Global Organization of Parliamentarians against Corruption (GOPAC)

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BACKGROUND PAPER FOR THE PANEL ON PARLIAMENTARY IMMUNITY

1. Background

Immunity, as a power resulting from the conduct of civil service, arises from the political necessity to have an emissary who is capable of relaying important messages to all counterparts in matters of war, politics and the economy. In the beginning it was considered both a privilege and an exemption and, with the passing of time, it acquired new meaning as a means of diplomatic protection. It later became the figure of institutional protection for the legislative branch, to be later conferred upon other high-ranking civil servants of the Executive and the Judiciary, and even upon those at the helm of autonomous constitutional agencies.

In his 'Dictionary of Politics', Dietr Nöhlen[1] thus refers to immunity as the exemption, leave, privilege or prerogative afforded to some authorities by virtue of the powers and duties under their remit.

Specifically in relation to the legislative branch, immunity is an instrument which allows this body, as the depositary of national sovereignty, to freely express the people's will.

From a legal-functional perspective, the principle of division of powers provides for a system of checks and balances whereby one paramount obligation of the Legislative is to hold the Executive accountable for its acts, therefore acting as some external force imposed on the latter to form a government that acts with integrity, honesty and transparency. The government would otherwise fail and,

[1] *Diccionario de Ciencia Política* (Dictionary of Political Sciences), Editorial Porrúa, El Colegio de Veracruz, México, 2006, p. 720.

should this occur, society[2] would be the one to lose the most, as per Sophocles' secular maxim: "a State in which insolence and the freedom to do anything reign will inevitably be doomed to sink into the abyss".

Thus, for a nation to develop fully and sustainably, it is imperative for its Parliament to operate freely and independently and, in furtherance of this goal, parliamentary immunity stands as an essential prerequisite for democratic exercise and as a useful tool for the efficient exercise of the legislative function and good governance at large.

In general terms, and considering the nuances of the judicial system in each individual country, parliamentary immunity broadly comprises two attributes: **inviolability**, consisting of the authority the State confers upon the legislative branch to safeguard its independence and its members' freedom to voice their opinions, the taking of stances, as well as an efficient institutional performance (all this within the framework of activities pertaining to this instrument of public power); and **immunity** in the strict sense of the term, which protects any legislator from impeachment while exercising his or her duties without any prior justification or authorization, hence the imperative to comply with a qualifying process.

This means that inviolability in fully exercising the freedom of speech is an institutional power of the Legislative, and a matter of public interest, with its members benefitting from the right of immunity from the impeachment resulting from discharge of their legislative duties[3], all of which results in the impossibility of waiving the constitutional jurisdiction on account of its very nature.

This also means that, just as affirmed at the Conference in Arusha, Tanzania, in 2006, immunity and inviolability are of the essence for the existence, independence and efficacy of the Legislative. It is not about granting anyone personal privileges, nor is it to spare sanctions to those who so may merit them. What it does, though, is to guarantee the **independence, integrity** and **freedom** of Congress whose members, in their capacity as peoples' representatives, have the basic task of protecting the interests of the Nation, defending these in Parliament and

[2] Speech by the Chair of the GOPAC to the UNO, 14 November 2006.
[3] *Suprema Corte de Justicia de la Nación* (National Supreme Court of Justice), Quinta Época (Fifth Sitting), Primera Sala (First Courtroom), SJF, LXXXVII, page 1881.

taking part in and exerting control over the exercise of governance as well as informing its citizens fully and clearly of their actions.

2.- Current Situation

Parliamentary immunity is enshrined in the Constitution of virtually all democratic countries, and the legal framework that regulates it is generally provided for in their relevant secondary legislation. However, one should note that there still exist instances where this regulatory framework is weak, even non-existent, thus taking away from this branch the possibility to further strengthen the Rule of Law and the respect for fundamental rights, at serious risk of turning it into exactly the opposite, i.e., an anachronistic mechanism that would be detrimental to the fundamental principle of equality before the law by facilitating corruption, nepotism and dishonesty, and giving rise to political revenge.

Regardless of its formal structure either in political or legal terms, it would be insensitive if not irresponsible to overlook, in actual fact, the existence of cases where some legislators, taking advantage of this prerogative - or as a result of legal loopholes - have availed themselves of their immunity to commit acts of corruption or for personal gain, engaging in libel or authoritarianism, or who have used it as an excuse to avoid prosecution for prior acts, all this causing much discontent and distrust in all citizens, not only towards the Parliament and its members, but towards the civil service at large, seriously affecting credibility and governance.

However, in the same vein, it would be of little or no use not to acknowledge the experiences in a number of countries where parliamentary immunity has evidenced its qualities and strengths – or its flaws and weaknesses – as an instrument of protection afforded to legislators against those who, without any reason and for publicity or political, electoral or other reasons, boldly seek to defame or discredit legislators and other civil servants, their ideology, their party affiliation, or what -or whom- they represent.

All these realities highlight the fact that parliamentary immunity is under question and should thus be subjected to deeper analysis so that concrete conclusions can be drawn, and urgent measures taken, with a view to ensuring it is

up to the demands of modern constitutionalism, both within our own sovereign nations and in the international context.

3.- Recent Developments

In previous GOPAC meetings, the necessity to reach joint agreements and to implement concrete actions in our respective legal systems has been repeatedly called for with the aim of according certainty and clarity to the practical exercise of parliamentary immunity, especially in relation to oversight, legislation and representation, as well as to the adoption of measures seeking to prevent and penalize, as the case may be, its misuse.

With these thoughts in mind, every GOPAC member country, subject to their own characteristics and circumstances, has attached a particular meaning, with its own rhythm and cadence, to the application of such measures and actions through regulatory reform as well as a revision of operational methods and practices. This has resulted in a variety of impacts and in rich experiences worth sharing in this forum, all of which will no doubt help increase both the extent and quality of our knowledge of parliamentary immunity, and will also enable us to undertake our own collective effort in order to build stances and general consensus that will serve as the basis for enhancing and modernizing it, as well as for defining its most salient features and increasing its practical efficacy in our respective countries.

We should equally acknowledge the work performed by some organizations which have represented their concern and have undertaken significant efforts to find viable proposals to the problems raised. Among these organizations, it is worth mentioning:

a) The USAID (United States Agency for International Development), which has held a significant number of meetings, courses, studies and legislation support actions and programs, as well as other activities which, given their interest, warrant a thorough review and which will undoubtedly contribute to the identification of suitable alternatives to support the process of regulatory and operational modernisation in matters of our concern in each of our countries;

b) the IABF or Inter-American Bar Foundation, which has undertaken comprehensive research on legislative immunity regulations, principles and

values in Latin America. This has facilitated the proposal of a number of actions aimed at improving its conceptual and operational structure, amongst which we may note the proposal for GOPAC itself, and the LAPAC (Latin-American Parliamentarians Against Corruption), its Latin American section, to become more actively involved and take on the political leadership necessary for the adoption of corrective measures in each and every one of the member countries; and

c) the effort undertaken by the Global Task Force of GOPAC as created by this forum at its previous meeting held in 2006, with the aim of analyzing research undertaken by the IPU (the Inter-Parliamentary Union), the USAID, the Inter-American Bar Foundation and other organizations, with a view to developing proposals on general international standards, promoting the creation of regional research committees and other activities which result from such standards and proposing agreements and future measures for implementation by each member country.

4.- Proposals:

In the light of the above, I would hereby propose that all background papers from this panel take as a basis the adoption of concrete actions regarding the following issues:

A) General Agreements:

4.1.- On the nature and characteristics of the concepts of legislative 'privilege' or 'jurisdiction'; inviolability; non-accountability/non-liability and parliamentary immunity, as this will enable us to arrive at the most consistent possible interpretation and to more accurately identify problems and their potential solutions;

4.2.- In relation to duration, so that immunity may be extended for the entire duration of a legislator's term of office and for protection to be realized not only in formal sittings but so that it may equally apply to a legislator's other roles, both within and without Parliament.

4.3.- On the characteristics of the potential application of the concept of *'flagrante delicto'* as a cause of suspension of immunity and the type of offences this may apply to; the viability of parliamentary activities to continue during investigation or to be discontinued until suspension of immunity has been ruled in respect of the legislator

under review, and, as the case may be, the prosecution of those responsible when the alleged offence is the result of political scheming. Corrupted individuals should, in the same light, be exempted from time deductions in the statute of limitations applicable to the criminal case while the legislator remains in office.

B) Commitments:

4.4.- To make interventions so that the executive, legislative and judicial branches of each member country necessarily include the issue of parliamentary inviolability and immunity in their respective public policies, programs and actions aimed at preventing and combating corruption.

4.5.- To develop or review, as the case may be, the legal and administrative regulatory framework of parliamentary immunity within their national legislation, as well as the manner and terms under which the civil service will participate in an effort to form a general parliamentary statute, prior to our next 2010 meeting, that will provide for limitations, restrictions, causes, assumptions and procedures for the suspension of parliamentary immunity;

4.6.- To clearly identify those individuals empowered to petition the procedure of removal of immunity, as well as time prescriptions and terms for individual processes; and the authorities responsible for declaring their admissibility, taking into consideration the advantages and disadvantages of the accused being part of a different power from that determining such admissibility.

4.7.- Introduce training for legislators and parliamentary staff and the dissemination of information to the public as a matter of institutional policy in our respective parliaments, in order to raise the level of education and general knowledge of issues pertaining to immunity.

4.8.- Within a framework of respect for parliamentary inviolability, but also in adherence to the principles of transparency and accountability, to explore the possibility that the activities of all members of the Legislative be the subject of investigation without this interfering with their work or impairing their rights as legislators.

The exchange of ideas and experiences, and the agreements we may reach as result of the discussion of these aspects will help us strike, in our countries, the very delicate balance between principles, standards and practices in order to build a functional system that will effectively protect legislators so they can freely express their own ideas and discharge their duties under legal security, on the one hand while on the other hand preventing immunity from turning into impunity and, as such, into an invitation to commit offences, by clearly setting out the rules of the game in the exercise of immunity.