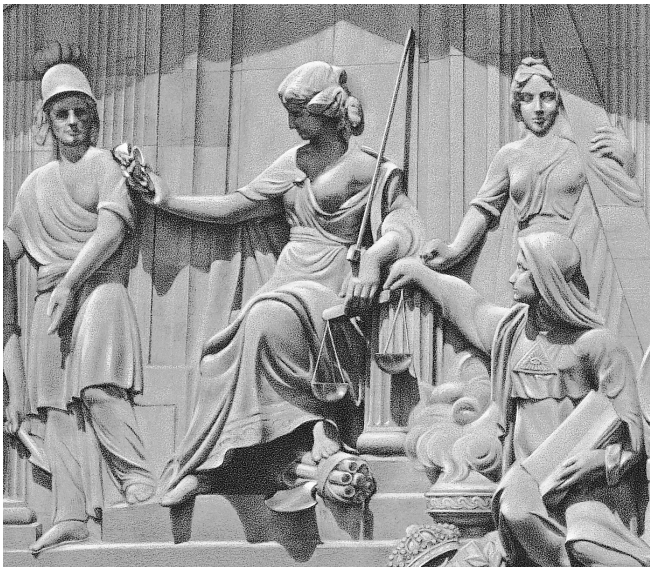

THE HOUSE OF REPRESENTATIVES

BRIEF PARLIAMENTARY LAW

THE PARLIAMENTARY IMMUNITY

LEGAL SERVICE / NOVEMBER 2000

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PREFACE

At regular intervals and on my initiative, the Legal Service of the House publishes texts on subjects concerning parliamentary law and distributes them on a wide scale in a series of brochures "Brief Parliamentary Law".

The subject the Legal Service broaches in the present brochure is that of the parliamentary immunity. In 1997, Article 59 of the Constitution was extensively revised, partially because the rigid nature of the parliamentary immunity had become a disadvantage for the Members of Parliament. Even a small-scale investigation by the Public Prosecutor in order to verify certain charges against a Member of Parliament was impossible without permission from the Assembly. Yet, a request to lift the immunity always led to considerable interest from the media causing the affected Member of Parliament, and often even before any actual investigations had been performed, to look guilty in the eyes of the public.

Fortunately, as of 1997 the Assembly only needs to give permission for arrests and referrals to a court. The fact that since the introduction of the new rule not a single request to lift parliamentary immunity has been submitted to the House leads to the assumption that the new rule is better balanced than the previous one.

All brochures in this series follow the same basic structure:

1. A first note clarifies an issue that is not always very accessible for people outside the legal world – hence, it consists of questions and answers. It only discusses the main problems with which Members of Parliament, journalists and all those interested in the activities of Parliament may be confronted;

2. Those who really want to explore the details might find it useful to also read the second note. Because of its academic nature, it may be 'less palatable' but it is more complete and it contains valuable references to court decisions and legal doctrine;

3. Finally, in the third part of this brochure, you will find the circular letter in which the Procurators-General implemented the new rule at the request of the presidents of the seven assemblies.

As such, I hope to have contributed to a better understanding of the rights and duties of the Members of Parliaments and hence to maximum legal certainty.

Herman DE CROO
Speaker of the House
Honorary Minister

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I. Parliamentary Immunity in Questions and Answers

What is meant by "parliamentary immunity"?

Parliamentary immunity (art. 59 of the Constitution) means that Members of Parliament in session cannot be arrested nor referred to a court of law without the permission of the assembly they belong to. This protection does not apply though when the Member of Parliament was caught in the act.

Similar to the "parliamentary privilege" (freedom of speech), the parliamentary immunity is a guarantee for the free exercise of the function of Member of Parliament, since the legislative branch must be independent of the judicial as well as of the executive branch. The origins of parliamentary immunity as a safeguard against arbitrary prosecution date back to the beginning of parliamentary history.

The regulation of parliamentary immunity was revised considerably in 1997. Before that, the assembly had always been involved in a very early stage of legal proceedings against a Member of Parliament. During the session and excluding cases in which the MP was caught in the act, no act of prosecution (not even the interrogation of a suspect) was allowed against a Member of Parliament without the permission of the parliamentary assembly.

Paradoxally enough, the rigid character of the parliamentary immunity became a disadvantage for the Mem-

bers of Parliament. Even a modest investigation by the Public Prosecutor in order to verify certain facts the Member of Parliament was charged with, was not possible without the permission of the assembly. A request to lift parliamentary immunity inevitably caused a great stir among the media and made the involved MP look guilty, often without any investigations being held.

Since 1997, the assembly only needs to give its permission for the arrest and the referral to a court of law, and not for the investigation itself anymore. Contrary to what the notion of "immunity" seems to signify, the members of parliament are only protected to a limited level where criminal cases are concerned.

Who has parliamentary immunity?

The immunity applies to the federal Members of Parliament (members of the House and of the Senate, art. 59 of the Constitution) and also to members of the parliaments of communities and regions (art. 120 Const.).

The immunity in the sense of art. 59 Const. does not apply to ministers. The Constitution contains a special procedure for the criminal prosecution of federal, communal or regional ministers (see art. 103 Const. and art. 125 Const.).

When are the Members of Parliament immune?

The immunity is only valid during the term of office. Outside the assembly sessions, Members of Parliament – just like any other citizen – may be arrested or prosecuted in a court of law.

The arrest or the prosecution outside the term of office may be continued after the term has begun without requiring the permission of the assembly.

De facto, the session will only be closed just before the beginning of the following session. In reality, parliamentary immunity lasts during the full period of the session (the "term of office").

For which actions are the MPs immune?

The immunity only protects Members of Parliament in *criminal cases*. This notion entails all categories of criminal acts: offences, crimes and misdemeanour (even traffic violations).

On the other hand, they are not immune for civil disputes. A Member of Parliament can be summoned as a civil and responsible party, even before a criminal Court.

The immunity does not apply to disciplinary claims either (e.g. by the Bar, the Medical Association, for Members of Parliament with this competency), nor to administrative courts (e.g. the 'Council of State').

The immunity does not apply in case the MP is *caught in the act*, i.e. when the crime is discovered when it is being committed or immediately after it was committed. In general, a maximum term of 24 hours is permitted after the actual committing of the crime to still be able to catch someone in the act.

Who can prosecute?

During the term of office, only the officials of the Public Prosecutor's Department can criminally prosecute a Member of Parliament. Hence, affected citizens cannot institute proceedings against an MP, not by directly summoning him, nor by suing him before an examining magistrate.

What is the scope of that protection?

There is a *gradation* in the protection MPs receive: for certain actions in criminal cases against an MP, the prior permission of the assembly is required. For other actions, the first President of the Court of Appeal must grant his permission. For a third category of actions, the MP is treated on the same basis as all other citizens.

For which actions must the assembly always grant its permission?

Without the permission of the legislative assembly in question, an MP

– cannot *be arrested*

Including an arrest within the framework of a criminal investigation as well as an arrest for the execution of a court decision.

The permission of the assembly is not required though for so-called administrative arrests. Those are police arrests within the framework of a preventative assignment (crime prevention) or within the framework of the maintenance of law and order. So, an MP can be arrested e.g. during a demonstration; but an administrative arrest may not last longer than necessary and never longer than 12 hours.

In that case, the president of the assembly must always be informed about the administrative arrest and the assembly can ask at all times that the arrest be terminated.

– cannot *be referred to a court of law*

Before an MP can be referred to a court, the Public Prosecutor's Department must ask the Assembly to lift the immunity of that MP.

– cannot *be directly summoned before a court of law*

Is the permission of the assembly required for measures of constraint against Members of Parliament?

Certain investigations – the so-called "measures of constraint" for which the action of a judge is required – can only be ordered in relation to Members of Parliament by the first President of the Court of Appeal, upon request of the competent (examining) magistrate. The permission of the Assembly is no longer required.

This includes:
- an order to appear for questioning and confrontation (especially when a Member of Parliament resists questioning or confrontation);
- a search warrant (when the Member of Parliament does not agree);
- seizure within the framework of such a search;
- tracing telephone calls without the permission of the persons involved and tapping a person's telephone;
- a physical examination.

A number of guarantees have been provided though for these measures of constraint; e.g. the President of the assembly must always be informed.

In addition, the President or a Member of the Assembly appointed by him must be present during search or seizure.

The role of the President can be compared with that of the Leader of the Bar Council when he is present at a search at a lawyer's house.

Are there any investigations for which the MP is considered equal to ordinary citizens?

Certainly. Common criminal proceedings are in particular applicable to questioning, the confrontation with witnesses, the search, seizure or tracing telephone calls with the permission of the MP involved and for indictment.

Suggesting a settlement to a Member of Parliament does not require the immunity to be lifted. When the public prosecutor e.g. suggests a settlement for a traffic violation, he does so in order to avoid prosecution. If the suggested settlement is not accepted or when the MP does not pay, permission to prosecute must be asked.

Can an assembly always suspend the prosecution of one of its members?

Yes. First of all, a Member of Parliament can ask its assembly for the suspension of his prosecution in any stage of the investigation. He must justify his request though with convincing arguments.

The assembly can then only order the suspension with a 2/3 majority of votes. In principle, it can order the suspension of the whole of the investigation, but it can also limit the suspension to one or more specific aspects of the investigation.

Once the investigative phase has been closed, i.e. as soon as the case has been brought before a court, only the assembly and no longer the MP involved can ask for a suspension.

In addition, the assembly to which the MP belongs can ask for the suspension of the detention of one of its members at its own initiative.

Contrary to what is the case for suspension at the initiative of the MP involved, in these cases a simple majority is enough.

The assembly can no longer ask for the suspension when in a criminal case the debates have been closed (in order to prevent the judgement to be entered).

The suspension of prosecution or detention can never exceed the duration of the current term of office.

What happens when the Public Prosecutor asks for the immunity to be lifted?

The request to lift immunity preferably originates with the Procurator General of the competent Court of Appeal. His request must be attached to a case file in which all charges, complaints, testimonies, confessions and exhibits have been included.

The President informs his assembly of the request to lift the immunity (without mentioning the name of the MP involved nor the charges) and the request is referred to the prosecution committee.

This committee sits in camera and can interrogate the MP involved. The latter has the right to be heard if he should ask to be so. He can be assisted by one of his colleagues or a counsel. Pleadings and the deposition of notes, conclusions and exhibits are permitted. In general, a direct discussion with the MP or his counsel are avoided.

If the committee should decide to hear witnesses, this will be done in the absence of the MP involved. The latter has the right to take cognisance of the elements of the testimony in the report. Deliberation is also done in absence of the MP involved. The committee decides with simple majority but traditionally, they try to reach a consensus.

The committee makes a recommendation to the plenary session that decides with a simple majority on whether the immunity will be lifted or not. Only the rapporteur of the committee, the MP involved or an MP representing him, as well as one speaker on behalf and one speaker against him may speak. In principle, the plenary debate is public. The MP involved can also be heard. The fact whether the counsel or the witnesses can be heard is disputed.

The decision to lift the immunity or not does not entail a suspicion of guilt or innocence. It is merely an authorization to prosecute or to arrest.

The assembly can limit the authorization to prosecute. It can e.g. authorize prosecution for certain facts and prohibit it for others, or it can authorize referral or direct summons but refuse arrest.

Has anything really changed since the 1997 amendment to the Constitution?

Although the amendment has been received with a certain feeling of scepticism, article 59 of the Constitution seems to have reached its goal.

Since the introduction of the new regulation, very few requests to lift parliamentary immunity have been submitted to the different assemblies when compared to before the amendment.

The reason is quite obvious: the judicial authorities can now hold an investigation against a Member of Parliament without needing the prior permission of the assembly. Only when the investigation has been terminated and the judicial authorities think there is sufficient reason to prosecute, the assembly must lift parliamentary immunity.

Another positive conclusion is that the new regulation of parliamentary immunity has been quickly and completely implemented in a circular letter of the Procurators General. In addition, the presidents of the seven assemblies have made a number of practical arrangements, e.g. in relation to Members of Parliament with a seat in more than one assembly.

Hence, it is their intention to exclude all problems of interpretation as much as possible and to procure maximum legal certainty.

Hence, it appears that the Belgian Members of Parliament are currently being protected in criminal proceedings by a balanced regulation that no longer exposes them to "public trials" and the suspicion of innocence is secured. Still, the citizens do not get the impression that the Members of Parliament are "above the law".

II. Brief legal analysis of parliamentary immunity

1. What is meant by "parliamentary immunity"?

Immunity (art. 59 Const.) entails that the members of parliament cannot be arrested nor referred or directly summoned to a court of law without the permission of the assembly to which they belong. The protection is not applicable in case the MP is caught in the act.

Just like "parliamentary privilege" (freedom of speech)[1], the parliamentary immunity is a guarantee for the free execution of the office of Member of Parliament. The legislative branch must be independent of the judicial as well as of the executive branch. The origins of the parliamentary immunity, as a protection against arbitrary prosecution, date back to the beginning of parliamentary history[2].

The regulation of the parliamentary immunity (art. 59 Const.) was extensively revised in 1997.[3] Before, the House was involved at a very early stage of the judicial proceedings against a member of parliament. During the term of office and except for cases in which an MP was caught in the act, not a single act of prosecution (not even the interrogation of an MP as a suspect) was possible

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1 The parliamentary privilege – freedom of speech – (art. 58 Const.) protects a Member of Parliament against any responsibility (civil, criminal and disciplinary) due to an opinion or a vote expressed while in function. It is absolute, the assembly cannot lift this irresponsibility.

2 For a comparative analysis: Van der Hulst, M., *Le mandat parlementaire,* Genève, Union Interparlementaire, 2000, 68 a.f. ; Myttenaere, R., Les immunités des parlementaires, *Informations constitutionnelles et parlementaires,* ASGP, 1998, nr. 175, 105-144.
In the 14the century already, the term « privilege » is mentioned in relation to the British Parliament. In the British parliamentary tradition, a rather limited protection is meant, especially against arrest in civil cases. The true origin of parliamentary immunity as we know it in Belgium dates back to the French Revolution, when the Assemblée Nationale issued a decree which stated that no member of parliament could be indicted without the prior permission of the assembly (decree of June 26, 1790, Charte française, see Erdman, F., De opheffing van de parlementaire onschendbaarheid, *Liber amicorum J. Van den Heuvel,* Antwerpen, Kluwer, 493).

3 *B.S.* March 1, 1997, see: Herziening van artikel 59 van de Grondwet, *Parl.St.,* The House, 1995/96, nr. 492.

against a Member of Parliament without the permission of the parliamentary assembly.[4]

Paradoxally enough, the rigid character of the parliamentary immunity almost became a disadvantage for Members of parliament. Even a modest investigation by the Public Prosecutor in order to verify certain facts the Member of Parliament was charged with, was not possible without the permission of the assembly. A request to lift parliamentary immunity inevitable caused a great stir among the media and made the involved MP look guilty, often without any investigation.[5]

Since 1997, in accordance with the new article 59 Const. the assembly only needs to grant permission in relation to the arrest and the referral to a court of law (or a direct summons), but no longer for an investigation. Contrary to what the notion of "immunity" might seem to suggest, the Members of Parliament are only protected to a limited extent in criminal proceedings.

Additionally, the immunity is merely temporary because when the assembly refuses the authorization for prosecution or suspends the prosecution, this will only last for the term of office. It is not a definite exemption from prosecution.[6]

The parliamentary immunity cannot be waived.[7] A Member of Parliament cannot disclaim the guarantees offered to him by art. 59 Const. It is a protection of the function, not of the person.

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4 The notion "act of prosecution" was interpreted in the broadest sense in accordance with the jurisprudence of the 'Hof van Cassatie' as "every act of tracing or investigation ordered by a magistrate, including the Public Prosecutor" (Joint circular letter of the college of Procurators General, September 18 1997, 2. (hereafter abbreviated as Circulaire col. P. G. 6/97).

5 Circulaire col. P.G. 6/97, 2.

6 *Parl. St., The House,* 1991-92, 14/1

7 VandeLanotte, J. en Goedertiere, G. "De parlementaire onschendbaarheid na de grondwetsherziening van 28 februari 1997" in Van der Hulst, M. en Veny, L. (ed.), *Parlementair recht, Commentaar en teksten,* Gent, Mys & Breesch, A.3.3.2, 15.

2. Field of application

2.1 Ratione personae

2.1.1 The immunity applies to members of the federal Parliament (members of the House and the Senate) as well as members of the parliaments of the communities and the regions (art. 120 Const.).

2.1.2. The immunity in accordance with art. 59 Const. does not apply to Ministers. For the criminal prosecution of federal, community or regional Ministers, the Constitution prescribes a special procedure (art. 103 Const. resp. art. 125 C).[8] Criminal proceedings can only be instituted against Ministers by the Public Prosecutor's Department at the Court of Appeal, which is also competent for the trial of Ministers. Appeals are possible through the 'Court of cassation'. The House of Representatives must grant its permission for each claim to settle the judicial procedure and for each direct summons before the Court of Appeal. Ministers cannot be arrested without the permission of the House, except when they are caught in the act.

2.2 Ratione temporis

2.2.1 Beginning and end of the immunity

In general, it is assumed that as soon as the results of the elections have been announced, an elected person has the capacity of a Member of Parliament, on the resolutive condition of a declaration of non-validity of his election after the verification of the credentials by the assembly.[9]

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[8] This special procedure is applicable to crimes committed by ministers in the exercise of their function as well as for crimes committed outside their function and for which they will be tried during their period of office (see also the law of December 17 1996 for the temporary and partial execution of article 103 of the Constitution, modified by the law of February 28 1997).

[9] *Parl. ST.,* The House, B.Z. 91/92, 14/1, 7, derived from Cass., case Van Rossem, December 17, 1991.

Note that the immunity only starts to play a role with the opening of the term of office. Outside the term of office, the immunity does not apply and the elected MPs can be arrested and prosecuted.[10]

The fact whether or not the oath has been taken is an irrelevant criterion as to the beginning of the immunity. As an example, the authors refer to the case Van Rossem of 1991. The person involved was elected as a Member of the House on November 24, 1991. At that moment, he was in preventive custody. On December 16, 1991, the House gathered and the session was opened. Only then could the House demand the suspension of the prosecution of Mr. Van Rossem.[11] The fact that he had not taken the oath was not relevant.[12]

Note also that the Procurator General had already sent the case file of Mr. Van Rossem to the President of the House (then the oldest member) the day after his election.[13]

There are also precedents in which the judicial authorities postponed the prosecution of elected officials, before the assembly had gathered in session, in order to allow the assembly to decide to claim the suspension of the prosecution. The elected persons involved mentioned their quality of Member of Parliament during the session of the criminal court, after which the public prosecutor demanded to adjourn the case.[14]

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10 The defence of Mr. Van Rossem also invoked art. 158 Criminal Code, that stipulates a criminal sanction for acts of prosecution or arrest against Members of Parliament, contrary to article 59 of the Criminal Code, invoked by judges or members of the Public Prosecutor's Department. The 'Court of cassation' said that art. 158 Criminal Code must be read together with art. 59 Const. in relation to the immunity and hence it is only applicable as of the opening of the term of office. (Cass., case Van Rossem, December 17 1991, not published).

11 See infra on the suspending competency of the Assembly. Messrs. Standaert and De Corte submitted a proposal for a resolution for the suspension of the prosecution and the arrest of Mr. Van Rossem (*Parl. ST.,* The House, B.Z. 1991/92, 14/1; 2.)

12 In its report, the prosecution committee states: "*Hence, it is important to point out that for the facts considered by the committee, the taking of the oath is irrelevant for the parliamentary immunity of the Member concerned.*

13 The letter reads: "*With reference to art. 45 of the Constitution, in order to allow the House to claim the suspension of the detention and/or prosecution …"* (*Parl. St.,* the House, B.Z. 91/92, 14/1, 6).

14 It concerned two separate cases from 1985 in relation to elected senators (messrs. Hanelle and Content).

The immunity is valid until the termination of the parliamentary mandate.

2.2.2 From what moment on can the suspension of prosecution be demanded by the assembly?

Must the House be declared "lawful and complete" (i.e. after the appointment of the permanent "Bureau") in order to be able to demand the suspension of the prosecution?[15] Apparently not. There is a precedent from 1932 in which the House demanded the suspension of the arrest of an elected MP on the day of the opening session (hence before the House had been declared lawful and complete).[16]

2.2.3 The immunity is only valid during the session

Outside the term of office of the assembly, Members of parliament may be arrested or prosecuted before a court of law.

In addition, an arrest or a prosecution commenced outside the term of office may be continued after the beginning of the session without requiring the permission of the assembly.[17] The only possibility the assembly has in that case, is to demand the suspension of the arrest or the prosecution during the session (art. 59, § 6, Const.).[18] The assembly takes a decision with a simple majority.

We must point out here that the parliamentary session is closed *de facto* just before the beginning of the next session. In reality, the parliamentary immunity is valid throughout the complete term of office.[19] Only when the session has been closed or when the Parliament has been dissolved, e.g. in view of coming elections

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15 Art. 3 and 4 House Reg.; The assembly has 15 days to appoints its 'Bureau' after the opening session.

16 It concerned a communist elected MP who had been arrested during a demonstration, Mr. Glineur (*Act.,* The House, December 20 1932, 11 and 13).

17 Cass, case Van Rossem, December 17 1991, not published; Vande Lanotte J. and Goedertiere G., *l.c.,* 25.

18 Note: other investigations, such as search, seizure, …, done outside the session cannot be suspended. It only concerns arrest and prosecution here (Vande Lanotte and Goedertiere, lc 27).

19 See Circulaire col. PG, 6/97, p. 3: "*In reality, it comes down to the fact that the special regulation in criminal proceedings is applicable as long as the parliamentary institution has not been dissolved in view of the elections.*"

and afterwards, before the opening of the session of the newly elected Parliament, we are "outside session".[20]

2.3 Ratione materiae

2.3.1 The immunity protects the Member of Parliament only "*in criminal proceedings"* (art. 59, § 1, Const.). This notion contains all categories of criminal acts (offences, crimes and misdemeanour[21]).

Art. 59 Const. is not applicable to civil disputes. Additionally, a Member of Parliament can be summoned before a court, even a criminal court, as a civilly responsible party.[22]

The immunity does not apply to disciplinary claims either (e.g. by the Bar, the Medical Association, for Members of Parliament with this competency), nor to administrative courts.

2.3.2 The immunity does not apply in case the MP is *caught in the act* (art. 59, § 1 and § 2, Const.). Used in the sense of art. 59, this notion is of limited content.[23] The crime must be discovered when it is being committed or immediately after it was committed.[24] In general, a maximum term of 24 hours is permitted after the actual committing of the crime to still be able to catch someone in the act.[25] After that, the immunity is applicable again.

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[20] Note: outside the session, the prosecution can also be instituted by the plaintiff e.g. in the period between the closure of the session and the opening of a new session. De facto, this period remains limited to one day (the second Monday of October). This should suffice to start the prosecution by the plaintiff. This risk would disappear when the Minister of Internal Affairs would close the session the eve of the next session, at 24 h (as is already customary in the Walloon Parliament).

[21] Including traffic violations.

[22] Hayoit de Termicourt, *I.C.,* 60 ; Vande Lanotte and Goedertiere, *I.c.* 28.

[23] Cass., June 20 1984, *R.D.P.*, 1985, 77, quoted in Vande Lanotte and Goedertiere, *I.c.,* 80. Art 41, second par., Criminal Code, that determines a number of cases in which MPs get caught in the act in accordance with analogies, is NOT applicable.

[24] Cass., December 31 1900, *Pas.,* 1901, I, 89; Circulaire col. PG, 6/97, 3.

[25] Circulaire col. PG, 6/97, 4: "*This term of 24 h must be regarded as a maximum that will only very rarely expire*"; see also Hayoit de Termicourt, *I.c.*, 58; Vande Lanotte and Goedertiere, *I.c.,* 82.

The Public Prosecution must determine whether or not the person in question was "caught in the act".[26] The legislative assembly cannot question this qualification.[27] The circular letter of the college of Procurators General (col. 6/97) determines that i*f there should be any doubts about the fact whether or not a Member of Parliament was caught in the act, for security reasons the procedures for crimes found outside being caught in the act, will be followed".*[28]

2.4 The special case of Members of Parliament with a seat in more than one assembly[29]

When an MP has a seat in more than one assembly, each assembly to which the MP in question belongs must decide to lift the immunity.[30] Also, the decisions to take measures of constraint for which the actions of a judge are required (see infra) must be notified to the president of each parliamentary assembly the person in question belongs to.[31]

In relation to the personal presence of the President during a house search, after considerable deliberation a Member with a seat in the assemblies involved can be delegated.[32]

On the contrary, in order to suspend the prosecution or the detention it is enough for one assembly to demand the suspension. When several assemblies demand a suspension but in a different scope, the suspension with the widest scope will be valid.[33]

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26 Vande Lanotte and Goedertiere, *l.c.,* 80.

27 Id.; the assembly can always demand the suspension of the prosecution. Hence, the assembly must always be informed.

28 Circulaire col. PG, 6/97, p. 6.

29 It concerns e.g. senators of a community as well as members of the Parliaments of the French-speaking community and the Walloon region.

30 Circulaire col. PG, addendum, P. 2

31 Id.

32 Id.

33 Letter from the 7 presidents to the Minister of Justice, June 3 1998. The respective committees for the prosecution of the involved assemblies can meet together and interrogate persons. The vote must always be held in each separate committee. In relation to such collaboration, a protocol can be agreed upon between the assemblies. Such collaboration does assume that the request to lift the immunity is notified at the different assemblies that are involved at the same time (Id.).

3. Scope of the protection

3.1 In general

3.1.1 During the session, criminal proceedings against a Member of Parliament can only be instituted by officials of the Public Prosecution and by the competent officials (art. 59, § 4, Const.). Hence, an affected party cannot institute the prosecution, nor by direct summons nor by instituting action before an examining magistrate.[34]

3.1.2 Acts of prosecution against Members of Parliament during which the rules of the parliamentary immunity are violated are null and void. This nullity is public.[35]

3.1.3 Another sanction for the violation of art. 59 Const. is contained in art. 158 of the criminal code : judges or members of the Public Prosecution are punishable when they do not obey the rules concerning parliamentary immunity.[36]

3.2 There are different levels of protection: for certain criminal proceedings against a Member of Parliament, the prior permission of the assembly is required (see infra 3.2.1). For other cases, the permission must be granted by the president of the Court of Appeal (infra 3.2.2). For a third category of proceedings, the Member of parliament is considered equal to any other citizen (infra 3.2.3).

3.2.1 Proceedings requiring the permission of the assembly: **arrest, referral and direct summons** before a court of law (art. 59, § 1, Const.).

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[34] Circulaire col. PG 6/97, p.3: " … *instituting criminal proceedings against a Member of Parliament during the session by means of an action before the examining magistrate or by means of a direct summons before a criminal court by an affected party can never be sustainable. »*

[35] Hayoit de Termicourt, *l.c.,* col. 66.

[36] Art. 158 Criminal Code : *"Will be punished with a fine of two hundred to two thousand francs and may be condemned with the denial of the right to fulfil official offices, services or employments, all judges, all public prosecution officials, all officers of the judicial police, all other public officers who – without the required authorizations – make, provoke, give or sign a judgement, an order for prosecution or an indictment against a Minister, a Senator or a Representative, or who – without the required authorizations – give or sign the order to arrest or to detain a Minister, a Senator or a Representative except, for the two latter, when these were caught in the act."*

Without the permission of the legislative assembly in question, a Member of Parliament:

- cannot *be arrested*

This concerns the judicial arrest within the framework of a criminal investigation (i.e. in relation to a criminal act).[37] It is assumed that for the arrest in order to execute a judgement or an arrest, the permission of the assembly is also required.[38]

The permission of the assembly is not required for so-called "administrative" arrests.[39] Those are arrests made by the police while performing its preventative assignments (crime prevention) of within the framework of the maintenance of law and order.[40] The administrative arrest may not last longer than necessary and never longer than 12 hours.[41]

The president of the assembly must always be informed about the administrative arrest[42] and the assembly can decide at all times that the arrest should be ended.[43]

- cannot *be referred to a court of law*

This concerns the decision of the examining magistrate (the court's indictment division) following an investigation by the ex-

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37 I.e. the arrest upon request by the Public Prosecutor (for a maximum of 24 hours) as well as upon request by the examining magistrate. (Vande Lanotte and Goedertiere, *l.c.,* 42).

38 Letter from the 7 presidents, 3.6.1998; even when the conviction would lead to the loss of all civil and political rights (Vande Lanotte and Goedertiere, *l.c.,* 39).

39 *Parl. St.,* the House, 95/96, 492/9, 3; letter from the seven presidents of June 3 1998; there are quite a number of precedents of "administrative" arrests of Members of parliaments; on 24.4.1992 e.g. 9 representatives of the Vl. Blok were administratively arrested during a demonstration in Voeren, see also Linkebeek, on 2.10.95 and Enghien on 31.6.96.

40 In accordance with art. 31 of the Act of August 5, 1992 in relation to police assignments (*B.S., December 22 1992)* the administrative arrest is possible for:
(1) Persons hindering police officials in the execution of their assignments;
(2) Persons who are actually disturbing the public order;
(3) Persons about to commit a crime that is endangering the public law and order;
(4) Persons participating in certain forms of routs.

41 Vande Lanotte and Goedertiere, *l.c.,* 40.

42 Circular Letter from the Ministers, April 15 1949.

43 In accordance with article 59, last paragraph. The notion of "detention" is also applicable to this form of arrest. (Vande Lanotte and Goedertiere, *l.c. 40*); Hayoit de Termicourt, *l.c.,* 62.

amining magistrate, which causes the case to be brought before the court.[44] Beforehand, the Public Prosecution must address a request to the assembly, via the Procurator General of the competent court of Appeal, to lift the immunity of the MP involved.[45]

- cannot *be directly summoned before a court of law*[46]

3.2.2 Certain other acts of investigation, the so-called **measures of constraint** that require the action of a judge, can only be ordered in relation to Members of Parliament by the first President of the Court of Appeal upon request of the competent (examining) magistrate.[47] The permission of the assembly is not required (art. 59, § 2, Const.).

This concerns:[48]
– an order to appear for questioning and confrontation (especially when a Member of Parliament resists questioning or confrontation);
– a search warrant (when the Member of Parliament does not agree);[49]
– seizure within the framework of such a search;
– tracing telephone calls without the permission of the persons involved and tapping a person's telephone;
– a physical examination.[50]

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44 Art. 129 and 130 Sv.

45 Circulaire col PG, addendum 3.

46 That is only possible for misdemeanour and violations when no investigation has been ordered. Otherwise, the court sitting in Houses or the court's indictment division will refer to a court of law. (Vande Lanotte and Goedertiere, *l.c.,* 33)

47 We must indicate the possibility of the first president to give a general order to take measures of constraint.

48 *Parl. St.,* the House, 95/96, 492/9, 3. Circulaire col. PG, 6/97, P. 5.

49 In accordance with the previous art. 45 C, the 'Court of cassation' stipulated that a search at the house of an MP is possible when it concerns an investigation of criminal acts against a third party and not against the Member of Parliament. We may assume that a search (or a seizure) in the house of the Member of Parliament within the framework of an investigation against a third party does not require the permission of the Member of Parliament nor the order of the first president of the Court of Appeal. (Actualité de l'immunité parlementaire, *J.T.,* 1993, nr. 12).

50 Art. 90 *bis* Sv.; Except for a situation in which the MP is caught in the act, a physical examination requires a decision of an examining magistrate or a court of law, even when the person in question would agree with or even request such an examination.

A number of guarantees have been provided for these measures of constraint:

1° The President of the assembly must always be informed about these measures of constraint;[51] he is bound by the secrecy of this investigation;[52]

2° At any stage of the investigation, during the session and in criminal proceedings, a Member of Parliament can ask the assembly to which he belongs to suspend the prosecution. (art. 59, § 5, Const.). The assembly must decide with a majority of two thirds of the cast vote.[53]

3° There is additional protection for searches and seizure. The President or a member appointed by him must be present during those actions (art. 59, third par., Const.).[54]

In a letter to the Minister of Justice dd. June 3, 1998 the seven presidents of the assemblies provide the following clarifications.

Every search or seizure is null and void if the president of the assembly in question or his replacement is not present. The President or his replacement act alone, without the help of the clerk of the assembly. If a deontological problem should arise for him, he will ask a replacement to act for him. If at the same time at different places a search or a seizure is going on, he can appoint several members of his assembly to replace him.[55]

The Conference of the presidents of the House of Representatives of July 14th ,1999 stated that the President, when he delegates his competencies, appoints one of the five vice-presidents of the House to attend the search or seizure at a member of the House. The vice-president is appointed in accordance with the order of

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51 Art. 59 C does not determine when and by whom the measure of constraint must be notified to the parliamentary president in question. The *ratio legis* of this obligation can hence only lead to the conclusion that this notification must be done as soon as possible and in any case before the execution of those measures of constraint, by the first president of the Court of Appeal (circular letter college of Procurators General, 6/97,6).

52 Letter from the seven presidents dd. 3.6.98.

53 Art. 59, fifth par., C. Note the difference with the suspension provided by the final paragraph of art. 59 Const., that only requires a simple majority.

54 For a practical case study: note of the Legal Service, 2000/0079.

55 Letter from the presidents of the seven assemblies to the Minister of Justice, dd. June 3, 1998.

the protocol, unless he is unable to attend, and he preferably belongs to the same linguistic group as the MP who is involved.

The role of the President of the assembly in a search during which documents are seized can be described in analogy with the role of the leader of the Bar who is present during a search at a lawyer's. In that case, he is also bound by the secrecy of the investigation.[56]

3.1.3 For certain investigations, the Member of Parliament is treated as any ordinary citizen. The normal criminal law is applicable.

This concerns:[57]

– questioning;
– confrontation with witnesses;
– a search with the permission of the Member of parliament in question;
– a seizure with the permission of the Member of Parliament in question;
– the tracing of telephone calls with the permission of the Member of Parliament in question;
– the indictment.

In addition, we must point out that offering a settlement to a Member of Parliament is not an act of prosecution as determined in art. 59 Const.[58] A settlement is only aimed at avoiding prosecution and prevents prosecution if the settlement is accepted.[59] When the settlement is not accepted or in case of non-payment, the assembly must be asked for permission to prosecute, even for minimal facts (e.g. parking tickets). Hence, the circular letter of the college of Procurators General insists on applying the greatest circumspection. Before offering a settlement to a Member of Parliament, the Public Prosecutor will consult the Procurator General of the Court of Appeal by means of a motivated report.[60]

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56 Id.
57 *Parl. St.,* the House, 1995/96, 492/9, 2 and 3
58 Circulaire col. P.G. 6/97,8.
59 Art. 216*bis*, § 1, Sv.
60 Circulaire col. P.G. 6/97, 9.

4. Suspension by the Assembly

4.1 Suspension on the initiative of the MP in question (art. 59, § 5, Const.).

In each stage of the investigation, a Member of Parliament can ask the appropriate assembly for the suspension of his prosecution.[61] The request must be substantiated by convincing arguments.[62] The decisive criterion to decide to suspend the prosecution is the *"serious and honest"* nature of the prosecutions.[63]

The House in question can only order the suspension with a majority of two thirds of the votes cast.[64] In principle, the assembly commands the suspension of all investigations, but it can also limit the suspension to one or several specific aspects of the investigation.[65]

The suspension can be requested in all stages of the investigation. It can no longer be requested when the investigation has been terminated, i.e. when the case has been brought before a court of law or after a waiver of prosecution. When the case has been brought before a court of law, suspension is only possible on the initiative of the assembly in question (art. 59, § 6, Const.).

The suspension can also be requested when the investigation was started outside the session or when the MP was caught in the act.

The Member of Parliament can repeat his request for suspension each time a new fact presents itself.

Art. 59, § 5, does not determine how long the ordered suspension lasts. The assembly in question can hence order a suspension that does not last as long as the complete session. The suspension can only be effective during the term of office.

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61 Note that the mere fact of asking the suspension of the prosecution by a Member does not imply that the suspension has already entered in force. It is the vote of the assembly that determines the moment on which the prosecution is suspended. (Circulaire col. P.G. 6/97, addendum, 2).

62 Vande Lanotte and Goedertiere, *l.c.,* 56

63 Id.

64 Note that in case of a suspension on the initiative of the House (infra, 4.2) a simply majority suffices. Hence, it is in the interest of a Member of Parliament who is being prosecuted to have a colleague submit the request for suspension.

65 This concerns the suspension of judicial acts that can be made without the permission of the assembly.

4.2 Suspension on the initiative of the assembly (art. 59, § 6, Const.).

The assembly to which the MP belongs can request the suspension of the detention[66] of a Member of Parliament or of his prosecution before a court of law on its own initiative.

Contrary to what is the case for suspension on the initiative of the MP in question, a simple majority suffices for suspension on the initiative of the assembly.[67]

The assembly in question cannot on its own initiative request the suspension of an investigation for which the Member of Parliament granted his permission or of a measure of constraint that requires the intervention of a judge.

The assembly can order the suspension of each prosecution before a court of law, regardless of the cause or reason thereof.[68] Hence, it can also reconsider a previous decision to lift the immunity or not to suspend.[69]

The assembly in question can at all times demand the suspension; although it can no longer order the suspension after the debates have been closed in a criminal trial in order to prevent the judgement from being entered.[70]

The detention or prosecution is suspended during the term of office. The assembly could order a specifically described duration. Anyway, the suspension can only be effective during the term of office.

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66 This implies the arrest as meant in art. 59, first par., of the Constitution as well as the administrative arrest.

67 See footnote nr. 64, Vande Lanotte and Goedertiere, *l.c.,* 49.

68 Circulaire col., PG, 6/97, 8.

69 Id.

70 *Parl. St.*, The House, B.Z. 1995, 19/1, 3: *"In article 59 Const. not a single intervention of the legislative assemblies in this stage of a judicial procedure is mentioned. Moreover, the principle of the separation of power is contrary to every intervention in relation to the judgement."*

5. Lifting the immunity

5.1 Since the amendment of article 59 Const. in 1997, no cases have occurred.[71]

5.2 The assembly has the autonomous competency to elaborate the procedure for the waiver of the immunity, taking into consideration the rights of the defence.[72]

The request to lift immunity preferably comes from the Procurator General at the Court of Appeal under which the case comes and is addressed to the President of the assembly.[73] A case file in which the charges, complaints, testimonies, confessions and exhibits are recorded must accompany the request. It is assumed that this case file must be complete.[74]

The President informs the assembly of the request to lift the immunity (without mentioning the name of the person involved or the charges) and the request is referred to the prosecutions committee.[75]

The committee holds a meeting behind closed doors. It is customary for the debates to start with a short report in order to determine the disputed aspects – in the absence of the MP in question.[76] The committee can then interrogate the MP in question. He has the right to be heard if he requests to do so.[77] One of his colleagues or

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71 The secretariat of the prosecution committee does report an investigation into the waiver of immunity for a member in relation to the non-payment of traffic tickets. The member paid the tickets and the investigation was withdrawn.

72 Vande Lanotte and Goedertiere, *l.c.,* 57-58; the assembly also needs to respect the principle of the "presumption of innocence" as described in the jurisprudence of the European Court for Human Rights (see the decision "Alenet de Ribemont").

73 Circular letter of the Minister of Justice of September 1, 1983, quoted in *Parl. St.,* The House, 1994/95, 1699/1, 4: "*une raison de convenance fait désirer, à mon sentiment, que la Chambre compétente ne soit saisie de pareille demande que par le procureur général lui-même. Sa haute intervention apparaît à la fois comme une marque de déférence à l'égard du pouvoir législatif et comme une garantie de l'examen sérieux dont l'affaire a été l'objet de la part du parquet … ».* The prosecutions committee subscribed to this definition of the circular letter in casu the request to lift the immunity of Mr. Vautmans and expressly asked the Procurator General to confirm that he himself (and not only the examining magistrate) had requested to lift the immunity.

74 See Vande Lanotte and Goedertiere, *l.c.,* 64.

75 Art. 93 Reg. House

76 Erdman, F., *o.c.*, 503.

77 Art. 93 Reg. House

a counsel can assist him.[78] Pleas and the deposit of notes, conclusions and documents are allowed.[79] Traditionally, a direct discussion with the MP in question or his counsel is avoided.[80]

If the committee decides to hear witnesses, this will always be in the absence of the MP in question. The latter can inspect the elements of the testimony that are included in the report. The deliberation is also held in absence of the Member of Parliament in question. The committee decides with a simple majority, but traditionally a consensus is aspired.[81]

The committee makes a recommendation to the plenary meeting that decides with a simple majority whether the immunity will be lifted.[82] Art. 93 of the Standing orders of the House determines that only the rapporteur of the committee, the Member of Parliament in question or a member representing him as well as one speaker in favour and one speaker against may speak. The debate in the plenary meeting is usually public.[83] The Member of Parliament in question can be heard.[84] Whether or not the counsel or the witnesses can be heard is disputable.[85]

The decision whether or not to lift the immunity does not imply a suspicion of guilt or innocence – it is merely an authorization to prosecute or to arrest.[86]

5.3 The prosecutions committee gave the following definition of the constant jurisdiction of the House in relation to the requests to lift the immunity[87]:

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78 E.g., Mr. Van der Biest was heard upon his request, assisted by two counsels. (*Parl. St.,* The House, 92/93, 687/1, 3). The question whether the MP in question can examine his file is disputed (see Vande Lanotte and Goedertiere, *l.c.,* p. 68-69). The Regulation of the Flemish Parliament does provide this possibility.

79 Erdman, F., *o.c.*, 503. The commission is not obliged though to answer these in its final report to the plenary meeting since the decision of the committee is not a legal deed. (id.)

80 Id.

81 Erdman, F., *o.c.,* 504.

82 The committee report to the plenary meeting is published as a printed parliamentary document. Traditionally, the anonymity of the MP is preserved and the description of the charges is limited as far as possible. (Erdman, F., *o.c.,* 504).

83 On the condition of art. 44 Standing orders of the House., that determines that the House can decide to hold a meeting behind closed doors upon the request of 10 members or the president.

84 Erdman, *l.c.,* 505

85 Erdman, *l.c.,* 505.

86 Vande Lanotte and Goedertiere, *l.c.,* 71.

87 *Parl. St.,* House, 94/95, 1699/1,6. See also the criteria used when judging the request to lift the immunity: Vande Lanotte and Goedertiere, *l.c.,* 71 a.f.

"*A waiver to lift the parliamentary immunity presupposes that:*
– or the facts announced prima facie lead to the conclusion that the claim is based on unfounded, unjustified, aged, arbitrary or trivial elements;
– or the facts are the unforeseen consequence of a political action;
– or it is a criminal act with clear political motives.

If an authorization to prosecute based on this judgement would be possible, the impact of the prosecution on the exercise of the mandate still needs to be discussed.[88]"

5.4 The authorization to prosecute, given by the assembly, is limitative. It is only applicable for the facts mentioned in the request to lift the parliamentary immunity or in the file handed over to the House in notification of pending prosecutions.[89]

5.5 The assembly can limit the authorization by granting it for certain facts and refusing it for others.[90] The legislative meeting can also grant the authorization for referral or direct summons but refuse the actual arrest.[91]

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88 Report in relation to the prosecution of Mr. Buisseret, *Parl. St.,* House B.Z., 1991-92, 448/1, 3-4; Mr. Van der Biest, *Parl. St.,* House, 1992-93, nr. 687/1, 4.

89 *Parl. St.,* House, 92/93, 687/1, 4.

90 *Parl. St.,* House, 1992/93, 687/1, 4: "*In case of a request for the authorization to prosecute in relation to several criminal acts, the House is allowed to authorize one file and refuse another.*"

91 Hayoit de Termicourt, *l.c.,* col. 74 ; Vande Lanotte and Goedertiere, *l.c.,* 78. E.g. for the request to lift the immunity of Mr. Van der Biest in 1991. (*Parl. St.,* House, B.Z. 1991-92, 563/1, 2 and *Parl. St.*, House, 1992-93, 687/1, 2).

6. Conclusion

Although the amendment of article 59 of the Constitution was received with a certain scepticism, it did not miss its goal. Since the new regulation became effective, the House received not a single request for a waiver of parliamentary immunity.

The reason is obvious. The judicial authorities can now hold an investigation against a Member of Parliament without requiring the prior intervention of the assembly. Only when the investigation has been terminated and the judicial authorities find there is sufficient reason to prosecute, the assembly needs to lift the parliamentary immunity (i.e. for a referral to a court of law or a direct summons) and of course also in the case of the arrest of a Member of Parliament.

Another positive result is that the new regulation concerning parliamentary immunity was completely implemented in a circular letter of the Procurators General. The circular letter also included an appendix, based on the remarks of the assemblies. In addition, the Presidents of the seven assemblies have made practical arrangements, e.g. in relation to Members of Parliament with a seat in more than one assembly.

Hence, everything possible is done to exclude all interpretation problems and to guarantee a maximal legal certainty.

It appears that the Belgian Members of Parliament are currently protected by a balanced regulation, which does not expose them to "public trials" and which guarantees the basic principle of a presumption of innocence, but which on the other hand does not give the public the impression that Members of Parliament are "above the law".

III. Joint Circular Letter of the College of Procurators General, COL. 6/97

and appendix

TRANSLATIONS

The Office of the Public Prosecutor of the Court of Appeal, Brussels

The Office of the Chief Public Prosecutor of the Court of Appeal against decisions of the courts for the settlement of industrial disputes, Brussels

D.4bis/1-2 Circ. nr. COL. 6/97
Appendix:

Sent to Mrs. and Messrs. 1st assistant and assistant public prosecutor – Leg. bar – O.R. – H.C.R.O. – Chief of Police – Comm. Off. Gendarmerie and brig. – Brig. comm.. nat. police, (chief) constable – Chief clerk of the court of first instance – Chief clerk of Police Court.

Sent to Mrs. and Messrs. 1st assistant and assistant public prosecutor.

For execution For information,

September 18th, 1997
The Public Prosecutor

Brussels, September 15th, 1997.

Dear Sir Public Prosecutor,

SUBJECT: Parliamentary immunity – The Prosecution of Members of Parliament – New Article 59 of the Constitution – Offering Settlements to Members of Parliament.

ATTN.: PP – PP - 1st assistant and assistant public prosecutor – Leg. bar – O.R. – H.C.R.O. – Chief of Police – Comm. Off. Gendarmerie and brig. – Brig. comm.. nat. police, (chief) constable – Chief clerk of the court of first instance – Chief clerk of Police Court.

To the attention of the Public Prosecutor of,

In the Belgian official journal (Belgisch Staatsblad/Moniteur belge) of March 1, 1997 (pg. 4308 to 4310) a new article 59 to the Constitution was announced, which leads to a profound modification of the content of the notion of parliamentary immunity and the procedure for the criminal prosecution of members of parliament. This new regulation does not only apply to the Members of the Senate and of the House of Representatives, but also to the Members of the Community and Regional Councils following article 120 of the Constitution.

1. The former article 59 of the Constitution

The former article 59 of the Constitution determined e.g. that no member of a Legislative Assembly could be prosecuted or arrested in criminal proceedings during the term of office, except when the parliamentary institution of which he was a member gave the permission to do so or when he was caught in the act.

Hence, the rule was that not a single act of prosecution was possible in relation to a Member of Parliament without the permission of his parliamentary institution.

The notion "act of prosecution" was to be interpreted in the broadest sense of the word since and as a result of the important decision of the 'Court of cassation' of June 16th, 1982 (R.D.P. 1982, pg. 914 a.f.): it also includes every act of tracing or investigation by order of a magistrate, including the Public Prosecutor.

Except for when the MP was caught in the act, even a modest and informative investigation by the Public Prosecutor in order to verify the truthfulness of certain assertions against a Member of Parliament had become impossible without prior permission of the legislative assembly in question.

The rigid character of this organisation of parliamentary immunity threatened to turn against the persons the article of the constitution was meant to protect, since even a modest informative investigation was impossible without prior permission and since a

request for such permission caused such a stir in the media that the politician involved – even before any actual investigations had been made – was already condemned in the eye of the public.

A series of initiatives in the House and the Senate lead on February 28th 1997 to a new article 59 of the Constitution that definitely breaks with the above-mentioned organisation of parliamentary immunity.

II. The new article 59 of the Constitution

The main difference with the former article 59 of the Constitution deals with the possibility to hold a certain inquiry or to prosecute when the MP was not caught in the act and charged with a criminal act, without the prior permission of his legislative assembly. The extent to which certain actions are possible is carefully limited and outlined in the new article.

As before, a Member of Parliament only enjoys the constitutional protection during the term of office. In reality, the special arrangement for criminal proceedings is applicable as long as his parliamentary institution was not dissolved in view of upcoming elections.

For criminal prosecution during the term of office, the fourth paragraph of the current article 59 determines that it can only be instituted by the "officials of the Public Prosecutor's Office and the competent officers".

That implies that instituting criminal prosecution against a Member of Parliament during his term of office by filing a complaint with an examining magistrate or as a consequence of a direct summons for a criminal court by an affected party can NEVER be sustainable.

The new article 59 of the Constitution maintains a different approach in accordance with the fact whether or not the charged Member of Parliament was caught in the act. Neither the text of the new constitutional article nor the preparatory works by the House and Senate show any modifications of the contents of the notion "caught in the act".

The fact of being caught in the act remains as described in article 41, first paragraph of the Criminal code, i.e. the crime (criminal act, misdemeanour or violation) that is discovered while being committed or immediately after having been committed (Cass. December 31, 1900, Pas. 1901, I, 89). The second possibility of article 41, first paragraph of the Criminal Code – the discovery immediately after the crime was committed – entails the case in which the crime is still recent and when the time passed between committing the crime and the investigation is limited to the strictly necessary time to institute an investigation (Cass. June 29 1984, R.D.P. 1985, 76). It is the time reasonably required to act and can never be longer than twenty-four hours (after the crime was committed). This twenty-four hour term must be considered as a maximum that only rarely will be allowed to be exceeded (HAYOIT DE TERMICOURT, De parlementaire immuniteit, RW 1955-1956, col. 50 a.f., L'immunité parlementaire, J.T. 1955 p. 613 et suivantes, R.D.P., 1955-1956, p. 279 et suivantes).

The cases mentioned in the second paragraph of article 41 of the Criminal Code, i.e. crimes that are only considered to be caught in the act in analogy are not included in the term "caught in the act" as meant by (the old and the new) constitutional article 59. In that case, a Member of Parliament who is suspected of a crime committed in such circumstances will be subject to the procedure for crimes found outside being caught in the act.

A. NOT CAUGHT IN THE ACT

Earlier, every prosecution of a Member of Parliament as well as every act of investigation or prosecution depended on the permission of his legislative assembly, but now the principle is applied that a criminal investigation by the Public Prosecutor as well as a judicial investigation by an examining magistrate against an MP is possible without further formalities.

Following the new article 59, first paragraph, of the Constitution, a permission by the House to which the suspected member belongs, is only required in three cases:

1. referral (by an examining magistrate) to a court of law,
2. direct summons (by an official of the Public Prosecution or the competent officer) before a court of law

3. the arrest.

Hence, the Public Prosecutor can order an investigation without further formalities against an MP or demand an investigation from the competent examining magistrate.

Also, the competent examining magistrate can hold an investigation without other formalities against an MP, except in a case of measures of constraint for which the law requires the actions of a judge. In accordance with article 59, second paragraph of the Constitution such measures of constraint can only be ordered by the first president of the Court of Appeal upon request by the competent judge.

What are those measures of constraint for which the actions of a judge are required?

Except for the arrest, for which other and special regulations exist (see supra), these include the following cases (Documents of the House of Representatives, nr. 492-1995/1996, nr. 9 – report):

1. Physical examination

For this matter, usually the examining magistrate, previously authorized by the court is competent. In case of an investigation against a Member of Parliament, after having obtained the authorization the examining magistrate will first address the first president of the Court of Appeal who can order or refuse to order the investigation.

2. Order to appear

In case of an order to appear against a Member of Parliament, the examining magistrate will have to address a request to the first president of the Court of Appeal who will take a decision.

3. Tracing telephone calls or tapping person's telephones

Here, also the examining magistrate will have to contact the first president of the court of Appeal to obtain the required order, when the measure is ordered against a member of a legislative assembly.

4. Search (without permission) and the related seizures

Finally, the examining magistrate will have to appeal to the first president of the court of Appeal who will take a decision regarding

search (without permission) and the related seizures against a Member of Parliament.

When the first president of the Court of Appeal orders one of the above-mentioned measures of constraint, this will be notified to the president of the legislative assembly of which the MP in question is a member. The new constitutional article 59 requires in its third paragraph that in case of a search (without permission) and the related seizures the president of that legislative assembly or a Member of Parliament appointed by him must be present in person before these activities can be held.

In relation to the execution of the other measures of constraint ordered by the first president of the Court of Appeal, the personal presence of the president of the legislative assembly in question (or an MP appointed by him) is not required, a mere notification suffices.

The new article 59 of the Constitution does not determine when (except for implicitly for the search or seizures) and by whom the measures of constraint, determined in its second paragraph, must be notified to the parliamentary president.

The ratio legis of this obligation, and more in particular the supervision by the president of the legislative assembly over certain very fundamental measures of constraint, can only lead to the conclusion that this notification must be given by the commanding officer, i.e. the first president of the Court of Appeal, immediately and in any case before the execution of the above-mentioned measures of constraint.

B. CAUGHT IN THE ACT

In case the MP was caught in the act, i.e. the cases of article 41, first paragraph, of the Criminal Code, during the term of office of his legislative assembly and following the new article 59 of the constitution, the Member of Parliament is considered a normal citizen, at least as far as the criminal prosecution is instituted by an official of the Public Prosecutor's Department or a competent officer (art. 59, fourth paragraph of the Constitution, see supra).

For measures of constraint, the intervention of the first president of the Court of Appeal is not required and for a referral to a criminal court by the court sitting in Houses, a direct summons in criminal proceedings by the Public Prosecution or an order for arrest, no prior permission is required from the parliamentary institution the suspect belongs to.

When there is any doubt about the fact whether or not a Member of Parliament was caught in the act, for safety reasons the procedure of article 59 of the constitution for cases outside *flagranti delicti* will always be followed.

C. OUTSIDE THE TERM OF OFFICE OF HIS PARLIAMENTARY INSTITUTION

When the investigation (informative enquiries by the Public Prosecutor or criminal investigation by the competent examining magistrate) against an MP was already instituted outside the term of office or before the person involved was elected, during the following term of office he will not be immune for the previously instituted and pending prosecution. In that criminal case he can be referred to the competent criminal court, be summoned before a court of law and even be arrested by the examining magistrate without permission from the legislative assembly to which he belongs afterwards. The special procedure in relation to the measures of constraint for which the actions of a judge are required, i.e. the intervention of the first president of the court of appeal, does not apply either.

Outside the term of office, the prosecution can also be instituted following a complaint filed with the examining magistrate or by means of a direct summons by a private or legal person.

In short, outside the term of office, a member of parliament is an ordinary citizen.

D. SUSPENSION OF PROSECUTION

The new article 59 of the Constitution describes in its fifth and sixth (final) paragraph two, completely different procedures following which an investigation or prosecution during the term of office can be suspended.

The fifth paragraph includes the case of a pending investigation by the Public Prosecutor or a criminal investigation by the examining magistrate for which, as already explained, no permission needs to be asked, not even outside being caught in the act during the term of office of the parliamentary institution.

In any stage of the investigation, the legislative assembly, on the initiative of the Member of Parliament under fire and with a majority of two thirds, can order the suspension of the prosecution which, in view of the stage of the proceedings in that case, comes down to a suspension of the (further) investigation or criminal investigation against that Member of Parliament for the duration of the term of office of his institution.

The sixth and final paragraph of the new article 59 is nearly a literal repetition of the final paragraph of the previous article 59 of the Constitution – the same applies to its contents. It determines that the legislative assembly involved, on its own initiative with a simple majority, can order the suspension of any prosecutions before a court of law or any detention of a Member of Parliament. The introductory explanation by the Prime Minister in the Senate (Print documents of the Senate, nr. 1 – 363/11-1996-1997-report) can create the impression that this is only about the prosecution before a court of law, instituted outside the term of office or a detention ordered outside the term of office.

In fact, this applies to every prosecution before a court of law and every detention of a Member of Parliament during the term of office of his legislative assembly, regardless of the reason or cause. More specifically, we can refer to the brief report of the Senate – Plenary Meetings – of January 15, 1997, page 1285 and to the report on behalf of the commission for the review of the Constitution and the reform of the institutions, Printed Documents of the House of Representatives, nr. 492/9-1995-1996 (third page), which shows that the final paragraph of the new article 59 of the Constitution is a technically adjusted version of the final paragraph of the former article 59. And the right of the Parliament to claim the suspension of prosecution and detention in the former article 59 was general. It could be used when the prosecution (or the detention) was instituted before the opening of the term of office, when permission was not needed because the MP was caught in the act and even

when prior permission was given (Cass. Dec. 31, 1900, Pas. 1901, I, 89).

E. THE SETTLEMENT

It is a fact that offering a settlement to a Member of Parliament is not an act of prosecution as determined in the former and the new article 59 of the Constitution. A settlement is only aimed at avoiding prosecution and it prevents prosecution when the settlement is accepted; in accordance with article 216 bis § 1, last paragraph but one, of the criminal code, the timely payment thereof prevents criminal prosecution.

As such, offering a settlement to a Member of Parliament was and is, in accordance with former and new article 59 of the Constitution, *in se* not subject to any constitutional determinations.

Still, such a measure remains a delicate issue. The Member of Parliament may have his reasons not to accept the settlement or just be unwilling to pay for it. In those cases, the prosecution must nearly always follow the procedure for crimes committed without being caught in the act, since a settlement is usually offered for traffic violations for which no acts of investigation or prosecution are possible within the period of time (maximum of twenty-four hours) reasonably required to act after the crime was committed, so the jurisprudence of the discovery *in flagranti delicti* will not be applicable.

That implies that in case the offered settlement is not accepted or not paid, first the permission to prosecute must be obtained from the legislative assembly, called for that purpose, before a summons before the competent criminal court of the Member of Parliament in question can be delivered, and this usually because of minimal facts (e.g. a parking violation).

It is clear that offering a settlement to a Member of Parliament must be done with the greatest prudence. Before deciding to do so, the Public Prosecutor will first consult the Procurator General of the Court of Appeal by means of a motivated report. In case the settlement is not accepted or not paid, the office of the Procurator

General of the Court of Appeal must ask the President of the Legislative Assembly to lift the immunity of that member of parliament.

CONCLUSION

The new article 59 of the Constitution will certainly exclude or reduce the interest of the media for an informative of judicial investigation during the term of office against a Member of Parliament, but it has implemented a fairly complex set of rules and procedures to do so.

Especially, we must indicate here the task of the first president of the Court of Appeal in the case of measures of constraint, for which the actions of a judge are required. It is striking though how the procedure, described in the second and third paragraph of the new article 59 of the Constitution, is applied without any intervention from or notification to the procurator general or the Public Prosecutor.

In view of the complexity and the confidential character, the Public Prosecutor, except for cases of MPs being caught in the act, will notify the Procurator General of the Court of Appeal beforehand by means of a report of any informative or judicial investigations against a Member of Parliament. When apprehended *in flagranti delicti* the institution of the informative investigation or the request of a judicial investigation must be reported in the same way the day after.

When a settlement is offered to a Member of Parliament, the Public Prosecutor will consult the Procurator General of the Court of Appeal before doing so.

The Procurator General,

A. Van Oudenhove.

College of Procurators General

Brussels, April 23 1999

Circular letter nr. COL 6/97 of the College of Procurators General at the Courts of Appeal – Addendum

Dear Sir/Madam Procurator General,
Dear Sir/Madam National Magistrate,
Dear Sir/Madam Public Prosecutor,
Dear Sir/Madam Labour Prosecutor,

Subject: Joint Circular Letter from the College of Procurators General nr. COL 6/97 – Addendum – Parliamentary immunity – Prosecution of Members of Parliament – New article 59 of the Constitution – Offering a settlement to Members of Parliament

In reference to the joint circular letter of the College of Procurators General nr. COL 6/97 in relation to the application of articles 59 and 120 of the Constitution concerning criminal investigation and prosecution against members of the Senate, the House of Representatives and the Community and Regional councils, sent to you on September 15th 1997, I would like to report to you the following.

On the 3rd of June 1998, the Presidents of the seven parliamentary institutions of the country gave a letter to the Minister of Justice in which they explained their joint vision on the interpretation of a number of aspects of the procedure contained in the above-mentioned articles of the constitution in general and of the role of the president of the assembly to which the prosecuted Member belongs in particular. Please find a copy of this letter, handed over by the Minister of Justice to the College of Procurators General, attached to this document.

An analysis between the aspects treated by the assembly of the presidents of the seven federal and regional parliamentary institutions in their joint letter of June 3, 1998 on the one hand and the content of the above-mentioned circular letter nr. COL 6/97 indi-

cates there are no contradictions between this joint letter and this circular letter.

In that joint letter of the presidents of the seven parliamentary institutions, a number of points are treated which are not mentioned in the circular letter nr. COL. 6/97 and to which we would like to draw your attention:

1. In point 3.1 of that joint letter, it is indicated that the mere fact of a request to suspend the prosecution by a member of the parliamentary assembly does not imply that the suspension enters in force at that moment already. In the circular letter nr. COL 6/97, point II D, it was already mentioned that the legislative assembly in question must agree with that request with a majority of two thirds of the present votes before the request can be accepted and acted upon. Hence, it is that vote, and not the prior request of the Member of Parliament in question, that determines the moment on which the prosecution is suspended.
2. In point 4 of that joint letter, the procedure is indicated for Members of Parliament with a seat in more than one assembly. Here, we think of the members of the Community and Regional councils, e.g. the Walloon parliament and the Parliament of the French-speaking community, the Flemish Parliament and the Brussels-Capital Regional Council. The presidents of the parliamentary institutions in their joint letter point out that in certain cases – when the MP was not caught in the act (point II A of the circular letter nr. COL 6/97) – every assembly to which the MP in question belongs must give its prior permission before proceeding with a reference to or a direct summons before a court of law. Although not mentioned in the joint letter, such a multiple prior parliamentary permission also applies to the detention of a member of several assemblies

A contrario, it will not suffice that one of the parliamentary assemblies to which the MP in question belongs refuses that permission or takes a decision to suspend the prosecution in order to exclude or to suspend (further) prosecution or detention.

Also, for decisions to take measures of constraint for which the actions of a judge are required (point II A 1 – 4 of circular letter nr. COL 6/97), the prior notification by the competent First President of the Court of Appeal must be at every president of the parliamentary institution of which the person in question is a member. In relation to the personal presence of the parliamentary presidents or of one of the delegate Members of Parliament during searches and related seizures, by mutual understanding one member, having a seat in the different assemblies, can be delegated to attend these acts of investigation on behalf of all related parliamentary institutions.

Finally and for reasons of completeness we want to mention that point 2.1 of the joint letter of the Presidents of the parliamentary institutions inaccurately mentions a suspension by the court of a decision to refer a member of parliament to a court pending the required permission by its parliamentary institution. Of course, it cannot be the intention that a judicial authority announces its future decision that still needs to be taken (referral or release) BEFOREHAND.

Evidently, not the court but the Public Prosecution itself addresses, in case of a claim to settle the procedure by an examining court for a member of parliament via the Procurator General of the competent Court of Appeal a request to the related parliamentary institution(s) for the required prior permission for the referral of that member of parliament to a court of law by the examining court.

I would like to ask you to add this letter and its addendum – containing a copy of the above-mentioned joint letter of the Presidents of the parliamentary institutions of the country – as an appendix to the circular letter nr. COL 6/97 in relation to the application of the articles 59 and 120 of the Constitution concerning criminal investigations and prosecutions against members of the Senate, the House of Representatives and the Community and Regional Councils.

Also, I would like to ask you to diffuse this addendum among the magistrates of your Public Prosecutor's Department and to draw their attention to the contents hereof.

For the College of Procurators-General (A. VAN OUDENHOVE, Procurator-General of Brussels, F. SCHINS, Procurator-General of Gent, A. THILY, Procurator-General of Liège, G. LADRIERE, Procurator-General of Mons, Chr. DEKKERS, Procurator-General of Antwerp).

G. LADRIERE
Procurator-General of Mons
President of the College

Dear Sir, Dear Madam,

During their meetings of February 18, 1997, October 14, 1997 and February 10, 1998 the presidents of the seven assemblies deliberated on the practical application of article 59 of the Constitution.

They have reached an agreement on the interpretation of a number of aspects of the procedures contained in the above-mentioned article of the constitution in general and on the role of the president of the assembly to which the prosecuted member belongs in particular.

The different aspects of the agreement can be summarised as follows:

1. The Role of the Presidents of the Assemblies

1.1 Although the second paragraph of art. 59 of the Constitution only stipulates that the measures of constraint are ordered by the first president of the Court of Appeal, the notification of that decision to the president of the assembly in question must be performed by the first president (and not by the examining magistrate who requested that measure of constraint).

1.2 In relation to the application of the second as well as of the third paragraph of article 59 of the Constitution, the president of the assembly is bound by the secrecy of the investigation.

1.3 Any search or seizure is null and void when the president of the assembly in question or his replacement is not present. The president (or his replacement) acts alone, without the assistance of the clerk of the assembly. If there should be a deontological problem for him, he will have himself replaced. If searches or seizures are being executed at the same time at different locations, he can appoint several members of his assembly to replace him. The role of the president of an assembly during a search in which documents are seized

can be described in analogy with the role of the leader of the bar who is present during a search at a lawyer's.

2. The Permission from the Assembly in Question

2.1 The permission from the assembly to which the Member of Parliament belongs is not required to file a request for the release or the referral to a court with the court sitting in Houses. The court sitting in Houses[92] will only be able to decide to proceed with the referral after the prior permission from the above-mentioned assembly was obtained. In that case, the court sitting in Houses will suspend its decision and will hand over the case to the Public Prosecutor's Department in order to request the parliamentary immunity to be lifted. Out of respect for the president in question, the permission is requested by the Procurator-General at the competent court of appeal.

2.2 The permission from the assembly is not required for an administrative arrest. The president of the assembly the member belongs to must be notified of that administrative arrest (see the ministerial circular letter of April 15 1949) and the assembly the member belongs to can decide at all times it should be terminated.

2.3 The permission from the assembly must also be asked for a detention ordered after a conviction.

3. Request to suspend prosecution

3.1 The mere fact that the member in questions requests the suspension does not lead to the actual suspension of the prosecution.

4. Members of Parliament with a seat in more than one assembly

4.1 For the referral to or the direct summons before a court of law, every assembly the member in question belongs to, must give its prior permission.

4.2 The decision to take measures of constraint for which the action of a judge is required must be notified as soon as possible to the president(s) of (each of) the assembly(assemblies) in question.

4.3 To prevent that two or three assembly presidents must be present at the same time during a search or a seizure, after deliberation between the involved presidents – one member that belongs to the same assemblies can be delegated by the presidents of these two or three assemblies.[93]

4.4 In order to suspend the prosecution or the detention, it suffices that one assembly requests the suspension, regardless of the attitude of the other assemblies. When several assemblies request a suspension with a different scope, the suspension with the widest scope prevails.

4.5 The respective committees for the prosecution of the assemblies in question can meet together and interrogate persons, if the waiver of immunity or the suspension of prosecution or detention of a member of parliament who is member of to or three assemblies is requested.
Each committee must vote separately.
In relation to such collaboration between the prosecution committees, a protocol can be agreed upon between the assemblies. Such collaboration assumes of course that the request to lift the immunity is filed with the several assemblies at the same time.

It is the opinion of the seven presidents that these points should as soon as possible be incorporated into a circular letter of the procurators-general at the courts of appeal. They would appreciate it if you would take the necessary steps.

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92 *Mutatis mutandis*, the same procedures are followed for the Indictment Division.

93 *De lege ferenda*, it is desirable that only the president of the assembly the member is elected to attend the search or the seizure.

Appendix: a note, approved by the seven presidents, containing the general principles for the practical application of article 59 of the Constitution.

Yours Faithfully,