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The European Parliament's quest for representative autonomy: An internal perspective

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5. Immunity and the Liberty to Represent

In 1979 the members of the European Parliament obtained a free mandate and a self-standing electorate. Yet their legal and financial status remained tied to national structures, at least initially. The development of the provisions regulating members' immunity and salary is analysed in the present chapter and the next. On a personal note, I can say that because of the manner in which Parliament applied the immunity provisions, I became aware of the fundamental importance of something like representative autonomy, though I had not labelled it then yet. In my last Strasbourg week, on May 5th 2009, Parliament voted to uphold the immunity of a colleague, Mr Patriciello, and thereby seemingly overstepped its competence (see further section 4).¹ As I came to understand, and is elaborated below, Parliament's action can (also) be read as *claim-making*, which is an essential parliamentary task.

In all European countries, members of parliament enjoy some form of immunity. This serves to uphold the separation of powers and the exercise of the free mandate,² as representatives may make unpopular representative claims or express opinions that are upsetting, shocking or disturbing to other powers or the public.³ The scope and conditions of parliamentary immunity are generally regulated in constitutional texts, statutory law, and parliamentary Rules of Procedure.⁴ It is essential for parliaments to have a substantial say over these provisions, as otherwise the whole purpose of parliamentary immunity may be undermined.

In this regard, and in comparison to other parliaments, the position of the European Parliament is precarious. As was indicated in the previous chapter, the competence of the European Parliament to lay down the immunity provisions of its members was (and still remains) limited. Moreover, members do not have an equal legal status, but theirs differ and partly depend on national legislation. This hampers

1 EP Decision of 5 May 2009 on the request for defence of the immunity and privileges of Aldo Patriciello [2010] OJ CE 212/124.

2 Maria Paula Saffon and Nadia Urbinati, 'Procedural Democracy, the Bulwark of Equal Liberty' (2013) 41 *Political Theory* 441, 453.

3 See the outline of the European Court of Human Rights on the link between free speech, the separation of powers, and parliamentary immunity, i.e. in *Case of A v The United Kingdom* [2002] para 77.

4 'Non-Liable? Inviolable? Untouchable? The Challenge of Parliamentary Immunities: An Overview' (Immunities overview) (Office for Promotion of Parliamentary Democracy, European Parliament 2012) 17; Report on the Scope and Lifting of Parliamentary Immunities (European Commission for Democracy Through Law 2014, No 714/2013, CDL-AD(2014)011) para 32.

their capacity to claim to represent *Union citizens*. The *representative autonomy* of the European Parliament is thus restricted. The central question in this chapter is how the European Parliament has tried to develop it. Through what means has the European Parliament attempted to shape the immunity of its elected members, and to what end?

The structure is as follows. Section 1 outlines the different types of parliamentary immunity that exist in the Union member states. This is necessary as background information, since there is a close correlation between the immunity that is accorded to members of the European Parliament and the immunity that is extended to parliamentarians in their home country. Section 2 subsequently describes the *de jure* immunity provisions of the members of the European Parliament. This section also includes information about the European Parliament's formal competences to amend the immunity provisions. Once the formal scene is set, the focus is on the actions undertaken. Section 3 takes stock of Parliament's objectives for change. In section 4, we subsequently observe how it tried to shape the provisions in line with its demands and in defiance of its limited powers. This is where the case of Mr Patriciello will be unfolded. Finally section 5 provides an analysis of the changes accomplished in the light of Parliament's quest for more representative autonomy.

1. Parliamentary Immunity: Reasons and Forms

Parliamentary immunity is a generic term. It covers all legal instruments that restrict or suspend legal proceedings against parliamentarians. There are two different *types* of parliamentary immunity. I will refer to these as *non-liability* and *inviolability*. The current section outlines their most important features. Moreover, it highlights that there are huge differences between the member states, with regards immunity legislation, due to different historical development and political contexts.⁵ As we shall see, this differentiation at the national level stands in the way of providing members of the European Parliament with an equivalent protection.

1.1. Non-Liability in the Exercise of Parliamentary Duties

Non-liability is the most well-known and least controversial type of immunity. It is also referred to as non-accountability or freedom of speech.⁶ The first modern parliament that guaranteed non-liability of its members was the British House of Commons. It resulted from an incident at the end of the 14th century, in which a

5 Report on the Scope and Lifting of Parliamentary Immunities (n 4); Nico J Schrijver and others, *Immuniteten: Het Recht Opzij Gezet: Handelingen Nederlandse Juristen-Vereeniging* (Kluwer 2013); David Blunt, 'Parliamentary Sovereignty and Parliamentary Privilege' (2015) <<https://www.parliament.nsw.gov.au>> accessed 5 February 2016; Noel Cox, 'Parliamentary Privilege Revisited' (2009) <<http://www.researchgate.net>> accessed 5 February 2016.

6 The term non-liability is the most appropriate one in my view. It refers to the absence of a legal responsibility. The term freedom of speech does not capture that also protection is offered against any interventions as the result of a representative's votes cast. The term non-accountability is less fitting as members can still be held accountable in a political sense, even when they cannot be prosecuted in a legal sense.

member narrowly escaped the death penalty for criticising the King and his court.⁷ Over the years, the right to discuss and deliberate political matters without fear of prosecution became well-established. In 1689, it was formally enshrined in the Bill of Rights.⁸ Nowadays, most countries have regulated non-liability for their members of parliament, including all countries of the European Union.⁹ The European Court of Human Rights has underlined the relevance of non-liability in a democratic political system in several cases. In *Jerusalem v. Austria*, it argued:

[W]hile freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to their preoccupations and defends their interests. In a democracy, Parliament or such comparable bodies are the essential for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein.¹⁰

The definition of ‘weighty reasons’ that justify limiting members’ freedom of speech differs from country to country. The European Commission for Democracy through Law has usefully mapped the different national provisions in its report on the scope and lifting of parliamentary immunities.¹¹

Non-liability protects individual parliamentarians, at the very least, against judicial proceedings challenging statements made in parliament, votes cast, questions asked in writing or vocally, and the drafting of parliamentary texts – such as proposals for legislation, resolutions or amendments.¹² This narrow interpretation of non-liability, based on a spatial criterion, applies for instance to the representatives of the British House of Commons. As a result, they can be subject to prosecution for statements made outside the parliamentary precincts.¹³ In many other countries, however, it is not the location but rather the substance of the comments that matters.¹⁴ Did the representatives make the challenged statements in the *exercise of duty*?¹⁵ Accordingly, members of parliament may be protected against prosecution for statements made on television or during public meetings.

7 Léon R Yankwich, ‘The Immunity of Congressional Speech – Its Origin, Meaning and Scope’ (1950) 99 *University of Pennsylvania Law Review* 960, 962.

8 Article 9 Bill of Rights.

9 Marc Van der Hulst, *The Parliamentary Mandate: A Global Comparative Study* (Inter-Parliamentary Union 2000) 66.

10 *Case of A. v. The United Kingdom* (n 3) [79]. It summarises paragraphs 36 and 40 of the *Case of Jerusalem v. Austria* [2001].

11 Report on the Scope and Lifting of Parliamentary Immunities (n 4).

12 Robert Myttenaere, ‘The Immunities of Members of Parliament’ (Constitutional and Parliamentary Information 1998) [22].

13 See, for a description of the British provisions, *Case of A. v. The United Kingdom* (n 3) para 79.

14 Myttenaere (n 12) 13.

15 ‘Parliamentary Immunity: Background Paper Prepared by the Inter-Parliamentary Union’ (UNDP Initiative on Parliaments, Crisis Prevention and Recovery; Inter-Parliamentary Union 2006) 8; Report on the Scope and Lifting of Parliamentary Immunities (n 4) 65.

In some countries, the freedom of speech guaranteed through non-liability is unconditional.¹⁶ Their members of parliament cannot face legal proceedings for *any* kind of statement that they made in the exercise of their parliamentary mandate. Members may only be subjected to disciplinary measures by parliament itself. However, most countries have put restrictions to non-liability.¹⁷ Some do not extend immunity for remarks that are offensive to the head of state and/or fellow citizens, or that are deemed racist. There are also countries where members may face charges when they comment on court cases that are still pending or when they disclose information gathered during closed-door sessions.¹⁸

The protection that non-liability offers, varies. In some countries, it is an absolute privilege. This means that there can be no criminal, civil or disciplinary proceedings taken.¹⁹ In other countries, proceedings can be entered into, but only after the assembly has given its authorisation.²⁰ In most, it prevents at least that members be arrested or summoned before court.²¹

Non-liability ceases with the ending of the parliamentary mandate. However, the protection that it offered continues to apply. As a result, also when members have left parliament, they cannot be prosecuted for how they have voted or voiced the concerns of their electorate when they were in office.²²

1.2. Inviolability for Unrelated Deeds

Inviolability is a more complex and controversial concept than that of non-liability.²³ It applies to acts committed *outside* the exercise of the parliamentary mandate. Inviolability can protect members of parliament from arrest, sanctions, prosecutions, and sometimes even from investigation, for matters that they have undertaken in their capacity as normal citizens.²⁴

The historical background for this type of immunity goes back to the aftermath of the French revolution. In 1789, there were genuine concerns among the members of the *Assemblée nationale* that the constitutional provisions on protecting freedom of speech would not suffice to keep them safe and able to perform their parliamentary duties. They feared that members could be silenced by being imprisoned on false charges or because legal action was undertaken on unrelated matters. The Assembly therefore adopted the rule that, in principle, 'the person of each deputy shall be inviolable.'²⁵ Only the Assembly could lift the immunity of members. The French model is thus more encompassing than the Westminster model. Next to extending

16 Report on the Scope and Lifting of Parliamentary Immunities (n 4) 67.

17 Myttenaere (n 12) 27-33; Report on the Scope and Lifting of Parliamentary Immunities (n 4) 69.

18 Myttenaere (n 12) 29-30; Report on the Scope and Lifting of Parliamentary Immunities (n 4) 69.

19 Myttenaere (n 12) 34.

20 Myttenaere (n 12) 35; Report on the Scope and Lifting of Parliamentary Immunities (n 4) 73.

21 Myttenaere (n 12) 38.

22 Report on the Scope and Lifting of Parliamentary Immunities (n 4) 61.

23 Van der Hulst (n 9) 142-143; 'Report on the Scope and Lifting of Parliamentary Immunities' (n 4) 101.

24 Report on the Scope and Lifting of Parliamentary Immunities (n 4) 105, 108.

25 Van der Hulst (n 9) 65.

non-liability for duty-related actions, it provides protection for acts that were not undertaken in the exercise of the parliamentary mandate. Most European countries have followed the French example. Only the Dutch have a system that is, in many respects, similar to the British one.

The scope of national legislation on inviolability varies considerably. In some countries, the protection only includes minor crimes.²⁶ Members of parliament are not exempted from prosecution for charges related to terrorism or other serious crimes, as this could violate public order and public trust. Yet other countries have adopted the opposite of this rule.²⁷ They argue that there is no reason not to prosecute representatives for minor offences, such as traffic incidents. Such accusations are not likely to damage the functioning and reputation of members to any serious extent and therefore have no detrimental effects on the liberty of a member to carry out his or her representative mandate. The list of differences between national systems is long. In some national systems, members of parliament are only offered protection against criminal proceedings. In others, civil proceedings are also (or even exclusively) covered.²⁸ In some systems, immunity does not apply to investigations, or in case a member of parliament pleads guilty or is caught in the act.²⁹ Ostensibly, the scope of parliamentary immunity differs considerably, depending on a country's institutional structure and political culture. Even the *trends* regarding inviolability do not move in the same direction. The European Commission for Democracy through Law noted that several new member states of the European Union have opted for a broad concept of parliamentary inviolability when they designed their constitutions in the 1990s.³⁰ This choice has been criticised for hindering the fight against corruption. In contrast, the general trend in Western European countries is to limit the protection offered to members of parliament for acts that are not related to their parliamentary mandate.³¹

Despite this variety, there are common features that characterise inviolability in basically all European countries. The first concerns its duration. Inviolability is only granted for the duration of the mandate. As soon as the parliamentary mandate has expired, the legal proceedings may start (again). Inviolability aims to *delay* justice until proceedings cannot interfere with the parliamentary mandate; it is not set out to *deny* justice.³² The second common feature is the conditionality of inviolability. In almost all countries, inviolability can be lifted.³³ This is commonly a competence of parliament.³⁴

26 Report on the Scope and Lifting of Parliamentary Immunities (n 4) 117.

27 Immunities Overview (n 4) 12; Report on the Scope and Lifting of Parliamentary Immunities (n 4) 118.

28 Myttenaere (n 12) 86-89; Report on the Scope and Lifting of Parliamentary Immunities (n 4) 88.

29 Report on the Scope and Lifting of Parliamentary Immunities (n 4) 108-114.

30 Ibid 124.

31 Ibid 125.

32 Ibid 121.

33 Myttenaere (n 12) 98.

34 Myttenaere (n 12) 98; Report on the Scope and Lifting of Parliamentary Immunities (n 4) 128.

1.3. *The Role of Parliaments to Safeguard Autonomy*

The competence to decide on waiver requests is a key instrument for parliament to guarantee the independent functioning of its members, and thereby its own institutional autonomy. Upon reception of a waiver request, parliament needs to assess 'whether proceedings are fair and well founded and not attributable to political or other ill-founded considerations.'³⁵ When there is fear of *fumus persecutionis*, parliament can decide to uphold a member's immunity. Similarly, a decision to lift immunity is an expression of confidence in fair proceedings, and a confirmation that the work and standing of parliament will not be hindered by it. It should not be seen as a collective belief in the guilt of the colleague concerned. In the countries of the European Union, the independence and quality of the judiciary is generally of a high standard. National parliaments therefore tend to lift immunity when the challenged action falls squarely outside the scope of a member's representative mandate.³⁶ This trend is fostered by case law of the European Court of Human Rights (ECtHR), which has adopted a *functional approach* to parliamentary immunity.³⁷

National parliaments generally also have a second role in relation to securing their members' immunity. They are involved in designing and laying down the immunity provisions.³⁸ The general rules on immunity are often laid down in constitutional texts and legislation,³⁹ while the detailed criteria and the procedures for lifting immunity are regulated in parliament's Rules of Procedure.⁴⁰ The choice for parliamentary leadership is understandable as immunity aims 'to protect parliament against undue pressure from the executive and the courts'.⁴¹ It would be counterproductive to give other institutions a free hand in shaping and deciding these provisions, as the members of parliament could subsequently end up with inadequate protection, thus endangering the unhampered exercise of their representative mandate. An investigation of GRECO (The Group of States against Corruption) highlighted that many parliaments have neglected to establish clear criteria and procedures for lifting and upholding immunity. This is problematic with a view to fighting corruption and ensuring fair, objective, and equal treatment of individual cases.⁴² The European Parliament and the Parliamentary Assembly of the Council of Europe are named as good examples in the study, as they have developed very elaborated sets of rules.⁴³ The rules of the European Parliament are central in the next section.

35 'Parliamentary Immunity: Background Paper Prepared by the Inter-Parliamentary Union' (n 15) 14.

36 Sascha Hardt, 'The Case Against the Introduction of "Political Immunity" in the Netherlands' [2008] 4 Montesquieu Policy Papers 8.

37 *Cordova v Italy* (No. 2) App no 45649/99 (ECHR, 30 January 2003); *Keller v Hungary* App no 33352/02 (ECHR, 4 April 2006).

38 Report on the Scope and Lifting of Parliamentary Immunities (n 4) 32.

39 Immunities Overview (n 4) 17; 'Report on the Scope and Lifting of Parliamentary Immunities' (n 4) 32.

40 Report on the Scope and Lifting of Parliamentary Immunities (n 4) 129.

41 Ibid 127.

42 Ibid 129.

43 Ibid 130.

2. The Immunity Provisions of Members of the European Parliament

The different levels of immunity that members of national parliaments enjoy in the different member states of the European Union have complicated attempts to agree on the protection of members of the European Parliament. Until today, there is no uniform Union immunity regime in place. National legislation continues to play a significant role. As a result, the liberty of members of the European Parliament to make representative claims about the electorate, and what it deems important, differentiates. This *de jure* situation stands in the way of regarding Parliament, and the electorate whom it represents, as a unity. The legal provisions that are laid down in primary law are analysed below. Section 2.1 introduces the Protocol that regulates the immunity of members of the European Parliament. It is followed by a detailed description of the protection that it offers, both in terms of non-liability and inviolability (sections 2.2 and 2.3). Finally, section 2.4 compares the two-fold responsibility of the European Parliament to that of national parliaments.

2.1. *The Protocol of 1965*

Unlike other sets of rules that are studied in this thesis, the formal rules regulating the immunity of the members of the European Parliament have barely evolved at all. In 1951, a protocol was concluded regarding the immunities of the institutions and the civil servants of the ECSC, which included provisions on the immunity of the members of the Common Assembly.⁴⁴ Six years later, similar protocols were attached to the Treaties establishing the EEC and Euratom.⁴⁵ In 1965, the texts were consolidated in a single Protocol on the Privileges and Immunities of the European Communities (PPI), which was annexed to the Merger Treaty.⁴⁶ This fifty-year old PPI still applies today.⁴⁷ The fact that the provisions have not been revised since 1965 is noteworthy, as the setting in which members carry out their European mandate has fundamentally changed in the past five decades.

In 1965, the members of the European Parliament were appointed by and from national parliaments. Accordingly, they all enjoyed protection as members of their national parliaments. Having dual mandates made it *inevitable* that the legal position of the European representatives diverged between one another. The recognition of these differences forms the basis of Article 9 PPI (see section 2.3). At the same time, all representatives were equally in need of legal protection for their work in, and for, the European Parliament, as national immunity provisions do not have

44 It was attached to the ECSC Treaty in an Annex, in accordance with Article 76 ECSC. The provisions on the Common Assembly were regulated in Chapter III, Articles 7-9.

45 Article 218 EEC; Article 191 Euratom.

46 The Protocol was concluded on 8 April 1965, and annexed to the Merger Treaty in Article 28 thereof. Treaty establishing a Single Council and a Single Commission of the European Communities (Merger Treaty).

47 The PPI is currently annexed to the treaties in Article 343 TFEU, as Protocol No. 7.

extra-territorial effect. To fill this gap, the member states agreed upon Article 8 PPI (see below section 2.2).⁴⁸

The number of members with a dual mandate has radically decreased since Parliament's first direct election of 1979. In the 1976 Direct Election Act, it was still possible to hold a mandate in both a national parliament and the European Parliament.⁴⁹ However, many political parties strongly discouraged their members from carrying out two mandates simultaneously, and some countries even formally banned dual mandates by means of national legislation.⁵⁰ In 2002, the Council amended the Direct Election Act, deciding that 'from the European Parliament elections in 2004, the office of Member of the European Parliament shall be incompatible with that of member of a national parliament.'⁵¹ Since 2009, it is in all countries of the European Union forbidden to combine a national with a European mandate. Despite this fundamental change, Articles 8 and 9 PPI continue to apply. Nowadays, Article 9 can no longer be seen as *recognising* national differences: it now *causes* differences on the basis of national origin. Whether this is problematic for how members of the European Parliament can carry out their representative mandate can only be concluded after studying the substance of the rules in place. That forms the objective of the sub-sections below.

2.2. *Union Immunity in Parliament's Premises*

The structure of the PPI appears to follow the traditional distinction between non-liability and inviolability, with Article 8 capturing the former and Article 9 the latter.

Article 8 reads as follows:

'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.'

By means of this provision, all members of the European Parliament are equally *non-labile* for opinions expressed, or for votes cast in the exercising of their

48 Before the Treaty of Lisbon, Articles 8 and 9 of the PPI were numbered 9 and 10 respectively. This may cause confusion when reading less recent texts or judgments on the matter. The PPI also includes an Article 7 (former Article 8) that applies to members of the European Parliament as well. It concerns the freedom of movement of members, essentially aiming to ensure that members reach the parliamentary premises without any hinder from customs or police. This provision does not provide immunity in judicial matters, and is therefore not considered further.

49 Act concerning the election of the representatives of the Assembly by direct universal suffrage [1976] OJ L278/1. Act concerning the election of the representatives of the Assembly by direct universal suffrage [1976] OJ L278/1, art 5.

50 Richard Corbett, Michael Shackleton and Francis Jacobs, *The European Parliament* (7th edn, John Harper Publishing 2007) 22.

51 Council Decision 2002/772/EC Euratom amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage [2002] OJ L283/1.

parliamentary duties. The drafters of the text assumed that Article 8 PPI would only apply for matters occurring within the premises of the European Parliament. They aimed to protect the representatives from prosecution in relation to statements made and votes cast during plenary meetings, or during meetings of parliamentary (sub)committees, group meetings, and other organs of the European Parliament – such as the Bureau and the College of Quaestors.⁵² Article 8 PPI was not meant to apply to other parliamentary-related activities taking place elsewhere, such as speeches at party congresses or interviews in newspapers.⁵³ That was the subject matter of Article 9 PPI (see below).

Article 8 PPI protects from ‘legal proceedings’ without this concept being further clarified. It is not evident from the text whether the immunity is only granted in connection with criminal proceedings or also in connection with civil proceedings. However, considering that, in 1965, none of the member states granted immunity to their national parliamentarians in civil proceedings, it has been assumed that the intention was only to offer protection in connection with criminal proceedings.⁵⁴

Article 8 PPI provides for absolute immunity for everything within its scope. The European Parliament is thus not entitled to waive it. Even the member of Parliament concerned cannot renounce the protection that the PPI offers. Whether Article 8 protects a member in a specific case, is a matter for the national court to decide. In taking this decision, the court must base itself on Union law alone, as Article 8 makes no reference to national rights.⁵⁵ Article 8 PPI does not prevent Parliament from exercising its right to take disciplinary measures when a member has misbehaved. Parliament’s decision should be in conformity with its own Rules of Procedure.

In short, Article 8 PPI creates a common, level playing field for frank discussions within the European Parliament, meaning between members of the European Parliament among themselves and/or between them and institutions such as the European Commission and the Council. It was not designed to provide members with equal protection beyond Parliament’s physical space.

52 ‘Onschendbaarheid En Immunititeiten van de Leden van Het Europees Parlement in Het Stelsel van Het Gemeenschapsrecht’ (Legal Service of the European Parliament 1990) PE 140.197; Neil MacCormick, ‘On Parliamentary Immunity in the European Parliament’ (Public Hearing Committee on Legal Affairs 2005) PE 364.931, para 6.

53 Klaus Offerman, ‘Parliamentary Immunity in the European Parliament’ (Policy Department C, Citizens’ Rights and Constitutional Affairs and the Directorate-General for Internal Policies, European Parliament 2005) PE 360.487, 9.

54 ‘Onschendbaarheid En Immunititeiten van de Leden van Het Europees Parlement in Het Stelsel van Het Gemeenschapsrecht’ (n 52) 7-8.

55 The Court underlined this responsibility of the national courts in Joined Cases C-200/07 and C-201/07 *Alfonso Luigi Marra v Eduardo De Gregorio and Antonio Clemente* [2008] ECR I-7929, paras 32-33.

2.3. *National Immunity in Home Country*

Article 9 PPI regulates the *inviolability* of members of the European Parliament. Unlike Article 8 PPI, it includes references to national legislation. This is included in paragraph (a) of 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.'

Article 9 PPI reads as a compromise between member states with divergent concerns and different traditions. At the time of drafting, five member states extended a form of inviolability to their members of parliament. Only the Netherlands, the sixth founding state, was not familiar with this tradition. However, it was unwilling to grant the European representatives a level of inviolability that the Dutch national parliamentarians did not enjoy. The other countries for their part were against limiting the protection enjoyed by the members of the European Parliament to non-liability.⁵⁶ These and other national differences burdened the negotiations. Ultimately it was agreed to differentiate between acts committed in a member's home country and those committed in another member state. For acts committed in their own country, members of the European Parliament are entitled to the same level of protection as that accorded to members of their national parliament (Article 9(a) PPI). In other member states, they are protected from prosecution by Union immunity (Article 9(b) PPI).

The consequence of Article 9(a) PPI is that the Dutch members of the European Parliament enjoy less protection in relation to acts committed in the Netherlands, than their French colleagues do for similar acts committed in France. Thereby it does not distinguish between acts undertaken in the performance of parliamentary duty and other acts. Article 9(a) PPI introduces a *spatial* criterion, not one regarding the content of statements. In the previous section, it was mentioned that certain member states – notably among them the United Kingdom – apply a spatial criterion as well. Although seemingly similar, the effect of the provisions is differently. The limitations that are enshrined in (for example) the British legislation apply to all members of the parliament concerned alike. All members are only protected for prosecution regarding statements made in the parliamentary premises. Such a rule does not undermine the unity of the national parliament. In the case of the European Parliament, the spatial criterion introduces inequality between members. It makes it possible that (depending on national legislation) some members are more at liberty than others

56 Carla Berkhout, 'De Immunitet van de Leden van Het Europees Parlement in Perspectief: Naar Een Blauwdruk Voor Een Uniforme Eigentijdse Regeling' (master thesis, Open Universiteit 2009) 36.

to undertake their representative task as they want and *where* they want. Their legal position is not identical in relation to speeches at party congresses and debates on national television. Instead, members of the European Parliament are given a similar protection as members of the national parliament in their home country. There is thus a level playing field between members of the same nationality.

An exception to this latter principle is formed by Article 9(b) PPI, which concerns prosecution outside the home country. When acts are committed in one of the other member states, members of the European Parliament have immunity (for the duration of their mandate) except for when they were caught in the act. This is not the case for national parliamentarians. The exceptional position for members of the European Parliament was created to avoid the national embarrassment of having a member of parliament face criminal charges in another member state.⁵⁷

The choice to make the legal protection of members of the European Parliament comparable to their respective national colleagues can be well understood. In 1965, when the PPI was drafted, members had a dual mandate. Their representative basis was formed by the national peoples, and public discussions were held at a national level. Of course, even then, the European Parliament was to be a unitary institution. The members were given a common task to also represent the sum of national peoples. Therefore, it was important to provide members with the same tools and conditions to carry out this task. Yet, to a large extent, this objective was accomplished through Article 8 PPI. This provision introduced a level playing field as long as the work was undertaken on the physical premises of the European Parliament. The tension between the representative mandate of the members of the European Parliament and their immunity provisions really started in 1979. With the introduction of direct elections, the task of the European representatives altered, at least conceptually. They now had to *reach out* to Parliament's self-standing electorate: an electorate that was not confined to national borders. They had to establish a direct link. Under these circumstances, it is 'surprising' – to quote Patricia Leopold – that the direct elections did not coincide with alterations to the immunity provisions, making them more uniform.⁵⁸ The members were given a direct free mandate, to represent a self-standing European electorate, but the liberty to represent this electorate continued to be tied to national rules. It shows the Direct Election Act as a source of contradictions.

Since the Treaty of Lisbon (2007), the task of the European Parliament to reach out to a Union electorate is strengthened and made more explicit. Article 14(2) TEU defines the European Parliament as the representative body of the Union citizens; Article 10(4) TEU highlights the importance of European political parties for expressing the will of the Union citizens. Reading these two provisions in relation to each other underlines that members of the European Parliament are expected to contribute to the development of cross-border political representation. They should not only relate to a national audience but (also) to Union citizens.

These new provisions make the anomaly that different immunity legislations apply to the members of the European Parliament more visible, as well as more

⁵⁷ Ibid.

⁵⁸ Patricia Leopold, 'Privileges and Immunities of MEPs' (1981) 6 *European Law Review* 275, 276.

problematic. This raises the question what the European Parliament can do, and does, to mitigate this.

2.4. Parliament's Lack of Rule-Making Power

Parliaments generally have a two-fold responsibility regarding their members' immunity (see section 1.3). They have a say in the decision-making process that determines the immunity legislation, and they decide on waiver requests in individual cases. These roles together support the autonomy of parliament. The position of the European Parliament deviates from that of most national parliaments. Regarding the power to lay down its own immunity provisions, it is ill-equipped in comparison.

Article 223(2) TFEU provides the European Parliament with the competence to lay down the rules and general conditions applicable to the exercising of the parliamentary mandate, after obtaining the opinion of the Commission and the approval of Council.⁵⁹ As there are no restrictions placed on the scope of Parliament's regulatory powers, these rules and general conditions may, arguably, include provisions on members' immunity. However, a new set of rules on immunity, which would be laid down in secondary law, cannot enter into force until the corresponding provisions that are laid down in the PPI, constituting primary law, have been repealed. There is a hierarchical relationship between the different legal acts of the European Union, by which secondary law should not contravene primary law. This is called the 'hierarchy of norms'.⁶⁰ As a result, the adoption of immunity provisions by virtue of Article 223(2) TFEU first requires a decision by the member states to repeal (part of) the PPI. This situation means that the European Parliament is hampered in defining the arena in which its members can undertake their representative task without fear of prosecution. It can neither design nor lay down the immunity provisions, and is hence ill-equipped to support the creation of a level playing field for the political representation by its members.

By contrast, the European Parliament has the power to lay down the conditions and criteria for *lifting* immunity. This originates in its right to regulate its own affairs, in combination with its privilege to decide on waiver requests. The former is laid down in Article 232 TFEU; the latter in the last sentence of Article 9 PPI.

'Immunity ... shall not prevent the European Parliament from exercising its right to waive the immunity of one of its members.'

⁵⁹ This provision was introduced by the Treaty of Amsterdam. See also Chapter 6.

⁶⁰ Deirdre Curtin and Tatevik Manucharyan, 'Legal Acts and Hierarchy of Norms in EU Law' in Anthony Arnall and Damien Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 103-125.

The rules of the European Parliament on the waiver of immunity are laid down in Rule 5-9 of the Rules of Procedure, 2014.⁶¹ As observed by GRECO (see section 1.3), these rules are very detailed. They also regulate certain substantive matters. For instance, Rule 6(2) stipulates the conditions under which members can appear as witness or expert witness in a court case, without their immunity first having been waived. The detailed rules may partly compensate for Parliament's lack of power – compared to national parliaments – to determine the rules through constitutional provisions and legislation.

Regarding the privilege to waive the immunity of members, the position of the European Parliament is comparable to that of national parliaments. It is at liberty to decide whether or not to lift the immunity of one of its members upon the request of a competent national authority. These decisions are amendable to judicial review.

3. Parliament's Challenge

Over the years, the European Parliament has battled over the content of the PPI (see below section 3.1) and its lack of power to amend it (see section 3.2). The question is what was behind this criticism. Can this be read as a desire to increase Parliament's liberty to make own representative claims about itself and its electorate?

3.1. *Unity of Parliament and of Its Electorate*

In the period that members were appointed by national parliaments, their dependency on national legislation was not regarded as problematic. It was rather seen as a logical consequence of the then existing institutional architecture.⁶² This view reveals itself in Parliament's waiver practice. Prior to 1979, the competent national authorities could either address the national parliament or the European Parliament with a waiver request when the situation called for it. The European Parliament made it clear that the institutional privilege of the national parliaments weighed heavier than its own.⁶³ It therefore decided to lift the immunity of a member when asked, and left the assessment of the facts to the national parliament concerned.⁶⁴ After 1979, the European Parliament could no longer renounce its privilege to draw its own conclusions regarding members with a single mandate. However, when

61 A thorough description of these can be found in Rosa Raffaelli and Sarah Salome, 'The Immunity of Members of the European Parliament' (Policy Department C (Citizens' Rights and Constitutional Affairs), Directorate-General for Internal Policies, European Parliament 2014) PE 509.981.

62 Report on a Request for the Parliamentary Immunity of a Member to be Waived – Mr. Marco Pannella (Rapporteur: Georges Donnez) (EP 1982, A1-0298/82 0010) para 13 explanatory statement.

63 Ibid para 11.

64 Report on the request for the withdrawal of parliamentary immunity of two members of the European Parliament (Rapporteur: Otto Weinkamm) (EP 1964, A0-0027/64 0010 (in Dutch)).

a member held a dual mandate, Parliament would still 'await the decision of the national parliament before bringing the matter before the European Parliament'.⁶⁵

The European Parliament always promoted a uniform legal statute for its members once they were directly elected. This is not apparent at first glance from studying Parliament's proposals. The Patijn Draft Convention of 1975 (see Chapter 4) proposed to continue giving members of the European Parliament the same immunity as that enjoyed by members of the national parliaments.⁶⁶ The rapporteur however expected that this situation would be short-lived, and aimed to facilitate the realisation of direct elections without introducing additional hurdles. Parliament worked under the hypothesis that, afterwards, a new uniform electoral system would be agreed by 1980 at the latest.⁶⁷ This would include immunity provisions, or alternatively these could be agreed according to a special procedure that Patijn proposed in Article 14 of his Draft Convention. In 1983, there was still no uniform election procedure and members continued to be elected according to divergent national laws. Nevertheless, the European Parliament pressed the Council to decide on a common statute for its members. After all, it was not the uniformity of the electoral rules, but the mere fact that members were directly elected to the European Parliament that gave them a self-standing electoral basis, and hence called for own immunity rules (see section 2.3). The continuing application of the PPI was:

'[N]ot commensurate, in either juridical or political terms, with the changed position of the European Parliament following direct elections'.⁶⁸

The PPI was regarded 'out of date' and 'no longer valid' under the new circumstances.⁶⁹ Some even called it 'not only nonsensical but even grotesque'.⁷⁰

On 10 March 1987, the European Parliament adopted a report in which it underlined the need for a revision.⁷¹ This Donnez-report shows, above all, that the

65 Report on a Request for the Parliamentary Immunity of a Member to be Waived – Mr. Marco Pannella (Rapporteur: Georges Donnez) (n 62) para 12 explanatory statement.

66 Draft Convention of 14 January 1975 on the election of Members of the European Parliament by direct universal suffrage (Draftsman: Schelto Patijn) [1975] OJ C32/15, art 4.

67 Ibid art 7.

68 EP Resolution of 15 September 1983 on the Statute of Members of the European Parliament [1984] OJ C277/135, para 2.

69 Report on the draft Protocol revising the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 in Respect of Members of the European Parliament (doc. C2-31/85 – COM (84) 666 final) (Rapporteur: Georges Donnez) (EP 1987, A2-0121/86 0010); Report on the reform of the Rules of Procedure with regard to parliamentary immunity (Rule 6) (Rapporteur: Andrew Duff) (EP 2002, A5-0195/2002 0010) para 4.

70 See comments of Malangré during the EP Debate of 15 May 1991 on the Protocol on Privileges and Immunities, following oral questions [1991] OJ C158/34.

71 EP Resolution of 10 March 1987 on the draft protocol revising the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 in respect of Members of the European Parliament [1987] OJ C99/44. The report contained Parliament's response to the Council regarding proposals by the Commission to revise the PPI. Following the resolution of the European

members of the European Parliament no longer saw any justification for having the same legal and financial status as members of the national parliament in their home country.

[E]qual treatment for European and national parliamentarians of the same nationality is not essential either logically or in practical terms, as opposed to the above-mentioned need to avoid differences in treatment between members of the same assembly.⁷²

Parliament wanted to create more distance from national structures, and strengthen the self-standing position of the European Parliament as ‘the one and only legislative body for Europe as a whole’.⁷³ The Donnez report presents an overview of Parliament’s institutional and practical arguments to support the case for uniform provisions. Similar sentiments have been repeated in other reports since.

The fact that members have divergent legal statuses is regarded as a potential threat to the *internal cohesion* of the European Parliament. It challenges ‘the feeling of belonging to one and the same parliament’.⁷⁴ By creating ‘first-class members’ and ‘second-class members’, also the *institution’s unity* is undermined.⁷⁵ Moreover, it threatens Parliament’s independence. ‘How can the independence of Parliament be effectively safeguarded in relation to other authorities through the protection of individual members if this protection is not the same for them all?’⁷⁶

Most relevant for the present investigation is the argument that the different provisions lead to *divergent representative capacities* of the elected members. They have to exercise their representative mandate under unequal conditions. The British Member Hoon has elaborated on the implications.

‘On the very same facts the legal conclusion will depend exclusively on the nationality of the member concerned. It means, for example, that theoretically a continental member would enjoy a wider degree of immunity in the United Kingdom than that enjoyed by the British member in whose constituency the events occurred. That cannot be right.’⁷⁷

Parliament of 15 September 1983, the European Commission had taken the initiative to propose amendments. The latter had sent these to the Council in 1984, which consulted Parliament, in line with the Treaty provisions, on 8 May 1985.

72 Donnez Report (n 69) para 12 explanatory statement.

73 See comments of Bru Perron during the EP Debate of 15 May 1991 on the Protocol on Privileges and Immunities, following oral questions (n 70).

74 Donnez Report (n 69) para 8 explanatory statement.

75 Ibid.

76 Ibid.

77 EP Debate of 9 March 1987 on the privileges and immunities of Members of Parliament [1987] OJ C99/1.

Indeed, it follows from Article 9(b) PPI that non-British members can claim immunity when they participate in an unauthorised demonstration in the United Kingdom. British members walking the same march may however face prosecution. The 'unfairness' that Hoon attacks shows in particular when members of the European Parliament of different national backgrounds participate in the same event in the same country. Nevertheless, unfairness is obviously also present when members can criticise the (European) authorities on national television in some countries, while in other countries for doing the same they could face prosecution.

In addition to these fundamental objections, the European Parliament challenges the existing system on a very practical basis. In order to rule on a waiver request, the European Parliament must be fully informed about which law of which member state applies and study those national provisions carefully. This exercise is very time-consuming. Moreover, it presents a considerable risk of errors in interpretation and even misapplication.⁷⁸

For all these reasons, the Donnez-report proposes to revise the PPI, a position that was repeated since. In 2003, the European Parliament once again proposed a uniform legal and financial statute for its members, and this time elaborated how the new immunity provisions should look like. Members would be protected in the exercise of their duties regardless of the location where activities take place:

'A Member may at no time be prosecuted or otherwise be held accountable extrajudicially for any action taken, vote cast or statements made in the exercise of his/her mandate.'⁷⁹

Moreover, according to the proposal, it would be for the European Parliament to decide whether a statement was indeed made in the exercise of duty and members could rely on their *non-liability*.⁸⁰ It is a matter for Parliament, not the courts. The proposal also foresees inviolability of the members: 'Any restriction of a Member's personal freedom shall be permitted only with the consent of Parliament, except where he/she is caught in the act.'⁸¹ To what extent this provision would have protected members cannot be proven, as it would depend on the actual waiver practice of the European Parliament.

The 2003 proposal arguably meets all the concerns that were expressed in the Donnez-report of 1987. It simplifies the waiver process, expresses the unity of Parliament and ensures that members from different countries can participate in protests and debates outside Parliament under the same conditions. However, as we come to see in the next Chapter, the proposal was not endorsed by the Council.

78 Donnez Report (n 69) para 9 explanatory statement. See also Commission, 'Draft for a Protocol revising the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 in respect of Members of the European Parliament' COM (84) 666, 3.

79 EP Decision of 3 June 2003 on the Adoption of a Statute for Members of the European Parliament [2004] OJ C068-E/115, art 4(1).

80 Ibid art 4(2).

81 Ibid art 5(1).

3.2. *Autonomy to Set Immunity Standards*

The European Parliament pursues not only a change in the *substance* of the PPI, but also seeks a larger say in the *decision-making procedure* regarding the immunity provisions.⁸² Scholars may consider this demand a typical extension of Parliament's battle for more legislative powers in whatever policy area. This thesis however, recommends to judge it (also) from a different angle. Having the power to lay down immunity provisions is necessary to support the free mandate of Parliament's elected members and the separation of institutions (or powers). From that perspective, a stronger position of Parliament is not only desired by Parliament itself, but can be considered particularly *appropriate*. The Commission, the Council, and the member states may in theory have an interest in providing the members of the European Parliament with only a very precarious legal position. This can influence how criticism is voiced. With the gradual increase of power of the European Parliament, this argument has increased in relevance.

It can also be considered appropriate that the European Parliament has a say over the immunity provisions because these provisions contain representative claims. They determine not only how, but also where and in whose name members can speak out without fear of prosecution. *In casu*, they reveal whether the members of the European Parliament are supposed to represent Union citizens and/or national citizens. Such formal representative claims ought not to be made without the elected representatives themselves expressing a view (see Chapter 2). Sir Neil MacCormick, a legal philosopher and former member of the European Parliament, referred to this norm during a debate in 2002, when he said that the European Parliament – 'as a democratic legislative assembly' – must have some 'inherent power' to shape the immunity provisions.⁸³

Until 2005, the European Parliament assumed that the issue of immunity would one day be regulated as part of a general framework, laying down the financial, legal, and social working conditions of its members. Demands for more rule-making powers were therefore not voiced separately in relation to the immunity provisions, but rather in the context of the statute for members (see further Chapter 6).⁸⁴ All of Parliament's proposals for such a statute included provisions on immunity. However, the Council was equally always unwilling to accept these provisions. They therefore were not included in the statute for members that was finally adopted by the Council and the European Parliament in 2005. As part of this negotiating process, on 3 June 2005, the Council promised to examine the request of Parliament to revise the PPI 'with a view to reach a conclusion as soon as possible'.⁸⁵ However, until this day, the

82 See, for instance, the EP Resolution of 10 March 1987 on the draft protocol revising the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 in respect of Members of the European Parliament (n 71). See also MacCormick (n 52).

83 EP Debate of 10 June 2002 on parliamentary immunity [2003] OJ C261-E/16.

84 Draft Statute of 14 December 1976 for Members of the European Parliament elected by direct universal suffrage (Draftsman: Walter Behrendt) [1976] I/459 f/76 (ASS). See also EP Resolution of 15 September 1983 on the Statute of Members of the European Parliament (n 68).

85 EP Resolution of 6 July 2006 on modification of the Protocol on Privileges and Immunities [2006] OJ C303-E/830, second indent.

Council has not substantively followed up on this promise. Apparently, it has no real interest to do so. A more extensive Union immunity for members of the European Parliament would strengthen the Union legal order, provide the European Parliament with more (representative) autonomy, and is not likely to promote enthusiasm among the population.

The European Parliament, as we have seen, is formally empowered to draft immunity provisions. It may in principle also take the final decision, after seeking the opinion of the Commission and with the unanimous approval of the Council.⁸⁶ However, in the current situation, these powers are dormant. As long as the PPI forms part of primary law, the European Parliament is not in a position to adopt secondary law that contradicts it (see section 2.4). In order to nonetheless make use of its regulatory power, Parliament sought recourse to establishing immunity provisions in a suspended form. In the proposals for a statute for members, Parliament incorporated immunity provisions, but stated that in so far as these provisions conflicted with the PPI, they 'may not enter into force unless and until an Intergovernmental conference has decided to repeal the corresponding provisions of primary law and that decision has been ratified by the Member States (hierarchy of norms).'⁸⁷

The debates and parliamentary reports testify to Parliament's frustration with its lack of active rule-making power, which it perceives as an infringement on its parliamentary credentials.

'The fundamental issue is of whether this European Community is a real community or an international organization. If it were merely an international organization, then the Council would indeed have the prerogative as regards members' privileges and immunities.'⁸⁸

For 'a parliament worthy of the name', it is unacceptable that the Council takes the lead on a matter that goes to the heart of Parliament's autonomy – and in particular its *representative autonomy*.⁸⁹ Parliament therefore insisted – and continues to insist – on change. However, it did not stop there. The next section analyses how the European Parliament has fostered a uniform legal status of its members by its own actions.

4. Alternative Channels for Change

Despite having limited effective rule-making powers, the European Parliament has nonetheless attempted to develop equivalent legal protection for its members. To this end, it has exploited two instruments. The first is Parliament's right to regulate

86 Article 223(2) TFEU.

87 EP Decision of 3 June 2003 (n 79) consideration 16.

88 Willi Rothley, EP Debate of 2 June 2003 on a Statute for Members of the European Parliament [2004] OJ C068-E/12.

89 Ibid.

its own affairs (see section 5.1). The second is Parliament's privilege to decide on waiver requests (see section 5.2). How it has used these instrument is outlined below.

4.1. *Rules of Procedure – an Instrument to Complement Primary Law*

In 1953, the European Parliament (then, the Common Assembly) decided, for the first time, on how to proceed if a national authority requested to waive the immunity of one of its members.⁹⁰ As the ECSC Treaty, and later the PPI, is silent on the procedure to be followed, the European Parliament could design its own, by virtue of its right to adopt Rules of Procedure.⁹¹ Over the years, Parliament has amended these rules several times. In this process, it has taken decisions that changed the scope of members' immunity.

The case involving Edgar Faure, a French member of the European Parliament, formed the immediate cause of such a change. Roger Wybot, a French citizen, had initiated defamation proceedings against Faure for remarks that were made on 27 January 1983. On that particular day, the European Parliament was not actually sitting. According to Wybot, this meant that Faure could not rely on his parliamentary immunity.⁹² Article 9 PPI only applies 'during the sessions of the Assembly' after all. Faure, however, disagreed with this reading. In his view, the word 'session' should not be interpreted so narrowly. Supporting Faure's position, the European Parliament argued before the Court of Justice that the word 'session' in Article 9 PPI should be understood as covering a longer period than just the time period of the actual plenary sittings.⁹³ According to Parliament's Rules of Procedure, a session starts on the second Tuesday in March and lasts for a year.⁹⁴ Accordingly, the European Parliament was 'in session' on 27 January 1983.⁹⁵ The Court of Justice accepted Parliament's argument that 'it was for the Parliament itself to determine the duration of its sessions'.⁹⁶ There were no provisions with which this position clashed. Hence, defining the duration of parliamentary sessions falls officially within Parliament's purview.⁹⁷ The effect of Parliament's actions (and the Court's judgement) is that all members of the European Parliament enjoy immunity for the same period of time. The duration does not depend on different national laws. Simultaneously, it means that the duration of immunity of members of national parliaments and of the European Parliament – from the same country – may differ.

The above example is not the only one where the European Parliament has taken advantage of the existence of 'blank spots' or open-textured provisions in the PPI. In a similar vein, Parliament has created a role for itself in so-called Article 8 cases. In section 2.2, we have seen that the immunity that Article 8 PPI provides cannot

90 CA Resolution of 10 January 1953 concerning some articles of the Rules of Procedure, OJ No 1 of 10 February 1953, art 47.

91 This is currently laid down in Article 232 TFEU.

92 Case 149/85 *Wybot v Faure and others* [1986] ECR 2391, para 6.

93 *Ibid* para 10.

94 Rules of Procedure of the European Parliament – September 1983, Rule 9(2).

95 Parliament's session lasted from 9 March 1982 until 7 March 1983 that year.

96 *Wybot v Faure and others* (n 92) para 10.

97 *Ibid* para 16.

be waived. Members have an absolute immunity, which means that they cannot be prosecuted in respect of opinions expressed or votes cast in the performance of their duty. Whether a statement falls within the protection of Article 8 is not for the Parliament to decide. Such an assessment is a matter for the national courts.⁹⁸

The lack of parliamentary involvement in Article 8 cases became the subject of intense discussions in 2002. In the preceding years, several Italian members of the European Parliament had been confronted with legal challenges against opinions they had expressed. At first sight, this seemed a violation of the absolute protection that Article 8 PPI offers. However, Parliament was incapable of protecting its members by upholding their immunity, as it only had the privilege to decide on waiver requests in Article 9 cases. In the absence of a waiver request to which it could respond, Parliament remained empty-handed. Sir Neil MacCormick, rapporteur for the Legal Affairs Committee on a report about the situation of Italian members specifically, expressed the inappropriateness of Parliament's weak position during a debate on 10 June 2002.

'If it were the case that members could show that their position as members of this House, as legislators on the European scene, was being prejudiced by conduct of a Member State and there was no way to bring this before the House solely because no appropriate authority in a Member State had sought to have the immunity waived, this would in itself be clearly an unsatisfactory state of affairs.'⁹⁹

Worried that the protection offered by Article 8 PPI was in practice undermined by the behaviour of member states – in particular the Italian authorities –, the European Parliament amended its Rules of Procedure.

The newly introduced rules had two effects. Firstly, Rule 6(3) ended Parliament's dependency on other authorities. It is no longer necessary for Parliament to await a formal request by a competent national authority before it can take a stand in an individual case. Parliament can now also proceed to a decision following a request to that end by a member, a former member, or by any other member with the agreement of the member concerned.¹⁰⁰ Secondly, a new Rule 7(6) makes it possible that Parliament takes a position even when the case involves Article 8 PPI.¹⁰¹ Hence, by virtue of these two amendments, the European Parliament is no longer bound to passivity when a member faces charges for opinions expressed during the exercise of duty. Andrew Duff, the responsible rapporteur for the rule-change, placed his

98 This was confirmed by the Court in *Alfonso Luigi Marra v Eduardo De Gregorio and Antonio Clemente* (n 55) paras 32-33.

99 EP Debate of 10 June 2002 on parliamentary immunity (n 83).

100 This provision is currently found in Rules of Procedure of the European Parliament – September 2015 Rule 9(1).

101 This provision is nowadays laid down in: *ibid* Rule 7(2).

proposals within ‘the context of a reform of the privileges and immunities system’.¹⁰² The European Parliament had found a way to amend the PPI, despite not having the competence to do so head-on.

In conjunction with the adoption of the Duff-report, Parliament adopted the MacCormick resolution to strengthen the legal position of Italian members. The resolution specifically concerned Francesco Enrico Speroni and Alphonso Marra. In this, Parliament requested:

‘[T]he competent courts should be put on notice to transmit to Parliament the documentation necessary to establish whether the cases in question involve absolute immunity under [Article 8¹⁰³] of the Protocol in respect of opinions expressed or votes cast by the members in question in the performance of their duties and (b) that the competent courts should be invited to stay proceedings pending a final determination by Parliament.’¹⁰⁴

Parliament called upon the courts to respect the immunity of the members concerned until it had arrived at a conclusion on whether the conditions for absolute immunity, as provided in Article 8 PPI, were met. Through this decision, Parliament challenged the understanding that it had no competence to engage in this decision.

In order to understand the *effect* of Parliament’s new position, it is necessary to study the case of Alphonso Marra. It led to new case law by the Court of Justice. The action against Marra was initiated by De Gregorio and Clemente. They claimed that Marra had insulted them by distributing leaflets containing offensive remarks. Both the *Tribunale di Napoli* and the *Corte d’Appello di Napoli* did not consider it necessary to ask Parliament to lift Marra’s immunity. This is understandable as the assessment whether Article 8 PPI applies, falls to the national court.¹⁰⁵ However, the European Parliament disagreed with the findings of the courts. As the leaflets were distributed while Marra was a member of the European Parliament, it qualified his case as a *prima facie* case of absolute immunity, which *should* be protected by Article 8 PPI.¹⁰⁶ Through its resolution, Parliament tried to stop Marra’s prosecution, but its efforts were in vein. Before the *Corte Suprema di Cassazione*, to which Marra subsequently turned, he asserted his immunity again. He requested a decision by the European Parliament on whether or not his immunity should be upheld. By then, the new procedural rules were in force. Unsure how it should proceed after Marra’s request, the Italian Court of Appeal asked the Court of Justice whether it was

102 Report on the reform of the Rules of Procedure with regard to parliamentary immunity (Rule 6) (Rapporteur: Andrew Duff) (n 69) para 16.

103 The original text refers to Article 9 PPI. Instead I refer to Article 8 as this is in line with the new numbering of the PPI and therefore avoids confusion.

104 EP Resolution of 11 June 2002 on the immunity of Italian Members and the Italian authorities’ practices on the subject [2003] OJ C261-E/102, para 1.

105 *Alfonso Luigi Marra v Eduardo De Gregorio and Antonio Clemente* (n 55) para 11.

106 EP Resolution of 11 June 2002 on the immunity of Italian Members and the Italian authorities’ practices on the subject (n 104) para 1.

required to await a waiver-decision by the European Parliament before coming to a conclusion. In its judgement, the ECJ stressed that it remains for the national courts to consider whether or not a member enjoys the immunity provided for in Article 8 PPI. It does not fall within Parliament's powers to alter this situation.

'[I]t cannot be inferred, even implicitly, from Rules 6 and 7 of the rules of procedure ... that the national courts are obliged to refer to the Parliament the decision on whether the conditions for recognising the immunity are met, before ruling on the opinions and votes of Members of the Parliament.'¹⁰⁷

The new Rule 7(6) has not empowered the European Parliament to formally establish whether Article 8 PPI applies in an individual case. It has only enabled Parliament to present an *opinion*, which has no binding effect with regard to national judicial authorities.¹⁰⁸ Nevertheless, this does not render the change in the Rules of Procedure meaningless. Interestingly, the Court of Justice also ruled that the opinion of the European Parliament cannot be ignored. In fact, it underlined that:

'[T]he duty of cooperation applies in the context of disputes such as those in the main proceedings. The European Parliament and the national judicial authorities must therefore cooperate in order to avoid any conflict in the interpretation and application of the provisions of the Protocol.'¹⁰⁹

Consequently, if a national court is aware that the European Parliament is formulating an opinion on the immunity of one of its members, it must suspend the legal proceedings. The Marra-ruling thus endorsed Parliament's right of initiative, and allows it to influence the decisions of the national courts on Article 8 cases.

It is evident that the two challenges described in this section brought about only minor amendments to the PPI. Yet, they show that the European Parliament is unwilling to remain passive when it comes to reforming the immunity provisions.

4.2. Waiver Decisions – Parliament's Case-Law

The European Parliament cannot delete the references to national legislation in the PPI. This is a fact that Parliament has to deal with until the PPI is either revised or repealed. However, Parliament is at liberty to interpret national legislation when it decides on individual waiver requests. It is not obliged to follow the line of the

¹⁰⁷ *Alfonso Luigi Marra v Eduardo De Gregorio and Antonio Clemente* (n 55) para 35.

¹⁰⁸ *Ibid* para 39.

¹⁰⁹ *Ibid* para 42.

national parliaments, as it ‘is sovereign in the exercise of its powers’.¹¹⁰ Between 1979 and 2009, the European Parliament has been asked to lift the immunity of one of its members 157 times.¹¹¹ This offered 157 opportunities to interpret national legislation. In making these decisions, Parliament was well aware of its institutional objective.

‘[T]he European Parliament should ... attempt to follow the precedents which have emerged from its own decisions on requests for the waiver of immunity, with a view to creating a concept of parliamentary immunity which is peculiar to the European Parliament, and could not in any event be identical to the concepts of immunity established by the different customs of the various national parliaments.’¹¹²

Parliament should encourage the realisation of Union immunity for all members – albeit within the boundaries set by the PPI. The objective to develop a genuine Union immunity *de facto*, by way of Parliament’s waiver practice, has been confirmed in several parliamentary reports.¹¹³ This section will outline how the European Parliament has acted to accomplish this.

4.2.1. *Union Immunity Extends to Civil Proceedings*

A first generic change brought about by the European Parliament concerns the scope of Article 8 PPI. The text of the Protocol does not explicate whether Article 8 PPI can only be invoked in case of criminal proceedings, or also in case of civil proceedings. However, as explained in section 2.2, Article 8 PPI was initially interpreted as applying to civil proceedings only.

110 Report on a request for the parliamentary immunity of a Member to be waived – Mr. Eric Blumenfeld (Rapporteur: Georges Donnez) (EP 1984, A1-0123/84 0010) para 13 explanatory statement.

111

Legislature	Cases treated in plenary	Decision to waive	Decision not to waive
1979-1984	8	1	7
1984-1989	36	9	27
1989-1994	33	5	28
1994-1999	9	2	7
1999-2004	27	4	20
2004-2009	44	24	20

Immunities Overview (n 4) 33.

112 Report on a request for the parliamentary immunity of a Member to be waived – Mr. Eric Blumenfeld (Rapporteur: Georges Donnez) (n 110) para 13.

113 See, for example, Report on the request for waiver of the immunity of Mr Peter Sichrovsky (Rapporteur: François Zimeray) (EP 2001, A5-0123/2001 0010); Report on the request for waiver of the immunity of Mogens N.J. Camre (Rapporteur: Sir Neil MacCormick) (EP 2003, A5-0243/2003 0010) para 7.

In September 2003, the European Parliament nevertheless gave a new interpretation to the scope of Article 8 PPI. The case at hand concerned Sakellariou, a German member with Greek roots. Parliament was asked to lift Sakellariou's immunity for comments that he had made in 2001, during an interview for the newspaper *Kyriakatiki Eleftherotypia*. When asked about the future of Greek-Turkish relations, Sakellariou said that 'the consequences were likely to be serious if a neighbourhood Mussolini such as Mr Papatthemelis practises foreign policy.'¹¹⁴ Following this, Papatthemelis brought an action before the civil division of the Athens Court of First Instance. He claimed damages adding up to roughly 150,000 euro. Lehne, who had been appointed rapporteur for the Committee on Legal Affairs and the Internal Market, studied the case, and concluded that Sakellariou's immunity should be defended. He arrived at this conclusion despite the fact that Sakellariou was not subject to criminal proceedings, but civil proceedings instead. The reason that Article 8 PPI was nevertheless applied, was that the damages claimed went beyond a reasonable definition of compensation. In fact, they constituted a penalty with deterrent effect.¹¹⁵ As the effect of these proceedings could be that Sakellariou would feel forced to be less outspoken during the remainder of his representative mandate, his liberty to represent his electorate as he deemed fit was at stake.

Therefore, Lehne suggested that the reference to 'legal proceedings' in the PPI should be interpreted as covering civil actions. This was in line with contemporary developments in the law of several countries, including the United States.¹¹⁶ The European Parliament took over the rapporteur's suggestion:

'[T]he immunity from legal proceedings enjoyed by members of the European Parliament also covers immunity from civil proceedings.'¹¹⁷

The Court of Justice agreed with Parliament's new line. In the case concerning Marra (see above), it confirmed that Article 8 PPI should apply to civil cases as well.¹¹⁸ It is possible that the interpretation of the Court was not only influenced by Parliament's opinion, but also by the developments in law that Lehne referred to. It would require a different line of research to establish this. Regardless, the example stands testimony to the fact that the European Parliament considers itself well positioned to advance substantive changes to the PPI.

114 Report on the request for defence of parliamentary immunity and privileges submitted by Jannis Sakallariou (Rapporteur: Klaus-Heiner Lehne) (EP 2003, A5-0309/2003 0010) para 1 explanatory statement.

115 Ibid 2 explanatory statement.

116 Report on the request for defence of parliamentary immunity and privileges submitted by Jannis Sakallariou (Rapporteur: Klaus-Heiner Lehne) (n 114) explanatory statement; Offerman (n 53) 12.

117 EP Decision of 22 September 2003 on the request for defence of parliamentary immunity and privileges submitted by Jannis Sakellariou [2004] OJ C77-E/1, para E.

118 *Alfonso Luigi Marra v Eduardo De Gregorio and Antonio Clemente* (n 55) para 27.

4.2.2. *Union Immunity outside Parliament's Premises*

A second change initiated by the European Parliament concerns the core of Article 8 PPI. It is about the definition of what can be regarded as 'activities that are undertaken in the performance of duties'. Capturing this evolution regarding absolute immunity is complicated, as it involves changes to the interpretation of both Article 8 and Article 9 PPI.

For decades, the immunity of members of the European Parliament for statements made in the exercise of their duty, was regulated by three provisions.¹¹⁹ Article 8 PPI concerned absolute immunity and applied when the statements were made in Parliament's precinct; Article 9(a) PPI regulated the immunity for statements made in members' home countries; Article 9(b) PPI regulated the immunity when statements were made outside Parliament, or in other member states. As a result of this arrangement the legal status of members differed, and for similar statements, some members could face prosecution and others not. Incapable of changing the PPI provisions, the European Parliament found an alternative manner to reduce the differences between members *de facto*. It established criteria for its waiver decisions that were of a different nature than customary in national parliaments. These criteria did not only aim to ensure that *fumus persecutionis* was avoided, but also set out to make the legal status of the members more comparable. The most important criterion in this regard was that the immunity of a member should be upheld when the alleged offence could be regarded as a 'political activity'. Thereby, Parliament took it upon itself to define which actions should be protected and which ones not. It is a type of decision that is generally made through the legislative procedure.

For many years, the European Parliament adopted an extremely generous approach to what constitutes 'political activities'. The case concerning Herklotz illustrates this well.¹²⁰ In 1979, Herklotz was anonymously accused of fraud that had been committed in a civic education association of which she was president between 1974 and 1976. In order to start legal proceedings, the Public Prosecutor Office of Frankenthal requested for the waiver of Herklotz' parliamentary immunity. On the proposal of rapporteur Fischbach, the European Parliament rejected the request. It took into consideration that the accusations against Herklotz were made anonymously, and additionally argued that Herklotz's activities could be interpreted as falling within the scope of political activities.

'The Legal Affairs Committee ascertained that the facts underlying the anonymous accusations against Mrs Herklotz are related to her political activity, since supporting activities to promote civic training are linked with political activities.'¹²¹

119 See section 2.2 and 2.3.

120 Report on request for the parliamentary immunity of a Member to be waived – Mrs. Herklotz (Rapporteur: Marc Fischbach) (EP 1981, A1-0321/81 0010).

121 Ibid 8.

The German authorities respected Parliament's decision. Only after her mandate was expired, was Herklotz prosecuted – and convicted.

By giving a broad interpretation to the term 'political activities' and by upholding immunity in all such cases, the legal positions of the members of the European Parliament were made more comparable. Herklotz was given a protection, also in relation to acts committed in her home country, that members of the German Bundestag did not have. The impact of national legislation on members' legal status was thus reduced. Rapporteur Wallis emphasised this result in 2005:

'Parliament's decisions have gradually forged a coherent notion of European parliamentary immunity which is, in principle, independent of the various practices of the national parliaments. This avoids differences in treatment between members resulting from their nationality.'¹²²

Parliament's policy regarding Article 9(a) PPI is remarkable. It has apparently managed to limit the differences in treatment on the basis of nationality by virtue of its waiver practice. However, this effect goes against what the drafters of the PPI had envisaged. They had explicitly aimed to *uphold* the national differences, as was outlined in section 2.3.

In recent years, the European Parliament has become more restrictive in its interpretation of what may constitute a 'political activity'. The connection between the acts and the parliamentary mandate must now be justified and proven. This is in line with developments of ECtHR case law.¹²³ As a result of this new approach, the European Parliament lifted the immunity of Mote in 2007, although the charge against him was similar to the one that Herklotz faced more than twenty years earlier.¹²⁴

The European Parliament has maintained a generous policy with regard to expressions of opinion alone. As a rule, these expressions are considered to be part of a member's 'political activities', irrespective of their content. According to Zimeray, one of Parliament's rapporteurs, it is often too difficult to distinguish between political speeches and speeches that are not connected to a member's political mandate. As a consequence, they are all regarded as made in the performance of duties.¹²⁵ For Parliament, the place where the statements were made, is irrelevant. This could be within Parliament, 'during demonstrations, at public meetings, in political publications, in the press, in a book, on television, by signing a political tract and even in a court of law.'¹²⁶

122 Report on the request for the defence of the immunity and privileges of Bruno Gollnisch (Rapporteur: Diana Wallis) (EP 2005, A6-0376/2005 0010) para 4(b) explanatory statement.

123 *Cordova v Italy* (n 37).

124 EP Decision of 10 July 2007 on the request for defence of the immunity and privileges of Ashley Mote [2008] OJ CE175/24.

125 Report on the request for waiver of the immunity of Mr Peter Sichrovsky (Rapporteur: François Zimeray) (n 113) 13.

126 Report on the request for the defence of the immunity and privileges of Bruno Gollnisch (Rapporteur: Diana Wallis) (n 122).

Recently, the legal basis on which this protection is built has changed. Parliament has long provided protection outside the parliamentary premises through its policy of upholding immunity when the authorities ask for it to be lifted. This thus involved Article 9 PPI. Nowadays, Parliament acts on the assumption that Article 8 PPI covers all statements made in the exercise of duty, without applying a spatial criterion. The development of Article 8 PPI shows when comparing the decisions of the European Parliament regarding the immunity of Le Pen in 1998, Gollnisch in 2005, and Patriciello in 2009. All cases concern the freedom of speech. To witness the change in Parliament's approach, it is necessary to note not only which provision of the PPI applied (according to the European Parliament), but also the arguments that Parliament presented to support its choice.

In December 1997, Le Pen launched his book 'Le Pen, the Rebel'. During the press conference in Munich, he called the gas chambers a detail in the history of the Second World War. Misrepresenting the atrocities committed during the Nazi-period constitutes a violation of German national law. Therefore, the German authorities requested the European Parliament to lift the immunity that Le Pen enjoyed on the basis of Article 9(b) PPI. The Parliament considered the matter, and decided to indeed waive Le Pen's immunity on 6 October 1998.¹²⁷ Parliament agreed with the German authorities that Article 9(b) PPI formed the appropriate article for the waiver request. This shows that, at the time, the criterion to establish whether Article 8 PPI or Article 9 PPI applied, was a geographical one. Moreover, Parliament held that Le Pen's comments could not be regarded as 'political activities'. If that were to have been the case, it should have upheld the immunity of Le Pen, in the same way as it did with the immunity of Herklotz.

'It appears from the summary of the facts that Mr. Le Pen expressed the sentiments in question during a press conference in connection with the launch of a book on his life and political activities. It cannot therefore be maintained that he was acting 'in the performance of his duties', as would have been the case, for example, if he had spoken these words during a sitting of the European Parliament or one of its bodies, or if he had acted as a member or rapporteur of a committee, or indeed in any capacity at all connected with the activities of Parliament.'¹²⁸

Seven years later, a different interpretation was given to Article 8 PPI when the immunity of Gollnisch was at stake. Like Le Pen, Gollnisch had made controversial statements outside Parliament's headquarters: in his case, during a press conference in Lyon. Remarkably, rapporteur Wallis did not consider the location of Gollnisch's speech a decisive matter. In agreement with her, the European Parliament expressed

127 Report on the request for waiver of the immunity of Mr Jean-Marie Le Pen (Rapporteur: Sören Wibe) (EP 1998, A4-0317/98 0010).

128 Ibid 8 explanatory statement.

that Gollnisch' comments *potentially* fell under Article 8 PPI.¹²⁹ This constitutes a noteworthy change. However, when studying the issue further, Parliament decided that Article 9(b) PPI applied nonetheless. The reason for this conclusion was unrelated to the spatial criterion.

'[Gollnisch had] expressed his opinion about the massacre of Katyn in response to questions from journalists about his highly critical remarks relating to political interference in the Rousso report on the political views of Lyon III University academics. The statements were directly related with the professional activities of Mr. Gollnisch as professor at the Lyon III University and had nothing to do with his duties as a member of the European Parliament.'¹³⁰

From the Wallis report and Parliament's vote, it became clear that even when members made statements at a press conference outside Parliament, they could be protected by absolute immunity as provided for in Article 8 PPI.

In the case regarding the Italian member Patriciello, the European Parliament tried to stretch the application of Article 8 PPI further. It applied Article 8 for activities that had taken place in Italy, and applied a very generous definition of what can constitute 'political activities'. In 2007, Patriciello was charged with falsely accusing an officer of the municipal police of Pozzoli of forgery of documents. This forgery had allegedly resulted in traffic fines for the owners of some cars parked close to a neurological institute and Patriciello's home. By all standards, Article 8 PPI seemed not to apply, not only because the contested statements were made in Italy, but also in particular because there was no obvious link between Patriciello's accusations and his parliamentary mandate. Patriciello heavily disputed the latter. He claimed that his comments to the police officer were made on behalf of his electorate and for the benefit of citizens. Consequently, Article 8 PPI should be invoked. Surprisingly, the argument was taken over by Parliament's rapporteur Sakalas.

'As a matter of fact, in his statements, Mr. Patriciello merely commented on facts in the public domain, the rights of citizens to have an easy access to a Hospital and to the healthcares, which had an important impact on the daily life of his constituents. Mr. Aldo Patriciello did not act for his own interests, he did not want [to] insult the public official but he act[ed] for [the] general interest of his electorate in the framework of his political activity.'¹³¹

129 Report on the request for the defence of the immunity and privileges of Bruno Gollnisch (Rapporteur: Diana Wallis) (n 122) para III 1 explanatory statement.

130 Ibid III 1a explanatory statement.

131 Report on the request for defence of the immunity and privileges of Aldo Patriciello (Rapporteur: Aloyzas Sakalas) (EP 2009, A6-0286/2009) para III explanatory statement.

As the European Parliament accepted Patriciello's explanation, it recommended that his immunity would be protected.¹³² In 2011, the Court of Justice put an end to this interpretation. It outlined that Article 8 PPI can only apply when there is a direct and obvious connection between the statements made and the parliamentary duties.¹³³ In the Patriciello case, this direct and obvious link was not found:

'[H]aving regard to the descriptions of the circumstances and the content of the allegations made by the Member of the European Parliament at issue in the main proceedings, they appear to be rather far removed from the duties of a Member of the European Parliament and hardly capable, therefore, of presenting a direct link with a general interest of concern to citizens. Thus, even if such a link could be demonstrated, it would not be obvious.'¹³⁴

Parliament lost this battle for Patriciello. However, it won the war on an important principle. The Court supported Parliament's general stance on the scope of Article 8 PPI.

'It is not impossible that a statement made by those Members beyond those precincts may amount to an opinion expressed in the performance of their duties within the meaning of Article 8 of the Protocol, because whether or not it is such an opinion depends, not on the place where the statement was made, but rather on its character and content.'¹³⁵

The application of Article 8 PPI is thus not necessarily limited to the precincts of the European Parliament. It is the content and the character of the challenged statements that are the determining factors, not the location. As a result, the protection offered to members of the European Parliament in order to represent their electorate without fear of reprisals, has grown more similar. Differences on the basis of national origin have been reduced. Concurrently, Parliament's waiver practice has increased the differences in legal protection between members of the European Parliament and their colleagues in national parliaments.

132 EP Decision of 5 May 2009 on the request for defence of the immunity and privileges of Aldo Patriciello (n 1).

133 Case C-163/10 *Patriciello* [2011] ECR-I7565, para 35.

134 *Ibid* para 36.

135 *Ibid* para 30.

5. Conclusion

Rules regarding parliamentary immunities reveal in which arena elected members are expected to carry out their representative mandate, and against which authorities they need protection. It is in that arena that members need special protection in order to represent their electorate as they deem fit. For a long time, the political arena was confined to the parliamentary premises. Therefore, in several countries, members of parliament only have *non-liability* for statements made in parliament itself.¹³⁶ They may face prosecution for actions outside these premises. The past decades have witnessed rapid changes in how political representation is undertaken. Statements are increasingly made (or repeated) outside the plenary room, on television, twitter or during public events. This phenomenon requires a general re-thinking of the privileges that should be extended to members of parliament. For the European Parliament the matter is even more pressing because of the simultaneous occurrence of a second development. As a result of this development, members now have different levels of immunity even when they evidently undertake core representative tasks.

Over the years, the representative task of the members of the European Parliament has become more transnational, in both form and substance. The European Parliament is held to represent Union citizens, instead of national peoples (Article 14(2) TEU). Moreover, European political parties and European federations of interests groups increasingly organise European activities, and members of the European Parliament more regularly engage in televised debates with their colleagues from different countries. While members of a national parliament enjoy the same legal protection both in and outside their parliament, members of the European Parliament do not have such a level playing field. This inequality is laid down in the Protocol on the Privileges and Immunities of the European Union (PPI), which was drafted as far back as 1965.¹³⁷ Article 9(a) PPI governs that members of the European Parliament enjoy the same immunities as accorded to members of their national parliament in their own state. *Within* the European Parliament, it provides equal legal protection to the members, by way of Article 8 PPI. As a result of this arrangement, members are not equally protected. Because representation takes place increasingly outside Parliament's premises (see above), they are even not equally protected when they engage in political activities.

The current immunity provisions undermine the capacity of members of the European Parliament to represent and reach out to *all* Union citizens, and certainly hamper their formal representative claim to do so. Moreover, the PPI infringes on the idea of institutional unity.¹³⁸ The European Parliament is therefore determined to change the Protocol. Since the Treaty of Amsterdam, it is formally empowered to draft and lay down the statute for its members, from which immunity provisions are not excluded. However, as long as the 1965 PPI is in force, which is a Treaty Protocol and therefore constitutes primary law, this has priority over any piece of secondary

136 Section 1.1.

137 See Chapter 5, section 2.1.

138 Section 3.

law.¹³⁹ Parliament's power to amend this situation is thus very limited as long as the member states have not revised the Treaty.

This chapter has nonetheless shown that the European Parliament has accomplished relevant changes in the past years, making the legal protection of its members more similar. It did so by building on powers that it was given for different purposes. The most important ones in this regard are Parliament's right to decide on waiver requests and its right to lay down its own Rules of Procedure.¹⁴⁰ Section 4 described Parliament's consecutive decisions in detail, which showed two different approaches. Initially, the European Parliament protected its members from prosecution for statements made outside Parliament by refusing to waive their immunity, as it may do according to Article 9 PPI.¹⁴¹ It thus sought to make their legal status more comparable *de facto*. In more recent years, Parliament has opted to re-interpret Article 8 PPI.¹⁴² Article 8 PPI provides an equal Union immunity to all members. The modern interpretation has it that the protection of Article 8 PPI covers all duty-related actions, even when they take place in a member's home country. By subsequently amending its Rules of Procedure, the European Parliament created a legal basis to inform the national courts of its opinion in individual cases.¹⁴³ The Court of Justice has confirmed that by virtue of loyal cooperation between the institutions, the national courts are bound to take this advice into account.¹⁴⁴ It did not regard intervention by the European Parliament in principle inappropriate. Hence, it means that even for actions undertaken in a member's home state, the national courts may be asked to respect the immunity of members of the European Parliament by virtue of Article 8 PPI. The case of *Patriciello* demonstrates that, to a limited extent, the legal protection of members has been harmonised.¹⁴⁵

The chain of decisions described above shows how the European Parliament tries to overcome members' dependence on national legislation as much as possible. With virtually no formal rule-making powers from the start, it has managed to ensure that members from different European political parties and from different countries can debate, participate in demonstrations, and engage in other political activities on a more equal footing. It enables them to represent *Union citizens*.

139 Section 2.4.

140 Section 2.4.

141 Section 4.2.2.

142 Section 4.2.2.

143 Section 4.1.

144 *Alfonso Luigi Marra v Eduardo De Gregorio and Antonio Clemente* (n 55) para 42.

145 Section 4.2.2. *Patriciello* (n 133).