DOI: 10.59560/18291155-2024.1-50

AIDA TADEVOSYAN
Head of the Expertise-Analytic Division
of the Legal-Advisory Department
of the Constitutional Court of Armenia,
Candidate of Legal Sciences

FENYA AGHABEKYAN
Leading Specialist of the Expertise-Analytic Division
of the Legal-Advisory Department
of the Constitutional Court of Armenia;
1st year Master's student of the program
"International Public Law, European Law"
in Russian-Armenian University

THE SPECIFICS OF THE INSTITUTE OF STATE OFFICIALS' IMMUNITY IN THE LIGHT OF ARMENIAN CONSTITUTIONAL ORDER

Annotation

The article discusses the nature of the institution of immunity as a political and legal concept in international and national law. The authors present the main approaches to the understanding of this concept, its classification, as well as the historical preconditions for its formation as a legal institute.

The authors proceed from the understanding that the comprehension of the institution of immunity should take place exclusively in the context of the political traditions of a particular state, the specifics of a particular legal order, the prevailing understanding of law, legal culture, as well as the specifics of the political and legal, socio-economic, historical and cultural development of a particular society and state.

The authors believe that the institution of immunity is determined only by the official position that a person occupies and the purpose of the proposed protection is to ensure favorable conditions for the effective performance of the official duties of the person, and in this sense, the institution of immunity cannot act as a personal privilege associated with the person of the official.
The authors find that the institution of immunity does not act as an absolute legal category and, in the presence of appropriate grounds, is subject to restriction and strictly narrow interpretation, which is also important for a democratic society. The authors believe that, in particular, on issues of disclosure and prevention of crimes against humanity, the immunity of officials should be subject to strict restrictions.
The authors present the main constitutional foundations for the regulation of the immunity of President and parliamentarians within the framework of the constitutional order of the Republic of Armenia, specifically concluding that all international and national legal provisions governing the issue of granting immunity to officials should not be interpreted and applied in a manner that contradicts paragraph 11 of the Declaration of Independence of Armenia and the state-forming values, principles and aims, establishes in the Preamble of the Constitution of the Republic of Armenia.
Keywords: immunity, ratione personae, ratione materia, president, parliamentarians, the declaration of independence of Armenia, the will of Constituent.

1. THE CHARACHTERIZATION OF THE INSTITUTE OF IMMUNITY IN INTERNATIONAL LAW

Inviolability represents a political and legal privilege intrinsically linked to the state officials and individuals occupying specific positions and exercising corresponding functions. This privilege fundamentally entails the impossibility of subjecting such officials to legal accountability or prosecution. The institution of immunity, as an integral facet of an official's legal status, bestows additional guarantees of protection, a configuration dictated by the political and legal attributes characterizing their status and the structure of powers.

It is crucial to emphasize, however, that immunity does not constitute an absolute legal category. Instead, its application is contingent upon the particular legal framework and the political and legal traditions inherent in a given political-legal system. Almost invariably, immunity is subject to specific

limitations and constraints dictated by the prevailing legal order and the established political and legal norms of a society.

In essence, the nuanced nature of immunity underscores its contextual variability, as its scope and constraints are intricately tied to the specific legal and political landscape in which it operates. The recognition of the concept of immunity is accompanied by an awareness of the necessity to balance the protection afforded to officials with the imperatives of accountability and justice within the confines of legal and societal norms.

Within the intricate tapestry of continental European constitutional law, the institution of immunity stands as a distinct feature, its contours and intricacies molded by the unique value framework, legal traditions, and public legal consciousness of each nation. This paper delves into the multifaceted nature of immunity, exploring its rationale and the factors that shape its specific applications across diverse continental legal systems.

As a general principle, immunity is typically bestowed upon high-ranking state officials, including presidents, prime ministers, legislators, judges, and human rights defenders. These individuals hold positions entrusted with profound public interest, justifying the provision of exceptional legal safeguards and enhanced means of state protection.

The cornerstone of granting immunity lies in the fundamental notion of shielding these officials from politically motivated prosecution while they diligently discharge their lawful duties. This protection aims to guarantee the unimpeded exercise of their legal powers, fostering an environment conducive to the fulfillment of their critical public functions. However, the precise content and specific characteristics of immunity vary considerably across various national systems. Each nation's unique historical heritage, cultural values, and evolving legal landscape imprint distinct features upon this institutional framework. Therefore, a comprehensive understanding of continental European immunity necessitates delving into the individual legal systems of each nation. Examining the specific constitutional provisions, judicial interpretations, and historical precedents can illuminate the nuanced variations in application and rationale that differentiate immunity across the continent. Analyzing the rationale behind immunity in various legal-political systems may reveal potential tensions between maintaining a vibrant democracy and safeguarding essential official functions. Examining these tensions critically can contribute to informed discussions about balancing individual rights, public interests, and the effective functioning of state

organs. The rationale for granting immunity to these officials is the idea of the need to protect them from persecution for political reasons in connection with their lawful activities in the exercise of legal powers.

In individual countries, the circle of officials endowed with immunity, the methods of legal regulation of this institution, and, in particular, the legal mechanisms for overcoming it, may differ, based on the corresponding features of a specific national legal system.

Thus, in some countries, the legal regulation of the institution of immunity may take place at different levels of the hierarchy of legal acts: from the constitution to laws, depending on the approaches of a particular state.

However, taking into account the importance of public relations that are the subject of the studied institution, as usual, some fundamental provisions are established, first of all, by the constitution itself, on the basis of which further concretization of legal regulation takes place by the current legislation.

The immunity granted to specific officials directly stems from the nature and scope of their official functions, rather than their individual characteristics. Notably, although the core objectives of immunity remain consistent across official categories, nuances in individual roles and power structures necessitate distinct legal treatment in terms of both substantive and procedural aspects.

International law recognizes two primary forms of immunity: *ratione personae* (personal) and *ratione materiae* (functional). These immunities are inherently linked to the legal status of the beneficiary official. Personal immunity shields individuals from prosecution for actions unrelated to their official duties, while functional immunity affords protection for lawful actions undertaken within the scope of their functions and powers.

Depending on the specific official position, the applicable immunity may have distinct justifications, protection mechanisms, and limitations on its waiver. This necessitates classifying the institution of immunity based on:

- **Protected legal relationships**: Functional vs. Personal
- **Waiver mechanisms**: Surmountable (absolute) vs. Insurmountable

Personal immunity safeguards private aspects of an official's life, not related to their public duties. It typically bars criminal prosecution, and potentially other forms of legal liability.

Personal immunity, despite extending privileged protection to areas of an official's life not directly related to their official duties, is, like functional

immunity, rooted in the political and legal characteristics of the position held, which objectively necessitate special protection. This entails the existence of appropriate legal mechanisms to safeguard officials from politically motivated persecution that could impede the effective exercise of their duties.

Personal immunity, being contingent upon an individual holding a specific position, is generally not absolute and may be subject to certain restrictions, especially after the expiration of the term of office. In contrast, functional immunity is often insurmountable.

According to Joanne Foakes, beyond the personal immunity of state officials, there is a huge historical backstage, connected with the view, that high state officials, and especially monarch, the Sovereign, were understood as personification of statehood, which was and is seen as inviolable value[1]. So, due to this understanding, the state officials were identified with the state itself, which resulted not only in constructing special political image of them, but also in providing special legal-mechanisms of extra protection.

Functional immunity is intricately linked to the exercise of official powers and their underlying functions. It signifies the protection from legal prosecution for the legitimate realisation of authorized powers.

The Court of Appeal of England stated (Zoernsch v Waldock (24 March 1964)) that in contrast with personal immunity, functional immunity, which extends to individuals holding both current and former official positions of any hierarchical level, is underpinned by a pragmatic rationale. This viewpoint asserts that an individual official should not be held accountable for actions that essentially represent the actions of the state. Additionally, functional immunity acts as a preventive measure against attempts to bypass State immunity through legal proceedings directed at an official acting on behalf of the State. This approach acknowledges the practical challenges associated with distinguishing individual actions from state actions and aims to shield officials from unwarranted personal liability in the course of executing their official duties[2].

The concept of immunity, encompassing both personal and functional aspects, is recognized in both constitutional law and international law. The legal principles and standards established within these two systems should be

[1] **Joanne Foakes.** "Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts". International Law Programme, November 2011, IL BP 2011/02.

[2] See 1.

interpreted and understood bearing in mind their mutual influence and interconnected nature.

In the scope of international law, the doctrine of immunity serves as a mechanism safeguarding the sovereignty and autonomy of states, grants legal guarantees to the representatives of states (state officials) not to be subjected to legal proceedings in foreign courts. The doctrine of immunity is firmly ingrained in the domains of international diplomatic law, international criminal law, and international humanitarian law.

However, it is crucial to acknowledge that contemporary regulations derive their foundation from international custom, as the inviolability of state officials and representatives has its historical roots in the development of international law. The rule of immunity of high-state officials is formulated on the basis of international custom, which also finds its expression in Article 7, paragraph 2, of the Vienna Convention on the Law of Treaties, which provides that *"In virtue of their functions and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty."*[1]

The concept of immunity of high-ranking officials of states was firmly established in international law, which was mentioned by the International Court of Justice in the Arrest Warrant case (Democratic Republic of the Congo v Belgium): *"51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal (…)"*[2].

In the case Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility), the ICJ observed that *"46. (…) it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their*

[1] Vienna Convention on the Law of Treaties 1969.
https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

[2] Arrest Warrant case (Democratic Republic of the Congo v Belgium), Judgment of 14 February 2002.
https://www.icj-cij.org/sites/default/files/case-related/121/121-20020214-JUD-01-00-EN.pdf

functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments"[1].

While the doctrine of diplomatic protection arises from the practice of imperialist states of 19th and 20th centuries, who used to take any measures to protect their nationals, who were engaged in commercial relations in weak states. The efforts to protect the state's nationals sometimes turned into intervention in the internal affairs of other states[2]. Preceding the codification of diplomatic law, diplomatic immunity relations were governed by customary rules. The efforts to codify the law of diplomatic immunity culminated in the adoption of the Vienna Convention on Diplomatic Relations (1961), which together with Vienna Convention on Consular Relations, comprehensively addressed and regulated the subject matter in question[3].

The concept of immunity is represented in other branches of international law too, as well as in international criminal law. Here it stands as immunity from prosecution. In the international criminal law the doctrine of immunity of state officials and representatives is well developed, taking into attention the necessity of overcoming the immunity of foreign nationals (state officials) for providing judicial proceedings against them.

As was mentioned, the functional immunity is not absolute and in certain circumstances can be overcome. In the doctrine of international criminal law there is a view, according which the international criminal law does not recognize the immunity for international crimes.

The Venice Commision mentioned that an alternative interpretation in the same vein could be argued, suggesting that the removal of immunity for heads of state or government has become a customary practice within public international law. In the House of Lords ruling regarding General Pinochet's immunity, three out of the five Law Lords affirmed this evolving trend in international law. Lord Nicholls, representing the majority view, articulated it as follows: "International law has unequivocally stated that certain behaviors,

[1] Case concerning armed activities on the territory of the Congo (new application: 2002) (Democratic Republic of the Congo v. Rwanda) jurisdiction of the Court and admissibility of the application. https://www.refworld.org/jurisprudence/caselaw/icj/2006/en/20552

[2] **John Dugard.** "Diplomatic Protection", Max Planck Encyclopedia of Public International Law [MPEPIL], May 2009.

[3] **Rosanne van Alebeek.** "Immunity, Diplomatic", May 2009 https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1055?rskey=ZRqYlD&result=31&prd=EPIL

such as torture and hostage-taking, are unacceptable for anyone. This applies equally, if not more so, to heads of state. A contrary conclusion would undermine the integrity of international law." This decision led certain scholars to assert that an individual's official capacity should never be a hindrance to prosecution. They argue that for the past fifty years, it has been an established principle, consistently relied upon by the courts, that immunity from prosecution for current or former heads of state or government cannot extend to crimes under international law. Reference is made to various legal instruments, including the Versailles Treaty, the Charter of the Nuremberg Tribunal, the Convention on the Prevention and Punishment of the Crime of Genocide, the work of the International Law Commission, and the Statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. Additionally, some states with a monistic tradition may implicitly acknowledge this principle, as their constitutions explicitly state that generally recognized principles of international law form an integral part of their national legal framework[1].

The Venice Commission mentions: *«A state could also maintain that a tacit exception from immunity was inherent in its constitution. In the case under consideration here, it might be conceived that, where the court required a state to surrender one of its leaders enjoying immunity, the state could justify handing that person over by interpreting the relevant constitutional provisions in the light of their intended purpose. Since the court's principal task is to combat impunity for perpetrators of «the most serious crimes of concern to the international community as a whole», a head of state or government who committed such a crime would probably violate the fundamental principles of his or her own constitution and could therefore be surrendered to the court, despite the protection normally guaranteed by the constitution»[2].*

We believe that in the case of serious international crimes, such as crimes against humanity, the institution of immunity should be subject to stricter limitations and endowed with more flexible mechanisms for its waiver. This is

[1] European Commission for Democracy Through Law (Venice Commission) report on constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court adopted by the Commission at its 45th Plenary Meeting (Venice, 15-16 December 2000).

[2] European Commission for Democracy Through Law (Venice Commission) report on constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court adopted by the Commission at its 45th Plenary Meeting (Venice, 15-16 December 2000).

due to the high degree of public interest in the disclosure and prevention of such crimes and the punishment of the perpetrators.
The institution of immunity, both in international and national legal systems, should be understood exclusively in the context of ensuring the protection of public interests and should not be transformed into a privilege for a specific individual or abused for political motives.

2. THE INSTITUTE OF CONSTITUTIONAL IMMUNITY IN THE SCOPE OF ARMENIAN CONSTITUTIONAL ORDER

The emergence and development of the institution of immunity in constitutional law took place in the context of the interaction and mutual influence of national and international law, which led to the development and implementation of a corresponding policy of harmonizing the legal standards governing the institution of immunity.
Thus, the constitutional institution of immunity was introduced into the Armenian legal system by the Constituent through constitutional amendments in 2005. It is noteworthy that before this, the Constitution as amended in 1995 did not recognize the idea of immunity for officials. As democratic traditions were established in the newly formed republic and international legal standards were rethought in the national legal system, the constitutional amendments of 2005 introduced the institution of immunity for the President of the country, as well as for members of parliament and the Human Rights Defender, with further concretization by the constitutional amendments of 2015.
The Constitutional Court of the Republic of Armenia in its decision of September 4, 2019, DCC-1476 noted:
"The Constitution has endowed a number of officials exercising important constitutional functions with immunity, the purpose of which is primarily to guarantee the normal and effective activity of these persons, as well as to protect them from unlawful interference in their powers and unfounded prosecution.
At the same time, the content of constitutional immunity is not uniform or uniform for officials endowed with immunity, and depending on the status of

a particular official, immunity has different scope and different procedures for overcoming.[1] "

An analysis of the relevant constitutional norms shows that in the Armenian constitutional context, personal immunity also extends to areas of the official's personal life that are not directly related to the exercise of official duties. In the case of the commission of unlawful acts unrelated to official activity, the person, by virtue of personal immunity, is endowed with guarantees of the legal impossibility of being held accountable.

At the same time, functional immunity provides the person with legal guarantees of non-liability exclusively in connection with the performance of activities determined by the official position. In Armenian constitutional law, these two types of immunity are combined. As a rule, personal immunity accompanies functional immunity and is aimed at maximizing the provision of favorable conditions for the proper performance of official duties, guaranteed against pressure and persecution on political grounds, since very often legal means become tools of political struggle.

The Article 140 of the Constitution of Republic Armenia:

«1. The President of the Republic shall be immune.

2. During the term of his or her powers and thereafter, the President of the Republic may not be prosecuted and subjected to liability for actions deriving from his or her status.

3. The President of the Republic may be subjected to liability for actions not related with his or her status only after the expiry of the powers thereof».

From the comparison of the above legal regulations, it follows:

(1) The Founder endowed the President with both personal and functional immunity. The functional immunity of the President protects him from possible prosecution in connection with the exercise of his official powers, is insurmountable and absolute, while personal immunity terminates upon the expiration of the term of office.

There are no corresponding legal mechanisms for overcoming or terminating personal immunity - personal immunity terminates by right upon the President's resignation from office, and can be

[1] The Decision of Constitutional Court of Armenia on the case of conformity of article 35 and part 2 of article 135 of the Criminal Procedure Code of the Republic of Armenia with the Constitution on the basis of the application of Robert Kocharyan, 4 september 2019, DCC – 1476.

overcome only in the case of removal of the President of the Republic from office.

(2) Unlike personal immunity, the functional immunity of the President is absolute and cannot be overcome even after resignation or expiration of the term of office.

Article 141 of the Constitution of the Republic of Armenia establishes the grounds and procedure for the removal of the President from office, which at the same time necessarily implies the overcoming of personal immunity:

«1 . The President of the Republic may be removed from office for treason, another grave crime, or gross violation of the Constitution.

2. For the purpose of obtaining an opinion on the existence of grounds for removing the President of the Republic from office, the National Assembly shall apply to the Constitutional Court, upon a decision adopted by majority of votes of the total number of Deputies.

3. The decision to remove the President of the Republic from office shall be adopted by the National Assembly, on the basis of the opinion of the Constitutional Court, by at least two thirds of votes of the total number of Deputies».

Therefore, the legal qualification of the President's actions that have motivated the initiation of the impeachment process falls within the purview of the Constitutional Court. This serves as a vital safeguard for the President being subjected to political pressure by the legislative branch. This principle, amongst others, emanates from the constitutional doctrine of separation of powers within the framework of mutual checks and balances.

We deem it necessary to emphasize that in the context of the relationships under study, the actions " deriving from his or her status " should be understood as the legitimate exercise of official powers. The purpose of functional immunity is to guarantee the unimpeded exercise of the constitutional functions of officials. It should be noted that the removal of the President from office on the grounds of high treason, another grave crime, or a gross violation of the Constitution simultaneously requires overcoming personal immunity.

The Constitutional Court of the Republic of Armenia in its decision of September 4, 2019, DCC-1476 noted:

"From a comprehensive analysis of the constitutional norms guaranteeing the immunity of the President of the Republic, it follows that the Constitution does not provide for a public authority body empowered to overcome the

personal immunity of the President of the Republic during his term of office, nor does it predetermine such a procedure. Of course, this does not mean the exclusion of the legal possibility of holding the President of the Republic accountable, since the removal of the President of the Republic from office provided for in Article 141 of the Constitution, which is an indirect mechanism for the early termination of the guarantee of his personal immunity, leads to the termination of his powers before the term established by the Constitution, which in turn allows the initiation of a procedure for holding him accountable"[1].

Thus, as the Constitutional Court noted, despite the fact that the Constitution does not provide for a separate procedure for terminating the personal immunity of the President, nevertheless, such procedure is indirectly provided for in Parts 1 and 2 of Article 141 of the Constitution, which establishes the grounds and procedure for the removal of the President from office.

From a comparison of the above norms, it follows that it is impossible to hold the President accountable under the law, including constitutional accountability in the form of his removal from office, without first overcoming his personal immunity.

The personal immunity of the President during his term of office can be overcome only in connection with his removal from office, the main condition for which is the the conclusion of the Constitutional Court. Thus, the Constituent strictly limited the possibility of overcoming the personal immunity of the incumbent President, conditioning it exclusively by the institution of the President's removal from office. Meanwhile, the functional immunity of the President cannot be overcome or terminated and remains in effect both during the performance of his duties and after the expiration of his term or the removal of the President from office.

Unlike presidential immunity and due to the specifics of their official position, the personal immunity of deputies, as well as of the Human Rights' Defender, is much more limited in the substantive and legal sense and in any case, if there are appropriate grounds, can be overcome, and in some cases can be ignored when an official was caught at the scene of a crime or immediately thereafter (RA Constitution, Article 96, Part 1 of Article 193).

[1] The Decision of The Constitutional Court of Armenia on the case of conformity of article 35 and part 2 of article 135 of the Criminal Procedure Code of the Republic of Armenia with the Constitution on the basis of the application of Robert Kocharyan, 4 september 2019, DCC – 1476.

The immunity of deputies is a fundamental principle of parliamentary democracy. It is designed to protect deputies from prosecution or other forms of interference with the exercise of their duties effectively. However, the immunity of deputies is not absolute and in certain circumstances can be waived.

The essence of the parliamentary mandate is that deputies are elected by the people for representing their interests. In order to fulfill this mandate, deputies must be able to speak and act freely, without fear of reprisal.

The immunity of deputies is a constitutional guarantee for the exercise of the parliamentary mandate[1]. The essence of the parliamentary mandate is that the deputy, in exercising his/her powers, proceeds from the paramount importance of the will of the people who elected him/her, and remains faithful to the political orientation and ideology for the implementation of which he/she is called upon by the will of the people.

Parliamentary immunity is one of the guarantees for the protection of the passive electoral right of a person. Inadequately protected personified political will of the people is problematic in terms of ensuring basic human rights and freedoms too[2].

According to Part 5 of Article 90 of the Electoral Code of the Republic of Armenia, "Criminal prosecution against a candidate for deputy, an elected deputy - until he takes office as a deputy, can be initiated only with the consent of the Central Electoral Commission. He cannot be deprived of liberty without the consent of the Central Electoral Commission, except in the case when he is detained at the time of the crime or immediately thereafter. The Central Electoral Commission makes a decision on this issue by at least 2/3 of the votes of the total number of members of the Commission. The provision established by this part does not apply to citizens detained or arrested before the registration of the candidate, as well as to cases of election of a detained person as a preventive measure of detention and extension of the term of arrest of these persons."

[1] Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly. Report | Doc. 14076 | 06 June 2016. Ms Liliana PALIHOVICI, Republic of Moldova, EPP/CD. Reference to committee: Doc. 13621, Reference 4092 of 17 November 2014. 2016 - Third part-session.
https://pace.coe.int/en/files/22801/html

[2] **Ghazaryan A., Hovhannisyan N.** «Parliamentary Immunity: Dying or An Indispensable Institution In The Process Of Realizing The Political Will Of The People?», the Bulletin of the Constitutional Court of the Republic of Armenia 2(110) 2023, pg. 75-99. (in Armenian).

In interpreting the applicable provision, the Constitutional Court of the Republic of Armenia noted in its decision of March 22, 2022: "The regulation provided for in Part 5 of Article 90 of the constitutional law should be interpreted and applied strictly restrictively, thus it will be possible to use immunity in accordance with its intended purpose, avoiding abuse of the candidate's immunity established by the constitutional law, and preventing its transformation into a personal privilege of a person, while ensuring the protection of other persons, in particular, the fundamental rights and legitimate interests of victims of crimes, public interests in preventing and disclosing them."[1].

The Venice Commission, referring to the meaning of the institution of parliamentary immunity, notes:

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

(…)

39. For these reasons the basic normative position of the Venice Commission is that national rules on parliamentary immunity should be seen as legitimate only in so far as they can be justified with reference to overriding public requirements. They should not extend beyond what is proportional and necessary in a democratic society. This is the main normative basis on which the assessments in this report are made.[2] *"*

The Venice Commission distinguishes two forms of parliamentary immunity: non-liability, which is derived from the freedom of speech and grants extra legal protection against judicial proceedings for acts, conditioned with the office of parliamentarian (functional immunity); and inviolability which

[1] The Decision of the Constitutional Court of Armenia on the case of conformity of 5th part of article 90 of the Constitutional Law Electoral Code of the Republic of Armenia with the Constitution on the basis of the application of the Human rights defender DCC-1644, March 22, 2022.

[2] European Commission for Democracy through Law (Venice Commission) report on the scope and lifting of parliamentary immunities adopted by the Venice Commission at its 98th plenary session (Venice, 21-22 March 2014).

grants special legal protection to parliamentarians, accused of breaking the law (personal immunity).

As the Commission noted, the basis of parliamentary immunity is the representative mandate, which determines the official position of the deputy. So, the Article 94 of the Constitution notes: *«Deputies shall represent the whole people, shall not be bound by imperative mandate, shall be guided by their conscience and convictions»*.

The fact that a deputy, as a representative of the people, is endowed with immunity should be understood exclusively in the light of the aforementioned principle and in order to ensure its effective implementation.

The guarantees of the effective implementation of the deputy's mandate were not perceived in the same way at different stages of the development of constitutional law. In contrast to the tendencies that took place in the past, and, in particular, in the conditions of the socialist legal order, at present the main guarantee of the unhindered implementation of the representative function of the deputy is considered to be a free mandate.

The Constitutions of the USSR established norms that limited deputies with an imperative mandate, which was based on the idea of the accountability and responsibility of the deputy to the people. However, with the collapse of the socialist legal order, this understanding of the deputy's mandate also came to an end: the post-Soviet republics, which chose the path of European democracy, introduced the institution of a free mandate into their legal systems.

But we need to mention that current trends of political development of European countries demonstrate that the concept of absolutely free mandate needs criticism.

The Venice Commission notes: *«152. The main historical justification for having rules on parliamentary inviolability is to protect the workings of parliament as an institution from undue pressure from the executive (the King), including pressure from the public prosecutor, as a part of the executive power. This justification also extends to protecting the parliamentary opposition, usually in a minority, against undue pressure from the ruling majority. It furthermore protects members of parliament from political harassment from other parties, for example in the form of unsubstantiated criminal complaints from political opponents.*

153. The Venice Commission notes that in most modern European democracies these

justifications for parliamentary inviolability do not appear to be unproblematic. In an established democratic system it is not very likely that the government would try to attack the workings of parliament as an institution by bringing unsubstantiated criminal charges against the members, and if this should happen, then parliament as an institution normally has far better and more effective means of defence than relying on criminal inviolability. Furthermore there are also legal and political norms and standards in any well-functioning democracy that effectively hinder the political majority from misusing the criminal legal system against individual political opponents. Rules and principles on the independence and impartiality of the judiciary and the public prosecuting authorities are much more important and relevant in this regard than old rules on parliamentary immunity»[1].

It is noteworthy that the idea of an imperative mandate has deeper roots in Armenian reality, being reflected in the sources of Armenian national law, as evidenced by the fact that Chapter 14 of "The Western Vanity" (1773) reflects the principle of the accountability of people's representatives to the people, the expression of trust by the people, their recall and re-appointment to office[2].

However, taking into account the modern tendentions of the development of representative democracy and the political and legal challenges that modern society faces, it is necessary to consider the specific features of the legal order, public legal consciousness, legal culture, as well as the problems that society faces on the way to creating a democratic society when granting a deputy or other official immunity.

The need to limit the free mandate is a subject of separate research, however, we believe that modern tendentions in political and legal development indicate that a free, unlimited mandate of a deputy should objectively be subject to certain proportionate restrictions, in the context of establishing appropriate restrictions to prevent the deputy from deviating from the political direction that is predetermined by the will of the people.

[1] 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).

[2] Յակոբայ Շահամիրեանց գիրք անուանեալ Որոգայթ Փառաց https://hycatholic.ru/pro/biblioteca/%D5%85%D5%A1%D5%AF%D5%B8%D5%A2%D5%A1%D5%B5_%D5%87%D5%A1%D5%B0%D5%A1%D5%B4%D5%AB%D6%80%D5%A5%D5%A1%D5%B6%D6%81_%D5%88%D6%80%D5%B8%D5%A3%D5%A1%D5%B5%D5%A9_%D5%93%D5%A1%D5%BC%D5%A1%D6%81.pdf

The immunity of certain public officials is a constitutional principle that is intended to protect them from unfounded or politically motivated persecution. However, this immunity is not absolute and must be balanced against the need to ensure that officials are held accountable for their actions.
The following are some of the arguments in favor of limiting the immunity of public officials:

- It can prevent abuse of power. When officials are immune from prosecution, they may be more likely to engage in corrupt or illegal behavior.
- It can promote accountability. When officials know that they can be held accountable for their actions, they are more likely to act in a responsible manner.
- It can increase public trust in government. When the public knows that officials are not above the law, they are more likely to trust the government.

Of course, there are also some arguments against limiting the immunity of public officials:

- It can make it difficult to attract qualified candidates to public service. If potential candidates know that they could be personally liable for their actions, they may be less likely to seek public office.
- It can subject officials to harassment and intimidation. If officials are not immune from prosecution, they may be more likely to be harassed or intimidated by those who disagree with their decisions.
- It can interfere with the performance of their duties, if officials are constantly worried about being sued or prosecuted.

Ultimately, the question of whether or not to limit the immunity of public officials is a complex one. There are strong arguments on both sides of the issue. The best approach may be to strike a balance between the need to protect officials from unfounded persecution and the need to ensure that they are held accountable for their actions.
In conclusion of this brief analysis of the institution of immunity, we find that constitutional immunity, regardless of the official who is granted it, cannot be understood or interpreted as a guarantee of impunity and

unaccountability. This additional protection is solely justified by the high degree of public interest that characterizes the official's position.

An official is granted functional immunity only insofar as they are the bearer of the relevant powers, and their personal immunity is also justified by the need to protect them from political pressure and interference related to the exercise of their official duties. Therefore, we find that the constitutional and legal norms that provide for the immunity of an official must be interpreted and applied restrictively and narrowly, as only in this way can the purpose of the aforementioned institution be properly achieved, ensuring the unhindered performance of the official's duties for the benefit of guaranteeing public interests, without distorting the will of the Constituent.

In conclusion, it should be noted that when determining the legal status of government bodies and officials, including the immunity of the latter, or when ensuring its implementation, legislative and law enforcement bodies are obliged to be guided by the awareness that the Constitution cannot provide for such regulations that contradict the ideological provisions establishing the value-ideological guidelines of statehood contained in the Preamble to the Constitution and in the Declaration of Independence of Armenia. Also, such legal norms cannot be interpreted and applied in a manner that contradicts the aforementioned provisions.

Paragraph 11 of the Declaration of Independence of Armenia states that: «The Republic of Armenia stands in support of the task of achieving international recognition of the 1915 Genocide in Ottoman Turkey and Western Armenia»[1]. As the Constitutional Court of the Republic of Armenia indicated in its decision of January 12, 2010, DCC-850: *«5. The RA Constitutional Court also finds that the provisions of the Protocol on Development of Relations between the Republic of Armenia and the Republic of Turkey cannot be interpreted or applied in the legislative process and application practice of the Republic of Armenia as well as in the interstate relations in a way that would contradict the provisions of the Preamble to the RA Constitution and the requirements of Paragraph 11 of the Declaration of Independence of Armenia.*

6. The Constitutional Court finds necessary that the steps by the Republic of Armenia towards undertaking the contemplated obligations and towards

[1] Declaration on the Independence of Armenia adopted 23.08.1990 https://www.concourt.am/en/normative-legal-bases/declaration

ensuring legislative and institutional safeguards necessary for the fulfillment of such obligations be consistent with the legal positions set forth in this Decision and the fundamental principles of the constitutional order stipulated by the Constitution of the Republic of Armenia»[1].

The immunity of officials is a complex issue that is governed by both international and national law. In general, immunity is granted to officials in order to protect them from unfounded or politically motivated persecution. However, this immunity is not absolute and must be balanced against the need to ensure that officials are held accountable for their actions.

The Declaration of Independence of Armenia is an important document that sets forth the basic principles of the Republic of Armenia. Paragraph 11 of the Declaration states that the Republic of Armenia shall independently determine its internal and external policy, ensuring its security, territorial integrity and inviolability of borders.

In the context of the immunity of officials, paragraph 11 of the Declaration of Independence of Armenia can be interpreted to mean that the Republic of Armenia has the right to determine the scope of immunity for officials. This right is not absolute, however, and must be exercised in a manner that is consistent with international law and the basic principles of the constitutional order of the Republic of Armenia. The Declaration of Independence of Armenia is an important document that can be used to guide the interpretation of the immunity of officials in the Republic of Armenia.

Bibliography

1. **Ghazaryan A., Hovhannisyan N.** «Parliamentary Immunity: Dying or An Indispensable Institution In The Process Of Realizing The Political Will Of The People?», the Bulletin of the Constitutional Court of the Republic of Armenia 2(110) 2023, pg. 75-99. (in Armenian).

2. Arrest Warrant case (Democratic Republic of the Congo v Belgium), Judgment of 14 February 2002.

[1] The Decision of the Constitutional Court of Armenia on the case on determining the issue of conformity with the Constitution of the Republic of Armenia of the obligations stipulated by the protocol on the establishment of diplomatic relations between the Republic of Armenia and the Republic of Turkey and by the protocol on development of relations between the Republic of Armenia and the Republic of Turkey signed in Zurich on 10 october 2009, 12 January 2010, DCC – 850.

https://www.icj-cij.org/sites/default/files/case-related/121/121-20020214-JUD-01-00-EN.pdf
3. Case concerning armed activities on the territory of the Congo (new application: 2002) (Democratic Republic of the Congo v. Rwanda) jurisdiction of the Court and admissibility of the application.
https://www.refworld.org/jurisprudence/caselaw/icj/2006/en/20552
4. Declaration on the Independence of Armenia adopted 23.08.1990 https://www.concourt.am/en/normative-legal-bases/declaration
5. European Commission for Democracy through Law (Venice Commission) report on the scope and lifting of parliamentary immunities adopted by the Venice Commission at its 98th plenary session (Venice, 21-22 March 2014).
6. European Commission for Democracy through Law (Venice Commission) report on constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court adopted by the Commission at its 45th Plenary Meeting (Venice, 15-16 December 2000).
7. **Joanne Foakes.** "Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts". International Law Programme, November 2011, IL BP 2011/02.
8. **John Dugard**. "Diplomatic Protection", Max Planck Encyclopedia of Public International Law [MPEPIL], May 2009.
9. On the case of conformity of article 35 and part 2 of article 135 of the Criminal Procedure Code of the Republic of Armenia with the Constitution on the basis of the application of Robert Kocharyan, 4 september 2019, DCC – 1476.
10. On the case of conformity of 5th part of article 90 of the Constitutional Law Electoral Code of the Republic of Armenia with the Constitution on the basis of the application of the Human rights defender DCC-1644, March 22, 2022.
11. On the case on determining the issue of conformity with the Constitution of the Republic of Armenia of the obligations stipulated by the protocol on the establishment of diplomatic relations between the Republic of Armenia and the Republic of Turkey and by the protocol on development of relations between the Republic of Armenia and the Republic of Turkey signed in Zurich on 10 october 2009, 12 January 2010, DCC – 850.
12. Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly. Report | Doc. 14076 | 06 June 2016. Ms. Liliana PALIHOVICI, Republic of Moldova,

EPP/CD. Reference to committee: Doc. 13621, Reference 4092 of 17 November 2014. 2016 - Third part-session. https://pace.coe.int/en/files/22801/html
13. **Rosanne van Alebeek**. "Immunity, Diplomatic", May 2009 https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1055?rskey=ZRqYlD&result=31&prd=EPIL
14. Vienna Convention on the Law of Treaties 1969 https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf
15. **Յակոբայ Շահամիրեանց**, գիրք անուանեալ Որոգայթ Փառաց https://hycatholic.ru/pro/biblioteca/%D5%85%D5%A1%D5%AF%D5%B8%D5%A2%D5%A1%D5%B5_%D5%87%D5%A1%D5%B0%D5%A1%D5%B4%D5%AB%D6%80%D5%A5%D5%A1%D5%B6%D6%81_%D5%88%D6%80%D5%B8%D5%A3%D5%A1%D5%B5%D5%A9_%D5%93%D5%A1%D5%BC%D5%A1%D6%81.pdf

ՊԵՏԱԿԱՆ ՊԱՇՏՈՆԱՏԱՐ ԱՆՁԱՆՑ ԱՆՁԵՌՆՄԽԵԼԻՈՒԹՅԱՆ ԻՆՍՏԻՏՈՒՏԻ ԱՌԱՆՁՆԱՀԱՏԿՈՒԹՅՈՒՆՆԵՐԸ ՀԱՅ ՍԱՀՄԱՆԱԴՐԱԿԱՆ ԿԱՐԳԻ ՀԱՄԱՏԵՔՍՏՈՒՄ

Ամփոփագիր

Հեղինակները հոդվածում բացահայտում են անձեռնմխելիության իրավաքաղաքական ինստիտուտը՝ միջազգային և ներպետական իրավունքների համատեքստում՝ ներկայացնելով վերջինիս իմաստավորման հիմնական մոտեցումները, դասակարգումներն ու այն պատմական նախադրյալները, որոնք հիմք են հանդիսացել սույն իրավական ինստիտուտի ձևավորման համար:

Հեղինակներն առաջնորդվում են այն ընկալմամբ, որ անձեռնմխելիության ինստիտուտի իմաստավորումը պետք է տեղ գտնի բացառապես պետության քաղաքական ավանդույթների, իրավակարգում առկա իրավագիտակցության, իրավական մշակույթի, ինչպես նաև իրավաքաղաքական, սոցիալ-տնտեսական, պատմական և մշակութային առանձնահատկությունների լույսի ներքո:

Հեղինակները գտնում են, որ անձեռնմխելիության ինստիտուտը պայմանավորված է բացառապես այն պաշտոնեական կարգավիճակով,

որն զբաղեցնում է անձեռնմխելիությամբ օժտված անձը, և շնորհված պաշտպանության նպատակը անձի պաշտոնեական լիազորությունների արդյունավետ իրականացման համար բարենպաստ պայմանների ստեղծումն է: Այս իմաստով անձեռնմխելիության ինստիտուտը չի կարող հանդես գալ որպես անձնական արտոնություն՝ պայմանավորված պաշտոնատար անձի ինքնությամբ:

Հեղինակները գտնում են, որ անձեռնմխելիության ինստիտուտը չի հանդիսանում բացարձակ իրավական կատեգորիա և համապատասխան հիմքերի առկայության պարագայում ենթակա է սահմանափակումների և խիստ նեղ մեկնաբանման, ինչը ժողովրդավարական հասարակության համար կարևոր հանգամանք է: Հեղինակները կարծում են, որ, հատկապես, մարդկության դեմ ուղղված հանցագործությունների կանխարգելման և բացահայտման հարաբերություններում անձեռնմխելիության ինստիտուտը պետք է ենթարկվի խիստ սահմանափակումների:

Հեղինակները ներկայացնում են ՀՀ նախագահի և պատգամավորների անձեռնմխելիության իրավակարգավորման հիմնադրույթները Հայաստանի Հանրապետության սահմանադրական կարգի շրջանակներում՝ եզրակացնելով, որ պաշտոնատար անձանց անձեռնմխելիությամբ օժտող բոլոր միջազգային-իրավական և ազգային իրավակարգավորումները չպետք է մեկնաբանվեն և կիրառվեն այնպես, որ հակասեն Հայաստանի անկախության մասին հռչակագրի 11-րդ կետին և ՀՀ Սահմանադրության Նախաբանում հաստատագրված պետականաշենք արժեքներին, նպատակներին և սկզբունքներին:

Հիմնաբառեր. անձեռնմխելիություն, ratione personae, ratione materia, նախագահ, պատգամավորներ, Հայաստանի անկախության մասին հռչակագիր, Սահմանադրի կամք:

ОСОБЕННОСТИ ИНСТИТУТА НЕПРИКОСНОВЕННОСТИ ДОЛЖНОСТНЫХ ЛИЦ В КОНТЕКСТЕ АРМЯНСКОГО КОНСТИТУЦИОННОГО ПОРЯДКА

Аннотация

В статье авторы раскрывают сущность института неприкосновенности, как политико-правового концепта в международном и внутринациональном праве, представляя основные подходы к осмыслению указанной концепции, ее классификации, а также

исторические предпосылки его сформирования в качестве правовогоинститута.

Авторы исходят из того понимания, что осмысление института неприкосновенности должно иметь место исключительно в контексте политических традиций определенного государства, особенностей конкретного правопорядка, превалирующего в нем правосознания, правовой культуры, а также особенностей политико-правового, социально-экономического, исторического и культурного развития конкретного общества и государства.

Авторы считают, что институт неприкосновенности обусловлен лишь тем должностным положением, которое лицо занимает, и цель предлагаемой защиты – обеспечивать благоприятные условия для эффективного исполнения должностных полномочий лица. В этом смысле, институт неприкосновенности не может выступать в качестве личной привилегии, связанной с личностью должностного лица.

Авторы находят, что институт неприкосновенности не является абсолютной правовой категорией и при наличии соответствующих оснований подлежит ограничению и строго узкому толкованию, что также важно для демократического общества. Авторы считают, что в особенности по вопросам раскрытия и предотвращения преступлений против человечества неприкосновенность должностных лиц должна подвергаться строгим ограничениям.

Авторы представляют конституционные основы регулирования института неприкосновенности Президента РА и парламентариев в рамках конституционного правопорядка Республики Армения и приходят к заключению, что все международно-правовые и национально-правовые положения, регулирующие вопрос наделения должностных лиц неприкосновенностью, не могут применяться в толковании, противоречащем пункту 11 Декларации о независимости Армении и государствообразующим ценностям, принципам и целям, установленным в Преамбуле Конституции РА.

Ключевые слова: иммунитет, rationepersonae, rationemateria, президент, парламентарии, Декларация о независимости Армении, воля Учредителя.

Հոդվածը հանձնված է խմբագրություն 27.02.204 թ., տրվել է գրախոսության 01.03.2024 թ., ընդունվել է տպագրության 04.03.2024 թ.: