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Parlementaire immuniteit, meer of minder...?

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The case against the introduction of 'political immunity' in the Netherlands*

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The case against the introduction of 'political immunity' in the Netherlands

Abstract

Following the decision of the Dutch public prosecution service to charge Geert Wilders with criminal utterances, the idea that parliamentary immunity in the Netherlands is insufficient and should be augmented by 'political immunity' has re-entered the public debate. Based on an analysis of the purpose of parliamentary immunity and the legal implications of extending it to 'political immunity', this policy paper advises against this idea.

Samenvatting

De parlementaire immuniteit in Nederland hoeft niet uitgebreid te worden naar een politieke immuniteit. Een dergelijke uitbreiding zal de huidige discussie niet oplossen en is daarnaast zelfs waarschijnlijk onmogelijk te realiseren.

Dat is de conclusie van Sascha Hardt in zijn policy paper *The case against the introduction of 'political immunity' in the Netherlands.* Hardt gaat dieper in op de parlementaire en politieke immuniteit in Nederland naar aanleiding van de rechtszaak van Geert Wilders naar aanleiding van diens uitspraken over Marokkanen. Hardt kijkt naar twee dimensies van parlementaire immuniteit, 'niet-aansprakelijkheid' en 'onschendbaarheid'. De niet-aansprakelijkheid houdt in dat een parlementariër alles moet kunnen zeggen in het parlement zonder daarvoor strafrechtelijk te kunnen worden vervolgd. Onschendbaarheid is breder en rekt dit begrip op tot buiten het parlement en niet alleen tot politieke uitlatingen maar ook tot daden.

In Nederland bestaat voor parlementariërs alleen 'niet-aansprakelijkheid' en volgens de letter van de wet (Artikel 71 Grondwet) zelfs alleen tijdens vergaderingen van het parlement. Tegenwoordig doet een politicus echter ook op TV en radio politieke uitspraken. Ook bij het voeren van verkiezingscampagnes nemen politici het blad niet voor de mond. In die gevallen kan de politicus - in theorie - worden vervolgd. Het is de vraag of de Nederlandse vorm van parlementaire immuniteit moet worden uitgebreid naar een 'politieke immuniteit' zodat het alle aspecten van het politiek debat inhoudt, ongeacht het forum, de persoon en of deze lid is van het parlement

Verwijzend naar uitspraken van zowel nationale rechters als het Europees Hof voor Mensenrechten stelt Hardt dat de vrijheid van meningsuiting van politici een vaag begrip is. De rechters erkennen in het algemeen dat politici een bijzondere positie in het publiek debat vertegenwoordigen en dat vrijheid van meningsuiting hierbij zeer belangrijk is. Het betekent echter niet dat zomaar alles gezegd zou kunnen worden. Het Europees Hof voor Mensenrechten zou een uitbreiding van parlementaire immuniteit naar politieke immuniteit niet goedkeuren. Het Hof erkent politieke immuniteit slechts als uitzondering en alleen wanneer een uiting nauw verweven is met de parlementaire taken van de politicus.

Hardt trekt uiteindelijk de conclusie dat het aan de politiek is of de vrijheid van meningsuiting uitgebreid moet worden of niet, maar ook dat een dergelijke uitbreiding niet de huidige problemen zal oplossen. Het uitbreiden van de parlementaire niet-aansprakelijkheid of het introduceren van de nieuwe vorm van immuniteit is wettelijk niet haalbaar of wenselijk. De rechter blijkt grotendeels onwillig om de vrijheid van meningsuiting voor politici in te perken. If it isn't broken, do not fix it.

1 Introduction

Members of virtually all national parliaments in the world enjoy parliamentary immunity.[1] Immunity is a legal instrument which bars, suspends, or limits the possibility of legal action against parliamentarians; it is a privilege rarely loved by public opinion but, according to a broad consensus, deemed necessary to protect the independence and proper functioning of parliaments.[2]
In the Netherlands, parliamentary immunity has repeatedly been at the centre of public and scholarly attention over the past few years, each time occasioned by the prosecution of right-wing parliamentarian Geert Wilders. With regard to the Dutch system of parliamentary immunity, the 'causa Wilders' has sparked both public and scholarly discussion on the question whether the narrow scope of parliamentary immunity as laid down in article 71 of the Dutch constitution should be broadened so as to create a 'political immunity', covering all contributions to political debate, regardless of the forum in which such contributions are made, the person who makes them, and whether this person is a member of parliament. This addresses the idea of a political immunity for the Netherlands by analysing the current Dutch immunity system, reviewing the arguments made in favour of political immunity from a legal perspective, and subsequently arguing against the introduction of political immunity in the Netherlands.

2 Background: Parliamentary Immunity

In order to examine the system of parliamentary immunity of the Netherlands and to understand why certain problems can arise from this system, it is useful to dwell on the *concept* of parliamentary immunity for a moment. Across legal systems, what precisely do we mean when we use this term and which problems arise in its context?

2.1 The Concept of Parliamentary Immunity

Parliamentary immunity is but an umbrella term. It denotes a legal instrument which protects members of parliament from (certain kinds of) legal action. Today, there is wide consensus with regard to the purpose and justification of granting such protection to members of parliament: immunity serves to safeguard the independence of parliament as a legislative body and its unimpeded functioning as a forum for free debate by enabling parliamentarians to exercise their mandate and without undue external influence. Historically, such influence would frequently take the form of both legal and physical pressure from the (monarchical) government. As a result, parliamentary immunity has developed independently in several European states with the purpose of shielding an increasingly assertive legislature from a reactionary and sometimes outright hostile executive.[3] Today, members of virtually all national parliaments as well as members of many local councils, regional parliaments and

[1] With very few exceptions, *cf.* Inter-Parliamentary Union, *Parliamentary Immunity* (background paper), Geneva, September 2006. For a list and summary of most existing systems of parliamentary immunity, see Maingot 2010.
[2] *Cf.* van der Hulst 2000.
[3] Such was the case, for instance, during the French Revolution. In Britain, parliamentary immunity (privilege) had already developed earlier, and more gradually.

international parliamentary assemblies enjoy a certain degree of immunity, though great differences exist with regard to its personal, material, and temporal scope.

When comparing different immunity systems, it is helpful to distinguish two main forms of parliamentary immunity, *non-accountability* and *inviolability*. Parliamentarians who enjoy non-accountability, also referred to as immunity in a narrow sense, enjoy freedom of speech in parliament; they may not be held legally liable for their utterances in parliament or for their voting behaviour. Non-accountability is the most ubiquitous form of parliamentary immunity and is enjoyed – at least on paper – by the members of most parliaments in the world, including all national parliaments in the European Union. The scope of non-accountability is narrow in the sense that it only covers utterances in parliament or directly related to the parliamentary mandate.[4] In most cases, however, it is also absolute in the sense in that it bars *any* form of legal action and that this bar is perpetual, thus protecting parliamentarians even after the end of their mandate. In addition, non-accountability usually cannot be lifted by parliament nor renounced by an individual member.[5]

While non-accountability covers parliamentary activities, inviolability means immunity in a wider sense, protecting parliamentarians from legal action, detention, or investigative measures (e.g. wire-tapping) in response to acts *outside* the immediate scope of the parliamentary mandate. Inviolability thus covers matters which non-accountability does not; it is an extra-professional immunity. Not all countries grant their parliamentarians inviolability, and its exact scope differs significantly between those that do. For instance, in some systems inviolability covers acts entirely unrelated to a member's parliamentary mandate, such as traffic offences, theft, or child custody disputes between a parliamentarian and her former spouse.[6] In other systems, whether inviolability applies depends on the existence of a certain connection between a parliamentarian's alleged offence and her mandate. In some countries, for instance, the presence of *fumus persecutionis* – a reasonable suspicion that legal action against a member of parliament is politically motivated – must be established in order for inviolability to apply. Also the legal effects of inviolability differ greatly between systems, ranging from a mere prohibition of arrest and detention without the authorisation of parliament to a general bar on all legal action, civil and criminal, and of all measures of investigation.

While the material scope of inviolability is thus very broad, it usually applies for a limited amount of time. Often, parliamentarians enjoy non-accountability only during the months that parliament is in session and cease to enjoy it altogether with the end of their mandate. This gives inviolability a merely suspensive effect: even the prosecution of a member of parliament is barred for the duration of her mandate, legal action can be resumed after the mandate has ended, even where it relates to acts committed during the mandate. Lastly, as opposed to non-accountability, inviolability

[4] This is a rough summary: systems differ in their interpretation of what constitutes an utterance, what 'in parliament' precisely means, and what the scope of the parliamentary mandate is. Article 71 of the Dutch Constitution, for instance, grants parliamentarians "and other persons who participate in deliberations" non-accountability "for what they have said in the meetings of the States-General or of committees thereof, or for what they have submitted to them in writing." This potentially includes utterances by non-parliamentarians, such as ministers speaking in the States-General, but it excludes utterances made outside the very narrow confines of actual parliamentary debates. Other systems exempt certain kinds of utterances from the scope of non-accountability (art. 46 of the German constitution exempts defamatory insults) or broaden it so as to include utterances made not *in* parliament but related to the parliamentary mandate.

[5] There are exceptions to this rule. For instance, in the United Kingdom Section 13 of the Defamation Act 1996 provides for a right of parliamentarians to waive parliamentary privilege (non-accountability), thus allowing the courts to examine the member's utterances in Parliament in defamation proceedings against him or her. It currently seems, however, as though the repeal of Section 13 is imminent; in May 2014, the British government has accepted the insertion of that Section into a "schedule of legislation no longer in practical use".

[6] *Cf. Syngelidis v. Greece*, ECHR 11 February 2011, App. No. 24895/07.

can usually be lifted by parliament or an organ thereof (e.g. a special committee) upon a request by the prosecuting authorities.

The immunity systems found in the member states of the European Union cover the entire range of combinations of non-accountability and inviolability, and of degrees of inviolability where it exists. However, the legitimacy and rationale behind parliamentary immunity is largely common ground. Immunity is generally understood as an institutional privilege intended to protect parliament, rather than a personal privilege which exists for the benefit of individual members, even though the latter are usually the immediate beneficiaries of its application. Individual members, one may say, enjoy parliamentary immunity as proxies for the corporate entity – parliament – of which they are a part.

2.2 The Need to Justify Parliamentary Immunity

As a privilege, albeit one formally attached to parliament as an organ of state, parliamentary immunity requires justification. After all, parliamentary immunity is not only met with considerable suspicion and aversion among the general public of many countries. Like any form of immunity, it also necessarily creates an exception to the principle of equality before the law, since it creates a *de facto* privileged class of persons. Hence, it encroaches on what Western Democracies consider one of the most central constitutional goods. In addition, immunity does not only sit uneasily with abstract constitutional values but may also violate positive rights, such as the right of access to justice laid down in article 6 of the European Convention on human Rights (ECHR), as parliamentary immunity limits the right of access to justice for anyone seeking legal redress against a parliamentarian. This makes it the more necessary to subject parliamentary immunity to both judicial and political scrutiny and to develop credible and workable criteria for its justification.

In the light of the widely accepted view that parliamentary immunity is an *institutional* privilege, the standard for a critical evaluation of any specific immunity system ought to be whether and to what extent it actually serves the independence and proper functioning of parliament as an institution, and whether the extent to which these aims are served by immunity outweighs its adverse effects. Such adverse effects are present, first and foremost, where immunity is abused, which is the case whenever it is invoked solely for the personal benefit of a member rather than for the benefit of parliament as an institution. Clearly, the greater the scope of parliamentary immunity, the greater the opportunity for its abuse: where members of parliament benefit from comprehensive inviolability which bars legal action against them even in the most evidently private matters (such as custody disputes) it becomes excessively hard to justify this immunity with reference to the need to protect parliament. Another adverse effect of parliamentary immunity – one that is admittedly hard to measure – consists in a loss of popular acceptance of the privilege, and hence a loss of popular trust and confidence in parliament as a representative institution. Where immunity is perceived to enable parliamentarians to "pursue their own personal and political interests over and above that which is made possible simply by their position of influence,"[7] this is seen as highly undemocratic and often leads to calls for parliamentary immunity to be curtailed or even abolished.[8] In the long run, it is therefore not in the interest of parliament as an institution to maintain a (perceived) imbalance between the satisfying

[7] Wigley 2003, p. 23
[8] Such demands are often made in the wake of corruption cases. *Cf.* Özbudun 2005; Wigley 2009.

and existing need for protection of parliament and creating opportunities for abuse of a privilege.

In conclusion, the need to justify parliamentary immunity exists both on a legal and on a political level. Legally, parliamentary immunity needs to satisfy both national (constitutional) and supranational norms.

2.3 Parliamentary Immunity and the Courts

Over the past two decades, such considerations have influenced the way parliamentary immunity is assessed by courts. In particular the case law of the European Court of Human Rights (ECtHR), but also that of national courts and, to a lesser extent, the Court of Justice of the European Union (CJEU) have recently displayed a tendency towards a what may be called a functional approach to parliamentary immunity: where a parliamentarian faces criminal prosecution or other legal action for an act committed *in the exercise of his or her function* as a member of parliament, the courts are generally willing to uphold immunity. This is the case, for instance, where a member of parliament makes an otherwise punishable statement in the course of a plenary debate. Here, the courts accept the rationale according to which the effective discharge of a representative mandate requires absolute freedom of speech in parliament. Where, however, the act of a parliamentarian falls squarely within the private sphere and bears no discernible connection to the exercise of the parliamentary mandate, both European and national courts are increasingly ready to hold the application of immunity unlawful. Acts which, under this functional approach, do not merit immunity include the aforementioned example of breach of custody agreements, tax fraud, or any criminal act committed in a private capacity.[9]

One effect of this functional approach to the legal assessment of parliamentary immunity is that it creates a certain judicial pressure against immunity systems which feature broad inviolability. As has been explained above, inviolability is a form of immunity which, by definition, covers extra-parliamentary acts of members of parliament. Especially where such extra-parliamentary acts are not in some way connected to the political activities of a parliamentarian (such as political campaigning or giving speeches at election rallies) but are in fact entirely private, it seems that the functional approach leaves little to no room for a justification of inviolability. Even though the courts – in particular the ECtHR – have never in so many words acknowledged that their approach to parliamentary immunity follows the divide between non-accountability and inviolability, it is nonetheless clear that in a large majority of cases, inviolability fails the functionality test.

However, it is often difficult to distinguish neatly between those acts which are necessarily incidental to and inseparably linked with the exercise of the parliamentary mandate and those which do not. On the one hand, the exact scope of the mandate is often ill-defined. What exactly are the tasks of a parliamentarian? Is it fair to assume that parliamentarians only act in their capacity as representative when they are engaged in official parliamentary business, while it is clear that, today, appearances in the media and at campaign meetings are equally essential elements of being a member of parliament? Especially in countries where parliamentary immunity is limited to non-accountability and parliamentarians do not enjoy any form of inviolability, the need for a more modern and much broader conception of which activities can constitute “the exercise of the mandate” is frequently discussed. On the other hand,

[9] For a full review of the body of case law on which this analysis is based, see S. Hardt, *Parliamentary Immunity*, Cambridge and Antwerp: Intersentia, 2013, chapter 2.

broad inviolability has often been defended with the argument that limiting the scope immunity to acts committed in the course of 'proper' parliamentary business is insufficient, since legal action against members of parliament could be politically motivated even where it does not relate to acts which are themselves related to the mandate. This argument is not equally plausible in all countries, even within the European Union. Whether the additional level of protection that inviolability offers is in fact required to safeguard the functioning of parliament depends on the political 'climate' and under which a parliament operates; that is, it depends on whether parliamentarianism and its values are a stable, and respected element of a country's political system. Where the democratic culture that functioning parliamentarianism requires is unstable or less developed, parliament may be at a greater risk of undue influence and a broader scope of immunity, including broad inviolability, may be in order. It has been argued that this is the case for parliaments in some post-communist states as well as in Turkey.
In any event, it is clear that the legal appraisal of parliamentary immunity remains difficult. Although the functional approach has broad clearer criteria of assessment, it is impossible to draw a conclusive and generally applicable fault line between justified and excessive immunity, simply because too many non-legal factors have to be taken into account. Thus, both courts and policy makers will have to continue to resort to a case-by-case review in order to determine which form and extent of parliamentary immunity is justified in a given set of political circumstances. This has to be borne in mind when discussing the immunity systems of the Netherlands and the European Parliament in the following.

3 The Case Against Political Immunity in the Netherlands

3.1 Only limited non-accountability, no inviolability

In the Netherlands, parliamentary immunity is laid down in article 71 of the Constitution, which reads as follows:

De leden van de Staten-Generaal, de ministers, de staatssecretarissen en andere personen die deelnemen aan de beraadslaging, kunnen niet in rechte worden vervolgd of aangesproken voor hetgeen zij in de vergadering van de Staten-Generaal of van commissies daaruit hebben gezegd of aan deze schriftelijk hebben voorgelegd.

The members of the States-General, the ministers, the secretaries of state and other persons who participate in deliberations may not be prosecuted or held liable for what they have said in the meetings of the States-General or of committees thereof, or for what they have submitted to them in writing.

Article 71 of the Constitution prescribes an immunity which is strictly limited to non-accountability for utterances in parliament, including committees, made during a parliamentary meeting or submitted in writing. Thus, the Dutch immunity system not only does not feature inviolability, i.e. immunity in the extra-professional sphere, also the scope of non-accountability is narrow as compared to systems in which acts and utterances 'in the exercise of the mandate' are covered, effectively excluding all

activities out of parliament (and even in parliament outside meeting hours!), including political activities such as campaign rallies and media interviews. Even where a member of parliament literally repeats a statement in a media interview which he or she has made previously in the plenary of the Second Chamber, non-accountability does not apply.

It is important to realise that the idea of broadening the Dutch immunity system and that of introducing 'political immunity' are closely related to this very limited nature of the existing immunity system. In fact, the Netherlands may well be the only country worldwide in which a considerable fraction of public opinion pleads in favour of extending immunity. To a very large extent, however, this demand is also due to disputes on the appropriate way of dealing with highly controversial and offensive political (and other) statements in public discourse, such as those made by Geert Wilders.

3.2 The 'causa Wilders': a case for broadening the scope of parliamentary immunity?

In the Netherlands, like in many other states, parliamentary immunity as a constitutional institution has long led a rather quiet, inconspicuous existence.[10] Only recently it has risen to a level of notoriety unknown since the first half of the twentieth century, when the question was discussed whether immunity should be limited so as to exclude certain utterances of extremist and revolutionary parliamentarians. Today, parliamentary immunity is again the object of debate, but this time, the question is the opposite: does an immunity system which only protects parliamentary debate do justice to modern forms of political discourse, *or should it be broadened*? In other words, should parliamentary immunity be replaced or supplemented by *political* immunity?

The issue of the adequacy of non-accountability ex article 71 of the constitution has its origin in the case of Geert Wilders, a political populist of the extreme right and member of the Second Chamber. On numerous occasions, Wilders has agitated against Islam and Muslim immigrants and pursued a political agenda with the aim of halting or limiting the immigration of non-western persons into the Netherlands and curtailing practice of Islam. Among others, he had demanded a ban of the Quran, which he compared to Hitler's *Mein Kampf* and referred to as "that fascist book".[11] In August 2007, he had released the film *Fitna*, the tenor of which is equally anti-Islamic. While Wilders has also represented his anti-Islamic stance in the Second Chamber, his most contentious utterances were made in public speeches, interviews and other

[10] Remco Nehmelman, "Spreken is zilver, maar wie bepaalt wanneer zwijgen goud is?", 5 *Ars Aequi* 60 (2011), p. 355.
[11] Geert Wilders, "Genoeg is genoeg: verbied de Koran", in *De Volkskrant*, 8 August 2007.

publications outside parliament and did therefore not fall under article 71. The question thus had to be answered how far a politician and member of the States-General may go in defending his views in public.

3.2.1 Geert Wilders and the question of freedom of speech of politicians

Initially, the Dutch prosecution service decided not to charge Wilders for his utterances. Although these utterances were potentially offensive, it argued, they had to be understood as contributions to public political debate and were thus not punishable. However, upon a number of complaints by private persons and interest groups, the Amsterdam Court of Appeals reviewed this decision.[12] Most interesting for the ensuing debate on necessary scope of freedom of speech for politicians is the court's analysis of the argument according to which utterances made in the context of public debate justify a wider freedom and are therefore not punishable. The court rejects this argument:

> The sole circumstance that the utterances of Wilders as a politician, outside of parliament where he enjoys criminal immunity, have been made as part of public debate does not, in the opinion of the Court, take away their criminal punishability. […]
>
> Although the Court is well aware that a politician, also in extra-parliamentary debate, must enjoy as much freedom as possible in formulating and disseminating his political views, the Court is of the opinion that this freedom does not relieve the politician of his responsibility to make contributions to public debate which are acceptable to society.
>
> The assessment of the manner in which public debate is conducted in terms of content does not in itself belong to the tasks of the judiciary. This is different where a contribution to public debate is unnecessarily offensive for a group of believers by violating their religious dignity, while the contribution also incites to hatred, intolerance, enmity and discrimination. Then, the criminal law enters the picture. In the past, people, also politicians, have been convicted for less far-reaching utterance than those done by Wilders.[13]

With this conclusion and considering that article 10 of the ECHR allows certain justified exceptions to freedom of speech, the Court of Appeals ordered the prosecutor's office to charge Wilders for insult of a group of persons and incitement to hatred.

The trial was held in Amsterdam District Court, which subsequently acquitted Wilders of all charges and thereby followed the plea of the prosecutor. The acquittal was primarily based on the argument that the utterances in question were directed against Islam as an ideology, and not against the followers of that ideology; therefore, they did not insult Muslims as a group of persons, even though they might find Wilders' utterances offensive. On the basis of a similar argumentation, the court dismissed the charge of incitement to hatred against Muslims. With regard to the alleged incitement

[12] Hof Amsterdam, 21 January 2009, LJN: BH0496.
[13] *Ibid.*, para. 12.1.4.

to discrimination on the basis of religion – one of the contested utterances contained a demand that no Muslim immigrants be allowed into the country – the court was of the opinion that, even though Wilders had definitely proposed to discriminate between Muslims and non-Muslims in immigration policy, this was not punishable in a contribution to public debate by a politician.[14] In March 2014, during a campaign speech in the Hague, Wilders demanded "fewer Moroccans" in the Netherlands. Following this utterance, over 6.400 criminal complaints and more than 15.000 discrimination complaints were filed against Wilders. Half a year later, on 10 October 2014, the Dutch prosecution service announced that Wilders will again be charged with making criminal utterances. As during the first round of prosecution in 2009 – 2011, this announcement has sparked public debate on the question whether the criminal courts are the right forum to judge Wilders' utterances. Are they not contributions to an ongoing political debate (about the position of Muslims in the Netherlands and about immigration from non-western countries)? And as such, should they not be exempt from the application of the criminal law? In other words, should political statements, even where they are discriminatory and offensive – such as the demands for "fewer Moroccans" – not be immune?

3.2.2 The idea of political immunity

The two past court rulings *in re* Wilders and the recent decision to prosecute him again illustrate that the core legal issue in this and similar cases is actually not the scope of the parliamentary immunity. Since the allegedly criminal utterances for which Wilders was prosecuted and those which are at issue in 2014 were all made outside parliament, it is clear that article 71 of the constitution could not and cannot be used as a defence. Conversely, similar utterances which Wilders has repeatedly made in the Second Chamber were never subject of litigation, since he would undoubtedly have been protected by non-accountability, as the Court of Appeals has explicitly recognised.

The material content of the immunity currently in place is thus uncontested. Rather, the unresolved problem which we encounter in the Netherlands is whether politicians enjoy – or *should* enjoy – a wider freedom of speech in public debate than other citizens due to their political role and their task of representing a fraction of public opinion. It is in this light that we should read demands for a broadening of the scope of immunity to cover contributions to public debate outside parliament. Before we address such demands, however, it is useful to make a brief inventory of the current state of freedom of speech for politicians.

[14] Rechtbank Amsterdam, 23 June 2011, LJN: BQ9001.

(A) Freedom of speech for politicians in public political debate

Do Dutch politicians enjoy a higher degree of freedom of speech in public debate than ordinary citizens? A definite answer to this question is difficult to find in Dutch case law. Nieuwenhuis, who has reviewed this body of case law comprehensively in an article of 2010,[15] finds that results are inconclusive.

At times, Dutch judges seem to tend towards a positive answer: in one relatively recent case, an accountant sued a member of a municipal council for defamation after the latter had made wrongful comments about him in political statements contained in a letter to the municipal executive. The council member had published that letter on the internet and therefore did not enjoy non-accountability. The court was still confronted with a conflict between the right to freedom of speech and the right to a good name and reputation. It considered that

> "In European and Dutch case law it is generally accepted that the freedom of opinion, *certainly that of a politician*, usually weighs heavier than the right to protection of a person's honour and good name, even if this rule is not absolute."[Emphasis added][16]

In this particular case, the court honoured the rule thus formulated and found in favour of the defendant council member.

Also in the ruling in which the Amsterdam Court of Appeals ordered the prosecution of Geert Wilders, the court found that "a politician, also in extra-parliamentary debate, must enjoy as much freedom as possible in formulating and disseminating his political views". However, in that case it attached a greater weight to the interest of the persons whose right Wilders had allegedly violated and added that "this freedom does not relieve the politician of his responsibility to make contributions to public debate which are acceptable to society."[17]

Yet, in the case of another Dutch right-wing politician and member of the Second Chamber, Hans Janmaat, who had publicly announced (outside parliament) the aim of his party to "abolish multicultural society", the Dutch Supreme Court stated that politicians speaking in public were under an obligation of "restraint and consideration", in particular in the light of the influence which their statements have on public opinion.[18] In this sense, a person's capacity of being a member of parliament can even be interpreted as an extra burden on freedom of speech, since the public attention and impact which public utterances of parliamentarians are likely to have result in an

[15] Aernout Nieuwenhuis, "Tussen grondrechtelijke vrijheid en parlementaire onschendbaarheid: de vrijheid van meningsuiting van de parlementariër", 1 *Tijdschrift van Constitutioneel Recht* 1, 2010, p. 21.

[16] Hof Amsterdam, 21 July 2008, LJN BD9027.

[17] Hof Amsterdam, 21 January 2009, LJN: BH0496, para. 12.1.4.

[18] HR 18 May 1999, NJ 1999, 634.

additional duty of restraint, as we have already observed in our analysis on ECtHR case law on the issue of the freedom of expression of parliamentarians. In particular the case *Féret v. Belgium*[19] has illustrated that the ECtHR recognises this duty of restraint, especially with regard to racist statements and hate speech. On the other hand, Nieuwenhuis cites rulings of lower courts in which the judges found that politicians, especially members of parliament, must be able to voice their views with the necessary force,[20] in particular during election campaigns.[21]

It is clear that a 'right' to poignancy and force in public political statements is hard to reconcile with a duty of restraint. As a result, we must find Dutch case law somewhat ambiguous as to the precise scope of the freedom of speech of politicians in public debate.

This ambiguity is also owed to the influence of ECtHR case law, which is directly applicable in the Netherlands' monist legal system and which Dutch national courts frequently use as a point of orientation. We have already seen in Chapter II that the body of case law from Strasbourg does not provide an accurate, clear delimitation of the degree of freedom of speech enjoyed by politicians outside parliament. It is useful to recall the most important results of this body of case law. On the one hand, the ECtHR has found in *Castells v. Spain* that

> [w]hile freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament […] call for the closest scrutiny on the part of the Court."[22]

On the other hand, the ECtHR seems more ready to accept an interference with a politician's freedom of expression – i.e. to accept his criminal conviction – where his utterances do not directly relate to political matters (see e.g. *Keller v. Hungary*[23]). This does not mean, however, that statements which are political in nature or relate to matters of public interest are generally protected: in *Öllinger v. Austria*[24] the ECtHR found that the statements which a parliamentarian had made but was unable to prove were in fact important for societal debate. Nevertheless, the Court held that the limitation of the member's freedom of expression imposed by the Austrian court was not disproportional. Finally, *Féret v. Belgium* has made it amply clear that the political

[19] *Féret v. Belgium*, ECHR 16 July 2009, app. no. 15615/07.

[20] Rechtbank den Haag, 7 April 2008, LJN BC8732.

[21] Hof Amsterdam, 10 March 1983, NJ 1984, 352.

[22] *Castells v. Spain*, ECHR 22 April 1992, app. no. 11798/85, para. 42.

[23] *Keller v. Hungary*, ECHR 4 April 2006, app. no. 33352/02.

[24] *Öllinger v. Austria*, *ECHR* 13 May 2004, app. no. 74245/01.

nature or societal relevance of the content of an utterance does not automatically merit greater freedom of speech. Especially sensitive topics such as immigration and the integration of foreigners must be handled with care – also, and perhaps especially, by politicians.

In conclusion, the case law of both Dutch national courts and the European Court of Human Rights results in a somewhat vague picture of the exact extent of the freedom of speech of politicians in public debate. It is clear, on the one hand, that the courts generally admit the special position of politicians as representatives of the people and recognise their enhanced need for freedom of expression. On the other hand, this special position does not rule out legitimate limitations of this freedom – it may even *cause* such limitations where politicians are assumed to have a special responsibility when speaking publicly. But whether a limitation is legitimate in a specific case, i.e. whether a politician may be held legally liable for his utterances is hard to determine with certainty. One factor which certainly plays an important role is whether the utterances in question are of a political nature: if a public statement cannot be attributed to public political debate, it does not merit an enhanced freedom of expression. However, this criterion is hardly suitable for providing much clarity – after all, as Thomas Mann famously stated "everything is politics." And even if the courts are willing and able to apply a more refined definition of what falls within the category of 'contributions to public political debate', it is unlikely that this will simplify the adjudication of cases like that of Geert Wilders.

(B) Does parliamentary immunity offer a solution?

Even though the courts have generally acknowledged that politicians deserve and require a wide freedom of expression even when speaking outside parliament, the somewhat blurred picture of this freedom outlined above does not allow the conclusion that politicians in the Netherlands enjoy special protection. While in France and other countries the prosecution of parliamentarians (though not necessarily members of the government) for criminal acts committed outside the parliamentary sphere can be suspended at the behest of parliament where it deems this desirable, no such possibility exists in the Netherlands.

At the same time, political discourse no longer takes place exclusively in the plenary hall of parliament but increasingly also in the public media, where politicians have to disseminate and defend their views, proposals and political goals vis-à-vis their electorate. Also parliamentary debates, now often broadcast live on television or the internet, function as a platform for communication with the wider public, while actual political decisions are (still) taken in the backrooms of parliament, in the quarters of political parties or behind closed doors by the government. Under such changed

circumstances, it is argued, maintaining the strict separation between what is said in and outside of the parliamentary meeting appears artificial and anachronistic.

Consequently, it has been proposed to broaden the scope of parliamentary immunity so as to effect "the absolute protection of the spoken word of members of the Chambers outside of parliament."[25] This demand, put forward by Peters in 2010, has again gained some momentum in the wake of the prosecution service's decision to charge Wilders again.[26] Back in 2010, Peters had put forward some arguments in support of this demand. First, he argues that the nowadays artificial separation of parliamentary and extra-parliamentary political debate may create problems in the adjudication of allegedly criminal extra-parliamentary speech; what, for instance, if a parliamentarian makes a potentially discriminatory legislative proposal and is later asked for further elaboration in an interview?[27] Second, he makes the teleological argument that, if parliamentary immunity has as its goal the protection of free political deliberation and if such deliberation now increasingly takes place beyond the walls of the plenary hall, it would be logical if extra-parliamentary political speech were protected just as much as speech in parliament. He adds that this protection should not discriminate between contributors to public debate with and without a parliamentary mandate but that it should cover *any* contribution, also by non-politicians and the press.[28] This would of course render trials like that against Geert Wilders impossible and replace them, as Peters hopes, with fierce but open public political debate.

Many Dutch commentators throughout the political spectrum have concluded, in the wake of the trial against Wilders, that the criminal courts are not the right forum to judge public utterances of politicians[29] and some have also joined Peters' call for a substantial broadening of parliamentary non-accountability.[30] In order to discuss such demands from a legal point of view, it is first necessary to separate the legal and political issues which are raised by the proposal to broaden non-accountability. The main political question is whether absolute freedom of expression in public political debate is desirable or, respectively, whether and how the boundaries between the right to freedom of political expression and other rights need to be clarified in the law or redrawn along different lines. This question of desirability can of course not truly be answered from a purely legal angle. We can, however, explore the possibility and legal implications of broadening parliamentary non-accountability within the existing

[25] Jit Peters, "Immuniteit ook buiten het parlementair debat", in 1 *TvCR* 3, 2010, p. 329.

[26] *Cf.* editorial comments of *Trouw* and *De Volkskrant* on 11 October 2014.

[27] Peters, *op. cit.*, p. 329.

[28] *Ibid.*, p. 330.

[29] *Cf.* Joop van den Berg, "Geen gewone burger", column on the website *Parlement & Politiek* (parlement.com), 1 July 2011.

[30] E.g. Femke Halsema, former leader of the Green/Left party in the Second Chamber. See "Halsema: meer parlementaire onschendbaarheid", in *De Volkskrant*, 11 January 2011.

constitutional framework and the nature of the immunity which would result from such an operation.

Is it legally possible to expand the scope of parliamentary non-accountability so as to establish an absolute freedom of political expression for parliamentarians outside parliament? It clearly is not. First, the freedom of expression which members of the States-General enjoy in the parliamentary meeting is by no means absolute: they may neither speak whenever they like, nor, crucially, say *what* they like. Although article 71 of the constitution withdraws utterances in parliament from the application of the criminal law, the parliamentary Chambers themselves and their chairpersons in particular remain competent to sanction members for their utterances according to the parliamentary rules of procedure. Even though it is true that little use is currently made of the chairman's power to sanction,[31] the existence of this power reflects the logic of all parliamentary immunity: it is not meant to confer upon members a *carte blanche* for licentious speech, but to serve the separation of powers and to ensure parliamentary self-government. Outside parliament, the chairpersons of the parliamentary Chambers are unable to maintain order and to sanction – and even if they were able to do so, this would be irreconcilable with the separation of powers. Thus, if article 71 of the constitution were to be amended so as to read "what they have said in political debate" instead of "what they have said in the in the meetings of the States-General or of committees thereof", this would clearly defy the institutional logic of parliamentary immunity. Moreover, it would certainly not be acceptable under the ECHR: the Court in Strasbourg has accepted parliamentary immunity as an exception to access to court (article 6 ECHR) only as far as a protected act or utterance is narrowly connected to the parliamentary tasks of a member.[32] In other words, an *institutional* link is required.

Since the extension of parliamentary non-accountability is thus not possible, we may ask ourselves whether it would be a feasible alternative to ensure absolute freedom of expression for *all* contributors to public political debate and not only for parliamentarians. For instance, a general constitutional right could be created to that effect, and an exception of political speech added to all crimes of utterance in the criminal code. This would create a new form of *political* immunity, quite independent of the institution of parliament.

However, would absolute freedom even of potentially discriminatory, anti-democratic or insulting political speech – and we may allow ourselves to question this desirability – solve any problems? It does not appear so. To the contrary, absolute political immunity would entail insurmountable conflicts of fundamental rights, since it would

[31] Peters, *op. cit.*, p. 329.

[32] In *Tsalkitzis v. Greece*, the Court described its test as follows: "la Cour recherchera si les actes incriminés étaient liés à l'exercice de fonctions parlementaires stricto sensu afin de conclure sur la proportionnalité ou non de la mesure mise en cause." (para. 47).

place freedom of speech above such rights as privacy and non-discrimination, on the sole condition that an utterance is of a political nature or contributes to public debate. This way, the new immunity would first fail the strict test of the ECtHR if it were claimed by persons whose utterances can be attributed to the state, such as ministers speaking on behalf of the government. Without the possibility to justify the immunity on the basis of the institutional needs of parliament and the separation of powers, it would violate article 6 of the Convention.

Further, problems would not only arise in relation to the ECHR but also to other international obligations. For example, the Netherlands has ratified the International Convention on the Elimination of all Racial Discrimination (ICERD). As opposed to other states (such as Belgium), it has not made a reservation against (parts of) article 4 of this Convention, which requires the state parties among others to impose a criminal sanction on "[…] all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin […]". Absolute freedom of speech in political debate would prevent the criminal prosecution of racist utterances and thereby undoubtedly violate this provision.

Finally, even if a system of comprehensive political non-accountability were introduced, the courts would still face the almost impossible task to define "political speech" and to distinguish it, for instance, from non-political criminal hate-speech.

In conclusion, whether a broadening of freedom of speech – either that of politicians or that of all persons – is *desirable* is ultimately a decision which must be left to political discourse. However, the above clearly shows that neither the option of extending parliamentary non-accountability to wider public debate nor that of introducing a genuine political immunity is in fact legally feasible. This is a result, on the one hand, of the necessarily institutional character of parliamentary immunity and, on the other hand, of international obligations.

3.3 Policy suggestions

On the basis of the above considerations, the following policy suggestions can be made:

1. The introduction of 'political immunity', either by means of an extension of existing parliamentary immunity or by means of a new instrument, would violate higher legal norms and it therefore not legally feasible. It should not be pursued further.

2. The functional approach whose emergence can be observed in courts throughout Europe suggests that a broadening of parliamentary immunity by adding a

layer of inviolability to the existing non-accountability would be anachronistic. However, if limited in extent – limited in scope, that is, to acts and utterances which are *necessarily incidental* to the exercise of the parliamentary mandate – and paired with an updated definition of the tasks and functions of a parliamentarian, the introduction of inviolability would not necessarily violate legal norms. However, it is highly doubtful whether the adoption of a very limited inviolability system would solve the issues which have given rise to the idea of political immunity. Amending the immunity system laid down in article 71 of the constitution is therefore not the appropriate way of addressing these issues.

3. In the Netherlands, politicians enjoy a very high degree of freedom of speech, limited *de iure* only by prohibitions of hate speech, insult, and discrimination, while *de facto* even this limitation is not a strict one, since the courts have so far been relatively reluctant to enforce it and the existing body of case law fails to delimit freedom of speech neatly. In terms of policy on the issue of freedom of speech of politicians, it is hence neither reasonable nor necessary to pursue a further extension of this freedom: if it isn't broken, do not try to fix it!

Over de auteur

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In een vrije staat dient iedereen die in het bezit kan worden geacht van een vrije wil, zichzelf te besturen. De wetgevende macht zou dan ook bij het volk in zijn geheel moeten berusten. Maar aangezien zoiets in de grote staten een onmogelijkheid is en ook in kleine staten op veel bezwaren stuit, dient het volk vertegenwoordigers aan te stellen die alles moeten doen wat het volk zelf niet kan.

Montesquieu, *Over de geest van de wetten* (1748)

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