Research on MP's Immunity in Georgia

At present the issue of MPs' immunity is quite urgent in our country. It should be remarked that the public opinion about this question is rather ambiguous: Some think that the current model of immunity is optimal and it should remain unchanged; others believe that the degree and scope of immunity is too high and it should be limited, while there are people who see immunity only as the means of promoting criminalization of politics, which should be waived altogether.

I think that before discussing the degree and scope of immunity it must be decided whether enjoyment of immunity by MPs is reasonable.

Hence, it would be reasonable if we briefly dwelt on the history of the institution of immunity.

The immunity of MPs, dating from the 17th century England, was later reflected in the constitutions of all democratic countries. This issue is as old as the issue of separation of powers. Moreover, they are directly connected with each other. The immunity of MPs is fully conditioned by the principle of checks and balances and division of responsibilities between legislative and executive powers. This means that the legislative power is endowed with a very significant function – as the body responsible for legislative drafting it determines the rules of play. However, it hasn't got repressive mechanisms to implement these rules. On the other hand, the executive power, not being able to define the rules of play, has the real authority as it can use repressive mechanisms (law enforcement bodies, armed forces etc.). So, there is a certain kind of starting balance between the two branches of power, without which none of these branches can function independently, moreover, they even can't exist without cooperating with each other. Notwithstanding such balance, there is a danger that one of the branches of power may go beyond its scope and interfere in the competence of the other. In order to prevent upsetting of the balance each branch of power should have the mechanism of controlling and checking the other's activities. For Parliament such mechanism is the authority to exercise parliamentary control over the executive power and to inform the public of the facts of violation discovered by it while performing its function, also the authority to form public opinion, to make the violators answerable etc. For full enjoyment of the above authorities the MPs should have the legislative guarantees of security, that is the immunity against possible violence from the executive power. However, like the reverse of the medal, this institution also has its negative side: syndrome of irresponsibility in particular MPs and abuse of power by them; attempts of criminal element to become MPs and while enjoying immunity avoid responsibility for the committed crimes, or at best to use their status to obtain indulgence.

Unfortunately, the mankind often has to choose between bad and the worse, i.e. to choose the lesser of two evils. Therefore, in spite of many negative features of the immunity of MPs, existence of checks and balances between different branches of

power is so important for the public that there can be no doubt about its necessity, although the form and degree of immunity can be a subject for discussion.

According to the general practice we could mark out two main elements of the MP immunity:

1. Relieving MPs of responsibility for the opinions expressed by them while voting or exercising their authority. This element is similarly reflected in constitutions of almost all the democratic states of the world and although this guarantee has the qualities of an absolute right, it does not seem to cause controversy.
2. Immunity, criminal prosecution against MPs is not permissible without the Parliament's permission even if the acts committed by MPs are not connected with exercising of their authority.

Since there is not much controversy over the first element of immunity we will dwell on the second one. The difference in interpretation of this element by constitutions of different countries lies mainly in the period of validity and degree of defense.

The difference in the validity period of immunity is conditioned by the character of a judicial system. According to the judicial system of the Continental Europe MPs enjoy immunity during the entire period of their tenure, while the Anglo-Saxon model grants immunity to MPs only during the parliament session, or while they are heading to the session or returning from the session. However, this difference is rather relative since sessions in the countries with the second model are going during the whole year except short breaks and MPs enjoy immunity practically during the entire period.

As for the degree of immunity, difference is more obvious. What almost all countries have in common is that criminal prosecution against an MP is inadmissible without Parliament's permission. However, the exception from this rule is when an MP is caught committing a crime. In such cases the Parliament's consent is no longer necessary. But this rule also differs according to countries, e.g. in some countries (Italy, Spain) an MP caught committing a crime is deprived of Parliament's protection, although in other countries (France, Germany) an MP that is caught committing a crime can be released from prosecution if this is required by the Parliament's decision. This surely means the higher degree of immunity for MPs, although in this regard the Constitution of Georgia has gone even farther than that.

Under Section 2, Article 52 of the Constitution of Georgia "bringing an criminal action against a Member of Parliament, his detention or arrest, or the search of his person or place of residence, is permissible only with the consent of the Parliament, except in cases where he is caught committing a crime. In such a case Parliament must be notified immediately. If Parliament does not agree to the Members detention or arrest, he must be released immediately." Thus, according to the Constitution of Georgia Parliament's consent is necessary even in cases when an MP is caught committing a crime. Such consent is expressed through the Parliament's decree and if the decree does not get enough votes the detained or arrested MP should be released. This means that if in France a detained or arrested MP can be released only as a result of active participation of the legislative body (at its request), in Georgia a passive attitude (failure to adopt a decree) of Parliament is enough for the same purpose.

Existence of such model of MPs immunity in the Georgian Constitution is conditioned by certain historical factors. In 1992-1995, the period when the Parliament of that time adopted the current Constitution, there were cases when some Members of Parliamentary Opposition were arrested. The immunity of an MP was in force even then and the Parliament's consent was necessary in order to arrest or detain an MP, except the cases of catching an MP committing a crime. The above MPs were arrested on the ground of catching committing a crime and it became impossible to release them notwithstanding great efforts of the Opposition. The Constitution of Georgia was adopted as a result of consensus between MPs, as at that time there was no constitutional majority in Parliament and it was not possible to adopt the Constitution without the votes of Opposition. Moreover, the situation was such that neither the Government (without full mobilization, which then was rather problematic) nor the Opposition had the majority necessary for adopting even a simple decision. Hence there were cases when during long periods the Parliament couldn't adopt any resolutions. So it is not surprising that while adopting the Constitution the MPs voted for such model of immunity that would be maximally acceptable for the Opposition.

However, many things have changed since then. Today the Parliament is stronger as well as democratic institutions, particularly free mass media and the third sector. Therefore the results of such a strong immunity for MPs are rather negative than positive. The current model encourages the attempts of criminals to become MPs and in MPs causes the syndrome of impunity and irresponsibility to the public. All this is promoted by the low level of legal culture in the country, as well as the so-called "collegial approach", when MPs don't vote for waiver of immunity just because their colleagues are involved. This approach is also supported by the fact that the passive position of Parliament is enough for release of an MP caught committing a crime. MPs can miss the Parliament sessions on ballot days or attend the sessions but not participate in voting. This will cause failure of decision because of absence of quorum and the MP who is (even justly) suspected or accused of a crime will be released or investigation of the case will be suspended, while the above-mentioned MPs will always find a good excuse for not expressing their position publicly.

In view of the above circumstances and the situation in our country it would be reasonable to change the present model of MPs' immunity and replace it by the French or German model. We would suggest the following version of Section 2, Article 52 of the Constitution:

"Bringing an action against a Member of Parliament, his detention or arrest, or the search of his person or place of residence, is permissible only with the consent of the Parliament, except in cases where he is caught committing a crime. In such a case Parliament must be notified immediately. The detained or arrested MP will be released immediately if it is required by the Parliament' decree".