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Parliamentary Immunity of the Member of Parliamentary Assembly of the Council of Europe As a Condition for Conducting Parliamentary Diplomacy

[Immunitet parlamentarny członka Zgromadzenia Parlamentarnego Rady Europy jako warunek prowadzenia dyplomacji parlamentarnej]

Abstract

The Author analyzed the problem: to what extent is having parliamentary immunity for a member of the Parliamentary Assembly of the Council of Europe (PACE) a condition for conducting parliamentary diplomacy by the PACE and its members? The assumption by the PACE of new competences in the scope of the control function (accession procedure, monitoring procedure, election monitoring, participation in conflict resolution), which were not available at the time of the establishment of the Council of Europe, resulted in the members of the PACE being involved in conducting parliamentary diplomacy and taking the associated risks for their security. The PACE therefore interprets the prohibition on detaining a member of the PACE to a greater extent than that resulting from legally binding norms (the Statute of the Council of Europe, the General Agreement on the Privileges and Immunities of the Council of Europe), demanding that the PACE must consent to the detention of a member of the PACE. This rule, included in the PACE guidelines, is the so-called „soft law" is valid but should not be abused. Immunity is intended to protect the integrity of the PACE and cannot be a cover for criminal activities.

Keywords: Council of Europe, PACE, parliamentary immunity, parliamentary diplomacy.

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Introduction

The case of the immunity of MP Marcin Romanowski for membership in the Parliamentary Assembly of the Council of Europe (PACE), which was requested in 2024 by the prosecutor's office to be waived in connection with proceedings regarding irregularities in the spending of the Justice Fund, increased the interest of the public and the scientific community in this immunity. It turned out that the scope of this immunity and the procedures for its application were controversial. There was also the question of the motives why PACE members were entitled to such immunity. In this study, I attempted to explain the source of these disputes in the context of the use of both legally binding documents and those of the so-called "soft law".

A special point of reference for this analysis is the phenomenon of parliamentary diplomacy. The study will analyze the issue of whether having parliamentary immunity is a necessary condition for PACE members to conduct parliamentary diplomacy.

The study will analyze the following research hypothesis: "In order to determine the scope of parliamentary immunity of a member of the Parliamentary Assembly of the Council of Europe, it is necessary to take into account both legally binding acts of the nature of international agreements (Statute of the Council of Europe, General Agreement on Privileges and Immunities of the Council of Europe) as well as documents of a nature the so-called «soft law», and especially the guidelines of the Parliamentary Assembly of the Council of Europe. Possession of formal immunity, and especially inviolability, are an essential element in protecting the integrity of the Parliamentary Assembly and enabling its members to perform the duties of membership, including when undertaking parliamentary diplomacy. However, the immunity applies only to PACE activities and cannot be abused to protect criminal activities."

The following research methods will be used in the study: legal-dogmatic, historical and systemic analysis.

General Characteristics of the Immunity of the Member of the Parliamentary Assembly of the Council of Europe

Parliamentary immunity is the institute of constitutional law, which protects the independence and authority of parliament as the highest authority, and it has developed in two forms: the irresponsibility and inviolability of delegates / MPs.[1] Irresponsibility protects the parliamentarians from respon-

[1] J. Steele, *Immunity of Parliamentary Statements*, 'Nothingam Law Journal' 2012, 1, p. 43.

sibility for expressing opinions, attitudes, gestures or votes in parliament, guaranteeing their freedom of speech in the parliament. On the other hand, inviolability allows for the protection of parliamentarians from arrest and the conducting of criminal proceedings against them even for acts committed outside their parliamentarian duties and office, until the permission for their prosecution is given by the Parliament.[2] The immunity is analyzed in the light of democratic principle[3]. It brings about the most important dilemmas and open questions which arise in these societies regarding parliamentary democracy[4].

The issue of parliamentary immunity is one of the important areas of research interest in the study of constitutional law.[5] This applies both to parliamentary immunity in Polish law[6] and in other political systems.[7] Undoubtedly, the institution of immunity is important for the status of a parliamentarian, but it is also perceived as an important guarantee instrument for the parliament as a body of legislative power, which also exercises a control function in relation to the executive power.[8] The protection afforded to the political expression of parliamentarians in the course of their duties is of fundamental constitutional importance.[9] However, if the institution of immunity itself

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[2] L. Balic, *Parliamentary Immunity in the Parliamentary Law of the Federation of Bosnia and Herzegovina*, 'Godišnjak pravnog fakulteta u Sarajevu' 2013, vol. 56, p. 9.

[3] C. Fasone. N. Lupo, *The Court of Justice on the Junqueras Saga: Interpreting the European parliamentary immunities in light of the democratic principle*, 'Common Market Law Review' 2020, 5, p. 1527.

[4] S. Ševgić, M. Bašić, *Parliamentary Immunity: Theory, legal regulation and practice in modern democratic countries*, 'Zbornik radova Pravnog fakulteta u Splitu' 2012, 3, p. 481.

[5] J. Mordwiłko, *Immunitet parlamentarny (krytyczna analiza instytucji)*, „Państwo i Prawo" 1966, 6, p. 6.

[6] M. Zubik, *Immunitet parlamentarny w nowej Konstytucji RP*, „Państwo i Prawo" 1997, 9, p. 19; K. Grajewski, Immunitet parlamentarny w prawie polskim, Warszawa 2001, p. 49; M. Troć, *Polski immunitet parlamentarny na tle prawno-porównawczym* [!], „Przegląd Prawa Konstytucyjnego" 2013, 4, p. 103; P. Chybalski, Parliamentary Immunity in Poland: In-depth analysis, Luxembourg 2015, p. 9.

[7] P. Uziębło, *Immunitet parlamentarny w państwach Unii Europejskiej*, „Studia Europejskie" 2007, vol. 16, p. 83; S. Wigley, *Parliamentary Immunity in Democratizing Countries: The case of Turkey*, 'Human Rights Quarterly' 2009, 3, p. 567; P. Cerase, *Parliamentary Immunity in Italy: In-depth analysis*, Luxembourg 2015, p. 9; P. Manthenjwa, *The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A comparison with jurisdictions in Britain, Canada and France*, 'The Comparative and International Law Journal of Southern Africa' 2016, 3, p. 387; J. Kysela, M. Antoš, *Czech Constitutional Court: Twists and turns of recent judgments of the highest courts in cases of parliamentary immunity*, 'Vienna Online Journal on International Constitutional Law' 2017, 2, p. 301 ; P. Gruda, *Parliament Immunity and Building Democracy in Kosovo*, 'Acta Universitatis Danubius. Juridica' 2018, 2, p. 133; J. K. S. Alzubi, *Parliamentary Immunity among Arab Constitutions*, 'Journal of Politics and Law' 2020, 2, p. 269. Cf. *Immunitet parlamentarny w państwach Unii Europejskiej*, „Studia Europejskie" 2007, vol. 16, p. 83.

[8] R. Viorescu, *Parliamentary Immunity: Form of protection and care for lawmakers*, 'European Journal of Law and Public Administration' 2015, 3, p. 99.

[9] Cf. decision of the European Court of Justice in 'Aldo Patriciello' (case C-163/10) and its impact on the protection of the freedom of speech of Members of the European Parliament. A modern conception of parliamentary immunity is less attached to the personal status of parliamentarians and focuses instead on a functional assessment of their activities in light of the roles which they are supposed to fulfil. In this approach, courts appear to be taking an increasingly narrow view of what constitutes parliamentary activity without clear principled criteria to identify it. Cf. R. S. Mehta, *Sir Thomas' Blushes: Protecting parliamentary immunity in modern parliamentary democracies*, 'European Human Rights Law Review' 2012, 3, p. 309.

does not raise any fundamental controversy,[10] it is controversial what the scope of immunity should be so that it fulfills its political function and at the same time does not lead to unjustified toleration of illegal actions of members of parliament, unrelated to the political role of parliamentarians.[11]

The subject analyses concentrate on the subjective scope of non-accountability and non-violability and focuses on the time and place in which the protection is provided, and trace the objective scope of the protection and the solutions related to the possibility to lift the parliamentary immunities. They lead to the conclusion that non-accountability is similar in different countries, has undergone few modifications over the years, and it is permanently formed. In the case of non-violability, there are more extensive differences, in particular in the objective scope and the degree of protection. However, various solutions prove that there is not a single universally accepted model of immunity and that the scope of the guaranteed protection can be more diverse, it can be subject to change, and be adapted to the changes in political systems and the political and social expectations.[12] Two stylized models of parliamentary immunity, the Legislative Agency Model & the Authorization Model, are compared to determine the correct balance between protecting representatives from outside interference & limiting their potential to abuse their positions. The Legislative Agency Model only bars the legal questioning of the immediate legislative agency of representatives, while the Authorization Model also requires the consent of the representative assembly before the nonlegislative agency of representatives can be legally questioned.[13]

The analyzes undertaken usually focus on the immunities applicable in national parliaments.[14] However, the issue of immunities held by members of international parliaments (e.g. the European Parliament[15]) or other interna-

[10] W. Kabański, *Rys historyczny immunitetu i ewolucji statusu parlamentarzysty*, „Krakowskie Studia Małopolskie' 2008, 12, p. 75.

[11] R. M. Stefański, *Immunitet parlamentarny w świetle ustawy o wykonywaniu mandatu posła i senatora*, „Prokuratura i Prawo' 1996, 10, p. 63; K. Grajewski, *Zakres polskiego immunitetu parlamentarnego*, „Przegląd Sejmowy' 1995, 3, p. 9; M. Onofrei, S. Gradinaru, *Parliamentary Imm(p)unity*, 'Procedia Economics and Finance' 2015, vol. 20, p. 453.

[12] A. Jackiewicz, *Immunitet parlamentarny we współczesnym świecie: ujęcie prawnoporównawcze*, „Przegląd Europejski' 2019, 1, p. 57.

[13] S. Wigley, *Parliamentary Immunity: Protecting Democracy or Protecting Corruption?*, 'The Journal of Political Philosophy' 2003, 11, p. 23.

[14] Immunitet parlamentarny – zagadnienia podstawowe, W. Odrowąż-Sypniewski (ed.), Warszawa 2007; Immunities in the Age of Global Constitutionalism, A. Peters, E. Lagrange, S. Oeter, C. Tomuschat (eds), Leiden 2015.

[15] M. Crespo Allen, Parliamentary Immunity in the Members States of the European Community and in the European Parliament, Luxembourg 1993, p. 12; D. Lis-Staranowicz, J. Galster, *Immunitet posła do Parlamentu Europejskiego*, „Przegląd Sejmowy" 2006, 6, p. 9; R. Rafaelli, The Immunity of Members of the European Parliament: In-depth analysis, Luxembourg 2014, p. 9; R. Panizza, Immunity of Members of the European Parliament, Brussels 2015, p. 9; E. Pavy, Handbook on the Incompatibilities and Immunity of the Members of the European Parliament, Brussels 2022, p. 12. Comp: Immunitet parlamentarny w państwach członkowskich Wspólnoty Europejskiej i w Parlamencie Europejskim, J. Strzelecka (ed.), Warszawa 1993; Rules on Parliamentary Immunity in the European Parliament and the Member States of the European Union, S. McGee, S. Isaacks (eds), Brussels 2001.

tional parliamentary institutions (e.g. Parliamentary Assembly of the Council of Europe) is also discussed. These cases were of interest to the European Court of Human Rights and the Court of Justice of the European Union,[16] which demonstrated a functional approach.[17]

Recently, there has been increased interest in the issue of parliamentary immunity – member of the Parliamentary Assembly of the Council of Europe[18] and former MP, member of the Parliamentary Assembly of the Council of Europe.[19] Piotr Chybalski rightly pointed out that the issue of the scope of immunity of an MP-member of the PACE appears to be exceptionally complex, which is due to, among others, from the overlap of two "immunity regimes" (constitutional and international law) and differences in the provisions binding Polish and foreign authorities.[20]

In addition to national immunities, PACE members benefit from a supranational system of parliamentary immunity granted by the Statute of the Council of Europe[21] and the General Agreement on the Privileges and Immunities of the Council of Europe 1949,[22] which is referred to as "European parliamentary immunity." This regime provides functional protection beyond national borders and opens the scope for parliamentary activities, in accordance with the mission that the Parliamentary Assembly is called to fulfill. The PACE shall regularly review the protection mechanism for its members, taking into account developments or challenges faced by national parliaments in various aspects of parliamentary immunity, in order to ensure the effective protection of its members and therefore the Assembly, in particular in the light of new political threats. Even though the 75-year-old system of immunities has not

[16] On 19 December 2019, the European Court of Justice issued its ruling in the case of Oriol Junqueras Vies, the former vice president of Carles Puigdemont's secessionist regional government of Catalonia. Mr Junqueras had been elected a member of the European Parliament while in preliminary detention for offences related to the unconstitutional Catalan independence referendum of 2017. He was refused prison leave to take the formal oath in front of the central electoral commission as required under Spanish law. Pursuant to the Spanish electoral code, failure to take the oath results in a mandatory declaration of vacancy and thus the forfeiture of the parliamentary mandate. Consequently, Mr Junqueras did not acquire the status of member of the European Parliament according to Spanish law. Mr Junqueras complained against the decision not to grant him leave, arguing that, following his election, he was entitled to parliamentary immunity pursuant to Article 9 of the Protocol (No. 7) on Privileges and Immunities of the European Union. Cf. S. Hardt, *Fault lines of the European parliamentary mandate: The immunity of Oriol Junqueras Vies: ECJ 19 December 2019, Case C-502/19, 'Junqueras', ECLI:EU:C:2019:1115*, 'European Constitutional Law Review' 2020, 1, p. 170.

[17] S. Hardt, Parliamentary Immunity in a European Context, Luxembourg 2015, p. 12.

[18] J. Jaskiernia, *Immunitet parlamentarny członka Zgromadzenia Parlamentarnego Rady Europy* [in:] Zagadnienia prawa konstytucyjnego. Księga jubileuszowa dedykowana Profesorowi Krzysztofowi Skotnickiemu w siedemdziesiątą rocznicę urodzin, vol. 1, ed. A. Domańska, Łódź 2023, p. 554.

[19] P. Chybalski, *Możliwość pociągnięcia do odpowiedzialności prawnej byłego posła, członka Zgromadzenia Parlamentarnego Rady Europy*, „Zeszyty Prawnicze Biura Studiów Sejmowych" 2018, 4, p. 55.

[20] P. Chybalski, *Problem zakresu ochrony immunitetowej posła sprawującego funkcję członka Zgromadzenia Parlamentarnego Rady Europy* [in:] Konstytucjonalizm polski: Refleksje z okazji jubileuszu 70-lecia urodzin i 45-lecia pracy naukowej profesora Andrzeja Szmyta, Gdańsk 2020, p. 770.

[21] Statute of the Council of Europe, ETS 1.

[22] General Agreement on Privileges and Immunities of the Council of Europe of 1949, ETS 2.

evolved in the convention texts, The Assembly tried to improve it with subsequent resolutions to adapt it to the realities of the work of its members and to take into account activities related to parliamentary diplomacy. It still has a solid legal basis to ensure effective protection for its members and institutions while preventing abuse.

However, the Assembly noted that, in implementing a system to protect its members, it was now necessary to clarify the scope of the current provisions and to define clear and objective criteria to enable privileges and immunities to fulfill their institutional purposes, while preventing possible abuse of privileges by parliamentarians for personal purposes. In this situation, it is worth familiarizing yourself with the *Guidelines on the scope of immunity of members of the Parliamentary Assembly* adopted by the Parliamentary Assembly of the Council of Europe on 27 September 2021.[23] Although they do not solve all the problems indicated by the legal doctrine, they will certainly be important in proceedings to waive the immunity of a PACE member.

Public interest in the construction of the immunity of a PACE member clearly increased when it was invoked in the case of MP Marcin Romanowski, former deputy minister of justice, who was charged by the prosecutor in connection with irregularities in the Justice Fund. When the court analyzed the justification for the detention, the defense pointed out that Romanowski was protected by the immunity of a member of the PACE, which was confirmed by the chairman of the PACE in a letter to the Marshal of the Sejm. Due to the doubts that arose, the court ordered Romanowski's release. The appellate court, considering the prosecutor's complaint, upheld the decision of the first instance court, finding that Romanowski was protected by the immunity of a member of the PACE, and its repeal required the use of an appropriate procedure.

In the context of the application of the immunity of a PACE member, a dispute emerged, especially since the Minister of Justice – Prosecutor General Adam Bodnar revealed that before the prosecutor's decision to detain Marcin Romanowski was made, the opinions of two independent experts (Andrzej Jackiewicz[24] and Joanna Juchniewicz[25]) were reviewed and they saw no obstacles to take such action, although they stipulated that the final interpretation would rest with the court. However, it turned out that the problem of immunity of a PACE member is more complicated, because it is not enough to rely – as these experts did – on legally binding documents, but it is also necessary to take into account the so-called "soft law".

[23] PACE Res. 2392 (2019), *Guidelines of the scope of parliamentary immunities enjoyed by members of the Parliamentary Assembly*, *Assembly debate* on 27 September 2021 (24th sitting). Doc. 15364, report of the Committee on Rules of Procedure, Immunities and Institutional Affairs, rapporteur: Mr Tiny Kox. *Text adopted by the Assembly* on 27 September 2021 (24th sitting).

[24] A. Jackiewicz, Opinia prawna, Białystok 2024, https://monitorkonstytucyjny.eu/archiwa/29274 (accessed: 08.10.2024).

[25] A. Juchniewicz, Opinia prawna w przedmiocie udzielenia odpowiedzi na pytania (Ministerstwa Sprawiedliwości), Olsztyn, 8 lipca 2024, https://monitorkonstytucyjny.eu/archiwa/29274 [accessed: 08.10.2024].

The Statute of the Council of Europe[26] provides in Art. 40a that: 'The Council of Europe, the representatives of the members and the Secretariat shall enjoy, in the territory of the members, the privileges and immunities necessary for the exercise of their functions. By virtue of these immunities, representatives of the Consultative Assembly may not, in particular, be arrested or prosecuted in the territory of the members on account of the views expressed or manner of voting in the Assembly, its committees or commissions.'

The General Agreement on the Privileges and Immunities of the Council of Europe[27] reads: 'Art. 14. The representatives in the Consultative Assembly and their deputies shall enjoy immunity from all official interrogations and from arrest and legal proceedings of any kind in respect of words spoken and votes taken by them in the exercise of their functions.

Article 15. During a session of the Consultative Assembly, the representatives in the Assembly and their alternates, whether or not members of Parliament, shall enjoy: (a) in the territory of their own State the immunities accorded to members of Parliament in that State; (b) in the territories of all other Member States, immunity from arrest and prosecution. This immunity shall also apply to travel to and from the venue of the Consultative Assembly meeting. However, it shall not apply where the representatives or their deputies have been caught in the act of committing a crime, attempting to commit a crime or committing a crime, or in cases where the Consultative Assembly has waived immunity'.

However, the Additional Protocol to the General Agreement on the Privileges and Immunities of the Council of Europe[28] clarifies the scope of parliamentary immunity:

'Article 3. The provisions of Article 15 of the Agreement shall apply to the representatives of the Assembly and their alternates whenever they attend meetings of the Committees or Subcommittees of the Consultative Assembly or travel to and from the place of meeting, whether the Assembly is in session or not at that time neither.

Article 5. Privileges, immunities and facilities are granted to the representatives of the Member States, not for their personal advantage, but in order to ensure their complete independence in the performance of their functions in connection with the Council of Europe.'

A Member State therefore has not only the right but also the obligation to waive the immunity of its representative in any case where that immunity might obstruct the administration of justice and where it can be waived without prejudice to the purpose for which it was granted. However, the practice of functioning of the Council of Europe brought a number of new experiences

[26] CETS, nr 001.
[27] CETS, nr 002.
[28] CETS, nr 010.

that required clarification of the scope of immunity of a member of the PACE. However, this was done by means of the so-called "soft law", which are not legally binding.

In 2021, the Parliamentary Assembly of the Council of Europe adopted *Guidelines on the scope of the parliamentary immunity of members of the Assembly.*[29] It states that:

Members of the Parliamentary Assembly enjoy privileges and immunities that maintain the integrity of the Assembly and ensure the independence of its members in the exercise of office. The purpose of immunity (immunity from arrest and prosecution) is to protect a parliamentarian against unjustified pressure that may be exerted on him in connection with activities that are not part of typical parliamentary activities. As the Guidelines state in point 4: 'Immunity cannot be invoked in cases *in flagrante delicto*. Since the purpose of this provision is to quickly restore public order and reduce the risk of evidence being lost, its application by national authorities should not be inspired by concerns unrelated to the sound administration of justice.' Point 6 of the Guidelines states: 'When considering a request for waiver of immunity, the Assembly must take into account the following elements: judicial proceedings brought against a Member should not jeopardize the proper functioning of the Parliamentary Assembly; the request must be serious, that is, not for reasons other than justice. If neither of these elements can be established, the Assembly should normally propose the waiver of immunity.' Point 7 of the Guidelines deals with procedural issues: 'Immunity may not be waived except by the Assembly at the request of the «competent authority» of the Member State concerned. The competent authority is usually the judge presiding over the case, but may also be the prosecutor or the Minister of Justice. A request for waiver of immunity may be submitted by an authority of a Member State other than that of which the member is a national.'

In a letter of July 16, 2024 to the Speaker of the Sejm, Szymon Hołownia, the Chairman of the PACE, Theodoros Rousopoulos, referring to the case of M. Romanowski, confirmed that members (their deputies) of this Assembly enjoy the immunities and privileges they are entitled to under Art. 40 of the Statute of the Council of Europe, the General Agreement on the privileges and immunities of the Council of Europe and Art. 3 of the Additional Protocol to this Agreement.

In response to the letter of the national prosecutor, Dariusz Korneluk, dated July 17, 2024, in which the prosecutor's office presented the circumstances of the case, the subject of the proceedings regarding MP Romanowski and the charges it wants to present to him, as well as specifying when the events alleged against him took place and whether they were related to the MP's performance of the mandate of the Parliamentary Assembly of the Council of

[29] PACE Res. 2392 (2019).

Europe, the chairman of the PACE, T. Rousopoulos, announced that the PACE would deal with the possible repeal of immunity of former Deputy Minister of Justice M. Romanowski when he receives a formal request in this matter. As Rousopoulos noted, immunity is not a privilege granted to an individual, but rather aims to guarantee respect for democratic institutions. "No one can rely on it to commit a crime, but no one can ignore it" he emphasized. He added that "the immunity granted to a member of the PACE applies unless the Assembly itself waives it. But first a formal request for this must be submitted by the competent authority."

The case of M. Romanowski raised a dispute over the understanding of the scope of immunity of a PACE member. The question arises: how it happened that experts invited by the Ministry of Justice found that immunity does not protect M. Romanowski from the possibility of arrest, and the chairman of the PACE clearly stated that he is protected by immunity and the body that wants to bring charges against him must apply to the PACE to waive immunity?

The controversy seems to be based on the inconsistency of the Council of Europe's legal system in this regard. Both the Statute of the Council of Europe (1949) and the General Agreement on the Privileges and Immunities of the Council of Europe (1949) and its Additional Protocol (1952) were created in the initial phase of the activity of this international organization. The role of the Consultative Assembly (today's Parliamentary Assembly) was perceived differently at that time. It was supposed to be a "discussing body" of the Council of Europe, and as a consequence, the creators of the CoE, with regard to immunity, decided that additional immunity was needed only on the way to and from Strasbourg and during meetings in Strasbourg, since the parliamentarian is otherwise covered by national immunity. Later it was noticed that a PACE member could also take action in other places, during meetings of PACE committees and subcommittees.

However, since this initial model, there has been a fundamental change in the PACE function. Its members are involved in control activities in relation to Member States as part of the accession procedure, as part of observing elections in Member States, and, above all, as part of the monitoring procedure, during which it is examined whether Member States fulfill the obligations undertaken at the time of membership in CoE. The immunity of a PACE member is therefore intended to protect the integrity of the PACE and guarantee that its members will be able to freely perform their tasks, without fear of becoming the subject of provocation and harassment. For this reason, PACE broadly interprets the prohibition of inviolability of a PACE member and only excludes the situation of being caught red-handed. If this situation does not occur, the PACE expects that the authority wishing to bring charges and decide on detention should request the PACE to waive

the immunity. PACE wants to have the right to assess whether these are not acts that could be classified as violating the integrity of PACE and preventing it from performing its tasks.

From the axiological point of view, there is no difference between legally binding regulations (Statute, General Agreement on Immunities) and "soft law" regulations, which include the PACE guidelines. All these regulations are based on the assumption that protection is due to activities in the PACE and is intended to protect the integrity of the Assembly. The only difference is who has the right to decide whether immunity applies. The conclusion may be drawn from legally binding documents that the decision on whether a person is protected by the immunity of a member of the PACE rests with the body applying the law, which determines whether the conditions for applying the immunity set out in the Statute of the Council of Europe and the General Agreement on immunities have been met. According to the PACE's interpretation, except in the case of a "red act", the state authority should take into account that the PACE member is protected by immunity and ask the PACE to waive it.

In this context, the problem of the meaning of the so-called "soft law" in the CoE system. Moreover, it is known that the Council of Europe makes extensive use of this instrument, which is more flexible and creates the possibility of quick response to emerging regulatory needs. In particular, the CoE avoids changes to the Statute or the General Agreement on immunities. There is no doubt that the interpretation of the scope of immunity adopted by the PACE deserved to be included in the General Agreement. However, since this did not happen, the question arises whether the Member State is bound by the interpretation adopted by the PACE in this respect. Formally, there is no legal requirement here, but disregarding the PACE interpretation exposes the state to conflict with the Parliamentary Assembly. Moreover, we cannot ignore the fact that member states should also care about protecting the integrity of this important body of the Council of Europe.

General Characteristics of Parliamentary Diplomacy

The subject of the analysis undertaken in this part of the study is the phenomenon of parliamentary diplomacy. It is observed in the context of the international activity of parliamentarians. This raises the following questions: What is the essence of parliamentary diplomacy? How can it be defined? What is the legal nature of it? How does it influence the perception of the functions of contemporary parliamentarism? What is its significance in the area of international relations?

The importance of the analysis undertaken here is related to the fact that the area of foreign policy is traditionally subject to less democratic control than the areas of domestic policy, hence the involvement of parliamentarians in this area is of particular importance.[30] The same is true in the field of security and defense, where also ensuring democratic control is, in the light of the experience of political system practice, a serious challenge.[31] Thus, if we accept as true the thesis of Joseph S. Nye Jr. on the "globalization of the democratic deficit",[32] then parliamentary diplomacy can be seen as a factor in mitigating the "democratic deficit" perceived in the field of world politics.[33]

Although the parliament's influence on the area of foreign policy has a centuries-old tradition, "parliamentary diplomacy" is a concept that has only begun to make its way in the axiology and institutional system of international organizations over the last three decades[34]. Traditional diplomacy is associated with the activities of the executive power (president, government, minister of foreign affairs, diplomats), and the introduction of the term "parliamentary" must raise questions about the validity of such categorization in the context of understanding the term "diplomacy".

Some trace the origins of parliamentary diplomacy to ancient times, recalling the activities of the Roman Senate in 205 BC, although it was undoubtedly about a certain type of activity, not a specific date.[35] The phenomenon of parliamentary diplomacy was written about in the context of the Scandinavian "political bloc" in the interwar League of Nations. Ludwik Dembiński recalled the figure of the American diplomat and professor of international law Philip Jessup, who in 1956, during a lecture at the Hague Academy of International Law, introduced the term "parliamentary diplomacy" into the dictionary of international law and international relations.[36] In his lecture, Jessup quoted another American politician and diplomat, Secretary of State in the offices of Presidents John F. Kennedy and Lyndon B. Johnson, Dean Rusk, who was probably the first to use this term.[37] Julian Sutor, also citing Jessup, explains that the concept of parliamentary diplomacy was formerly used to describe conference diplomacy. This interchangeable use of terminology results from

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[30] See M. Zürn, *Global Governance and Legitimacy Problems*', 'Government and Opposition' 2004, 2, p. 261.

[31] See W. Wagner, *The Democratic Control of Military Power Europe*, 'Journal of European Public Policy' 2006, 2, p. 214.

[32] J. S. Nye Jr., *Globalization's Democratic Deficit: How to make international institutions more accountable*, 'Foreign Affairs' 2001, 4, p. 2.

[33] A. Moravcsik, *Is There a 'Democratic Deficit' in World Politics? A framework for analysis*, 'Government and Opposition' 2004, 2, p. 336.

[34] S. Stavridis, D. Jančić, *Introduction The Rise of Parliamentary Diplomacy in International Politics*, 'The Hague Journal of Diplomacy' 2016, 2–3, p. 107

[35] D. Fiott, *On the Value of Parliamentary Diplomacy*, 'Madariaga Paper' 2011, 7, p. 1.

[36] L. Dembinski, The Modern Law of Diplomacy. External Missions of States and International Organizations, Dordrecht–Boston–Lancaster 1988, p. 253; P. Jessup, *Parliamentary Diplomacy*, pt. 1, 'Recueil des cours' 1956, 1, The Hague, p. 185.

[37] D. Rusk, *Parliamentary Diplomacy – Debate vs. Negotiation*, 'World Affairs Interpreter' 1955, 2, p. 121.

the similarity of deliberations and negotiations at international conferences to those in parliamentary practice.

Parliamentary diplomacy should be understood as the role played by parliaments national, parliamentary assemblies of international institutions, international interparliamentary associations or parliamentarians acting individually within the framework of international politics. Parliaments often pursue foreign policy that is not necessarily consistent with the foreign policy pursued by the government. Parliamentarians representing national parliaments can act as diplomats on their own behalf during their stay abroad, e.g. by entering into conversations with representatives of the authorities of the visited country, which is often reported by the media and the authorities of that country. From a formal point of view, public statements by parliamentarians do not bind the country they come from. However, public opinion and the authorities of the visited country may suspect that the parliamentarian is acting with the consent of his government. This form of foreign activity of parliamentarians may be a kind of "litmus test", allowing for examining the views or position on a given issue represented by the authorities of the visited country.[38]

Parliamentary diplomacy is a phenomenon that cannot be clearly categorized yet, but it cannot be ignored either, because it has a practical dimension, involving members of national parliaments in the foreign policy of their countries. Parliamentary diplomacy is certainly not an alternative to classic diplomacy, but going beyond the traditional areas of parliamentary work related to legislation and control of the executive power, it is undoubtedly a good complement to foreign policy and classic diplomacy conducted by the governments of individual countries.[39]

Diplomacy in the strict sense means diplomacy undertaken by the state (state diplomacy). However, diplomacy in the broad sense includes both state diplomacy and diplomacy undertaken by other entities active in the sphere of international relations, referred to as "paradiplomacy". Although the concept of "paradiplomacy" was born in the context of the international activity of the constituent elements of federal states, and then was extended to the activity of territorial substructures also of unitary states, it does not seem justified to limit it only to this type of entities. If the term "paradiplomacy" makes sense, it is only when it covers phenomena that take place outside the traditional diplomacy conducted by a state.[40]

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[38] I. Bochenek, *Dyplomacja parlamentarna jako jeden z instrumentów współczesnych stosunków międzynarodowych*, „Przegląd Sejmowy" 2016, 5, p. 239.

[39] B. Surmacz, A. Kuczyńska-Zonik, *Dyplomacja parlamentarna: uwarunkowania, pojęcie, zadania* [in:] Dyplomacja parlamentarna w Europie Środkowej i Wschodniej w latach 2015–2019, B. Surmacz, A. Kuczyńska-Zonik (eds), IEŚ Policy Papers 2019, 2, p. 14.

[40] J. Jaskiernia, Dyplomacja parlamentarna, Toruń 2022, p. 41.

The existence of international parliamentary assemblies naturally gives rise to a tendency for parliamentarians to be active in the sphere of international relations. It usually takes an advisory and controlling form within these organizations, but there is an increasingly visible tendency for members of international parliamentary assemblies to take initiatives outside the organizations in which they operate. The term diplomacy refers to bilateral and multilateral interstate relations, but it seems reasonable to note that elements of such diplomacy also appear in the relations of an international organization with its member states.[41] This may apply to both the "government" segment of these organizations and the parliamentary dimension. Therefore, in connection with an international organization, we can talk about conducting a "parliamentary foreign policy."[42]

In the light of the definition proposed by Frans Weisglas and Gonnie de Boer, parliamentary diplomacy covers the full range of international activities undertaken by parliamentarians in order to increase mutual understanding between countries, mutual assistance in improving the control of governments and the representation of the people, and to increase the democratic legitimacy of intergovernmental institutions.[43]

Philip C. Jessup pointed to the elements that distinguish parliamentary diplomacy from other forms of multilateral negotiations. The first is a permanent organization whose responsibilities and competences extend beyond the agenda of one session. Secondly, they are public and covered by the media. Thirdly, they are implemented on the basis of formalized procedures, according to which one point of view may be accepted and another rejected. The fourth element is that the discussion ends with a resolution adopted by majority vote.[44]

Jerzy J. Wiatr highlighted the following differences between parliamentary diplomacy and classical diplomacy: 1) parliamentary diplomacy is undertaken by a wide spectrum of political forces represented in parliament, while classical diplomacy is undertaken by the ruling majority and reflects its policy (e.g. in the activities of the Parliamentary Union often votes are divided in the national delegation on specific issues, and such a situation is not possible in government diplomacy); 2) parliamentary diplomacy is based on the power of persuasion, especially of a moral nature – so it does not lead to binding decisions; However, in conflicts of a national, ethnic or religious nature, such non-binding influence may bring the expected results in the long run;

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41 F. A. M. Alting von Geusau, European Organizations and the Foreign Relations of States, Leyde 1962, pp. 56 and 57.

42 P. Fischer, Europarat und parlamentarische Aussenpolitik, München 1962, p. 22.

43 F. Weisglas, G. de Boer, *Parliamentary Diplomacy*, 'The Hague Journal of Diplomacy' 2007, vol. 2, pp. 93 and 94.

44 P. C. Jessup, *Parliamentary Diplomacy: An examination of the legal quality of the rules of procedure of organs of the United Nations*, 'Recueil des cours', vol. 89, 1, p. 178.

3) parliamentary diplomacy is undertaken by people who have no professional preparation in this field, but who draw their knowledge from parliamentary experience; however, in this respect, parliamentarians benefit from the help of professional diplomats employed by parliamentary offices; 4) parliamentary diplomacy is undertaken on an *ad hoc* basis, so it does not involve permanent representations abroad; parliamentarians sometimes use embassies, but they usually take action during interparliamentary conferences; 5) because there is a large turnover in the composition of interparliamentary delegations (especially in new democracies), the phenomenon of discontinuation of activities undertaken within the framework of parliamentary diplomacy has a wide scope.[45]

Parliamentary diplomacy, on the one hand, resembles classical diplomacy to some extent (participation in negotiations, searching for ways to resolve conflicts, mediation, etc.), but on the other hand, it is characterized by certain specific features. What is crucial is that it is undertaken not by representatives of governments and professional diplomats, but by the people's mandate holders sitting in international parliamentary assemblies. It is therefore an element of the implementation of the functions of these assemblies, even if this factor is not always highlighted in the classifications of their functions. Parliamentarians therefore engage their authority in solving internal and international conflicts, and a particularly important instrument of conduct is dialogue with parliamentarians from given countries. This is where the "parliamentary dimension" of international relations lies, in which the executive power is not replaced, but rather complements the activities it undertakes in the field of diplomacy.[46]

Parliamentary diplomacy covers various forms of parliamentary activity in the international arena: foreign visits of parliamentary delegations; receiving visits from parliamentarians from other countries, as well as courtesy visits from the highest representatives of other countries officially staying in the country (heads of state, prime ministers, ministers of foreign affairs) and ambassadors accredited in a given country; participation of parliamentarians in the work of parliamentary assemblies of international organizations; organization of bilateral and multilateral parliamentary meetings; organization and activities of bilateral parliamentary friendship groups. A special dimension of parliamentary diplomacy is related to parliamentary procedures regarding the recognition of states.[47]

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[45] J. J. Wiatr, *Parliamentary Diplomacy After Cold War*, 'Romanian Journal of International Affairs' 1995, 5, pp. 99 and 100.

[46] J. Jaskiernia, *Parliamentary Diplomacy – A new dimension of contemporary parliamentarism* [in:] Contemporary Challenges of Parliamentarism: Theory and practice. Special issue devoted to the memory of Professor Wojciech Orłowski (1963–2019), S. Patryra, M. Chrzanowski (eds), 'Studia Iuridica Lublinensia' 2022, 5, pp. 85–102.

[47] C. Loda, J. Doyle, E. Newman, G. Visoka, *Parliamentary Recognition* [in:] Routledge Handbook of State Recognition, G. Visoka, J. Doyle, E. Newman (eds), London 2020, p. 256.

The resolution of the Second World Conference of Speakers of Parliaments, held on 7–9 September 2005 at the UN Headquarters in New York, stated: "We emphasize that parliaments must be active in international affairs not only through interparliamentary cooperation and parliamentary diplomacy, but also by participating in and monitoring international negotiations, supervising and enforcing what has been adopted by governments, and ensuring compliance with national standards and the rule of law. Likewise, parliament must be more vigilant in scrutinizing the activities of international organizations and contributing to their deliberations."[48]

There has been a tendency to include parliamentarians in state delegations undertaking international negotiations. This was noted, for example, in relation to the review conferences on non-proliferation treaties. It is indicated that such behavior is often associated with the intention to weaken the voices opposing the solutions contained in these international documents.[49]

One of the important goals of parliamentary diplomacy is to ensure democratic control in the sphere of foreign affairs, security and defense, which by their nature are subject to weaker parliamentary control than other areas of state activity, and this is due to, among others, from the secret or confidential nature of activities undertaken by state authorities in both bilateral and multilateral relations.[50]

Is the Parliamentary Immunity of the Member of the Parliamentary Assembly of the Council of Europe a Condition to Conduct of Parliamentary Diplomacy?

There is undoubtedly a causal relationship between the institution of parliamentary immunity of members of the Parliamentary Assembly of the Council of Europe and the ability of PACE members to conduct parliamentary diplomacy. The intention of parliamentary immunity is to ensure the integrity of PACE. The point is for PACE members, when taking action on its behalf, to be convinced that they benefit from special protection provided by parliamentary immunity and the resulting inviolability.

This regularity has been valid since the establishment of the Council of Europe and its Parliamentary Assembly (initially: the Consultative Assembly) in 1949, but it gained importance with the development of the Council of Europe. There was a change in the PACE function. If initially this body was intended only as a "discussion body" and it seemed that it would be enough

[48] Second World Conference of the Speakers of Parliaments, New York, 7–9 September 2005, Geneva 2006, p. 13.
[49] M. Onderco, *Parliamentarians in Government Delegations: An old question still not answered*, 'Cooperation and Conflict' 2018, 3, p. 415.
[50] G. Bono, *Challenges of Democratic Oversight of Security Policies*, 'European Security' 2006, 4, p. 434.

to provide additional protection for PACE members on the way from their places of residence to Strasbourg and back, because they enjoy parliamentary immunity in the country, this model became obsolete with the development of PACE competences. Changes taking place within the PACE control function were of key importance.

The new tasks concern in particular PACE's participation in the accession procedure (deciding on the country's admission to the Council of Europe) and the monitoring procedure (control of the implementation of the country's obligations assumed at the time of gaining membership in the Council of Europe), as well as monitoring of elections and participating in solving an international conflicts. PACE members, taking action under these procedures, are often forced to criticize the governments of member states in such sensitive areas as: violation of the rights of the opposition, inhumane treatment of prisoners in prisons or detention centers, violation of the rights of national, linguistic, religious or sexual minorities, violation of the democratic principles of electoral law, violation of the separation of powers and the principles of pluralism. This means that PACE members carrying out tasks on its behalf are exposed to potential threats, provocations and attempts to discredit them. They must therefore be assured, based on the principle of inviolability, that they will be able to carry out their tasks on behalf of PACE undisturbed and without risk to their personal security.

Therefore, regardless of what definition of "parliamentary diplomacy" we adopt, there is no doubt that the activities of PACE members undertaken in the accession procedure, monitoring procedures, monitoring procedure and attempts to resolve international conflicts should be included in the type of activities that constitute parliamentary diplomacy. There is an analogy here with classical diplomacy. Just as diplomats involved in conducting classical diplomacy enjoy diplomatic immunity, parliamentarians involved in conducting parliamentary diplomacy should enjoy parliamentary immunity, conditioning the success of their mission in this area.

At the same time, however, the immunity of a PACE member, as follows from the documents of the Council of Europe, both legally binding and of the nature of the so-called "soft law" should not be abused to protect against criminal activities. Hence, the requirement for PACE to consent to the detention of a PACE member has the sole purpose of ensuring that the request of the relevant state authorities to detain a PACE member is not related to his activities at PACE. PACE wants to be sure that this is not about actions of state authorities that could weaken the integrity of PACE by taking unjustified actions towards its member. If such a situation is out of the question, PACE agrees to waive immunity.

Final Observations

As the involvement of members of the Parliamentary Assembly of the Council of Europe in the conduct of parliamentary diplomacy has increased, public opinion and the scientific community have increased interest in the advisability and scope of parliamentary immunity held by PACE members. There is no doubt that without parliamentary immunity and the associated privilege of inviolability, PACE members would not be able to carry out their parliamentary diplomacy tasks in the name of PACE without risk to their security. Immunity therefore serves to protect the integrity of PACE in the sphere of international relations. At the same time, the Council of Europe emphasizes that immunity cannot protect the criminal activities of PACE members. The principled approach of PACE in the procedure for waiving immunity clearly shows that there is no agreement in the Council of Europe to tolerate the abuse of this instrument.

Immunitet parlamentarny członka Zgromadzenia Parlamentarnego Rady Europy jako warunek prowadzenia dyplomacji parlamentarnej

Abstrakt

Autor poddał analizie problem: w jakiej mierze posiadanie przez członka Zgromadzenia Parlamentarnego Rady Europy (ZPRE) immunitetu parlamentarnego jest warunkiem prowadzenia przez ZPRE i jego członków dyplomacji parlamentarnej? Podjęcie przez ZPRE nowych kompetencji w zakresie funkcji kontrolnej (procedura akcesyjna, procedura monitoringowa, monitorowanie wyborów, udział w rozwiązywaniu konfliktów) – nieznanych w momencie powstawania Rady Europy – spowodowało, że członkowie ZPRE są zaangażowani w prowadzenie dyplomacji parlamentarnej i podejmują ryzyko dla swego bezpieczeństwa z tym związane. ZPRE interpretuje w związku z tym zakaz zatrzymania członka ZPRE szerzej, niż to wynika z norm prawnie wiążących (Statutu Rady Europy, Generalnego Porozumienia w sprawie Przywilejów i Immunitetów Rady Europy) – żądając, by na zatrzymanie członka ZPRE musiało wyrazić zgodę ZPRE. Ta reguła, zawarta w wytycznych ZPRE o charakterze tzw. miękkiego prawa, jest zasadna, ale nie powinna być nadużywana. Immunitet ma chronić integralność ZPRE, nie może jednak być osłoną dla działań kryminalnych.

Słowa kluczowe: Rada Europy, ZPRE, immunitet parlamentarny, dyplomacja parlamentarna.

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