the United Kingdom*, Commission Decision of 17 December 1976, App. No. 7729/76.
7 *A. v. The United Kingdom*, ECHR 17 December 2002, App. No. 35373/97.

abandoned in *Young*. The Court affirmed the Commission's approach in *Young* by subsequently applying the test of legitimacy of aim and proportionality to the principal question of the case:

> The right of access to a court is not absolute, but may be subject to limitations. These are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[8]

The result of the Court's examination of whether the UK system of parliamentary privilege constitutes a legitimate and proportional limitation of the right to access to a court was that, indeed,

> '[it] cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1'.[9]

With regard to absolute non-accountability for utterances in parliament, *A v. the United Kingdom* has so far not been overruled; it has been confirmed in the similar case of *Zollmann v. the United Kingdom*.[10] However, in a series of cases against Italy, the Court in Strasbourg developed a more differentiated approach to non-accountability regarding statements made by parliamentarians *outside* parliament.

The first of these cases was *Cordova v. Italy* (No. 1).[11] The *Cordova* case concerned a dispute between a public prosecutor and the former President of the Italian Republic, Francesco Cossiga, who had become Senator for life after the end of his presidential term. The applicant had investigated a person who had certain dealings with Mr Cossiga. Thereupon, Mr Cossiga sent the applicant insulting letters and gifts.[12]

The applicant filed a complaint against Mr Cossiga, whereupon proceedings were brought against the former President for the insultation of a public official. However, the Senate adopted a resolution in which it held that the letters and parcel sent to the applicant fell within the scope of Article 68(1) of the Constitution and that Mr Cossiga thus benefitted from parliamentary non-accountability. The district court held that it lacked jurisdiction to question the decision of the Senate any further. The applicant was also refused leave to appeal against the district court's ruling and thus to bring the matter before the Constitutional Court as a conflict of state powers. He therefore complained to the European Court of Human Rights, alleging a violation of his right of access to court.

Before addressing the question whether parliamentary immunity (in this case, non-accountability) constituted a disproportionate limitation of the applicant's rights under Article 6 of the Convention, the Court first had to determine whether the applicant had in fact been denied access to court – after all, the district court had examined the *prima facie* lawfulness of the Senate's resolution and had come to the conclusion that it was lawful and not manifestly unreasonable. However, the ECtHR held that:

> such an examination cannot be equated with a decision on the applicant's right to the protection of his reputation, nor can a degree of access to a court limited to the right to ask a preliminary question be

8 *Ibid.*, para. 74.
9 *Ibid.,* para. 83.
10 *Zollmann v. the United Kingdom*, ECHR 27 November 2003, App. No. 62902/00.
11 *Cordova v. Italy* (No. 1), ECHR 30 January 2003, App. No. 40877/98.
12 *Ibid.*, para. 11.

> considered sufficient to secure the applicant's 'right to a court', having regard to the rule of law in democratic society. […] In this connection, it should be borne in mind that, in order for the right of access to be effective, an individual must have a clear and practical opportunity to challenge an act interfering with his rights.[13]

Addressing the principal question whether non-accountability constituted a proportionate limitation of the right of access to court, the Court gave a dismissive answer:

> Although […] Mr Cossiga had criticised the applicant's investigations in an earlier parliamentary question, the Court considers that ironic or derisive letters accompanied by toys personally addressed to a prosecutor cannot, by their very nature, be construed as falling within the scope of parliamentary functions. […]
> The Court takes the view that the lack of any clear connection with a parliamentary activity requires it to adopt a narrow interpretation of the concept of proportionality between the aim sought to be achieved and the means employed. This is particularly so where the restrictions on the right of access stem from the resolution of a political body.[14]

Accordingly, Court found a violation of Article 6(1) of the Convention. It upheld the above line of reasoning in *Cordova v. Italy* (No. 2),[15] in which another parliamentarian had insulted the same applicant in two speeches he had given at election meetings, and in three cases in which the applicants had been denied access to court in defamation proceedings against Italian parliamentarians who had made defamatory statements in press interviews.[16]

Reading the case law in *A, Zollmann, Cordova* and the other Italian cases in conjunction reveals a consistent pattern in the Court's approach to non-accountability. On the one hand, it recognises the absolute freedom of parliamentary debates as a constitutional tradition present in all contracting states and accepts it as a legitimate and proportionate limitation of the rights *ex* Article 6 of the Convention. However, where the statements concerned have not been made in parliament, the Court requires a very narrow and material connection to the parliamentary work of the member in question in order for non-accountability to be proportionate. The fact that the member has referred to the applicant in parliament before making the statements concerned outside parliament is insufficient. Also, as seen in *Cordova* (No. 1), the Court takes the view that certain acts of expression are 'by their very nature' incapable of being connected with the parliamentary functions of a member.

2.2.2 Inviolability under Article 6 ECHR

With regard to inviolability – the immunity of members of parliament from legal action for acts committed outside parliament – the ECtHR has adopted an approach very similar to that which it has taken towards non-accountability. In all but one case (*Kart v. Turkey*, see below) it has not even explicitly recognised a formal difference between the two forms of immunity. However, the following shows that the approach of the Court leads to different effects in cases involving non-accountability and inviolability, respectively.

As opposed to non-accountability, inviolability is usually temporally limited to the duration of the parliamentary mandate. It can also normally be lifted, usually by the chamber of parliament to which the member concerned belongs. The degree to which parliamentarians are inviolable differs considerably – mostly, they may not be detained without the prior authorisation of parliament (except *flagrante delicto*). Often, also investigative measures

13 *Ibid.*, para. 52.
14 *Ibid.*, paras. 62-63.
15 *Cordova v. Italy* (No. 2), ECHR 30 January 2003, App. No. 45649/99.
16 *De Jorio v. Italy*, ECHR 3 June 2004, App. No. 73936/01; *Ielo v. Italy*, ECHR 15 March 2005, App. No. 23053/02; *Patrono, Cascini and Stefanelli v. Italy*, ECHR 20 April 2006, App. No. 10180/04.

like searches or wiretapping are prohibited, while some states even prohibit the criminal prosecution of members of parliament in general (France did so prior to the constitutional amendment of 1995). In order for inviolability to apply, most systems do not require that the alleged criminal act holds any connection with the parliamentary functions of the member.[17]

Despite the temporary nature of inviolability, the ECtHR has been critical of this form of immunity. Even though case law with regard to inviolability is relatively scarce, it is recognisable that the Court is reluctant to accept a limitation of the right of access to court in cases where the object of legal proceedings against the parliamentarian concerned is not, or is insufficiently, connected with his parliamentary functions.

In the case *Tsalkitzis v. Greece,*[18] a construction developer wished to bring corruption charges against the mayor of Kifissia. In November 2001, he had filed a complaint of blackmail and abuse of office against the mayor. However, the latter had in the meantime been elected to parliament in the general elections of 2000 and was now protected by inviolability.

In assessing whether parliamentary immunity, in the particular circumstances of the case, constituted a proportionate limitation of the applicant's rights *ex* Article 6 of the Convention, the ECtHR first observed that the alleged criminal act had taken place almost three years prior to the former mayor's election to parliament. Moreover, the Court noted that a connection between the alleged crime of blackmail and corruption with the former mayor's parliamentary functions could not be assumed, since it fell well outside the sphere of normal (read: acceptable) parliamentary business and since it was of a particular immoral nature. The Court then reiterated what it had held in *Cordova*: that, lacking a clear connection with the parliamentary functions of the member concerned, a narrow interpretation of proportionality had to be employed, especially where the restriction of access to court followed from the decision of a political body. Finally, the Court addressed the argument of the Greek government that the limitation of access to court by virtue of inviolability was nonetheless proportionate because it was only temporary and would cease with the end of the mandate. The Court dismissed this argument, considering that Greek parliamentarians could be re-elected indefinitely. If the member in question were to remain a member of parliament for a long time, this could create a time lapse which would potentially make it difficult to prove the alleged crimes.[19]

It follows from *Tsalkitzis* that the Court applies the same main criterion in its assessment of non-accountability and inviolability – the alleged act needs to be connected to the parliamentary functions of the member concerned in order for the limitation of access to court to be justified. This cannot be the case where the alleged crime was committed before the beginning of the mandate. In addition, the temporary nature of inviolability does not make the limitation proportionate, at least not where the mandate is renewable indefinitely.

In the light of the Italian cases referred to earlier, the Court's ruling in *Tsalkitzis* is unsurprising. It is still remarkable, since it calls into question the very concept of inviolability, which, after all, explicitly intends to protect parliamentarians of legal action relating to activities of members *outside* their parliamentary mandate. This serves the purpose of preventing politically motivated lawsuits against members and to safeguard

17 There are exceptions, see e.g. Art. 57(2) and (3) of the Austrian Federal Constitutional Act.
18 *Tsalkitzis v. Greece*, ECHR 16 November 2006, App. No. 11801/04.
19 *Ibid.*, paras. 48-51.

their unimpeded attendance of parliament. Certainly, both of these aims were not at stake in this case, since the alleged crime was manifestly unrelated to any political activity, and as detention was not at issue. Nevertheless it is evident that the generous inviolability enjoyed by Greek parliamentarians – it prohibits not only arrests but criminal prosecution in general – can virtually never pass the Court's proportionality test unless either the alleged criminal act is manifestly connected with parliamentary activities or unless the prosecution is politically motivated.

This was confirmed more recently in *Syngelidis v. Greece*.[20] In this case, the applicant had brought criminal charges against his ex-spouse M.A., a member of parliament, for denying him access to his child. The applicant had joined these proceedings as a civil party, claiming the symbolic sum of ten euros in damages. A request to lift M.A.'s inviolability had been made to parliament, and had been considered by a committee, which had assessed whether one of the grounds for denying the request, specified in the Rules of Procedure of the Greek Parliament, was present. The committee had simply advised that one of these reasons applied, but had not specified which one. Subsequently, parliament had decided to uphold M.A.'s inviolability, to the effect that the criminal case against her could not be heard in court.

The ECtHR was confronted with important structural arguments submitted by both the applicant and the Greek government. On the one hand, the government argued that the limitation which inviolability presented for the right of access to court was proportionate, because the Greek inviolability regime prohibited *criminal* proceedings against members of parliament, not *civil* proceedings. Hence, instead of joining criminal proceedings with a merely symbolic claim in damages, the applicant could have lodged a proper civil claim against M.A., which could have resulted in a substantial sum of damages that constituted an adequate remedy. The applicant, on the other hand, conceded that inviolability was in principle capable of being compatible with Article 6(1) ECHR, but only if the Greek parliament, in exercising its discretionary power to lift inviolability, interpreted and applied the relevant constitutional provisions correctly, which it had not done in this case and in many others. According to a survey submitted by the applicant, between 1974 and 2003 the Greek parliament had granted a mere five out of 800 requests to lift inviolability, thus systematically shielding its members from criminal proceedings. In the light of this practice, the circumstances of the present case and the Court's rulings in *Cordova* and *Tsalkitzis*, the applicant was of the opinion that his right of access to court had been breached. Moreover, the applicant argued that inviolability created a disproportionate imbalance between himself and his ex-wife, as she had remained free to bring criminal proceedings against him, but not vice versa.[21]

The Court dismissed the government's argument that the possibility of civil proceedings against M.A., of which the applicant had made no use, were sufficient to offset or render proportionate the limitation of Article 6 ECHR with regard to criminal proceedings. According to the Court,

> where the domestic legal order provides an individual with a remedy, such as a criminal complaint with the possibility to join the proceedings as a civil party, the state has the duty to ensure that the person using it enjoys the fundamental guarantees of Article 6.[22]

With regard to the arguments brought forward by the applicant, the Court reiterated the principles it had developed in *Cordova* and subsequent case law: that parliamentary

[20] *Syngelidis v. Greece*, ECHR 11 February 2011, App. No. 24895/07.
[21] *Ibid.*, paras. 37-39.
[22] *Ibid.*, para. 45.

immunity was in principle compatible with the ECHR where it served the legitimate aim of protecting parliament from undue influence, but that proportionality had to be given a narrow interpretation where there was no clear connection between the alleged criminal behaviour of the member and his parliamentary functions. This was clearly the case here, since M.A.'s behaviour was entirely unrelated to her parliamentary work and 'more consistent with a personal quarrel'.[23] Accordingly, the Court noted that the parliamentary committee which examined the lifting request had stated no particular reason for the decision not to lift inviolability, thus denying the applicant even the possibility to know why, specifically, he was barred from access to court. Finally, the Court 'attache[d] some significance to the fact that the impugned approach of the Parliament has created an imbalance in treatment between the applicant and M.A., since the latter was able to bring proceedings against the applicant […]'.[24] The Court therefore held that the applicant's right *ex* Article 6(1) ECHR had been violated.

With *Syngelidis v. Greece*, the Court in Strasbourg has consolidated its functional approach to parliamentary immunity: it is legitimate in principle for contracting states to protect their legislatures by means of an immunity system which ensures that parliaments can discharge their constitutional functions free from any undue influence. Implicitly, it recognises parliamentary debate – that is to say, debate *in* parliament – as the most essential function of a legislative body. Accordingly, the protection of this function by means of an absolute immunity is proportionate, as was established in *A v. UK*. But the further an act of a member is removed from this core function, the narrower the concept of proportionality must be interpreted. It follows that, where an alleged criminal act of a member is entirely unrelated to his parliamentary work, this act must in principle not be protected by immunity, unless there are good reasons for such protection *in addition* to the mere fact that the defendant is a parliamentarian. For instance, the Court's judgment in *Syngelidis* does not rule out that the Court would have accepted M.A.'s inviolability despite the private nature of her alleged criminal behaviour, if parliament had credibly argued that her prosecution was politically motivated.

Kart v. Turkey[25] was the only case to date in which a parliamentarian, thus the beneficiary of parliamentary immunity himself, complained that his rights under Article 6 of the Convention had been violated as a result of immunity. Before he was elected a deputy of the Turkish Grand National Assembly, the applicant in this case had faced criminal charges. However, after his election, proceedings were stayed in accordance with Turkish inviolability rules. In order to be able to defend his reputation in court, the applicant requested his inviolability to be lifted, but the request was denied by the competent committee of the Grand National Assembly and, later, the plenary assembly. After the end of his first term as a deputy, the applicant was re-elected but had still not managed to have his inviolability lifted.

The Court's judgment in *Kart* was the first one in which it acknowledged that parliamentary immunity usually consists of two component parts, non-accountability and inviolability, that the two pursue different aims and are of a different legal nature, and that the applicant only challenged the application of inviolability. Before assessing the case on the merits, the Court gave a comparative account of the immunity systems of the contracting states, the Parliamentary Assembly of the Council of Europe and the European Parliament, in which it found that most states do provide for an extra-professional immunity (inviolability). The Court then '[made] it clear at the outset that its role is not to rule in an abstract manner on

[23] *Ibid.*, para. 46.
[24] *Ibid.*, para. 48.
[25] *Kart v. Turkey*, ECHR 8 July 2008, App. No. 8917/05.

the compatibility of the system of parliamentary immunity with the Convention, but to ascertain *in concreto* whether [its] application in this case […] violated Article 6 of the Convention'.[26] It went on to hold that inviolability, given its aim of securing the unimpeded functioning of parliament and its members, is in principle legitimate. The judges held, cautiously, that

> [although] the Court cannot be used as a means of verifying the relevance of the choices made by the national parliaments in the matter, it nonetheless remains that parliamentary practice must be in conformity with the imperatives of the rule of law as embodied in the Convention.[27]

Subsequently, the Court held that Turkish inviolability is unusually broad in that it applies to both criminal and civil proceedings and covers acts committed before the election of a member. It also observed that under Turkish law the decision whether or not inviolability is to be lifted need not – and in this case was not – substantiated by any argument, that there is no time limit for this decision and that inviolability, if upheld, inevitably leads to a long time lapse before a criminal trial can commence or be resumed. Finally, 'the Court [could not] ignore that parliamentary 'inviolability' in Turkey is a controversial subject and […] has been identified as one of the main problem areas in the context of corruption'.[28] For these reasons, the judges found in favour of a violation of Article 6(1), even if by a narrow majority of four votes to three.

This judgment was, however, reversed by the Grand Chamber.[29] This time, the majority (thirteen votes to three) based its decision on the argument that the charges against the applicant had been brought before his election, so that he was aware that, by becoming a parliamentarian, the determination of his criminal case was likely to be delayed.[30] In addition, the Grand Chamber also found that the temporary nature of inviolability mitigated the limiting effect of inviolability on Article 6. It even went so far as to say that

> not only is the obstruction to criminal procedure as a result of parliamentary inviolability only temporary, but in principle Parliament does not intervene at all in the course of justice as such […] [since] it seems only to have considered whether inviolability, as a temporary obstacle to judicial action, should be lifted immediately or whether it was preferable to wait until the end of the applicant's term in Parliament.[31]

Both of these arguments appear doubtful and unsound. As Judge Power correctly observed in his dissenting Opinion, the first argument means that the applicant's choice to exercise one of his Convention Rights (the right to stand for parliament, protected under Article 3 of Protocol No. 1 to the Convention) had already implied a waiver of another, namely his right of access to court under Article 6.[32] The second argument is not only inconsistent with the Court's own ruling in *Tsalkitzis*, it also does not hold much water with regard to the temporal aspect of Article 6 of the Convention, which not only guarantees access to court, but also a hearing within a reasonable time.[33] Finally, the statement that the decision not to lift inviolability was essentially not *about* access to court can only be described as judicial pettifoggery and sits very oddly with the Court's earlier case law on inviolability. Kloth has noted that the Grand Chamber judgment also failed to take into account the interests of the victims of the applicant's alleged criminal behaviour.[34]

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26 *Ibid.*, para. 72.
27 *Ibid.*, para. 84.
28 *Ibid.*, para. 92.
29 *Kart v. Turkey* (Grand Chamber), ECHR 3 December 2009, App. No. 8917/05.
30 *Ibid.*, para. 106.
31 *Ibid.*, para. 109.
32 See also M. Kloth, *Immunities and the Right of Access to Court Under Article 6 of the European Convention on Human Rights*, Leiden: Martinus Nijhoff, 2010, p. 198.
33 This has also been observed in the dissenting Opinion of Judge Bronello and two others.
34 Kloth 2010, p. 197-198.

The arguments on which the Grand Chamber based its judgment in *Kart* give a strong impression that the reasoning of the Grand Chamber was influenced by the desired result. As a consequence, the second judgment in *Kart*, which predated that in *Syngelidis* by little more than two months, stands out in the otherwise quite consistent case law of the European Court of Human Rights with regard to parliamentary immunity and Article 6 of the Convention.

2.3 Cases under article 10 ECHR

Parliamentary immunity also raises issues under Article 10 of the Convention, which guarantees the right of freedom of expression. Article 10 reads as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. […]
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

It should be noted that Article 10 is the only provision of the Convention which explicitly states that the exercise of the right contained in it 'carries with it duties and responsibilities', which is particularly relevant for elected representatives.

The relationship between immunity and the right to freedom of expression is indirect. Parliamentary immunity itself does not usually have the potential to infringe this right,[35] but it is useful to determine the exact extent of freedom of expression in order to establish the limits of parliamentary immunity, by answering two questions. First, do members of parliament (when speaking outside parliament) generally enjoy a wider margin of freedom of expression than 'ordinary' citizens? If so, this could be interpreted as a special privileged status for parliamentarians under the ECHR – a form of immunity under the Convention. Second, are there special limitations on freedom of expression with regard to remarks *about* parliamentarians? If this question were answered in the positive, this would also confer an extra degree of protection on members of parliament. Both of these questions have been addressed by the European Court of Human Rights, though the body of case law is significantly smaller and much less conclusive than that of parliamentary immunity under Article 6 of the Convention.

2.3.1 Freedom of Expression of Parliamentarians outside Parliament

An important judgment of the European Court of Human Rights with regard to the freedom of expression of parliamentarians outside parliament was that in *Castells v. Spain*.[36] The applicant in this case had been charged with insulting the government, a crime punishable under Spanish law by a substantial prison sentence or a fine. On trial, the applicant offered to substantiate the truth of his alleged insults, but the Supreme Court, which conducted his

[35] An exception might be the law of contempt in Westminster-type systems, where parliament can avail itself of its penal powers and sanction individuals who have committed a contempt or breach of privilege by their utterances. This may constitute an infringement of these individuals' convention rights; see *Demicoli v. Malta*, discussed in the previous section.

[36] *Castells v. Spain*, ECHR 23 April 1992, App. No. 11798/85.

trial, ruled that a defence of truth was not admissible in proceedings for slurs against the government, since the truth of a statement was immaterial for its insulting character. The Supreme Court finally sentenced the applicant to one year and a day in prison. He was also disqualified from public office for the same amount of time. The sentence was later upheld by the Constitutional Court.

The applicant complained of a violation of his right to freedom of expression under Article 10 of the Convention. Since Mr Castells was a member of the Spanish Senate at the time, the Court not only had to determine whether his conviction had violated Article 10, but also whether, as an elected representative, he enjoyed a wider freedom of expression than others. First, the Court held in *Castells* that, in general, freedom of expression does not only pertain to ideas which are favourably received but also to opinions which 'offend, shock or disturb'.[37] Crucially for our purpose of determining that question, the Court remarked that

> [w]hile freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws the attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court.[38]

What this means is unclear: that limitations of the freedom of expression of representatives have to be subject to 'the closest scrutiny' does not say that such limitations are *per se* less permissible in the case of a parliamentarian, than in other cases. On the other hand, it certainly does say that they must be treated with the utmost care. However, the Court went on to hold that

> [t]he freedom of political debate is undoubtedly not absolute in nature. A Contracting State may make it subject to certain 'restrictions' or 'penalties', but it is for the Court to give a final ruling on the compatibility of such measures with the freedom of expression enshrined in Article 10. […]
>
> The limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system, the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authority but also of the press and public opinion.[39]

Based on this finding, and on the fact that the applicant had been denied the opportunity to prove the truth of his allegations against the Spanish government, the Court found a violation of Article 10.

It is uncertain whether this merits the conclusion that parliamentarians enjoy a wider freedom of expression than other citizens. More recent ECtHR case law suggests that the determining factor for the Court is not so much the status of an individual as a parliamentarian or other representative of the people, but the relevance of the remark in question for public political debate. In *Keller v. Hungary,*[40] the applicant, a parliamentarian, had made derogatory statements about the late father of a minister. The latter successfully sued the applicant for damages, arguing that the parliamentarian had harmed his reputation. The ECtHR found the applicant's complaint under Article 10 of the Convention manifestly ill-founded. Apparently, the Court finds non-political statements, even if they come from parliamentarians, less worthy of protection than genuine political statements. However, in the case of *Öllinger v. Austria,*[41] a member of parliament had made certain statements which could not be proven but which, as the ECtHR explicitly acknowledged,

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37 *Ibid*., para. 42.
38 *Ibid*.
39 *Ibid.*, para. 46.
40 *Keller v. Hungary*, ECHR 4 April 2006, App. No. 33352/02.
41 *Öllinger v. Austria*, *ECHR* 13 May 2004, App. No. 74245/01.

were important for societal debate. Nevertheless, in this case the Court in Strasbourg held that the limitation of the member's freedom of expression by the Austrian court was *not* disproportionate, and thus justifiable.

In 2009, the Strasbourg Court delivered its judgment in the case of *Féret v. Belgium.*[42] The applicant, Mr Féret, was the head of the extreme-right political party *Front National* and a member of the Belgian Chamber of Representatives. He had published and supervised the publication of a number of leaflets and other campaign publications which advocated anti-immigrant policies and whose content and tone was generally xenophobic and discriminatory. These publications led to numerous complaints and, finally, to criminal proceedings against Mr Féret for hate speech and incitement to discrimination. After his parliamentary immunity had been lifted, he was tried by the Brussels Court of Appeal and sentenced to 250 hours of community service in the field of the integration of foreigners and a suspended prison sentence. In addition, he was declared ineligible for a period of 10 years.

The ECtHR, faced with the question whether the conviction of the applicant constituted a violation of his rights under Article 10 of the Convention, first reiterated principles that had already been cited in *Castells*: freedom of expression does not solely cover ideas which are considered inoffensive, but also opinions which offend, shock or disturb. Moreover, Article 10(2) of the Convention leaves little room for restrictions on freedom of expression in the domain of political discourse or questions of general interest.[43] However, with reference to earlier case law, the judges also reiterated that the fight against racial discrimination in all its forms and manifestations is of the utmost importance.[44] Finally, the Court addressed the question whether parliamentarians enjoy a greater degree of freedom of expression than others:

> La qualité de parlementaire du requérant ne saurait être considérée comme une circonstance atténuant sa responsabilité. A cet égard, la Cour rappelle qu'il est d'une importance cruciale que les hommes politiques, dans leurs discours publics, évitent de diffuser des propos susceptibles de l'intolérance […]. Elle estime que les politiciens devraient être particulièrement attentifs, en termes de défense de la démocratie et de ses principes, car leur objectif ultime est la prise même du pouvoir. […] La Cour estime que l'incitation à l'exclusion des étrangers constitue une atteinte fondamentale aux droits des personnes et devrait par conséquent justifier des précautions particulières de tous, y compris des hommes politiques.[45]

This adds another interesting facet to the Court's approach to the question of freedom of expression of members of parliament. The quality of being a parliamentarian does not attenuate a person's responsibility – id est, provide him with a wider freedom of expression – but even leads to a greater duty of care. Politicians (thus also parliamentarians) must be 'particularly attentive in terms of the defence of democracy and its principles', since their aim is to come into power. Incitement to the exclusion of foreigners constitutes a 'fundamental attack on the rights of persons', so it justifies 'particular precautions', including against politicians. Consequently, the Court held that the limitation of the applicant's freedom of expression by the Belgian court had not violated the Convention. It follows from *Féret,* therefore, that hate speech and incitement to discrimination, even by campaigning politicians, is not protected by Article 10 of the Convention.

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42 *Féret v. Belgium*, ECHR 16 July 2009, App. No. 15615/07.
43 *Ibid*., para. 63.
44 *Ibid*., para. 71, with reference to *Jersild v. Denmark*, ECHR 23 September 1994, App. No. 15890/89.
45 *Ibid*., para. 75.

2.3.2 Freedom of Expression: Speaking about Parliamentarians

The second facet of freedom of expression which – though somewhat more remotely – relates to parliamentary immunity is the question to what extent a person's status of being a member of parliament limits the freedom of others to disseminate information about this person. This question has been at issue in the case of *Karhuvaara and Iltalehti v. Finland.*[46] The newspaper *Iltalehti* had reported about a case of assault against a police officer. The headline of the relevant article had mentioned that the perpetrator was the husband of a member of the Finnish parliament. Under Finnish criminal law, dissemination of information about a person's private life is punishable if it is likely to cause that person damage or suffering, unless the information in question relates to the person's position in politics, business or public office and affects the evaluation of his activities in this position. At the material time, a provision in the Finnish Parliament Act (which was later repealed by a constitutional amendment in 2000) provided that, where the victim of abuse was a member of parliament, this constituted a seriously aggravating circumstance. As the newspaper headline had only mentioned the parliamentarian to 'colour' the reported events, but who otherwise had nothing to do with her husband's criminal act, the newspaper and its editor-in-chief, Mr Karhuvaara, were convicted on the basis of the criminal provision mentioned above. They incurred heavy fines, aggravated, as was mandatory under the Parliament Act, by the victim's status as a member of parliament.
The applicants complained to the European Court of Human Rights that their conviction, and in particular the aggravation of their penalty by the victim's status as a parliamentarian, had violated their freedom of expression. Due to the agreement by all parties that the applicants' conviction amounted to a limitation of their rights *ex* Article 10(1) of the Convention and that it was prescribed by law, the Court only had to assess whether this limitation was 'necessary in a democratic society'. The Court was of the opinion that it was not. Together with the observation that even the national court had found the provision of the Parliament Act outdated, it based its decision on an assessment of the 'immunity effect' of that provision. Once again, the Court's functional approach can clearly be seen:

> The present case does not raise the issue of parliamentary immunity directly as there was no question of Mrs A.'s immunity from civil or criminal action. Parliamentary immunity was, however, of indirect relevance as it was Mrs A.'s status as a member of parliament that led to more severe convictions and sentences under section 15 of the Parliament Act. This indirect protection afforded to parliamentarians by way of punitive and deterrent criminal sentences, directed towards third parties, is relevant both to the justification and the proportionality of the convictions.
>
> The Court notes that the offences in question did not have any connection with the performance of Mrs A.'s official duties as a member of parliament. No criticism of Mrs A. was suggested, and it has not even been claimed that the publication of Mrs A.'s name and picture in connection with the account of the criminal proceedings against Mr A. in any way affected Mrs A.'s freedom of speech or was capable of limiting free parliamentary debate. In the absence of any link with the aims underlying parliamentary immunity, the use of Mrs A.'s parliamentary status as an aggravating factor of the offences in question is problematic.[47]

Similarly to its approach to parliamentary immunity in cases relating to the right of access to court, the Court was not ready to accept a greater degree of protection for parliamentarians than was necessary in the light of their parliamentary functions. It may perhaps be concluded from the assessment of the Court (quoted above) that this approach is relevant not only for issues of freedom of expression, but to all (hypothetical) cases in which a person's status as a parliamentarian negatively affects the legal position of a third party.

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46 *Karhuvaara and Iltalehti v. Finland*, ECHR 16 November 2004, App. No. 53678/00.
47 *Ibid.*, paras. 51-52.

2.4 ECtHR Case Law on Parliamentary Immunity: Conclusions

Since *A v. the United Kingdom* the European Court of Human Rights has created a body of case law from which we can derive the status of immunity under the ECHR. The Court's approach is very clearly a *functional* one: it accepts that parliamentary immunity is a constitutional norm present in all contracting states. This means that although the implementation of parliamentary immunity in practice differs considerably between the contracting parties, it must summarily be understood as a constitutional principle from which they did not mean to derogate by adopting the Convention. However, since parliamentary immunity necessarily conflicts with the right of access to court *ex* Article 6(1) of the Convention, the Court treats it as a limitation thereof, which must be assessed according to the well-known criteria of legitimate aims and proportionality.

The Court accepts that parliamentary immunity serves to ensure that parliament can freely discharge its constitutional tasks. It is at this point that the Court applies a functional criterion: while the legal institution of immunity generally serves a legitimate aim, its application is only proportionate to this aim where it actually relates to the functions of parliament – or, since the immediate beneficiary of immunity is the individual parliamentarian, to the parliamentary functions of the member. The effect of parliamentary immunity is to bar judicial action against a parliamentarian, usually criminal or civil proceedings for certain acts or utterances. In the Court's view, where an act or statement has occurred as part of the core functions of parliament (for instance, a vote or speech in parliament), this merits absolute protection, as in *A v. UK*. While the Court has never contested explicitly that acts or utterances outside actual parliamentary debates can also fall within the parliamentary functions of a member, its 'proportionality threshold' becomes higher the further the act or utterance in question is removed from the core of parliamentary activity. Hence, statements made in newspaper interviews are not necessarily protected, insulting letters and gifts to a public prosecutor are by default irreconcilable with parliamentary activity.

Except in *Kart v. Turkey*, the European Court of Human Rights has never formally distinguished between non-accountability and inviolability but generally refers to 'parliamentary immunity' instead. Nevertheless it is clear that its functional approach bears different consequences for the two forms of immunity because of their very nature: non-accountability explicitly relates only to acts and utterances which are part of, or are very closely connected to, a member's parliamentary functions. Under its functional approach, the Court will therefore see non-accountability as a disproportionate limitation of Article 6 ECHR only where it actually denies this connection, as it did in *Cordova* and the other Italian cases.

Inviolability, on the other hand, relates by definition to acts of parliamentarians which lie in the extra-parliamentary sphere (as acknowledged by the Court in *Kart*). Therefore, despite the Court's repeated statement that 'some restrictions on access to court must be regarded as inherent [in Article 6(1) ECHR], an example being those generally accepted by the Contracting States as part of the doctrine of parliamentary immunity',[48] we may conclude that the Court has in reality adopted a reverse approach to inviolability: *in principle* it constitutes a disproportionate limitation of the right of access to court. The Court will therefore find a violation of that right wherever the application of inviolability is not justified by additional reasons (such as a manifest relation between the alleged criminal act and parliamentary activities or a political motivation for criminal charges). Admittedly, case law

[48] *Cordova v. Italy* (No. 1), para. 60; *Tsalkitzis v. Greece*, para. 45; *Syngelidis v. Greece*, para. 42.

is still too scarce and the cases insufficiently diverse to be absolutely certain about the consistency of the Court's rejection of inviolability in principle. The Grand Chamber judgment in *Kart* is a point in case against it. Nevertheless, cases like *Tsalkitzis* and *Syngelidis* clearly support our conclusion of a 'reverse approach'.

The functional approach of the ECtHR to immunity is an important finding, since it questions the legitimacy of an important part of the immunity systems of many European states *vis-à-vis* the ECHR. In most states parliament or a parliamentary body has a discretionary power to lift inviolability without the possibility to appeal this decision in court, so the narrow functional approach of the European Court towards inviolability has created a certain judicial inroad into the constitutional powers of parliament in many of the contracting states. It surely has done away with the idea (if it ever existed) of parliamentary immunity as a personal privilege for parliamentarians.

With regard to the extent of freedom of expression enjoyed by parliamentarians under the ECHR, general conclusions remain difficult: on the one hand, limitations on freedom of expression in political discourse require 'the closest scrutiny' (*Castells*). On the other hand, being a parliamentarian alone does not confer upon an individual a greater freedom of expression (*Keller*) and may even lead to a greater duty of care. Lastly, the Court does not seem willing to afford any protection to hate speech or incitement to discrimination (*Féret*).

Nevertheless, it is safe to conclude that the Court employs a functional approach, similar to the one observed in connection with Article 6, to issues involving parliamentarians and Article 10 of the Convention. First, where parliamentary functions are not at issue, being a member of parliament merits no special treatment. A difference can be observed, however, in the definition of parliamentary functions: the Court used a relatively conservative, institutional definition of 'parliamentary functions' in case law relating to Article 6 (*Cordova, Syngelidis*). In issues relating to Article 10, it affords much greater relevance to the political nature of utterances, or their being in the general interest, than to the institutional aspect of being a member of parliament (*Castells, Öllinger, Karhuvaara*).

3. PARLIAMENTARY IMMUNITY IN THE CASE LAW OF THE CJEU

KEY FINDINGS

- The immunity system of the European Parliament is a combination of a common "European" immunity and the 28 different immunity regimes of the Member States.
- Apart from the fact that this may produce unequal or even discriminatory results (not considered in this analysis), this makes it necessary to define the scope of the "parliamentary duties". Whether or not an act or utterance falls under this heading is decisive for the type of immunity that applies.
- In its very scarce case law on the matter, the CJEU has adopted an approach that requires a material connection between the act or utterance and the duties of an MEP in order for non-accountability to apply. This approach is very similar to that adopted by the ECHR.

3.1 The immunity regime of the European Parliament

Members of the European Parliament (MEPs) benefit from a complex immunity system that dates back to an era when the Parliament was not directly elected but was composed of delegates from the national parliaments of the Member States.[49] This system is laid down in Articles 8 and 9 of Protocol No. 7 to the Treaty on European Union. The crucial first paragraph of Article 9 has been inspired by the system of immunity for members of the Parliamentary Assembly (until 1974: Consultative Assembly) of the Council of Europe, and which still reveals its structure as a gathering of delegates from national parliamentarians.[50] Articles 8 and 9 of Protocol No. 7 read as follows:

> **Article 8**
> Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.
>
> **Article 9**
> During the sessions of the European Parliament, its Members shall enjoy:
> (a) in the territory of their own State, the immunities accorded to members of their parliament;
> (b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.
>
> Immunity shall likewise apply to Members while they are travelling to and from the place of meeting of the European Parliament.
>
> Immunity cannot be claimed when a Member is found in the act of committing an offence and shall not prevent the European Parliament from exercising its right to waive the immunity of one of its Members.

Article 8 of the Protocol provides for absolute non-accountability in the exercise of a member's functions. This provision is thus similar or identical to non-accountability as it exists in all Member States (although it is frequently limited to votes and opinions expressed *in* parliament proper).

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49 This was the case until 1979.

50 For the immunity system of the Parliamentary Assembly of the Council of Europe, see: Statute of the Council of Europe, Art. 40; General Agreement on Privileges and Immunities of the Council of Europe, Arts. 13-15; Protocol thereto, Arts. 3 and 5. For the historical link between the immunity system of the European Parliament and that of the Parliamentary Assembly, see Harms 1968.

The complexity of the European Parliament's (EP) immunity system stems from Article 9, which, depending on the location of a member at the relevant time, either provides an MEP with inviolability equal to that enjoyed by national parliamentarians of his home Member State or with a broad 'European' inviolability that prohibits 'any measure of detention' and 'legal proceedings' against him.[51] In fact, this means that the inviolability system of Article 9 is a combination of the systems of all 28 Member States of the EU and the proper inviolability of the European Parliament.

The exact scope of the immunity depends, first, on the nationality of the member concerned[52] and, second, on the state in which the alleged criminal act or the fact to which legal proceedings relate has occurred. Article 9(3) provides for the exception of *flagrante delicto* which can be found in all inviolability provisions of European states. Lastly, the European Parliament has a right to waive inviolability on request, pursuant to Article 9(3).

3.2 The CJEU and the Scope of European Non-accountability

Even though the Protocol summarily refers to the 'immunity' enjoyed by parliamentarians in the Member States – thus to the entirety of immunities existing there – it is clear that Article 9 deals with inviolability only. Apart from certain cases in which a parliamentarian holds a dual mandate as a member of a local or regional assembly,[53] it is inconceivable how a member of the European Parliament could perform an act or make an utterance that is covered by national non-accountability, which, after all, relates exclusively to the inner dealings of national parliaments. This is different under Article 8 of the Protocol, which grants members of the EP absolute non-accountability for 'opinions expressed […] in the performance of their duties'. It is thus necessary to determine the scope of parliamentary duties.

The CJEU has, for a very long time, carefully avoided this question, and in fact any substantive question with regard to parliamentary immunity.[54] The only two decisions of interest in this respect are those in *Marra*[55] and, most recently, *Patriciello*.[56]

In *Marra*, two persons had brought civil claims for damages against Mr Marra MEP, who had allegedly insulted them in leaflets he had distributed in his native Italy. While on trial in a local court, Mr Marra had requested the EP to defend his immunity and this request was granted. However, for unknown reasons, the resolution of the EP had not reached the

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51 It has long been doubted whether the term 'legal proceedings' had to be interpreted as meaning both criminal and civil proceedings, since none of the six founding members of the European Communities, which initially adopted the Protocol, provided for inviolability from civil proceedings in their national systems. However, since 2003, the European Parliament has in several cases asserted inviolability from civil proceedings against its members where it was of the opinion that the amount which the members would potentially have to pay in civil damages was such that it had to be considered punitive in nature; see Offermann 2007.

52 The phrase 'their own state' in Art. 9(1)(a) refers to the state in which a member has been elected, thus strictly speaking not the state of which he is a national. After all, there may be cases of dual nationality or, where election rules permit this, cases in which a national of one Member State is elected in another.

53 While membership of the European Parliament is incompatible with a national parliamentary mandate by virtue of art. 7 (1) and (2) of the Act concerning the election of the Members of the European Parliament by direct universal suffrage, membership of local or regional councils/assemblies remains possible for MEPs, subject to national legislation. Membership of such bodies often brings with it non-accountability similar to that enjoyed by national parliamentarians.

54 Mehta 2012, p. 314.

55 *Alfonso Luigi Marra v. Eduardo De Gregorio and Antonio Clemente* (preliminary ruling), CJEU 21 October 2008, joined cases C-200/07 and C-201/07.

56 *Aldo Patriciello*, CJEU 6 September 2011, case C-163/10.

Italian Court. In a preliminary question to the CJEU, this Court therefore asked, first, whether it was required to request the lifting of immunity and, in the absence of a decision by the European Parliament, whether it was competent to rule on the scope of immunity. These questions did not, however, distinguish between the two forms of immunity contained in Articles 8 and 9 (then Articles 9 and 10) of the Protocol, respectively. With regard to the circumstances of the case, the CJEU assumed that the immunity at stake was that of Article 8 (non-accountability for opinions expressed in the exercise of a member's functions).[57] It observed that this particular immunity was absolute and could not be waived by the European Parliament; neither did the Parliament have the power to determine whether the conditions for the application of Article 8 are met in a specific case. This decision falls within the exclusive competence of the national court, which is thus not obliged to request a waiver.[58] However, where the European Parliament has been requested to defend its member's immunity, the duty of sincere cooperation obliges the Court to stay proceedings until the EP has reached a decision. However, the national judge is not obliged to follow that decision.[59]

Accordingly, it is for the national judge to rule on the scope of European non-accountability. The CJEU's judgment in *Marra* did not provide any guidance as to the definition of opinions expressed in the performance of an MEP's duties – this issue was not raised by the question of the referring court. However, it was addressed in the Opinion of Advocate General Maduro, who suggested a test of two criteria. His Opinion is one of very few authoritative texts on this important question in an EU context:

> First, the opinion at issue in any given case must be about a genuine matter of public interest. While a statement on an issue of general concern will be covered by the absolute privilege guaranteed by Article 9 regardless of whether it is made inside or outside the premises of the European Parliament, this privilege may not be relied upon by MEPs in the context of cases or disputes with other individuals that concern them personally but have no wider significance for the general public. […] I want to be clear in this respect: the question whether or not such a statement contributes to a public debate is not to be determined by the style, accuracy or correctness of the statement but by the nature of the subject-matter. Even a possibly offensive or inaccurate statement may be protected if it is linked to the expression of a particular point of view in discussing a matter of public interest.
>
> Second, a distinction must be drawn between factual allegations against particular individuals and opinions or value judgments. As the European Court of Human Rights has held 'while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 [ECHR]'. When a Member of Parliament makes a value judgment about a matter of general importance, no matter how upsetting or offensive some people may find it, he should, in principle, be able to avail himself of absolute privilege. However, Article 9 of the Protocol, which expressly refers to 'opinions', does not cover statements made by MEPs which contain factual allegations against other individuals.[60]

According to Advocate General Maduro, it thus falls within the duties of an MEP to make statements and voice opinions about matters of general interest, also where this is done in a non-parliamentary context. He further draws a line between 'value judgments' and 'factual allegations'; the former must fall within the sphere of absolute non-accountability, whereas the latter do not because they can be falsified. Interestingly, Maduro does not attach any importance to a material link between the utterances of an MEP and his specific activity in the Parliament. In the absence of a larger amount of case law, it is hard to assess the feasibility of this approach with certainty.[61] It is, however, evident that it would

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57 *Ibid.*, para. 31.
58 *Ibid.*, paras. 32-33.
59 *Ibid.*, paras. 42-44.
60 Opinion of AG Maduro in *Marra*, joined cases C-200/07 and C-201/07, delivered on 26 June 2008, paras. 37-38.
61 Think, for instance of Geert Wilders' statement that the Quran is a 'fascist book'. Is calling something 'fascist' a value judgment or a factual allegation? And in either case, in the context of the Quran, which is the basis

make the scope of absolute non-accountability enjoyed by MEPs much broader than it is in all or most of the Member States.

In *Patriciello*, the only case to date in which the CJEU has considered the question what constitutes an opinion expressed in the exercise of an MEP's duties directly, Advocate General Jääskinen rejected the test proposed by Maduro and has instead suggested an 'organic' approach. By this he means

> that the Court should introduce a criterion specific to the nature of the duties of a Member of the European Parliament, on the basis of the case-law of the European Court of Human Rights. This criterion links substantive immunity not to the content of a Member's comments, but rather to the relationship between the context in which those comments are made and the parliamentary work of the Parliament.[62]

Thus, the decision whether an opinion has been expressed in the exercise of an MEP's duties should still be taken on the basis of the content of that opinion, but this content should be materially linked to the actual work of the EP, and not to the concept of public interest. As Jääskinen himself points out, this approach is inspired by that taken by the European Court of Human Rights in its case law regarding parliamentary immunity.

The circumstances of the case in *Patriciello* were the following: an Italian MEP had observed a municipal police officer issuing tickets to several drivers who had parked their cars in contravention of the relevant regulations on a parking lot close to a neurological clinic. The MEP had then accused her of falsifying the relevant times, which amounts to the criminal offence of forgery. He was subsequently charged with making false accusations against a public official. Upon his request, the MEP asserted his immunity under Article 8 of Protocol No. 7. The resolution states that

> [a]s a matter of fact, in his statements, Mr Patriciello merely commented on facts in the public domain, the rights of the citizens to have an [sic] easy access to a Hospital and to the healthcares [sic], which had an important impact on the daily life of his constituents.[63]

The trial court submitted to the CJEU the question whether making false accusations (*in abstracto*) constituted an utterance protected by non-accountability *ex* Article 8.

Even though it is obvious that the accusations which Mr Patriciello had made against the Italian police officer would not have passed the test suggested by Advocate General Maduro in *Marra*, since they were of a factual and thus falsifiable nature, the Court chose to adopt a more restrictive approach. According to the Court, non-accountability *ex* Article 8 is 'in essence intended to apply to statements made by those members within the very precincts of the European Parliament'. Nevertheless it is possible that it also covers opinions expressed outside these precincts, since this depends 'not on the place where the statement was made, but rather on its character and content'.[64] However, the Court also acknowledges the harsh consequences which absolute inviolability has on those who wish to bring legal proceedings against a member. It therefore holds that 'the connection between the opinion expressed and parliamentary duties must be direct and obvious'.[65] This was of course clearly not the case with regard to the opinion which Mr Patriciello had expressed at the parking lot. We can thus see that the CJEU essentially followed the

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of a religion whose core dogma is that this book is the word of God, can a statement about the book be distinguished from a statement about Muslim believers?

62 Opinion of AG Jääskinen in *Patriciello*, case C-163/10, delivered on 9 June 2011, para. 89.

63 *Aldo Patriciello*, CJEU 6 September 2011, case C-163/10, para. 12.

64 *Ibid.*, paras. 29-30.

65 *Ibid.*, para. 35.

Opinion of Advocate General Jääskinen and adopted his 'organic' test, which strongly resembles the functional test employed by the ECtHR.[66]

Court of Justice will refine or alter its definition of an 'opinion expressed in the exercise of an MEP's functions' on a future occasion, where the underlying case offers more room for controversy. For the time being, however, European non-accountability should be interpreted according to the test suggested by Advocate General Jääskinen.

3.3 CJEU Case law on parliamentary immunity: conclusions

Article 8 of Protocol No. 7 provides MEPs with absolute non-accountability for opinions expressed in the exercise of their duties. Whether an utterance falls within this category is ultimately for the national trial court to decide. However, the CJEU has provided some guidance in this question. It did not adopt the wide interpretation suggested by Advocate General Maduro in the case of *Marra*, which would have rendered MEP's unaccountable for opinions which relate to matters of public interest and do not amount to factual accusations. Instead, the Court found an approach very similar to that of the European Court of Human Rights: an opinion expressed by an MEP must bear a 'clear and obvious' connection with the actual work of the European Parliament in order to fall within the scope of Article 8 of the Protocol. At least with regard to non-accountability, the approach of the CJEU is thus congruent with that of the ECtHR.

[66] It should be noted that we referred to the ECHR's approach as 'functional', since the decisive factor is the connection between the act that is the basis of proceedings against a parliamentarian and his parliamentary functions. AG Jääskinen, however, calls the approach suggested by AG Maduro 'functional' because it refers to the function of an MEP's statement as a contribution to public debate. He characterises his own approach as 'organic'.

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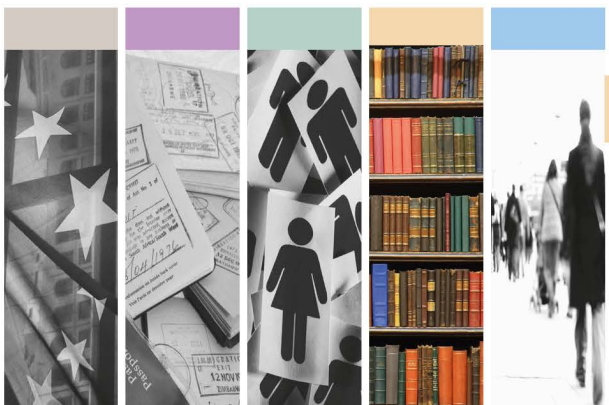

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