

Freedom of speech under attack

Ellian, A. & Molier, G. (eds.). Den Haag: Eleven international publishing, p. 77-98

Extension of Parliamentary Immunity

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1 Introduction

With the acquittal of Geert Wilders on the 23th of June 2011 a long lasting and controversial legal process came to an end. Wilders was prosecuted for the rather strong political statements he had made outside the parliamentary arena.² It is noteworthy that if Wilders would have made his statements during a parliamentary debate, that is, at a moment that parliament would be 'officially' in meeting, he could not have been prosecuted. Article 71 of the Dutch Constitution provides that anyone taking part in parliamentary deliberations cannot be prosecuted or otherwise held liable in law for anything he says during the sittings of the States General or its committees or for anything he submits to them in writing.³ This provision deals with the doctrine of parliamentary immunity. The Dutch legislator opted for a very limited scheme of immunity compared with other European constitutions. A Member of Parliament does not enjoy immunity for statements expressed outside parliament, which means that he can be prosecuted for alleged criminal statements made outside the assembly. Thus, the limited constitutional regime of parliamentary immunity in The Netherlands entails that the place of action, namely parliamentary proceedings, is essential for immunity. This system is characterised as the system of 'intraparliamentary immunity'. Moreover, this immunity applies not only to parliamentarians, but also to members of the government and even to any other person who is allowed to take part in parliamentary deliberations, such as civil servants.

The Wilders trial led to a debate about the extension of the immunity of parliamentarians. Some legal scholars argued that the reach of parliamentary immunity should be broadened and should also cover statements made outside parliament. This change would make it impossible to prosecute members of the States General for their political statements made outside the Assembly. Some, including Geert Wilders, proposed to change criminal law to the extent that *everyone* in the Netherlands should have full freedom of (political) expression. In this chapter the doctrine of parliamentary immunity will be discussed and, in addition, different appearances of parliamentary immunity will be distilled. The structure of this chapter is as follows: first, the history of the Dutch parliamentary immunity will be set out. This will be helpful in understanding the development of the

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² Amsterdam District Court, 23 June 2011, *LJN*: BQ9001.

³ The States General consists of the House of Representatives and the Senate.

concept of parliamentary immunity in The Netherlands. The current codification of article 71 of the Dutch Constitution is regarded as a (provisional) ending point of this development. Subsequently, some foreign systems will be looked into. This will show that in some countries there is great variety in how parliamentary immunity is regulated in different countries. Then the case law of the European Court of Human Rights (ECHR) will be examined. Over the last few decades the Strasbourg Court has handed down a couple of relevant, but also contradictory, judgements on the matter of parliamentary immunity. Furthermore the views on the concept of parliamentary immunity in legal literature will be set out. Both in recent and ancient literature legal scholars have discussed the concept and scope of parliamentary immunity. Thereafter, this chapter will rethink the current scheme of parliamentary immunity in The Netherlands. In this context we will focus on the temporal scope of parliamentary immunity (when does immunity start and end?) and the question whether statements made outside parliament should also fall within the scope of parliamentary immunity. This chapter will end with a conclusion.

2 History of the Doctrine of Parliamentary Immunity

2.1 Early Development

The doctrine of parliamentary immunity already existed during the Roman Empire. At that time, it was prohibited to attack the Roman people's representatives or interfere in the exercise of their functions.⁴ The motive behind this scheme was to guarantee the representatives of the Roman people freedom in the exercise of their jobs.⁵ The immunity rules for British Members of Parliament are the oldest still in force rules on parliamentary immunity. Article 9 of the Bill of Rights, adopted in 1689, states: 'That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.' In the centuries before 1689 England had grown to become a parliamentary democracy. The influence of Westminster Parliament on legislation and on monitoring the government gradually increased throughout the centuries. The explicit codification of parliamentary immunity in the Bill of Rights should therefore mainly be seen as a protection clause against the British monarch. Before the codification of parliamentary immunity in the Bill of Rights it occasionally occurred that the King imprisoned a Member of Parliament in response to unwelcome statements. In this context the apprehension of Richard Strode in 1512 is illustrative. Strode, a Member of Parliament, tried to introduce a bill to improve the working conditions in the British tin mines in Dartmoor. However, even before Strode could travel to Westminster he was arrested and imprisoned for obstruction. The British Parliament rejected this way of acting and passed a bill called the Strode's Act, officially named the Privilege of Parliament Act 1512. This bill condemned the judgement that convicted Strode and stated that judges had to act differently in similar future cases. Nevertheless, the bill did not seem to help much as British parliamentarians were systematically imprisoned for their political statements by order of the King up to 1689. The dethronement of King James II in 1688 is regarded as a turning point in British history as Great Britain has been a parliamentary democracy ever since.⁶ The absolute supremacy of the

⁴ M. van der Hulst, *The Parliamentary Mandate: A Global Comparative Study*, Inter-Parliamentary Union, Geneva, 2000, P. 63.

⁵ S. McGee and A. Isaacs, *Rules on Parliamentary Immunity in the European Parliament and the Member States of the European Union* (final draft), European Centre for Parliamentary Research and Documentation, Brussels, 2001, Introduction section.

⁶ I. Loveland, *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction*, 4th edition, Oxford University Press, Oxford, 2006, P. 265-266.

British monarch has ended since. Up till now the codification of the rights of the parliament, including parliamentary immunity, in the Bill of Rights has had a very important constitutional value.

Even though immunity is an important parliamentary privilege, the protection provided for in art. 9 Bill of Rights is limited to what has been said in parliament. About one century later, in 1791, another model for the protection of the position of representatives originated in France. During the French Revolution in which the monarchy was overthrown and replaced by the Republic there was a strong call for strengthening the position of parliamentarians. The French constitution of 1791 included an immunity clause under which, unlike the British model, parliamentarians did not only enjoy immunity within the parliament, but were also protected against prosecution for their behaviour outside parliamentary deliberations. However, a majority of the parliament could make prosecution possible by lifting parliamentary immunity.

The two models of parliamentary outlined above have served as a model for other Western parliamentary democracies. On the one hand there is a very limited model that entails that immunity only exists for what has been said in parliament (intraparliamentary immunity) and on the other hand we see a model that also covers statements and even behaviour outside sittings of parliament (extraparliamentary immunity). The current Dutch model is similar to the British scheme. The British model, for that matter, has been applied to a lesser extent than the broader French variant. An important difference between the two models has already been demonstrated. In the British and Dutch model parliamentary debate enjoys immunity, while in the French model the member of parliament enjoys immunity. Moreover, in the latter scheme the scope of the immunity may vary from covering all actions both inside and outside parliament (inviolability) or may merely protect the freedom of expression of a member of parliament.

2.2 Development in The Netherlands

The first provisions regarding the doctrine of parliamentary immunity in the Netherlands were written down in the Constitution of the Batavian People of 1798.⁷ Even though there were some systems of protection and freedom of advice before 1798, those only had minor significance.⁸ It is no surprise that the provisions on parliamentary immunity in the Constitution of 1798 were strongly influenced by the French Constitution of 1791. Actions of members of parliament, both inside and outside parliament, were ought to be non-prosecutable. In the relationship between parliament, the government and the courts the freedom and independency of parliament had to be ensured.⁹ The provisions of the Constitution on parliamentary immunity were rather comprehensive. A separate section of the Constitution, entitled 'Safeguarding members of the Representative Body', ensured that Members of the Representative Body could not be 'hunted down, accused, or condemned' for written or spoken statements in the exercise of 'their Post'.¹⁰ If one wanted a member of parliament to be prosecuted for acts committed outside parliament then first, similar to the French model, the

⁷ Cf. also P.J. Oud, *Het Constitutioneel Recht van het Koninkrijk der Nederlanden, Deel I [Constitutional Law of the Kingdom of the Netherlands, Part I]*, 2th edition, W.E.J. Tjeenk Willink, Zwolle, 1967, P. 596.

⁸ D.J. Elzinga, 'Parlementaire Onschendbaarheid voor Volksvertegenwoordigers, Verouderd Instituut of Onmisbare Bescherming?' [Parliamentary Immunity for Representatives of the People, Obsolete Institution or Indispensable Protection?], in: D.J. Elzinga (Ed.), *De Staat en het Recht: Opstellen over Staatsrecht en Politiek [The State and the Law. Essays on Constitutional Law and Politics]*, W.E.J. Tjeenk Willink, Zwolle, 1990, p. 119.

⁹ Oud, 1967, P. 595.

¹⁰ Article 71 of the Constitution of the Batavian People of 1798. Cf. also G.W. Bannier, *Grondwetten van Nederland [Constitutions of The Netherlands]*, W.E.J. Tjeenk Willink, Zwolle, 1936, P. 65.

Representative Body had to give its consent. The Supreme Court was the competent judicial authority to decide on the question whether a member of parliament should be convicted.¹¹ In the period between 1798 and 1814, the rules on parliamentary immunity, changed a couple of times. Eventually little was left of the comprehensive scheme that had been introduced in 1798.¹²

Between 1814 and 1848, the legislator barely paid attention to the doctrine of parliamentary immunity. The constitutions of 1814, 1815 and 1840 only provided for a limited immunity in respect of criminal prosecution. The immunity could be lifted by parliament itself.¹³ In 1848 the legislator established a system of parliamentary immunity in the Dutch Constitution. The ideal of strengthening the position of the Dutch parliament was one of the main reasons for writing a new Constitution. Unprecedented revolutionary constitutional reforms took place under the inspiring leadership of J.R. Thorbecke. For example, for the first time in Dutch constitutional history, the Constitution provided for a system in which the members of the States General would be elected directly by the people.¹⁴ The codification of the doctrine of parliamentary immunity in the new Constitution seems quite logical in the light of the underpinning ideal to strengthen the position of parliament. The former Article 92 granted immunity for 'advices given by them (members of parliament) in the assembly'. This provision enabled Members of the States General to say what they considered desirable in the light of the public interest without having the fear of prosecution.¹⁵ Consequently the newly introduced system of parliamentary immunity strengthened the independent position of parliamentarians.¹⁶ Adhering to the British model the Dutch system of parliamentary immunity was restricted to statements made during debates in the States General. Unfortunately, it is not possible to exactly figure out the reasoning on which this system of limited immunity was based. Probably extending the immunity to behaviour of members of parliament outside parliamentary deliberations would be a step too far in the eyes of the Crown. It is also likely that conservative members of parliament would not have agreed with the implementation of a broader concept of immunity.¹⁷

After 1848 the codification of parliamentary immunity in the Dutch constitution has undergone some changes. In the Constitution of 1887, the term 'advices' was removed and the scope was broadened to the extent that it also covered the written or spoken statements of members of parliament at the sittings of the States General or one of its committees. This change meant that the statements made did not have to relate to the subject of the meeting.¹⁸ In 1922 the system of immunity was extended to ministers and other persons participating in the debate. In 1948 State Secretaries were also placed under the protection of the immunity clause. By broadening the scope of the provision parliamentary immunity developed from a personal privilege for Members of the States General to a privilege for everyone participating in the sittings of the States General. Finally, in 1983 the words 'or otherwise held liable in law' were added to the current article 71 of the Dutch Constitution. The legislator thus

¹¹ Article 119 of the Dutch Constitution provides a scheme as to the prosecution and trial of misfeasance. In this system the Supreme Court acts as the so-called *Forum Privilegiatum*. This will be further elaborated in paragraph 6.

¹² Cf. Bannier, 1936, P. 171-172.

¹³ Elzinga 1990, P. 121.

¹⁴ However, the suffrage conferred on the Dutch people has to be considered as a census suffrage.

¹⁵ Oud 1967, P. 597.

¹⁶ P.P.T. Bovend'Eert and H.R.B.M. Kummeling, *Het Nederlandse Parlement [The Dutch Parliament]*, 10th edition, Kluwer, Deventer, 2004, P. 118.

¹⁷ Vgl. Elzinga 1990, P. 121 ff.

¹⁸ Elzinga 1990, P. 121.

expressed that parliamentary immunity includes protection against criminal as well as civil, administrative and disciplinary liability. Ever since, article 71 of the Constitution reads as follows:

“Members of the States General, Ministers, State Secretaries and other persons taking part in deliberations may not be prosecuted or otherwise held liable in law for anything they say during the sittings of the States General or of its committees or for anything they submit to them in writing.”

In 1987 the provision was at the centre of an interesting legal dispute. The District Court of The Hague was faced with the question whether Article 71 Constitution refers to the persons mentioned in the article itself or to the office that these persons hold.¹⁹ As to the facts of the case, plaintiff Harm Drost argued that statements of both minister Van den Broek and minister Korthals Altes made during a sitting of the Senate were incorrect and misleading. In the view of Drost these statements unfavourably influenced the process of decision making in the States General and eventually led to his extradition to Germany. Drost reasoned that if article 71 would be interpreted as to apply to the participants to the debate in person it would mean that the provision not necessarily applied to the participants to the debate in the performance of their duties as ministers. Then an action could be brought against them for the statements made in the States General as organs of the State of the Netherlands. As the State is liable for the conduct of its organs this ultimately would lead to civil liability of the State of the Netherlands. The Court, however, did not follow this reasoning and stated:

‘The intention of the provision is apparently that ministers and state secretaries must be able to express themselves without reservation during the sittings of the States General, i.e. knowing that it is not the competence of the courts to check the lawfulness of their statements. If the plaintiff’s reasoning would be followed, the Court, in order to assess the liability of the State, would have to look into what the ministers have said. This reading is contrary to the wordings of Article 71.’²⁰

3. Some Foreign Systems

In the foregoing we already briefly paid attention to the British system of parliamentary immunity. The British scheme originated in 1689 and is still considered to be one of the most basic British privileges. As mentioned before, the current Dutch provisions corresponds to the British regime. As to their approach to the concept of parliamentary immunity both Britain and The Netherlands hold a unique position. This is because, after all, the immunity in both systems is limited to what is said during the sittings of parliament. The French system of parliamentary immunity, the so called extraparliamentary immunity, served as a blueprint for many other Western systems.²¹ The current French system of parliamentary immunity is enshrined in art. 26 of the French Constitution. This provision ensures that a member of one of the Chambers (the National Assembly and the Senate) is able to speak and write freely during the sittings of the parliament. Article 26 of the French Constitution further provides that criminal offenses committed by a representative can be prosecuted if the Presidium of the Assembly lifts the immunity of the Member of Parliament

¹⁹ The Hague District Court, 26 February 1987 (Harm Dost), *Kort Geding*, 134, 1987,

²⁰ The Hague District Court, 26 February 1987 (Harm Dost) *Kort Geding*, 134, 1987, paragraph 6.2.

²¹ Cf. also R. Nehmelman, *De Verboden Politieke Meningsuiting als Ambtsmisdrijf* [The Forbidden Political Free Speech as Misfeasance] in R. Nehmelman (Ed.), *Parlementaire Immuniteit Vanuit een Europese Context bezien* [Parliamentary Immunity viewed from a European Perspective], Wolf, Nijmegen, 2010, p. 12 ff. Cf. the comprehensive analysis of the Belgian system in the same publication: S. Sottiaux, p. 49 ff.

concerned. However, it has to be noted that within the system Article 26 of the French Constitution provides for, even though a Member of the French parliament can be convicted directly after the immunity has been lifted, the detention itself can only take place after the convicted parliamentarian is no longer a Member of Parliament. The Belgian system has strong similarities with the French model. The Belgian scheme consists of two constitutional provisions. The first provision (Art. 58 of the Belgian Constitution) establishes the full immunity for statements of parliamentarians which are made in the exercise of their function. In Belgium this provision is also referred to as 'parliamentary accountability'. In this scheme the decisive factor is not the place where the statement was made, but the answer to the question whether the statement was made in the exercise of the function of parliamentarian. In that sense, this immunity goes beyond the Dutch immunity. However, statements made during (party) political activities should not be regarded as statements made in the exercise of the function of parliamentarian. Therefore, interviews, speeches at party meetings and press conferences are strangely enough not covered by this provision. Although in Belgium, unlike the Dutch system, parliamentary immunity also applies to statements made outside parliament. So the extension of the protective value of immunity is limited in scope. The second provision establishes a special regime for the criminal prosecution of a Member of Parliament (Art. 59 Belgian Constitution). In Belgium a Member of one of the Chambers cannot be prosecuted, arrested or otherwise held liable in law before a court or tribunal, except when the Chamber of which he is a Member lifts his immunity. A majority decision of the House of which the parliamentarian is a Member, is needed in order to lift its immunity.²²

In Germany immunity exists for members of the *Bundestag* (not for members of the *Bundesrat*!). Article 46 of the *Grundgesetz* (GG) provides that a Member of the *Bundestag* enjoys immunity for the oral or written comments he makes during the parliamentary debates (in both plenary and committee sessions). An exception is made for offensive language. The second paragraph of art. 46 GG provides that the Members of the *Bundestag* also enjoy immunity for statements made outside the assembly, however, this immunity can be lifted by a majority decision of the *Bundestag*. It is established practice that at the beginning of a period of the *Bundestag* the immunity is collectively lifted by the Members.²³ The underlying reason for this is that individual procedures of lifting immunity attract a lot of publicity. By collectively lifting the immunity at the start of the session of the *Bundestag* a possible criminal investigation can take place without the media already having interfered because of the prior lifting of immunity.

4. The European Court of Human Rights and Parliamentary Immunity

For a proper understanding of the doctrine of parliamentary immunity it is necessary to discuss the case law of the European Court of Human Rights.²⁴ Over the past few decades the Strasbourg Court has been faced with questions that lie at the heart of the concept of parliamentary immunity. Many of the cases concern the conviction of a parliamentarian. The main question in these cases is whether a conviction can withstand the test of article 10 ECHR (freedom of expression). In some cases article 6 ECHR (right to a fair trial) plays a central role. The question is then raised whether the immunity of

²² Cf. also ECHR 16 Juli 2009, *Féret t. België*, appl. nr. 15615/07, *Mediaforum* Vol. 11, nr. 10, 2009.

²³ ECHR 8 July 2008, appl. nr. 8917/05, *Kart v. Turkey*, Cf. also the case comment on the case: *European Human Rights Law Review*, No. 6, 2008, pp. 795-797.

²⁴ See the comprehensive study by R. Lawson: 'Wild, Wilders, Wildst', *NJCM-Bulletin*, No. 4, 2008, pp. 469-484.

members of parliament constitutes a breach of article 6 as parliamentary immunity prevents third parties from taking legal action against parliamentarians.

First and foremost it has to be noticed that parliamentary immunity for statements made *during* sittings of the parliament must be regarded as absolute in the sense that parliamentarians cannot be held liable in law for the statements they make during parliamentary deliberations. The high-profile decision *A v. the United Kingdom* is considered to be the start of this line of argument.²⁵ In this case, during the sitting of the British parliament, Michael Stern, a British parliamentarian, made some remarks on the antisocial behaviour of his neighbours and called them 'neighbours from hell'. After that the neighbours were approached by journalists and television reporters and received hate mail. Therefore the neighbours decided to take legal action against Stern. Eventually, the case ended up in Strasbourg. The neighbours argued that Stern's parliamentary immunity prevented them from taking legal action in respect of statements made about them in Parliament and therefore violated their right of access to a court under article 6. The ECHR held that in this case the doctrine of parliamentary immunity must be regarded as an inherent restriction on the right of access to a court and stated that: 'in all the circumstances of this case, the application of a rule of absolute parliamentary immunity cannot be said to exceed the margin of appreciation allowed to States in limiting an individual's right of access to a court.'²⁶ This even though the Court found the allegations 'extremely serious and clearly unnecessary'.²⁷ In the specific circumstances of this case parliamentary immunity must be regarded as an absolute right that does not constitute a breach of article 6. So, the application of the concept of parliamentary immunity may have far-reaching consequences.

In *A. v. the United Kingdom* the Court emphasized that Stern made his statements during parliamentary deliberations. As immunity for statements within Parliament itself 'is consistent with and reflects generally recognised rules within signatory States', this type of immunity 'cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court'.²⁸ As to the question whether article 6 has been violated the Court deems it of importance whether a statement is made within the assembly. Therefore, in assessing matters of parliamentary immunity, the Court will first look at the question whether a statement is made 'within the exercise of parliamentary functions in their strict sense'.²⁹ When this 'strict sense test' is passed no violation of article 6 will be found. However, regarding the assessment of a possible violation of article 6, when statements are not made within the exercise of parliamentary functions in their strict sense the Court will look into the question whether there is a clear connection between a specific statement and a parliamentary activity.³⁰ As the Court held in its *Cordova* judgement, 'the lack of any clear connection with a parliamentary activity requires the Court to adopt a narrow interpretation of the

²⁵ ECHR 17 December 2002, *A. v. United Kingdom*, appl. nr. 35373/97, *Nederlands Juristenblad*, 2003, pp. 330-331.

²⁶ *A. v. United Kingdom*, paragraph 87 with reference to ECHR 21 November 2011, *Al-Adsani v. the United Kingdom*, appl. no. 35763/97, paragraph 47.

²⁷ *A. v. United Kingdom*, paragraph 88.

²⁸ *Ibid.*, paragraph 83.

²⁹ ECHR 30 January 2003, *Cordova v. Italy*, appl. no. 40877/89, paragraph 62. See also ECHR 3 June 2004, *De Jorio v Italy*, appl. no. 73936/01, paragraph 53, ECHR 6 December 2005, *Ielo v Italy*, appl. no. 23053/02, paragraph 50 and ECHR 24 February 2009, *Conferatti v. Italy*, appl. no. 46967/07 paragraph 72.

³⁰ See for a more detailed view of the steps the Court takes in assessing a possible violation of article 6. R.J.B. Schutgens, *Parlementaire immuniteit [Parliamentary Immunity]*, preadvies NJV Zomer 2013, Deventer, Kluwer 2013, P. 29 and 30.

concept of proportionality between the aim sought to be achieved and the means employed.³¹ The approach of the ECHR to the concept of a 'clear connection' is narrow one. For example, in the case of *Patrono, Cascini and Stefanelli v Italy*, the Court held that the rather strong (political) comments of members of parliament on the dismissal of three Italian judges, had no clear connection with their parliamentary activities.³² According to Schutgens, there are no cases in which the Court came to the conclusion that a parliamentarian's behaviour outside parliament constituted a clear connection with its parliamentary activities.³³

For statements made outside parliament the Castells case is an important starting point. Castells, a Spanish senator, was prosecuted for insulting the Spanish government in the media.³⁴ As a supporter of the independence of the Basque Country Castells, in a newspaper article, accused the Spanish authorities of laxity in prosecuting the perpetrators of murders contrived by right-wing extremists. He accused the government of complicity to the murders. At the instance of the Spanish Supreme Court the Spanish Senate lifted Castells' immunity. Both before the Supreme Court and the Constitutional Court Castells argued that his statements were part of the political criticism that any member of parliament has to be able to engage in. However, both Courts rejected this appeal. Castells lodged an application with the ECHR and claimed that his freedom of expression was violated. In its judgement the ECHR emphasized the importance of the right to freedom of expression of a member of parliament. The Strasbourg Court held that the freedom of expression constitutes one of the essential foundations of a democratic society and considers the right of freedom of expression to be especially important for parliamentarians as they represent and defend the interests of their electorate. The court comes to the following conclusion:

*"While 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 defend their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court."*³⁵

One month after its Castells judgement the Court, in a 'non-parliamentary' case about an Icelandic writer who had made allegations that excessive violence was common practice by the Icelandic police force, reiterates its standpoint that 'the freedom of expression as enshrined in Article 10 (...) is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.'³⁶ Furthermore in the case of *Wingrow v. United Kingdom* the ECHR held 'that there is little scope under Article 10 para. 2 of the Convention

³¹ *Cordova v. Italy*, paragraph 63.

³² ECHR 20 April 2006, *Patrono, Cascini and Stefanelli v. Italy*, appl. no.10180/04, paragraph 53. See also ECHR 16 November 2006, *Tsalkitzis v. Greece*, appl. no. 11801/04, paragraph 49.

³³ Schutgens 2013, P. 29.

³⁴ ECHR 23 April 1992, *Castells v. Spain*, with case note, E.J. Dommering, appl. no. 11798/85, *Nederlandse Jurisprudentie*, No. 102, 1994.

³⁵ *Ibid.*, paragraph 42.

³⁶ ECHR 25 June 1992, *Thorgeir Thorgeirson v. Iceland*, appl. no. 13778/88, paragraph 63. In *Nilsen & Johnsson v. Norway* the Court, referring to *Thorgeir Thorgeirson*, states that the strict scrutiny approach is not limited to 'arguable allegations of police misconduct', but 'also applies to speech aimed at countering such allegations since it forms part of the same debate'. See ECHR 25 November 1999, *Nilsen & Johnsson v. Norway*, appl. no. 23118/93, paragraph 44.

for restrictions on political speech or on debate of questions of public interest'.³⁷ In the case *Jerusalem v Austria* the Court recalls its *Castells* judgement and adds that freedom of expression constitutes one of the basic conditions for the progress of democratic society and for individual self-fulfilment.³⁸ More recently the ECHR confirmed that the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual.³⁹ Even provocative, offensive, shocking or disturbing statements are in principle protected under art. 10 ECHR.⁴⁰ In the case of *Otegi Mondragon v. Spain* the Spanish Supreme Court found Arnaldo Otegi, a member of a left-wing Basque separatist parliamentary group, guilty of serious insult against the Spanish King and sentenced him to one year's imprisonment. During a visit of the Spanish King to Basque Country Otegi had stated that the King 'defends torture and imposes his monarchical regime on our people through torture and violence'. The ECHR found a breach of article 10 ECHR even though it held that Otegi's statements portrayed the King in a very negative light, with a hostile connotation and could be regarded as provocative.⁴¹ Especially the right to make these kind of statements, according to the Court, are the demands of pluralism, tolerance and broadmindedness, without which there would be no democratic society.⁴²

It is important to note that the Court does not regard the freedom of speech of parliamentarians, regarding statements made outside the parliamentary debate, to be an absolute right. For instance in the *Piermont* case the Court made clear that it does look at the exact wording of the statements that were made and the conditions under which those statements were made.⁴³ In this case *Piermont*, a German Member of the European Parliament, criticized the continuation of nuclear testing by France during a visit to French Polynesia. The French authorities expelled *Piermont* from the country and imposed an entry ban on her. The Court held that the statements made by *Piermont* were peaceful and were expressed during a demonstration authorized by the authorities. Thus, the context in which statements are made are an important factor to balance in the scales in determining the scope of article 10. According to the Court the fight against intolerance, is an integral part of the protection of human rights. In that sense it is crucial that politicians in the exercise of their public duties, avoid making statements that foster intolerance.⁴⁴

The context-based approach of the Strasbourg Court in assessing matters of parliamentary immunity in our opinion diametrically opposes the *Castells* case law in which the Court clearly stated that the limits of the freedom of expression for politicians are wider because of their representative function. In this context-based approach the Court in particular looks to the impact that certain statements

³⁷ ECHR 25 November 1996, *Wingrow v United Kingdom*, appl. no. 17419/90, paragraph 58. The court confirms this line of argument in ECHR *Sürek v. Turkey*, appl. no. 26682/95, paragraph 61 and ECHR 12 July 2001, *Feldek v. Slovakia*, appl. no. 29032/95, paragraph 74.

³⁸ ECHR 27 February 2001, *Jerusalem v. Austria*, appl. no.26958/95, paragraph 32.

³⁹ See, for example, ECHR 6 April 2006, *Malisiewicz-Gasior v. Poland*, appl. no. 43797/98, paragraph 57. Cf. also A.R. Mowbray, *Cases and Materials on the European Convention on Human Rights*, 2th edition, Oxford University Press, Oxford, 2007, P. 396.

⁴⁰ ECHR 29 October 1992, *Open Door and Dublin Well Woman v. Ireland*, appl. no. 14234/88 en 14 235/88, paragraph. 71-72.

⁴¹ Case ECHR 15 March 2011, *Otegi Mondragon v. Spain*, appl. no. 2034/07, paragraph 54, 61 and 62.

⁴² See ECHR 29 March 2005, *Sokołowski v. Poland*, appl.no. 75955/01, paragraph 41 and ECHR 23 September 1994, *Jersild v. Denmark*, appl. no. 15890/89, paragraph 37.

⁴³ ECHR 27 April 1995, *Piermont v. France*, appl. no. 15773/89 en 15774/89, *Nederlandse Jurisprudentie*, No. 498, 1996.

⁴⁴ Cf. ECHR 6 July 2006, *Erbakan v. Turkey*, appl. no. 59405/00, paragraph 64.

can have. This may mean that a politician in fact has more responsibility in expressing his opinion. The aforementioned approach is expressly brought forward in the *Zana* judgment from 1997. In this case the Court came to the following conclusion:

*"The statement cannot, however, be looked at in isolation. It had a special significance in the circumstances of the case, as the applicant must have realised. (...) The interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time. In those circumstances the support given to the PKK - described as a "national liberation movement" - by the former mayor of Diyarbakyr, the most important city in south-east Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region."*⁴⁵

In the case of *Erbakan* in 2006 the Court also adopts this approach: politicians have a greater responsibility than others and should therefore, in some circumstances, refrain from statements that lead to intolerance. For that matter it has to be noted that article 10 paragraph 2 expressly states that the exercise of the freedom of expression carries with it duties and responsibilities. This choice of words is remarkable and for that very reason the ECHR in the aforementioned Turkish cases held that the freedom of expression for politicians is accompanied by certain responsibilities. In addition, the Court had already stated this in the context of the *Handyside* case.⁴⁶

In two more recent cases we again find the view that a politician has more responsibility as to his right to free speech and therefore should be more cautious with his statements. In the *Féret* case the Walloon politician Daniel Féret who was the leader of the Belgian Front National, a far-right political party in French-speaking Belgium, had to take into account the context and the potential impact of his statements. Féret distributed leaflets that depicted immigrants as criminal and as profiteers of the Belgian welfare state. After the Belgian public prosecutor office received several complaints about the leaflets it successfully requested the Belgian Chamber of representatives to lift Féret's parliamentary immunity. According to the Belgian court Féret's statements were not made in the exercise of his function and furthermore had to be qualified as discriminatory statements. According to the Belgian Court Féret's offending conduct had not fallen within the exercise of a parliamentary activity and furthermore the leaflets contained passages that represented a clear and deliberate incitation to discrimination, segregation, hatred, and even violence, for reasons of race, colour or national or ethnic origin. The ECHR on its turn reiterates the *Castells doctrine*: while freedom of expression is important for everybody, it is especially so for an elected representative of the people. Nevertheless Féret's position as a Member of Parliament could not be considered as a mitigating circumstance because it is crucial for politicians to avoid comments that might foster intolerance when expressing themselves in public.⁴⁷ The right to freedom of expression, which encompasses the political debate, is not absolute in the view of the Court. The Court even goes a bit further and concludes that some statements could harm democracy. Recommending solutions to immigration-

⁴⁵ ECHR 25 November 1997, *Zana v. Turkey*, appl. no. 18954/91, paragraph 59-60.

⁴⁶ ECHR 12 December 1976, *Handyside v. United Kingdom*, appl. no. 5493/72, paragraph 49: "From another standpoint, whoever exercises his freedom of expression undertakes 'duties and responsibilities' the scope of which depends on his situation and the technical means he uses. The Court cannot overlook such a person's 'duties' and responsibilities' when it enquires, as in this case, whether 'restrictions' or 'penalties' were conducive to the 'protection of morals' which made them necessary' in a 'democratic society.'"

⁴⁷ ECHR 16 July 2009, *Féret v. Belgium*, appl. no. 15615/07, paragraph 54.

related problems by advocating racial discrimination, in the view of the Court, is likely to cause social tension and undermines trust in democratic institutions.⁴⁸ In the present case there had been a compelling social need to justify the restriction of the freedom of expression and there had been no violation of article 10 of the Convention. Thus, according to the Court, parliamentarians have a special responsibility and should be aware of the social context in which they make their statements. The Court held that there had been no violation of Article 10 by a narrow majority of 4 votes to 3. Judge Sajó firmly rejects the majority-decision of the Court in his dissenting opinion. He states that the rise of a xenophobic mentality among the members of society, although being an insidious process, should be combatted through a free exchange of views. The conviction of a xenophobic parliamentarian is not the right remedy in his view.⁴⁹ In this regard the *Le Pen* case is of importance. In *Le Pen* the Court ruled that the hate speech of the leader of the French *Front National* was contrary to the fight against racial discrimination and furthermore had put the safety and dignity of the entire French population at risk.⁵⁰

What to think about the case law of the Strasbourg Court? On the hand the Court makes clear that article 10 ECHR has a broad scope as to views expressed by politicians because they speak on behalf of their electorate (the *Castells* case law) while, on the other hand, the Court states that parliamentarians have a special responsibility. A responsibility that should refrain them from making certain intolerant statements. In a previous publication Nehmelman already said that he does not agree with this ambiguous case law.⁵¹ The Court has to make a clear choice and has to decide whether the limits of free speech are wider as regards politicians than as regards private individuals or should take the view that article 10 ECHR limits the right to freedom of expression of politicians because of them having a special responsibility. The Court cannot take a middle course. In our opinion article 10 ECHR should have a broad scope as regards the statements of politicians. Even though we are aware of the disadvantages this approach entails in our opinion it is the right way of dealing with this sensitive topic because far-reaching, even harmful statements should be opposed by free speech itself. This point of view will be further elaborated at the end of this chapter.

5. Arguments For and Against Broadening the Reach of Parliamentary Immunity in Dutch Legal Literature

5.1 Introduction

The doctrine of immunity has always been controversial and raises many questions. Why are the limits of free speech wider as regards politicians than as regards private individuals? Should immunity not only cover statements made during sittings of a parliament but also statements made outside parliamentary deliberations. Or should the concept of parliamentary immunity be abolished in its entirety? These questions that are relevant nowadays were already asked in the distant past. In this section possible answers to the abovementioned questions will be briefly discussed. The pros

⁴⁸ *Ibid.*, paragraph 77.

⁴⁹ Judges Zagrebelsky and Tsotsoria joint his opinion.

⁵⁰ ECHR 20 april 2010, *Le Pen*, LJV: BN0891, *Nederlandse Jurisprudentie* No. 429, 2010, with case note E.J. Dommering.

⁵¹ Cf. R. Nehmelman, 'Spreken is Zilver, maar wie bepaalt wanneer Zwijgen Goud is? Over de Vraag of de Parlementaire Immunititeit voor Volksvertegenwoordigers moet worden uitgebreid' ['Speech is Silver, but who decides when Silence is Golden? On the Question Whether Parliamentary Immunity for Parliamentarians should be Extended'], *Ars Aequi*, May 2011, pp. 355-360.

and cons with regard to the extension of parliamentary immunity in The Netherlands will become visible which will make it possible to make a well-considered decision as to the matter of broadening the scope of parliamentary immunity.

5.2 Abolishing the Existing System of Parliamentary Immunity

In the first half of the twentieth century, three State Committees examined the doctrine of parliamentary immunity. All of them were faced with the question whether it should be possible to lift parliamentary immunity if a parliamentarian abuses this immunity by making confidential information available to the public. Between 1910 and 1912 the first State Committee Heemskerk was not able to answer this question unequivocally. In 1934 the Commission Koolen advised to make it possible to lift immunity in the context of the problematic situation regarding the 'revolutionary representatives'. Similar to the Commission Koolen, the Commission De Wilde advised to lift the immunity of parliamentarians who were found guilty of sedition or confidential information publicly available. Both proposals were rejected by the States General.⁵²

Earlier, a more radical proposal had been made. This proposal entailed the abolition of parliamentary immunity in its entirety. The main underlying argument for this proposal was the thought that the privilege of parliamentary immunity no longer fulfilled any function. This proposal was made by Van Os who was assisted by his tutor Krabbe.⁵³ In 1910 Van Os explained why in his opinion the concept of parliamentary immunity had to be removed from the Dutch Constitution. According to Van Os there was no objective justification for a different treatment of members of the States General compared to other citizens. He put forward the question why a specific group of Dutch civilians (parliamentarians) had to be excepted from a common legal responsibility of the entire Dutch people. Van Os' criticism was based on the following arguments. Firstly, the historical argument for parliamentary immunity had virtually disappeared. As The Netherlands had developed to a stable constitutional monarchy a Member of the States General did not have to be protected against the power of the King any more. Secondly Van Os argued that immunity was not necessary to protect minority groups in parliament against the parliamentary majority. Furthermore Van Os stated that the judiciary was sufficiently independent and impartial in order to judge cases about political issues such as the freedom of expression of members of parliament. Van Os also weakened the argument that parliamentarians should enjoy a certain degree of sovereignty. He asked the question why sovereignty had to be accompanied by the lack of the possibility to prosecute member of the States General. According to van Os also the relating point of the essence of the parliament as a representative state body could not be a valid reason to grant immunity to its members.

Many years later, in 1990, Elzinga tried to weaken Van Os' arguments and made a plea in favour of article 71 of the Dutch Constitution.⁵⁴ Although Elzinga admits that many of the original arguments for maintaining parliamentary immunity are not that valid any more, he emphasized the importance of the concept of parliamentary immunity. Moreover he refutes the argument that parliamentary immunity is a privilege for parliamentarians. Elzinga states that, even though it is not the judiciary who has been given the authority over what is said during parliamentary deliberations, parliamentarians are not inviolable as regards to their statements made in the deliberations.

⁵² Cf. Elzinga 1990, p. 122.

⁵³ W.A.E. van Os, *De Gerechtelijke Onvervolgbaarheid der Volksvertegenwoordigers [The 'Improsecutability' of Representatives of the People]*, J.B. Wolters, Groningen 1910 (introduction written by H. Krabbe).

⁵⁴ Elzinga 1990.

Parliament has its own internal mechanisms for disciplining a member of parliament. The President in each Chamber may admonish any member who violates the Rules of Procedure and then, after offering the Member concerned a chance to retract the offending remark, may impose parliamentary sanctions.⁵⁵ Therefore the right to freedom of expression during sittings of the parliament is not absolute. Baron De Vos van Steenwijk already argued this in 1927. He stated the following:

*"Committing libel is unlawful. Both in and outside parliament. Only the method of enforcement is different. The power of criminal law is replaced by the power of the Rules of Procedure. Whether one considers the parliamentary sanctions sufficient depends on the final aim one wants to reach with imposing sanctions on parliamentarians. If one wants to make it impossible for parliamentarians to speak in parliament the system of parliamentary enforcement will not suffice, nor does the criminal enforcement system. But if the final aim is to have the competent authority imposing sanctions on a parliamentarian because of his unlawful conduct the system of parliamentary enforcement will be satisfactory."*⁵⁶

According to Elzinga the parliamentary sanctions imposed by the Chamber President may in some circumstances be regarded as even more severe than sanctions imposed by a criminal court. A second argument for maintaining parliamentary immunity is that according to Elzinga the threshold for people to take legal action has become lower in the past few decades. This creates the risk that politicians will have to defend themselves before a court more quickly. Elzinga comes to the conclusion that parliament should remain a place where its members can perform their duties, which is exercising their right to free speech on behalf of their electorate. In 1995, despite Elzinga's plea, the former leader of the Dutch Liberal Democratic Party (D66) Thom de Graaff wanted to propose an amendment to remove article 71 of the Dutch Constitution. De Graaff was of the view that the system of sanctioning laid down in the Rules of Procedure would be insufficient in the light of the rise of extreme right-wing parties in the Netherlands. Due to a lack of support De Graaff eventually decided not to propose the amendment.

5.3 Arguments For and Against the Extension of Parliamentary Immunity

As seen before, discussions in The Netherlands about parliamentary immunity in the past were focussed on the matter of possible abolition of parliamentary immunity. Nowadays the question of extension of parliamentary immunity takes center stage in debates about parliamentary immunity. To be more precise, the discussion focuses on the question whether parliamentary immunity should also cover statements of the members of the States General made outside parliamentary deliberations (the so-called extraparliamentary immunity). Jit Peters, an emeritus Professor of Constitutional Law at the University of Amsterdam, advocated an extension of immunity in an interview in the daily paper *Trouw*. In this interview Peters stated:

⁵⁵ The Chamber President has the power to impose the following sanctions on members of parliaments who violate the Rules of Procedure: give a warning, forbid a Member from speaking and forbid a Member from attending the rest of the sitting or further sittings the same day. These rules are laid down in article 58-60 of the Rules of Procedure of The House of Representatives respectively article 94 and 98 of the Rules of Procedure of the Senate.

⁵⁶ R.H. Baron de Vos van Steenwijk, 'Parlementaire Immunititeit' ['Parliamentary Immunity'] in Krabbe (Ed.), *Staatsrechtelijke opstellen deel 2 [Constitutional Essays part 2]*, 1927, p. 122.

" Some members of the House of Representatives are not even seen in parliament any more. Suppose they say something in parliament but no one picks it up. And they their statements in a room in some small village and a newspaper writes an article about it. Isn't it strange that they can be prosecuted for these statements because of the mere fact that were made outside parliament?"⁵⁷

Peters' view leads to a discussion in the *Tijdschrift voor Constitutioneel Recht* between former politician Eric Jurgens and Peters himself.⁵⁸ Jurgens wonders why, in a debate between a civilian and a member of parliament, the civilian should refrain from unlawful statements while the member of parliament is allowed to say anything he wants.⁵⁹ Public debate, that is, a debate that takes place outside parliament has to be a level playing field for all participants. He furthermore sees the choice of the legislator for a system of intraparlimentary immunity as an argument for maintaining the current system. Moreover the development of the concept of parliamentary immunity in the Dutch Constitution shows that not only parliamentarians but also any other person taking part in parliamentary deliberations enjoys immunity within the framework provided for by article 71. Moreover Jurgens warns for the danger of abuse if the scheme would be extended. In this regard, he mentions the example of the Italian Senator Ianuzzi who could not be prosecuted after insulting a journalist.

Nieuwenhuis, assistant professor of Constitutional Law at the University of Amsterdam, also opposes the extension of the current system of parliamentary immunity.⁶⁰ He believes that representatives of the people should not be granted a special position for statements made outside parliament, because their freedom of expression is not clearly distinguishable from that of non-parliamentarians. Political criticism could as well be expressed by other people, not being parliamentarians. His main argument against extending the scope of art. 71 Constitution is illustrated in the following quote:

" The connection between freedom of expression and democracy means that the opinion-forming process of all individuals, all voters, all potential politicians, takes center stage. References to the justifications of freedom of speech can only reinforce this premise. For that reason the freedom of expression of a member of parliament or a politician in a political discussion does not outweigh the right to free speech of an ordinary citizen participating in a political debate. "⁶¹

However Peters, sticking to his point, states that the immunity should be broadened. According to him the current limited, intra-parliamentary immunity, does not meet the requirements of modern democracy, since the political arena is not limited to the parliamentary assembly any more.⁶²

⁵⁷ J. Peters, 'Immunititeit moet Breder: Interview met prof. J. Peters' ['The Reach of Immunity should be Broadened: An Interview with Prof. J. Peters'], *Trouw*, 5 July 2008.

⁵⁸ *Tijdschrift voor Constitutioneel Recht*, Vol. 1, No. 3, pp. 322-326.

⁵⁹ E.C.M. Jurgens, 'Een Gedurfde Stelling' ['A Courageous Thesis'], *Tijdschrift voor Constitutioneel Recht*, Vol. 1, No. 3, pp. 322 ff.

⁶⁰ A.E. Nieuwenhuis, 'Tussen Grondrechtelijke Vrijheid en Parlementaire Onschendbaarheid' [Between a Fundamental Freedom and Parliamentary Immunity], *Tijdschrift voor Constitutioneel Recht*, Vol. 1, No. 1, 2010, pp. 21 ff.

⁶¹ Nieuwenhuis 2010, p. 22.

⁶² J.A. Peters, 'Immunititeit ook Buiten het Parlementaire Debat' ['Immunity, also Outside Parliamentary Debate'], *Tijdschrift voor Constitutioneel Recht*, Vol. 1, No. 3, 2010, pp. 327-330.

More recently Joop van den Berg, emeritus professor of parliamentary history at the University of Maastricht, made a plea to rethink the scheme of immunity under article 71 of the Dutch Constitution. In an article on the website www.parlementenpolitiek.nl Van Den Berg concluded that the main problem that extending the scope of article 71 will cause is a jurisdictional one.⁶³ Like Baron Vos van Steenwijk and Elzinga, Van den Berg argues that in the current situation the Presidents of the Chambers have the power to impose sanctions for statements made during sittings of the parliament while the judiciary is the competent authority as to statements made outside parliament. An extension of the scope of article 71 of the Dutch constitution, in principle, will lead to a situation in which there is no authority with the power to impose sanctions on parliamentarians for statements made outside parliament. Van den Berg therefore puts forward the question whether the jurisdiction of the Chamber Presidents should be expanded to statements made outside parliamentary deliberations.

6 Extending the Scope of Parliamentary Immunity in The Netherlands; Possible Models

6.1 Extension of the Parliamentary Immunity of Members of Parliament

It is necessary to have regard to the aforementioned legal framework before taking a position in this complex constitutional matter. For the sake of clarity we will express our own view as to the Dutch parliamentary immunity directly. In our opinion parliamentary immunity should be extended in the sense that politicians should enjoy a certain form of immunity for statements made outside parliamentary deliberations. We advocate a limited variant of extraparliamentary immunity. This requires, at least, that the system of intraparlimentary immunity remains intact. The current scheme in which parliamentary immunity covers statements made during sittings of the States General is of great value as it serves the 'dual interest' of free speech in Parliament and the separation of powers.⁶⁴ The Parliament as the center of open political debate in which, in principle, an absolute freedom of expression applies to all participants should be protected. The Chamber Presidents must exercise general control over debates and, if necessary, impose sanctions on parliamentarians who are violating the Rules of Procedure. Moreover the argument of the separation of powers is an important reason to maintain parliamentary immunity. The States General as an important body in the legislative procedure should not interfere in judicial decisions. The judiciary on its turn should not have authority over what members of parliament say in their deliberations. For this very reason we are of the view that parliamentary immunity should also cover statements made by representatives outside parliamentary deliberations. Another reason for this plea for extension lies in the fact that members of parliament have a special position in taking a (leading) standpoint in the public debate. The Netherlands is an (indirect) representative democracy. In this type of democracy the representatives of the people must be free to say or write whatever they think or feel. In that sense, in our opinion, parliamentarians are not equal to other 'ordinary' civilians. Therefore we reject the equality argument brought forward by some opponents of the extension of parliamentary immunity. From our point of view only in a system that enables every citizen to influence the political process directly all citizens should enjoy the same protection as regards their political statements.

⁶³ J.Th.J. van den Berg, 'Welke rechter?' ['Which judge?'], essay for the website www.parlementenpolitiek.nl, 3 June 2011.

⁶⁴ *A. v. The United Kingdom*, para. 66 and 77.

6.2 Possible Variants of Extraparliamentary Immunity

Our plea for the extension of parliamentary immunity does not mean that the immunity should be unlimited and thus absolute. As set out before the Presidents of the Chambers to a great extent decide how far a representative can go in expressing his views during debates in parliament. Therefore an unlimited right to freedom of expression for parliamentarians outside parliamentary deliberations would create a problematic legal vacuum. Even though the right to free speech may be far-reaching, in our opinion it should not be boundless. The question arises what a scheme of far-reaching, though limited, extraparliamentary immunity should exactly look like. Numerous variants are possible some of which find their origins in foreign legal systems and/or constitutional literature. At this point we would like to briefly discuss some possibly interesting systems. A first model is one in which the Chamber President or a special Chamber Committee gets the power to decide whether a parliamentarian has gone too far in expressing its opinion outside parliament. This scheme, in which parliament get its own jurisdiction in deciding the scope of extraparliamentary immunity, is similar to the disciplinary committees for special occupational groups such as lawyers and doctors. It may be necessary to introduce new (parliamentary) sanctioning powers, laid down in the Rules of Procedure, in order for this system to have actual effect. One probable disadvantage of the system is that, in the end, political competitors will judge the statements of a fellow member of parliament. This could possibly lead to a situation in which political competitors do not dare to intervene in the strong political statements of a controversial member of parliament because of possibly negative electoral consequences. One should then think, for example, of a committee existing of parliamentarians of left-wing parties that has to answer the question whether a (far) right-wing member of parliament has gone too far with its statements in a television programme.

An own jurisdiction for the Chamber President or a special Chamber Committee, despite being an interesting thought, should be regarded as unrealistic. With this in mind, Nehmelman, in previous publications, set out a scheme that derives from both foreign (France and Belgium) and historical (the Batavian Constitution of 1798) systems. In this scheme, before a member of parliament can be prosecuted, the House of Representatives or the Senate must lift his immunity. A problem that emerges within is system is the problem of abuse of the 'lifting power' by political competitors of the parliamentarian concerned. Therefore Nehmelman proposed to lift immunity with a qualified three-fifths majority. This solution constitutes the golden mean between a (slightly unrealistic) two-thirds majority and a too simple ordinary parliamentary majority. Above all, in this qualified majority system neither the coalition nor opposition will have enough votes to lift immunity on its own. After immunity is lifted for the purposes of criminal proceedings a special procedure at the Supreme Court will be instituted. In this procedure the *Procureur-Generaal* will act as a public prosecutor. The parliamentarian concerned will be convicted when a majority of the Supreme Court judges, in these cases consisting of ten members, finds him guilty. There are a couple of reasons for choosing the Supreme Court as the competent judicial authority. First of all, the Supreme Court already has a special position regarding the trial of misfeasance of present and former members of the States General, Ministers and State Secretaries: the so-called *Forum Privilegiatum* (article 119 of the Dutch Constitution). Secondly, in the cases concerned it is necessary to get a judgement quickly. Off course the possibility to lodge an appeal with the Strasbourg court remains untouched.

In 2010 Nehmelman already argued that the procedure laid down in article 119 may already apply to alleged criminal conduct of parliamentarians outside parliament.⁶⁵ However, in the context of this chapter it is not possible to set out this complex argument. Basically it came down to the fact that alleged criminal statements of a parliamentarian may be regarded as misfeasance in the meaning of article 44 of the Dutch Criminal Code. As a consequence, article 119 of the Dutch constitution and the Criminal Ministerial Responsibility Act apply to these type of cases.

In short the proposed system entails the following: the scope of parliamentary immunity for members of the States General will be broadened and will also cover statements made outside parliament. However, in this scheme the States General have the power to lift the immunity of the representative concerned. Nevertheless, the proposed system is faced with a couple of problems. In our opinion the most important obstacle has to do with candidates for the House of Representatives who are not yet elected. Those person cannot (yet) enjoy the protection granted to parliamentarians even though they can play a very important role in political debates. A possible solution for this undesirable situation could be that a candidate Member of the House has to decide himself whether he wants to make (possibly criminal) statements. If he is elected he will enjoy immunity for the statements he made, otherwise he has to be regarded as an ordinary citizen and thus can be prosecuted for his statements. With this solution it will be the electorate that decides whether or not a candidate will be granted immunity.⁶⁶

7. Conclusion

This chapter analysed the concept of parliamentary immunity. By looking into the history of the doctrine of parliamentary immunity, describing different legal systems and by assessing the case law of the European Court of Human Rights as well as giving an overview of the views in Dutch constitutional literature this chapter sought to gain insight in the complex matter of parliamentary immunity. In this chapter we advocated the extension of the current limited system of parliamentary immunity as laid down in article 71 of the Dutch constitution. In our opinion the freedom of expression is especially important for members of parliament in an indirect representative democracy. Therefore we argued that parliamentarians should also be granted immunity for the statements they make outside parliamentary deliberations. In some cases the ECHR has followed this line of argument. However, in our opinion parliamentary immunity should not be absolute. It is possible for the Chambers to lift immunity with a three-fifths majority. The *Procureur Generaal* then acts as a public prosecutor and the Supreme Court has to answer the question whether the statements of the parliamentarian concerned were unlawful.

⁶⁵ Nehmelman 2010, p. 7 ff.

⁶⁶ A parallel could be drawn between this proposal and the caution money new political parties have to pay when they not get enough votes to get elected into the House of Representatives. In this system a political party also has to make an educated guess as to his chance of 'success'.