

GUARANTEES OF INDIVIDUAL FREEDOM FOR CONGRESSMEN AND THE PRESIDENT OF ROMANIA

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Guarantees for congressmen

The parliamentary immunity is known, studied and regulated in two forms, namely: a) lack of legal liability, b) inviolability of the congressman.[1] Since the lack of legal liability takes into account the thesis provided in the article 72 paragraph (1) on the irresponsibility of lawmakers for the votes and opinions expressed in their mandate, the important part of this paper is only the inviolability, which, unlike the first, concerns a procedural[2] immunity solely for penal liability only if it involves making a custodial measure.

Note that prior to the revision of the Constitution, the old Basic Law had in the article 69 [3] on parliamentary immunity, but that existing text was broader in the sense that there was no distinction based on the nature of the facts (whether or not they in connection with the work) and also it prohibited, alongside the restraint, the search and the arrest, the indictment of the congressman without the consent of the Parliament House he was part of. In other words, just being a congressman attracted the parliamentary immunity for all offenses committed by him both in terms of deprivation of liberty, and in terms of referral to court. We find that the reason why the procedural immunity was removed from the indictment is its redundant character as long as prior to referral to court the competent Chamber gave consent for taking preventive measures, which is likely to lead to the conclusion that there are necessary penal investigations for those penal acts, being solid clues of committing them.

Returning to the current constitutional provisions on parliamentary immunity, it is noticed that the Regulation of the Chamber of Deputies from 1994, with subsequent[4] modifications and amendments, provided in the art.195 [5] and the art.196[6] on the immunity of Deputies and the Senate Regulation of 2005, with subsequent[7] modifications and amendments, provided in the article 172[8] concerning the senators' immunity.

The trend regarding the constitutional regulation of the parliamentary immunity consists of its relation to the actual exercise of the term of senator or deputy, outside of which every congressman is treated in terms of penal law as any other citizen. The old constitutional regulation contained provisions on penal liability which were sensitively hindering the criminal liability and even contravention of deputies and senators; although

the Constitutional Court has repeatedly decided that the parliamentary immunity is not a privilege.

Due to changes made by the Law Review of the Romanian Constitution to the relating provisions, it is inserted a civic spirit, modern and European in the regulatory approach of the parliamentary immunity regime. It was given up at the immunity type contravention, as the constitutional text provides no contravention indictment conditions of senators and deputies[9].

This immunity is the quality of congressman and exclusively concerns the defendants who, during trial are senators or deputies, regardless of when they committed penal acts for which they are judged and the nature of the facts. The fact that the penal procedural provisions of article 40 distinguish between the loss or acquisition of quality it is not likely to affect the constitutional provisions mentioned, care the material competence established in order to consider the quality of the defendant will cease if, after committing the offense, he shall no longer have that quality and the act is not related to his duties, or if a judgment was given firstly. In other words, whenever a congressman is investigated for a penal offense, the High Court of Cassation and Justice remains competent to hear the case, even after the loss of quality only in cases where the offense was committed having this quality or if a judgment was given in the first instance[10]. This solution is in fact logical, because the procedural immunity no longer finds reason.

Regarding the material competence in order to acquire the quality of congressman after committing the offense the Constitutional Court decided, by Decision No. 67 of 13 February 2003[11], that they contravene the constitutional provisions on immunity, to the extent that they are understood and applied in the sense that the senators and deputies will be judged by other courts than the Supreme Court, where the court complaint occurred before obtaining the parliamentary mandate. Following this decision, paragraph 2 of article 40 of the Penal Procedure Code was amended by Government Emergency Ordinance nr.109/2003[12], but only to cover this special situation, governed by the Constitution and interpreted in this way by the Constitutional Court. The rule, however, maintained in the Penal Procedure Code, that otherwise, the exception subsequently introduced, does not violate the constitutional provisions on equality of people in the same legal situation, as it is applied equally to all people in the standard situation.

Therefore, the constitutional provisions regarding the parliamentary immunity concerning the jurisdiction of the High Court of Cassation and Justice represents *eo ipso* penal procedural rules with constitutional status as the supreme position of the constitution in the hierarchy of legal acts entails the fact that the laws and the other normative acts should not contravene the Basic Law. Therefore, the protective nature of the constitutional rule reveals that the indicted lawmaker is removed from the jurisdiction of the court which has the competence according to general rules - being defended in this kind of pressure and local enemies - and he is given the opportunity to be tried by the High Court of Cassation and Justice, which, in relation to the position it holds in the judiciary, it presents the highest guarantees of independence and impartiality[13]. On the contrary, this idea was not shared by the authors of separate opinion at the Decision nr.67/2003 of the Constitutional Court, occasion for the former constitutional judges at that time, prof.univ.dr Ioan Vida, prof.univ.dr Gábor Kozsokár Costică Bulai to show that it seems to call into question the independence and impartiality of the other courts. Or, according to the former provisions of the article 123 para. (2) of the Basic Law - currently art. 124 para. (3) - all judges, regardless of the court where they were appointed, shall be independent and subject only to

the law and the impartial judgment is required by the constitutional principles and also by the provisions of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, any deviation will be directed towards judicial review. In my opinion, I think this last variant of interpretation is the only one possible, because the level of the court where a judge activates has no exponential implications on his independence and impartiality. Therefore, in accordance with the provisions of article 124 para. (2) of the Basic Law, justice is unique, impartial and equal for all.

The other category of protection measures for deputies and senators consists of forbidding their search, detention and arrest without the consent of the Chamber they belong to. Listing the judicial actions subject to permission, the constitutional text makes no distinction as to time of committing the facts justifying such measures, and hence it results that it gets involved both in the case of offenses committed by a deputy or a senator during his mandate and for those committed before gaining the quality of congressman. When defining the parliamentary immunity it is essential the moment of taking the judicial measure- moment which must necessarily be placed inside the term - and not the date of the offense that generated the measure, date that can be previous to the choice of the concerned within the members of the Parliament[14].

According to the Constitution, each Chamber will approve or not this measure. This power does not transform the Chamber into tribunal because it cannot tell the right. Therefore, the question is obvious: what does the Chamber have to analyze, so as not to collide with exclusive powers of the courts. The Regulation of the Chamber of Deputies merely says it will examine whether there are reasonable grounds for approval of the application and the Rules of the Senate states that will determine whether or not the request was made in order to divert the senator from the exercise of his office.

Before answering this question we consider it necessary to analyze several requests addressed to the Chambers. Thus, in the Decision No. 5 of 24th March 2010[15], the Romanian Senate approved the application submitted by the Minister of Justice regarding the request of the Prosecutor's Office attached to the High Court of Cassation and Justice - National Anticorruption Directorate, the arrest of the defendant C.V. in the Case 310 / P/2009 and in the Decision No. 8 of 24 March 2012[16] the Chamber of Deputies approved the domiciliary search, arrest and detention of Mr. B.M. in the case nr.68/D/P/2012 of the Prosecutor's Office attached to the High Court of Cassation and Justice - Directorate for Investigating Organized Crime and Terrorism. In both cases it was prepared one report by the Legal Committee of appointment, discipline, immunities and validations respectively the Legal, Discipline and Immunities Commission. The members of specialized committees were given copies according to the original of relevant documents in order to analyze the request made. The arguments and discussions were not public, but we can guess that based on the material attached for each application with the presentations of those involved, they have been analyzed taking custodial measure to the extent that it is not intended to exercise any pressures likely to harm freedom of expression and action in the accomplishment of the parliamentary tasks. The basic idea of the parliamentary immunity is to provide special protection to a congressman for all acts and deeds through which he effectively exerts its term as a politician of the electorate. The constitution does not specify the purpose of the acts or facts through which a deputy or senator would exercise its constitutional prerogatives or regulations conferred by its status as representative of the people. Not even in the Romanian or foreign specialized doctrine it

was not specified the nature of the acts and deeds for which a congressman can claim his immunity[17].

Therefore, we believe that the analysis of aspects related to the consent or not to the request of retention, search and preventive arrest of a congressman circumscribes all the rules imposed to establish immunity, namely the assurance of independence of the congressman in exercising his term and put him under protection of documents or abusive acts of the administrative authorities, judicial or even individuals.

Finally, we find it useful to point out some shortcomings regarding the constitutional provisions of the article 72 paragraph (2) second thesis and those of the article 109 paragraph (2) first thesis, according to them the Chamber of Deputies or the Senate have to decide either on the consent of arrest, detention or search of congressmen or on the request of penal prosecution of members or former members of the Government that have the quality of lawmakers, neither the Constitution nor the regulations of the two Chambers and not even the law on ministerial responsibility establish any terminus inside which the competent Chamber to decide and eventually which would be the consequences of not deciding in due time[18]. This can lead to unnecessary delays in the act of administration of justice, the more as in the case of article 109 paragraph (2) in the absence of request of the concerned Chamber the file of criminal investigation is stalled. The time passed can flow unjustified for the investigated person risking even the fulfillment of the statute of limitation of criminal liability.

Guarantees for the President of Romania

In the constitutional immunity class conferred for the term or function of public authority exercised, it is remarkable the immunity of the head of state which has been imposed so due to historical traditions existing in the law of other countries and a practical need to achieve the activity at a good level. According to the article 84 of the Basic Law the President of Romania enjoys immunity, with the proper application of the provisions of the article 72 para. (1) of the Constitution relating to prohibition of legal accountability for votes or political opinions expressed in the term. From the perspective of penal law the best explanation of the reasons behind the proposed regulation of the institution of immunity is the one proposed by Doru Pavel, that the immunity should not be considered a "privilege" or protection, but rather (...) an attribute embedded in the function. So the provided protection under the constitutional text is not for the person who has committed an offense, but "the incumbent who is accused of having committed an offense" operating under strict conditions provided by law[19]. Regarding his liability, the Basic Law regulated in article 96 the possibility of accusation for high treason, with the vote of at least two thirds of the deputies and senators in the collective session. The proposal may be initiated by a majority of deputies and senators and shall be immediately informed the President of Romania in order to explain the facts he is being held.

Analyzing these constitutional provisions it results that the penal liability of the Romanian President can only be applied for the crime of high treason, he benefits of legal immunity for any penal crimes. I think that such immunity is effective only within the term and at its end, provided that there are no other legal impediments such as the fulfilling of the statute of limitation for criminal liability, the investigators can begin or may continue a criminal investigation procedure before term started.

On the other hand, the suspension procedure of the position provided by the article 95 of the Constitution is not related to any criminal liabilities that would entail consequences for the individual freedom, but as far as its result, the President of Romania may be suspended for serious offenses that violate the provisions of the Constitution and should be dismissed by referendum, then, if the facts which were the basis for the suspension can meet the constitutive elements of an offense then, it can be initiated the penal prosecution for such offenses under common law. Therefore, unlike the liability of former government members who are protected by a special procedure which concerning the start of the prosecution, for the former President the Constitution has not established similar standards of protection.

The text of the article 96 of the Basic Law which establishes the liability of the President for high treason, does not define the content of this act, which in the opinion of many authors, it is not a simple circumscribed act to the provisions of the Penal Code[20]. Indeed, the high treason should not be confused with the offense of treason determined by the Penal Code, for the simple reason that the violation of the penal law does not overlap the violations of the Constitution, including its provisions establishing mandatory compliance of the law. As the constituent legislator created a separate institution - high treason – the only one actually which attracts the liability of the President of Romania, the authors of the work are inclined to believe that it operates in accordance with the texts of the Penal Code, but hovering over them, by serious violation of the presidential duties, due to the abdication of the oath taken at the beginning of the term and the betrayal of national interests.

Moreover, it is hard to imagine a concrete situation for the application of the provisions of the article 96 of the Constitution, because the Penal Code does not deal with the offense of high treason, but only with acts of treason, treason by helping the enemy, treason by transmitting secrets, actions against the constitutional order, compromise of state interests, communicating false information, the disclosure of secrets that endanger the state security and others. None of them can be categorized as high treason offense as long as it is not defined as such. It is also shown that the one, who can determine with a qualified majority of two thirds the removal of the presidential immunity, is obliged to revise the Basic Law and to define the crime of high treason, eliminating, in this way, the contradictory disputes taking place in connection with the meaning of this phrase.

On the other hand, according to another opinion[21], the Constitution seems to suggest an autonomous offense of high treason, crime in which are provided no content and no penalty. Under these conditions, it seems required rather the solution according to which the notion is actually a generic name that refers to already existing incriminating texts in penal law, which is supported by the provisions of the article 60 of the Regulation of common sessions of the two Chambers, which mentions that the demand for impeachment of the President shall include "(...) a description of the facts as they are charged and their legal classification".

Therefore, in this *chapeau* of high treason there are considered as logical interpretation, the offenses under Title I of the Special Part of the Penal Code or in the Law nr.51/1991 regarding the national security of Romania, to the extent that the act is suitable to be committed by the President, and by committing these offenses the president " flagrantly violates his duty of loyalty to the country and seriously harms the interests of the Romanian state." Beyond the beauty of such a demonstration, we consider that all reasoning is exactly the opposite, as it has the center of gravity one statutory provision

which apparently translates only at the level of common law the constitutional norm. However, the explanation provided in the article 60 of the Regulation has, in the light of these arguments, the meanings of amending the Constitution. Therefore, the obvious pyramidal hierarchy of the normative acts denies this possibility which would only affect the supremacy of the fundamental Law and, why not the constitutional provisions which devote for its revision procedure. In this way, the completion of the constitutional text mentioned before equals its amendment. However, even if the statutory standard cannot be assessed, in the absence of other elements, contrary to the Basic Law, there is no doubt that it represents the vanguard of a future constitutional text better defined.

Distinct from all these considerations we also show that the need to revise the Constitution on these issues is necessary from the perspective of what is meant by "impeachment" with which the constituent legislator has operated, since it is not unequivocal. Thus, it is understandable that through the impeachment there can be initiated preliminary actions, that the prosecution can start or that the indictment can be ordered, all being procedures within the competence of the Public Ministry. On the other hand, according to the article 36, paragraph (1) of the Law nr.24/2000 on legislative technique rules for drafting normative [22] acts, including the Basic Law "*they must be written in legal language and style specifically normative, concise, sober, clear and precise in order to exclude any doubt, in strict compliance with rules of grammar and spelling*". In this way prof. Univ. Dr. Ioan Vida referring to J. Dabin, he underlined that to ensure the practicability of the right it is necessary to define it. An undefined or poorly defined right is not practicable, meaning that its application will lead to hesitation and controversial source of legal uncertainty. To eliminate such shortcomings it is necessary to resort to rigorous concepts used in creating the right. So the first condition which ensures the practicality of the right is to define [23] it.

The broad definitions technique cannot be however used in all cases and under all legal regulations, without serious damage for the legal security, legality and general interests of society. To avoid such situations, the legislator uses concepts strictly determined or determinable which do not leave the judge the extending of the legal standard meaning beyond the limits preset by the legislature. Such concepts are required by the specific of the penal law, by the principles *nullum crimen sine lege* ^o *nulla poena sine lege*, and other situations that require precision in assessing fundamental rights and obligations of citizens and the establishment of penalties which affect the status of the people concerned[24]. In the doctrine [25] it was also shown that, in the situation where there would be admitted an emergency solution operating the existing text *de lege lata* an eventual solution of conviction based on such as legal text it's impossible not to automatically sentence Romania for a violation of the provisions of article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms[26]. In theory either, it cannot be argued that there is a degree of predictability of the reference constitutional text that there are voices of definite authority in the doctrine which allow the violation of the principle of legality of incrimination and punishment and between the supporters of the emergency solution there are serious differences of opinion regarding the offenses contained in the phrase "high treason".

Regarding these issues it is necessary to specify that *de lege ferenda* the ordinary legislator intended to define and incriminate in the art.398 of the future Penal Code[27] the offense of high treason, qualifying the active subjects as being the President of Romania or a member of the Superior Council of National Defence of the Country. In this sense high

treason means the act of committing one of the offenses of treason, treason by transmitting secret state information, treason by helping the enemy, and that relating to actions against the constitutional order.

Accordingly, the rule article 96 of the Basic Law is a rule devoid of content that cannot produce any legal consequences in terms of attracting criminal liability of the President of Romania, being, according to the arguments above, inapplicable.

References

- [1]. M. Constantinescu și I. Muraru, *Parliamentary Law*, Gramar Publishing House, Bucharest, 1994, p.96.
- [2]. M. Constantinescu și I. Muraru, *Parliamentary Law*, Gramar Publishing House, Bucharest, 1994, p.98.
- [3]. 1) The Deputy or Senator may not be detained, arrested, searched or prosecuted, for criminal or minor offense, without the consent of the Chamber he is part of, after the hearing. The Jurisdiction belongs to the Supreme Court of Justice.
(2) In the case of flagrant offense, the deputy or senator may be detained and searched. The Minister of Justice shall inform without delay, the president of the Chamber of the arrest and search. In case the Chamber finds no grounds for detention, it shall order immediately the revocation of the measure.
- [4]. Republished in the Official Gazette of Romania, Part I, nr.762 of 13th of November 2012.
- [5]. (1) Pursuant to art. 72 of the Romanian Constitution, republished, the deputies may be investigated and criminally prosecuted for offenses unrelated to votes or political opinions expressed in the term but they cannot be searched, detained or arrested without the consent of the Chamber of Deputies, after hearing them . The investigation and prosecution shall only be carried out by the Prosecutor's Office attached to the High Court of Cassation and Justice. The judgment power belongs to the High Court of Cassation and Justice.
(2) The request for detention, arrest or search is addressed to the President of the Chamber of Deputies by the Minister of Justice. Committing or subsequent discovery of new criminal offenses determine the introduction of a new request for detention, arrest or search.
(3) The President of the Chamber informs the deputies about the request, in public session, then he immediately sends it to the Legal, Discipline and Immunities Commission for review, which will determine, through its report, whether or not there are reasonable grounds for approving the request. The decision of the Commission is adopted, within 5 days of referral by a majority of votes of its members. The vote is secret.
(4) The Minister of Justice shall submit to the Legal, Discipline and Immunities Commission all documents it may request, in case of refusal, the committee will address the Chamber of Deputies, through the Permanent Bureau, in order to decide on that refusal.
(5) The request under par. (2), together with the committee's report shall be submitted to the parliamentary group of which the member in question is concerned. The group will express its views on the request in a written report within 5 days after the notification.
(6) For deputies who are not part of any parliamentary group, they may submit their views regarding the request to the Standing Bureau.
(7) The Commission report together with the parliamentary report shall be submitted to the Permanent Bureau and submitted for debate and approval by the Chamber of Deputies.
(8) The Chamber of Deputies will decide on the measure later than 20 days after referral by a majority vote of the members present.
- [6]. (1) In the case of flagrant offense, the deputies may be detained and searched. The situation will be brought promptly to the attention of the Minister of Justice. The Minister of Justice shall promptly inform the Chamber of Deputies about the arrest and search. If the Chamber finds no grounds for detention, it shall order the revocation of the measure.
(2) The provision for revocation of detention shall be executed immediately by the Minister of Justice.

- [7]. Published in the Official Gazette of Romania, Part I, nr 948 of 25th October 2005
- [8]. (1) Senators shall enjoy parliamentary immunity throughout their term.
(2) The parliamentary immunity is intended to guarantee freedom of expression to the senator and his protection against legal prosecutions, abusive or disturbing prosecution.
(3) The senators cannot be held legally liable for the votes or political opinions expressed in the term.
(4) Pursuant to art. 72 of the Romanian Constitution, republished, the deputies may be investigated and criminally prosecuted for offenses unrelated to votes or political opinions expressed in the term but they cannot be searched, detained or arrested without the consent of the Chamber of Deputies, after hearing them . The investigation and prosecution shall only be carried out by the Prosecutor's Office attached to the High Court of Cassation and Justice. The judgment power belongs to the High Court of Cassation and Justice.
(5) In case of flagrant offenses, the senators may be detained and searched. The Minister of Justice shall immediately inform the President of the Senate on detention and search. If the Senate finds no grounds for detention, it shall order the revocation of the measure.
(6) The request for authorization of the reference to court, penal or contravention, and the request for restraint, arrest or search is addressed to the President of the Senate by the Minister of Justice
(7) The President of the Senate informs the senators about the request, in public session, then he immediately sends it to the Legal, Discipline, Immunities and Validation Commission for review, which will determine, through its report, whether or not it was made to divert the senator from exercising its function. The decision of the Commission is adopted, through a secret vote by a majority of votes of its members.
(8) The Permanent Bureau of the Senate proposes to debate and approve to the Board the committee's report, duly justified, within 15 days after deposit.
(9) The requests for restraint, arrest, and search shall have precedence on the agenda.
- [9]. C. Ionescu, *The Romanian Constitution commented and annotated with parliamentary debates and the jurisprudence of the Constitutional Court*, Title III, Chapter I – Parliament, Legal Universe Publishing House, Bucharest, 2010, p.251.
- [10]. In this regard the Constitutional Court ruled in Decision No. 433 of 13 September 2005, published in Official Gazette of Romania, Part I, nr.870 of September 28, 2005
- [11]. Published in the Official Gazette of Romania, Part I, no. 178 of March 21, 2003.
- [12]. Published in the Official Gazette of Romania, Part I, no. 748 of October 26, 2003
- [13]. See in this regard Decision No. 67 of 13 February 2003, published in Official Gazette of Romania, Part I, no.178 of March 21, 2003.
- [14]. See in this regard Decision No. 67 of 13 February 2003, published in the Official Gazette of Romania, Part I, no.178 of March 21, 2003.
- [15]. Published in the Official Gazette of Romania, Part I, 188 of March 24, 2010
- [16]. Published in the Official Gazette of Romania, Part I, nr.180 of March 20, 2012
- [17]. C. Ionescu , *The Constitution of Romania commented and annotated with parliamentary debates and the jurisprudence of the Constitutional Court*, Title III, Chapter I - Parliament Legal Universe Publishing, Bucharest, 2010, p.250.
C. Ionescu, *Constituția României comentată și adnotată cu dezbateri parlamentare și jurisprudența Curții Constituționale*, Titlul III, Capitolul I – Parlamentul, Ed. Universul Juridic, București, 2010, p.250.
- [18]. The same idea was dotted by the European Commission in the Report of 30 January 2013 on the progress registered by Romania under the Cooperation and Verification Mechanism whereby the constitutional procedure for removal of immunity in cases of search, arrest or detention, there shall be included a terminus within each stage of the proceedings in Parliament. It is also necessary to provide full justification when the Parliament refuses to remove immunity.
- [19]. Nitu D., *The Immunity of the Head of State in Penal Law*, Legal Universe, Bucharest, 2012, page 32
- [20]. I. Vida, *Vida I.C., Executive power and public administration*, Second Edition, Cordial Lex Publishing House, Cluj Napoca, 2012, pag.133-134.
- [21]. Nitu D., *The Immunity of the Head of State in Penal Law*, Legal Universe, Bucharest, 2012, page 95
- [22]. Republished in the Official Gazette of Romania, Part I, No. 260 of 21 April 2010

- [23]. I. Vida, *Formal Forensic, Introduction in the legal technique and procedure*, Fifth Edition, revised and supplemented, Legal Universe Publishing, 2012, page 53
- [24]. I. Vida, *Formal Forensic, Introduction in the legal technique and procedure*, Fifth Edition, revised and supplemented, Legal Universe Publishing, 2012, page 55.
- [25]. Nitu D., The immunity of the president in penal law, Legal Universe, Bucharest, 2012, page 96.
- [26]. With the marginal name *No punishment without law*
- [27]. The facts set out in art. 394-397, committed by President of Romania or a member of the Supreme Council of National Defence, represents the offense of high treason and is punishable by life imprisonment or imprisonment from 15 to 25 years and deprivation of certain rights .