

MEMORANDUM

TO: ROBYN JORDAN, IRIS

FROM: HERMAN SCHWARTZ

SUBJECT: IMMUNITY FOR MP'S

DATE: MARCH 24, 2003

I agree generally with the Marakvelidze memo of January 20, 2003. The factual background and current situation are indeed crucial in evaluating the current and proposed approach. The provision under discussion is a constitutional provision, however, which means that whatever change is made must last a long time and be appropriate for the many changing circumstances to which a constitutional provision must apply.

As the memo points out, there are two competing considerations: improper invocation of the immunity to shield a legislator's corruption or other misconduct; and protection against executive misuse of the prosecutorial power to suppress opposition.

In the long run, the concern about excessive protection for legislative corruption would seem more important. If Georgia remains a democracy, albeit imperfect, serious abuse of the prosecutorial power by the Executive to destroy or stifle the Opposition seems unlikely. Even during the 1992-95 period, part of the problem of releasing wrongly arrested MP's seems to have been that "during long periods the Parliament couldn't adopt any resolution." By contrast, even in countries where democracy is solidly established so that no executive would seriously consider misusing the prosecution to get rid of an opposing MP, corruption is a very serious problem, with no ready or easy answers.

For this reason, my own preference is for very narrow immunity, essentially limited to what the memo refers to as the “Anglo-Saxon approach.” This, however, is not likely to be acceptable to the legislators and I therefore support the proposal in the memo, with the following thoughts and suggestions.

1. This may be a translation problem but both the original constitutional provision and the proposed amendment refer to “Bringing an action.” In English, “an action” can refer to either a criminal prosecution or a civil proceeding by a private person or the State for damages or some other civil remedy.

The English translations of comparable provisions in other constitutions that I have examined all refer only to *criminal* prosecutions, except for the South African which, however, is limited to expressions or activities as a legislator. A proposed amendment should be clear that it allows immunity only for criminal prosecutions, for there is no reason that civil actions should be included.

If the original Georgian makes it clear that only criminal prosecution is involved, this problem disappears.

2. Requiring the specific approval of Parliament for the *continued* detention of a Member “caught in the commission of a crime” (after parliament has been notified), does indeed go further than other countries like France, Russia, (Art. 98), Poland, (Art. 105(5)), Romania, (Art. 69(2)), Sweden ((Art. 8)), which require affirmative action to release someone “caught . . .” It seems unnecessary and the amendment seems appropriate.

Moreover, the current provision is ambiguous: How much time for this approval does the Parliament have under Art. 52.2, if it does want to continue the detention? Is the Member automatically released from detention if the Parliament does not act within 24 hours? 48 hours? Is there a statutory provision for this?

3. On the other hand, the amendment seems to go further than necessary to resolve the problem created by the requirement of parliamentary approval for continued detention of one “caught in the commission of a crime.”

Like immunity provisions in other countries, the first sentence of Article 52.2 refers to “detention or arrest.” As I understand it, “detention” and “arrest” are different stages in the criminal process, with arrest being the advanced and more formal stage, perhaps involving the judiciary if I do not wholly misunderstand the civil law system. The first clause of the first sentence of current Art. 52.2 requires parliamentary permission for “Bringing an action against a Member of Parliament, his detention or arrest,” or searching him and his effects. When a Member is “caught in the commission of a crime,” the exception clause then dispenses with the need for parliamentary permission in all three proceedings— “bringing an action, detention or arrest.” The last sentence of the current Art 52.2 then reinstates the requirement of parliamentary action to continue the *detention* of such a Member.

Where *arrest* for a Member “caught . . .” is concerned, the current Article 52.2 contains no provision for parliamentary action that either requires release from arrest or, as noted above, is necessary to permit the arrest. The proposed amendment, however, allows the Parliament to order his release, which under the current 52.2 does not seem possible. I do not understand the reason for that. If there is enough evidence to formally arrest a Member, why allow Parliament to let him remain at large? It is perhaps understandable that the immediate detention would be subject to parliamentary review, – on-the-spot mistakes all not uncommon – but if there is enough evidence to justify a formal arrest of someone “caught in the commission,” release by the Parliament would seem inappropriate interference, inconsistent with separation of powers principles.

The above is premised on my understanding of the difference between “detention” and “arrest” that I described above, about which I am far from confident. So these comments may be unwarranted.