



The Immunity of the Deputy in the 1998 Constitution of the Republic of Albania

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Received: 19 February 2024 / Accepted: 15 March 2024 / Published: 23 March 2024

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Doi: 10.56345/ijrdv11n125

Abstract

Immunities are generally configured as an exception to the application of the common law provided for the benefit of some subjects due to the function they perform. It should be emphasized that immunity, in general, is a very significant instrument for the protection of the autonomy and independence of constitutional institutions. In this paper, the author will deal only with the immunity of the deputy, postponing to a second moment the treatment of immunity for other constitutional institutions provided by the Constitution of the Republic of Albania. The issue of the MP's immunity has been and continues to be at the center of the political debate at the moment we are writing this. It will continue to be in the center of attention from our politicians until it is not considered as a personal privilege but as an instrument to protect the exercise of functions in the Parliament. First, the author will deal with the notion and origin of immunity in general, then to stop at the immunity of the deputy according to the 1998 constitution and the evolution that has occurred during these years.

Keywords: Parliamentary immunity, Constitution, Irresponsibility, Criminal immunity

1. Introduction

1.1 The notion and origin of immunity

More or less all modern Constitutions foresee the institution of immunity as an effective tool in realizing the autonomy and independence of the holders of the institutions. The constitutional immunities provided by democratic systems, based on the history of parliamentary law, are divided into substantive immunities and procedural immunities.¹ Substantial immunities essentially exclude the criminal or illegal nature of the behavior committed and as a result lead to absolute, general and permanent irresponsibility,² while procedural immunity³ has a formal nature and is relative⁴ and temporary⁵ because it does not exclude you from responsibility but leads to the use of a special procedure that is different from that

¹ VOLPI MAURO, *Le immunità della politica negli ordinamenti democratici, ne Diritto pubblico comparato ed europeo*, 2005, nr. 3 dhe ne P. A. Pillitu (a cura di), *Scritti in onore di Giorgio Badiali*, II, Aracne Editrice, Perugia, 2007 f. 350.

² Here comes the irresponsibility for thoughts and opinions expressed, which was born as a way to protect parliamentarians, for the first time in England in Article 9 of the Bill of Rights 1689, after the success of the Glorious Revolution.

³ Criminal immunity was established for the first time in France in the Decree of the National Assembly on June 23, 1789.

⁴ Relative in the sense that it pertains to criminal responsibility.

⁵ Temporary in the sense that it includes only the period of the mandate.

of the general law for all citizens.⁶

The immunity was first born around the figure of the Monarch, holy and immortal, then it was extended to the members of the parliament and the government, to be recognized later not only for the Heads of States but also for the judges of the Courts of different levels.⁷ The Institute of Immunity is a dynamic concept that has evolved with history and the change of State models. Thus, for example, parliamentary immunity initially served to protect the exercise of its function by the executive power. In the parliamentary government model, where the Parliament does not need to be protected by its Government, and above all, with the release of judges from the protection of the Government, this concept loses its meaning.

Later, in some countries, transition from the liberal system to the democratic one, the concept of immunity gained ground as a privilege of the political class with the aim of protecting political freedom wherever and whenever it is expressed, while in today's democracies we can say that the idea is now dominant that parliamentary immunities are intended to guarantee the freedom and independence of parliamentary functions from the acts of the judicial power with the aim of persecution.⁸ It should be emphasized that in the constitutional State of law, immunity includes exceptions to the principle of equality of citizens before the law and taking responsibility due to the exercise of the functions attributed by the government.⁹ C. Martinelli states that immunities, since they consist of differentiated treatments in derogation of different constitutional principles, should not be configured as a natural attribute of the sovereignty of constitutional bodies, nor as a privilege created for the benefit of personal and private interests, but as a provision of a special right and as a prerogative aimed at protecting the exercise of constitutional and public functions.¹⁰ However, it should be noted that we are dealing with a tension between the principles of the constitutional State of law¹¹ and the freedom to exercise the democratic mandate. Because of this tension, a balance must be found, which is certainly broken when politics is protected from any type of legal control, or vice versa, when legal responsibility overlaps with political responsibility.¹²

2. Immunity of the Deputy

The immunity of the deputy is regulated in Article 73 of the Constitution of the Republic of Albania, which has undergone two amendments since its adoption in 1998. Based on this constitutional provision, we can say that the immunity of the deputy is embodied in irresponsibility (criminal, civil or disciplinary) for opinions and votes given in the exercise of his function and criminal immunity. The constitutional provision that sanctions the immunity of the deputy, contains principles that regulate the guarantee of attributes and judicial authority against mutual interference. These principles are designed to protect constitutional goods or constitutional principles, potentially conflicting, which must be reconciled from time to time in order to coexist. So, on the one hand, we have the autonomy of parliamentary functions as an area of political freedom of the representative assembly, on the other hand, we have legality and constitutional principles such as the equality of citizens before the law, equal judicial protection, etc.

This institute is not new to our system, but it existed in the previous constitutional acts of the Republic of Albania. These prerogatives, non-responsibility and immunity, in derogation of common law and the principle of equality, tend to protect the deputy by protecting him from the restrictions that can be exercised by other state powers. In particular, they should serve to protect the freedom of opinion of MPs, which is the basis of parliamentary life, and to protect them from criminal prosecutions that aim to condition the political activity of the parliament.¹³ The Constitutional Court of Italy has stated that parliamentary immunity *aims to protect the deputy from illegal judicial interventions in the exercise of his*

⁶ VOLPI MAURO, *Le immunità della politica negli ordinamenti democratici, ne Diritto pubblico comparato ed europeo*, 2005, nr. 3 dhe ne P. A. Pillitu (a cura di), *Scritti in onore di Giorgio Badiali, II, Aracne Editrice, Perugia, 2007 f. 350-35.*

⁷ TOMASO FRANCESCO GIUPPONI, *Le immunità costituzionali, Relazione al Convegno Le immunità nel diritto interno, internazionale e comparato, Università di Perugia, 25-27 maj 2006, f.2-9; VOLPI MAURO, Le immunità della politica negli ordinamenti democratici, ne Diritto pubblico comparato ed europeo*, 2005, nr. 3 dhe ne P. A. Pillitu (a cura di), *Scritti in onore di Giorgio Badiali, II, Aracne Editrice, Perugia, 2007 f. 351-352.*

⁸ TOMASO FRANCESCO GIUPPONI, *Le immunità della politica. Contributo allo studio delle prerogative costituzionali*, Giappichelli, Torino, 2005, f. 125-128.

⁹ VOLPI MAURO, *Le immunità della politica negli ordinamenti democratici, ne Diritto pubblico comparato ed europeo*, 2005, nr. 3 dhe ne P. A. Pillitu (a cura di), *Scritti in onore di Giorgio Badiali, II, Aracne Editrice, Perugia, 2007, f. 353.*

¹⁰ CLAUDIO MARTINELLI, *L'insindacabilità parlamentare. Teoria e prassi di una prerogative costituzionale*, Giuffrè, Milano, 2002, f. 9-10.

¹¹ Si, ligjshmeria, barazia para ligjijt, pergjegjesia per veprimet qe kryejme, etj.

¹² VOLPI MAURO, *Le immunità della politica negli ordinamenti democratici, ne Diritto pubblico comparato ed europeo*, 2005, nr. 3 dhe ne P. A. Pillitu (a cura di), *Scritti in onore di Giorgio Badiali, II, Aracne Editrice, Perugia, 2007, f.354.*

¹³ BIN R, PITRUZZELLA G, *Diritto Costituzionale*, G. Giappichelli, Torino, 2004, f. 207.

representative mandate; to protect him, that is, from the risk that particularly invasive means of investigation or coercive acts of his fundamental freedoms may be used for purposes of persecution, conditioning or unrelated to the actual needs of the jurisdiction. The beneficiaries of the protection, in any case, are not the individual MPs, but the assemblies as a whole. It aims to preserve their functionality, the integrity of the composition and the full autonomy of decision-making, in relation to unnecessary interventions of the judicial power.¹⁴

Whereas, in the Opinion of the Venice Commission regarding the procedures for limiting parliamentary immunity and the conditions for granting authorization for criminal prosecution, it is stated that the main purpose of the provisions that guarantee parliamentary immunity in different constitutions is the protection of the Parliament itself and in a special way of its proper functioning and parliamentary immunity is not at all a personal privilege of each of the members of Parliament.¹⁵ Finally, this Commission addressing the caution that must be shown in the review of requests for authorization, referring to possible political interference, has argued that there should be a basic presumption that immunity should be waived in all cases, when there is no reason to suspected that the accusations against the relevant deputy are politically motivated.¹⁶

3. Irresponsibility for the Opinions Expressed and Votes given by the Deputy.

The constitutional provision in the first paragraph of Article 73 provides that *the deputy is not responsible for the opinions expressed in the Assembly and the votes given by him in the exercise of his function.....* The first question that arises naturally and that needs to be answered is if the deputy is not responsible only for the opinion expressed in the assembly or even for the opinion expressed outside the assembly such as newspapers, magazines, TV, in the meeting with the electorate, etc? First of all, it should be said that the immunity of parliamentary prerogatives is irresponsibility, born in England in the 1600s. In those systems, later, a restrictive regulation of this immunity was affirmed using the spatial criterion that connects it not to the function it performs but to the place where the opinion is expressed. In the United Kingdom, the non-liability of parliamentarians only concerns opinions expressed in the hall, in committees or in parliamentary procedures. In a conflict between the Court and the Parliament, the relevant parliamentary commission, created in 1997, in the final report of 1999 stated that the opinions given by the parliamentarian outside the hall and the affairs of the Parliament in the narrow sense of the word are not covered by immunity.¹⁷ Whereas, the Constitutional Court of the Republic of Italy, which in the end has adopted a position diametrically opposed to the United Kingdom, has expressed that: the activity of the members of the chambers in the representative democratic state by its nature is destined to be projected outside the halls of the assembly¹⁸ in the interest of free political dialectics, which is the vital condition of representative democratic institutions.¹⁹ According to this decision, irresponsibility has nothing to do only with the opinion expressed in the Assembly, but with a wider activity outside the Parliament.

The Law on Main Constitutional Provisions provided that the deputy has no legal responsibility for the actions he performs and the positions he takes during the exercise of his duties as a deputy or for the vote given.²⁰ In contrast to the current Constitution in force, the above formulation is broader and does not limit legal irresponsibility to actions and attitudes within the Assembly, but also to actions outside the Assembly. In most legal systems of civil law, irresponsibility is related to the exercise of functions,²¹ but there are cases where irresponsibility is related to the country. For example, the German Federal Law, in the first paragraph of Article 46, defines the non-responsibility of the deputy for the opinions expressed and the votes given in the Bundestag²² and in the committees,²³ while the Constitution of the Republic of Italy

¹⁴ *Decisione nr 390/2007, Corte Costituzionale Italiana.*

¹⁵ *CDL-AD(2006)005-e Opinion on the Draft Decision on the limitation of parliamentary immunity and the conditions for the autorisation to initiate investigation in relation with corruption offences and abuse of duty of Albania adopted by the Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006).*

¹⁶ *CDL-AD(2014)011-e Report on the scope and lifting of parliamentary immunities adopted by the Venice Commission at its 98th plenary session (Venice, 21-22 March 2014).*

¹⁷ *VOLPI MAURO, Le immunità della politica negli ordinamenti democratici, ne Diritto pubblico comparato ed europeo, 2005, nr. 3 dhe ne P. A. Pillitu (a cura di), Scritti in onore di Giorgio Badiali, II, Aracne Editrice, Perugia, 2007, f. 358.*

¹⁸ *The parliamentary structure in the Republic of Italy consists of the Chamber of Deputies and the Chamber of Senators, which have the same powers. So we are dealing with a perfect bicameralism.*

¹⁹ *Decisione n. 320/2000, Corte Costituzionale Italiana.*

²⁰ *Shih nenin 22/4.*

²¹ *VOLPI MAURO, Le immunità della politica negli ordinamenti democratici, ne Diritto pubblico comparato ed europeo, 2005, nr. 3 dhe ne P. A. Pillitu (a cura di), Scritti in onore di Giorgio Badiali, II, Aracne Editrice, Perugia, 2007, f. 358-360.*

²² *The Bundestag is the German federal parliament and expresses the popular representation of the Federal Republic of Germany.*

relates the non-responsibility of the deputy to his function and not COUNTRY.²⁴

What about in Albania, Based on the literal interpretation of the relevant constitutional provision, in Albania the deputy is not responsible only for the opinions and votes given in the Assembly and not outside the Assembly in the exercise of his function. This thesis is also supported by the Albanian constitutional doctrine. It should be emphasized that irresponsibility for opinions expressed and votes cast in the Assembly is relative and not absolute. Why? What about in Albania? Based on the literal interpretation of the relevant constitutional provision, in Albania the deputy is not responsible only for the opinions and votes given in the Assembly and not outside the Assembly in the exercise of his function. This thesis is also supported by the Albanian constitutional doctrine.²⁵ It should be emphasized that irresponsibility for opinions expressed and votes cast in the Assembly is relative and not absolute. Why? Because the Constitution itself, in the second part of the first paragraph, Article 73, provides that legal irresponsibility does not apply in the case of defamation.²⁶ It should be emphasized that the deputy is not responsible for the opinions expressed and the votes given in the Parliament even after the end of his mandate, while the criminal immunity has as a prerequisite the fact that the deputy is in office and is valid only for the time of the legislature.

4. The Criminal Immunity of the Deputy

The criminal immunity of deputies regulated in article 73 of the constitution has undergone changes during these years with law no. 88/2012, For some changes in law no. 8417, dated 21.10.1998 Constitution of the Republic of Albania and with law no. 761 /2016, For some additions and changes in law no. 8417, dated 21.10.1998, Constitution of the Republic of Albania. It should be underlined that the Constitution of 1998 until its amendment in 2012 provided that deputies could not be prosecuted without the authorization of the Assembly. With the changes of 2012, criminal immunity was limited, allowing the prosecutor's office to prosecute the MP, conduct background investigations, summon and interrogate the MP without prior authorization from the Assembly.²⁷ In Italy and France, the authorization for the criminal prosecution of the deputy has been repealed by the respective constitutional laws no. 3/1993 and no. 95-880/1995, while in most of the legal systems, they foresee the authorization for the criminal prosecution of the deputy, such as Austria, Greece, Spain etc. Based on the second paragraph of Article 73, the authorization of the Assembly is necessary in the case of arrest or deprivation of liberty in any form, as well as in cases where personal or residential control is exercised.²⁸

So, after the constitutional changes of 2012, criminal immunity is materialized in three *ad acta* authorizations that guarantee the deputy in a criminal process. These are:

- authorization from the Assembly for the arrest or deprivation of freedom of the deputy in any form, with the exception of *flagrante delicto*,
- authorization from the Assembly to exercise personal control over the deputy,
- authorization from the Assembly to exercise control in the deputy's residence.

Here we are not dealing with an absolute criminal immunity because the deputy can be arrested or detained when he is caught in the commission of the above or immediately after the commission of a serious crime where there is no need for authorization, *but the General Prosecutor or the Head of the Special Prosecution*²⁹ *immediately notifies the Assembly, which, when it finds that there is no place for proceeding, decides to lift the measure.*³⁰ Regarding the arrest or deprivation of liberty of the deputy without authorization from the assembly, the constitutional provision has changed from time to time regarding the nature of the crime. Initially, in the 1998 Constitution, the deputy could be arrested or deprived

²³ *The Basic Law of the Federal Republic of Germany, in the first paragraph of Article 46, provides that: A member of parliament may never be prosecuted in a judicial or disciplinary manner or generally held accountable outside the Bundestag for opinions expressed and votes cast in the Bundestag or in one of his commissions. This provision does not apply in defamation cases. Author's translation.*

²⁴ *The Constitution of the Republic of Italy, in the first part of the first paragraph, Article 68, provides that: Members of Parliament cannot be prosecuted for the opinions expressed and the vote given during the exercise of their functions.*

²⁵ ANASTASI A., OMARI L., *E drejta kushtetuese, Shtepia botuese Pegi, Tirane, 2010, f. 226-227.*

²⁶ *The Constitution of the Republic of Albania, in the second part of the first paragraph, Article 73, provides that: This provision does not apply in the case of defamation.*

²⁷ *The Constitution of the Republic of Albania, the first paragraph of Article 73, provides that: The Member of Parliament cannot be arrested or deprived of his freedom in any form or subjected to a personal or home search, without the authorization of the Assembly.*

²⁸ *Shih paragrafin e dytë të nenit 73, Kushtetuta e Republikës së Shqipërisë.*

²⁹ *The underlining is the author's to emphasize the fact that the Head of the Special Prosecutor's Office was established in 2016, with the constitutional changes in the framework of the justice reform.*

³⁰ *Shih paragrafin e tretë të nenit 76, Kushtetuta e Republikës së Shqipërisë.*

of his liberty for committing a serious crime in flagrante delicto.³¹

Later, with the changes of 2012, the constitutional legislator, in the framework of limiting the immunity of the deputy,³² expanded the range of crimes for which the deputy can be arrested in flagrante delicto, further limiting his criminal immunity.³³ So, with the constitutional changes of 2012, the deputy could be detained or arrested in flagrante delicto without authorization after committing any type of crime and not only for committing serious crimes. The restriction of absenteeism in cases of flagrante delicto did not last long in time because the constitutional amendments of 2016 establish that the MP can be arrested in flagrante delicto without the authorization of the Assembly only for serious crimes.³⁴ The arrest of the MP in flagrante delicto only for the commission of serious crimes, without the authorization of the Assembly, strengthens the immunity of the MP in the dimension of criminal immunity. The constitution, in the specific provision of criminal immunity, does not provide for the duration of the immunity, so the immunity from arrest pertains to the entire time of the legislature or only to the period of the parliamentary sessions?

Immunity from arrest extends according to the constitutional doctrine throughout the time of the legislature, unless it is expressly stated that it extends only during the time when the assembly is in session.³⁵ There are constitutions that provide for the extension of immunity from arrest only within the session, such as the Constitution of Belgium³⁶ and Luxembourg,³⁷ while the constitution of Norway provides that MPs cannot be arrested only during their commute and stay in Parliament, except in the case of flagrante delicto.³⁸ The examination of the request of the General Prosecutor and the Head of the Post Prosecutor's Office for the granting of authorization by the Assembly is regulated not only by the constitution³⁹ but also by the Rules of Procedure of the Assembly⁴⁰ and the Code of Criminal Procedure.⁴¹

5. Conclusions

- Seeing that the Albanian society has a high perception regarding the corruption of politicians.
- Considering that from the request for authorization until the decision is made in the plenary session, a long time takes, which can be used by those interested to hide the products of the criminal offense or to escape (as happened during this legislature), for consequences the granting of the authorization loses its effectiveness.
- Considering that during the last years, the Council for Regulation, Mandates and Immunity has turned into a quasi-judicial body, (in violation of the principle of separation of powers) requesting additional documents and evidence from the Prosecutor's Office regarding the granting of authorization for arrest or deprivation of liberty, to exercise personal and housing control.
- Considering that the information and evidence sent by the competent bodies for the granting of authorization by the parliament are made public, seriously undermining the preservation of investigative secrecy and the continuation of investigations by the Prosecutor's Office.
- Seeing that the Constitution and the Rules of the Assembly do not contain any clear indication of the parameters that the parliament should take into account when evaluating the request for authorization.
- Considering that the criminal prosecution and the criminal process can be carried out without prior authorization from the Assembly, against the deputy, the provision under study does not provide anything regarding his arrest in the event of a summary conviction decision. So should he be arrested after receiving the authorization from the assembly or can he be arrested without the authorization of the assembly for

³¹ *Shih paragrafin e tretë të nenit 76, Kushtëtuta e Republikës së Shqipërisë, e pa ndryshuar.*

³² *We say restriction of immunity because we are not dealing with the removal of the immunity of the deputy that was often propagated by the media and political actors during that period.*

³³ *The Constitution of the Republic of Albania, amended by constitutional law no. 88/2012, in the first part of the third paragraph, article 73, provided that: The deputy can be detained or arrested without authorization when caught in the act or immediately after the commission of a crime. The underlining is the author's.*

³⁴ *The Constitution of the Republic of Albania, amended by constitutional law no. 761/2016, in the first part of the third paragraph, article 73, provides that: The deputy can be detained or arrested without authorization when caught in the act or immediately after the commission of a serious crime. The underlining is the author's.*

³⁵ ANASTASI A., OMARI L., *E drejta kushtetuese, Shtepia botuese Pegi, Tirane, 2010, f.229.*

³⁶ *Shih nenin 59, Kushtëtuta e Belgjikës, e ndryshuar.*

³⁷ *Shih nenin 59, Kushtëtuta e Luksemburgut, e ndryshuar.*

³⁸ *Shih nenin 67, Kushtëtuta e Norvegjisë, e ndryshuar.*

³⁹ *Nenet 73, 135 dhe 148, Kushtëtuta e Republikës së Shqipërisë.*

⁴⁰ *Nenet 13, 118 dhe 119, Rregullorja e Kuvendit të Republikës së Shqipërisë.*

⁴¹ *Neni 288, Kodi i Procedurës Penale të Republikës së Shqipërisë, i ndryshuar.*

... serving the sentence after the decision of the cut form?

It is more than necessary to amend the constitution and legislation to answer the problems raised above, otherwise immunity will continue to be treated as a personal privilege and not as a privilege to preserve the functionality and autonomy of the parliament from the judicial power.

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