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**Scope of Immunity of Members of the Bundestag –
A Case Study of a Bundestag Member, Mr. Pofalla**

Keywords: immunity, Fundamental Law, Bundestag's Rules of Procedure, Federal Constitutional Court

Słowa kluczowe: immunitet, Ustawa Zasadnicza, Regulamin Bundestagu, Federalny Sąd Konstytucyjny

Abstract

Members of the Bundestag enjoy parliamentary immunity under the Basic Law. The member may be held liable or arrested for an offense punishable by criminal law only if the Bundestag permits it and waives the member's immunity, unless the member is caught red-handed or on the following day. Since the majority rule also applies here, the decision to waive immunity is decided by the governing majority. This raises the question, especially on the part of members of individual opposition parties, to what principles the Bundestag is subject to when deciding whether or not to waive the immunity of a member of the Bundestag. The Bundestag's reservation of permission (*Genehmigungsvorbehalt*) to conduct criminal proceedings according with the jurisprudence of the Federal Constitutional Court serves primarily the benefit of the parliament as a whole. The subjective rights of members of the Bundestag to certain conduct of the Bundestag cannot be derived directly from the Article 46 (2) of the Basic Law. However, pursuant to the second paragraph of Article 46 in conjunction with the second sentence of the Article 38 (1) of the Basic Law, a member of the Bundestag may demand that the Bundestag, de-

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ciding whether or not to waive his or her immunity, not be guided by unreasonable and arbitrary motives.

Streszczenie

Zakres immunitetu posła do Bundestagu – kazus posła Pofalli

Posłowie do Bundestagu korzystają z zagwarantowanego w Ustawie Zasadniczej immunitetu parlamentarnego. Za czyn zagrożony karą poseł może zostać pociągnięty do odpowiedzialności albo aresztowany tylko wtedy, gdy Bundestag wyrazi na to zgodę i uchyli immunitet, chyba że zostanie on schwytany w chwili popełnienia czynu lub w ciągu następnego dnia. Ponieważ również w tym przypadku ma zastosowanie zasada większości, decyzja o uchyleniu immunitetu leży w gestii większości rządzącej. Powstaje w związku z tym pytanie, szczególnie po stronie deputowanych poszczególnych partii opozycyjnych, jakim zasadom podlega Bundestag przy podejmowaniu decyzji o ewentualnym uchyleniu immunitetu posła. Przysługujące Bundestagowi zastrzeżenie zezwolenia (*Genehmigungsvorbehalt*) na przeprowadzenie postępowania karnego, zgodnie z orzecznictwem Federalnego Sądu Konstytucyjnego, służy przede wszystkim parlamentowi jako całości. Z art. 46 ust. 2 Ustawy Zasadniczej nie można wyprowadzić wprost subiektywnych praw posła do określonego zachowania Bundestagu. Może on natomiast, na podstawie art. 46 ust. 2 w zw. z art. 38 ust. 1 zd. 2 Ustawy Zasadniczej żądać, aby Bundestag podejmując decyzję o uchyleniu immunitetu, nie kierował się niemerytorycznymi i arbitralnymi motywami.

In 2001 a member of the Bundestag and the CDU/CSU faction, Ronald Pofalla, during the 14th parliamentary term requested the Federal Constitutional Court (FCC) to declare that the Bundestag and its President had violated the Basic Law (BL)² by allowing a search of Ronald Pofalla's premises. In its ver-

² Basic Law (hereinafter BL), *Grundgesetz für die Bundesrepublik Deutschland* (GG) in der im Bundesgesetzblatt Teil III, Gliederungsnummer 100–1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 1 des Gesetzes vom 28. März 2019 (BGBl. I S. 404) geändert worden ist. Article 46 (2) of the BL: A member may be held liable or arrested for an offense punishable by criminal law only with the permission of the Bundestag, unless the member is caught red-handed or on the following day. Article 46 (4) of the BL: All criminal proceedings

dict, the FCC for the first time had made a fundamental decision on the immunity of members of the Bundestag. In result, the Committee on Election Control, Immunity, and Rules of Procedure (*Ausschuss für Wahlprüfung, Immunität und Geschäftsordnung*) of the Bundestag amended the rules on immunity, in particular by specifying the criteria for reviewing Bundestag's decisions in this matter. The Rules of Procedure of the Bundestag (*Geschäftsordnung des Deutschen Bundestages*, hereinafter: GO-BT)³, by a resolution on the Rules governing immunity, emphasize that the right to demand the suspension of criminal proceedings primarily serves the benefit of the Bundestag as a whole. However, pursuant to Article 46 par. 2 in conjunction with the Article 38 par. 1 sentence 2 of the BL, each member may demand that the Bundestag, when deciding to waive immunity, not be guided by unreasonable and arbitrary motives.

The Public Prosecutor's Office in Kleve, having obtained the consent of the Prosecutor General and the Ministry of Justice of the Land of North Rhine-Westphalia, initiated preliminary proceedings on April 30, 2000 against Ronald Pofalla, a member of the Bundestag, for suspicion of tax evasion. The Bundestag did not exercise its right under the Article 46 (4) of the BL to demand that the proceedings be suspended (*Genehmigungsvorbehalt*). On May 4, 2000, the District Court (*Amtsgericht*) in Kleve ordered, at the request of the Public Prosecutor's Office, that the premises of Mr. Pofalla be searched and his property be seized⁴. On May 11, 2000⁵, on the basis of a unanimous recommendation from the Committee on Election Control, Immunity, and Rules of

and proceedings pursuant to Article 18 against a member, all arrests and other restrictions on his or her personal liberty shall be suspended at the request of the Bundestag. Article 38 (1), 2nd sentence of the BL: They are representatives of the entire nation, not bound by orders and instructions, and are subject only to their conscience.

³ *Geschäftsordnung des Deutschen Bundestages* (GO-BT) in der Fassung der Bekanntmachung vom 2. Juli 1980 (BGBl. I S.1237), zuletzt geändert laut Bekanntmachung vom 1. März 2019 (BGBl. I S. 197).

⁴ A similar case took place in February 2001: the Munich Public Prosecutor's Office ordered a search of the office and apartment of Frank Hofmann, a collaborator of the SPD chairman of the CDU Donation Investigation Committee. The man allegedly disclosed professional secrets by giving documents that were classified by the prosecutor's office in Augsburg as secret to the press.

⁵ Deutscher Bundestag, 14. Wahlperiode, 102. Sitzung, 11 Mai 2000, Sten. Prot. S. 9541 C.

Procedure⁶, the Bundestag decided to waive the immunity of Ronald Pofalla for the purpose of carrying out a search of his living premises and his member's office. As a result, on the same day, the police and the Public Prosecutor's Office searched Mr. Pofalla's living and working premises. However, the fact that the search took place three days before the elections to the national parliament in North Rhine-Westphalia cast a shadow over the procedural steps that were taken. Pofalla was presented as the Minister of Justice in the "shadow cabinet" of the main CDU candidate. The Prosecutor's Office justified the necessity to undertake the search at this specific time with the threat of expiry of the limitation period.

On August 11, 2000, the State Court (*Landgericht*) in Kleve declared the search and seizure orders issued by the District Court as unlawful. A few days later, the Public Prosecutor's Office closed the case. On September 19, 2000, the Minister for Justice of North Rhine-Westphalia apologized to the member of Bundestag for the unlawful conduct of his subordinate offices. The mentioned Prosecutor General was retired⁷.

It should be pointed out that the institution of immunity of members of the Bundestag is governed primarily by the Article 46 (2–4) (107) of the GO-BT and the two resolutions that constitute Annex 6 to the GO-BT⁸: Resolution on the procedures for waiving the immunity of members of the Bundestag and

⁶ BT-Drucks, May 11, 2000, 14/3338: Beschlussempfehlung des Ausschusses für Wahlprüfung, Immunität und Geschäftsordnung – Antrag auf Genehmigung zum Vollzug gerichtlicher Durchsuchungs- und Beschlagnahmebeschlüsse.

⁷ BT-Drucks, 10.10.2000, 14/4244, pp. 4–5.

⁸ Annex 6 consists of two resolutions of the chamber: Beschluß des Deutschen Bundestages betreffend Aufhebung der Immunität von Mitgliedern des Bundestages – Resolution on the procedure for waiving the immunity of members of the Bundestag (Anlage der Geschäftsordnung des Deutschen Bundestages, BGBl. I 1980, 1237) vom 25.6.1980 (BGBl. I, 1237, 1264, zuletzt geändert durch Nummer 1 der Bekanntmachung vom 15.7.2002 (BGBl. I, 3012) and Grundsätze in Immunitätsangelegenheiten und in Fällen der Genehmigung gemäß § 50 Abs. 3 StPO und § 382 Abs. 3 ZPO sowie bei Ermächtigungen gemäß § 90 b Abs. 2, § 194 Abs. 4 StGB 1A – Resolution on the rules governing immunity and in the case of permissions pursuant to sec. 50(1) of the StPO and sec. 382 (3) of the ZPO, as well as authorizations pursuant to sec. 90 b (2), sec. 194 (4) of the StGB 1A (Anlage 6 der Geschäftsordnung des Deutschen Bundestages, BGBl. I 1980, 1237 vom 25.6.1980 (BGBl. I, 1237, 1261, zuletzt geändert durch Nummer 2 der Bekanntmachung vom 15.7.2002 (BGBl. I, 3012))), hereafter referred to as: Rules governing immunity.

Resolution on the rules governing immunity cases and permissions pursuant to the sec. 50 (3) of the StPO (Strafprozeßordnung) and the sec. 382 (3) of the ZPO (Zivilprozeßordnung), as well as authorizations pursuant to sec. 90 b (2), sec. 194 (4) StGB (Strafgesetzbuch), which the Bundestag or the Committee on Election Control, Immunity, and Rules of Procedure adopts at the beginning of each parliamentary term. In items 2a of the Rules governing immunity, the house took the view that, if the Bundestag has agreed to the conduct of an inquiry into criminal offenses during the term of office of the house, the President of the Bundestag and the member concerned must be informed before the inquiry is initiated, provided that this does not prejudice the investigation of the truth. If a member has not been notified of any investigative measures to be taken against him or her, the President of the Bundestag shall be notified of such measures, stating the reasons for them. The right of the Bundestag to demand the stay of proceedings under the Article 46 (4) of the BL remains unaffected. The Bundestag granted a relevant authorization and a general permission to conduct preparatory inquiries at the beginning of its term of office. This does not cover, however, carrying out of searches or seizures, as in such cases a case-by-case authorization is required.

Mr. Pofalla believed that the decision to waive his immunity and allow the searches violated his rights under Article 38 (1), second sentence, in conjunction with the Article 46 (2) of the BL. He further argued that a resolution adopted by the Bundestag at the first session of a new term of office, under which preparatory proceedings against members of the Bundestag are in principle permitted, was unconstitutional. In his opinion, each individual case should be examined separately. Pofalla was of the opinion that the Bundestag or its President should have considered whether the prosecution's accusation was really credible before approving the searches ordered by a court. Moreover, in his opinion, it was necessary to check whether the requested search was a necessary and proportionate procedural step in the specific case. He argued that in case of the slightest doubt – and certainly such as the suspicion of political abuse – the waiver of immunity should be refused or the proceedings should be suspended, pursuant to the Article 46 (4) of the BL⁹. In his case, the polit-

⁹ The Bundestag's request for suspension of proceedings concerns the entire scope of application of the Article 46 (2) and (3) of the BL, whether or not the permission has already

ical abuse was to result from the upcoming elections to the state parliament and an attempt to discredit him. He claimed that the allegation of tax evasion was never justified and, moreover, there was no need to carry out a search of its living and working premises as he was ready to hand over to the competent authorities all documents necessary in this case.

The judgment in Ronald Pofalla's case is the first fundamental decision of the FCC on the immunity of members of the Bundestag¹⁰. Although the Bundestag's resolution to waive the immunity of Mr. Pofalla was fully upheld, the Committee on Election Control, Immunity, and Rules of Procedure considered it necessary to revise the Bundestag's regulations concerning immunity¹¹.

The institution of parliamentary immunity¹² applies to criminal proceedings, proceedings related to the loss of fundamental rights resulting from Article 18 of the BL, and any restrictions on personal liberty. Immunity is to serve the interests of the parliament, first of all by preventing the reduction of Bundestag's efficiency, but also to protect the reputation and sovereignty of the parliament¹³. The question under discussion was whether immunity is only a parliamentary right or also a right of a member of a parliament¹⁴. This dispute was resolved unequivocally by a judgment in the case of Roland Pofalla. The Federal Constitutional Court emphasized that the importance and purpose

been granted. S. Magiera, [in:] *Bonner Kommentar – Grundgesetz*, eds. W. Kahl, Ch. Waldhoff, Ch. Walter, R. Dolzer, Heidelberg 2017, p. 194.

¹⁰ In January 2001, the FCC rejected the request from the CDU/CSU faction seeking confirmation that the Federal Government, by refusing to conduct proceedings before the FCC on the dispute between the federal authorities and the State of North Rhine-Westphalia concerning the requests for waiver of the immunity of Mr. Pofalla, infringed the rights of the Bundestag and the CDU/CSU faction (Beschluss des BVerfG vom 24.01.2001 – 2 BvE 1/00, BVerfGE 103, p. 81).

¹¹ Ausschussdrucksache 14-G-84, Ausschussprotokoll vom 27.06.2002, Ausschuss für Wahlprüfung, Immunität und Geschäftsordnung des Deutschen Bundestages.

¹² "Immunity" means that prosecution of a Member for any reason, including his or her conduct outside Parliament, shall be permitted only with the consent of the Bundestag. It is not an outdated relic of the "struggle" against absolutism – even under the Basic Law, unjustified persecution cannot be ruled out. Ch. Degenhart, *Staatsrecht I. Staatsorganisationsrecht. Mit Bezügen zum Europarecht*, 34. Auflage, Heidelberg 2018, p. 264.

¹³ T. Maunz, [in:] *Grundgesetz*, eds. T. Maunz, G. Dürig, München 2003, Article 46, nb. 26.

¹⁴ H.-H. Trute, [in:] *Grundgesetz-Kommentar*, eds. I. von Münch, P. Kunig, 5. Auflage, München 2001, Article 46, nb. 22.

of immunity confirm the fact that immunity primarily serves to protect the parliament. The concept of representation¹⁵ set out in the Article 38 (1), 2nd sentence, of the BL, which justifies the reservation of authorization for criminal proceedings (*Genehmigungsvorbehalt*) under the Article 46 (2) of the BL, is at the same time the basis for the member's claim against the Bundestag. This claim, as the judges in Karlsruhe emphasized, must be interpreted as meaning that the parliament must decide on waiving of an immunity in a way that is not arbitrary. As in the case of the reservation to the authorization to institute criminal proceedings, this right serves not only the Bundestag itself, but also its members, through whom the Bundestag performs its duties. The Article 46 (4), in conjunction with Article 38 (1), 2nd sentence, of the BL grants members of the Bundestag the right to Bundestag's decisions concerning demands to suspend criminal proceedings that are not arbitrary¹⁶. Thus, the FCC solved another issue, namely the fact that a member of may assert his or her rights in a procedure concerning a dispute between federal authorities (*Organstreitverfahren*)¹⁷.

The procedure for waiving the immunity of members of the Bundestag is governed by two basic internal acts of the house: Resolution of the Bundestag on waiving of immunity of members of the Bundestag and the Rules governing immunity. The Bundestag adopts the aforementioned resolution at the beginning of each term of office. On this basis, the house consents to the conduct of criminal investigations in criminal cases against members of the Bundestag until the end of the parliamentary term, unless the proceedings relate to insults of political nature¹⁸. Preparatory proceedings may be initiated in individual cases at the earliest 48 hours after the President of the Bundestag and the house have been informed about this fact¹⁹.

¹⁵ Legal status of a parliamentarian, R. Balicki, *Immunitet parlamentarny w Niemczech*, [in:] *Immunitet parlamentarny w wybranych państwach europejskich*, eds. S. Grabowska, J. Juchniewicz, Rzeszów 2017, p. 188.

¹⁶ BVerfGE 104, 310.

¹⁷ S. Magiera, [in:] *Grundgesetz. Kommentar*, eds. M. Sachs, München 2014, Article 46, nb. 103; N. Achterberg, M. Schulte, [in:] *Das Bonner Grundgesetz*, eds. H. von Mangoldt, F. Klein, Ch. Starck, Bd. 2, 4. Auflage, München 2000, Article 46, nb. 31.

¹⁸ Cf. sec. 185, 186, and 187 a (1) of the StGB.

¹⁹ Annex 6 to the GO-BT, No. 1, sentences 1 and 2.

In its verdict in the Pofalla case, the FCC examined whether the 48-hour period for the Bundestag to decide on waiving of immunity was not too short, but ultimately did not make any substantive decision in this respect. However, this issue has been dealt with by the Committee on Election Control, Immunity, and Rules of Procedure. In its opinion, the 48-hour period, particularly if weekends or public holidays are considered, is too short to guarantee an adequate analysis of the case. It was therefore recommended that, pursuant to the sec. 222(3) of the ZPO and the sec. 57 of the VwGO²⁰, weekends and public holidays should not be included in the calculation of the 48-hour period. The President of the Bundestag, in consultation with the Chair of the Committee on Election Control, Immunity, and Rules of Procedure, may also extend this period on a case-by-case basis in order to examine a specific situation, including to submit inquiries to and to obtain explanations from law enforcement agencies. It cannot be ruled out that, due to a threat to parliamentary interests, it may be necessary to decide pursuant to the Article 46 (4) of the BL. In such a case, the 48-hour period, excluding weeks in which sessions are held, would not be sufficient for the Bundestag to pass a relevant resolution. Of course, it is possible to convene an extraordinary meeting of the Committee on Election Control, Immunity, and Rules of Procedure or to hold a written vote on the basis of sec. 72 of the GO-BT in order to make a preliminary decision on the matter. The obstacle, however, is that such preliminary decision would have become final only seven days after its notification, provided that no objection was lodged within that period.

On July 4, 2002, following the recommendation of the Committee on Election Control, Immunity, and Rules of Procedure, the Bundestag unanimously adopted a resolution amending the Resolution on waiving of immunity of members of the Bundestag²¹. On its basis, No. 1, 2nd sentence, of the Rules governing immunity, was given the following wording: “Before an explanatory proceeding is initiated, the President of the Bundestag and the member concerned shall be informed of the intention to do so, provided that this does

²⁰ Verwaltungsgerichtsordnung in der Fassung der Bekanntmachung vom 19. März 1991 (BGBl. I S. 686), die zuletzt durch Artikel 4 des Gesetzes vom 15. August 2019 (BGBl. I S. 1294) geändert worden ist (VwGO) – Regulation on administrative procedure.

²¹ Deutscher Bundestag, 14. Wahlperiode, 248 Sitzung, 4 Juli 2002, Sten. Prot. S. 25160 D.; BT-Drucks. 14/9659.

not prejudice the investigation of the truth; failing such notification of the member of the Bundestag, the President of the Bundestag shall be informed of the fact, stating the reasons for doing so. The right of the Bundestag to demand the stay of proceedings under the Article 46 (4) of the BL remains unaffected. Explanatory proceedings may be opened in individual cases at the earliest forty-eight hours after receipt of the notification by the President of the Bundestag. Saturdays, Sundays and public holidays shall not be included in the calculation of this period. The President of the Bundestag may, in agreement with the Chair of the Committee on Election Control, Immunity, and Rules of Procedure, extend that period by an appropriate length of time”.

The Committee on Election Control, Immunity, and Rules of Procedure, pursuant to the §107 (2) of the GO-BT, established the procedure for dealing with requests for waiver of immunity of members of the Bundestag. These principles form the basis for the recommendations of the committee to be addressed to the Bundestag, drawn up on a case-by-case basis. They constitute a set of organizational and procedural provisions and rules of interpretation followed by the Committee on Election Control, Immunity, and Rules of Procedure when making decisions, e.g. provisions concerning entities entitled to submit requests for waiver of immunity, proceedings in cases of traffic offenses, provisions related to internal parliamentary procedure or simplified procedure²², as well as obligations to notify about protective measures resulting from the provisions of the Act on protection against infections²³. The main focus of the Rules governing immunity is on the procedure to be followed in the parliament. However, these Rules also contain provisions concerning third parties – creditors, persons entitled to submit a request for waiver of immunity²⁴.

We may ask the question of whether the Bundestag has the right to regulate matters related to immunity. The Federal Constitutional Court takes the view that the parliament’s autonomy not covers not only matters related to the rules of procedure of the house, but also refers to its general pow-

²² *Rules governing immunity*, cf. numbers 1, 11, 3, and 13, respectively.

²³ *Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz – IfSG)* vom 20. Juli 2000 (BGBl. I S. 1045), das zuletzt durch Artikel 18a des Gesetzes vom 9. August 2019 (BGBl. I S. 1202) geändert worden ist.

²⁴ *Rules governing immunity*, cf. numbers 1, 2, and 5.

ers to regulate its own affairs²⁵. As the FCC stated, approval of criminal proceedings against its members falls within the competence of the parliament²⁶. Pursuant to its organizational powers, according with the sec. 107 (2) of the GO-BT, the Bundestag authorizes the Committee on Election Control, Immunity, and Rules of Procedure to determine the Rules governing immunity. It should be noted here that the Rules governing immunity, while focusing on intraparlimentary regulations, also contain provisions that legally bind other state institutions and third parties²⁷. Their external effect is not challenged in practice, nor does the FCC consider the Rules governing immunity established by the Bundestag as problematic²⁸. Nevertheless, with regard to the constitutionally guaranteed parliamentary autonomy, there is a discussion as to whether the provisions of the Rules can be legally binding not only for members of the Bundestag, but also for constitutional bodies, other state institutions, or third parties²⁹.

²⁵ BVerfGE 104, 310 (332), 102, 224 (235ff).

²⁶ BVerfGE 104, 310 (332).

²⁷ *Rules governing immunity*, cf. No. 1 and 2.

²⁸ In both BVerfGE 103, 81 and BVerfGE 104, 310, there is no comment from the FCC on this matter. Similarly, in the publications on this subject, the external influence of the Rules governing immunity is discussed only occasionally (cf. H.H. Klein, [in:] *Grundgesetz. Kommentar*, eds. T. Mauz, G. Dürig, 81. EL September 2017, Article 40, nb. 68, who confirms their binding effect in the parliament; H. Butzer writes about “a considerable external influence”, H. Butzer, *Die Grundsätze in Immunitätsangelegenheiten im Rechtsquellenkanon des Parlamentsrechts*, *Zeitschrift für Parlamentsfragen (ZParl)*, Heft 3, 93, Westdeutscher Verlag 1993, p. 384, while G. Kretschmer points out that the provisions of the Rules affect persons outside the parliament who participate in or are involved in the performance of parliamentary duties. He believes that the provisions of parliamentary rules of procedure may, to a limited extent, be binding to third parties, G. Kretschmer, *Geschäftsordnungen deutscher Volksvertretungen*, [in:] *Parlamentsrecht und Parlamentspraxis*, eds. H.-P. Schneider, W. Zeh, Berlin 1989, §9, nb. 51. The Federal Government also seems prepared to accept the limited effect of the Bundestag’s Rules of Procedure on third parties (cf. BT-Drucks, 11/2148, p. 10). The Federal Constitutional Court, when expressing its opinion on the Bundestag’s autonomy in the area of rules of procedure, argued that the Bundestag’s Rules of Procedure were binding on its members (BVerfGE 1, 144 (148)).

²⁹ J. Bückler, *Das Parlamentsrecht in der Hierarchie der Rechtsnormen*, *Zeitschrift für Parlamentsfragen (ZParl)*, Heft 2, 86, Westdeutscher Verlag 1986, p. 324; R. Dach, [in:] *Bonner Kommentar – Grundgesetz*, eds. W. Kahl, Ch. Waldhoff, Ch. Walter, R. Dolzer, Heidelberg 2017, Article 40, nb. 32.

On the basis of the functional interpretation of the Article 46 (1), 2nd sentence, of the BL, it can be assumed that the Bundestag has the power to impose obligations on other institutions or persons who are not members of parliament by means of the GO-BT provisions to the extent that such persons voluntarily enter the internal sphere of the Bundestag or can be included in it by virtue of their constitutional powers³⁰. Such an interpretation, which considers the needs and requirements of parliamentary practice, is also relevant to the rules governing immunity. A decision on immunity matters is not necessarily limited to the parliamentary sphere. After all, it has direct effects, especially to law enforcement agencies. The understanding of parliamentary autonomy cannot be hermetically limited to the parliament itself, in terms of neither the content nor the subject. In many cases, the organization of own affairs of a member of a parliament is linked to the organization of relations with third parties.

The Rules governing immunity, which have been referred to on multiple occasions, are of fundamental importance to decisions made by the Bundestag with regard to immunity matters. Before the judgment in Mr. Pofalla's case, the sec. 4 of the aforementioned Rules, related to the assessment of evidence, had the following wording: "The Bundestag may not assess evidence. The right to immunity is intended to ensure smooth operation of the Bundestag and to guard its reputation. A decision to maintain or waive immunity is a political decision and, by its very nature, shall not interfere with a pending case concerning determination of right or wrong, guilt or innocence. The essence of the mentioned political decision is based on an equilibrium between the interests of the parliament and those of other sovereign authorities. Therefore, evidence may not be assessed with regard to the issue of fulfillment of the constituent elements of a prohibited act".

In its judgment in the case of Mr. Pofalla, the FCC set out the criteria on the basis of which decisions should be taken in matters concerning immunity. This made it necessary to review the existing legislation and gave the Committee on Election Control, Immunity, and Rules of Procedure the opportunity to amend the Rules governing immunity. While so far they had been based on the traditional understanding of immunity as an exclusive right of the parliament, the

³⁰ H.H. Klein, *op.cit.*, Article 40, nb. 68.

FCC supplemented their character with the legal status of a member of parliament resulting from the principle of representation. The judges found³¹ that the reservation concerning the authorization to start criminal proceedings against a member of the Bundestag was intended primarily to ensure proper operation of the parliament and it was for the latter to decide whether or not to grant the authorization in question. As the FCC stated, “The Bundestag has a wide discretionary power”³². However, individual members have the right to require that, when deciding on their immunity, the parliament should not be guided, with a grossly erroneous assessment of their status, by non-essential and arbitrary motives. This is because the Federal Constitutional Court takes the view that immunity is also intended to protect the parliamentary work of unpopular members of parliament from interference from other authorities. Consequently, the Bundestag, when considering whether to waive the immunity of its member, must not fail in taking into account the manifestly irrelevant actions of other bodies, the obvious aim of which is to obstruct the work of the member. However, the member may not demand that the Bundestag, when considering his case, examine the matter and bring the interests of the member to the fore, since the reservation of permission to initiate criminal proceedings against a member of the Bundestag is primarily intended to protect the parliament as a whole. The Bundestag is not deprived of the ability to examine the merits of the accusation against a member, but is not obliged to do it. If the parliament finds that there are no substantive grounds for criminal proceedings against its member, in particular if the proceedings are politically motivated, it must reject the request for waiver of immunity³³. The conclusions reached by the FCC show that the General Court set out the meaning of immunity and the criteria to be followed by the Bundestag in its decisions on these matters in a more comprehensive and precise manner than the Rules governing immunity. Considering this position of the FCC, the Committee on Election Control, Immunity, and Rules of Procedure amended No. 4 of the Rules governing immunity, giving it the following wording³⁴: “The fundamental objective of immunity

³¹ BVerfGE 104, 310 (329).

³² BVerfGE 80, 188 (220).

³³ BVerfGE 104, 310 (333).

³⁴ Beschlussempfehlung und Bericht des Ausschusses für Wahlprüfung, Immunität und Geschäftsordnung BT-Drucks. 14/9659 betreffend: *Änderung der Geschäftsordnung des*

is to ensure the operation of the Bundestag; every member shall have the right to a decision that is free from non-essential and arbitrary motives. The decision to waive or restore immunity shall be made by the Bundestag on its own responsibility, considering the interests of the parliament and other sovereign authorities and the interests of the member concerned. No assessment of evidence shall be made; the decision shall not include determination of right or wrong, guilt, or innocence". As indicated, protection of the reputation of the Bundestag as an additional reason for safeguarding of immunity was removed from the Rules governing immunity. As stated in the substantiation of the final recommendations of the Committee on Election Control, Immunity, and Rules of Procedure³⁵, it was assumed that granting a permission to waive immunity, while protecting the ability of the parliament to function properly, is intended to preserve its reputation.

The Committee on Election Control, Immunity, and Rules of Procedure also considered it appropriate to include in the Rules governing immunity a provision that the subjective legal situation of the member should be considered and that, with certain limitations, the member should be granted the right to be heard³⁶. The Federal Constitutional Court left the matter open, but suggested that the right to be heard might arise in specific cases³⁷.

The decision of the FCC in the case of Mr. Pofalla is a classic example of how subjective rights can develop over time from an objective legal institution. For decades, it had been absolutely indisputable that the provisions on immunity justify the political right of the parliament and, consequently, that individual members should not be granted the right to lodge a complaint with the FCC against the Bundestag's decision to waive immunity. Today, it is a common position that implementation of objective legal principles

Deutschen Bundestages, Beschluss des Deutschen Bundestages betr. Aufhebung der Immunität von Mitgliedern des Bundestages (Anlage 6 zur GO-BT), p. 3.

³⁵ Ibidem.

³⁶ Cf. No. 3 of the *Rules governing immunity*, GO-BT in der Fassung der Bekanntmachung vom 2. Juli 1980 (BGBl. I S. 1237), zuletzt geändert laut Bekanntmachung vom 8. März 2019 (BGBl. I S. 197): "The Committee on Election Control, Immunity, and Rules of Procedure may, at the request of a faction, give the member concerned an opportunity to be heard".

³⁷ BVerfG, in NJW 2002, p. 1114. This opinion is particularly relevant in situations where a member would argue that the criminal proceedings against him or her are conducted on a non-essential basis.

is possible only when they can be enforced by a court. In this judgment, the Federal Constitutional Court did not address the very interesting issue of the resolution, adopted at the start of each term of the Bundestag, giving general consent to the conduct of criminal investigations against members of the Bundestag until the end of the term. It is clear that the parliament voluntarily renounces the possibility of using the Article 12 (1) of the BL. But what if it is only during a parliamentary term that law enforcement agencies put pressure on members of the Bundestag by initiating preliminary proceedings? It will be difficult for them to recover the rights they have under the Article 46 of the BL. This is particularly the case where the government, supported by a parliamentary majority, is the ultimate entity supporting implementation of these measures. Although it is difficult to imagine such a scenario from today's point of view, the question arises whether the need to relieve the Bundestag of the requirement to make decisions in small, routine matters allows it to give up one of its powers.

What is the scope of the immunity of a member of the Bundestag? Well, immunity is primarily intended to safeguard the right of the parliament to function efficiently. A member may request that the parliament, when deciding whether and to what extent to permit criminal prosecution measures, should act on factual and non-arbitrary grounds. The Bundestag should find a balance between the need to maintain its own capacity to function and the interests of other state authorities. However, the Bundestag is not legally obliged to consider the requests of investigative bodies.

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