



# REFORMING PARLIAMENTARY IMMUNITIES IN UKRAINE

## EXECUTIVE SUMMARY

There is public pressure in Ukraine to lift the immunity of members of parliament (MPs). Parliamentary immunity was abused in the past to shield corrupt politicians from criminal prosecution. MPs have been perceived to be among the most corrupt officials by Ukrainians, according to past opinion polls.

The current coalition has promised to abolish immunities and on 16 January President Poroshenko submitted a draft law to parliament aimed at deleting the constitutional guarantee of immunity of parliamentarians<sup>1</sup>, with the exception of a narrow guarantee of a special aspect of immunity: non-liability for statements made in parliament and for voting. The wider guarantees of immunity, aimed at shielding MPs from criminal prosecution for other acts (often called inviolability), would be abolished altogether.

These changes are portrayed as bringing the legal framework closer in line with international and European obligations and practices. However, there are no international obligations related to the immunity of members of parliament and the European practice on this is varied. Indeed, parliamentary immunity is a double-edged sword. It can aid corruption, but it can also protect parliament from undue pressure. The Venice Commission of the Council of Europe stressed in a recent report that immunity provisions can be important to safeguard the separation of powers, in particular in fragile democracies, where the legislature may be under inappropriate pressures from the executive or the

judiciary<sup>2</sup>. Given that the newly elected parliament may be seen as less corrupt than the previous parliaments, while the judiciary is still largely unreformed and the rule of law weak, there may be arguments in favour of a more careful reform which narrows the concept of inviolability and clarifies the process of lifting MP's immunity.

Ultimately, the members of Ukraine's parliament will have to judge if at this stage of the transition the bigger risk is impunity for criminal activities of MPs or undue pressures on parliamentarians by other branches of power.

---

<sup>1</sup> The draft law touches upon immunities of judges as well. The issue of limiting immunities of judges falls beyond the scope of the paper and is not addressed here.

---

<sup>2</sup> See the Report of the Venice Commission on the Scope and Lifting of Parliamentary Immunities, adopted on 21-22 March 2014, CDL-AD(2014)011, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e).

## 1. GENERAL REMARKS

There is a growing belief among the Ukrainian public that eliminating parliamentary immunity can put an end to widespread political corruption and impunity as lawmakers will no longer be shielded from criminal prosecution. While corruption in Ukraine is a systematic phenomenon pervading all public sectors and levels of public administration, the Ukrainians perceive the parliament (Verkhovna Rada) and political parties as the two most corrupt institutions after the Ukrainian judiciary<sup>3</sup>. In the run-up to the parliamentary elections 2014 nearly all political parties reacted to this frustration with a well-intentioned but rather a populist declaration to waive the legal guarantees of the deputies against criminal proceedings. The commitment to renounce the parliamentary immunity is also stipulated in the coalition agreement of November 2014.<sup>4</sup>

On 16 January 2015, President Poroshenko presented his draft law on the amendments of the Ukrainian constitution with regards to the immunity of deputies and judges. On the same day, with 297 votes "in favour", it was included on the Rada's agenda as an "urgent draft law"<sup>5</sup>. This is not the first attempt to amend parliamentary immunity in Ukraine. The ambiguous consultative referendum of April 2000, held by then President Kuchma, aimed mainly at weakening the position of the legislature, including removal of immunities. Both the Constitutional Court of Ukraine and the Venice Commission doubted the constitutionality and admissibility of the referendum the results of which have never been implemented<sup>6</sup>. In July 2007, then President Yushchenko without success called on all political parties to renounce immunity<sup>7</sup>. This time, the Presidential draft has good chances to be adopted and thus, introduce the first amendments to the constitution by the new Verkhovna Rada. Many MPs have reaffirmed their willingness to keep the campaign promise and abolish immunities, although some started to express doubts<sup>8</sup>.

<sup>3</sup> See the results of Transparency International's Global Corruption Barometer, available at [http://www.transparency.org/country#UKR\\_PublicOpinion](http://www.transparency.org/country#UKR_PublicOpinion). It is also well-known that some Ukrainian businessmen acquired MP mandates in order to protect their business, never showing up in parliament after being elected as MP. See the results of the survey by the civil organisation "Transparent democracy" and the "Ukrainian News": <http://chesno.org/news/1508>.

<sup>4</sup> In the preamble of the coalition agreement the members of the coalition commit themselves to "ensure the equity of all state officials before the law, to limit all kind of immunities with regards to criminal prosecution [...] to abolish the parliamentary immunity and to be responsible for their actions towards the Ukrainian people". See the coalition agreement in Ukrainian at [http://samopomich.ua/wp-content/uploads/2014/11/Koalicyjna\\_uhoda\\_parafovana\\_20.11.pdf](http://samopomich.ua/wp-content/uploads/2014/11/Koalicyjna_uhoda_parafovana_20.11.pdf).

<sup>5</sup> On 16 January 2015, the draft law of President Poroshenko No. 1776 on amendments to the constitution with regard to immunity of MPs and judges was registered with the Verkhovna Rada. The document is available at [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=53602](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53602).

<sup>6</sup> See the Opinion of the Venice Commission of October 2000 on implementation of the constitutional referendum in Ukraine, CDL-INF (2000) 14 and the decision of the Constitutional Court of Ukraine of 27 June 2000, Nr.1-в/2000. Along with the abolition of the deputy immunity against criminal procedure, it was proposed to reduce the number of the seats in parliament (300 instead of 450) and introduce additional grounds allowing President to dissolve the Verkhovna Rada.

<sup>7</sup> The respective draft law No. 1375 was registered on 18 January 2008.

<sup>8</sup> Mykhaylo Havrylyuk, a newly elected deputy, announced on 26 November 2014 that he had changed his mind about the urgency of abolition of the deputy immunities. While maintaining his promise to vote for abolition, he expressed willingness to postpone the vote until the revolution is over and the judiciary is reformed accordingly. The statement in Ukrainian is available at <http://www.unian.net/politics/1014025-novoizbrannyiy-deputat-gavrilyuk-zayavil-cto-otmenyat-deputatskuyu-neprikosnovennost-poka-rano.html>.

## 2. CONCEPT OF PARLIAMENTARY IMMUNITY

Parliamentary immunity is an old concept in the European constitutional tradition. It is based on the need to protect the legislature as an institution against politically motivated retribution by the executive, courts or political opponents. It is deemed to foster separation of powers and thus, democratic developments. There are two main categories of immunity.

- The first category protects the parliamentarians against the judicial proceedings for votes and statements made while exercising their mandate. This category is usually referred to as "non-liability" and represents a special freedom of speech.
- The second form of immunity is called "inviolability" and guarantees the protection against arrest, detention, and prosecution. This aspect of immunity is more controversial as it implies a high risk that the officials may misuse the protection for sheltering illegal activities. Along with strengthening the separation of powers, inviolability may at the same time threaten democratic developments.

The Ukrainian constitution follows rather a wide concept of parliamentary immunity. Without any difference in the terminology, article 80 of the constitution provides for both mentioned forms of immunity. Together with further laws and rules on application of immunity developed by the Constitutional Court, it can be summarised as per Table 1.

A closer look at the non-liability guarantees shows that they are limited in nature. They are directly linked to the parliamentary functions and do not extend to private statements and behaviour of members of parliament. Their limits are laid down by the constitution and they are subject to judicial review. There is little reason to question these guarantees. Protecting freedom of political debates in parliament and "maintaining the separation of powers between the legislature and the judiciary"<sup>9</sup> they serve democratic developments.

<sup>9</sup> See the decision of the European Court of Human Rights *A. v. United Kingdom*, No. 35373/97, 17 December 2002, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60822>.

**Table 1: Model of parliamentary immunity in Ukraine**

	<b>Non-liability</b>	<b>Inviolability</b>
<b>Scope</b>	<p>Non-liability for: results of voting; statements made in the building of parliament and in its bodies.</p> <p>Voting and opinions expressed by the people's deputies while working at the Verkhovna Rada and its bodies cannot be subject to elaboration at the Verkhovna Rada and its bodies.</p>	<p>Protection against: criminal liability; arrest; detention; custody; arrest and detention under the administrative law; searches of an MP; inspection of an MP and his/her personal belongings, luggage, transport, private premises or office, any kind of correspondence and telephone conversations; any other measures restricting his/her rights and freedoms.</p>
<b>Duration</b>	<p>Perpetual nature: it starts upon recognition of the candidate by the electoral commission as elected and continues after expiry of his/her mandate.</p>	<p>Temporary nature: it starts upon recognition of the candidate by the electoral commission as elected and ends with the expiry of his/her mandate.</p>
<b>Exceptions/ Possibility of lifting</b>	<p>Non-liability does not protect against: charges of insult; charges of defamation.</p>	<p>Inviolability can be lifted in each concrete case upon consent of the Verkhovna Rada supported by the simple majority during an open name voting procedure.</p> <p>Such consent is required for each separate measure even within the same case: in order to charge an MP with a crime under the criminal law; for arrest, despite the possible previous consent to hold an MP liable in the same case; for detention, despite the possible previous consent to hold an MP liable in the same case; for custody, despite the possible previous consent to hold an MP liable in the same case; for any kind of inspection of an MP and his/her belongings.</p> <p>A request for lifting shall be submitted by the Prosecutor General, accepted by the head of parliament, granted by the special committee of the Rada and approved by simple majority. Provided none of the parties involved in the process requests additional information from the Prosecutor, the request may be approved within 32 days.</p>

Of greater concern are the guarantees against criminal proceedings. Despite the possibility of lifting them, they imply an unnecessary high level of protection. There is no exception with regard to the situation when the parliamentarians are caught in the act of committing a crime ("in flagrante delicto") or with regard to administrative offences. In addition, fragmentary rules on lifting immunity provide for an unnecessary lengthy and non-

transparent procedure. The Rada's consent is required for every measure within the same case<sup>10</sup>. There are no clear detailed criteria for taking a reasoned decision: A request for consent submitted by the Prosecutor General can be rejected by a mere

<sup>10</sup> See the assessment of the inviolability in the light of fight against corruption by the Group of States Against Corruption (GRECO) in the Evaluation Report on Ukraine of 19-23 March 2007, Joint First and Second Evaluation Rounds, Greco Eval I -II Rep (2006) 2E.

indication that it lacks concrete facts and proofs in the opinion of the head of parliament or the handling parliamentary committee. These rules on inviolability should be reviewed. The attempts taken so far to revise article 80 of the constitution illustrate that the need for reform has always been associated with elimination of inviolability. The President's draft law also suggests waiving the guarantees against criminal liability. (For details of the proposed changes see Table 2).

**Table 2: Amendments to parliamentary immunity**

Article 80 of the constitution	Article 80 as suggested by the draft law No. 1776 of 16 January 2015
<p>"People's deputies of Ukraine are guaranteed parliamentary immunity.</p> <p>People's deputies of Ukraine are not legally liable for the results of voting or for statements made in Parliament and in its bodies with exception of liability for insult or defamation.</p> <p>People's deputies of Ukraine shall not be held criminally liable, detained or arrested without the consent of the Verkhovna Rada of Ukraine."</p>	<p>"People's deputies of Ukraine are not legally liable for the results of voting or for statements made in parliament and in its bodies with exception of liability for insult or defamation."</p>

### 3. EUROPEAN PERSPECTIVE ON PARLIAMENTARY IMMUNITY

Ukraine's parliamentary committee on legal policy and justice in its analysis of the draft law presented by President, justifies the urgency for renouncing immunity by a general reference to international law. It declares that the renouncement of parliamentary immunity brings the Ukrainian constitution in line with international standards without explicitly mentioning what standards should be complied with<sup>11</sup>. It is important to note that Ukraine is not internationally obliged to renounce immunity against criminal procedure. There are no international or European obligations on how to regulate parliamentary immunity. The extent of parliamentary immunity is solely for the national legislator to determine.

A recent report by the Council of Europe's Venice Commission explored parliamentary immunities in Europe in detail, illustrating the many models existing in Europe. It concluded that in countries with a well-functioning rule of law and effective democratic institutions, parliamentary immunity is not vital, given that there are few risks of undue interferences with the legislature and

effective institutions to prevent it<sup>12</sup>. At the same time, the Venice Commission highlighted differences between stable and fragile democracies. In fragile democracies risks are higher that the legislature is being interfered with, for example by arresting or charging MPs on spurious grounds. The negative aspects of inviolability should be carefully weighted against its potential benefits while assessing the need for immunity in each country. (The pros and cons of inviolability are outlined in Table 3).

### 4. THE CASE OF UKRAINE

Ukraine does not necessarily fulfil the conditions that would favour or justify a removal of inviolability, such as stable and mature democratic institutions, established solid party policy, independent and autonomy judiciary, high level of protection of individual political rights (freedom of speech, protection against an arbitrary arrest), and guarantees for functioning opposition in parliament.

In some ways it could be considered to be paradoxical that the prosecution of MPs is made easier at the moment, when many perceive the new Verkhovna Rada as being less dominated by criminal and corrupt interests than in the past, while the judicial branch of power is yet unreformed. There remains a risk of prosecution on political grounds that could affect any MP opposing powerful interests. In this context it is noteworthy that in 2000 the Venice Commission stressed the need for a certain degree of protection of Ukrainian parliamentarians against criminal and civil proceedings at the constitutional level<sup>13</sup>. Indeed, while inviolability benefitted corrupt MPs, it has at various times served successfully as a "minority guarantee" and spared parliamentarians a trial or detention based on politically motivated charges by the executive<sup>14</sup>. The laws passed by parliament on 16 January 2014, often referred to as dictatorship laws aimed at suppressing the Maidan protests also weakened parliamentary immunity by simplifying its lifting procedure<sup>15</sup>. This illustrates still an important role of immunity when it comes to repression of parliamentary opposition and making pro-government deputies even more compliant.

<sup>12</sup> See the Report of the Venice Commission on the Scope and Lifting of Parliamentary Immunities, adopted on 21-22 March 2014, CDL-AD(2014)011, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e).

<sup>13</sup> See the Opinion of the Venice Commission of October 2000 on implementation of the constitutional referendum in Ukraine, CDL-INF(2000)14, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF\(2000\)014-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2000)014-e).

<sup>14</sup> In June 2004, shortly before the presidential elections, Yuliya Tymoshenko, then deputy of the Verkhovna Rada of the 4th convocation, was charged with bribing a Supreme Court judge. The Prosecutor General's request to strip her from immunity was not granted then. The immunity also protected the MPs who supported Tymoshenko at the time of her arrest and trial and subsequent imprisonment in 2011.

<sup>15</sup> By amendments to the Laws on Rules and Procedures of the Verkhovna Rada prior consideration in the parliament's committee was removed and decision-making at the parliament's plenary was expedited.

<sup>11</sup> The conclusions together with the draft law and its accompanying statement of the Presidential Administration are available in Ukrainian at [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=53602](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53602).

**Table 3: The Pros and Cons of Inviolability**

(Potential) negative aspects /undermining democracy	(Potential) benefits / fostering democracy
<ul style="list-style-type: none"> <li>• Infringes the principle of equality before law and thus, the core element of the rule of law;</li> <li>• Serves as incentive for persons who committed a crime to seek to be elected as an MP;</li> <li>• Feeds political corruption;</li> <li>• Undermines public confidence in legislature;</li> <li>• Procedure for lifting immunity within parliament may contradict the principle of presumption of innocence;</li> <li>• May contradict the principle of separation of powers as parliament assesses preliminary a case of criminal responsibility;</li> <li>• Obstructs the course of justice: decision on lifting is taken by political institution that does not guarantee objectivity and impartiality (either immunity is lifted where the allegations are clearly unfounded; or immunity is maintained where there is obvious breach of law).</li> </ul>	<ul style="list-style-type: none"> <li>• Strengthens the principle of separation of powers by protecting the legislature from undue pressures by the executive or the judiciary;</li> <li>• Strengthens democratic development while ensuring conditions for proper fulfilment of the functions of the legislature, in particular control of the executive;</li> <li>• Protects opposition against undue harassment by ruling majority;</li> <li>• Protects parliamentarians from unfounded criminal allegations by political opponents and politically motivated court decisions.</li> </ul>

As a next step, the Constitutional Court of Ukraine must verify the constitutionality of the changes proposed by President Poroshenko to article 80 of the constitution. It is expected that the court would reconfirm its previous conclusions and declare the amendments to be in conformity with the constitution: Waiving inviolability does not infringe fundamental rights and freedoms or threatens the Ukrainian territorial integrity or independence<sup>16</sup>. Thus, the matter remains one of a political choice. The constitutional amendment will need to garner 300 votes.

If there was a political decision not to put an end to inviolability, it should be changed in a manner that is more precise and restrictive. The Venice Commission report includes some principles to follow while revising inviolability provisions<sup>17</sup>:

- To limit the scope of inviolability by the constitution or law (and exclude from the scope liability for “flagrante delicto”, serious criminal offences, minor or administrative offences)<sup>18</sup>;
- To enshrine in law a detailed and clear procedure for lifting inviolability in line with basic procedural principles (clarity, transparency, predictability, non-arbitrariness);

- To provide clear criteria for speedier and reasoned decisions on lifting immunity (in particular to ensure one single decision on lifting within the same proceedings is sufficient).

In conclusion, parliamentary immunities are ambiguous. They can be abused to shield corruption and other crimes from prosecution, but they can also be a powerful protection against encroachment and undue pressure by other branches of power. It is ultimately up to Ukraine’s parliament to decide which aspect is considered to be most relevant at this stage of the country’s transition.

<sup>16</sup> See the Decision of the Constitutional Court of Ukraine of 10 September 2008, Nr. 2-в/2008; the Decision of the Constitutional Court of Ukraine of 27 June 2000, Nr. 1-в/2000.

<sup>17</sup> For detailed guidelines see the Report of the Venice Commission on the Scope and Lifting of Parliamentary Immunities, adopted on 21-22 March 2014, CDL-AD(2014)011, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e).

<sup>18</sup> It may seem paradoxical to exclude minor offences as well as serious crimes. The idea is that there can be no immunity against serious crimes, while prosecuting minor offences on the other side are not likely to harm an MPs interest in significant way, or that they would be abused to weaken political opponents.

## ABOUT DEMOCRACY REPORTING INTERNATIONAL

Democracy Reporting International (DRI) is a non-partisan, independent, not-for-profit organisation registered in Berlin, Germany. DRI promotes political participation of citizens, accountability of state bodies and the development of democratic institutions world-wide. DRI helps find local ways of promoting the universal right of citizens to participate in the political life of their country, as enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

<http://www.democracy-reporting.org>

## INSTITUTE OF INTERNATIONAL RELATIONS, TARAS SHEVCHENKO NATIONAL UNIVERSITY OF KYIV

Institute of International Relations, Taras Shevchenko National University of Kyiv (IIR) is a leading school of international relations, political science, international, European and comparative law, international economic relations, business, and information within the biggest University in Kyiv, Ukraine. IIR is a domestic partner of DRI in the implementation of its project of independent, unbiased and professional monitoring of political reforms in Ukraine in the light of its international commitments and European standards.

<http://www.iir.edu.ua/>

This briefing paper has been published in the framework of the project aimed at supporting a transparent political reform process in Ukraine. The project is funded by the German Foreign Office. The contents of this publication are the sole responsibility of Democracy Reporting International and Institute of International Relations of Taras Shevchenko National University of Kyiv. They can in no way be taken to reflect the views of the German Foreign Office.



Federal Republic of Germany  
Foreign Office

This briefing paper was drafted by Ruslana Vovk and reviewed by Michael Meyer-Resende of Democracy Reporting International.