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Review paper

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POLITICAL IMMUNITY AND LEGAL LIABILITY

ABSTRACT

At present, the political scene in Romania is characterized by turmoil that has led to an increase in the level of verbal aggression or violence and some politicians have resorted to actions that violated criminal, misdemeanour or civil law. If persons other than those acting in their capacity as politicians had committed such acts, accountability in any of its variants would have followed its natural course. In the case of politicians holding public office, however, it seems that the reaction of the judiciary seems to be either restrained or non-existent because of the political immunity they enjoy. As political immunity does not mean the granting ab initio of a general amnesty for politicians, an up-to-date analysis is needed of what political immunity is and what it represents, its place and role in public and legal life, its limits, when politicians can be held liable in any of the above-mentioned forms, the effectiveness and efficiency of this liability, in order to make the necessary legal and approach corrections.

Keywords: *political immunity; criminal liability; contravention liability; civil liability.*

1. INTRODUCTION

In a democratic society, its members act in the knowledge that their anti-social acts attract their liability. As a result, this paper will begin with a punctual analysis of liability, i.e. the forms of legal liability, with an emphasis on criminal liability. In the same society, its members have established that there are persons who exercise certain functions and who, in order to carry out their duties freely and unhindered, need to benefit from a certain protection. This category includes politicians, who enjoy immunity, which comes into play under certain conditions, has certain limits and requires certain steps to be taken, all of which will be discussed in the second part of this paper, with a view to placing it properly, where appropriate, alongside and among the other legal institutions.

2. LEGAL LIABILITY

2.1. Concept

With reference to liability in general, in an older work¹ it was explained that when a willful wrongful act is committed and another person has been injured in his physical or moral being or in his property, bearing the consequences of this injury is the issue of liability. This is described as the reaction triggered by an action which society at the place and time of its commission considers condemnable. Each ruling class imposes on society ethical rules of conduct which pass into the moral conscience of society and, through its medium and pressure, into the conscience of the people of that society. When a wrongful act violates the moral rules of conduct accepted by the social conscience it brings reprobation from the social circle in which the act took place. On the other hand, the perpetrator may also have regrets or remorse about the act committed, because their conscience is shaped by the social environment reflecting the morals of that society, which gives rise to moral responsibility. Moral liability differs from legal liability in that the former is based on the violation of obligations that have no correlative rights and cannot be sanctioned by means of state coercion. In the latter case, the sanction lies in the offender's conscience and possibly takes the form of a reaction of disapproval on the part of the community. Legal liability, however, can be discussed only with the emergence of the state and of the law, when the reaction to conduct contrary to the rules of conduct takes an increasingly organized form, which implies the possibility of recourse to state coercion.

As mentioned above, any subject of law, whether we are talking about a private individual in relation to his fellow human beings, the state in relation to its subjects or other states, must answer for their acts by bearing the consequences of the undertaken commitments or the breach of legal duties. In this form, liability is similar to responsibility as a general principle of law, representing the general framework for its realization. Some of its defining features are better highlighted if we compare liability with other legal institutions. Thus, for example, legal liability also implies guilt, conduct contrary to the law, whereas political liability is not incurred because of violations of the law. Even if liability means an obligation to make reparation, it is not the same as punishment as an effect of responsibility, because of the difference between them and then, because the first objective is to restore the situation to that prior to the act, to erase, to remove all consequences, and only in the subsidiary is there a pecuniary reparation. There is

¹ Eliescu, M., *Răspunderea civilă delictuală*, Academiei R.S.R., București 1972, pp. 6-8; see also Popa, N., *Teoria generală a dreptului*, C.H. Beck, București 2008, pp. 234-236; Vida, I.; Vida, I., C., *Teoria generală a dreptului*, Universul Juridic, București 2016, p. 174.

a difference between liability and sanction, the former being a pre-sanctions phase and the latter being a materialization of the consequences of liability.²

Legal liability has been defined as a relationship established by a legal norm between the perpetrator and the state, represented by the public authorities, which may include courts of law, state officials or other agents of public power. Legal liability is based on the violation of legal rules, which contain legal sanctions, and the legal sanction is therefore both a prerequisite for the institution of legal liability and its object. In these circumstances, legal liability is a legal framework for the realization and embodiment of the legal sanction. It is within this framework that the legal sanction is applied, which may consist in the restitution of a thing, the annulment of an act, reparation for damage or even the imposition of a penalty.³

2.2. Forms, principles, conditions

Taking into account a number of factors considered to be interdependent and interfering, such as the social values affected, the type of legal rule infringed, the degree of social danger of the act, the culpability of the perpetrator and so on, we can distinguish several forms of legal liability, which are somehow specific to each branch of law. If we were to establish an order, the first would probably be constitutional or politico-legal liability. It results from failing to comply with certain obligations contained in constitutional rules, such as those addressed to the President, the Parliament, the Government or their members. Criminal liability arises as a consequence of the commission of an offence, i.e. by infringing criminal rules, and entails the application of a penalty necessary to restore the order of law and even the authority of the law. Civil liability can be found in civil law, with two components, namely tortious and contractual, both based on the idea of compensation for damage caused by a person's actions. Tortious civil liability covers the obligation to compensate for the damage caused by a wrongful act, whereas in the case of contractual civil liability, the obligation breached is a concrete obligation that is outlined in a valid contract concluded between the aggrieved party and the party who has entered into the contractual obligations. Then there would be administrative liability, with several variants. One of them would be the contraventional liability generated by the commission of a contravention, an anti-social act of less serious gravity than the crime, committed with culpability. Another form of administrative liability is that of the state

² Dănișor, D.; C., Dogaru, I.; Dănișor, G., *Teoria generală a dreptului*, Ed. 2, C.H. Beck, București 2008, pp. 537-538; for the distinction between liability and responsibility see also Vida, I. *et al.*, *op. cit.* note 1, p. 174.

³ Craiovan, I., *Tratat de teoria generală a dreptului*, Universul Juridic, București 2015, p. 501; for a different approach to the issue see also Vida, I. *et al.*, *op. cit.* note 1, pp. 174-176.

administration for damage caused by unlawful administrative acts. The pecuniary liability of the State and of magistrates, who have acted in bad faith or gross negligence, for damage caused by judicial errors. Disciplinary liability is another component of administrative liability for acts which constitute misconduct rather than contraventions. Developments in society naturally lead to the emergence of other forms of liability, such as environmental liability, known as *ecological liability*, but the list is still open.⁴

Even if there are different forms of legal liability, they are all based on several common principles, including the legality of legal liability, personal liability, imputability, uniqueness and individualization.⁵ At the same time, the incurring of any form of legal liability is subject to the fulfillment of certain conditions. Among them we find: unlawful conduct which is an action or inaction that contravenes legal rules; the harmful result is that element that causes damage to society as a whole or only to a specific individual, harming social values; the existence of a causal relationship between the act and the result is given by the generation of the result by the unlawful act; guilt designates the subjective side of the breach of law, given that acts of human nature are characterized not only by material features but also represent a manifestation of will and conscience; the non-existence of certain circumstances which in principle preclude legal liability has the effect of exonerating the person from further punishment.⁶ Because criminal liability is the harshest form, attracting also the most serious possible sanction in most democratic systems (life imprisonment), in the next section I will point out some of its particularities.

2.3. Criminal liability

Criminal liability, as a form of legal liability, is the consequence of not complying with the provision of the criminal law. As such, it arises only as a result of the commission of an offense and is realized in the criminal legal relationship through the activity of the subjects of that relationship, who are the holders of correlative rights and obligations. Criminal liability has several specific features. For a start, the unlawful act must be criminal in nature and constitute an offense. Then, the subjects of criminal liability are the State and the offender, the former creates the legal constraint to apply and ensure the realization of the legal sanction. The last one is to bear the consequences of the act committed by applying and enforcing

⁴ Craiovan, I., *op. cit.* note 3, pp. 502-508; Dănișor, D. *et al.*, *op. cit.* note 2, pp. 538-541; Popa, N., *op. cit.* note 1, pp. 236-237; Vida, I. *et al.*, *op. cit.* note 1, pp. 176-181.

⁵ Craiovan, I., *op. cit.* note 3, p. 508.

⁶ Craiovan, I., *op. cit.* note 3, pp. 508-510; Dănișor, D. *et al.*, *op. cit.* note 2, pp. 542-543; Popa, N., *op. cit.* note 1, pp. 237-239; Vida, I. *et al.*, *op. cit.* note 1, pp. 181-183.

the sanction. At the same time, the content of the legal relationship of criminal liability, consisting of the correlative rights and obligations of the subjects, contains the right of the state to hold the offender criminally liable and the obligation to punish him, the obligation of the offender to answer for the offense committed, to execute the sanction imposed, and the right to answer and be punished within the limits of the law. Lastly, the legal relationship of liability is the sanction imposed by the State for the unlawful act committed, with criminal sanctions being the most serious form of legal constraint.⁷

The principles underlying criminal liability are also different from other forms of liability and concern the following facts. First, the offense is the sole basis of criminal liability, according to which criminal liability can be incurred only in the case of the commission of a crime, and not in the case of an anti-social act, unlawful act, act provided for by criminal law. Second, the personality of criminal liability directs it to the person who participated in the commission of the crime. Third, the uniqueness of criminal liability is where the commission of a crime entails only once the application of the criminal sanction provided for by the criminal law for it. Then, we have the celerity of criminal liability which aims at reducing the time between the act and the sanction. Next is the inevitability of criminal liability, based on the rule that the commission of the crime always entails criminal liability, the exceptions being limited. After that, there is the individualization of criminal liability, meaning adapting the punishment to the act and the person. Last but not least, the prescriptibility of criminal liability which is based on the fact that, as a rule, the passage of a certain period of time makes it no longer of interest to be held criminally liable, the exceptions being limited here as well.⁸ Although Art. 16 para. 1, 2 of the Constitution of Romania (*hereinafter CR*) states that "(1) *The citizens are equal before the law and public authorities, without privileges and without discrimination. (2) No one is above the law*",⁹ certain persons, however, because of the public functions they hold, benefit from a certain preferential treatment, which does not necessarily mean that criminal liability is removed, but that it is made more difficult. This preferential treatment is known in current parlance as immunity.

⁷ Pascu, I., *Drept penal. Partea generală*, Ed. a 2-a, Hamangiu, București 2009, pp. 323-325; see also Pașca, V., *Drept penal. Partea generală*, Ed. a III-a, Universul Juridic, București 2014, pp. 387-390; Lefterache, L., V., *Drept penal. Partea generală*, Ed. a 4-a, Hamangiu, București 2024, pp. 646-648; Hotca, M., A., *Manual de drept penal. Partea generală*, Universul Juridic, București 2024, p. 561.

⁸ Pascu, I., *op. cit.* note 7, pp. 326-329; some authors have approached three of the principles as conditions of criminal liability, in which sense see Pașca, V., *op. cit.* note 7, pp. 391-392.

⁹ The Romanian Constitution can be consulted in full at <https://www.presidency.ro/ro/presedinte/constitutia-romaniei>, February 20, 2025.

3. POLITICAL IMMUNITY

3.1. The concept

Given that from an etymological point of view immunity is considered to be a set of rights or privileges enjoyed by certain categories of persons,¹⁰ for the sake of a precise understanding of immunity, I will turn to works that provide explanations on the fundamental law where immunity is regulated first. It is laid down in Art. 72 of the RC, but here, as we shall see in the next section, its effects and the procedure it generates are regulated, in a somewhat natural way. However, the explanations provided on this article¹¹ state that parliamentary immunity is a form of defense, but also a guarantee that deputies and senators will be safe from the executive power which would resort to attempts to intimidate, threaten and sanction parliamentarians for the way in which they exercise their mandate, or, in other words, the executive cannot bring criminal or misdemeanour proceedings against them unless certain conditions are met. However, through Art. 20 para. 1 of Law No. 96/2006 on the status of deputies and senators¹² it has been stated that *"The parliamentary immunity is the set of legal provisions that provide deputies and senators with a legal regime derogating from ordinary law in their relations with the judiciary and in order to guarantee their independence"*, which essentially comprises the elements outlined above. Although the above data refer to parliamentary immunity, a form of political immunity, the definition of parliamentary immunity can also be transferred to the concept of political immunity, with the proviso that it covers not only members of parliament but also the president of the republic and members of the Government.

3.2. Forms

Depending on the criteria to be used, immunity can take several forms, such as immunity under domestic or international law, absolute or relative, functional or extra-functional. In order to remain within the scope of the subject, we will concentrate on immunity under domestic law, although some authors distinguish

¹⁰ Academia Română, Institutul de lingvistică "Iorgu Iordan – Al. Rosetti", *Dicționarul Explicativ al Limbii Române*, Ed. a 2-a, rev., Univers Enciclopedig Gold, București 2009, p. 496.

¹¹ Ionescu, C.; Dumitrescu, C., A., (coordonatori), *Constituția României. Comentarii și explicații*, C.H. Beck, București 2017, p. 775; see also Ionescu, C., *Tratat de drept constituțional contemporan*, Ed. 3, C.H. Beck, București 2019, p. 1179.

¹² The full text of the law can be consulted at <https://legislatie.just.ro/Public/DetaliiDocument/71194>, February 20, 2025.

between immunity under substantive criminal law and procedural immunity, depending on the criminal matters in which they are involved.¹³

3.2.1. Parliamentary immunity

Through Art. 72 CR,¹⁴ where it is stated that *"(1) Deputies and senators cannot be held legally liable for votes or political opinions expressed in the exercise of their mandate. (2) Deputies and Senators may be prosecuted and brought to criminal trial for acts unrelated to votes or political opinions expressed in the exercise of their mandate, but may not be searched, detained or arrested without the consent of the Chamber to which they belong, after hearing them. Prosecution and criminal proceedings may be brought only by the Public Prosecutor's Office of the High Court of Cassation and Justice. The High Court of Cassation and Justice shall have jurisdiction. (3) In cases of flagrante delicto, Members of Parliament or Senators may be detained and searched. The Minister of Justice shall promptly inform the President of the Chamber of Deputies of the detention and search. If the Chamber of Deputies finds that there are no grounds for detention, it shall immediately order the revocation of the measure."*, the first of the forms of immunity is regulated, excluding the liability of parliamentarians, whether deputies or senators, for the votes or political opinions they express in the exercise of their mandate. With regard to the forms of legal liability excluded, it was considered¹⁵ that the legal text refers to criminal, civil or misdemeanour liability, not disciplinary liability, which arises in the event of misconduct of this nature.¹⁶ Immunity takes effect when parliamentarians have to vote, and as the law does not make any distinction, I consider that it concerns any procedure in which a vote is taken. As far as the political opinions covered by immunity are concerned, these are speeches, expressions of positions in meetings of specialized committees, of the chambers, statements of a political nature, questions and interpellations addressed to members of the Government, in parliamentary inquiries, interaction with other state institutions, that is to say everything that involves the exercise of the function of parliamentarian and the performance of the duties of the legislature. It must be emphasized, however, that it is also important that there is a close link between the votes and opinions expressed and the exercise of the parliamentary

¹³ Streteanu, F.; Nițu, D., *Drept penal. Partea generală*, Universul Juridic, București 2014, pp. 233-235.

¹⁴ See the full text at <https://www.presidency.ro/ro/presedinte/constitutia-romaniei>, February 20, 2025.

¹⁵ Ionescu, C. *et al.*, *op. cit.* note 11, p. 775.

¹⁶ For disciplinary misconduct of parliamentarians see also Țiclea, Al., *Răspunderea disciplinară. Teorie și jurisprudență*, Universul Juridic, București 2014, p. 48.

mandate, otherwise immunity does not come into play¹⁷. As such, I share the views¹⁸ that political opinions which are not related to the exercise of a parliamentarian's mandate are not covered by immunity, for example, opinions expressed within party structures or meetings in which the parliamentarian participates as a member of that party. The same applies to opinions expressed in statements and press conferences, interviews and broadcasts which do not relate to his or her duties but to general or specific political issues. Opinions expressed by members of parliament in public meetings with the population of the constituencies in which they stand as a candidate or with members of the public are also considered to be outside immunity. Nor are political opinions expressed by members of the parliament before the courts protected by immunity. Also, if parliamentarians in their speech defame the country, incite discrimination and territorial separatism, use slander or insults, these opinions attract legal liability because they exceed the constitutional framework that protects them. On the other hand, if the presiding officers or secretaries of the chambers perform their duties in bad faith, their actions attract legal liability. As far as gestures are concerned, it was considered that they do not amount to the expression of a political opinion and therefore, as they are often reprehensible, they attract legal liability when they are made.

In the doctrine¹⁹ a judicious distinction has been made between political opinion and political statement. Thus, the formulation of an opinion is a fact of conscience, the result of thought, of a value judgment and expresses its content, which depends on the quality of thought and is influenced by the person's degree of culture and education. An opinion is the natural result of political reflection, of a subjective assessment of a political fact or event. A political statement, however, contains a statement, an observation, a public assertion of political nature and concerns an event or conduct of this kind. This form of manifestation is more a statement of a fact or an event and is not a value judgment or the result of reflection or reflection. Because the two forms of expression are distinguished more by intrinsic elements of the author, they may overlap or intertwine, and it is sometimes difficult in practice to determine whether it is an opinion or a political statement, I am of the opinion that, by confusion, political statements will be considered as opinions and under the protection of immunity, even though they are not mentioned in the constitutional text.

With regard to the temporal scope of immunity, a legal problem arises from the content of Art. 222 of the Rules of the Chamber of Deputies (*hereinafter the RCD*),

¹⁷ Ionescu, C., *op. cit.* note 11, p. 1178.

¹⁸ Ionescu, C. *et al.*, *op. cit.* note 11, pp. 776-780; Ionescu, C., *op. cit.* note 11, pp. 1184-1185.

¹⁹ Ionescu, C. *et al.*, *op. cit.* note 11, pp. 780-783.

which stipulates that "*Deputies have parliamentary immunity, in accordance with the provisions of Art. 72 of the Constitution of Romania, republished, from the date of issuance of the certificate proving the election, subject to validation and the swearing of the oath of allegiance to the country and the people.*",²⁰ which extends the protection of immunity from the moment of the issuance of the certificate of election, if the mandate is validated and the oath of allegiance has been sworn, although until the legal meeting of the Chamber of Deputies, members of the parliament cannot exercise their mandate. By this legal text, immunity acquires a kind of retroactive effect, it is established by the validation of the mandate and the taking of the oath, but it would also cover the period from the moment of the issuance of the certificate of election until the first meeting of the Chamber of Deputies. Concerning this issue, in some disagreement with the opinions expressed in the legal doctrine,²¹ I consider that Art. 222 of the RCD, being contrary to Art. 72 of the RC, can be applied only within the limits set by the latter, and therefore any conduct of members before the start of their term of office is outside the protection of immunity. Moreover, during this period, the non-compliant conduct could consist only in the expression of political opinions, since it is not possible to talk about the expression of a vote during this period. Any argument of a philosophical nature pales before the supremacy of the constitutional rule and we have not identified any viable legal argument to apply the RC provisions differently from what they state. On the other hand, it is important to emphasize that Art. 192 para. 1 of the Rules of the Senate (*hereinafter the RS*) which states that "*Senators enjoy parliamentary immunity for the duration of their term of mandate.*",²² although it refers to parliamentary immunity, does not add to the constitutional norm, it does not extend it, as the RCD does, as such, at least apparently, there is a difference in the extent of the immunity of deputies, compared to that of senators who are at a disadvantage. These aspects have also been emphasized by some criminal doctrine.²³ First, it was pointed out that Art. 72 para. 1 RC establish a substantive criminal immunity under which Members of Parliament can never be held criminally liable for the votes they cast, and this immunity operates even after the end of their mandate, being a functional immunity. On the other hand, it has rightly been argued that immunity does not apply to offenses committed in connection with the exercise of the right to vote. As for the other component of the activity under the protection of immunity - the

²⁰ The full text of the Regulation can be consulted at <https://legislatie.just.ro/Public/DetaliiDocument/67896>, February 21, 2025.

²¹ Ionescu, C. *et al.*, *op. cit.* note 11, p. 776.

²² The full text of the Regulation can be consulted at https://www.senat.ro/pagini/reg_sen/REG_SENATULUI_republicare_ianuarie_2025.htm, February 21, 2025.

²³ Streteanu, F.; Nițu, D., *op.cit.* note 13, pp. 239-242; in a similar but narrower sense see also Rusu, M., I., *Drept penal. Parte generală*, Hamangiu, București 2014, p. 115; Pașca, V., *op. cit.* note 7, pp. 128-129; Hotca, M., A., *op. cit.* note 7, pp. 146-147.

expression of opinions, although a somewhat broader term is used in the approach to the issue, namely, taking positions related to parliamentary activity, however, the explanations highlight that it is essentially the same thing, protection is not offered if the facts are outside the duties of the parliamentarian. The example that needs to be mentioned here is an insulting speech against a minister that would fall under the offense of abusive behaviour under Art. 296 para. 1 of the Criminal Code, which stipulates that *"(1) The use of insulting expressions towards a person by another one in the performance of their duties shall be punishable by imprisonment from one month to 6 months or a fine. (2) Threatening or striking or other violence committed under the conditions of para. (1) shall be punishable by the penalty prescribed by law for that offense, the special limits of which shall be increased by one third."*²⁴ Slightly debatable is the view that less serious acts which could be characterized as abusive conduct, public incitement, incitement to hatred or discrimination may be covered by immunity to the extent that they were committed in the exercise of the parliamentarian's duties, since I am of the opinion that anything which goes beyond the exercise of the mandate and meets all the conditions for criminal liability renders the institution of immunity ineffective. Moreover, Art. 72 para. 2, first sentence of the RC makes it very clear that members of the parliament may be prosecuted and brought to criminal trial for acts that are unrelated to the votes and political opinions expressed in the exercise of their mandate, without any further clarification. In this sense, the Constitutional Court of Romania (hereinafter: the CCR) has also ruled in this sense, which by Decision No. 96/2002²⁵ established that these provisions, being derogations from the ordinary law in order to protect the parliamentarian in order to enable him to perform his duties and his entire activity in good conditions, cannot be interpreted in a broad sense. It was also pointed out²⁶ that the practice of the European Court of Human Rights (hereinafter: the ECtHR) is along the same lines, essentially establishing that immunity is not absolute, that there must be a close link between parliamentary activity and the acts alleged against a parliamentarian, in the sense that parliamentary immunity cannot cover reprehensible acts committed by a member of parliament outside his parliamentary activity. The reason is that this would amount to restricting, in a manner incompatible with Art. 6 para. 1 of the European Convention on Human Rights (hereinafter: the ECHR), of the right of access to a court of law for private individuals, whenever a member of the parliament makes defamatory statements outside parliament and unconnected with his or her work.

²⁴ See the full text at <https://legislatie.just.ro/Public/DetaliiDocument/109855>, February 25, 2025.

²⁵ See the full decision at <https://legislatie.just.ro/Public/DetaliiDocument/35861>, February 25, 2025.

²⁶ Bărsan, C., *Convenția europeană a drepturilor omului. Comentariu pe articole*, Ed. 2, C.H. Beck, București 2010, pp. 464-466.

As for the other form of immunity, it is considered to be one of criminal procedural law, regulated by Art. 72 para. 2 RC and is intended to follow an exceptional procedure to be followed in the event of the commission by members of the parliament of any offenses not covered by substantive immunity. Moreover, I support the view that, unlike the former, this form of immunity is lost once the parliamentary mandate ends. The division of parliamentary immunity into the two forms of substantive law and criminal procedural law, although it is of great help in avoiding confusion between genuine, true, real immunity, as provided for in Art. 72 para. 1 RC and, I would say, procedural conditions, which are also considered to be an immunity, is questionable. That is because the latter is not in essence an immunity, but procedural mechanisms to guarantee the former, which are derogatory in nature from those laid down by criminal procedural law as a whole. In other words, I consider that the parliamentarian enjoys full immunity for all the acts expressly and imitatively mentioned in Art. 72 para. 1 RC, and the sorting out of the acts that fall within the scope of immunity or not, is carried out by each chamber (an activity not expressly specified in the RC), which also have the role of authorizing or not the search, detention or preventive arrest of members of the parliament (an activity expressly specified in Art. 72, paras. 2, 3 RC). As such, once the chambers have decided that the act of a particular member of parliament is not one of those referred to in Art. 72 para. 1 RC and immunity is lifted, he or she may be held legally liable in any of its forms without further formalities except for the criminal ones characterized by some additional steps, previously presented.

It is true, however, that both the constitutional text and the texts of the two rules of procedure of the Chambers of Parliament are slightly deficient, focusing on the procedure of criminal or misdemeanour liability, leaving other forms of legal liability out of account. Nevertheless, if there was no examination of the acts that a parliamentarian is accused of having committed, and the Chambers did not decide to waive immunity, the constitutional provision would be devoid of content and effective practical application. Therefore, if someone were to sue a parliamentarian with a view to holding them liable in tort (when, for example, from the rostrum of the Chamber of Deputies, they state that things are going badly in a particular ministry because the minister is corrupt), I am of the opinion that the court, ex officio or at the request of the interested party, should address the Chamber of which the parliamentarian is a member. That way, through the Standing Bureau, the Legal Committee and then the plenary of the Chamber, it can be determined whether or not the act is covered by parliamentary immunity, which can only be decided by each chamber and not by any other state body, institution or authority.

3.2.2. The immunity of the President

Art. 84 para. 2 RC states that *"The President of Romania shall enjoy immunity. The provisions of Article 72(1) shall apply accordingly."*²⁷ On the basis of these legal provisions, it has been considered²⁸ that the President enjoys parliamentary immunity, with the proviso that he is not exempt from any kind of liability for decisions taken or for acts or actions carried out outside his constitutional and legal functions, and as such does not enjoy total or absolute immunity, as would appear from a first reading of the constitutional text. Criminal doctrine²⁹ has expressed the view that the immunity of the President cannot be considered either general or absolute, nor can it be limited to mere opinions expressed in the exercise of the mandate, considering that it is a general and perpetual functional immunity that covers acts arising from the totality of presidential powers that operate even after the end of the mandate.

If we take the legal text as a starting point, the issue of the President's immunity appears to be a simple one, and the above mentioned issues regarding parliamentary immunity are applicable here as well. Still, the differences between the two institutions (functioning, powers, organization etc.) raise several issues for which there are no regulations in the fundamental law or in the rules of the Chambers, which is why discussions arise. One of these concerns the liability of the President in the case of acts and deeds involving the exercise of state power, on which the view has been expressed³⁰ that in the case of such powers only political liability could be incurred and not criminal liability, which could be incurred only for high treason under Art. 96 of the Constitution, and that in other situations, even if the President commits offenses, although in theory criminal liability could be incurred, there is no procedural framework that establishes the procedures to be followed to facilitate this.

In another point of view,³¹ it was not accepted that in the case of offenses not covered by immunity, the provisions of indictment of the President for high treason would apply by analogy, but it was considered that the President during his term of office can only be held criminally liable for the crime of high treason and not for other crimes that could be subject to criminal proceedings after the end of his

²⁷ See the full text at <https://www.presidency.ro/ro/presedinte/constitutia-romaniei>, February 20, 2025.

²⁸ Ionescu, C. *et al.*, *op. cit.* note 11, p. 892; see also Ionescu, C., *op. cit.* note 11, pp. 1218-1219.

²⁹ Streteanu, F.; Nițu, D., *op.cit.* note 13, p. 236.

³⁰ Ionescu, C. *et al.*, *op. cit.* note 11, pp. 892-893.

³¹ Streteanu, F.; Nițu, D., *op.cit.* note 13, pp. 237-239; see also Hotca, M., A., *op. cit.* note 7, pp. 147-149; Pașca, V., *op. cit.* note 7, pp. 127-128; Rusu, M., I., *op. cit.* note 23, pp. 114-115;

term of office. It has been argued that the same applies to offenses committed by the President prior to the beginning of his term of office. The conclusion to be drawn from this would be that the substantive and procedural criminal immunity in respect of acts committed in the exercise of his functions is perpetual, with the exception of the crime of high treason, and that the procedural immunity in respect of other acts is strictly limited to the duration of the President's term of office, during which the limitation period will be suspended.

Although the opinions expressed are well reasoned, I believe that things should be approached from another perspective as Art. 96 RC which establishes that *"(1) The Chamber of Deputies and the Senate, in a joint session, with the vote of at least two thirds of the number of deputies and senators, may decide to impeach the President of Romania for high treason.*

(2) The proposal for impeachment may be initiated by a majority of the Deputies and Senators and shall be brought to the attention of the President of Romania without delay, so that he may explain the facts alleged against him. (3) From the date of impeachment until the date of removal from office, the President shall be suspended by operation of law. (4) The High Court of Cassation and Justice shall have jurisdiction. The President shall be automatically removed from office on the date of the final judgment of conviction."³² refers to impeachment. This is a special procedure that is triggered by Parliament if the President commits a specific offense, namely high treason under Art. 398 of the Criminal Code which provides that *"The acts provided for in Art. 394-397, committed by the President of Romania or by another member of the Supreme Council for the Defense of the Country, constitute the crime of high treason and are punishable by life imprisonment or imprisonment for 15 to 25 years and the prohibition to exercise certain rights."*³³. I consider that by the constitutional provision, it is established in concrete terms which is the body that can be referred for such an offense, how the suspension of the President by right, and finally his removal from office.

In addition, the President may also be suspended from office under Art. 95 RC which stipulates that *"(1) In the event of serious acts in violation of the Constitution, the President of Romania may be suspended from office by the Chamber of Deputies and the Senate, in a joint session, by a majority vote of the deputies and senators, after consulting the Constitutional Court. The President may give explanations to Parliament with regard to the acts alleged against him. (2) A proposal to suspend a Member from office may be initiated by at least one-third of the number of Members and Senators and shall be brought to the*

³² See the full text at <https://www.presidency.ro/ro/presedinte/constitutia-romaniei>, February 20, 2025.

³³ See the full text at <https://legislatie.just.ro/Public/DetaliiDocument/109855>, February 25, 2025.

immediate attention of the President. (3) If the proposal to suspend the President from office is approved, a referendum shall be held within 30 days at the latest to remove the President from office."³⁴ if serious acts have been committed in violation of the Constitution. The provisions of the two legal texts referring to the suspension of the President raise the question of whether the suspension of the President in fact means a waiver of his immunity in order to enable him to be held legally responsible. The way the rules are presented, it would appear either that the suspension of the President means a waiver of his immunity or that the institution of suspension automatically and directly entails a waiver of his immunity, in any case, once the President is suspended he is no longer protected by immunity. Then, the question arises, what would be those serious acts that violate the provisions of the Constitution, for example, causing a traffic accident by the President who personally drove his car and killed a person would be such an act? Art. 22 para. 1 of the RC states that "*The right to life and the right to physical and mental integrity of the person are guaranteed*",³⁵ therefore an act violating this right of a person may be considered to violate the Constitution and to be of a serious nature,³⁶ in which case I believe that the President may be suspended from office, his immunity removed and the President held criminally liable. Unfortunately, the provisions of Art. 95 RC do not contain a procedure like Art. 96 RC, under which the President is removed from office as of the date of the final judgment of conviction for the crime of high treason. Art. 95 RC stipulates that in this case, the consequence of the suspension of the President is that a referendum is to be held on his removal from office, i.e. the citizens entitled to vote are called upon to decide whether or not to end his term of office in this way.³⁷ Under these circumstances, I am of the opinion that only ordinary, minor offenses, which do not violate the RC, could be subject to criminal proceedings after the end of the mandate. This would also apply to acts of a non-criminal nature. It is for Parliament to examine the facts and decide on them on the basis of Art. 95 RC. The opinion I have expressed does not contradict and is not contradicted by the CCR Decision no. 678/2014³⁸ in which the Court has judiciously argued that the President of Romania, being elected by citizens with the right to vote in the exercise of his mandate, should enjoy immunity, which in its reasoning does not

³⁴ See the full text at <https://www.presidency.ro/ro/presedinte/constitutia-romaniei>, February 20, 2025.

³⁵ See the full text at <https://www.presidency.ro/ro/presedinte/constitutia-romaniei>, February 20, 2025.

³⁶ With reference to the aspect that the gravity of the facts must be proven and established, see CCR Decision No. 266 of March 21, 2004, which can be consulted in its entirety at https://www.ccr.ro/wp-content/uploads/2020/10/D0266_07.pdf, February 28, 2025.

³⁷ For other opinions, analysis and procedural details see also Ionescu, C., *op. cit.* note 11, pp. 1219-1230.

³⁸ The full decision can be consulted at <https://legislatie.just.ro/Public/DetaliuDocument/163602>, March 1, 2025.

discuss the situations that could arise under Art. 95 RC. On the other hand, I would also find it hard to believe that a President who committed a serious act, such as the one given as an example, which is in no way connected with the exercise of his mandate, would still have the legitimacy necessary to carry out his duties, and in such circumstances i believe that the solution is the one offered by Art. 95 RC.³⁹

3.2.3. Ministerial immunity

Since in Romania the Government is formed by a vote of confidence given by the Parliament to the government team, the Government will be mainly politically accountable to the Parliament for the way in which it has carried out the government program. Political accountability may also be supplemented by legal accountability, depending on the facts held against a particular minister. In this case the legal liability can be criminal and civil. Any form of liability implies guilt and punishment. In the case of political liability, the members of the Government are jointly and severally liable, guilt is established by a vote of the Members of Parliament, and the sanction may even be dismissal from the Government.⁴⁰

As far as the criminal liability of members of the Government is concerned, it has been pointed out⁴¹ that because ministers are not elected by the electoral body, they cannot benefit from an immunity similar to parliamentary immunity, which would give them full freedom in the exercise of their duties and at the same time protect them from any kind of threats, influence or interference from other public authorities or even from citizens. However, Art. 109 para. 2 RC which states that *"(1) The Government is politically accountable only to Parliament for its entire activity. Each member of the Government is jointly and severally politically accountable with the other members for the work of the Government and its acts. (2) Only the Chamber of Deputies, the Senate and the President of Romania have the right to request the criminal prosecution of members of the Government for acts committed in the exercise of their office. If prosecution has been requested, the President of Romania may order their suspension from office. The indictment of a member of the Government entails suspension from office. The High Court of Cassation and Justice shall have jurisdiction. (3) The cases of liability and the penalties applicable to members of the Government shall be regulated by a law on ministerial responsibility."*⁴² has provided a ministerial protection measure

³⁹ For further discussion of the serious offences referred to in Art. 95 RC, see Ionescu, C. *et al.*, *op. cit.* note 11, pp. 984-994.

⁴⁰ Ionescu, C. *et al.*, *op. cit.* note 11, pp. 1135-1137.

⁴¹ *Ibid.*, pp. 1140-1145.

⁴² See the full text at <https://www.presidency.ro/ro/presedinte/constitutia-romaniei>, February 20, 2025.

consisting in the right to request the criminal prosecution of a member of the Government for acts committed in the exercise of his office. The right of referral belongs to the Chamber of Deputies, the Senate and the President of Romania and can only concern a person who is a member of the Government. The protection measure is of an objective nature, representing a procedural constitutional guarantee aimed at safeguarding the public interest consisting in the realization of the act of Government through the exercise of the mandate.

Given that in the constitutional system in Romania members of the Government may hold such a position at the same time as deputies or senators, those deputies and senators who also fulfil the position of members of the Government will be criminally liable for acts that are not related to the exercise of their mandate as elected representatives of the people and may be criminally liable if the acts were committed in the exercise of their duties within the Government. In the case of such a person, it is necessary to determine whether his acts are connected with the exercise of his mandate as a parliamentarian or with the exercise of a ministerial function, and if the acts fall into the first category, his immunity should be waived in accordance with the above.

Returning to Art. 109 para. 2 RC, it follows from their content that the members of the Government are criminally liable only if the acts they are accused of are committed in the exercise of their ministerial function, *per a contrario*, for other acts the members of the Government will be liable according to the rules of ordinary law regardless of the position they hold within the Government, and liability may take any of the forms analysed above. Through Art. 8 of the Law no. 115/1999 which provides that *"(1) The following acts committed by members of the Government in the exercise of their office shall constitute offenses and shall be punishable by imprisonment from 2 to 12 years: a) impeding, by threat, violence or by fraudulent means, the exercise in good faith of the rights and freedoms of any citizen; b) presenting, in bad faith, inaccurate data to Parliament or to the President of Romania on the activity of the Government or of a Ministry, in order to conceal the commission of acts likely to harm the interests of the State. (2) The following acts committed by a member of the Government shall also constitute offenses and shall be punishable by imprisonment from 6 months to 3 years: a) unjustified refusal to submit to the Chamber of Deputies, the Senate or their standing committees, within 30 days of the request, the information and documents requested by them in the framework of the activity of informing the Parliament by the members of the Government, pursuant to Art. 110 para. (1) of the Constitution; b) issuing normative orders or instructions of a discriminatory nature on grounds of race, nationality, ethnicity, language, religion, social category, beliefs, age, sex or sexual orientation, political affiliation, wealth or social origin, of such a nature as to infringe human rights. (3) Attempting the acts referred to in para. (1) shall*

be punishable.”,⁴³ the offenses that entail the criminal liability of the members of the Government together with the corresponding punishments were established, these offenses have a specific character and are closely related to the ministerial activity. According to Art. 9 of the same law, if the offences do not fall within those provided for in Art. 8, the liability is a common law liability under criminal law.

The criminal doctrine⁴⁴ has held that members of the Government enjoy a procedural immunity for the duration of their term of office which, in relation to acts committed in the exercise of their office, in order to protect the office and not the office holder, requires a kind of authorization prior to the initiation of criminal proceedings. In addition to the above-mentioned forms of immunity, the immunity of the People’s Advocate, judicial immunity or family immunity have also been considered,⁴⁵ if we refer to domestic law, and, at the international level, those concerning diplomatic representatives, heads of state, representatives of an international organization, members of a foreign army, etc., but to deal with these would go beyond the subject I have set out to address here.

4. IMMUNITY IN EUROPEAN LAW

Just for the sake of giving a full outline to the issue addressed, I would like to point out very briefly at the end of the paper that immunity is also regulated by European legislation. For example, Art. 9 of Protocol No. 7 on the privileges and immunities of the European Union⁴⁶ states that during the sessions of the European Parliament its members enjoy the immunities accorded to members of their own parliaments on the national territory, and immunity from arrest or prosecution in the territory of any Member State. Immunity shall continue to have effect while a member is travelling to attend a meeting of the European Parliament and during his or her return travel to the country of origin, but shall not be waived in cases of *flagrante delicto*. The development of privileges and immunities in terms of their content, the procedure for waiving them and the defense of immunity are governed by Art. 5-9 of the Rules of Procedure of the European Parliament.⁴⁷ In accordance with the general provisions at the end of Protocol No 7, privileges and immunities are

⁴³ The full text of the law can be consulted at <https://legislatie.just.ro/Public/DetaliuDocument/59416>, March 1, 2025.

⁴⁴ Streteanu, F.; Nițu, D., *op.cit.* note 13, pp. 242-244.

⁴⁵ Streteanu, F.; Nițu, D., *op.cit.* note 13, pp. 244-250.

⁴⁶ The content of the whole act can be consulted at https://www.europarl.europa.eu/cmsdata/199812/A2_RO.pdf, March 1, 2025.

⁴⁷ The full Regulation can be consulted at https://www.europarl.europa.eu/rules/rules20240716/Rules20240716_RO.pdf, March 1, 2025.

enjoyed by Members of the European Parliament and other officials such as Members of the Commission, senior staff of the Court of Justice of the European Union, certain categories of staff of the two European banks, etc. Of course, each individual immunity of each individual official at European level would require a detailed approach, but it would go far beyond the proposed topic, taking it in a different direction, which is why I will limit myself to what has been shown so far at European level.

5. CONCLUSION

The above analysis shows that the issue of immunity is permeated by two main principles: the first, according to which any member of a state organization must be held accountable in one or more of the forms provided by law when he or she commits an act against the social rules; the second is that, in order to ensure the unrestricted and proper exercise of their duties, certain members who exercise certain functions within the community are exempt from liability for those acts inherent to their function, but only within the limits of the exercise of that function. In other words, certain members of the community are given a certain mandate by others to do something for the whole community to make things work for the better, and the fear of being held accountable for the decisions made, for the work done, is stopped by immunity. If, however, those members who exercise certain functions commit anti-social acts that are unrelated to the exercise of the function or represent an overstepping of that function, I consider that they are in fact in doing so overstepping the popular mandate given to them, and therefore the community no longer understands to protect them, but to treat them the same as everyone else. Under these circumstances, the procedures for verifying whether or not a person is subject to immunity and for lifting immunity should be swifter and easier, i.e. they should not become insurmountable obstacles to holding to account anyone who has violated the trust of other members of the community. To do otherwise is to turn immunity into a legal institution of unlimited character, which is undesirable in a democratic society and, I would say, harmful for the other members of the community, who, by generalization, see in those members of public office who enjoy immunity a bunch of corrupt persons, weakening confidence in the democratic structures of the state organization, in its smooth functioning in accordance with the general interests of all its members, leading to social outbursts against state institutions and regression in its development.

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