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ARTICLE

Enlarging the Immunities of European Parliament's Members: The *Junqueras* Judgment

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Abstract

Members of Parliament have traditionally enjoyed different kinds of immunities; nowadays, these are openly criticized on several grounds. The Court of Justice of the European Union (CJEU) has recently given a judgment on the inviolability of European Parliament's members, which might be regarded as a milestone in its scarce case law on the matter: *Oriol Junqueras Vies*, Judgment of the Grand Chamber of December 19, 2019. This Article intends to summarize and comment on this decision, a preliminary reference requested by the Spanish Supreme Court in a notorious criminal procedure, connected with the suspended referendum on Catalonia's independence. The CJEU reinforces the inviolability of Members of European Parliament (MEPs), thus strengthening the powers of this institution. However, the judgment perhaps fails to fully capture European Court of Human Rights (ECtHR) case law and was rendered at a time when the controversy on Mr. Junqueras had arguably become outdated.

Keywords: European Parliament; immunities; inviolability; European Court of Justice; preliminary ruling

A. Introduction

A major political event occurred in Spain in September and October 2017. Political leaders of the Regional Government of Catalonia decided to take the road towards independence from Spain and disregard the judicial decisions that had suspended their acts and the courts' prohibition of a referendum on independence. This led to criminal charges against certain officials, including the Vice President of Catalonia's Regional Government, Mr. Oriol Junqueras. Subsequently, and while in prison, Mr. Junqueras was elected as an MEP. The Spanish Supreme Court requested a preliminary ruling on his immunity.[1]

Parliamentary immunity, in general terms, is a controversial institution.[2] Nevertheless, the CJEU has limited case law on the matter,[3] although this area of Protocol No. 7 to the Treaties

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[1]*See* ECJ, Case C-502/19, Oriol Junqueras Vies, ECLI:EU:C:2019:1115 (Dec. 19, 2019), http://curia.europa.eu/juris/liste.jsf?num=C-502/19.

[2]*See Report of the Commission for Democracy Through Law (Venice Commission) on the Scope and Lifting of Parliamentary Immunities*, at 50, 144–56, 172, 184, 196–97, 199–200, Study No. 714/2013 (May 14, 2014) [hereinafter *European Commission Report*]; Simon Wigley, *Parliamentary Immunity: Protecting Democracy or Protecting Corruption?*, 11 J. POL. PHIL. 23 (2003); Angela Figueruelo Burrieza, *Prerrogativas Parlamentarias y Quiebra del Principio de Igualdad*, 17 REVISTA DE LAS CORTES GENERALES 103, 105, 107 (1989); Antonio Carro Martínez, *La Inmunidad Parlamentaria*, 9 REVISTA DE DESRECHO POLÍTICO 87, 87–90, 94–95 (1981).

[3]*See* SASCHA HARDT, EUR. PARLIAMENT'S POLICY DEP'T FOR CITIZENS' RIGHTS & CONSTITUTIONAL AFFAIRS, PARLIAMENTARY IMMUNITY IN A EUROPEAN CONTEXT 23 (2015) (stating that there is "[v]ery scarce case law on the matter").

has been considered outdated[4] and flawed.[5] The ECtHR has been more prolific than the CJEU in this regard. However, in the mentioned judgment (Case C-502/19, Oriol Junqueras Vies, Judgment of the Court of Justice (Grand Chamber) of 19 December 2019), it only quotes two ECtHR decisions and perhaps fails to fully capture its case law.[6]

The *Junqueras* judgment deals with one type of parliamentary immunity: the inviolability of European Parliament members for extra-parliamentary conduct—in this case, prior to his election. As other officials of the Regional Government of Catalonia—also accused of the same crimes—fled from Spain and took refuge in other European Union (EU) countries, eventually to be elected members of the European Parliament, the ruling has certain effects on judicial cooperation in criminal matters. Indeed, Mr. Junqueras's case became a feature in the Spanish press.

B. Factual and Legal Background

Following a series of controversies and misunderstandings between the Spanish national authorities and the regional authorities of Catalonia, several Catalonian political parties decided that the time had come for Catalonia to secede from Spain from Spain and create a new independent republic. In November 2015, the Catalonian Parliament passed a resolution that solemnly declared the beginning of the process for Catalonia to become a republic.[7] It was no surprise that the resolution was declared unconstitutional and annulled by the Spanish Constitutional Court.[8] However, in September 2017, two acts were passed by the Regional Parliament of Catalonia: Law 19/2017—passed on September 6, 2017, on the self-determination referendum[9]—and Law 20/2017—passed on September 8, 2017, on the foundation of the republic and the transition period.[10] Both were challenged by the national government before the Constitutional Court. A unanimous court ruling first suspended and later declared both laws unconstitutional, and therefore null and void.[11] In particular, Law 19/2017, on the self-determination referendum—which, among other points, called for a referendum on independence to be held on October 1, 2017[12]—was suspended by the Constitutional Court's decision on September 7, 2017. Personal notification was sent to all members of the Catalonian Regional Government, including Mr. Junqueras.[13] Ignoring this suspension, the Catalonian government organized the referendum for the planned date and attempted to avoid the intervention of the national police forces through secrecy. On October 1, some voting took place,[14] although national political parties and Catalonian parties against independence reminded people of

[4]*See* Myriam Benlolo-Carabot, *Les immunités des Communautés Européennes*, 54 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 582 (2008).

[5]*See* Sascha Hardt, *Fault Lines of the European Parliamentary Mandate: The Immunity of Oriol Junqueras Vies*, 16 EUR. CONST. L. REV. 12 (2020) (stating that it has been considered "[d]iscriminatory and highly anachronistic"); Opinion of Advocate General Szpunar at paras. 75, 107, Case C-502/19, Oriol Junqueras Vies (Nov. 19, 2019).

[6]*Junqueras*, Case C-502/19 at para. 85 (quoting two ECtHR cases). The cases are Karácsony and Others v. Hungary, App. Nos. 42461/13 and 44357/13 (May 17, 2016), http://hudoc.echr.coe.int/eng?i=001-162831, and Uspaskich v. Lithuania, App. No. 14737/08 (Dec. 20, 2016), http://hudoc.echr.coe.int/eng?i=001-169844.

[7]Regional Parliament of Catalonia, Resolution 1/XI, On the Start of the Political Process in Catalonia as a Consequence of the Electoral Results (Sept. 27, 2015), https://www.parlament.cat/document/intrade/153125.

[8]S.T.C., Dec. 2, 2015 (S.T.C., No. 259) (Spain).

[9]Regional Parliament of Catalonia, Law 19/2017 (Sept. 6, 2017), https://www.boe.es/ccaa/dogc/2017/7449/f00001-00012.pdf.

[10]Regional Parliament of Catalonia, Law 20/2017 (Sept. 7, 2017), https://www.boe.es/ccaa/dogc/2017/7451/f00001-00027.pdf.

[11]S.T.C., Oct. 17, 2017 (S.T.C., No. 114) (Spain) (ruling on Law 19/2017); S.T.C., Nov. 8, 2017 (S.T.C., No. 124) (Spain) (ruling on Law 20/2017). The basis for the annulment was not only the content of both laws but also the violation of the minorities' rights in their approval.

[12]*See* Law 19/2017, *supra* note 9, at art. IX, https://www.boe.es/ccaa/dogc/2017/7449/f00001-00012.pdf.

[13]*See* B.O.E. 2017, 10287 (Spain), https://boe.es/buscar/doc.php?id=BOE-A-2017-10287.

[14]The regional Catalonian government claimed that 2,286,217 people had voted—43% of the population over the voting age—of which 90% voted for independence.

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the illegal nature of the referendum. National police forces attempted to enforce the court suspension, especially in Barcelona, with varying degrees of success; they were met with a number of riots. On October 10, the Regional President—in accordance with the referendum results—proclaimed the independence of Catalonia before the Catalonian Parliament but proposed suspending the proclamation until negotiations were held with the "Spanish State." With the assent of the Senate,[15] the national government resorted to Article 155 of the Spanish Constitution, removed the Catalonian self-government institutions—Parliament and Government—and called for regional elections in Catalonia.

In light of these events, the public prosecutors and one political party—Vox—filed several criminal complaints against all members of the Catalonian Regional Government.[16] Five of them—including its deposed President—fled from Spain, but others were arrested: amongst them, the Vice President, Mr. Junqueras. To prevent their escape, the Court ordered the imprisonment of the arrested officials. Under the Council Framework Decision 2002/584/JHA of June 13, 2002 on the European arrest warrant and surrender procedures among Member States, the Court then issued European arrest warrants to Belgian—and later German and Scottish—courts for the five accused officials that had escaped. However, the arrest warrants were unsuccessful.

The trial of Mr. Junqueras and other former members of the Catalonian Regional Government began in the Spanish Supreme Court on February 12, 2019 and lasted until June 12, 2019. At that time, Mr. Junqueras became a candidate for the European Parliament and was announced as such by the Spanish Electoral Board on April 29, 2019.[17] The same situation occurred with three other accused fugitives, as their political parties placed them at the head of their lists. On May 26, 2019, the voting took place, and Mr. Junqueras and the other three fugitives were elected as MEPs. They were subsequently all proclaimed as elected MEPs by the Spanish Electoral Board.[18]

According to Article 224 of the Spanish Electoral Act, once proclaimed by the Spanish Electoral Board, elected MEPs must swear or promise allegiance to the Spanish Constitution within five days. If they fail to do so, their seats will be declared vacant and all their privileges suspended until they comply.[19]

Mr. Junqueras—who was still in prison—requested permission from the Court to appear before the Spanish Electoral Board to swear allegiance to the Spanish Constitution, but it was denied. The Electoral Board subsequently declared his seat vacant and suspended all of his privileges. Mr. Junqueras challenged the refusal and invoked Article 9 of Protocol No. 7 to the Treaties[20] on the Privileges and Immunities of the European Union (the Protocol):

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.
(c) Immunity shall likewise apply to Members while they are travelling to and from the place of meeting of the European Parliament.

[15]*See* B.O.E. 2017, 12327 (Spain) https://www.boe.es/buscar/doc.php?id=BOE-A-2017-12327.

[16]Criminal complaints were also filed against three political leaders who were not members of the government.

[17]*See* B.O.E. 2019, 6475 (Spain) http://www.juntaelectoralcentral.es/cs/jec/documentos/EUROPEAS_2019_Candidaturas%20proclamadas.pdf.

[18]One of the fugitives, Clara Ponsatí Obiols, only obtained her seat in the European Parliament after Brexit as a result of the five additional MEPs assigned to Spain. *See* B.O.E. 2019, 8953 (Spain), http://www.juntaelectoralcentral.es/cs/jec/documentos/EUROPEAS_2019_Proclamacion%20Diputados%20electos.pdf; B.O.E. 2020, 1104 (Spain), https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-1104.

[19]*See* L.O.R.E.G. (Electoral Organization Act) art. 224, §§ 1–3 (2011) (Spain).

[20]*See* Consolidated Version of the Treaty on the Functioning of the European Union, Protocol on the privileges and immunities of the European Union art. 9, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

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(d) Immunity cannot be claimed when a Member is found in the act of committing an offence and shall not prevent the European Parliament from exercising its right to waive the immunity of one of its Members.

In this context, the panel of Supreme Court magistrates who had to judge the case asked the CJEU for a preliminary ruling on:

(1) Whether Article 9 of the Protocol was applicable before "the sessions" were opened, to a person in prison charged with acts committed prior to the electoral period, who had been refused permission to leave prison in order to comply with national legislation requirements;
(2) in the case of affirmative reply, whether it was applicable even if the national electoral board had informed the European Parliament that the accused had not completed all the national requirements to become an MEP; and
(3) if affirmative, whether a person accused of serious crimes should be allowed to leave prison to travel to the European Parliament.

On October 14, 2019, the judgment in the criminal proceedings against Mr. Junqueras and the other eleven political leaders was published by the Supreme Court.[21] Mr. Junqueras was found guilty of the crime of sedition in conjunction with a related crime of misappropriation and sentenced to a term of imprisonment of thirteen years. This sentence included an absolute disqualification from holding public office for thirteen years along with a subsequent definitive forfeiture of all the privileges, positions, and public offices he may hold—even if elected—in the future for thirteen years.

The Supreme Court sent a certified copy of the judgment to the CJEU, in view of the pending preliminary ruling. The Supreme Court stated that it was interested in the outcome, even though it may not affect Mr. Junqueras, due to the conviction of disqualification and forfeiture of all public positions and offices for thirteen years.

C. Opinion of the Advocate General

The Advocate General, Mr. Maciej Szpunar, submitted his opinion on November 12, 2019. After certain general reflections on parliamentary immunities, which he acknowledged were often subject to criticism,[22] Advocate General Szpunar stated that the goal of parliamentary inviolability—one of the forms of immunity—was to ensure that parliamentary sessions could be held without undue restrictions on the attendance of its members through abusive legal proceedings.[23]

Szpunar observed that Article 9 of the Protocol had not been altered since the times of Protocol No. 7 to the European Coal and Steel Community Treaty.[24] However, the European Parliament was no longer an advisory assembly; it had become the main legislative and political institution of the EU, whose members are now elected by the citizens through universal suffrage. Furthermore, Article 39 of the Charter of Fundamental Rights of the European Union (CFREU) now protects

[21]Nine members of the Catalonian government were convicted in October 2017, including Mr. Junqueras: Six received prison terms for sedition—and, in some cases, misappropriation—and three were fined for disobedience. See the English version at Comunicación Poder Judicial, *El Tribunal Supremo condena a nueve de los procesados en la causa especial 20907/2017 por delito de sedición*, PODER JUDICIAL ESPANA (Oct. 14, 2019), http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Noticias-Judiciales/El-Tribunal-Supremo-condena-a-nueve-de-los-procesados-en-la-causa-especial-20907-2017-por-delito-de-sedicion.

[22]*See* Opinion of Advocate General Szpunar, *supra* note 5, at para. 7.

[23]*See id.* at para. 6.

[24]*See id.* at para. 104.

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the right to both active and passive suffrage.[25] In fact, the right to vote would be worthless without the right of those elected to exercise their mandate.[26] The literal interpretation of Article 9 of the Protocol therefore leads to an unsatisfactory result.[27]

Advocate General Szpunar pointed out that in order to enjoy immunity, it is necessary to become an MEP, which is regulated by both Member State and EU law. The Advocate General then proceeded to determine whether Mr. Junqueras was a member of the European Parliament, which was refused by all parties at the preliminary ruling—including both the European Parliament and the Commission—except, of course, by Mr. Junqueras himself.[28]

According to Article 14 of the Treaty on European Union (TEU), "The European Parliament shall be composed of representatives of the Union's citizens . . . " and its members " . . . shall be elected . . . by direct universal suffrage . . . ." Although the Act Concerning the Election to the European Parliament by Direct Universal Suffrage—annexed to Council Decision 76/787/ESC, EEC, Euratom (the 1976 Act)—refers to national provisions to govern the electoral procedure in each Member State,[29] the Advocate General found that the status of MEPs—members of an EU institution and elected by its citizens—can only be regulated by EU law. To allow national law to rule this matter would be tantamount to accept national interference in the independence of the European Parliament and in the autonomy of EU law as a whole.[30]

Accordingly, the Advocate General considered the Spanish electoral law—which imposes an oath of allegiance to the Spanish Constitution, as a requirement to become an MEP—to be contrary to direct universal suffrage and to the representative nature of MEPs. Voters elect the members of Parliament, not individuals who may eventually become MEPs. Their decision by vote is not subject to any confirmation or ratification.[31] Therefore, this requirement—or others that exist in different Member States—may affect the effective exercise of an MEP's functions but not the office of a member of Parliament, nor their privileges or immunities.

The Advocate General also considered that the 1976 Act does not authorize Member States to suspend an MEP for an unlimited time, which could extend to the whole term.[32] He found it unclear that Spanish law regards the oath as part of the electoral procedure required to become an MEP, when the requirement does not apply to members of the Spanish National Parliament, who are only suspended if they do not swear or promise allegiance to the Constitution in Parliament after three plenary sessions. Moreover, Article 9 of the Protocol grants MEPs "the immunities accorded to members of their parliament." In this case, MEP status seems to be less favorable than that of members of the Spanish National Parliament—with respect to the investiture as a member of the assembly—which is a requirement to enjoy the immunities.[33]

Advocate General Szpunar partially concluded that any individual officially elected to the European Parliament immediately becomes an MEP, irrespective of any ulterior formality that is required either by European or the national law of the Member State.[34]

[25]*See* European Convention, The Charter of Fundamental Rights of the European Union art. 39., Dec. 7, 2000, 2000 O.J. (C 364) 18 (granting the right to vote and the right to stand as a candidate at elections to the European Parliament) [hereinafter CFREU].

[26]*See* Opinion of Advocate General Szpunar, *supra* note 5, at para. 106.

[27]*See id.* at para. 107.

[28]*See id.* at para. 40.

[29]Initially, it was Article 7(2). By Council Decision 2002/772 of June 25, 2002 and September 23, 2002, Amending the Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage, Annexed to Decision 76/787/ECSC, EEC, Euratom, 2002 O.J. (L 283) 1 (EC, Euratom) [hereinafter Amended 1976 Act], Article 7 was amended—still referring to national law for the electoral procedure—and renumbered as Article 8.

[30]*See* Opinion of Advocate General Szpunar, *supra* note 5, at para. 44.

[31]*See id.* at para. 46.

[32]*See id.* at para. 54.

[33]*See id.* at para. 7.

[34]*See id.* at para. 70.

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As mentioned above, Article 9 of the Protocol dates back to a time when members of the Assembly were also members of their national parliaments, and it was therefore pointless to grant them additional immunity. According to the Advocate General, this regime became outdated when direct universal suffrage was established for the European Parliament and even more so when simultaneous membership to the European and national parliaments was repealed. It has been claimed as a source of inequality among members of the European Parliament and should be interpreted in a way that preserves the coherence and unity of the status of MEP, in the opinion of the Advocate General.[35]

Regarding the first question of the preliminary ruling on the meaning of "during the sessions," Advocate General Szpunar quoted Article 229 of the Treaty on the Functioning of the European Union (TFEU)—"The European Parliament shall hold an annual session. It shall meet without requiring to be convened, on the second Tuesday in March"—and concluded that the European Parliament is permanently in session.[36] Privileges and immunities apply irrespective of whether a particular session has been held, as the CJEU had already stated in *Wybot*.[37] Therefore, the "sessions" of a newly elected European Parliament begin on the date mentioned in Article 11 (3) of the 1976 Act[38]—namely, "the first Tuesday after the expiry of an interval of one month as from the end of the electoral period."[39]

In relation to the second question, the Advocate General mentioned Article 5 of the 1976 Act, according to which "the five-year term for which members of the European Parliament are elected shall begin at the opening of the first session following each election" and "the term of office of each member of the European Parliament shall begin and end at the same time as the period referred to in paragraph 1."[40] Consequently, as this is neither conditioned on the attendance to the first session nor on any other circumstance, national formalities cannot prevent the beginning of an MEP's term of office on said date. The Advocate General concluded that, as of that moment, all parliamentary immunities apply.[41]

As to the third question, Advocate General Szpunar stated that because the CJEU had declared in *Wybot* that immunities apply without regard to the actual sessions, there was no reason why immunities should not be applied before the inaugural sitting of the European Parliament, especially because Article 9 of the Protocol refers to "travelling to ... the place of meeting of the European Parliament."[42] The Advocate General found that it was not unusual in Member State law to apply immunities from the very moment the candidate is proclaimed as elected, which is in line with one of the privilege's goals: To ensure that Parliament begins its work with all members present.[43] In his opinion, this cannot be limited to the first journey to the place of meeting but should be extended to all previous formalities necessary to perform functions. Therefore, national authorities must refrain from establishing any measures that could obstruct

[35]*See id.* at para. 75.

[36]*Id.* at para. 79.

[37]*See* ECJ, Case C-149/85, Wybot v. Faure, ECLI:EU:C:1986:310 (July 10, 1986), http://curia.europa.eu/juris/liste.jsf?num=C-149/85.

[38]*See* Opinion of Advocate General Szpunar, *supra* note 5, at para. 80.

[39]*See* Amended 1976 Act, *supra* note 29. The inaugural sitting of the European Parliament—elected between May 23 and 26, 2019—was held on July 2, 2019. By that time, Mr. Junqueras had been tried but not yet convicted. However, the Advocate General concluded that parliamentary immunities begin upon election.

[40]*Id.*

[41]*See* Opinion of Advocate General Szpunar, *supra* note 5, at para. 84. This interpretation moves away from the 1976 Act. As Hardt states, "Union law prior to *Junqueras* ruling did not seem to allow much room for the application of parliamentary immunity rules to members-elect. At least a strictly textual approach seemed to rule out the possibility of considering elected persons 'members of the European Parliament' before the constituent meeting." Hardt, *Fault Lines*, *supra* note 5, at 6. However, Hardt considers that this approach, "while difficult to maintain in light of the wording of the law ... is most consistent with the spirit and purpose of parliamentary immunity."*Id.*

[42]*See* Opinion of Advocate General Szpunar, *supra* note 5, at para. 90.

[43]*See id.* at para. 92.

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the members and suspend any that have already been adopted, unless inviolability has been lifted by the European Parliament.[44]

Finally, the Advocate General took into consideration the judgment of October 14, 2019, in which the Spanish Supreme Court sentenced Mr. Junqueras to a term of imprisonment and absolute disqualification from holding public office—even elective—which entails the withdrawal of his parliamentary mandate. As he had been tried and convicted before the European Parliament could reach a decision to lift his immunity, the lawsuit in which the preliminary questions were raised had become outdated. Any judicial decision reached now on the leave to swear allegiance to the Spanish Constitution would be meaningless.[45] Szpunar recalled that, according to Article 267 TFEU, the CJEU is competent to give its interpretation of EU law only in real cases pending before national courts and not hypothetical ones. Therefore, pursuant to Article 100 (2) of the Rules of Procedure of the Court of Justice,[46] "the Court may at any time declare that the conditions of its jurisdiction are no longer fulfilled." Consequently, the Advocate General expressed his doubts as to the need to answer the request for a preliminary ruling.[47]

D. The Court Judgment

The Court began its analysis by ascertaining whether the request for a preliminary ruling was admissible. Contrary to the views of the Advocate General, the Court highlighted the fact that the Spanish Supreme Court had confirmed the need for such a ruling—notwithstanding the conviction of Mr. Junqueras—because his appeal against the refusal of leave was still pending and had to be decided. The case was therefore real, not hypothetical, and had not become extinct after the judgment; the case was admissible.[48]

However, the Court did heed the Advocate General when reasoning as to the democratic nature of the European Parliament—as expressed in Articles 10 (1) and 14 (3) TEU, and 223 (1) TFEU. Having established that—according to the 1976 Act—Member States are competent to regulate the electoral procedure[49] and that the European Parliament "takes note" of the results officially declared by them,[50] the Court of Justice of the European Union interpreted that becoming a member of the European Parliament—in the sense of Article 9 of the Protocol—results from the official proclamation of the election results by Member States.[51] From that moment, immunities apply. This covers not only the first paragraph of Article 9 of the Protocol—as ruled in *Wybot* —but also the second.[52]

These immunities—according to the Court—are the result of Article 343 TFEU, which provides for the enjoyment of the necessary immunities by the Union and the members of its institutions to fulfil their mission. They are aimed at ensuring that all institutions are completely and effectively protected against any impediment or threat that might affect their independence and activity.[53] For the European Parliament, this is a consequence of representative democracy under Article 10 (1) TEU, because membership is determined by the citizens' vote. It also comes from universal suffrage, under Article 39 CFREU and Article 14 (3) TEU, which means the effective acquisition of their seat in the European Parliament by those elected.[54] In line with this argument,

[44]*See id.* at para. 95.

[45]*See id.* at para. 100.

[46]CJEU, Consolidated Version of the Rules of Procedure of the Court of Justice art. 100 (2) (Sept. 25, 2012) https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf.

[47]*See* Opinion of Advocate General Szpunar, *supra* note 5, at para. 101.

[48]*See Junqueras*, Case C-502/19 at paras. 58–59.

[49]TFEU art. 8.

[50]*Id.* art. 12.

[51]*See Junqueras*, Case C-502/19 at para. 71.

[52]*See id.* at para. 81.

[53]*See id.* at paras. 76, 82.

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the CJEU observed that—according to the ECtHR—parliamentary immunities are aimed at ensuring the independence of Parliament, quoting two cases: *Karácsony and others v. Hungary*, Appl. No. 42461/13 and 44357/13, judgment of May 17, 2016, and *Uspaskich v. Lithuania*, Appl. No. 14737/08, judgment of December 20, 2016.[55]

The Court concluded that, once officially proclaimed as elected to the European Parliament, Mr. Junqueras was entitled to the immunities of Article 9 of the Protocol, irrespective of his imprisonment after being charged with serious crimes in criminal proceedings and irrespective of the lack of authorization to complete the formalities required by Member State law to participate in the first sitting.[56]

The Court observed that when Mr. Junqueras was officially proclaimed as elected to the European Parliament, on June 13, 2019, he was in prison. As this situation may obstruct the freedom of an MEP to travel to the first sitting of the European Parliament and to fulfill all the required formalities, it must be considered contrary to the immunity granted by Article 9, paragraph two, of the Protocol[57] and therefore revoked. However, if a national court finds that the imprisonment of a person that has become an MEP should continue, it must request the waiver of European Parliament immunity, as provided in Article 9, paragraph three, of the Protocol,[58] as soon as possible.

Finally, the CJEU replied to the Spanish Supreme Court that Article 9 of the Protocol must be interpreted to mean that:

> A person officially proclaimed as elected to the European Parliament, if in prison and accused of serious crimes in criminal proceedings and not authorized to fulfil certain requirements imposed by the Member State's law, nor to travel to the European Parliament to take part in its first session, is entitled to the immunities provided for in the second paragraph of the Article.
>
> This immunity entails the cancellation of the measure of imprisonment, in order to allow the person to travel to the European Parliament and to fulfil the required formalities there. Nevertheless, if the national court deems that imprisonment should continue after the person has become a member of the European Parliament, it must request a waiver of European Parliament immunity as soon as possible, in accordance with Article 9, third paragraph, of the same Protocol.[59]

E. Comment

Parliamentary immunities are well known conventions of a venerable origin.[60] They are traditionally divided in two large categories,[61] each with its own Article in the Protocol.[62] Article 8 states that "Members of the European Parliament shall not be subject to any form of inquiry, detention,

[54]*See id.* at paras. 83, 86.

[55]*See id.* at para. 84.

[56]*See id.* at para. 87.

[57]*See* Hardt, *Fault Lines*, *supra* note 5, at 14. Hardt believes that this emphasis in the second paragraph of Article 9 of the Protocol—regarding travelling immunity—and not in the first—regarding general inviolability—is a consequence of the huge diversity among national Member State law of parliamentary immunities. In some, inviolability is almost nonexistent.

[58]*See Junqueras*, Case C-502/19 at paras. 89–91.

[59]*See id.* at para. 95.

[60]*See* Marc Van Der Hulst, The Parliamentary Mandate: A Global Comparative Study 63–65 (2000).

[61]*See generally* Nicolás Pérez Serrano, Tratado de Derecho Político 779–82 (2d ed. 1989); Ramón Entrena Cuesta, *Incompatibilidades y Prerrogativas Parlamentarias*, *in* Los Parlamentos de Europa y el Parlamento Europeo 103, 109 (1997).

[62]*See* Eur. Parliament's Policy Dep't for Citizens' Rights & Constitutional Affairs, Handbook on the Incompatibilities and Immunity of the Members of the European Parliament 9–10 (Aug. 2014).

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or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties."[63] This article provides for non-liability, sometimes called "non accountability," of opinions or votes and traces back to the 1689 Bill of Rights.[64] Article 9—applied in the case at hand—adds inviolability, which is also called immunity in the strict sense of the word. In a limited scope, based on British tradition, it was enshrined in Article I, Section 6 of the United States Constitution.[65] Both forms of immunity share certain common features: they are not personal privileges of the members of parliament but rather a means to protect the institution.[66] Therefore, they cannot be waived by an individual member,[67] although there are some exceptions in certain countries.[68] Both also limit the fundamental rights of non-members of parliament—namely, the victims of their acts or persons offended by their speech. Redress in court may become more difficult or even impossible. As with all politicians' privileges, they tend to be viewed skeptically—by large parts of society—as a form of shielding corruption[69] or other heinous acts.[70] In the words of the Venice Commission, the "paradox of parliamentary immunity" is "that it can serve both to foster and to undermine democratic development."[71]

In the case at hand, this Section focuses on the second kind of immunity but touches on aspects of the first, when necessary. This Section will discuss three issues: (1) how the case compares to the Court's existing case law, (2) whether it accurately took into account ECtHR and human rights case law, and (3) whether, in the aftermath of the judgment, any weak points have been highlighted.

I. How to Strengthen the Powers of the European Parliament

It is well known that—since the times of the European Economic Community—the European Court of Justice has consistently reinforced EU law and institutions.[72] The Court—a key element of the European Communities and now the EU—has obviously contributed to building them by interpreting the law.[73] It is not surprising that the case at hand strengthens the powers of the European Parliament with respect to its members, as opposed to the Member States.

[63]TFEU art. 8.

[64]*See* English Bill of Rights 1689, https://avalon.law.yale.edu/17th_century/england.asp (last visited Mar. 25, 2020) ("That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.").

[65]U.S. Const. art. I, § 6 ("The Senators and Representatives . . . shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses.").

[66]*See* Hardt, Parliamentary Immunity, *supra* note 3, at 7 ("There is general consensus that parliamentary immunity is not a personal privilege of parliamentarians, but an institutional privilege that accrues to parliaments as corporate bodies."); Manuel Cavero Gómez, *La Inmunidad de los Diputados del Parlamento Europeo*, 20 Revista de las Cortes Generales 7, 13 (1990).

[67]Mercedes Senén Hernández, *Inviolabilidad e Inmunidad en el Parlamento Europeo*, 9 Revista de las Cortes Generales 319, 332 (1986).

[68]*See* Van Der Hulst, *supra* note 60, at 90.

[69]According to Article 30.2 of the 2003 U.N. Convention against Corruption:

> Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

See U.N. Secretary-General, Implementation Review Grp., Conference of the States Parties to the United Nations Convention Against Corruption: Regional Implementation of Chapter III (Criminalization and Law Enforcement) of the United Nations Convention against Corruption (2013), https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/27-31May2013/V1381711e.pdf (focusing on immunities and jurisdictional privileges of public officials—under Article 30, paragraph 2 of the Convention—and illicit enrichment, under Article 20 of the Convention).

[70]*See* Wigley, *supra* note 2, at 29–31.

[71]*See European Commission Report*, *supra* note 2, at 7.

[72]*See generally* Damian Chalmers, Gareth Davies, & Giorgio Monti, European Union Law 16 (3d ed. 2014).

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In short, the case strengthens the powers of the European Parliament in a threefold way: (1) By constraining Member States' national provisions on the electoral procedure[74] to the period ending with the official election proclamation;[75] (2) by interpreting that "during the sessions" amounts to "during the entire parliamentary mandate" from the official proclamation, thereby securing all immunities since such date; and (3) by establishing that the imprisonment of a newly elected member of the European Parliament must be cancelled, in order to allow him to travel to the sitting, unless the Court requests the waiver of immunity from the European Parliament in the shortest possible time.

This tendency to enhance the European Parliament's powers was already present in *Wybot*. Mr. Wybot filed defamation proceedings against Mr. Faure with the *Tribunal Correctionnel* of Paris, although the latter had been elected as a member of the European Parliament in 1979—the first election by universal suffrage. Apparently, the controversial speech was totally unrelated to his parliamentary mandate or activity. The Criminal Court observed that Article 9 of the Protocol[76] began with the expression "[d]uring the sessions of the European Parliament, its Members shall enjoy ... the immunities accorded to members of their parliament,"[77] and the European Parliament was not actually sitting on the date of the summons. Moreover, it seems that immunities for the members of the French Parliament did not cover periods of time in which Parliament was not sitting, and the Protocol used national immunities as a reference. According to Article 26 of the French Constitution,[78] authorization by the Bureau of the Legislative Chamber was required to allow a criminal court to hear charges against a member of the Chamber, "during the sessions."[79]

The CJEU faced two options: it could either strictly interpret the Protocol as an exception to the general procedural rule, and thus favor the right of the plaintiff to sue, or interpret it in a broad sense, thus strengthening the immunities and powers of the European Parliament. In its judgment of July 10, 1986, the CJEU chose the latter option—in line with Advocate General Darmon.

In *Wybot*, the Court referred to a previous case, *M. Albert Wagner v. MM Jean Fohrmann and Antoine Krier*,[80] which was ambiguous. It certainly interpreted the sessions of the European Assembly as independent from the sittings, but it restricted sessions to the two annual sessions that were held—at that time[81]—from May to June and as from October. This was obviously prior to the election of the European Parliament by universal suffrage. Perhaps this is the reason why the CJEU, in this case, did not quote *Wagner*, although it had been quoted by the Spanish Court in its request for the preliminary ruling.[82] *Wagner*, by disconnecting Assembly "sessions" from "sittings," expanded immunity and thereby the powers of the European Assembly, as its authorization

[73]*See* Robert Schütze, European Union Law 17 (2d ed. 2019).

[74]*See* Amended 1976 Act, *supra* note 29, art. 8 ("Subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions ....").

[75]*See Junqueras*, Case C-502/19 at paras. 69, 71. *See also* Hardt, *Fault Lines*, *supra* note 5, at 8. Hardt welcomes this new interpretation. As of the official proclamation of the elected candidates as MEPs, any national regulation of the electoral procedure thereafter can only regulate formalities but not deprive the MEP of membership. Therefore, Spanish law requiring an oath to the Spanish Constitution could not be understood as a condition for membership to the European Parliament.

[76]TFEU art. 9. It was Article 10 at the time of the proceedings.

[77]*Id.;*

[78]1958 Const. art. 26 (Fr.). This Article was later amended by constitutional law 95-880, of August 4, 1995.

[79]*Id.* ("No member of Parliament may, during the sessions, be prosecuted or arrested in criminal or correctional matters without the authorization of the assembly of which he is a member, except in the case of *flagrante delicto*.").

[80]*See* ECJ, Case C-101/63, Wagner v. Fohrmann and Others, ECLI:EU:C:1964:28 (May 12, 1964), http://curia.europa.eu/juris/liste.jsf?language=en&num=C-101/63.

[81]*Id.* at 201 ("The result of the foregoing considerations is that, subject to the dates of opening and closure of the annual session determined by Article 22 of the ECSC Treaty, the European Assembly must be considered as being in session, even if it is not in fact sitting, until the moment of closure of the annual or extraordinary sessions.").

[82]*See Junqueras*, Case C-502/19 at para. 37. *See also* Opinion of Advocate General Szpunar, *supra* note 5 (declining to quote *Wagner*).

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was required to hear the case against one of its members based on the immunities provided for in the law of Luxembourg.[83]

This trend of strengthening the European Parliament's authority has also been followed by the General Court in *Bruno Gollnisch v. European Parliament*,[84] in which a member of the European Parliament challenged two decisions of the institution: To lift his immunity and not to defend his immunity. The General Court dismissed the action, as the statements for which Mr. Gollnisch was prosecuted had no link to his duties as a member of Parliament—the alternative would have made it impossible to lift the immunity, according to Article 8 of the Protocol[85]—nor did the decisions of the European Parliament infringe Article 9 of the Protocol. This judgment does not enhance the powers of the European Parliament, but it does support the way that Parliament exercises those powers.

The trend of increasing the powers of the European Parliament has also been asserted by the CJEU in relation to non-liability—Article 8 of the Protocol—in two judgments on preliminary rulings requested by Italian courts: *Alfonso Luigi Marra v. Eduardo De Gregorio and Antonio Clemente*,[86] and *Criminal Proceedings against Aldo Patriciello*.[87] Italian law does not require authorization from the Italian Parliament to take action against any of its members,[88] but in both cases, the MEP concerned brought his case before the European Parliament—pursuant to Article 6 (3) of its Rules of Procedure[89]—and the European Parliament decided to defend the MEP's immunity. Although, only in *Patriciello* was the decision notified to the criminal court; in the other case, it did not reach the criminal court.[90] In *Patriciello*, the CJEU stated that the "immunity provided by Article 8 of the Protocol must be established on the basis of EU law alone," in its own interpretation of the expression "performance of their duties"—as it is used in said Article 8.[91] The CJEU even hinted at some of the conclusions of the actual case.[92] In neither case did the CJEU deprive the Italian courts of their power to interpret the Protocol—without being bound by any decision that may have been reached by the European Parliament—but invoked cooperation between the institution and national courts, in order to avoid any conflict between the interpretation and application of the provisions of the Protocol.[93] In *Marra*, the CJEU even stated that the court must stay the proceedings if informed that the MEP has requested the defense of his immunity from the institution.[94]

The case at hand does not quote *Patriciello* but rather *Marra*, at the end of the judgment, recalling the principle of loyal cooperation.[95] However, neither case departs from the strengthening of

[83]*See Wagner*, Case C-101/63. In fact, the CJEU judgment states that the Grand Duchy of Luxembourg had filed a request for withdrawal of parliamentary immunity, which did not interfere with the preliminary ruling sought by the *Tribunal d'Arrondissement* of Luxembourg.

[84]ECJ, Joined Cases 346 & 347/11, Gollnisch v. Eur. Parl., ECLI:EU:T:2013:23 (Jan. 17, 2013). *See* Sébastien Platon, *Nouvelles Précisions sur la levée et sur la défense d'immunité des députés européens: encore un arrêt Gollnisch*, JOURNAL D'ACTUALITÉ DES DROITS EUROPÉENS (2013).

[85]*See Gollnisch*, Joined Cases 346 & 347/11 at para. 78.

[86]ECR, Joined Cases 200 & 201/07, Alfonso Luigi Marra v. Eduardo De Gregorio and Antonio Clemente, 2008 E.C.R. I-579. *See* Roberto Mastroianni, *Joined Cases C-200/07 and C-201/07*, Alfonso Luigi Marra v. Eduardo De Gregorio and Antonio Clemente, *Judgment of the Court (Grand Chamber) of 21 October 2008, [2008] ECR I-7929*, 47 COMMON MARKET LAW REVIEW 1541 (2010) (providing the annotation of this case).

[87]Case C-163/10, Criminal Proceedings Against Aldo Patricello, 2011 E.C.R. I-543.

[88]*See* Art. 68 Costituzione [Cost.] (It.). Italian law only requires authorization to arrest them, seize their mail, or intercept their communications. In fact, it did require the authorization to be subject to criminal proceedings, but the Article of the Constitution was amended by constitutional law of October 29, 1993, No. 3.

[89]These are now Rules Nos. 7(1) and 9(1).

[90]*See Marra*, Joined Cases 200 & 201/07 at para. 30.

[91]*See Patricello*, Case C-163/10 at paras. 28, 35. Essentially, performance was not limited to the European Parliament, and the connection between the opinion expressed and parliamentary duties must be direct and obvious.

[92]*See id.* at para. 36.

[93]*See id.* at para. 40; *Marra*, Joined Cases 200 & 201/07 at para. 42.

[94]*See Marra*, Joined Cases 200 & 201/07 at para. 43.

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European Parliamentary powers. Of course, the responsibility for interpreting non-liability resides in the court trying the case and not the European Parliament; Article 8 of the Protocol leaves no room for doubt. Still, the CJEU gives the European Parliament a voice—based solely in its Rules of Procedure—by imposing cooperation between both institutions and even providing for a stay of the judicial proceedings. This raises many doubts,[96] but undeniably asserts the role of the European Parliament when dealing with its members' immunities. Again, the CJEU strengthens EU institutions and restricts Member States' powers.

II. A Partial Approach to Human Rights

The case at hand refers to the right to vote under Article 39 (2) of the CFREU.[97] This is the only fundamental right invoked throughout the grounds of the judgment. The Court rightly stresses the relationship between universal suffrage—also established in Article 14 (3) TEU—and the respect for elected candidates. If such candidates are not allowed to become MEPs, it affects the democratic decision-making power of the voters.

The ECtHR has developed considerable case law on parliamentary immunity. However, the judgment only quotes two cases: *Karácsony and others v. Hungary*,[98] and *Uspaskich v. Lithuania*.[99] This selection does not appear to be particularly brilliant. The former case dealt with non-liability, not inviolability, and was an Article 10 case—dealing with the freedom of expression of the members of the Hungarian Parliament[100]—in which no criminal proceedings were held; the claimants had been sanctioned by the Hungarian Parliament.[101]

The second quoted ECtHR case was one of inviolability; however, immunity had been lifted once by the Lithuanian Parliament and twice by the European Parliament.[102] It involved the right to free elections, pursuant to Article 3 of Protocol No. 1 to the Convention, which—according to a unanimous ECtHR—had not been violated. Moreover, that case included certain statements that do not entirely favor Mr. Junqueras' case:

> In the present case, however, it transpires that the applicant's political party, which itself avoided prosecution by formally changing its status … indeed shielded him [Mr. Uspaskich] from prosecution by systematically presenting him as a candidate in municipal, parliamentary and European Parliament elections, all of which meant that at least for a certain time the applicant could enjoy immunity from prosecution ….[103]

On November 2, 2017, Mr. Junqueras was summoned before a criminal court, which decided to imprison him. His political party immediately presented him as the first candidate, for the

[95] *See Junqueras*, Case C-502/19 at para. 93.

[96] Mastroianni, *supra* note 86, at 1554:

> 1) "What remedy is available if the European Parliament does not take any action in a reasonable time period … ?"; 2) "May the national court proceed (as seems reasonable) or should the Member State react by lodging an action for failure to act before the Court of Justice of the European Union … ?"; and 3) "What are the consequences if the national court does not respect its duty and does not suspend the judicial proceedings?"

Some other questions might be added: May the judge disagree with the European Parliament resolution, without contradicting the duty to cooperate? In case of disagreement, is it necessary to request a preliminary ruling? Can a lack of cooperation be understood as an infringement of EU law?

[97] *See Junqueras*, Case C-502/19 at para. 86.

[98] *Karácsony and Others*, App. Nos. 42461/13 and 44357/13.

[99] *Uspaskich*, App. No. 14737/08. *See Junqueras*, Case C-502/19 at para. 85.

[100] *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

[101] *See Karácsony and Others*, App. Nos. 42461/13 and 44357/13.

[102] *See Uspaskich*, App. No. 14737/08.

[103] *Id.* at para. 99.

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province of Barcelona, in the regional elections to be held in Catalonia that year on December 21.[104] He was elected as a member of the Regional Parliament of Catalonia. He was again presented by the same party as its first candidate, for the province of Barcelona, in the national elections to take place in Spain on April 28, 2019[105] and was elected to the Spanish *Congreso de los Diputados*. He requested the Spanish Supreme Court to ask the *Congreso de los Diputados* for authorization in order to keep him in prison and try him—thus interpreting Spanish parliamentary immunity—but it was denied by the Court, on the grounds that the trial was already in course and the crime—which dated back to 2017—had no relationship to his activity as a member of Parliament.[106] Mr. Junqueras was again presented as a candidate for the European Parliament elections, which took place in Spain on May 26, 2019.[107] His election triggered the case at hand. It was obvious that it would be impossible for the candidate, if convicted, to hold his seat in any of the three Regional, National, or European Parliaments. Obviously, some kind of protection from imprisonment, trial, and conviction was sought.

The ECtHR deals with parliamentary immunity essentially in relation to the right of access to justice—provided in Article 6 of the European Convention on Human Rights (ECHR)—and, to a lesser extent, the freedom of expression—pursuant to Article 10 of the ECHR.[108] At times, both rights are involved, as in *A. v. United Kingdom*.[109] In that case, *A.* claimed that she had no remedy against the offensive statements made by a member of the British House of Commons, who gave her name and address in a debate in the House on the subject of municipal housing policy. The Court upheld the prerogative of the member of the Parliament, which protected her freedom of speech and found no violation of Article 6 of the ECHR.[110] In other cases, the outcome was a judgment of Article 6 infringement, as immunity was held to be disproportionate as a means of protection of parliamentary activity by the ECtHR and, therefore, did not shield the alleged freedom of expression.[111]

[104]*See* B.O.E. 2017, 13683 (Spain), https://www.boe.es/boe/dias/2017/11/25/pdfs/BOE-A-2017-13683.pdf (providing the official proclamation of the candidates).

[105]*See* B.O.E. 2019, 4902 (Spain), http://www.juntaelectoralcentral.es/cs/jec/documentos/GENERALES_2019_Candidaturas%20proclamadas.pdf.

[106]The Court nevertheless granted Mr. Junqueras leave to attend the first sitting of the Parliament.

[107]B.O.E. 2019, 6457 (Spain), https://www.boe.es/boe/dias/2019/04/30/pdfs/BOE-A-2019-6475.pdf.

[108]Hardt, *Parliamentary Immunity*, *supra* note 3, at 9–10, 17; Frédéric Krenc, *La règle de l'immunité parlamentaire à l'épreuve de la Convention Européenne des Droits de l'Homme*, 55 Revue Trimestrielle Des Droits De L'Homme 813 (2003). Of course, there are some cases involving other rights, such as the previously-mentioned *Uspaskich v. Lithuania*, in relation to Article 3 of Protocol No. 1. Moreover, ECtHR cases on the freedom of speech of Members of Parliament are numerous but normally do not raise the issue of immunity. *See* Castells v. Spain, App. No. 11798/85 (Apr. 23, 1992), http://hudoc.echr.coe.int/eng?i=001-57772; McGuinness v. United Kingdom, App. No. 39511/98 (June 8, 1999), http://hudoc.echr.coe.int/eng?i=001-4860; Öllinger v. Austria, App. No. 74245/01 (May 13, 2004), http://hudoc.echr.coe.int/eng?i=001-23922; Keller v. Hungary, App. No. 33352/02 (Apr. 4, 2006), http://hudoc.echr.coe.int/eng?i=001-75126; Féret v. Belgium, App. No. 15615/07 (July 16, 2009), http://hudoc.echr.coe.int/eng?i=001-93627; Meslot v. France, App. No. 50538/12 (Jan. 9, 2018), http://hudoc.echr.coe.int/eng?i=001-180684; Pastörs v. Germany, App. No. 55225/14 (Oct. 3, 2019), http://hudoc.echr.coe.int/eng?i=001-196148. In the case of Karhuvaara and Iltalehti v. Finland, App. No. 53678/00, paras. 51–52 (Nov. 16, 2004), http://hudoc.echr.coe.int/eng?i=001-67457, immunity was "of indirect relevance"—according to the ECtHR—as penalties were higher when the victim was a member of the Finnish Parliament, even if the "offences in question did not have any connection with the performance of . . . official duties as a member of parliament." The Court found a violation of Article 10, involving the freedom of speech.

[109]A. v. United Kingdom, App. No. 35373/97 (Dec. 17, 2002), http://hudoc.echr.coe.int/eng?i=001-60822.

[110]*See id.*; *see also* Zollmann v. United Kingdom, App. No. 62902/00 (Nov. 27, 2003), http://hudoc.echr.coe.int/eng?i=001-23579 (confirming the ruling by decision of inadmissibility).

[111]*See* Cordova v. Italy (No. 1), App. No. 40877/98, para. 58 (Jan. 30, 2003), http://hudoc.echr.coe.int/eng?i=001-60913; Cordova v. Italy (No.2), App. No. 45649/99, para. 59 (Jan. 30, 2003), http://hudoc.echr.coe.int/eng?i=001-60914. In both cases, the ECtHR pointed out that:

> It would be incompatible with the purpose and object of the Convention, however, if the Contracting States, by adopting a particular system of parliamentary immunity, were thereby absolved of their responsibility under the Convention in relation to parliamentary activity. It should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective. This is particularly so

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The right of access to justice is the most relevant of the immunity cases, as the person offended by the conduct of a member of Parliament may see his or her action prevented and thus be deprived of the right to take action in court.[112] In the field of inviolability, a relevant case is *Tsalkitzis v. Greece*,[113] in which the claimant sued the mayor of Kifissia, C.T.—for blackmail and criminal misconduct in public office, in connection with a building permit—claiming damages. The accused was not a member of the Greek Parliament when the events occurred but was elected before the petitions were submitted to the court. The Greek Parliament refused to lift immunity twice,[114] and Mr. Tsalkitzis brought his case before the ECtHR. The Court unanimously ruled that Greece had breached Article 6 of the Convention, which dealt with the right of access to justice. It held that for a State to block civil actions unconditionally or make certain types of people exempt from liability is contrary to the Convention.[115] The ECtHR took into account that the conduct had taken place three years before the accused was elected and observed that it had no relationship to his parliamentary duties. Restrictions of the right of access to justice had to be proportionate and this denial of justice was not, even if the lawsuit was surrounded hypothetically by a political context.[116]

This same conclusion—the breach of Article 6 of the ECHR by a refusal to lift immunity—was reached in the ECtHR case *Syngelidis v. Greece*,[117] concerning a lawsuit between a divorced couple over the enforcement of a judicial decision on the custody of a child. Criminal charges were filed against a member of the Greek Parliament by her former husband, who requested the amount of ten euros by way of nominal compensation for non-monetary damages; however, the Greek Parliament refused to lift immunity. Even in light of such a weak civil claim, the ECtHR declared: "[W]here parliamentary immunity hinders the exercise of the right of access to justice, in determining whether or not a particular measure was proportionate the Court examines whether the impugned acts were connected with the exercise of parliamentary functions in their strict sense."[118] In that case, the Court ruled that it was not a proportional measure.

Obviously, the facts in the ECtHR cases, *Tsalkitzis v. Greece* and *Syngelidis v. Greece*, were different from the CJEU *Junqueras* case: Only a criminal case, without any private party claiming

of the right of access to a court, in view of the prominent place held in a democratic society by the right to a fair trial.

[112]This only works for the offended person, not for a Member of Parliament who unsuccessfully requests the waiving of their inviolability. In Kart v. Turkey, App. No. 8917/05, paras. 10, 16, 29 (Dec. 3, 2009), http://hudoc.echr.coe.int/eng?i=001-96007, Mr. Kart—an attorney—had been accused of insulting another lawyer and a public official. The criminal proceedings against him were suspended when he became a member of the Turkish National Assembly, and the Parliament decided not to lift his immunity, which he had requested in order to defend himself in court. He complained that this amounted to a violation of his right of access to justice, but the claim was dismissed by the Grand Chamber of the ECtHR. However, the grounds of this judgment were considered "doubtful and unsound" by Hardt. *See* Hardt, *Parliamentary Immunity*, *supra* note 3, at 16.

[113]Tsalkitzis v. Greece, App. No. 11801/04 (Nov. 16, 2006), http://hudoc.echr.coe.int/eng?i=001-78071.

[114]This is not surprising. According to the Venice Commission, "Greece stands out as the most restrictive country -in the period 2000-2009 only 31 requests to lift immunity were granted out of a total of 220." *European Commission Report*, *supra* note 2, at 24 (noting that only 14.09% of requests to lift immunity were granted). However, the European Parliament is also quite restrictive, according to Klaus Offermann. *See* Klaus Offermann, Eur. Parliament's Policy Dep't for Citizens' Rights & Constitutional Affairs, Parliamentary Immunity in the European Parliament 22 (2005) (last updated 2007) ("Between the introduction of direct elections to Parliament and 31 August 2003, a total of 104 requests for waiver of parliamentary immunity were considered. In 19 cases, i.e. 18.2% of the total, Parliament voted in plenary to waive immunity.").

[115]*Tsalkitzis*, App. No. 11801/04 at para. 46.

[116]This case has a sequel: Tsalkitzis v. Greece (No.2), App. No. 72624/10 (Oct. 19, 2017), http://hudoc.echr.coe.int/eng?i=001-177691. Mr. Tsalkitzis appeared on a television show and reiterated the allegations he made in his criminal complaint. C.T. lodged a criminal complaint against him for false accusation, perjury, and slander, and Mr. Tsalkitzis was convicted. He claimed before the ECtHR that he did not have a fair hearing in the Greek court, as he could not bring the criminal charges that had been hindered by the Greek Parliament. However, the ECtHR dismissed the violation of Article 6 (1) of the Convention.

[117]Syngelidis v. Greece, App. No. 24895/07 (Feb. 11, 2010), http://hudoc.echr.coe.int/eng?i=001-97271.

[118]*Id.* at para. 44.

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damages, and where the lifting of immunity had not been refused by the European Parliament. However, these cases clearly indicate that parliamentary inviolability raises human rights issues in relation to access to justice, and that restrictions on court activity must be proportionate to the protection of parliamentary duties, which means examining whether the conduct at stake was related to the parliamentary mandate.

Even if *Junqueras* deals with issues prior to the lifting of immunity—by strengthening inviolability—it inevitably hinders judicial proceedings in course, which may affect private parties seeking redress. Moreover, if these judicial proceedings had begun many months before the elections—and therefore clearly had no connection to parliamentary duties—the extended inviolability could be abused to shield politicians from their liabilities. As the Venice Commission notes, "rules on parliamentary inviolability ... can be misused in ways that may undermine democracy, infringe the rule of law and obstruct the course of justice," and "should therefore be regulated in a restrictive manner."[119] The case at hand does the opposite; it extends inviolability without any consideration for the right of access to justice or the connection between the facts and the parliamentary mandate, thus setting certain rules that may be difficult to apply to subsequent cases.

III. Aftermath of the Judgment

Notwithstanding its extension of parliamentary inviolability, this case does not consider the continuation of imprisonment of a newly elected member of European Parliament as incompatible with Article 9 of the Protocol—provided the criminal court requests lifting the immunity in the shortest possible time. This part of the judgment is sensible,[120] as imprisonment before conviction is typically limited to serious crimes and intended to secure the trial, which normally requires the presence of the accused person. If imprisonment were cancelled without exception, some defendants might never return to the Member State to be tried.

In the criminal proceedings that gave rise to the case at hand, this possibility of escaping to other European countries to avoid trial actually existed. Of the fourteen members of the Regional Government of Catalonia—at the time the suspended referendum on independence took place and independence was proclaimed—five fled to other European countries. The Spanish Supreme Court issued European arrest warrants (EAWs) to Belgian courts pursuant to Council Framework Decision of 13 June 2002, on the European Arrest Warrant and the Surrender Procedures between Member States.[121] However, warrants for arrest were ultimately refused[122] and those accused have therefore avoided being tried and, eventually, convicted.

Judicial cooperation in criminal matters between Member States is clearly deficient. As reported by official statistics, approximately two-thirds of EAWs are not executed.[123] Therefore, even though "the Union is founded on the values of respect for human dignity,

[119]*See European Commission Report*, *supra* note 2, at para. 33.

[120]*See* Daniel Sarmiento, *MEP Immunity and the Junqueras Conundrum*, EU L. Live (Jan. 15, 2020), https://eulawlive.com/op-ed-mep-immunity-and-the-junqueras-conundrum-by-daniel-sarmiento/ (stating that in this point "the judgment sends a balanced message").

[121]Council Directive 2002/584/JHA of July 18, 2002, Council Framework Decision of June 13, 2002, on the European Arrest Warrant and the Surrender Procedures between Member States, 2002 O.J. (L 190) 1 (EC).

[122]Mr. Puigdemont, one of the fugitives, traveled to Germany and the Spanish Supreme Court also issued a warrant for his arrest to the German authorities, but the Oberlandesgericht Schleswig-Hostein only agreed to surrender him for a minor crime—misappropriation. As this may have prevented a trial for the more serious crimes, pursuant to Article 27.2 of the Council Framework Decision 2002/584/JHA, of June 13, 2002, the Spanish Supreme Court rejected it. *Id.* Another of the accused fled to Scotland and the Scottish courts requested more information from Spain. However, that fugitive was subsequently elected as an MEP. For the other three accused, arrest warrants have been rejected by the Belgian courts.

[123]*See* Eur. Comm., *Statistics on EAW Use*, European e-Justice (2017), https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do (last visited May 14, 2020) (showing that, according to the latest statistics published by the European Commission, in 2017, only 6,317 out of the 17,491 EAWs issued have been executed).

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freedom, democracy, equality, the rule of law and respect for human rights,"[124] in many cases, it is possible to avoid criminal charges simply by moving to another Member State.

This obviously affects the inviolability of MEPs, as shown in the case at hand. If immunity for newly elected members, "while they are travelling to and from the place of meeting of the European Parliament,"[125] could mean the immediate release from imprisonment—even for crimes unrelated to the member's parliamentary duties—the privilege could in some cases allow an MEP to escape trial and conviction, simply by never returning to the Member State of imprisonment.

As a matter of fact, the case judgment did not benefit Mr. Junqueras.[126] After being notified of the judgment, the Spanish Supreme Court reached two decisions on January 9, 2020. First, the Court acknowledged that Mr. Junqueras should have been considered a member of the European Parliament since June 13, 2019 (date of official proclamation). Second, however, it declared that his imprisonment had been lawful following the CJEU ruling. Therefore the Court ordered that he be kept in prison to serve the term of his conviction, and rejected the request to lift his European Parliament immunity because his mandate had been withdrawn pursuant to said conviction (forfeiture of all public offices, even if elective).[127] Subsequently, the European Parliament declared Mr. Junqueras's seat to be vacant.[128]

Advocate General Szpunar was probably right when he raised his doubts concerning the CJEU's competence to answer the request for a preliminary ruling, after being informed of the conviction by the Spanish Supreme Court.[129] The rejection of the leave from prison to travel to the European Parliament was no longer a real issue once Mr. Junqueras had been deprived of his parliamentary mandate by the conviction. Notwithstanding the insistence of the Spanish Supreme Court on the preliminary reference after the conviction—which is not easy to understand[130]—it would have been wiser for the CJEU to drop the case and wait for a better opportunity to interpret the questioned law.

However, the case did benefit three others accused, along with Mr. Junqueras, who had fled and consequently had not been tried or convicted. Having been elected MEPs,[131] and being granted inviolability from the case, their membership became unquestionable. The Court of Justice of the European Union considered it a mere formality that the three had not returned to Spain to swear an oath, in accordance with the requirements of the Spanish Constitution, one that could not deprive them of their parliamentary mandate. After the judgment was rendered, their membership to the European Parliament became unquestionable. The Spanish Supreme Court requested the lifting of their inviolability, which is still pending.

In view of the circumstances of the case and its aftermath, the judgment seems prudent, by not forcing an outright release of prisoners elected as members of Parliament. Nevertheless, the CJEU was aware that the controversy that gave rise to the preliminary reference was over and probably

[124]TEU art. 2.

[125]TFEU art. 9.

[126]*See* Hardt, *Parliamentary Immunity*, *supra* note 3, at 16.

[127]The text of both decisions, in English, can be found at the following website: http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Noticias-Judiciales/La-Sala-Segunda-del-Tribunal-Supremo-acuerda-que-no-procede-la-libertad-de-Oriol-Junqueras-ni-la-peticion-de-suplicatorio-al-Parlamento-Europeo–una-vez-que-ya-esta-condenado-en-firme (please, proceed to the end of the web page) (last visited 4 May 2020).

[128]In its plenary session of January 13, 2020, Mr. Junqueras brought an action for annulment of this decision before the General Court of the EU and requested interim measures. *See* ECJ, Case T-24/20, Junqueras v. Parliament, Order of the Vice President of the General Court, ECLI:EU:T:2020:78 (Mar. 3, 2020), http://curia.europa.eu/juris/liste.jsf?num=T-24/20 (dismissing these measures).

[129]*See* Opinion of Advocate General Szpunar, *supra* note 5, at para. 101.

[130]It was probably grounded on its—mistaken—belief that the CJEU was going to deny either that Mr. Junqueras was a member of the European Parliament or that inviolability was applicable to him.

[131]As previously mentioned, *supra* note 18, one of the fugitives—Clara Ponsatí Obiols—only obtained her seat in the European Parliament after Brexit, as a result of the five additional MEPs assigned to Spain.

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should have observed the opinion of the Advocate General in rejecting its competence to answer the request.

F. Concluding Remarks

EU law governing the inviolability of MEPs is certainly far from perfect.[132] This part of the Protocol dates back to the times of the European Coal and Steel Community,[133] and makes inviolability identical "in the territory of their own State" to that afforded to members of the National Parliament.[134] As there are enormous differences between Member States regarding inviolability,[135] the Protocol prevents a consistent status for the MEPs. This institution has attempted to renew the law on immunity in a uniform way—so far, unsuccessfully.[136]

The case at hand constitutes a step forward, towards a more unitary inviolability of MEPs, by limiting certain Member State powers. This strengthens the authority of the European Parliament, in line with previous case law. However, the human rights involved in inviolability cases—particularly the right of access to justice—as well as ECtHR case law on the matter, should perhaps be considered more closely in the future. Inviolability is subject to a proportionality analysis by the ECtHR, which could arise in subsequent cases, in order to ensure that it protects Parliament from undue interference but does not shield its members from charges unrelated to their duties. Finally, *Junqueras* is not particularly suitable for the new rulings on inviolability, because the dispute was eliminated by Mr. Junqueras's conviction—as proven in the aftermath.

[132]*See* Isabelle Pingel, *Les immunités de l'Union Européenne*, *in* Anne Peters, Evelyn Lagrange, Stefan Oeter & Christian Tomuschat, Immunities in the Age of Global Constitutionalism 301, 311 (2015) (affirming that this law has not experienced the evolution of the law of immunities, but, in the future, this might change).

[133]*See* Opinion of Advocate General Szpunar, *supra* note 5, at para. 104 (mentioning that Article 9 of the Protocol is a copy of Article 9 of the Protocol on the Privileges and Immunities of the European Coal and Steel Community).

[134]TFEU art. 9(a).

[135]*See* Handbook on the Incompatibilities and Immunity of the Members of European Parliament, *supra* note 62; *European Commission Report*, *supra* note 2, at 18–21; Van Der Hulst, *supra* note 60; Senén Hernández, *supra* note 67, at 324; Carro Martínez, *supra* note 2, at 106–08.

[136]*See* Benlolo-Carabot, *supra* note 4, at 582 n.245 (showing that, in 2003, this institution proposed a unified status for its members, but it was not accepted on this point by the Council); Offermann, *supra* note 114, at 4 (there was a previous unsuccessful proposal in 1983).

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