# THE HOUSE OF REPRESENTATIVES

## BRIEF PARLIAMENTARY LAW

## THE PARLIAMENTARY IMMUNITY

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## PREFACE

This brochure forms part of the series "Brief Parliamentary Law", published by the Legal Department of the Belgian House of Representatives and initiated in 2000 by my predecessor, Mr Herman De Croo.

All brochures in this series follow the same basic structure:

1. a series of questions and answers on the main problems which Members of Parliament, journalists and all those interested in the activities of Parliament may be confronted with ;

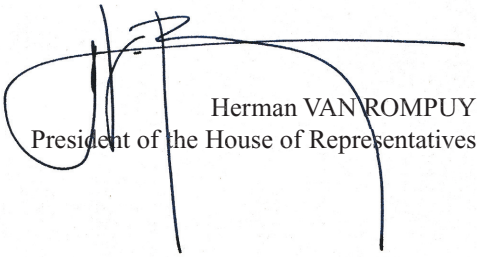
2. a brief yet complete note for those who really want to explore the details. Because of its academic nature, it may be "less palatable", but it is more complete and it contains valuable references to court decisions and legal doctrine.

Since none of the subject matters of these brochures is fixed, it is necessary to review and update these publications at regular intervals in accordance with the evolution of the law, legal doctrine and case-law.

So, considering that evolution, I deemed that the time had come to make this brochure on parliamentary immunity keep abreast with it.

Please note that this English version is equivalent to the French and Dutch updates of March 2007.

I am convinced that thanks to this update, this publication, together with the other brochures of "Brief Parliamentary Law", will continue to contribute to a better understanding of the rights and duties of the Members of Parliament and hence to maximum legal certainty.



Herman VAN ROMPUY
President of the House of Representatives

# THE HOUSE OF REPRESENTATIVES

## BRIEF PARLIAMENTARY LAW

# THE PARLIAMENTARY IMMUNITY

# 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 or directly summoned before 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 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 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 Belgian members of the European Parliament enjoy the immunity granted by art. 59 Const. when they are in the Belgian territory. When they are in the territory of any other Member of the European Union, they enjoy immunity from any measure of detention and from legal proceedings.

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 and 125 Const.).

**When are the Members of Parliament immune?**

The immunity is only valid during the session. 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 session may be continued after the session 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. This means that, in practice, parliamentary immunity lasts during the full period of the parliamentary term.

**For which actions are the MPs immune?**

The immunity only protects Members of Parliament in *criminal cases*. This notion includes all categories of criminal acts: felonies, crimes and misdemeanours (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, against Members of Parliament who are lawyers or doctors), 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 session, only the officials of the Public Prosecutor's Office 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 Office must ask the assembly of which he is a member to lift his immunity.

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

**Is the permission of the assembly required for measures of**

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.

**constraint against Members of Parliament?**

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 head of the Bar 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 still 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 session.

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

The request to lift immunity preferably originates with the Public Prosecutor General to 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 Assembly 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 opinion that 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.

Moreover, 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 the 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 Public Prosecutors 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.

So, 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 session 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

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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: Myttenaere, R., Les immunités des parlementaires, *Informations constitutionnelles et parlementaires,* ASGP, 1998, nr. 175, 105-144; Van der Hulst, M., *Le mandat parlementaire,* Genève, Union Interparlementaire, 2000, 68 onwards.
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 *Belgian State Gazette,* March 1st 1997; see: Herziening van artikel 59 van de Grondwet, *Doc. parl.* House of R.*,* 1995-1996, n° 492.

MP as a suspect) was possible 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 Belgian Supreme Court ('*Cour de cassation*') as "every act of tracing or investigation ordered by a magistrate, including the Public Prosecutor" (Joint circular letter of the College of Public Prosecutors General, September 18th 1997, 2. (hereafter abbreviated as Circulaire col. P. G. 6/97 – see appendix 1).

5 Circulaire col. P.G. 6/97, 2 – see appendix 1.

6 *Doc. parl.* House of R., 1991-92, 14/1.

7 Vande Lanotte, 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 Belgian Members of the European Parliament enjoy the immunity granted by art. 59 Const. when they are in the Belgian territory. When they are in the territory of any other Member of the European Union, they enjoy immunity from any measure of detention and from legal proceedings.[8] The Statute of the Members of the European Parliament should enter into force at the beginning of the next session (2009). The aim is to also draft new immunity regulations by then.[9]

2.1.3 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 and 125 Const.).[10] Criminal proceedings can only be instituted against Ministers by the Public Prosecutor's Office at the Court of Appeal, which is also competent for the trial of Ministers. Appeals are possible through the *'Court of*

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8 Art. 10 of the Protocol of April 8th 1965 on the privileges and immunities of the European Communities :
"During the sessions of the European Parliament, its members shall enjoy :
in the territory of their own Member State, the immunities accorded to members of their Parliament;
in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.
Immunity shall likewise apply to members while they are travelling to and from the place of meeting of the European Parliament.
Immunity cannot be claimed when a member is found in the act of committing an offence and shall not prevent to the European Parliament from exercising its right to waive the immunity of one of its members."

9 See, among others, three resolutions of the European Parliament : (1) P5_TA (2003) 0241, June 4th 2003, *OJ* C March 18th 2004, ed. 68E, 210, (2) P5_Ta (2003) 0573, December 17th 2003, *OJ* C April 15th 2004, ed. 91E, 230, (3) P6_TA (2005) 0245, June 23rd 2005, *OJ* C. June 8th 2006, ed. 133E, 48.

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

*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.[11]

It is admitted by analogy that a substitute acquires the status of a Member of Parliament (and hence enjoys immunity) as soon as the mandate of the Member to be succeeded comes to an end.

Note that the immunity only starts to play a role with the opening of the session. Outside the session, the immunity does not apply and the elected MPs can be arrested and prosecuted.[12]

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 24th 1991. At that moment, he was in preventive custody. On December 16th 1991, the House gathered and the session was opened. Only then could the House demand the

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11 *Doc. Parl*. House of R., extr. session 91/92, n° 14/1, 7, derived from *Cass*. December 17th 1991 ; with regard to the Members of the European Parliament, see C.J.E.C. July 10th 1986, n° 149/85, European Court reports 1986, III, 02411 : "*Article 10 of the protocol of 8 april 1965, which grants members of the European Parliament immunity 'during the sessions of the assembly', is to be interpreted as meaning that the European Parliament must be considered to be in session, even if it is not actually sitting, until the decision is taken closing its annual or extraordinary sessions.*" (see also C.J.E.C. May 12th 1964, n° 101/63).

12 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 Office. 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 session. (*Cass.*, case Van Rossem, December 17th 1991).

suspension of the prosecution of Mr Van Rossem.[13] The fact that he had not taken the oath was not relevant.[14]

Note also that the Public Prosecutor 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.[15]

There are also precedents in which the judicial authorities postponed the prosecution of elected members, before the assembly had gathered in session, in order to allow the assembly to decide to claim the suspension of the prosecution. The elected members 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.[16]

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?[17] 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 sitting (hence before the House had been declared lawful and complete).[18]

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13 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 (*Doc. parl.* House of R., extr. session 1991/92, 14/1, 2.).

14 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. ».*

15 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 …*» (*Doc. parl.* House of R., extr. session 91/92, 14/1, 6).

16 It concerned two separate cases from 1985 in relation to elected senators.

17 Rules 3 and 4 of the House's Rules of Procedure; The assembly has 15 days to appoint its 'Bureau' after the opening sitting.

18 It concerned an elected MP who had been arrested during a demonstration (*Hansard,* House of R., December 20th 1932, 11 and 13).

### 2.2.3 The immunity is only valid during the session

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

In addition, an arrest or a prosecution commenced outside the session may be continued after the beginning of the session without requiring the permission of the assembly.[19] 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, 6th par., Const.).[20] 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. This means that, in practice, the parliamentary immunity is valid throughout the whole parliamentary term.[21] Only when the session has been closed or when the Parliament has been dissolved, e.g. in view of coming elections and afterwards, before the opening of the session of the newly elected Parliament, we are "outside session".[22]

### 2.3 Ratione materiae

2.3.1 The immunity protects the Member of Parliament only "*in criminal matters"* (art. 59, par. 1, Const.). This notion contains all categories of criminal acts (felonies, crimes and misdemeanours[23]).

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19 *Cass*, December 17th 1991, *unpublished*; Vande Lanotte J. and Goedertiere G., *l.c.,* 25.

20 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).

21 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."*

22 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 Home Affairs would close the session the eve of the next session, at 24 h (as is already customary in the Walloon Parliament).

23 Including traffic violations.

Art. 59 Const. is not applicable to civil disputes[24]. Additionally, a Member of Parliament can be summoned before a court, even a criminal court, as a civilly responsible party.[25]

The immunity does not apply to disciplinary claims either (e.g. by the Bar, the Medical Association, against Members of Parliament who are lawyers or doctors), nor to administrative courts.

2.3.2 The immunity does not apply *in the case of a flagrant offence* (art. 59, 1st and 2nd par., Const.). Used in the sense of art. 59, this notion is of limited content.[26] The crime must be discovered when it is being committed or immediately after it was committed.[27] 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.[28] After that, the immunity is applicable again.

The Public Prosecutor must determine whether or not the person in question was "caught in the act".[29] The legislative assembly cannot question this qualification.[30] The circular letter of the College of Public Prosecutors General (col. 6/97) determines that *if 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".*[31]

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24 For instance, parliamentary immunity would not apply when a bailiff states adultary (art. 1016*bis*, Judicial Code).

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

26 *Cass.*, June 20th 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.

27 *Cass.*, December 31st 1900, *Pas.,* 1901, I, 89; Circulaire col. PG, 6/97, 3 (see appendix 1).

28 Circulaire col. PG, 6/97, 4 (see appendix 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.,* 80.

29 Vande Lanotte and Goedertiere, *I.c.,* 80.

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

31 Circulaire col. PG, 6/97, p. 6 (see appendix 1).

### 2.4 The special case of Members of Parliament with a seat in more than one assembly[32]

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.[33] 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.[34] In relation to the personal presence of the President during a house search, it can be agreed by common consent to delegate a Member with a seat in the different assemblies involved.[35]

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.[36]

## 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 Prosecutor's Office and by the competent officials (art. 59, 4th par., Const.). Hence, an affected party cannot institute proceedings, nor by direct summons nor by bringing an action before an examining magistrate.[37] Of course, the injured person may

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

33 Circulaire col. PG, addendum, p. 2 (see appendix 2).

34 Id.

35 Id.

36 Letter from the 7 presidents to the Minister of Justice, June 3d 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.).

37 Circulaire col. PG 6/97, p.3 (see appendix 1) : "*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.*"

institute proceedings against other persons who are involved in the same case.[38]

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 of public order.[39]

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 Prosecutor's Office are punishable when they do not obey the rules concerning parliamentary immunity.[40]

**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, 1st par., Const.).

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).[41] It is assumed that for

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38 See Criminal Court Eupen, October 11th 2005, *unpublished.*

39 Hayoit de Termicourt, *l.c.,* col. 66.

40 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."*

41 *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).

the arrest in order to execute a judgement or an arrest, the permission of the assembly is also required.[42]

The permission of the assembly is not required for so-called "administrative" arrests.[43] 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.[44] The administrative arrest may not last longer than necessary and never longer than 12 hours.[45]

The President of the assembly must always be informed about the administrative arrest[46] and the assembly can decide at all times that the arrest should be ended.[47]

- cannot *be referred to a court of law*

This concerns the decision of the examining magistrate (the Council Chamber or Indictment Chamber) following an investigation by the examining magistrate, which causes the case to be brought before the court.[48] Beforehand, the Public Prosecutor's Office must address a request to the assembly, via the Public Prosecutor General to the competent Court of Appeal, to lift the immunity of the MP involved.[49]

- cannot *be directly summoned before a court of law*[50]

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42 Letter from the 7 presidents, June 3rd 1998 (see appendix 3); even when the conviction would lead to the loss of all civil and political rights (Vande Lanotte and Goedertiere, *l.c.,* 39).

43 *Doc. parl.* House of R., 95/96, 492/9, 3; letter from the seven presidents of June 3rd 1998 (see appendix 3); there are quite a number of precedents of "administrative" arrests of Members of parliaments; on April 24th 1992 e.g. 9 Members of the House were administratively arrested during a demonstration in Fourons, see also Linkebeek, on October 2nd 1995 and Enghien on June 31st 1996.

44 In accordance with art. 31 of the Act of August 5th 1992 in relation to police assignments (*Belgian State Gazette,* December 22nd 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 gathering.

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

46 Circular Letter from the Minister, April 15th 1949t

47 In accordance with article 59, last paragraph Const., 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).

48 Art. 129 and 130, Criminal Procedure Code.

49 Circulaire col PG, addendum, 3 (see appendix 2).

50 That is only possible for crimes and misdemeanours 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).

3.2.2 Certain other acts of investigation, the so-called **measures of constraint** that require the action of a judge[51], 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.[52] The permission of the assembly is not required (art. 59, 2nd par., Const.).

This concerns:[53]

– an order to appear for questioning and confrontation (when a Member of Parliament resists questioning or confrontation)[54];

– a search warrant (when the Member of Parliament does not agree)[55];

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51 Since 2003, the Criminal Procedure Code contains legal provisions that govern the use of a number of investigation techniques which were given the attribute "special" because of their secret nature and also because of the possible trespassing on fundamental rights. These techniques are : the observation, the infiltration and the use of informants. The special investigation techniques are implemented under the Public Prosecutor's supervision (not under the judge's control). Only doctors and lawyers enjoy in some cases a special regime with a structural intervention of the examining magistrate and of the head of the Bar or a representative of the Medical Association (art. 56*bis*, Criminal Procedure Code). Such exceptional measures do not apparently apply to Members of Parliament.

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

53 *Doc. parl.* House of R., 1995-96, 492/9, 3. Circulaire col. PG, 6/97, p. 5 (see appendix 1).

54 The order to appear is mentioned without nuance in the Circulaire col. PG, p. 5. Against: H.-D. Bosly and D. Vandermeersch, Droit de la procédure pénale, Bruges, La Charte, 2003, 155, who equate the order to appear with an arrest and are of the opinion that permission from a parliamentary assembly is required in this case.

55 In accordance with the previous art. 45 Const., 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. So 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, n° 12). However, some authors of the doctrine consider that this jurisprudence of the *Cour de cassation* (which dates from September 30th 1992) cannot be upheld under the new art. 59 Const. – that was completely amended in 1997 – and that the exceptional proceedings provided for by this article (measure ordered by the first President of the Court of Appeal, presence of the President of the assembly concerned, …) are now applicable when the measure of constraint is directed against a Member of Parliament (H.-D. Bosly and D. Vandermeersch, o.c., 152-153; P. Herbots, "*Parlementaire immuniteit Dewinter geschonden*", *De Juristenkrant* May 10th 2006, 5). Owing to the considerable increase of the number of acts of (preliminary) investigation that can be performed in relation to a Member of Parliament without a request to lift his immunity having to be filed, the distinction made between an investigation against a Member of Parliament and that against a third party seems to have become unnecessary.

During an investigation that was recently opened against a third party, the telephone talks of a Flemish Member of Parliament were allegedly recorded by order of an examining magistrate without previous order of the first President of the Court of Appeal and without the President of the Flemish Parliament having been informed. This seems to be an application of the old jurisprudence of the *Cour de cassation*.

– 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.[56]

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;[57] he is bound by the secrecy of the investigation;[58]

2° A Member of Parliament can at any stage of the investigation request during a session and in criminal matters that the assembly of which he is a member suspend the proceedings (art. 59, 5th par., Const.). The assembly must decide with a majority of two thirds of the votes cast.[59]

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, 3rd par., Const.).

In a letter to the Minister of Justice of June 3rd 1998, the seven Presidents of the assemblies provide the following clarifications (see appendix 3).

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

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56 Art. 90*bis* Criminal Procedure Code; 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.

57 Art. 59, 5th par., Const. 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 (circulaire col. PG, 6/97, p. 6 – see appendix 1).

58 Letter from the Presidents of the seven assemblies to the Minister of Justice, June 3rd 1998 (see appendix 3).

59 Art. 59, 5th par., Const. Note the difference with the suspension provided by the final paragraph of art. 59 Const., that only requires a simple majority.

search or a seizure is going on, he can appoint several members of his assembly to replace him.[60]

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 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 head 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.[61]

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

This concerns:[62]

– 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.[63] A settlement is only aimed at avoiding prosecution and prevents prosecution if the settlement is accepted.[64] 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).

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60 Letter from the Presidents of the seven assemblies to the Minister of Justice, June 3rd 1998 (see appendix 3).
61 Id.
62 *Doc. parl.* House of R., 1995/96, 492/9, 2 and 3.
63 Circulaire col. P.G. 6/97, p. 8 (see appendix 1).
64 Art. 216*bis*, 1st par., Penal Procedure Code.

Hence, the circular letter of the College of Public Prosecutors General insists on applying the greatest circumspection. Before offering a settlement to a Member of Parliament, the Public Prosecutor will consult the Public Prosecutor General to the Court of Appeal by means of a motivated report.[65]

In principle, the affixing of the seals to an MP's office must be considered as a purely preparatory proceeding which is meant to make sure that a search or seizure, if any, will be useful. Accordingly, the intervention of the first President of the Court of Appeal and the presence of the President of the assembly concerned are not required.[66]

### 4. Suspension by the Assembly

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

At any stage of the investigation, a Member of Parliament can request the assembly concerned to suspend the proceedings.[67] The request must be substantiated by convincing arguments.[68] The decisive criterion to decide to suspend the prosecution is the *"serious and honest"* nature of the prosecutions.[69]

The House in question can only order the suspension with a majority of two thirds of the votes cast.[70] 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.[71]

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65 Circulaire col. P.G. 6/97, p. 9 (see appendix 1).

66 On the contrary, if it appears that the affixing of the seals is an actual measure of constraint, e.g. because the office remains sealed for such a long time that one cannot speak of a preparatory proceeding any more, it seems obvious that, by analogy with a search or a seizure an order of the first President of the Court of Appeal is required and that the President of the assembly concerned must be present when the seals are being affixed.

67 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 – see appendix 2).

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

69 Id.

70 Note that in case of a suspension on the initiative of the House (*infra*, 4.2) a simple 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.

71 This concerns the suspension of judicial acts that can be performed without the permission of the assembly.

The suspension can be requested at any stage 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, 6th par., 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, 5th par., Const. 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 as long as the session lasts.

### 4.2 Suspension on the initiative of the assembly (art. 59, 6th par., Const.).

The assembly to which the MP belongs can request the suspension of the detention[72] 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.[73]

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.[74] Hence, it

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72 This implies the arrest as meant in art. 59, 1st par., Const. as well as the administrative arrest.

73 See footnote n° 70, Vande Lanotte and Goedertiere, *l.c.*, 49.

74 Circulaire col., PG, 6/97, 8 (see appendix 1).

can also reconsider a previous decision to lift the immunity or not to suspend.[75]

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 delivered.[76]

The detention or prosecution is suspended during the whole session. The assembly could order a suspension of a fixed duration. Anyway, the suspension can only be effective as long as the session lasts.

### 5. Lifting the immunity

5.1 The assembly has the autonomous competency to elaborate the procedure for lifting the immunity, taking into consideration the rights of the defence.[77]

The request to lift immunity preferably comes from the Public Prosecutor General to the Court of Appeal under which the case comes and is addressed to the President of the assembly.[78] 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.[79]

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75 Id.

76 *Doc. parl.* House of R., extr. session 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."*

77 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").

78 Circular letter of the Minister of Justice of September 1st 1983, quoted in *Doc. parl.* House of R., 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 Prosecution Committee subscribed to this definition of the circular letter *in casu* the request to lift the immunity of the Member of the House and expressly asked the Public Prosecutor General to confirm that he himself (and not only the examining magistrate) had requested to lift the immunity.

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

A draft request or summons is generally added to the file concerning a request for referral or direct summons, though this is not absolutely necessary. It makes it possible to know exactly for which facts the Public Prosecutor wants to start proceedings[80].

The Public Prosecutor General must introduce a request to lift immunity as soon as the judicial investigation is finished and the Council Chamber has fixed a date for examining the case[81]. The same holds true when the Public Prosecutor requests that the MP be exempted from prosecution, for the examining bodies can order him to be referred to a court even when the Public Prosecutor demanded exemption from prosecution[82].

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 Prosecution Committee[83].

In the House of Representatives, the members of the Prosecution Committee, the Member of Parliament concerned and his/her counsel are usually[84] allowed to consult the case file. Making photocopies and using a dictaphone are forbidden, whereas taking notes is permitted[85].

The Committee meets 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.[86] The Committee can then interrogate the MP in question. He has the right to be heard if he

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80 *Doc. parl.,* House of R. 2001-2002, n° 1946/001, 21.

81 It is important to allow the assembly sufficient time to examine the request.

82 Letter from the President of the seven assemblies to the Minister of Justice, December 5th 2005 (see appendix 4).

83 Rule 160, House's Rules of Procedure.

84 There is only one case where the Prosecution Committee departed from this principle: a numbered copy of the huge file was delivered to the members of the Committee, while the member concerned was allowed to look through it at the Committee secretariat (*Doc. parl.* House of R., 2004-2005, n° 1714/001,4).

85 *Doc. parl.*, House of R., 2000-2001, n° 1346/001, 3 ; *Doc. parl.*, House of Representatives, 2001-2002, n° 1873/001, 3 ; *Doc. parl.*, House of Representatives, 2001-2002, n° 1946/001, 10.

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

so requests.[87] One of his colleagues or a counsel can assist him.[88] Pleas and the deposit of notes, conclusions and documents are allowed.[89] Traditionally, a direct discussion with the MP in question or his counsel is avoided.[90]

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.[91]

The Committee makes a recommendation to the plenary meeting that decides with a simple majority whether the immunity will be lifted.[92] Art. 160 of the Rules of Procedure 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.[93] The Member of Parliament in question can be heard.[94] Whether or not the counsel or the witnesses can be heard is disputable.[95]

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.[96] A parliamentary assembly does neither investigate nor judge, but it examines the facts which it is informed of by the Public Prosecutor. This examination is only marginal and is limited

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87 Rule 160, House's Rules of Procedure.

88 E.g., a Member of Parliament was heard upon his request, assisted by two counsels. (*Doc. parl.,* House of R. 1992-93, n° 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 Rules of Procedure of the Flemish Parliament do provide this possibility, which, in practice, is allowed by The House of Representatives.

89 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.

90 Id.

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

92 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).

93 On the condition of art. 56 of the House's Rules of Procedure, that determines that the House can decide to hold a meeting behind closed doors upon the request of 10 members or the President.

94 Erdman, *l.c.,* 505

95 Id.

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

to what is necessary to allow the Committee to decide on the request to lift immunity. However, a legislative assembly does not pronounce on the charges that the Public Prosecutor thinks he can infer from the facts, nor on whether the Public Prosecutor's intervention is opportune, adequate and well-timed.[97]

5.2 The Prosecution Committee gave the following definition of the constant jurisdiction of the House in relation to the requests to lift the immunity[98]:

"*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.[99]"

5.3 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.[100]

5.4 The assembly can limit the authorization by granting it for certain facts and refusing it for others.[101] It can also grant the authorization for referral or direct summons, but refuse the actual arrest.[102]

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97 *Doc. parl.,* House of R. 2000-2001, n° 1346/001, 6-8; *Doc. parl.,* House of R. 2001-2002, n° 1946/001, 17-18.

98 *Doc. parl.,* House of R. 1994-1995, n° 1699/1,6. See also the criteria used when judging the request to lift the immunity: Vande Lanotte and Goedertiere, *l.c.,* 71 onward.

99 *Doc. parl.,* House of R., extr. session 1991-1992, n° 448/1, 3-4; *Doc. parl.,* House of R., 1992-1993, n° 687/1, 4; *Doc. parl.,* House of R. 2000-2001, n° 1346/001, 6; *Doc. parl.,* House of R. 2001-2002, n° 1873/001, 9; *Doc. parl.,* House of R. 2001-2002, n° 1946/001, 16.

100 *Doc. parl.,* House of R., 1992-1993, n° 687/1, 4.

101 *Doc. parl.,* House of R., 1992-1993, n° 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.*"

102 Hayoit de Termicourt, *l.c.,* col. 74 ; Vande Lanotte and Goedertiere, l.c., 78. E.g. for the request to lift the immunity of an MP in 1991 (*Doc. parl.,* House of R., extr. session 1991-1992, n° 563/1, 2 and *Doc. parl.,* House of R, 1992-1993, n° 687/1, 2).

5.5 Art. 59, 1st par., Const. requires the authorization of the legislative assembly only *to start* criminal proceedings (by way of a referral or direct summons), *not to continue* them. The fact that an MP is re-elected or becomes a member of another assembly does not change anything to this. Hence, the assemblies concerned must not lift the immunity again or confirm the lifting of it.[103]

However, the Public Prosecutor must avail himself of the lifting of the immunity within a reasonable time. If too long a time elapses between the decision of lifting the immunity and the arrest or actual prosecution of the MP, it can be necessary to file a new request to lift his immunity. If, for instance, new investigations were carried out after the decision of lifting the immunity was made and the Public Prosecutor's request was modified, a new request must be submitted.[104]

## 6. Conclusion

Although the amendment of article 59 of the Constitution was received with a certain scepticism, it did not miss its goal.

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 Public Prosecutors General. An addendum to this circular letter was also drafted in order to take account of the assemblies' remarks. 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 and in relation to the date when the request to lift the immunity must be filed.

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103 *Cass.*, October 4th 2006, <http://www.cass.be>.

104 *Doc. parl.,* House of R. 2001-2002, n° 1873/001, 11; *Doc. parl.,* House of R. 2003-2004, n° 0712/001, 4; *Doc. parl.,* House of R. 2004-2005, n° 1714/001, 13-14.

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".

Finally, it should be noted that the theory of the parliamentary immunity is evolving too, as appears more particularly from a recent decision of the European Court of Human Rights. In a case against Greece, this Court judged that parliamentary immunity can entail an infringement of the right of access to justice if the facts which the MP is charged with have no relation to the exercise of the parliamentary mandate.[105] Since art. 59 Const. was amended in 1997, the Greek form of parliamentary immunity however differs from the Belgian one on several counts. E.g. in Belgium an investigation against an MP can now take place during the exercise of the parliamentary mandate. The authorization of the parliamentary assembly concerned is only required to refer the MP to a court, to summon him directly or to deprive him of his liberty. However, Belgium shows in this respect a greater sense of realities than Greece, as the Belgian Paliament accedes more systematically to requests to lift the parliamentary immunity. The future will tell us whether the Belgian and European courts of law share this opinion.

[105] E.C.H.R., Tsalkitzis v. Greece, November 16th 2006. See also K. Muylle, "EHRM holt parlementaire onschendbaarheid uit", *De Juristenkrant*, February 14th 2007.

## III. Appendices

## 1. Joint circular letter n° COL 6/97 of the College of Public Prosecutors General, September 15th 1997

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

In the *Belgian State Gazette (Belgisch Staatsblad/Moniteur belge)* of March 1st 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 criminal act (felony, crime and misdemeanour) 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 Procedure Code – the discovery immediately after the criminal act was committed – entails the case in which the act is still recent and when the time passed between committing the act 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 Procedure Code, *i.e.* criminal acts 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 criminal act committed in such circumstances will be subject to the procedure for acts 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 Procedure 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 Office 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 SESSION OF HIS PARLIAMENTARY INSTITUTION

When the investigation (preliminary investigation by the Public Prosecutor or criminal investigation by the competent examining magistrate) against an MP was already instituted outside the session or before the person involved was elected, during the following session 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 session, 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 session, 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 session 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 session 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 session 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 (Parl. 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 session or a detention ordered outside the session.

In fact, this applies to every prosecution before a court of law and every detention of a Member of Parliament during the session 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, Parl. Documents of the House of Representatives, nr. 492/9-1995-1996 (p. 3), 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 session, 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 Procedure 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 criminal acts 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 Public Prosecutor General to the Court of Appeal by means of a motivated report. In case the settlement is not accepted or not paid, the Prosecutor General to 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 a preliminary or judicial investigation during the session 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 paragraphs of the new article 59 of the Constitution, is applied without any intervention from or notification to the Public Prosecutor (General).

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 Public Prosecutor General to the Court of Appeal beforehand by means of a report of any preliminary 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 Public Prosecutor General to the Court of Appeal before doing so.

The Public Prosecutor General,

A. Van Oudenhove.

## 2. Circular letter n° COL 6/97 of the College of the Public Prosecutors General to the Courts of Appeal – addendum, April 23th 1999

Subject: Joint Circular Letter from the College of Public Prosecutors General n° 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 Public Prosecutors General n° 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 Public Prosecutors 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 3rd, 1998 on the one hand and the content of the above-mentioned circular letter n° COL 6/97 indicates 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 n° 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 n° 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 n° 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 n° 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 Public Prosecutor General to 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 n° 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 Office and to draw their attention to the contents hereof.

For the College of Public Prosecutors General.

G. LADRIERE
Public Prosecutor General of Mons
President of the College

### 3. Letter from the Presidents of the seven assemblies to the Minister of Justice, June 3rd 1998

Dear Sir,

During their meetings of February 18th 1997, October 14th 1997 and February 10th 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 Council Chamber. The Council Chamber[1] 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 Council Chamber will suspend its decision and will hand over the case to the Public Prosecutor's Office in order to request the parliamentary immunity to be lifted. Out of respect for the President in question, the permission is requested by the Public Prosecutor General to 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 15th 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.

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1 *Mutatis mutandis*, the same procedures are followed before the Indictment Chamber.

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.[2]

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 Prosecution committees 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 Public Prosecutors General to the Courts of Appeal. They would appreciate it if you would take the necessary steps.

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[2] *De lege ferenda*, it is desirable that only the President of the assembly the Member is elected to attend the search or the seizure.

**4. Letter from the Presidents of the seven parliamentary assemblies to the Minister of Justice, December 5th 2005**

Subject : Parliamentary immunity – Implementation of art. 59 of the Constitution

Dear Madam,

During their meetings of October 4th 2004 and June 27th 2005, the Presidents of the seven parliamentary assemblies looked into a specific aspect of the implementation of art. 59 Const., *i.e.* the moment when, in legal proceedings, the Public Prosecutor General must ask the competent parliamentary assembly permission to refer a MP to a court. Another question to be examined was the procedure that had to be followed when the Public Prosecutor's Office requests that the MP be exempted from prosecution.

(See point 2.1. of the letter of June 3rd 1998 from the seven Presidents to the Minister of Justice concerning the implementation of art. 59 Const.)

A working group set up by the Conference of the Presidents of the seven parliamentary assemblies and composed of the President of the Prosecution Committee of the House of Representatives and the President of the Committee on Justice of the Senate, on the one hand, and the President of the College of Public Prosecutors General, on the other hand, examined these issues on February 1st and May 24th 2005. Following this examination, the seven Presidents agreed to replace point 2.1. of the above-mentioned letter by the following text :

"1. When the Public Prosecutor's Office demands that the MP be referred to a court, the request to lift the parliamentary immunity on the strength of art. 59, 1st par., Const. must, considering *inter alia* the fact that lifting the said immunity is required for the criminal action to be admissible, be filed with the assembly concerned as soon as the investigation is finished and the Council Chamber has fixed a date for dealing with the case according to art. 127, 6th par., of the Criminal Procedure Code ; it is important to grant the assembly sufficient time to examine the request.

2. When the Public Prosecutor's Office demands that the MP be exempted from prosecution, one must start from the similarity to art. 103, 5th par., Const. concerning the prosecution of Ministers; as a result, it is advisable to file the request to lift the immunity at the moment mentioned in n° 1."

These decisions shall be transcribed as soon as possible into a circular letter of the Public Prosecutors General to the Courts of Appeal, in which the addendum of April 23rd 1999 to the circular letter n° COL 6/97 of the College of the Public Prosecutors General to the Courts of Appeal shall be adapted in the sense indicated above. We would be grateful if you would take the necessary steps to this end."