PARLIAMENTARY IMMUNITY

by Derik Latorre Boza[1]

I. History, concept and legal nature

Parliamentary immunity is one of the prerogatives peculiar to the parliamentary function. It is part of what is called the **Status of Members of Congress**: that collection of rights, prerogatives, obligations, prohibitions and incompatibilities that are legally inherent in that function.

As for the history of this institution, there are basically two theories that have been circulated. One of these is the theory, supported by May and Ason, that traced the history of this institution back to the medieval institutions of English law called “freedom of speech” and “freedom from arrest”. This view is said to be untenable “basically for one simple reason: the absence of any break in temporal continuity between the parliaments that existed when there were two estates (king and kingdom) and liberal parliamentarianism”[2]. What distinguishes the privilege called “freedom from arrest and molestation” is that, unlike parliamentary immunity in the liberal sense, “it protected personal freedom from legal actions of a civil nature, not from actions under criminal law. The protection therefore lost its reason for being when debtors’ prisons were abolished in England more than a century ago. Since then, the British MP has had the same legal treatment as another other citizen. Consequently, there is no modern-day parliamentary guarantee of immunity in England today. The Houses must simply be informed of cases and judgments involving members of Parliament, and the same holds for the United States and other well-established democracies, such as Australia, Canada and the Netherlands”[3].

The other view is that parliamentary prerogatives have their clearest precedent in 18th-century French parliamentarianism. Thus was born the model of parliamentary immunity, inspired by the dogma of parliamentary sovereignty, since Parliament was seen as the sole body capable of representing and implementing the will of the new sovereign: the nation. This theory is more convincing, although it was during the period of 19th-century European constitutionalism[4] that these prerogatives were given the shape that is familiar to us. It was a time when the principle of parliamentary sovereignty was questioned and the theory of the division of powers asserted itself.

Parliamentary immunity can be understood in two senses: one broad and the other much more restricted. In the broad sense, we can say that parliamentary immunity “means a right inherent in the status of MP, by virtue of which representatives are afforded a certain degree of indemnity with regard to legal actions that might be brought against them by the government or individuals. A right to indemnity, in short, that assumes various forms, depending on whether it is a question of inviolability or immunity in the narrow sense”[5].

In its narrow sense—the sense in which we will use it from this point on—parliamentary immunity means that members of parliament cannot be detained or prosecuted without the authorization of parliament—of which they are members—unless they are caught committing a crime (caught in the act). There has been talk among the experts of how ambiguous the term is in Spanish, since it suggests a situation of total **impunity** and total protection from criminal prosecution. This is not the case, because the only thing that immunity implies is an additional requirement: prior authorization and the consequent lifting of this immunity, so that a member of parliament can be prosecuted in a ordinary court of law.

It is important to state that immunity involves “an authorization that, except when members are caught in the act, parliament must give before any arrest, detention or legal proceeding that might result in members being deprived of their freedom. According to the predominant view

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2 GARCÍA, Eloy, *Inmunidad Parlamentaria y Constitución Democrática* [Parliamentary immunity and democratic constitutions], in the *Revista de Derecho* [Law review] of Complutense University. No. 15, Madrid, 1989, pages 441-442.

3 ABELLÁN, Ángel, *El Estatuto de los Parlamentarios y los Derechos Fundamentales* [The status of members of parliament and basic rights], Tecnos, Spain, 1992, pages 15-16.

4 GARCÍA, Eloy, *Inmunidad Parlamentaria y Constitución Democrática* [Parliamentary immunity and democratic constitutions], pages 443, 444, 445 and 446.

5 GARCÍA, Eloy, *La Inmunidad Parlamentaria y Estado de Partidos* [Parliamentary immunity and the party state], Tecnos, Madrid, 1989, page 64.

among the experts, this authorization does not touch on the merits of the case: that is, it does not entail a verdict of guilt or innocence concerning a member's conduct"[6]. It is crucial to understand that parliamentary immunity protects the function of MP. It does not imply a judgment of guilt or innocence, since it does not delve into the merits of the legal case against the member of parliament. It is simply a formal guarantee of a procedural type.

As regards its legal nature, parliamentary immunity is "an admissibility requirement in cases where criminal proceedings have been initiated against a member of parliament. The requirement is that authorization must be obtained from the legislative body to continue with the criminal proceedings"[7]. It gives the member of parliament formal protection, but has no material effects, since parliament has no jurisdiction. "Once one rules out the legal nature of the authorization to prosecute issued by the Houses, immunity is seen for what it truly is: a procedural requirement"[8].

We might discuss whether parliament's decision can be considered a preliminary question or a prejudicial question. Section 4 of the Code of Criminal Procedure defines two concepts. Preliminary questions are those that arise when there is no **admissibility requirement**. They can be raised at any stage of the case or be resolved officially. Prejudicial questions arise when the **criminal nature** of the act of which someone is accused **must be established in some other (extra-penal) way**. Remember that the procedure for lifting parliamentary immunity does not delve into the merits of the case, and consequently the criminal nature of the act cannot be established in that way. Only the Judiciary can do that. It appears to be a procedure involving a preliminary question. However, the need for parliament's authorization cannot be established at just any stage in the proceedings. A judge cannot even begin investigating, to say nothing of a member of parliament being prosecuted or detained, without the corresponding permission first being obtained. In addition, both questions are handled by the Judiciary. Not so the authorization lifting parliamentary immunity. We are therefore dealing with an admissibility requirement of a unique legal nature.

As for the reach of this prerogative, unlike parliamentary inviolability, which refers to crimes committed in the performance of the duties of an office, parliamentary immunity seeks to prevent detention or even legal proceedings that members of parliament might arbitrarily undergo for crimes not related to their duties. Properly speaking, immunity means that members of parliament cannot be subjected to repressive measures limiting their personal freedom for alleged behaviour not connected with the performance of their public duties[9]. It protects members of parliament in relation to acts that are alien to their strictly parliamentary function. There is discussion among the experts about whether the crimes of which a member of parliament is accused must be committed during that member's term of office, or whether this protection also covers crimes committed earlier. The latter opinion appears the most logical one, otherwise political persecution could exploit complaints about acts committed before the member took office.

It is an admissibility guarantee that shelters members of parliament from any criminal charge that might deprive them of their freedom. The point must be to **unjustifiably deprive** parliament of one of its members. This guarantee translates into a requirement that the parliament to which the member belongs must give its authorization before the member can be detained or criminally prosecuted. The exceptions to this principle are cases where an individual is caught in the act. Without this authorization, any detention, indictment or prosecution of a member of parliament would be null and void.

II. Characteristics

1. Applied exceptionally

The effect of an application of parliamentary immunity is to discontinue or suspend legal action in a specific situation. It is a legal concept that temporarily removes a certain matter from the jurisdiction of the courts. It is therefore "advisable that immunity be used sparingly. It should be

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6 *Ibidem*, page 75.

7 TIRADO, José Antonio, "*Inmunidad parlamentaria y derechos fundamentales: apuntes en torno al caso del congresista Javier Noriega* [Parliamentary immunity and basic rights: issues concerning the case of member of congress Javier Noriega]" in *Lus et Veritas*, No. 11, Pontifical Catholic University (PUC), Lima, pages 89-90.

8 GARCÍA, Eloy, *Inmunidad Parlamentaria y Estado de Partidos* [Parliamentary immunity and the party state], page 76.

9 VERGOTTINI, Giuseppe de. *Derecho Constitucional Comparado* [Constitutional law compared], ESPASA-CALPE, Madrid, 1983, page 337.

limited to legal proceedings that could deprive members of parliament of their freedom, and it should therefore be applied only to criminal cases"[10]. Logically, by this line of reasoning, only the political nature of a persecution would justify an application of immunity, regardless of the acts of which the member is accused. That is, only if the judicial investigation were a cover for a veiled political motive of some sort would it be proper to apply the prerogative in question.

The basic issue here is that, in deciding whether to agree to lift immunity and thus authorize the criminal prosecution of a member of parliament, the house must determine only whether some hidden political or partisan motive directed against the member of parliament lies behind the charge. If the charge is not political in nature, the house should agree to the judicial body's request. "One can therefore put forward a restrictive interpretation of this privilege, whose function should be to prevent members of the houses from being arbitrarily deprived of their freedom, since this would diminish their independence. Consequently, the scope of the examination of the request for authorization to prosecute or detain must be limited to determining whether there is any partisan or irregular motive hidden behind the request."[11] What constitutes a political reason underlying a judicial persecution is itself a controversial question. The factors that would make it necessary to lift immunity have been expanded as well: Member of Congress Lourdes Flores Nano, in a brilliant speech during a congressional debate in a plenary session on 30 November 1995, said that parliament's decision is definitely not a verdict of innocence or guilt. "The decision that Parliament makes solely involves 'examining […] whether the charges constitute—I am quoting Professor Hariou—serious acts or motives.' That is what the prevailing view requires: that, when making its decision, parliament must evaluate whether the alleged acts are serious or not. Nor can conclusive evidence be demanded. Only at the end of a trial can one determine that the evidence is conclusive, not at the beginning." In this light, the view that this prerogative must be applied exceptionally may appear much more convincing. However, this position is actually rather questionable, because it perverts to a certain extent the very sense of the protection sought through parliamentary immunity. This is because the case is being analysed on its merits, whereas the analysis should be a purely formal or political one.

The reason its application is so restrictive is that "the problems raised by parliamentary immunity affect the very heart of relations between the State's senior powers, which must show maximum respect for constitutional principles and fundamental rights. In practice, this would translate into parliament granting almost all such requests, except when it is obvious that criminal proceedings are being used in an attempt to disturb the functioning of the houses or alter the make-up that the popular will gave to them."[12] One can therefore conclude that Congress should generally authorize the prosecution—and the possible detention or arrest—of any of its members, because, as citizens, they must be subject to the Judiciary in the same conditions, when legal disputes involving them are to be resolved. The exception to the rule is the application of parliamentary immunity.

The view that parliamentary immunity should be exceptional has spread the farthest, given that the internationalization of democratic institutions and the rule of law have made great strides around the world, and in our societies as well. The circumstances that justify immunity have thus become more flexible. Spain's Constitutional Court has used various criteria for controlling immunity, but the following stand out:

a) The reach of the prerogatives must be interpreted restrictively.
b) Parliamentary immunity protects only against the political use of criminal proceedings against a member of parliament.[13]

2. Corporate nature of the prerogative

The purpose of the parliamentary immunity prerogative is to protect the integrity of the legislative body, as well as its independence, so that it can normally perform its functions, especially its legislative function and its political control or oversight function. Immunity is not a personal privilege instituted for the benefit of deputies or senators. Rather, it is justified in relation to the whole set of parliamentary functions that immunity is supposed to protect. Consequently, a request to lift immunity must stand up to scrutiny searching for any political significance to the proceedings, in order to prevent criminal proceedings from being used to

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10 ABELLÁN, Ángel, *op. cit.*, page 81.
11 SANTAOLALLA LÓPEZ, Fernando. *Derecho Parlamentario Español* [Spanish parliamentary law], Editora Nacional, Cultura y Sociedad, Madrid, 1983, page 88.
12 ABELLÁN, Ángel. *op. cit.*, pages 75-76.
13 See in this respect: TIRADO, José Antonio, *op. cit.*, pages 91-92.

disturb the functioning of the houses or alter their make-up[14]. This is the ultimate point of immunity: to protect the legislative body itself, and not its members individually. Members of parliament are afforded protection as representatives of the parliamentary body, not as a legal right.

This, coincidentally, is the opinion of Pareja Paz Soldán, who maintained that "immunities must not be considered privileges of social and political life, not enjoyed by other citizens. Nor must immunity be understood as a licence guaranteeing absolute impunity. It is a privilege that protects representatives from unmotivated persecution stemming from the function of parliament. It is a guarantee not just of this function, but also of the majesty and integrity of Congress"[15].

This corporate prerogative can also be considered a means of political control, because it seeks to protect the independence of members of parliament. Consequently, it is afforded not to members of parliament individually, but to the legislative body—whose prime function these days is oversight—to prevent any alteration of the majorities and minorities that resulted from the electoral process or any interference in parliament's normal functioning.

This characteristic has been refuted by Jurgen Habermas, who claims that immunity is also "an authentic right, which belongs to the individual who holds representative office: the individual member of parliament."[16]

3. Cannot be waived

Given the corporate nature of the prerogative, one must maintain that this guarantee cannot be waived. Thus, a member of parliament "cannot freely waive this protection, since the guarantee belongs to parliament, or rather is peculiar to the function of parliament. If a deputy or senator enjoys this guarantee, it is by virtue of a legitimate interest and a public legal right [...] For the same reason, the dialogue concerning this guarantee is between the judicial body and the house, and the interest in exercising this prerogative lies with the house, and not with the member of parliament."[17]

This characteristic is also based on the fact that parliamentary prerogatives are established constitutionally, as a guarantee of function and thus of procedure, and not as a legal right. Consequently, a member of parliament cannot waive the prerogatives or renounce them, because they are procedural guarantees, and they apply to the member only as an instrument, or as a legislator, and not as a citizen.

In 1994, a bill to amend the Constitution was submitted to the Costa Rican Congress. The bill sought to restrict parliamentary immunity and to make it constitutional for a representative to waive his or her parliamentary privilege[18]. One can make the case that the principle that parliamentary prerogatives cannot be waived was being watered down, including in its regulatory treatment. The person who proposed the above-mentioned bill said that the purpose of her proposal was "to enshrine the right of public officials to waive this privilege. Although this right has existed in practice, it is not expressly stated in this section of the Constitution."[19] This complements Eloy García's argument: "The moment the protected legal benefit becomes a freedom of the individual deputy, of which the independence of parliament is nothing more than a simple logical corollary, there is no reason to deny the representative effective ownership of the right of immunity. Immunity thus takes the form of an authentic legal right, of a power that can be exercised in relation to third parties in the form of a judicially enforceable duty or obligation, which the member of parliament can, like any other right of this type, abandon voluntarily at any time—as Swiss legislation establishes for immunity in the narrow sense."[20] Section 1 of that country's Federal Law on Political Guarantees and the Police, of 26 March 1934, states that members of the Bundestag (the lower house) can, by means of a written

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14 ABELLÁN, Ángel, *op. cit.*, page 72.

15 PAREJA PAZ SOLDÁN, José. *Derecho Constitucional* [Constitutional law]. Studium, Lima, 1979, 2 volumes, Volume 1, page 421.

16 GARCÍA, Eloy, *Inmunidad Parlamentaria y Estado de Partidos* [Parliamentary immunity and the party state], page 50.

17 ABELLÁN, Ángel, *op. cit.*, page 79.

18 In this respect, see *Inmunidad Parlamentaria* [Parliamentary immunity], Legislative Assembly of the Republic of Costa Rica, 1995.

19 PISZK, Sandra, in *Inmunidad Parlamentaria* [Parliamentary immunity], Legislative Assembly of the Republic of Costa Rica, 1995, page 10.

20 GARCÍA, Eloy. *Inmunidad Parlamentaria y Estado de Partidos* [Parliamentary immunity and the party state], pages 61-62.

notice addressed to the Board, waive the protection that immunity confers on them.

4. Temporary

We can thus see that immunity is a procedural requirement "that places in parliament's hands the ability to delay or postpone, for a limited period of time, criminal and civil responsibility (in the case of Spain) or just criminal responsibility (in other parliamentary legislation)."[21] It is therefore a temporary guarantee, which only delays the judicial prosecution of a person for a certain period of time, but in no way exempts that person from responsibility.

5. Not subject to review

This is a particularly controversial point, owing to its implications. One of the views concerning a legislative body's decision on a request to lift the immunity of a member of parliament is that this decision cannot be considered to belong to an area beyond the jurisdiction of the Judiciary. Under this line of reasoning, Tirado maintains that "Parliament's decision to authorize a criminal prosecution to continue against one of its members has, on more than one occasion, been termed non-actionable, because it is an act of pure political will or because it takes the form of an act whose effects are solely internal." He then goes on to say that all acts of public authorities are actionable, "because to maintain the opposite would mean admitting that there are areas outside judicial control". The Chilean Constitution backs up this view. Section 58 of that document states that a decision of the Court of Appeals on whether to lift parliamentary immunity can be appealed to the Supreme Court.

However, it would be entering a vicious circle to accept that congress's decision on whether to grant the Judiciary's request for a lifting of parliamentary immunity from a certain member of congress can be reviewed by the Judiciary itself. There could be a case where a member of congress who feels arbitrarily stripped of parliamentary immunity appeals for protection of this constitutional right to the judicial body. This would create more than one problem. One would also be falling in a theoretical inconsistency, since one would be seeking, through an appeal to the courts, to protect an institutional prerogative that is not a legal right. Would this be legally feasible? And if the Judiciary's initial request were turned down, would the Judiciary be able to appeal the refusal to itself, in order to settle a dispute of which it is also a party? Another possibility would be to put the question to the People. This would be more advisable and theoretically rigorous, according to Section 200-5 of the Constitution and the law against [...] resolutions and decrees of a general nature (*ergo monēs*), from whatever authority they may come."

In addition, in the case of this decision—meaning the decision on whether to lift immunity—we are dealing with an eminently political act. Consequently, and because it is made by the political constitutional body *par excellence*, such a decision could not and should not be subject to any review. In this vein, Gómez Sarmiento maintains that "the act whereby the houses lift or refuse to lift immunity is a constitutional act of political control, performed by the houses exercising political power", a power conferred on them by the Constitution. Because this act is a political one, "there can be no recourse against it: the request cannot be resubmitted, nor can the decision be appealed or even reviewed. It is an act in which the house makes a discretional decision."[22]

Finally, according to García again, one can maintain, observing reality itself, that "the Constitutional Court's control over parliament comes up against a boundary that it cannot cross, owing to the political, non-legal nature of the representative function. This means that, however much one might dislike the idea, there are specific areas and spheres of public life where the ultimate verdict lies with the voters, not with the judges."[23] This means that parliament's decision can be reviewed, but this depends on political will.

III. Fields of application in time and space

Unlike inviolability, this guarantee is not perpetual, but is limited to the term in office of the member of parliament[24]. The term of office of members of parliament includes not just the

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21 ABELLÁN, Ángel, *op. cit.*, page 76.

22 GÓMEZ SARMIENTO, José Manuel. *La Inmunidad Parlamentaria en Colombia* [Parliamentary immunity in Colombia], Bogota, Pontifical Xavierian University (PUJ), 1985, 149 pages, pages 145-149.

23 GARCÍA, Eloy. *La Inmunidad Parlamentaria y Estado de Partidos* [Parliamentary immunity and the party state], page 15 (footnote).

24 This time is not calculated by the time specified in the statue of limitations, although

periods when parliament is sitting. It also includes parliamentary recesses, when the work of members of parliament simply changes form. Consequently, “it must be understood that the term of office, during which members of parliament are protected by immunity, also includes the periods between sessions or outside of sessions: that is, when the houses are not sitting. The prevailing view has generally been that this protection is too broad. Outside of sessions, judicial proceedings against a member of parliament can hardly prejudice that member’s work in the house, unless he or she is a member of the Permanent Deputation[25]. This last observation is very important, because the majority view among the experts is that such coverage would be abusive, since total impunity could be achieved if the member of parliament were re-elected again and again. It would be normal for immunity to operate only during the sessions and for members of parliament to be subject to ordinary law between parliaments. This would not prevent the new parliament from asking the Judiciary for the necessary reports and, if it found that arbitrary, political persecution lay behind the prosecution, calling for the proceedings to be suspended.

These parliamentary prerogatives serve the purpose of maintaining the balance of powers, to guarantee that power is exercised rationally and in accordance with the Rule of Law. Parliament is one of the fundamental bodies of the State, so its integrity must be protected, even in exceptional situations, such as those in which exceptional states might be declared. A state of siege, a state of emergency and exceptional laws do not suspend or affect parliamentary immunities [...] Basic rights are suspended, but not the principles on which the Public Powers, such as parliamentary privileges, are based.”[26]

As for the spatial application of parliamentary immunity, we believe that it is limited to the national territory, where members of parliament enjoy the functional protection afforded by this prerogative. Outside the national territory, parliamentary immunity in no way applies. However, Peruvian members of parliament have a “diplomatic passport”, which places them under diplomatic protection when they are abroad, under section 2 of Decree No. 832. It is worth noting that section 6 of this same decree states that a member loses the right to use a diplomatic passport if parliamentary immunity is lifted, among other reasons. This makes sense.

IV. Material field of application

Under Peruvian law, the protection afforded by parliamentary immunity applies to proceedings of a criminal nature, and is justified only in the case of crimes, because these are the only offences punishable by imprisonment. However, this could be interpreted as a protection so broad that it includes prosecution for even minor crimes. The wording of the Constitution allegedly leaves the door open to this interpretation, although this would not be the most correct

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there are doubts about this, because this question has not been dealt with in legislation. Tirado, referring to Spanish legislation, maintains that, if the lifting of parliamentary immunity is not authorized, criminal proceedings cannot continue. This raises the question of whether “criminal proceedings are suspended or, on the contrary, permanently dismissed”. See TIRADO, José Antonio, *op. cit.*, footnote, page 92.
In this respect, Fernando Santaolalla maintains that section 7 of the Act of 9 February 1912 provides that, if authorization to prosecute is withheld, “the decision will be communicated to the court that made the request, and it will dismiss the case against the senator or deputy with prejudice. This outcome of dismissal with prejudice supposes that the case will be permanently shelved, and that it will therefore be impossible to proceed with the case after the term of office of the member of parliament expires. Our legislation thus broadens the limits of immunity [...] When a member ceases to be a deputy or senator, he or she should come under ordinary procedural law, otherwise the effects of immunity would be prolonged forever.” Likewise, Santaolalla says that section 754 of the Criminal Prosecution Act (*Ley de Enjuicimiento Criminal*) (modified by the 1912 Act) provided for dismissal, but “without prejudice”, not “with prejudice”. This meant that proceedings were merely **suspended** until the end of the term of office of the member of parliament. See SANTAOLALLA LÓPEZ, Fernando, *op. cit.*, page 94.
Garrido maintains that “an application for authorization to prosecute stops the clock on the time limit for legal action and does not simply end the count. The clock should start running again the moment prosecution is authorized or, if there is no authorization, the moment the sessions end (at the end of the term of office in our case). This is because of an old, seldom-discussed legal principle: that the clock on the time limit for a legal action cannot run to the detriment of those who, for legal reasons, cannot take that action.” See GARRIDO FALLA, Fernando. *Comentarios a la Constitución* [Comments on the Constitution], Civitas, Madrid, 1980, pages 1093-1094.

25 ABELLÁN, Ángel, *op. cit.*, pages 92-93.

26 PAREJA PAZ SOLDÁN, José. *Derecho Constitucional* [Constitutional law], page 422.

interpretation, because the need for parliament's authorization should not be recognized so generally. It should perhaps be restricted to crimes punishable by imprisonment or at least by restrictions on civil or political rights (as might be the case with disqualification penalties), in which case the charge would be null and void by reason of incapacity. "We believe that the point of immunity is limited to preventing the arbitrary removal of members from the houses. Consequently, in cases involving minor crimes not punishable by imprisonment, there appears to be no reason to apply the immunity principle, in which case prior authorization to indict or prosecute would be pointless."[27]

V. Rights infringed by parliamentary immunity

As we have seen, the guarantee of immunity is a concept that temporarily places a certain legal dispute beyond the reach of the Judiciary. This legal situation is exceptional, since ordinary law is prevented from operating, parliament's authorization being required in order to continue criminal proceedings. Spain's Constitutional Court has maintained that "immunity always implies that the right to a criminal trial can be refused. This possibility does not in itself contradict the basic principle of due process."[28] This exceptional situation—a limitation authorized by the Constitution itself—can be used arbitrarily, in which case the right to due process would in fact be infringed.

According to Tirado, parliamentary immunity "can affect two basic rights if its constitutional purpose is not respected: due process, and the right to access and hold public office"[29]. One can point out that "the improper granting of parliamentary authorization for criminal proceedings against a member of parliament could constitute a violation of that member's right to hold public office, because the limitation on his or her ability to exercise that right would be imminent and unjustified."[30] This is particularly debatable, since the lifting of parliamentary immunity from a member of parliament does not prevent that member from holding the office to which he or she was elected. Rather, it allows the Judiciary to go ahead with criminal proceedings or authorize the member's detention. Except in this last instance, securely justified because the member was caught in the act or because of a judicial finding, members of parliament stripped of immunity can continue performing the duties of their office. Their political rights would be suspended only if their responsibility for the crime of which they were accused were proven judicially. In that case, they obviously lose their right to hold public office.

VI. Legislative treatment of parliamentary immunity

A. In Peru

The Peruvian Constitution sets out this guarantee in section 93[31], which literally says that members of Congress cannot "be prosecuted or arrested without the prior authorization of Congress or the Permanent Commission, from when they are elected until one month after they have ceased performing their duties, except when caught in the act, in which case they are brought before Congress or the Permanent Commission within twenty-four hours, for it to decide whether to authorize detention and prosecution."

Section 16[32] of the Regulations of the Congress of the Republic add that immunity from prosecution "does not protect members of Congress from non-criminal actions brought against

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27 SANTOALALLA LÓPEZ, Fernando, *op. cit.*, page 92.

28 ABELLÁN, Ángel, *op. cit.*, page 71 (footnote).

29 TIRADO, José Antonio, *op. cit.*, page 92.

30 *Ibidem*, *op. cit.*, page 92.

31 The 1979 Constitution dealt with immunity in section 176, of which the current standard is actually a copy. Meanwhile, the 1993 Constitution had the following wording: "Senators and deputies are inviolable in the performance of their duties and cannot be charged or arrested without the prior authorization of the House to which they belong, from one month before the legislature opens until one month after it closes, except when caught in the act, in which case they shall, within 24 hours, be brought before their respective House." As regards immunity in the narrow sense, the temporal duration of the protection afforded a member of parliament was more restricted. It was exclusively related to the legislature: from one month before it opened until one month after it closed.

32 In this respect, section 16 of the old Regulations of the House of Deputies said that "No deputy can be prosecuted or detained without the prior authorization of the House, except when caught in the act, in which case he or she is brought before the House, or the Permanent Commission of Congress during a recess, so that the House of Deputies can authorize or reject detention and prosecution before the Judiciary."

them for their private acts". They also add that, if, as the result of a trial, "the judicial body believes that it is proper and necessary to impose some measure that involves detaining the member of Congress, it shall ask the Congress or the Permanent Commission to authorize or reject the measure." Reading these provisions together, one infers that, first, not even in cases where a member is caught in the act can immunity be ignored, because Congress or the Permanent Commission, as the case may be, is called upon within a short period of time (twenty-four hours) to authorize or reject the lifting of immunity. This really is excessive. What constitutes being caught in the act cannot be decided across the board. The dominant Italian view is that the member must truly have been caught in a criminal act (meaning that a person, immediately after a crime, is followed by the victim or law-enforcement personnel and is caught with an object or signs that lead one to presume that the person committed a crime a short time before). In France, jurisprudence in 1947 created the theory of "continuous flagrancy" in order to maintain that, because insurrection is a continuous crime, members of parliament who instigate an insurrection are in the act of the crime as long as it lasts.
Apart from the problem of reach, the case of flagrancy raises the important question of whether immunity should be done away with completely, so that a member of parliament presumed to have committed a crime can be prosecuted and detained as if he were not a member of parliament, or whether, as appears to be becoming the custom in Peru, one must still ask for Congress's authorization before issuing an arrest warrant or ordering a trial.

On the other hand, immunity under our law protects members of Congress only from criminal prosecution. It does not protect them from actions of other kinds. We do not believe it is the intent of section 16 of the Regulations to require the action to be under criminal law, with the additional requirement that the action must be for public acts or acts connected with the member's duties. This is because it is precisely the point of this guarantee, unlike inviolability, to also protect members of Congress in relation to acts not connected with their official duties, as we saw earlier. This is because the political persecution that parliamentary immunity is intended to combat could be hiding behind an accusation that implicates a member of Congress in a specific crime and thus achieves the sought-after goal of depriving Congress of one of its members for a political motive. Finally, the same Regulations state that, if the judicial body orders some measure that would deprive a member of Congress of his or her freedom, the guarantee of immunity takes the form of a requirement that Congress—or the Commission, as the case may be—must authorize or reject the effective implementation of this measure. This would mean delaying the measure and would in no way place the member of Congress beyond the reach of the judicial body, which is autonomous under the same Constitution. This is, properly speaking, a lifting of the privilege, and it has different effects: a temporary or permanent removal from office (the office becoming vacant in the latter case).

B. A comparison of laws

1. The German Constitution

Section 41-2 of this document states that a decision of the Federal Diet "can be appealed to the Federal Constitutional Court". Section 46-2 states that deputies can be charged or detained for a punishable act "only with the prior consent of the Federal Diet, unless they have been caught committing this act or on the following day". Section 46-2 adds that the authorization (*Genehnagung*) from the Federal Diet is required "for any other restriction of the personal freedom of a deputy or to begin proceedings against a deputy under section 18". Finally, section 46-4 states that "any criminal proceedings and any action under section 18 against a deputy, such as detention (*Haft*) or some other restriction of his or her personal freedom", shall be suspended "if the Federal Diet so demands".

2. The Spanish Constitution

Section 71 of this document states that, during their term of office, deputies and senators also enjoy immunity and can be detained only when caught in the act. They cannot be indicted or prosecuted without the prior authorization of their respective house. It states that, in cases against deputies and senators, the "Criminal Chamber of the Supreme Court shall have jurisdiction".

3. The Constitution of France

Section 26 of this document states that no members of parliament can, in a criminal or correctional matter, be the subject of arrest or any other measure that deprives them of their freedom or restricts their freedom, without the authorization of the General Committee of the house to which they belong. **This authorization is not necessary in the case of serious crimes or in cases where members are caught in the act or in the case of final sentencing.** In addition, the detention or prosecution of members of parliament, or any

measures that deprive them of their freedom or restrict their freedom, “shall be suspended during the sessions, if the assembly to which the member belongs so requires. To this end, the assembly in question shall meet with full rights in special session to permit, if necessary, the application of the preceding paragraph.”

4. The Constitution of Guatemala

Section 161 of that document states that deputies, as a guarantee of their ability to perform their duties, shall enjoy, beginning the day they are declared elected, personal immunity from detention or prosecution, unless Congress first authorizes such action and declares that there are grounds for a case, except when the deputies are caught in the act, in which case they must be immediately brought before the Board or Permanent Commission of Congress for the corresponding pre-trial procedures. In addition, in this case the accused remain under the jurisdiction of the judge in charge of the case. If they are ordered taken into preventive custody, **they remain in office unless the commitment order is revoked**. Finally, **in the case of a final finding of guilt, the office becomes vacant**.

5. The Constitution of Chile

Section 58 of this document states that no deputies or senators, from the day of their election or appointment, or from their induction, as the case may be, can be prosecuted or deprived of their freedom, except when caught in the act, unless the Court of Appeals with the appropriate jurisdiction, in plenary session, gives prior authorization for charges to be laid, stating that there are grounds for a case. This decision can be appealed to the Supreme Court. This is extremely important, because it means that a decision that is, properly speaking, political can be contested. Any deputies or senators arrested after being caught in the act shall immediately be brought before the appropriate Court of Appeals, together with the corresponding summary information. The Court will then proceed as set forth in the law. Finally, it states that, the moment a final decision is made that there are grounds for a case, the accused deputy or senator is suspended from his or her duties and under the authority of the judge in charge of the case.

6. The Constitution of Colombia

This is a very interesting case. Section 186 of the Constitution states that crimes committed by members of Congress are judged exclusively by the Supreme Court of Justice, which is the only authority that can order the detention of members. If caught in the act, they must be arrested and immediately brought before that body.

VIII. Procedure for lifting parliamentary immunity

There is a certain unanimity among the experts concerning the procedure to follow in order to lift parliamentary immunity, although there are clear differences in the legislation. The Judiciary is the State body with the jurisdiction and authority to submit this request to parliament, which is the body that ultimately decides whether to lift the guarantee in question.

An important point to discuss is what is called a “supplicatory request”, which is a request that the judicial body submits to parliament for permission to prosecute (or arrest, as the case may be) a certain member of parliament. This request must be submitted along with evidence showing that the member must be brought to justice for the commission of a certain crime. When deciding whether to grant the supplicatory request, parliament must determine solely whether, behind the accusation, there is some political or partisan motive for impugning the member. That is, it must evaluate the political significance of the accusation, to ensure that the functioning of parliament is not affected. If there is such an intent, parliamentary immunity takes effect and protects the member. **Parliament must not analyse the merits of the accusations themselves (whether the accusations made against the member of parliament are true or false), because that is the exclusive function of the Judiciary. To act otherwise would be to infringe on the jurisdiction of that institution.** In other words, parliament will not use the terms guilty or not guilty, or responsible or not responsible, because it is supposed to conduct a formal, political analysis of the petition.

A problem common to almost all democratic societies has been the lack of specific details concerning the procedure for parliamentary immunity, and political considerations therefore have tainted the question with a certain amount of arbitrariness. “In practice, it has happened that, because the decision to grant or reject a supplicatory request is not subject to any legal standard, it has been used as the majorities see fit, including against minorities. This has given

rise to abuse and a perversion by the houses of their power to authorize. Many supplicatory requests have been rejected that should have been granted…"[33]. Because of questions of this nature, some experts and even some leading-edge laws have come out against parliamentary immunity, because it confers on members of parliament a privilege that gives them special treatment before the law, to the detriment of ordinary citizens. This makes it necessary—the Constitution undeniably maintains the validity of parliamentary guarantees in general and parliamentary immunity in particular—to regulate the parliamentary procedure to be followed when deciding whether to grant a supplicatory request made by the Judiciary. In this procedure, members of congress who are the targets of such supplicatory requests must have every opportunity to exercise their "right to defend themselves" before the authorities deciding the issue.

The issue of granting a supplicatory request is directly related to the very purpose of immunity, which is to protect the make-up that popular will has chosen to give to parliament. Launching a purely political case—after immunity has been lifted, of course—against a member of parliament would mean preventing a certain portion of the electorate from being represented. In concrete terms, parliament must study, as Fernández-Viagas says, "whether the presence of [the accused member of parliament] is essential for the normal functioning of the house"[34].

The procedure for lifting parliamentary immunity is a unique "pre-jurisdictional" procedure, since it is not the merits of the case that are discussed (criminal responsibility or lack thereof), but rather whether to authorize the body with jurisdiction (the Judiciary) to exercise that jurisdiction against a specific person who holds the office of Member of the Congress of the Republic. To guarantee autonomy and the ability to function, this office comes with the prerogative known as immunity. In this procedure, there is not, strictly speaking, an accusing party. Can we then rightly say that members of congress have a "right to defend themselves", which is a feature of acts where a legal right is discussed? In this respect, the answer would appear to be much more negative. First, parliamentary immunity is one of the functional prerogatives that protect the integrity of Congress, and not the integrity of a member of Congress in particular. That is why it is Congress that decides whether to protect itself using immunity. Second, if there is no accusation made by an internal party, then one can hardly speak of a corresponding right to defend oneself. What is involved is a legitimate right to speak. It would therefore be more precise to speak of a right to be heard, as in the case of Spanish legislation.

A. Its treatment in Spanish legislation

In Spanish law, the rules of procedure for deciding whether to grant a supplicatory request submitted by the Judiciary call for a fundamentally legal approach. These rules are contained in the Regulations of the Chambers of the *Cortes Generales* [Spanish parliament].

Section 71.3 of the Spanish Constitution states that the Criminal Chamber of the Supreme Court has jurisdiction to hear cases against deputies and senators.

1. Regulations of the Congress of Deputies: Sections 10 to 14 of these Regulations deal with parliamentary prerogatives. The President of Congress, once it is known that a deputy has been detained or that the Judiciary or government has taken some other action that might impede a deputy in the performance of the duties of his or her office, shall immediately take the steps necessary to safeguard the rights and prerogatives of the Chamber and its members. Congress plays an active role in defending its inherent and constitutional integrity.

Once a supplicatory request for the authorization of Congress is received, the President, with the agreement of the Board (*Mesa*), forwards it within five days to the Commission on the Status of Deputies. Supplicatory requests not forwarded and **documented as required by the applicable procedural laws** are not accepted. It is important to emphasize the regulatory requirement that the supplicatory request be documented, owing to the nature of the petition.

The Commission must complete its work within 30 days, **after hearing the member in question**. The hearing can take place in writing in a period of time decided on the Commission, or orally before the Commission itself. Once the Commission's work is finished, the question, duly documented, is submitted to the first ordinary plenary session of the Chamber. This is the ultimate authority where the matter will be decided.

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33 ABELLÁN, Ángel, *op. cit.*, page 67.

34 FERNÁNDEZ VIAGAS BARTOLOMÉ, Plácido. *La Inviolabilidad e inmunidad de los Diputados y Senadores: La crisis de los "privilegios" parlamentarios* [The inviolability and immunity of deputies and senators: The crisis of parliamentary "privileges"], Civitas, Madrid, 1990, page 143.

Within eight days of the date on which the plenary session of the Chamber decides whether to grant the requested authorization, the President of Congress forwards that decision to the judicial authority, reminding it that it must inform the Chamber of any warrants or judgments that personally affect the deputy.

According to section 14.1, the supplicatory request is considered rejected if the Chamber has not made a decision within sixty calendar days, counted during the sessions from the day after the supplicatory request was received. The arrangement whereby silence means a negative response is questionable, because it might lend itself to abuse of the prerogatives by members of parliament, often turning them into personal privileges. A better arrangement would have been for silence to mean a positive response.

2. Regulations of the Chamber of Senators: Sections 20 to 26 deal with the parliamentary prerogatives and obligations of senators. The first paragraph of Section 22.1 states that the arrest or detention of a senator caught committing a crime shall immediately be communicated to the Office of the President of the Senate. In this case, one can say that the flagrancy of the act makes it unnecessary to request authorization to detain the member of parliament. The only requirement is that the appropriate authorities make the necessary report to Congress.

Senators cannot be indicted or prosecuted without the prior authorization of the Senate, sought through the corresponding supplicatory request. This authorization is also necessary in proceedings against individuals who, while under prosecution or indictment, take up office in the Senate.

Once the supplicatory request is received, the President of the Senate immediately forwards it to the Supplicatory Requests Commission. This Commission requests any background information that it considers necessary and, after hearing the individual in question, must issue an opinion within thirty days. A debate on the opinion is placed on the agenda of the first ordinary plenary session to be held. One can see the importance of having a special commission to deal with petitions for a lifting of immunity made by the Judiciary. Because this is a functional guarantee set forth in the Constitution, it must be treated in a serious and specific manner.

The Senate meets in a secret session to be informed of the opinion concerning the supplicatory request in question. There can be a debate on whether to grant the supplicatory request, with two turns in favor and two against, in alternation. Keeping the session secret makes it easier to settle the question arbitrarily. It would therefore be advisable for matters of this nature to be aired publicly.

The President of the Senate, within eight days of the Chamber reaching a decision, forwards that decision to the Supreme Court by sending it a certified copy of the adopted motion.

The supplicatory request is deemed rejected if the House does not decide on it within sixty calendar days, calculated during the sessions from the day after the supplicatory request was received. In this case, too, the fact that silence means a negative response could be used to reject a supplicatory request arbitrarily.

If the supplicatory request is granted and the senator is indicted, the Chamber can decide, by a simple majority of its members and depending on the nature of the acts of which the senator is accused, to temporarily suspend the senator from his or her duties. This means, properly speaking, the suspension of the political rights of that member of parliament. The session at which the Chamber decides whether to suspend the senator is also secret. During that session, there are only two turns in favour and two against, in alternation, and the senator in question is not given a hearing. Finally, if it decides in favour of temporary suspension, the Chamber may, in its decision, revoke the senator’s appointment, to the point of termination. It can therefore be said that the lifting of parliamentary immunity does not necessarily imply the suspension of the political rights of the member of parliament.

B. Treatment in Peruvian legislation

As regards the procedure for deciding whether to lift parliamentary immunity, neither the National Constitution nor the Regulations of the Congress of the Republic regulate the matter. The procedure is left to unfold under the principles of Parliamentary Law, as well as custom. The procedure ends up being as follows:

First, the Judiciary, through the President of the Supreme Court of Justice, submits to the President of Congress a request for parliamentary immunity to be lifted from a particular member of Congress. Once the Office of the President receives this request, the President

forwards it to the Constitution Commission (Would it not be better for it to go to the Constitutional Accusations Commission?), where the case is analysed. If there is sufficient evidence supporting the request and no political motive can be determined, a report recommending the lifting of parliamentary immunity is drafted. Finally, this report is submitted to a plenary session of Congress (the supreme authority) for discussion or to the Permanent Commission of Congress (in a parliamentary recess or between two parliaments), where the final decision is made.

Legislative antecedents

Only the immediate antecedents will be analysed. Peruvian legislation treats this question in the Internal Regulations of Congress. One must recall that the 1979 Constitution envisaged a bicameral congress. The Regulations of the Senate Chamber repeat what is set forth in the Constitution. No concrete procedure is spelled out, so there is a regulatory vacuum in this respect.

On the other hand, the Regulations of the Chamber of Deputies, adopted in 1987, give certain rules to follow in order to lift immunity. Section 16 repeats the rationale for immunity, in the same way as the Constitution does: “No deputy can be prosecuted or detained without the prior authorization of the Chamber, unless caught in the act, in which case the deputy shall be brought before the Chamber, or the Permanent Commission of Congress **during a recess**, so that the Chamber of Deputies can decide whether to authorize the Judiciary to detain and prosecute the deputy”. Section 19 of the Regulations states that, in cases covered by **section 16** (parliamentary immunity) and **section 17** (constitutional accusation), **deputies can be judged only by the Supreme Court of Justice**. This section is ambiguous, since we can conclude after reading it that the Supreme Court is the only one authorized to judge a deputy believed to have committed a common crime. This would be in accordance with the provisions of section 114 of the former Organic Law of the Judiciary, which stated that the court of first instance would be the Second Chamber and that the court of second instance would be the First Chamber of the Supreme Court. This is not at all clear from an analysis of section 124 of the Regulations, which states that “a judge’s petition for leave to criminally prosecute a deputy for a common crime, or to continue proceedings when one of the accused is found to be a deputy, must first be forwarded to the Supreme Court of Justice, which **has the Chamber hear** this petition. The petition is examined by a committee of five deputies, who issue an opinion within thirty days, and the Chamber decides whether to suspend the privilege. To do so requires a vote of more than fifty percent of the deputies legally authorized to vote, in a secret session.” What authority is supposed to judge a deputy when a judge submits a petition and obtains a favorable decision from Congress? The same judge who submitted the petition, or the Supreme Court, according to section 19?

This matter could be settled more easily when a deputy is caught in the act, because one could say without hesitation that the Supreme Court would judge the deputy. Section 123 of the Regulations states that the situation of a deputy brought before the Chamber after being caught in the act, under section 176 of the Constitution[35], is examined by a committee of five deputies, and the decision to authorize the deputy’s detention and prosecution is made on the basis of the committee’s report, which is issued within five days.

Identifying the Supreme Court as the body competent to prosecute representatives—as was done in section 19 of the Regulations of the Chamber of Deputies—is more in keeping with the legal nature of such a senior body and with the function of parliamentary immunity itself. It would seem that the interpretation should lean in this direction.

One point that deserves attention is that, under the Regulations of the Chamber of Deputies, a lifting of parliamentary immunity implied a suspension of parliamentary privilege (section 124). This gives it greater reach than it was in fact given.

Thus, it is important to stress that both section 123 (which refers to the exceptional case of someone being caught in the act) and section 124 speak of a committee of five deputies entrusted with checking the facts and issuing an opinion on whether to lift parliamentary immunity. Under section 124, the opinion is heard in plenary session, and the votes of more than fifty percent of the deputies legally authorized to vote, in a secret session, are required in order to suspend parliamentary privilege.

IX. The effects of parliament’s decision

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[35] Section 93 in the case of the 1993 Constitution.

The effects of immunity are more limited in intensity and duration than those of inviolability. The only thing that immunity seeks to do is to temporarily suspend, with respect to members of parliament, the effect of the constitutional provisions that require all to be answerable to the Judiciary for certain forms of private conduct.

In the case of Peru, parliamentary immunity begins to show its effects the moment the Judiciary finds merit in an accusation and wishes to initiate proceedings against a member of Congress. At that moment, the Judiciary must ask Congress for authorization to prosecute and, if necessary, detain the member of Congress in question. Congress can respond negatively or positively to the judicial request.

If the response is positive, we believe that the representative comes before the Judiciary, which can continue with proceedings until a final judgment is handed down. In this respect, there was an important observation made in a debate of the Congress of the Republic in plenary session on 1 December 1995 by Member of Congress Daniel Estrada Pérez. He maintained that section 93 of the Constitution identifies two situations: “The first involves the possibility of lifting immunity when authorization is sought to prosecute a member of Congress. The second involves lifting parliamentary privilege when an arrest warrant has been issued against the member of Congress: that is, when the member faces going to jail.” Member of Congress Carlos Ferrero Costa expressed the same opinion at a session of the Constitution and Regulations Committee on 3 October 1995, saying that Congress could lift the parliamentary immunity of a member of Congress, **but that this did not mean that the member was suspended from office**. It is therefore worthwhile to differentiate between two aspects of the lifting of parliamentary immunity:

a. The lifting of immunity in the narrow sense, which simply involves Congress authorizing the prosecution of one of its members, in which case the representative can continue performing the duties of his or her office, even when there is a preventive custody warrant, in which case the member of congress is suspended from office until the warrant is cancelled or replaced by a subpoena.

b. The lifting of parliamentary privilege as soon as the Judiciary issues a final detention warrant against the member of Congress, in which case the office becomes vacate.

If Congress’s response is negative, the Judiciary is unable to continue with criminal proceedings during the term of office: that is, “from the moment they are elected until one month after they stop performing their duties.” As we saw earlier, there are doubts about whether a criminal case is permanently dismissed (permanently shelved) at that point, meaning a permanent undermining of constitutional order, or whether it is simply suspended. From the wording of section 93 of the Constitution, one should conclude that the case would simply be suspended during the term of office, thus ensuring that this guarantee is not turned into a personal privilege that could allow members to act with impunity. As mentioned in the section on immunity’s field of application in time, in the case of Spain’s judicial legislation, under section 7 of the Act of 9 February 1912, if authorization to prosecute a deputy or senator is refused—either expressly or tacitly—“the proceedings are permanently shelved, and there is not way to restart them after the term of office expires. This ultimately means giving parliament the ability to declare a deputy beyond the reach of the courts and, because of what was said earlier, to undermine the Constitution.”[36] That is because this Spanish pre-constitutional rule calls for dismissal with prejudice—not dismissal without prejudice—for the senator or deputy, and this means the permanent shelving of the case and no possibility to restart it when the representative’s term of office expires. This could not be supported in the case of Peru, because there is no constitutional reference to this effect. On the contrary, section 93 emphasizes the temporary nature of this guarantee.

X. Crisis of the institution

Parliamentary immunity is in crisis, and there are some experts and even—as we have seen—some pieces of legislation that have opted for eradicating it from law, because it violates the principle of equality of all citizens and because the causes that gave rise to it no longer apply, and it is therefore no longer indispensable. Most authors have made a purely judicial analysis of this crisis, attributing it to the whole series of examples of abuse and corruption in its practical use. Their suggestions for ways to overcome the crisis are also purely judicial in nature. One of them is to allow the Constitutional Court, for example, to have jurisdictional control over parliament’s decisions. Another group of academics have taken a broader approach to the

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[36] GARCÍA, Eloy. *Inmunidad Parlamentaria y Estado de Partidos* [Parliamentary immunity and the state party], pages 79-80.

problem, analyzing it basically from the socio-political standpoint. In this line of reasoning, the true root of the crisis of parliamentary immunity can be said to lie in the crisis affecting the foundations that gave rise to it—a crisis caused by the very dynamic of those foundations: the doctrine of the division of powers and political representation. As regards the notion of the division of powers, we believe that, from a modern standpoint, the thinking of Montesquieu is seriously called into question, since power is held to be a single and indivisible whole, and one speaks of duties of the bodies holding the power of the State. However, the constitutional democratic State "keeps alive the basic central idea of the thinking of Montesquieu, thanks to which the legal mechanisms of the division of powers complement one another and, to a certain degree, become intermixed, with an internal system of weights and counterweights of a political nature that considerably limits the power of the majority, and which Sternberger has defined as the "vital division of power"[37]. This last concept is understood to mean institutionalized confrontation, since the majority that holds the power allows the minority to effectively enjoy a series of rights and guarantees, "which make up what is called the status of opposition, and among which parliamentary immunity occupies an outstanding role"[38].

In this respect, Abellán maintains that, "in contemporary constitutional and democratic states, whether monarchies or republics, the old conflict of legitimacy between the Crown and Parliament has disappeared. These are no longer antagonistic bodies fighting for power [...] guarantees can no longer be doctrinally based on protecting members of parliament from arbitrary persecutions by the Executive or the courts. Rather, they are based on **serving as instruments guaranteeing the freedom and functional independence** of the legislative chambers as constitutional bodies"[39].

One must remember, then, that, when immunity appeared, "the very existence of parliament was in question, and it therefore had to safeguard its own existence against attacks by the other powers. It is now clear that this situation no longer applies, because the old relationship between executive power and legislative power (in which the legislative branch did the job of controlling the executive branch) has given way to a relationship of government and opposition, in which parliament loses its position as an agency of control over the government's activities, surrendering that position to the opposition (inside or outside parliament)"[40]. This is an especially important point, because the function of oversight or political control is not necessarily in the hands of congress, but is generally performed by the opposition. In this sense, prerogatives are today justified by the need to maintain the functional independence of the opposition more than that of congress itself. For Eloy García, the doctrine of the division of powers continues to lend parliamentary immunity "sufficient support to justify its inclusion in constitutional texts, giving it two specific functions: one the one hand, to serve as a legal mechanism of defence against the decisions of the constituent power, given the predictable expansive inclinations of the constituted powers, and, on the other hand, to act as an instrument guaranteeing the rights of the opposition"[41].

Parliamentary immunity has been abused—generally by the parliamentary majority—to give representatives a licence of impunity that translates into an unjustifiable and absolute freedom from criminal responsibility. There are various examples of this abusive practice. Thus, we note that Italian practice "tends to immediately free anyone being held in preventive custody who is proclaimed a deputy (unless caught in the act). The House is then immediately called on to decide whether he or she can be re-arrested (with the result that parties often include on their list of candidates party members who have been arrested or are being prosecuted and whom they wish to see freed)."[42]

As regards the new contents and criteria of political representation, the latter has broken into two distinct points: "that which regards the entities that do the representing, and that which involves the very nature of the links that join representatives with those who are represented"[43]. The new entities that do the representing are, in reality, the political parties, who name the candidates, and, through these parties, the sectors of society that places their confidence in each party, and not the whole of society. And the relationship between representatives and

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37 *Ibidem*, page 100.

38 *Ibidem*, pages 101-102.

39 ABELLÁN, Ángel, *op. cit.*, pages 26-27 (my emphasis).

40 TIRADO, José Antonio, *op. cit.*, page 91.

41 GARCÍA, Eloy. *Inmunidad Parlamentaria y Estado de Partidos* [Parliamentary immunity and the party state], page 103.

42 BISCARETTI DI RUFFIA, Paolo. *Derecho Constitucional* [Constitutional law], Tecnos, Madrid, 1984, page 375 (footnote).

43 GARCÍA, Eloy. *Inmunidad Parlamentaria y Estado de Partidos* [Parliamentary immunity and the party state], pages 110-111.

represented is also channeled through the political parties, because the representative is no longer an individual, but rather part of a party collective (parliamentary group). This has even been understood in jurisprudence, as in the case of Spain's Constitutional Court, which holds that the constitutional incompatibility between the rule that prohibits binding mandates and the rule that affirms the idea of party democracy must be resolved in favour of the latter.

From another standpoint, when "the judicial apparatus detaches itself from the Executive and the independence of judges is strengthened, another of the reasons for parliamentary immunity obviously ceases to apply"[44]. Or, to put it differently, "in a democratic state, the best guarantee that the prosecution or detention of members of parliament will not be turned into a political tool is the independence of the judges and courts. Effectively subjecting the police to judges, prohibiting arbitrary arrests and ensuring the autonomy of the courts are the best guarantees against any attack on the independence of the houses. In these circumstances, immunity is becoming superfluous."[45] However, this is not the case in countries like Peru, where the Judiciary is not independent, but rather an appendix of the Executive, through various mechanisms, such as appointing judges pro tempore, directly interfering in the Judiciary in an effort to "reform it", packing the Judiciary with supporters of a particular regime, even making the Judiciary subject to the Executive, through the setting of budgets. Thus, the judicial route can be used to the detriment of the parliamentary opposition (generally in a minority). We must therefore rethink the need to functionally protect Congress, and especially the parliamentary sector that makes the functions of political control and oversight effective.

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44 TIRADO, José Antonio, *op. cit.*, page 91.

45 SANTAOLALLA LÓPEZ, Fernando, *op. cit.*, page 87.

Lima, Peru

3 September 2008

Translation Bureau
House of Commons
Canada

As the author of the essay *La Inmunidad parlamentaria* [Parliamentary immunity], I am writing to authorize you to translate this document into English. I am told that there is an interest in distributing this essay among English-speaking members of parliament and individuals connected with parliamentary work. I share this interest, and it is therefore necessary to have a version in that language.

Should anyone wish to communicate with me, they can e-mail me at dlatorre@consucode.gob.pe or deriklatorre@hotmail.com.

Sincerely,

Derik Roberto Latorre Boza
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