THE HOUSE OF REPRESENTATIVES

BRIEF PARLIAMENTARY LAW

THE PARLIAMENTARY PRIVILEGE (FREEDOM OF SPEECH)

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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.

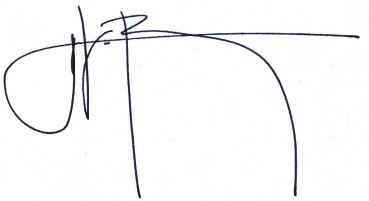
The present brochure on the parliamentary privilege was updated in January 2006, as it appeared that the absolute character of this principle was questioned more and more.

In the meantime, however, the Belgian Supreme Court («*Cour de cassation*») confirmed the absoluteness of the parliamentary privilege, so that a new update had to be published without delay.

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



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I. Parliamentary privilege in questions and answers

What is «parliamentary privilege» or «freedom of speech»?

Every citizen has a constitutional and guaranteed right to freedom of speech. This freedom is not absolute. Abuse of this freedom – e.g. slander or defamation – can lead to a sanction or to the payment of damages.

Members of Parliament have special protection. Article 58 of the Constitution stipulates: *«No member of either House can be prosecuted or be the subject of any investigation with regard to opinions expressed and votes cast by him in the exercise of his duties.»*

Courts and disciplinary institutions are not competent to institute an investigation or to judge disputes arising from an opinion expressed (or a vote cast) by a Member of Parliament in the exercise of his duties.

It is quite easy to understand why the parliamentary privilege was introduced : in the exercise of his mandate, a Member of Parliament must be able to speak freely, in complete independence and without fearing any form of prosecution or sanctioning.

Is there a difference between «parliamentary privilege» and «parliamentary immunity»?

Parliamentary privilege (art. 58 Const.) protects a Member of Parliament against all liability (civil, criminal or disciplinary) for an opinion expressed or a vote cast in the exercise of his duties. It is absolute : the assembly cannot lift this non-accountability.

Parliamentary immunity (art. 59 Const.) is only applicable in criminal proceedings, *i.e.* for criminal acts committed by a Member of Parliament. It protects Members of Parliament in criminal proceedings against arrest or referral to a court of law, yet it is relative: the assembly can lift the immunity. It is not applicable when the MP is caught in the act or outside the parliamentary session.

Hereafter, we will only deal with parliamentary privilege.

Who is protected by the parliamentary privilege or «freedom of speech»?

In first instance the Members of Parliament (members of the House, senators and members of the parliaments of communities and regions).

Since 1995, Ministers and Secretaries of State also enjoy a similar protection (art. 101, 104, 124 and 126 Const.).

As of what moment on is a Member of Parliament protected ?

Parliamentary privilege is a consequence of the function of Member of Parliament. Hence, it is applicable from the beginning of the mandate, *i.e.* when the oath is taken; but the House and the Senate assume that the verification of credentials, preceding the oath, is also part of the scope of application.

The parliamentary privilege terminates at the end of the mandate.

After the end of his mandate, a Member of Parliament continues to be protected against prosecution for opinions expressed and votes cast *during* that mandate.

Where is the protection valid?

The place where the opinion is expressed is not relevant. The protection is valid during the exercise of the function (*i.e.* the parliamentary mandate), be it inside the parliamentary building or outside.

As such, it is possible that a press conference in the parliamentary building (Palace of Nation) does not fall within the range of application of privilege whereas a visit of an investigative committee does fall under that scope.

Hence, the decisive criterion is not the place where the opinion is expressed but whether or not the opinion was expressed during the exercise of the duties of Member of Parliament.

How far does this protection go?

The parliamentary privilege is only applicable for an opinion expressed or a vote cast «in the exercise of the duties» (the parliamentary mandate).

What is «a vote»?

Every vote in a parliamentary body (plenary assembly, committees, …).

What is «an opinion»?

Oral as well as written opinions (bills, reports, amendments, …).

Obviously, acts of violence do not fall under the protection of the privilege. Gestures can be considered an opinion, unless they are accompanied by violence.

What is «the exercise of duties»?

The Constitution does not describe the exact meaning of the exercise of duties. Legal doctrine and case-law consider the «exercise of duties» equal to «the exercise of the parliamentary mandate». During the years, they have developed two important criteria to verify whether a Member of Parliament expressed his opinion or cast his vote in the exercise of his parliamentary mandate.

A first important criterion to determine the range of application lies within the Rules of Procedure of the legislative assembly.

When the opinion was voiced during a meeting of a body, founded by the Rules of Procedure or *a fortiori* by the law or the Constitution, there is no dispute. For everything a Member of Parliament says during the plenary meetings and the meetings of the «Bureau», the linguistic groups, the Conference of Presidents, the Parliamentary Consultation Committee, the standing, special and temporary committees, the committees of inquiry, the advisory committees and the College of Quæstors, he enjoys privilege.

Currently it is assumed that meetings of political groups also belong to that range of application when they deal with the parliamentary activities. When a Member of Parliament voices an opinion during the weekly groups meeting, he is protected but during a study day accessible for third parties, the protection is not valid.

A second important criterion is whether a Member of Parliament acts by order of or on behalf of the Parliament (or a committee) or as a private person.

The Rules of Procedure of the House stipulate that the President of the House *«speaks in the name of the House and in accordance with its wishes»*. In that context, the President of the assembly is protected by the freedom of speech.

Also the declarations of a President of a committee of inquiry, done on behalf of that committee, are covered by parliamentary privilege. When that President goes beyond his role of spokesperson, he can be held responsible.

Following that same line of logic, press announcements and conferences on behalf of the committee (or of another institution of the assembly) can also be protected. When a

Member of Parliament organises a press conference on his own initiative, he can never call upon the privilege.

When a Member of Parliament belongs to an official delegation of his assembly, the opinions he expresses are protected by parliamentary privilege since he acts by order of his assembly.

Is the exercise of the «parliamentary mandate» the same as the exercise of the «political mandate»?

No, a distinction must be made between the activities of a Member of Parliament within the framework of his duties (his parliamentary mandate) and his political or party-political activities. The privilege is not applicable for party-political or political activities in general, only for the exercise of the mandate.

Speeches during party meetings or other activities of a political party (colloquia, …) do not belong to the scope of the «freedom of speech», even when they are organised in the Parliament. Political debates in which party opinions are expressed are not protected either.

Nearly all difficulties up to now can be linked to the exact meaning of «the exercise of the parliamentary mandate». That is an evolving notion: what does not belong to that mandate today, might belong to it tomorrow. There is certainly a «grey area» that does not always offer the Members of Parliament complete legal certainty. Nobody can predict with absolute certainty whether the judge will claim to be competent when a claim is instituted against a Member of Parliament.

What if a Member of Parliament literally repeats what he said before in a committee or a plenary meeting?

In general, it is accepted that a Member of Parliament is not protected by parliamentary privilege when he repeats, e.g. during an interview or a press conference, what he said during a parliamentary meeting, not even when reading his declaration aloud.

When a Member of Parliament publishes a speech, given by him in the assembly, in a brochure, he is no longer protected by parliamentary privilege.

If he merely refers to a speech given in Parliament, he will be protected.

Does the privilege also apply to official documents of the legislative assemblies?

Absolutely, it applies to all opinions and votes included in the *Verbatim Report*, the *Summary Report,* the *Bulletin of questions and answers* and the parliamentary documents. A Member of Parliament is also protected e.g. when he submits a bill, resolution or motion or when he asks a written question.

A person, quoting from the official publications of the House in good faith is also protected if it is a literal reproduction : a journalist who brings his own report about the parliamentary activities can be held responsible.

What about the Internet sites of the assembly and its individual members?

The official documents on the Internet site of the assembly, just like the paper versions, are protected by parliamentary privilege.

A personal site of a Member of Parliament is different. The reproduction of speeches on a personal site is not covered. A mere reference to the *Verbatim Report* on the official site of the House by means of a hyperlink could be considered protected.

Is the parliamentary privilege absolute?

If a Member of Parliament has expressed his opinion or cast a vote in the exercise of his duties, all criminal prosecution is excluded (e.g. because of slander or defamation) as well as civil claims and disciplinary claims (e.g. by the association of medical doctors for Members of Parliament who are also doctors).

That is logical because the Members of Parliament must at all times be able to speak freely, without self-censorship. The threat of a civil claim for damages can be as terrifying as a criminal claim.

A Member of Parliament can also refuse to testify about an opinion expressed in the exercise of his parliamentary mandate, and he is not obliged to reveal his sources.

Can a Member of Parliament voluntarily renounce parliamentary privilege ?

No. The protection of art. 58 of the Constitution is «of public order». That means that the judge must bring it up and that the Member of Parliament cannot renounce it. Contrary to what is true for parliamentary immunity (art. 59 of the Constitution), the assembly cannot lift the privilege in order to allow prosecution.

II. Brief legal analysis of parliamentary privilege

1. General

1.1 Every citizen has a constitutional and guaranteed right to freedom of speech (art. 19 of the Constitution and art. 10 E.C.H.R.). This freedom is not absolute. Abuse (such as slander, defamation, …) can be sanctioned criminally, civilly (quasi-delictual liability – art. 1382 Civil Code) or disciplinary by courts of law *cq* disciplinary institutions.

1.2 For Members of Parliament in the exercise of their duties, art. 58 of the Constitution includes special protection: *«No member of either House can be prosecuted or be the subject of any investigation with regard to opinions expressed and votes cast by him in the exercise of his duties.».* Courts and disciplinary institutions are not competent to institute an investigation or to judge disputes arising from an opinion[1] expressed by a Member of Parliament in the exercise of his duties, neither are disciplinary institutions (e.g. the Association of Medical Doctors in relation to a Member of Parliament who is also a doctor). The difference with common law is not the «freedom of speech» as such, because that is a common right. The distinction lies in the incompetence of courts of law (*cq* disciplinary institutions) to judge the use Members of Parliaments make of their freedom of speech.

[1] This entails an "exception of non-admissibility".

1.3 We must indicate here that Members of Parliament remain subject to internal disciplinary sanctions in accordance with the Rules of Procedure imposed by the competent bodies of their assembly.[2]

1.4 The *ratio legis* of the parliamentary privilege is evident: in the exercise of his mandate, a Member of Parliament must be able to speak freely in all independence and without fearing any form of prosecution or sanction (unless of course from the House itself, in accordance with the Rules of Procedure) [3, 4].

This principle was confirmed by the judgment that the Supreme Court *(«Cour de cassation») rendered on June 1st 2006 : «The parliamentary privilege serves a rightful purpose which consists in protecting the freedom of expression in Parliament and maintaining the separation of the legislative and judiciary powers. Deciding that a judge is not entitled to determine whether the opinion expressed by a Member of Parliament or a parliamentary committee was false and whether the liability of the federal State could consequently be involved, does not injure the right of access to justice in a disproportionate way.»* [5]

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2 See especially articles 62 to 67 of the Rules of Procedure. See also Vuye, H., «*Les irresponsabilités parlementaire et ministérielle: les articles 58, 101, alinéa 2, 120 et 124 de la Constitution*», *C.D.P.K.*, 1997, 9 and 20.

3 The origin of the parliamentary freedom of speech can be found in the English Bill of Rights. The constitutions of nearly all democracies provide such an immunity.

4 Apart from the fact that it was confirmed by the «*Cour de cassation*» on June 1st 2006 (see footnote n° 5), the parliamentary privilege was explicitly and officially endorsed by the European Court of Human Rights in its judgment of December 17th 2002 (A.c. United Kingdom). In this judgement, the Court observes that the parliamentary privilege of the Members of Parliament is aimed at legitimate objectives, such as the protection of the freedom of expression in public matters and the separation between the legislative and the judicial branch. For more details on this judgement (as well as the other relevant judgements of the ECHR), see F. Krenc, «*La règle de l'immunité parlementaire à l'épreuve de la Convention européenne des droits de l'homme*», *Rev. Trim. D.H.,* 2003, pp. 813 to 821; H. Vandenberghe, «Parlementaire onverantwoordelijkheid voor de «freedom of speech» en het E.V.R.M.», in *Liber Amicorum Jean-Pierre De Bandt,* Brussel, Bruylant, 2004, pp. 907 tot 922; S. Van Drooghenbroeck, «L'irresponsabilité parlementaire en question», *Journal du Juriste,* nr. 18, 28 januari 2003, pp. 5 and 6; D. Voorhoof, *«Europees Hof erkent absolute vrijheid parlementair debat», Juristenkrant, nr. 61, 4 februari 2003, p. 6; D. Voorhoof, «Europees Hof bakent vrijheid parlementair debat af*», *Juristenkrant,* nr. 64, 26 februari 2003, p. 9.

5 *Cass.* June 1st 2006, *R.W.* 2006-2007, 213, concl. M. De Swaef, note A. Van Oevelen, *J.T.* 2006, 461, note S. Van Drooghenbroeck, NjW 2006, 559, note I. Boone, *T.B.P.* 2006, note K. Muylle.

2. Scope of application

2.1 *Ratione temporis*

2.1.1 The immunity comes forth from the function of Member of Parliament. Hence, it is applicable from the beginning of the mandate, *i.e*. when the oath is taken.

Still, the House and the Senate assume that, prior to the oath, also the verification of the credentials and the related votes fall within the scope of application.[6]

2.1.2 Contrary to parliamentary immunity (art. 59 of the Constitution), the freedom of speech is not limited to the parliamentary session. Hence, as the Committee for the review of the Constitution may hold a meeting ouside the session,[7] any member of that Committee would be protected by art. 58 of the Constitution during that meeting.

2.1.3 The parliamentary privilege terminates when the mandate is over. Also after the end of the mandate, a Member of Parliament remains protected against prosecution for opinions expressed or votes cast *during* the mandate.[8]

2.2 *Ratione personae*

2.2.1 The beneficiaries of the protection are of course the Members of Parliament.[9]

2.2.2 The Ministers and the Secretaries of State are also protected. Art. 101 of the Constitution, second paragraph, determines by analogy with the privilege of the Members of Parliament:

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6 For the Senate, the parliamentary privilege begins with the election of the Member of Parliament, on the resolutive condition of the non-validity of his credentials.

7 Rules of Procedure of the House of Representatives, Rule 120, n° 4.

8 Hayoit de Termicourt, *Mercuriale du 15 septembre 1955*, *J.T.,* November 6th 1966.

9 Members of the House, Senators as well as the members of the Community and Regional Parliaments (art. 120 Const.; see also art. 42 of the special law of August 8th 1980 on institutional reforms, art. 28, first par., of the special law of January 12th 1989 on the Brussels institutions and art. 44, first par., of the law of December 31st 1983 on institutional reforms for the German-speaking Community.

«No minister can be prosecuted or be the subject of any investigation with regard to opinions expressed by him in the exercise of his duties.». Art. 104 of the Constitution, final paragraph, makes this rule applicable to federal Secretaries of State. Art. 124 and 126 of the Constitution contain similar provisions with respect to the members of the Community and Regional Parliaments and with respect to the regional Secretaries of State. The separate immunity for Ministers and Secretaries of State was found necessary after the introduction of the incompatibility of the functions of Member of the Government and Member of Parliament during the 1993 review of the Constitution (art. 50 of the Constitution).

Note : the protection is only valid for Ministers and Secretaries of State. Commissioners of the government or Royal Commissioners cannot enjoy the freedom of speech.[10]

[10] The parliamentary privilege is a result of the quality of Minister or Secretary of State. It is applicable from the beginning of the mandate, *i.e.* when the Minister takes his oath. The ministerial irresponsibility does end at the termination of the function, but remains valid for opinions expressed during the mandate.
The protection is valid during the exercise of the duties. In analogy with parliamentary irresponsibility, not the place where the opinion is expressed matters, but the fact whether or not it is expressed in the exercise of the duties.
The *ratione materiae* range of application of the irresponsibility of Ministers and Secretaries of State must, in our opinion, be regarded as parallel with that of parliamentary privilege, since it was the will of the constitutional legislator to give Ministers and Secretaries of State addressing the Parliament the same «freedom of speech» as the Members of Parliament. Opinions expressed by a Minister during parliamentary meetings, such as plenary meetings, the «Bureau», standing, special and temporary committees, inquiry committees, advisory committees but also a Conference of Presidents, … belong to the area of application. Also all (written) answers to parliamentary questions are protected.
In addition, other (oral or written) opinions, specific for the function of Minister, are protected (e.g. during a Minister Council, Government Council, Crown council, interministerial conference, …). Following the same logic, we might assume that a Minister is protected by art. 101 of the Constitution when he acts by order of or on behalf of the government.
Jurisprudence is divided over press conferences. A member of the government giving a press conference about his policies is probably not protected. An announcement of general interest on radio or television or a general information campaign will probably belong to the range of application. Hence there is a grey zone, as is the case of parliamentary privilege. Not protected are: the declarations of a member of the government as a private person or politician, e.g. during a party-political meeting. As far as we know, there are no cases known of the application of the constitutional stipulations on ministerial irresponsibility.

2.2.3 Also those who quote in good faith from the official publications of the parliamentary activities *(Verbatim Report, Summary Report, Hansard,* parliamentary documents, …) are protected.[11] It must be a literal reproduction: when a journalist gives his own account of the parliamentary activities, the common law remains applicable and he can be held responsible.[12] [13]

2.3 *Ratione loci*

The place where the opinion is voiced, is irrelevant. The protection is valid in the exercise of the parliamentary mandate, regardless of whether this takes place inside or outside the Parliamentary building. It is possible for a press conference, held inside the parliamentary building (Palace of the Nation), not to be protected by the freedom of speech,[14] whereas on the other hand a visit by a committee of inquiry is protected. The senators who were elected directly by the French-speaking or the Dutch-speaking electoral body, when involved (without voting rights) in the work of the Flemish Parliament, the Parliament of the French Community or the Parliament of the Walloon Region (art. 37*bis* of the special law of August 8th 1980 on institutional reforms), also benefit from the protection of article 58 of the Constitution.

The decisive criterion for the applicability is not the place where the opinion is voiced, but whether or not this opinion was expressed in the exercise of the duties of Member of Parliament.

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11 «f*idèlement, de bonne foi et en dehors de toute intention méchante»* (Conclusions First Attorney-General Terlinden at Cass., April 11th 1904, *Pas.,* 1904, I, 200).

12 H. Vuye, *l.c.,* 14. When a journalist publishes a literal reproduction within the framework of a polemical situation, the common law is applicable. (*Id.).*

13 One could rightly ask oneself whether the publications of the House itself, such as the *Informations parlementaires*, are not excluded from the range of application of art. 58 of the Constitution …

14 See e.g. Ghent, September 30th 1994, *A.J.T.*, 1994-95, 220; Rb. Bruges, June 1st 1992 (not published): «*the circumstance that the press conference was held in the buildings of the European Parliament does not change the nature of the announcement. That press conference was hence not an act in his parliamentary function*». In relation to a press conference held by an EP Member about «hormone mobsters».

2.4 *Ratione materiae*

2.4.1 The freedom of speech is only valid for an opinion or a vote.

2.4.1.1 This includes oral opinions as well as written announcements (Private Members' bills, proposals for resolution, amendments, interpellations, questions, motions …). [15]

2.4.1.2 Acts of violence are of course excluded from the protection of the privilege.[16] Gestures could be considered an opinion unless they are accompanied by violence.[17]

2.4.2 The privilege is only valid in the exercise of the parliamentary mandate. A number of criteria can be derived from Court decisions and legal doctrine to determine the *ratione materiae* area of application.

2.4.2.1 A first important criterion to determine the area of application appears to be the ***Rules of Procedure*** of the legislative assembly.

In its arrest of 1938, the Brussels Court of Appeal puts it as follows: *«According to the Rules of Procedure of the House, […] committees are bodies through which the legislative function is exercised. Therefore, there is no doubt that the Members of the House who attend […] committee meetings accomplish acts pertaining to the exercise of their mandate and are consequently protected.»*

In 1994, the Ghent Court of Appeal determined in a similar way, in relation to the declarations that a Member of the European Parliament who was protected by an identical privilege[18] had made during a press conference: *«It is not an*

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15 *Cass.* June 1st 2006 (see footnote n° 5); H. Vuye, *l.c.*, 10; R. Hayoit De Termicourt; *l.c.*, 613.

16 J. Velu, J. *Droit Public, T.I., Le statut des gouvernants,* Brussel, Bruylant, 1986, 498, *Annales,* Senate, 1899-1900, 334, 346 and 347.

17 H. Vuye, *l.c.,* 18.

18 In accordance with art. 9 of the «Protocol concerning the privileges and immunities», for the European MPs, the same protection applies as provided by art. 58 of the Constitution.

announcement imposed by the Rules of Procedure of the European Parliament».[19]

For opinions expressed during meetings of bodies, founded by the Rules of Procedure or *a fortiori* by the law or the Constitution, there seems to be no dispute at all: plenary assembly, «Bureau», linguistic groups, Conference of Presidents, Consultation Committee, standing, special and temporary committees, committees of inquiry, advisory committees, the College of Quaestors.[20]

Also meetings of political groups, as far as these concern parliamentary activities,[21] are in our opinion included in the area of application. In 1938, the Brussels Court of Appeal thought differently, but the main argument was that the (then) Rules of Procedure did not mention anything about the existence of the groups. The current article 11 of the Rules of Procedure provides the possibility to organise groups and preserves e.g. Thursday mornings for meetings of political groups. So we can assume that group meetings are a part of the parliamentary activities. This position was also confirmed by the Prosecutions Committee of the House and by different authors.[22]

According to case-law and legal doctrine though, the debates that take place within the Intergovernmental and Interparliamentary Conference on Institutional Renewal and within the «Institutional Forum» might not be covered by the freedom of speech.

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19 Ghent, September 30th 1994, *A.J.T.* 1994-95, 220.

20 See *Doc. parl.,* House, 92/93, 781/1, 5. See in the same way, Hayoit de Termicourt, *l.c.,* 613; J. Velu, *o.c.* 498, H. Vuye, *l.c.,* 16.

21 In our opinion, this must be interpreted restrictively. In our opinion, the following does not fall under the area of application of art. 58 of the Constitution: a study day organised by a fraction but accessible by third parties, a delegation of a fraction to an activity that does not belong to parliamentary activities, etc.

22 *Doc. parl.*, House, 92/93, 781/1, 5 in relation to a request to lift the immunity of Mr. Van Rossem in order to allow criminal prosecution for slander and defamation in his declarations during a press conference. See, in the same way, Hayoit de Termicourt, *l.c.,* 613; J. Velu, *o.c.,* 498, H. Vuye, *l.c.,* 16.

2.4.2.2 In doctrine and case-law, an important distinction is made between the activities of a Member of Parliament in accordance with his mandate on the one hand and the ***political or party-political activities*** on the other hand: the freedom of speech is applicable in the exercise of the mandate and not for political or party-political activities in general.[23] In the same way, the Ghent Court of Appeal used the fact that during a press conference, a European Member of Parliament[24] referred to the initiatives of his party as an argument to show that he was not protected by the freedom of speech.[25] As for the Brussels Court of Appeal, it ruled out the application of the parliamentary privilege for racist and xenophobe acts committed on prints or a webpage originated with a political party.[26]

Speeches during party gatherings or other activities of a political party (colloquia, …), even when they are organised inside the Parliament, are not included in the area of application of the freedom of speech. Also political debates in which party opinions are defended are not covered.

2.4.2.3 Another important criterion is whether or not a Member of Parliament acts ***by order of or on behalf of*** his parliamentary assembly (or a committee) or as a private person.[27]

Here, we must indicate art. 10.2 of the Rules of Procedure for the parliamentary committees of inquiry of the House, which stipulates the following: *«Except for all different decisions by the committee, only the President can speak in its name».*

Declarations made by the President on behalf of the committee of inquiry are in our opinion protected by the parliamentary

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23 *«L'immunité protège le député dans l'exercice de son mandat parlementaire, mais ne le protège pas dans l'exercice de son activité politique ou partisane»* (Brussels, February 2nd 1938, *Pas.,* 1938,7).

24 EP Members enjoy the same protection (see footnote n° 18).

25 Ghent, September 30th 1994, *A.J.T.* 1994-95, 220.

26 Brussels April 18th 2006, *unpublished.*

27 The Ghent Court of Appeal ruled that since an EP Member organised a press conference as a private person, and not by order of the European Parliament, he was not protected by the privilege (see footnote n° 25*).*

freedom of speech. Once he leaves his role of spokesperson, he would be held responsible. In this last hypothesis, it is a question of who is competent to judge the area of application and whether or not the MP acted in the exercise of his mandate.

Also protected are in our opinion: press announcements and conferences, on behalf of the committee (or another body of the assembly). When participating in a delegation of the assembly, the Member of Parliament is also protected.

Art. 5, first paragraph *in fine,* of the Rules of Procedure of the House also stipulates that the President of the House ***«****speaks in the name of the House and in accordance with its wishes»****.*** In that context, the President of the assembly is protected by the freedom of speech.

2.4.2.4 Special case: a Member of Parliament ***literally repeats*** what he said before in a committee or the plenary assembly outside the meeting.

In general, it is accepted that a Member of Parliament is not protected by the freedom of speech when he repeats e.g. during an interview or a press conference what he said earlier in a parliamentary meeting, not even when he reads his declaration out loud.[28] In relation hereto, we can refer to a case dating from 1986: a Member of the House was summoned to appear before the civil court of Brussels because he accused a third person of financial malversation. He made his statements during an interpellation debate in the House and repeated them later on during a televised debate.[29]

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[28] J. Velu says: «*L'immunité ne couvre toutefois pas la reproduction ou la diffusion, par un parlementaire, d'un discours prononcé par lui dans l'exercice de ses fonctions, si cette reproduction ou cette diffusion se fait en dehors de celles-ci et de la publicité légale des débats des Chambres*».
See also «*Cour de cassation*». *«L'immunité parlementaire ne couvre pas le représentant qui reproduit, en dehors de l'enceinte parlementaire, ou publie son discours»*. (*Cass.*, April 11th 1904, *Pas.* 1904, 199); in the same sense: *Parl. Doc.*, The House, 92/93, 781/1, 5.

[29] As far as we know, this case was never adjudicated.

The publication by a Member of Parliament of a speech, held in the parliamentary assembly, in the form of a brochure is not protected either.[30]

A mere reference to a speech held in the Parliament is protected.[31]

2.4.3 We must point out that the official documents of the legislative assemblies are also protected by the freedom of speech.[32] These are: the *Verbatim Report,* the *Summary Report,* the parliamentary documents and the *Bulletin of Questions and Answers*.
According to the Belgian Supreme Court («*Cour de cassation*»), the parliamentary privilege covers not only oral declarations made by Members of Parliament individually, but also their writings and, by extension, all the parliamentary activities.[33] On this ground, the Court quashed a judgment of the Brussels Court of Appeal in which the latter had determined that the text of the report drawn up by a parliamentary committee of inquiry had been written without due consideration and that this had to be considered a fault.[34] One year earlier, in another case, the Court of First Instance of Brussels already ruled in the same way as the «*Court of cassation*» did in its later judgment.[35]

We think the official documents on the Internet site of the assembly are also protected. An interesting question in relation

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30 H. Vuye, *l.c.,* 19 – decision of the court of Tournai, confirmed by the Brussels Court of Appeal in 1906. The Prosecutions Committee of the House shared this point of view (*Doc. parl*., House, 1992/93, n° 781/1, 5).

31 H. Vuye, *l.c.,* 19.

32 H. Vuye, *l.c.,* 10; Hayoit de Termicourt, *l.c.* 613.

33 *Cass*. June 1st 2006, *R.W.* 2006-2007, 213, concl. M. De Swaef, note A. Van Oevelen, *J.T.* 2006, 461, note S. Van Drooghenbroeck, *NjW* 2006, 559, note I. Boone, *T.B.P.* 2006, 435, note K. Muylle.

34 Brussels June 28th 2005, *C.D.P.K.* 2005, 655, note K. Muylle, *J.L.M.B.* 2005, 1576, note M. Uyttendaele and note J. Wildemeersch, *J.T.* 2005, 594, note M.-F. Rigaux, *T.B.B.R.* 2005, 556, note H. Vuye.

35 Brussels Court of First Instance, January 21st 2005, *unpublished*. The Court admits that there is a conflict between two principles: «*that according to which a person harmed by the words of a Member of Parliament acting in the exercise of his duties should have jurisdictional recourse*» and «*that according to which it is necessary to guarantee the independence of the parliamentary mandate*». The conclusion of the Court was that the second principle prevails.

thereto relates to the personal site of a Member of Parliament. The reproduction of speeches on a personal site is in our opinion not protected (see 2.4.2.4.). However, a mere reference, by means of a link to the *Verbatim Report* published on the official site of the House, should be protected in the same way as the «paper» document.

3. The absolute character of the freedom of speech

3.1 The «*Court de cassation*» confirmed in its judgment of June 1st 2006 that the parliamentary privilege is absolute. [36]

3.2 The principle of parliamentary privilege does not only exclude criminal prosecution (e.g. for slander and defamation) but also civil claims and (external) disciplinary claims (e.g. by the Association of Medical Doctors for MPs who are also doctors).[37] Members of Parliament remain subject to internal disciplinary sanctions as provided for by the Rules of Procedure of their assembly.

3.3 The *ratio legis* of parliamentary privilege, and more specifically guaranteeing the independence of the Members of Parliament, indeed resists civil or (external) disciplinary claims. These can have a frightening effect and lead to a kind of self-censorship. *« If citizens had the right to file a claim for damages against the State on account of an allegedly ill-considered opinion voiced during parliamentary proceedings, this privilege would be limited, which would trespass against the Constitution.*» [38]

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[36] *Cass.*, June 1st 2006, *R.W.* 2006-2007, 213, concl. M. De Swaef, note A. Van Oevelen, *J.T.* 2006, 461, note S. Van Drooghenbroeck, *NjW* 2006, 559, note I. Boone, *T.B.P.* 2006, 435, note K. Muylle.

[37] *Cass.*, October 12th 1911, *Jurisprudence de la Belgique,* 1911, 308.

[38] *Cass.*, June 1st 2006, *R.W.* 2006-2007, 213, concl. M. De Swaef, note A. Van Oevelen, *J.T.* 2006, 461, note S. Van Drooghenbroeck, *NjW* 2006, 559, note I. Boone, *T.B.P.* 2006, 435, note K. Muylle.

3.4 A Member of Parliament can refuse to testify in cases related to his freedom of speech, and he cannot be forced to reveal his sources.[39]

3.5 We must point out that for criminal claims, the Member of Parliament is protected by the immunity (art. 59 of the Constitution). For civil claims (based on the quasi-delictual liability of art. 1382 Civil Code), the judge determines the admissibility of the claim and the applicability of the freedom of speech.

3.6 The opinions expressed and votes cast by the Members of Parliament during the exercise of their duties or the reproduction thereof in the documents that are published by Parliament cannot be used to prove that these Members of Parliament are member of a racist party[40] nor lead to the application of article 15*ter* of the law of July 4th 1989 concerning the limitation and control of electoral spending (withdrawal of the endowment of political parties).[41]

3.7 The protection of art. 58 of the Constitution is of public order: the judge must put it forward and the Parliament cannot forsake it.[42] Contrary to the rules of parliamentary immunity (art. 59 of the Constitution), the assembly cannot lift the freedom of speech to allow prosecution.[43]

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39 H. Vuye, *l.c.*, 10: In 1884 Mr. Ch. Woeste refused to testify before the criminal court of Ghent in relation to a document he had read out in the House. He was condemned to the payment of a fine. Doctrine considers though that this judgement is not constitutional *(id).*

40 Ghent, April 21st 2004, *A.M.* 2004, 170, *J.T.* 2004, 590, note E. Brems and S. Van Drooghenbroeck, *Rev. b. dr. const.* 2005, 553, *T. Vreemd.* 2004, 120, note S. Sottiaux, D. De Prins and J. Vrielink.

41 Court of Arbitration, n° 10/2001, B.4.7.4.

42 Not in theory anyway. A Member of Parliament can *de facto* forsake the freedom of speech by repeating a litigious opinion in a situation in which he is not protected.

43 H. Vuye, *l.c.*, 3.

4. Conclusion

Parliamentary privilege hardly ever causes problems in relation to the *ratione temporis, ratione personae and ratione loci* area of application.

All difficulties until now were related to the material area of application, and more specifically to the interpretation of «the exercise of the parliamentary mandate». The exercise of the parliamentary mandate is an evolving notion: things that do not belong to the exercise of a mandate today, might do so tomorrow (see the example of the meetings of political groups). For a Member of Parliament, an evolving interpretation offers little legal certainty. Hence, it is logical that from time to time pleas are heard to demand more guarantees against prosecution because of opinions expressed in the «grey area» of the exercise of the parliamentary mandate.

Nevertheless, it is our opinion that the House has a means to offer its members more legal certainty. Court decisions and legal doctrine clearly show that the courts, in their judgement of the existence of an exception of non-admissibility *(i.e.* that the opinion was expressed during the exercise of the parliamentary mandate), nearly always refer to the Standing orders of the assembly in question. As soon as it is demonstrated that the opinion was expressed during a meeting of an institution of which the existence is being regulated by the Standing orders (or *a fortiori* by the law or the Constitution), the courts tend to consider it an opinion expressed «during the exercise of the parliamentary mandate».

Hence, many problems could be avoided by making sure that all organs which should be subject to parliamentary privilege are mentioned in one way or another in the Standing orders of the House. The same goes for all cases in which a Member of Parliament must act by order of or on behalf of the Parliament. If this is considered not to be sufficient, a stipulation could be added to the Standing orders that enables the House to qualify the participation in organs and forums in the grey area as the exercise of the parliamentary mandate. It would hence even

be possible, if necessary, to engage the privilege for opinions expressed in institutions such as the Intergovernmental and Interparliamentary Conference on Institutional Renewal. Based on case-law, we could state that there is a good chance that the courts would follow the House in this matter, as long as it does not exaggerate. Based on article 60 of the Constitution, it is perfectly defendable that the House has the right to define in its Standing orders the content of the exercise of the parliamentary mandate, as far as this does not cause a conflict with a higher legal standard.

Even more important than these considerations on the scope of the *ratione materiae* protection is the fact that the absolute character of the parliamentary privilege seems to be questioned more and more during the last few years. Above all, the fact that the damage resulting from inconsiderate or insulting statements made by Members of Parliament cannot be repaired in view of article 58 of the Constitution seems to be less and less accepted by the public opinion and certain judges.

The case A. v. United Kingdom illustrates the fact that the Members of Parliament can get carried away during their speech and hence cause damage. To claim the repair of that damage is part of the general social evolution and is very understandable. But in its judgement, the ECHR seems to accept in the case A the thesis according to which the parliamentary privilege is aimed at a legitimate objective that is of a higher order than the individual right of repair of damage suffered when it emphasizes that "the creation of exceptions to this immunity, the application of which would depend on the specific facts of each case, would seriously undermine the legitimate objectives pursued" [44]. The Belgian Supreme Court («*Cour de cassation*») followed this view in its judgment of June 1st 2006, which confirms that the parliamentary privilege is absolute. [45]

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[44] ECHR, A. v. United Kingdom, December 17th 2002, par. 88.

[45] *Cass.* June 1st 2006, *R.W.* 2006-2007, 213, concl. M. De Swaef, note A. Van Oevelen, *J.T.* 2006, 461, note S. Van Drooghenbroeck, *NjW* 2006, 559, note I. Boone, *T.B.P.* 2006, 435, note K. Muylle.