Elected, but not quite?

The case of Oriol Junqueras Vies before the CJEU

Introduction

On 12 November, Advocate-General Maciej Szpunar presented his conclusions[1] in the case of Oriol Junqueras Vies, which is soon to be decided by the judges of the Court of Justice of the European Union. This case could (CJEU) could be ground-breaking in the development of representative democracy at EU level, but it also contains much political dynamite.

When the regional government of Catalunya launched a referendum on the matter of secession from Spain in 2017 and subsequently unilaterally declared independence, Mr Junqueras Vies was the vice president of that government. Along with several others, he was arrested and placed in pre-trial detention on suspicion of, among others, "rebellion" and embezzlement of funds. After having been charged, but before he was convicted, he was elected a member of the Spanish *Congreso de los Deputados*. Upon his request he was given leave to attend the constituent session of the Chamber and to take the required oath of office, but the presidency of the *Congreso* suspended his mandate. Subsequently – still before his final conviction – he was elected a member of the European Parliament in May 2019, but this time was not granted leave to swear an oath on the Spanish constitution in front of the *Junta Electoral Central*, the Commission overseeing European elections in Spain, and neither to attend the first session of the new European Parliament on 2 July 2019.

Mr Junqueras complained against the decision not to grant him leave from prison to the Spanish Supreme Court, claiming that he enjoyed parliamentary immunity under article 9 of Protocol No. 7 to the Treaties on Parliamentary Privileges and Immunities as of the day of his election. The Supreme Court referred to the CJEU the question whether parliamentary immunity pursuant to the protocol already applies prior to the beginning of the parliamentary term for which a person has been elected, and if so, whether this would also be the case if the member elect could not – for reason of being imprisoned – take steps necessary under national law to acquire the status of a member of parliament and therefore did not acquire this status. Lastly, the Court asked whether, if the CJEU were to answer both these questions in the affirmative, the member elect would have to be released from prison quasi-automatically to be able to attend the European Parliament, even while on trial for serious criminal offences, or whether the immunity would have to weighed against the interests of justice in an orderly trial. The referring Court made it clear that the preliminary reference related solely to proceedings regarding Mr Junqueras Vies's complaint against the decision not to grant him leave to take the oath, *not* to his criminal trial, which the referring court did not stay to await the CJEU's ruling. On 14 July 2019, the *Tribunale Supremo* sentenced Mr Junqueras Vies to thirteen years in prison and the forfeiture of his civic rights for the same period.

Political dynamite

The main reason why this case is politically charged like few others this year, due to the fact that Mr Junqueras Vies was not the only Catalan secessionist elected to the European Parliament but denied the chance to take their seat (and enjoy immunity): Carles Puigdemont, Catalunya's exiled former PM, leader of the secession movement, and probably the most controversial figure around Catalonia's drive for independence, was also elected to the European Parliament and has so far not been able to take his seat, since pursuant to Spanish law, that would have required his return to Spain to take the oath on the Spanish constitution – which would, of course, not only have been at odds with Mr Puigdemont's separatist agenda, but which also most likely would have led to his immediate arrest. If the CJEU were now to decide that Mr Junqueras Vies has duly acquired a mandate as a MEP, it is hard to conceive how that would not also be the case for Mr Puigdemont.

[1] Case C-502/19, Conclusions of Advocate-General M. Maciej Szpunar, 12 November 2019.

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However, next to being politically sensitive, the case of Mr Junqueras Vies has explosive potential for another reason, too: 40 years after MEPs have first been elected directly, it once again highlights the striking inequalities between Member States when it comes to the administration of European elections. It also highlights the unjustifiably discriminatory system of parliamentary immunity for MEPs. The issues ensuing from this preliminary reference reach the core of EU democracy.

European parliamentary mandate and immunity

The 1976 Act concerning the election of the members of the European Parliament by direct universal suffrage[2] imposes a number of framework conditions – for instance, that the election system should follow the principle of proportional representation – but otherwise provides that the election procedure follows the national law of the Member States. But does that give member states the authority to make the acquisition of the European mandate subject additional formal requirements, like the Spanish obligation to take an oath on the Spanish constitution? While the Spanish state, the Commission, and the European Parliament all maintain that this is the case and that, accordingly, a MEP-elect does not acquire the mandate if they are prevented from taking the oath, this view is highly problematic. First, it makes the conditions for the acquisitions of the European mandate highly divergent between member states, since some of them do impose such requirements, while others so not. The Junqueras case illustrates that this system discriminates between MEPs-elect on the grounds of nationality. Second, it defies the spirit and purpose of general direct elections for the European parliament if the conditions for the acquisition of the European mandate – beyond mere administrative and procedural aspects – were derived from national rather than Union law. Third, the possibility for member states to set such additional conditions creates a possibility for member states to undermine the immunities and privileges enjoyed by MEPs on the basis of protocol 7 to the Treaties: where is enjoyed by virtue of the European mandate, but that mandate can be withheld on the basis of national rules and decisions – for instance by denying a MEP-elect leave from preliminary detention and making it physically impossible for him to comply with a formality under national law – this renders immunity ineffective. For these reasons, I believe that Advocate-General Szpunar is entirely correct in not following the shared opinion of Spain, the Commission, and the Parliament.

An additional complication is presented by the fact that the temporal scope of European parliamentary immunity is not entirely clear, while its material scope is manifestly discriminatory on the basis of nationality.

Articles 8 and 9 of Protocol No. 7 on Privileges and Immunities (PPI) provide as follows:

> *Article 8*
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> Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.
>
> *Article 9*
>
> During the sessions of the European Parliament, its Members shall enjoy:
>
> (a) in the territory of their own State, the immunities accorded to members of their parliament;
>
> (b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.
>
> Immunity shall likewise apply to Members while they are travelling to and from the place of meeting of the European Parliament.
>
> Immunity cannot be claimed when a Member is found in the act of committing an offence and shall not prevent the European Parliament from exercising its right to waive the immunity of one of its Members.

According to art. 5(1) of the Act of 1976, a Member's term begins with the opening of the EP's first session following an election; Rule 4(1) of the Rules of Procedure of the EP confirm this. But is a MEP-elect already a "Member" for the purpose of art. 8 and 9 PPI? While a strictly textual approach seems to rule out this possibility, so that a Member-elect would not enjoy any immunity until the constituent meeting of the newly elected parliament. If we assume such a reading of the law, Mr Junqueras Vies could not claim immunity for the period between his election in May 2019 and the

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01976X1008(01)-2002092

constituent meeting of the new EP on 2 July of that year, even if his election were to be held valid despite his being prevented from taking the oath as required by Spanish law. However, it has long been noted that

> although the result thus achieved may be textually pure, it is nonetheless shocking in legal terms since it is contrary to the spirit of the text. In fact, the protection thus accorded seems to be of a fragmented nature since Members are not usually regarded as enjoying such status as from the opening of the first sitting but rather as from the evening of the election. Therefore, Members may be attacked in their capacity as Members of the European Parliament immediately after the results are proclaimed and not enjoy any protection at the time.[3]

Advocate-General Szpunar shares this assessment and pleads for an interpretation affording MEPs-elect the protection of parliamentary immunity as of the moment of proclamation of election results. This approach, while difficult to maintain in the light of the text of the law, is most consistent with the spirit and purpose of parliamentary immunity, and the only interpretation which would guarantee a degree of harmonisation in the legal situation of MEPs-elect before the constituent meeting of the new EP.

From a systemic point of view, however, an even greater problem than that of the temporal scope of European parliamentary immunity is the discriminatory nature of its material scope under art. 9(a) PPI. According to that provision, MEPs enjoy "in their own state, the immunities accorded to members of their parliament." This means that, with regard to acts committed on the territory of their member state of origin, the material scope of their immunity is equated with that of members of the respective national parliament. In the case of Mr Junqueras View, for instance, we would thus have to turn to art. 71 of the Spanish constitution, which grants Spanish parliamentarians extensive immunity:

> *Section 71(2)*
> During their term of office, Members of Congress and Senators shall […] enjoy freedom from arrest and may be arrested only in the event of flagrante delicto. They may be neither indicted nor tried without prior authorization of their respective House.

Hence, if Mr Junqueras Vies were found to have been entitled to immunity as a Member of the European Parliament, the scope of that immunity would have been measured on the basis of that of Spanish parliamentarians, since he was located in Spain and the acts for which he was being prosecuted and in relation to which he was detained had taken place there. Since he had not been finally convicted at the time of his election, it is arguable that his (continued) detention and his trial wold have required authorization by the European Parliament. Hypothetical as that may already be at this point, the problematic nature of art. 9 PPI only become clear when we imagine the same case in a different member state. Imagine, for instance, that Mr Junqueras Vies was a Dutchman and this case had played out in the Netherlands: the Dutch constitution does not grant member of the national parliament any immunity beyond non-liability for utterances in the Chamber, during the session. No freedom from arrest, no requirement for prior authorization for a criminal indictment and trial. In the Netherlands, Mr Junqueras Vies would not have been entitled to immunity, regardless of the status of his mandate at the relevant time. In a number of other member states, such as Greece, he would have enjoyed a similar or even stronger set of immunities as in Spain, and so would any MEP in case of acts committed on the territory of another member state than her own, or *en route* to the European Parliament (by virtue of art. 9 PPI, second para.).

As I have argued elsewhere[4] – and I am happy that Advocate General Szpunar appears to agree with me[5] – this system is discriminatory and highly anachronistic. It stems from the time when the European Parliament did not consist of directly elected members but of delegates who were, first and

[3] François Zimeray, Report on the request for upholding the immunity and privileges of Mr Francesco Musotto (2002/2201(IMM)), 20 June 2003, A5-0248/2003, para. 17. This opinion has also been shared by the European Parliament on various occasions in decisions to defend Members' immunity, *cf.* Klaus Offermann, *Parliamentary Immunity in the European Parliament*, internal study DG Internal Policies, European Parliament, 2005 (updated 2007), PE360.487/REV2.
[4] Sascha Hardt, *Parliamentary Immunity*, Cambridge/Atwerp: Intersentia, 2013, p. 43 *et seq.*
[5] Case C-502/19, Conclusions of Advocate-General M. Maciej Szpunar, 12 November 2019, para. 75.

foremost, members of national parliaments. Today, in a European Parliament that struggles for recognition as the organ of democratic representation for all EU citizens alike, and for whose Members a simultaneous national mandate in fact constitutes an incompatibility, there is absolutely no justification for a rule like that of art. 9(b) PPI. The European Parliament is aware of this, but several attempts to modernize the European Immunity system have failed in the past decades, mainly since changing the PPI requires a cumbersome treaty amendment procedure.

Conclusion

At this point, the case of Oriol Junqueras Vies is entirely open. What is certain is that the CJEU is acutely aware of the case's political sensitivity, but also of the deep-rooted problems ingrained in the current state of EU law with regard to the European parliamentary mandate, the mode of its acquisition, its temporal scope, as well as the system of parliamentary immunity attached to it. I dare not foresee how the Court will decide but do agree with the conclusions of the Advocate-General: in the interest of a unified European parliamentary mandate, parliamentary immunity should apply from the moment of proclamation of election results, with the effect that member state authorities must request authorisation from the EP to take measures against a MEP-elect that they would be barred to take under their national immunity regime, or suspend active measures where they are already underway. More globally, however, the case highlights the urgent need for a modernization and harmonization of the European parliamentary mandate and immunity regime.