

# NEXT STEPS FOR REFORM OF UKRAINE'S PARLIAMENTARY IMMUNITIES<sup>1</sup>

## EXECUTIVE SUMMARY

On 5 February 2015, the Ukrainian Parliament (“Verkhovna Rada”) adopted in the first reading the draft law no. 1776 (“Draft Law”) aiming at abolishing guarantees against criminal prosecution (“inviolability”) of Members of Parliament (MPs) – these guarantees are currently enshrined in the constitution. The issue has strong public resonance as in the past membership in parliament was abused to shield criminal activities from prosecution. In accordance with the procedure for constitutional amendments, the Draft Law was submitted to the Constitutional Court for review. On 16 June 2015, the Constitutional Court found the suggested constitutional amendments to be in conformity with the Ukrainian constitution.

On 19 June, the Council of Europe’s Venice Commission in its opinion on the Draft Law concluded that “the current state of the rule of law in Ukraine does not yet warrant a complete removal of inviolability of MPs”.<sup>2</sup> The Commission recommended to establish other mechanisms that could both prevent the misuse of inviolability by MPs. The Commission argued that in absence of an impartial judiciary and no well-functioning political system undue harassment and pressure by the executive and the judiciary against legislators remain a real risk. Based on earlier Venice Commission opinions, DRI had argued along the

same lines in its January briefing paper<sup>3</sup> pointing out that a reform could at this stage be limited to removing ambiguous language and unreasonably long delays for lifting MP’s immunity.

The legislative process can now take three ways: First, the Verkhovna Rada adopts the Draft Law with 300 or more votes. Second, 300 votes are not mobilised and the Draft is defeated, in which case no new draft can be submitted on this topic for one year. Third, MPs decide to make substantial changes, for example reflecting the Venice Commission recommendations, in which case another first reading and another decision by the Constitutional Court is required. Thus, before putting the Draft Law on the floor for voting, MPs should have a clear view if they will achieve the first option (approval) or if they rather make substantial changes. The second way, a defeat of the Draft and the need to pause the process for a year, would send a bad signal on overall reforms.

## 1. THE ISSUE

Inviolability<sup>4</sup> of MPs was abused in the past to shield corrupt politicians from criminal prosecution. For this reason, public opinion is strongly against MPs immunities. However, the case against inviolability is not so clear cut as it can also be an important democratic guarantee in contexts where the executive or the judiciary may exercise undue pressure on MPs. In particular in fragile

<sup>1</sup> This briefing paper was written by Ruslana Vovk and Michael Meyer-Resende of Democracy Reporting International.

<sup>2</sup> See para. 11 of the Opinion of the Venice Commission of 19 June, 2015 on Draft Constitutional Amendments on the immunity of members of parliament and judges of Ukraine, CDL-INF(2015)013, available at:

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)013-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)013-e).

<sup>3</sup> See the DRI’s Briefing Paper No. 53 “Reforming Parliamentary Immunities in Ukraine”, available at: [http://democracy-reporting.org/files/briefingpaper\\_reforming\\_parliamentary\\_immunities\\_in\\_ukraine\\_english.pdf](http://democracy-reporting.org/files/briefingpaper_reforming_parliamentary_immunities_in_ukraine_english.pdf).

<sup>4</sup> Parliamentary immunity has two categories: “non-liability” and “inviolability”. “Non-liability” protects MPs against the judicial proceedings for votes and statements made while exercising their mandate. “Inviolability” guarantees MPs the protection against arrest, detention, and prosecution.

democracies with no impartial judiciary, there may be arguments in favour of a more careful reform which narrows the concept of inviolability and clarifies the process of its lifting rather than a complete removal.

## 2. DECISION OF THE CONSTITUTIONAL COURT

The Constitutional Court of Ukraine must review the conformity of every projected constitutional amendment with articles 157 and 158 of the Ukrainian Constitution, making sure that amendments:

- do not abolish or restrict human and citizens' rights and freedoms;
- do not envisage the liquidation of the independence or violation of the territorial indivisibility of Ukraine;
- are not to be introduced under conditions of martial law or a state of emergency.<sup>5</sup>

In its decision of 16 June 2015 (no. 1-B/2015) the Constitutional Court of Ukraine justified why the abolishment of inviolability of MPs fulfil the requirements of articles 157 and 158.<sup>6</sup> The decision is plausible as the inviolability of MPs is not their right but a privilege. Besides, there is no legal obligation – neither on the European nor international level – to maintain inviolability or to abolish it. The decision on the issue lays within the political margin of the legislator.

That said, in a dissenting opinion, judge Stanislav Shevchuk criticised the lack of reference to international standards and practice, pointing out a need to protect Ukrainian MPs on the constitutional level.<sup>7</sup> In this respect the Court could have referred to the Report of the Venice Commission on the Scope and Lifting of Parliamentary Immunities and the opinion of the Venice Commission of October 2000 on implementation of the constitutional referendum in Ukraine.<sup>8</sup> Both documents support the need for a degree of constitutional protection of MPs against civil and criminal proceedings in countries with non-well-functioning democratic institutions as Ukraine.

## 3. OPINION OF THE VENICE COMMISSION

On 19 June, the Venice Commission issued an opinion on these draft constitutional amendments.<sup>9</sup> The Commission pointed out that there are no European standards with regards to inviolability. Thus, the decision about the restriction of parliamentary inviolability should be based on country specific analyses, “notably taking into account the state of development of the rule of law in the country concerned“. The

Commission acknowledged that inviolability of MPs indeed “can be an obstacle to fight corruption“. At the same time it concluded that with given Ukraine’s widespread judicial corruption and fragile democracy, a „complete removal of inviolability can be dangerous for the functioning and the autonomy of Parliament.“<sup>10</sup> Thus, it recommended establishing other procedural safeguards which “can prevent interference in the activity of Parliament while facilitating fight against corruption.“ As an example the Commission referred Italy’s Article 68 (II and III) Constitution which states that without authorisation of its chamber (Chamber or Senate), an MP cannot “be arrested or otherwise deprived of his personal freedom, nor held in detention, except when a final court sentence is enforced, or when the Member is apprehended in the act of committing an offence for which arrest *flagrante delicto* is mandatory“.<sup>11</sup> The procedure to lift immunity is further regulated in the Rules of Procedures of the Chamber of Deputies and the Rules and Procedures of the Senate. The requests to lift the immunity are examined by the “committee for authorisation to take action” in the Chamber (composing 21 deputies) and the Committee on Electoral Matters and Parliamentary Immunities in the Senate (composing 23 senators) within 30 days. At the same time a minority of MPs is entitled to complain against detention or any other measures taken against MP to the Constitutional Court within the certain deadline. Such a complaint would suspend the measures taken by prosecutor and ordinary judges towards the MP concerned until the decision of the Constitutional Court.<sup>12</sup>

In its briefing paper of January on the reform of parliamentary immunities in Ukraine, DRI also highlighted certain Ukrainian rules on inviolability that are worth revision. It suggested *inter alia* to exclude from the scope of protection the liability for “*flagrante delicto*” and to ensure that one single decision on lifting of inviolability within the same proceedings is sufficient.<sup>13</sup> The briefing paper also drew attention to the political context: “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.”

## 4. WHAT HAPPENS NEXT?

On the basis of the positive decision by the Constitutional Court of Ukraine, the Verkhovna Rada can vote for the amendments in the second reading. Recently, President Poroshenko called upon the MPs to adopt the amendments during the ongoing plenary session of

5 See article 158 of the Ukrainian Constitution.

6 See the Decision of the Ukrainian Constitutional Court of 16 June 2015, No. 1-B/2015, available in Ukrainian at: <http://zakon4.rada.gov.ua/laws/show/v001v710-15>.

7 See the Opinion of judge S. Shevchuk, available in Ukrainian at: <http://ccu.gov.ua/doccatalog/document?id=277138>.

8 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, [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);

and 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\(2000\)14-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2000)14-e).

9 See the Opinion of the Venice Commission of 19 June, 2015 on Draft Constitutional Amendments on the immunity of members of parliament and judges of Ukraine, CDL-INF(2015)013, available at:

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)013-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)013-e).

10 See para.18 of Opinion of the Venice Commission of 19 June 2015 on Draft Constitutional Amendments on the immunity of members of parliament and judges of Ukraine, CDL-INF(2015)013, available at:

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)013-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)013-e).

11 See the Italian constitution, available in English at: [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf).

12 For procedure to lift immunity in Italy see the Opinion of the Venice Commission of 17 September 2013, no. 714/2013 „Comparative Table On the Lifting of Parliamentary Immunity“, CDL(2013)043 available at:

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2013\)043-bil](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2013)043-bil).

13 See the DRI’s Briefing Paper No. 53 “Reforming Parliamentary Immunities in Ukraine”, available at: [http://democracy-reporting.org/files/briefingpaper\\_reforming\\_parliamentary\\_immunities\\_in\\_ukraine\\_english.pdf](http://democracy-reporting.org/files/briefingpaper_reforming_parliamentary_immunities_in_ukraine_english.pdf).

Parliament.<sup>14</sup> Even though no official decision has been made yet, the Speaker of Parliament, Volodymyr Groysman, reassured that MPs would work without summer break that was supposed to start on 18 July.<sup>15</sup> On 1 July 2015, the Verkhovna Rada prepared resolution no. 1776/II2 suggesting the following steps with regards to the Draft Law<sup>16</sup>:

- Submission of further changes to the Draft Law 10 July;
- Discussion within various VR's committees by 15 July;
- Providing MPs with relevant documentation by 16 July;
- Voting on the Draft Law during the plenary session on 16 July.

The resolution lacks a signature and thus, it is just a draft and legally invalid. But the draft agenda for the VR's plenary week starting on 14 July refers in a general manner to the Draft Law: Whereas it indicates directly what actions (first reading, second reading, etc.) will be taken with respect to the listed legal acts, there is no similar clarification regarding the Draft Law.<sup>17</sup> This general reference may imply that MPs would have to vote firstly on including the Draft Law into the agenda of a specific day of the plenary session day for its second reading.

There are three ways that this legislative process can now go:

- The current Draft Law is adopted by 300 or more votes;
- The Draft Law is defeated in the second reading (gaining only less than 300 votes), in which case the constitution remains unchanged and changes on this issue can only be proposed in one year again<sup>18</sup>; this option would be disappointing for Ukraine's reformers;
- Substantial changes are made to the Draft Law, in which case the Verkhovna Rada is obliged to pass them in another first reading (with at least 226 votes) and to request a new decision of the Constitutional Court on constitutionality.

In the first reading on 5 February 2015 the Draft Law was supported by 365 MPs. It remains to be seen if deputies would still opt for abolishment of inviolability altogether, or if the recommendations by the Venice Commission gained traction with MPs.

In view of these options, it is advisable that coalition members discuss their position on the recommendation of the Venice Commission before voting in the second reading. Otherwise they risk a delay of a year for any kind of reform of immunities, which would send a bad signal on overall reforms.

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14 See the respective statement of P. Poroshenko of 19 June 2015, available in Ukrainian at: <http://www.depo.ua/ukr/politics/poroshenko-spodivaetsya-shcho-nardepi-progolosuyut-zanyattva-19062015174400>.

15 See the respective statement of V. Groysman of 8 July 2015, available in Ukrainian at: <http://www.pravda.com.ua/news/2015/07/8/7073786/>.

16 See the draft resolution no. 1776/II2, available in Ukrainian at: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=55804](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=55804).

17 See the draft agenda for 14-17 July, available in Ukrainian at: <http://static.rada.gov.ua/zakon/new/WR/WR140715.htm>.

18 See Art. 158 of the constitution: „The draft law on introducing amendments to the Constitution of Ukraine, considered by the Verkhovna Rada of Ukraine and not adopted, may be submitted to the Verkhovna Rada of Ukraine no sooner than one year from the day of the adoption of the decision on this draft law.“