

Fault Lines of the European Parliamentary Mandate: The Immunity of Oriol Junqueras Vies

ECJ 19 December 2019, Case C-502/19, *Junqueras*,
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INTRODUCTION

On 19 December 2019, the European Court of Justice issued its ruling in the case of Oriol Junqueras Vies, the former vice president of Carles Puigdemont's secessionist regional government of Catalonia. Mr Junqueras had been elected a member of the European Parliament while in preliminary detention for offences related to the unconstitutional Catalan independence referendum of 2017. He was refused prison leave to take the formal oath in front of the central electoral commission as required under Spanish law. Pursuant to the Spanish electoral code, failure to take the oath results in a mandatory declaration of vacancy and thus the forfeiture of the parliamentary mandate. Consequently, Mr Junqueras did not acquire the status of member of the European Parliament according to Spanish law. Mr Junqueras complained against the decision not to grant him leave, arguing that, following his election, he was entitled to parliamentary immunity pursuant to Article 9 of the Protocol (No. 7) on Privileges and Immunities of the European Union (hereinafter 'the Protocol').

The term 'parliamentary immunity' is an umbrella term that covers two distinct types of immunity: the first is 'non-accountability', freedom of speech

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and freedom of the parliamentary vote – known in French as *irresponsabilité* or *immunité de fond* and in German as *Indemnität*. The second is ‘inviolability’, freedom from deprivation of liberty and, as the case may be, legal proceedings – *inviolabilité* or *immunité de procédure* in French and *Immunität* in German. In this case note, I will use the term ‘immunity’ in the latter sense unless indicated otherwise.

The three questions subsequently submitted to the Court by the Spanish *Tribunal Supremo* essentially asked whether a member-elect in preliminary detention already enjoys parliamentary immunity before the constituent meeting of the Parliament for the legislative cycle for which that member was elected, and if so, whether this continues to hold if the person in question is prevented – by his detention – from meeting national legal requirements for the acquisition of the mandate. Lastly, the referring court asked whether the immunity, should it apply, automatically requires the release of the detained member-elect from prison in order to perform the necessary formalities and to take his seat in the European Parliament, or whether this needs to be decided based on the circumstances of the case and the legal interests concerned.

To answer these questions, the Court had to focus on two core issues, both of which bear far-reaching consequences for European elections and the legal status of members of the European Parliament beyond this concrete case. The first issue was whether Mr Junqueras, at the time his request for prison leave to comply with formal requirements mandated by Spanish electoral law was denied, had already acquired the quality of member of the European Parliament – for if he had not, it would be clear that he did not have a claim to immunity. Finding that Mr Junqueras *was* a member of the European Parliament at the time in question would, however, mean that member states are far less free than previously assumed to regulate formalities and conditions for the acquisition of the European mandate. The second core issue of the case – only arising if the question for Mr Junqueras’s MEP status was answered in the affirmative – was the temporal and material scope of European parliamentary immunity, which, under the provisions of the Protocol, is notoriously complicated and unclear.

The Court delivered its ruling in the midst of immense political tensions, not least because of its possible ramifications for other controversial Catalan figures – in particular Mr Puigdemont, who had fled Spain and had likewise been elected to the European Parliament. In the light of these circumstances, the Court delivered a very progressive judgment regarding both central issues. Its findings mark important steps for the development of democracy and parliamentarianism at EU level.

First, the judgment makes it clear that what makes a person a member of the European Parliament is *being elected* – and that this is indeed the only requirement

for acquiring that status.¹ Failure to comply with additional requirements imposed by the national law of member states therefore does not prevent the acquisition of a mandate or lead to its forfeiture. The meaning of this aspect of the *Junqueras* ruling for European democracy will be addressed in the second section of this note.

Second, the judgment strengthens the legal position of members-elect by interpreting Article 9 of the Protocol (No. 7) on Privileges and Immunities of the Union widely (and with considerable judicial creativity) so as to cover members-elect during the time prior to the constituent meeting. This aspect of the judgment will be further analysed in the third section below, where I will argue that the Court's judgment in the *Junqueras* case mitigates one of the flaws of the European immunity regime but at the same time highlights, once again, the inherently problematic nature of the system of parliamentary immunity established under the Protocol.

Since the *Tribunal Supremo* had made it very clear in its referral that its questions to the Court of Justice only related to the case concerning Mr Junqueras's complaint upon being denied prison leave – and not, crucially, his criminal trial and ultimate conviction as such² – it had been unlikely that he would regain his freedom even if the Court confirmed that he enjoyed parliamentary immunity after his election. Today, Mr Junqueras not only remains in prison but has had his mandate revoked by the European Parliament following a new ruling of the *Tribunal Supremo* in January 2020. Two other prominent Catalan separatists, Mr Puigdemont and Mr Comín, have been able to take up their mandate in the European Parliament but the lifting of their parliamentary immunity has been requested. The reactions of both the Spanish judiciary and the European Parliament to the judgment of the Court of Justice have given rise to questions and debate. In the fourth section of this note, I will briefly comment on recent developments in the cases of Mr Junqueras, Mr Puigdemont, and Mr Comín.

TOWARDS A EUROPEAN PARLIAMENTARY MANDATE

Today's directly elected European Parliament evolved out of an assembly very similar to the parliamentary assembly of the Council of Europe: its members were in the first instance members of the national parliaments of member states, elected in accordance with the respective national procedure and merely delegated to the

¹With the proviso that there are no incompatibilities as referred to in Art. 7(1) and (2) of the 1976 Act concerning the election of the Members of the European Parliament by direct universal suffrage, as amended by Council Decision 2002/772/EC.

²ECJ 19 December 2019, Case C-502/19, *Junqueras*, para. 30.

European Parliament. The Parliament's development from a second-tier consultative organ in the European Communities to a genuine co-legislature and the democratic centrepiece of the EU is a slow process that continues to this day, with principal issues as to what *kind* of democracy the EU is still unresolved.³

A hybrid of European and national electoral law

It comes as no surprise that, when the transition was made from delegated membership to direct elections in the 1970s, the electoral law for the European Parliament as well as the law regulating the European parliamentary mandate (including parliamentary immunity) became a hybrid between European and national legislation. With its legal basis in Articles 14(2) and (3) TEU and 223(1) TFEU (ex 190(4) TEC), the main lines of the electoral law are today laid down in the Act concerning the election of the members of the European Parliament by direct universal suffrage of 1976⁴ (hereinafter the Electoral Act 1976), which imposes a number of framework conditions: next to the requirement that elections 'shall be by direct universal suffrage and shall be free and secret'⁵ and a provision saying that elections shall be held in the same four-day period from Thursday morning to Sunday across all member states, the Act merely specifies that the electoral system must be one of proportional representation, be it a (preferential) list system or a single transferable vote (STV) system. Also the establishment of an electoral threshold of up to 5% of the votes cast on a national basis is permitted, in line with the electoral tradition of some member states.⁶ Beyond this framework, European elections remain, in the words of Article 8 of the Act, to be 'governed in each Member State by its national provisions', which may 'if appropriate take account of the specific

³As evidenced, amongst others, by the attempt to establish the *Spitzenkandidaten* process, cf M. Dawson, 'The lost Spitzenkandidaten and the future of European democracy', 6 *Maastricht Journal of European and Comparative Law* (2019) p. 731.

⁴OJ L 278 8.10.1976, p. 5, last amended by Council Decision 2002/772/EC, Euratom of 25 June and 23 September 2002, OJ L 283 21.10.2002.

⁵Art. 1(3) of the Electoral Act 1976.

⁶Currently, 15 member states impose electoral thresholds, varying between 1.8% and 5% of the votes cast. Interestingly, in Germany, where a threshold of 5% applies in national parliamentary elections, the Federal Constitutional Court has ruled both a threshold of 5% and one of 3% unconstitutional in two consecutive judgments (German Federal Constitutional Court, Judgment of 9 November 2011, 2 BvC 4/10 and Judgment of 26 February 2014, 2 BvE 2/13). In both cases, the Constitutional Court's main argument for the different assessment of the threshold in national and European elections was that in the European Parliament, as opposed to the *Bundestag*, there is no need for a stable majority to sustain a government, which would justify the encroachment on the principle of equality of the vote constituted by an electoral threshold.

situation in the Member States, [but] shall not affect the essentially proportional nature of the voting system’.

As a result of this relatively thin framework of European electoral rules and the reference to national law for details, the minutiae of election process can differ considerably between member states. Such differences may, for instance, relate to the minimum age to vote and stand for election, conditions for the nomination of candidates, and the allocation of seats vacated during the electoral term.⁷ It is thus fair to say that the electoral process is far from harmonised.

Membership begins before the mandate

This lack of harmonisation played an important part in the case of Mr Junqueras, because it enabled the argument based on which the Spanish authorities dismissed his claim to parliamentary immunity. According to that argument, the failure of Mr Junqueras to take the oath required by Article 224(1) of the Spanish electoral code as a consequence of his imprisonment led to the mandatory declaration of vacancy of his seat by virtue of Article 224(2) of that code. Since taking the oath is an integral part of the electoral procedure under Spanish law, so the argument goes, Mr Junqueras had never become a member of the European Parliament in the first place and thus could not enjoy any immunity reserved for members.

Advocate General Szpunar rightfully dismissed this argument, observing that ‘the consideration that only a person who takes up the actual exercise of his mandate without hindrance will acquire the status of a member of Parliament and the immunity associated with it leads to a vicious circle’.⁸ While it was easy for the Court to follow the Advocate General’s opinion that member states should not be able to prevent the acquisition of the European parliamentary mandate in this way, this does not automatically warrant the conclusion that members-elect must legally be considered members of the European Parliament already before the constituent meeting. While there was little doubt that the independence of the European Parliament from the member states and the autonomy of the EU legal order requires that the status of members of the European Parliament be governed by Union law alone, as Advocate General Szpunar argued,⁹ Union law itself seemed to delimit the temporal scope of the European parliamentary mandate quite clearly: Article 5 of the Electoral Act 1976 stipulates that

⁷R. Panizza, ‘The European Parliament: Electoral Procedures’, *Fact Sheets on the European Union – 2019*, May 2019, (www.europarl.europa.eu/ftu/pdf/en/FTU_1.3.4.pdf), visited 3 March 2020.

⁸CJEU 19 December 2019, Case C-502/19, *Junqueras*, Opinion of AG Szpunar, para. 50.

⁹*Ibid.*, para. 44.

1. 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.[...]
2. 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.

The end of the term of office is stipulated in equally unambiguous terms in Article 13 of the Act. Rule 4 of the European Parliament's Rules of Procedure echoes these provisions. Accordingly, Union law prior to the *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. If the Court had accepted such a reading of the law, Mr Junqueras could by default not have had a claim to immunity for the period between his election in May 2019 and the constituent meeting of the new Parliament on 2 July of that year. However, it has long been noted that

although the result thus achieved may be textually pure, it is nonetheless shocking in legal terms since it is contrary to the spirit of the text. In fact, the protection thus accorded seems to be of a fragmented nature since Members are not usually regarded as enjoying such status as from the opening of the first sitting but rather as from the evening of the election. Therefore, Members may be attacked in their capacity as Members of the European Parliament immediately after the results are proclaimed and not enjoy any protection at the time.¹⁰

Advocate General Szpunar emphatically shared this assessment in his Opinion and pleaded for an interpretation affording members-elect the protection of parliamentary immunity as of the moment of proclamation of election results.¹¹ This approach, while difficult to maintain in the light of the text of the law, is indeed most consistent with the spirit and purpose of parliamentary immunity, part of which is to give effect to the principle of democracy enshrined in Article 14 TEU.¹² It can be argued that

¹⁰F. Zimeray, 'Report on the request for upholding the immunity and privileges of Mr Francesco Musotto' (2002/2201(IMM)), 20 June 2003, A5-0248/2003, para. 17. This opinion has also been shared by the European Parliament on various occasions in decisions to defend members' immunity, cf K Offermann, *Parliamentary Immunity in the European Parliament*, internal study DG Internal Policies, European Parliament, 2005 (updated 2007), PE360.487/REV2.

¹¹AG's Opinion in *Junqueras*, *supra* n. 8, para. 81 ff.

¹²With reference to earlier case law, the Court reiterates this purpose as being 'to completely and expediently protect the institutions of the union against impediments to their proper functioning and independence or against risks of violation thereof [...]'. In the case of the European Parliament, this means amongst others that 'in line with the principle of representative democracy referred to in [...] Article 14 TEU, its composition must be a faithful and complete representation of the free choice of citizens, made in direct general elections [...]' (author's translation); see *Junqueras*, *supra* n. 2, paras. 82-83.

this principle demands harmonisation of the legal status of members-elect from different member states. While (some) divergence in electoral procedure is certainly permissible, and in fact a necessary consequence of placing the organisation of elections in the legal domain of member states, divergence in legal status between persons elected in different member states unduly runs counter to electoral equality¹³ if it means that elections in some member state result in a mandate with certainty, while in others members-elect remain in a precarious situation until the constituent meeting.

The Court had to realise that a conservative, textual reading would arguably have meant a departure from democratic principles for two reasons: first, the ‘immunity gap’ between the announcement of election results and the constituent meeting of the European Parliament would have allowed member states to defy the popular vote and the proper function of the European Parliament by preventing members-elect from taking office; second, divergent national rules regarding the time at which and the steps through which one acquires the European mandate would have continued to jeopardise electoral equality.

The Court solved this creatively, without too blatantly departing from the text of the Electoral Act 1976, by separating *membership* of the European Parliament from the parliamentary *mandate* or *office*. While the latter unambiguously starts with the constituent meeting, the former begins with the announcement of election results. The reasoning through which the Court reached this conclusion is remarkable: since the European Parliament is not competent to question the regularity of the proclaimed election results or to check their conformity with Union law, it has to ‘take note’ of these results (Article 12 of the Electoral Act 1976) and verify their credentials.¹⁴ According to the Court, the link thus created between the elected person and the institution of the European Parliament must mean that the quality of member is acquired with the proclamation of election results.¹⁵ And as the general applicability of Article 9 of the Protocol on Privileges and Immunities attaches to membership of the European Parliament – and not to the effective exercise of the mandate – the Court has thus extended its coverage to members-elect.

¹³It has been noted that equality of the vote is not explicitly affirmed in primary or secondary EU law, since the system of digressive proportionality in the allocation of seats in the European Parliament to member states necessarily contains an element of inequality, cf B. Michel, ‘Thresholds for the European Parliament Elections in Germany Declared Unconstitutional Twice: Bundesverfassungsgericht Judgment of 9 November 2011, 2 BvC 4/10, 5% Threshold Judgment of 26 February 2014, 2 BvE 2/13, 2 BvR 2220/13, 3% Threshold’, 12 *EuConst* (2016) p. 133. Nevertheless, it is arguably part of a wider consensus on the content of the principle of democracy.

¹⁴*Junqueras*, *supra* n. 2, paras. 69-70.

¹⁵*Ibid.*, para. 74.

National regulatory competence ends with the proclamation of election results

Arguably, the *Junqueras* judgment has limited the margin for national regulation of the European electoral process in one important respect: with membership of the European Parliament being acquired with the proclamation of electoral results, the ability of member states to set procedural barriers to the acquisition of the mandate by imposing national requirements ends once the polls are closed, the votes counted, and the results determined and officially announced (according to the procedure laid down in the respective national electoral codes, thus preserving the relevance of national law to European elections). This development should be welcomed, as it reduces the uncertainty resulting from the vague wording of Article 8 of the Electoral Act 1976 considerably and further adds to the harmonisation of European electoral rules. In this sense, while we are still far from a purely European parliamentary mandate, the *Junqueras* judgment is a logical and coherent step in the development of EU democracy.

It should, however, be noted that it is far from easy to draw a clear line between formal steps that belong to the electoral process – and are thus governed by diverging national rules – and others that do not. In *Junqueras*, the Court makes clear that a provision like Article 224(2) of the Spanish electoral code, which provides for a mandatory declaration of vacancy of the seat of a member-elect who fails to take the oath on the Spanish constitution, cannot prevent an elected person from becoming an MEP.¹⁶ Whether this is equally true for more bureaucratic formalities to be carried out after the announcement of results, such as the verification of personal details or the ascertainment of the absence of incompatibilities, appears less clear.

PARLIAMENTARY IMMUNITY: THE ART OF THE POSSIBLE

From the Court's ruling that membership of the European Parliament is a direct consequence of being elected and is acquired immediately with the proclamation of election results, it follows that members-elect do in fact fall within the scope, *ratione temporis et personae*, of Protocol No. 7 on Privileges and Immunities. The Protocol is the elaboration of Article 343 TFEU, according to which

¹⁶When the Court set aside the ruling of the General Court confirming the denial of interim measures to Mr Puigdemont and Mr Comín in Order C-646/19, issued one day after the *Junqueras* judgment, it did so on the ground that 'contrary to the President of the General Court's conclusion, the fact that the proclamation [of election results] states that the candidates declared elected are required, in accordance with national law, to swear or affirm allegiance to the Constitution does not exclude, prima facie, that that proclamation may be regarded as the "results declared officially" within the meaning of Article 12 of the Electoral Act'. However, it also cautiously pointed out that the question whether or not the oath of allegiance must be deemed part of the electoral procedure 'is a question of law to which the answer is not immediately obvious and therefore calls for a detailed examination [...]'.

‘[t]he Union shall enjoy [...] such privileges and immunities as are necessary for the performance of its tasks’. The immunities of members of the European Parliament are regulated in Articles 8 and 9 of the Protocol, which read as follows:

Article 8

Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.

Article 9

During the sessions of the European Parliament, its Members shall enjoy:

- (a) in the territory of their own State, the immunities accorded to members of their parliament;
- (b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.

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

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.

Since new members-elect do not take up their mandate until the constituent meeting and hence are not performing any parliamentary duties before that, Article 8 can be left out of consideration here. The difficult question the Court was faced with in the *Junqueras* case was which of the – potentially very different – immunities provided for by the first and second paragraph of Article 9 of the Protocol Mr Junqueras enjoyed at the time in question.

The crucial choice the Court had to make here was between the immunity afforded to members by the first paragraph under (a), and the ‘travelling immunity’ provided for by the second paragraph. Why did the Court not choose the seemingly more general immunity but instead opted to afford Mr Junqueras the immunity that applies to members ‘while they are travelling to and from the meeting place of the European Parliament’, even though Mr Junqueras was arguably in Spain and not travelling?

An inherently discriminatory system

Pursuant to the text of Article 9, the immunity referred to in the first paragraph under (a) only applies ‘[d]uring the sessions of the European Parliament’. Case

law of the Court of Justice has long determined that the European Parliament is to be deemed continuously in session for 12-month periods, so that members enjoy immunity even in between part-sessions and during times when no actual parliamentary business takes place.¹⁷ However, the session for which Mr Junqueras had been elected was not to start until the constituent meeting and although it has been argued that the immunity of Article 9 under (a) should apply as of the announcement of election results,¹⁸ this is not obvious. Arguably, having found that membership of the European Parliament is acquired with the proclamation of results, the Court might have been able to justify stretching the temporal scope of this immunity in such a way that newly-elected members would have been covered even before the beginning of *their* session of the European Parliament. In terms of the temporal scope of immunity, this would have closed a gap between re-elected members (whose previous session continues between election night and the constituent meeting of the new Parliament) and newly-elected ones. However, opting for the ‘travelling immunity’ instead requires a much smaller effort of interpretation, since travelling to the meeting place of the European Parliament logically includes doing so to prior to the constituent meeting in order to attend it.¹⁹

My assumption is that the Court also opted for the immunity of the second paragraph of Article 9 for an additional, more important reason, namely in recognition of the fact that the immunity under Article 9(a) is inherently discriminatory and therefore itself highly problematic; in fact, if the Court intended to close the ‘immunity gap’ between election night and the constituent meeting of the newly-elected European Parliament, choosing to apply this provision would have done so only in some member states but not in others. This requires some explanation: according to Article 9(a) of the Protocol, members of the European Parliament enjoy ‘in their own state, the immunities accorded to members of their parliament’. This means that, with regard to acts committed on the territory of their member state of origin,²⁰ the material scope of their immunity is equated

¹⁷ECJ 12 May 1964, Case C-101/63 *Wagner v Fohrmann and Krier*, p 433; cf also ECJ 10 July 1986, Case C-149/85 *Wybot v Faure*, where the court held in para. 22 that ‘[a]n interpretation of the word “session” limiting immunity to the periods when Parliament is actually sitting might [...] prejudice the carrying on of the Parliament’s activities as a whole’.

¹⁸In his Report on the request for upholding the immunity and privileges of Mr Francesco Musotto (2002/2201(IMM)), 20 June 2003, A5-0248/2003, para. 17 rapporteur François Zimeray ‘[called] on the Convention and the next intergovernmental conference to correct this anomaly [of the protocol not affording members immunity between election night and the constituent meeting] by amending the text of Article 3 of the 1976 Act. Such a revision would allow optimum protection of Members, guaranteeing them real freedom of expression and filling the legal vacuum which exists [...]’.

¹⁹*Junqueras, supra* n. 2, para. 80.

²⁰I.e. the member state in which they have been elected. Cf S. Hardt, *Parliamentary Immunity* (Intersentia, 2013) p. 44, note 76.

with that of members of the respective national parliament. In the case of Mr Junqueras, we would therefore have to turn to Article 71 of the Spanish constitution, which grants members of the Spanish *Cortes Generales* extensive immunity:

Section 71(2)

During their term of office, Members of Congress and Senators shall [...] enjoy freedom from arrest and may be arrested only in the event of flagrante delicto. They may be neither indicted nor tried without prior authorisation of their respective House.²¹

Hence, if Article 9(a) of the Protocol had been found to have covered Mr Junqueras at the time he was denied prison leave, the scope of the immunity enjoyed by him would have been measured on the basis of that of Spanish parliamentarians, since he had been elected in Spain and was located in Spain. Whether the *Tribunal Supremo* would have found it necessary to request the lifting of his immunity from the European Parliament is doubtful: when Mr Junqueras had been elected a member of the Spanish House of Representatives one month prior to the European elections, the judges were of the opinion that no such request was necessary, since the trial had begun before the elections. Nevertheless, the European Parliament would have been able to assert Mr Junqueras's immunity on his request.²² Despite the reference to national law in Article 9(a) of the Protocol, the European Parliament is not bound by national practice or legal opinion in determining whether immunity exists in a given case and, if so, whether it should be waived.²³ Still, assuming that affording effective immunity to Mr Junqueras and closing the 'immunity gap' was the intention of the Court, Article 9(a) would thus have seemed a suitable option at first glance.

The problematic nature of Article 9(a) only becomes clear when we imagine the same case in a different member state. Imagine, for instance, that Mr Junqueras had been elected to the European Parliament in the Netherlands; imagine further that his entire case had played out in the Netherlands: the Dutch constitution does *not* grant members of the national parliament any immunity beyond non-liability for utterances in the Chamber during the session. There is absolutely no freedom from arrest and no requirement for prior authorisation for a criminal indictment and trial.

²¹Translation as rendered on the official website of the Spanish Parliament, (www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf), visited 3 March 2020.

²²Rule 7 of the Rules of Procedure of the European Parliament.

²³K. Offermann, *Parliamentary Immunity in the European Parliament*, internal study DG Internal Policies, European Parliament, 2005 (updated 2007) p. 23.

It follows that, under application of the same European immunity rule, the hypothetical Mr Junqueras elected in the Netherlands would not have been entitled to immunity, regardless of the status of his mandate at the relevant time. Conversely, in a number of other member states, such as Greece, he would have enjoyed a similar or even stronger set of immunities as in Spain. In a third category of member states, such as Austria, whether or not immunity (or, more specifically, inviolability) would apply depends on an assessment of whether or not the acts to which legal action against our hypothetical Mr Junqueras relate were connected to his activity as a parliamentarian. Article 157(3) of the Portuguese Constitution provides that '[n]o Member of the Assembly of the Republic may be detained, arrested or imprisoned without the Assembly's authorisation, save for a wilful crime punishable by [a maximum term of three years of imprisonment]'.²⁴

We thus see that the general application of Article 9(a) of the Protocol on Privileges and Immunities would by no means close the 'immunity gap' throughout the Union but would have done so to different degrees in different member states. Only to complete the point – and at the risk of digressing from the ruling discussed here just for a moment – let us consider the case where a member of the European Parliament is accused not of sedition, rebellion or another offence intimately connected to their member state of origin, but, for instance, of hate speech or another criminal utterance in a televised interview. Save for cases in which the utterance must be considered an 'opinion expressed in the performance of their duties', in which case it is protected under Article 8 of the Protocol, our hypothetical member might or might not enjoy far-reaching immunity, depending entirely on which member state they were elected in, in which member state they are investigated or prosecuted, and whether they are travelling to or from the European Parliament.

As I have argued elsewhere²⁴ – and I am pleased to see that Advocate General Szpunar appears to agree²⁵ – the immunity system created by Article 9, with its differentiation between member states and specific situations, is in its entirety discriminatory and highly anachronistic. It follows the model of the Parliamentary Assembly of the Council of Europe²⁶ and stems from the time when the European Parliament did not consist of directly-elected members but of delegates who were, first and foremost, members of national parliaments. Today, in a European Parliament that struggles for recognition as the organ of democratic representation for all EU citizens alike, and for whose Members a

²⁴Hardt, *supra* n. 20, p. 43 ff.

²⁵Case C-502/19, Conclusions of AG Szpunar, 12 November 2019, para. 75.

²⁶*Cf* Art. 40 of the Statute of the Council of Europe, Arts. 13-15 of the General Agreement on Privileges and Immunities of the Council of Europe, as well as Arts. 3 and 5 of the Protocol thereto. For the historical link, *see also* T. Harms, *Die Rechtsstellung des Abgeordneten in der Beratenden Versammlung des Europarates und im Europäischen Parlament* (Hansischer Gildenverlag 1968).

simultaneous national mandate in fact constitutes an incompatibility, there seems to be no justification for an immunity regime like the one resulting from of Article 9 of the Protocol. The European Parliament is aware of this, but several attempts to modernise the European immunity system have failed in recent decades, mainly since changing the Protocol requires a cumbersome treaty amendment procedure.²⁷

From travelling immunity to the right to travel

By opting for the application of the ‘travelling immunity’ provided for by the second paragraph of Article 9 of the Protocol to the situation of Mr Junqueras, the Court has shown that it is equally conscious of the problematic nature of the current immunity regime, as well as of the unlikelihood of its harmonisation by an amendment to the Protocol on Privileges and Immunities in the near future.

The material scope of the immunity enjoyed by MEPs pursuant to the second paragraph of Article 9 of the Protocol is less than clear, since it does not spell out the precise nature of the protection afforded here. However, it appears logical that it is the same as that indicated in the first paragraph under (b), namely ‘immunity from any measure of detention and from legal proceedings’. It is unlikely, after all, that the drafters of the Protocol intended to tie the material scope of the immunity of travelling members of the European Parliament to that enjoyed by national parliamentarians of the member states in which they were elected: that could have been achieved more easily by including a reference to travel in the first paragraph under (a), or by simply omitting the second paragraph of Article 9, in which case Article 9(a) would have applied during travel on the territory of the home member state, and Article 9(b) during travel in other member states (the difficulty of determining which member state one is in at a given moment while, say, on a long-haul train journey, makes this also seem impractical). Nor does the second paragraph contain an indication that the creation of a third immunity regime, next to those under Article 9(a) and (b), was intended, while the words ‘[i]mmunity shall likewise apply’ suggest a link to the preceding provision under Article 9(b). In any event, the Court appears intent to read the immunity provided for by the second paragraph of Article 9 as precluding any measures that would deprive members of the European Parliament of their liberty so as to prevent them from travelling, unless the immunity has been lifted by the European Parliament upon request.²⁸

The solution which the Court has found for members-elect prior to the constituent meeting is thus to interpret the immunity that the text of Article 9,

²⁷Hardt, *supra* n. 20, p. 45, note 77.

²⁸Junqueras, *supra* n. 2, paras. 87-91.

second paragraph affords to parliamentarians ‘while they are travelling’ widely, in effect turning it into one that protects their *right* to travel. In doing so, the Court has practised the art of the possible. It resorts to the only provision on parliamentary immunity for members of the European Parliament that applies uniformly and does not differentiate between members of the European Parliament, either on the basis of where they were elected or where they are subjected to penal procedure or detention.

It should be noted that the interpretation of the second paragraph of Article 9 of the Protocol as providing a right to travel to the European Parliament has the potential to considerably extend the immunity enjoyed by many MEPs (next to members-elect). After all, MEPs elected in member states whose national immunity regimes do not provide for freedom from arrest and detention (such as the Netherlands) were not previously deemed to enjoy such a right whenever they were on the territory of their ‘home’ member states and thus covered by the immunity of Article 9(a) of the Protocol. This curious consequence of the Court’s ruling begs for clarification in further case law. In any event, it once again highlights the need for a comprehensive reform of the entire immunity regime for the European Parliament.

NO RETROACTIVE EFFECT IN THE CONCRETE CASE

The ruling of the Court was clear: when the Spanish authorities had officially announced the results of the 2019 European elections, Mr Junqueras had become a member of the European Parliament. He had become entitled to parliamentary immunity, and according to the Court of Justice, that meant that he should have been released from preliminary detention in order to allow him to travel to the European Parliament, safe if the latter had lifted the immunity upon request.²⁹ However, by the time the Court’s issued its judgment, Mr Junqueras had been convicted in final instance and sentenced to 13 years’ imprisonment and barred from holding public office for the same period. And while the *Tribunal Supremo* took cognisance of the judgment from Luxemburg, it did not overturn Mr Junqueras’s conviction or otherwise order his release from prison. In January 2020, the *Tribunal Supremo* ruled that the final conviction of Mr Junqueras had been left intact by the judgment of the European Court and constituted an incompatibility with the office of member of the European Parliament.³⁰ The European Parliament

²⁹Ibid., para. 94.

³⁰Press release of the Spanish judiciary (*poder judicial*) of 9 January 2020, (www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Sala-de-prensa/Archivo-de-notas-de-prensa/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), visited 3 March 2020.

thereupon declared Mr Junqueras's seat vacant. At the same time, Mr Junqueras's exiled former colleagues Carles Puigdemont and Antoni Comín, whose claims to a European mandate and to immunity are analogous to that of Mr Junqueras and who were able to take up their mandate after the Court's judgment, currently remain members of the European Parliament, but the lifting of their immunity has been requested by the Spanish authorities. Should their immunity indeed be lifted, they must be expected to lose their European parliamentary mandate if they are convicted in Spain.

Has the *Tribunal Supremo* acted unlawfully in not ordering Mr Junqueras's release? Some commentators have argued that it did,³¹ while others praise the decision to keep Mr Junqueras imprisoned as a victory of the rule of law.³² And while such opinions often coincide with their author's respective stance on the Catalan question, the issue is indeed difficult. In paragraph 93 of its judgment, the Court of Justice places the decision regarding the consequences of Mr Junqueras's immunity back in the hands of the referring court, but not without a firm reminder of the principle of sincere cooperation and the *leitmotifs* of the Court's judgment. In this sense, the Spanish judges, ruling in January 2020 that Mr Junqueras cannot serve as an MEP as a consequence of his sentence, '[ignored] the text and spirit of the ECJ ruling'.³³ It did not, however, imply that the criminal sentence against Mr Junqueras, which includes the suspension of the right to hold public office, is void or must be overturned. In this regard, the Court appears to respect the delimitation of the case to the procedure relating to the denial of prison leave while Mr Junqueras was in preliminary detention, and excluding the underlying criminal trial. It can, therefore, not be said that the *Tribunal Supremo* acted unlawfully. Nevertheless, the Spanish judges did not await the resolution of the preliminary reference before passing judgment in the criminal case against Mr Junqueras, even though they must have been fully aware that this would render a ruling of the Court of Justice in his favour practically ineffective. This does expose the Spanish court to the allegation of disloyalty towards European law.

³¹In particular those with an affiliation to the cause of Catalan independence, *see* for instance R. Romeva and A. Bosch, 'Oriol Junqueras is Europe and it has spoken with a loud voice: Spain must respect democracy', *Euronews* op-ed, 9 January 2020, (www.euronews.com/2020/01/09/oriol-junqueras-is-europe-and-it-has-spoken-with-a-loud-voice-spain-respect-democracy-view), visited 3 March 2020.

³²*See* for instance I. Guardans, 'Oriol Junqueras' trial shows the healthy functioning of Spanish law and democracy', *Euronews* op-ed, 14 January 2020, (www.euronews.com/2020/01/14/oriol-junqueras-trial-shows-the-healthy-functioning-of-spanish-law-and-democracy-view), visited 3 March 2020.

³³P. van Elsuwege, 'The Junqueras Saga Continues – A New Challenge for the EU legal order', *Vefassungsblog*, 14 January 2020, available at (verfassungsblog.de/the-junqueras-saga-continues) visited 3 March 2020.

At the very least, the fact that Mr Junqueras's parliamentary mandate and his immunity were confirmed by the Court of Justice but that neither appears to be of any practical consequence in his case leaves an aftertaste of tragedy that forcefully illustrates the need for a clear and harmonised European mandate and immunity regime in the future.

CONCLUSIONS

The ruling of the Court of Justice of the European Union in *Junqueras* appears to be of little practical consequence to its eponym, as it neither secured his release from prison nor preserved his European parliamentary mandate. It did, however, allow Mr Puigdemont and Mr Comín to take up their mandates. For the European Parliament as such, the law governing its elections, as well as the immunity regime for its members, the case signifies a major step towards a more European mandate. A person must now be legally considered a member of the European Parliament as soon as their election has been announced in their member state of origin; member states are no longer free to make the acquisition of the European mandate subject to legal requirements other than being elected. What this means in practice remains unclear: it appears unlikely and unpracticable that any formalities that follow the proclamation of results under national law are now ruled out. However, national rules that provide for the forfeiture of the mandate as an automatic consequence of the failure of a member-elect to observe a requirement such as the pledge of allegiance to the Spanish constitution appear no longer tenable.

As a consequence of becoming members of the European Parliament with the official proclamation, members-elect enjoy parliamentary immunity (inviolability) pursuant to Article 9, second paragraph, even before the constituent meeting of the new Parliament. With a degree of farsighted creativity, the Court has turned this 'immunity while travelling' into a 'right to travel' to the European Parliament that applies to members-elect regardless of their member state of origin and protects them from detention and legal proceedings.

