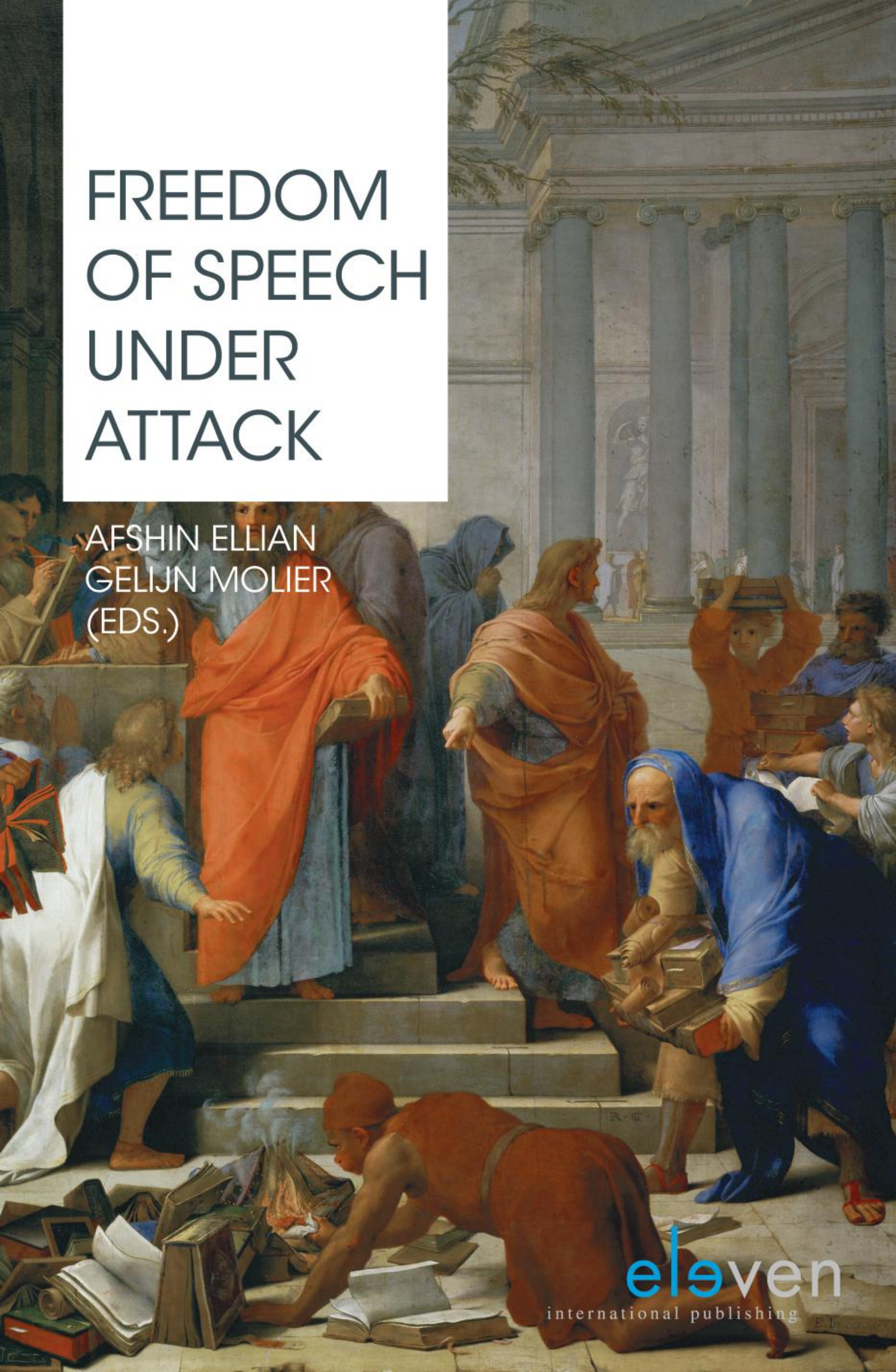

FREEDOM OF SPEECH UNDER ATTACK

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5 Extension of Parliamentary Immunity[1]

Remco Nehmelman and Max Vetzo

Introduction

With the acquittal of Geert Wilders on the 23rd 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 of the parliamentary arena.[2] It is noteworthy that if Wilders would have made his statements during a parliamentary debate, that is, at a moment when Parliament would be 'officially' in session, 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 sessions 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 himself, proposed to change

1 This chapter originally appeared as R. Nehmelman, 'Uitbreiding van de parlementaire immuniteit' *in* A. Ellian, G. Molier and T. Zwart (Eds.), *Mag ik dit zeggen?*, Boom Juridische uitgevers, The Hague, p. 243-262. Max Vetzo is responsible for the extension of section 4 on the European Court of Human Rights and parliamentary immunity. In writing this paper we have gratefully made use of the award-winning master's thesis, *Parlementaire immuniteit in een Europese context [Parliamentary immunity in a European context]*, by P.E. de Morree (supervised by R. Nehmelman), Utrecht, 2009, published at: http://Montesqieu-instituut.nl/9353202/d/prijzen_2010/paulien_demorree.pdf.

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

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

the 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 concept of parliamentary immunity in the Netherlands. The current codification of article 71 of the Dutch Constitution is regarded as a (provisional) end point of this development. Subsequently, some foreign systems will be looked at. This will show that there is a great variety in how parliamentary immunity is regulated in different countries. Then, the case law of the European Court of Human Rights (ECtHR) 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 older 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.

History of the Doctrine of Parliamentary Immunity

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 with 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 activities.[5] The immunity rules for British Members of Parliament are the oldest rules on parliamentary immunity which are still in force. 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 the Westminster Par-

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 Parliamentarian Research and Documentation, Brussels, 2001, Introduction section.

liament on legislation and on monitoring the government gradually increased over 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 working conditions in the British tin mines on 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 Strode's Act, officially entitled 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 British monarch ended at that time. Up until now the codification of the rights of 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 article 9 of the 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 to strengthen the position of parliamentarians. The French Constitution of 1791 included an immunity clause under which, unlike the British model, parliamentarians not only enjoyed immunity within Parliament, but were also protected against prosecution for their behavior outside of parliamentary deliberations. However, a majority in Parliament could make prosecution possible by lifting parliamentary immunity.

The two models of parliamentary immunity 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 can see a model that also covers statements and even behavior outside the sessions 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 models,

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

parliamentary debates enjoy immunity, while in the French model, it is the Member of Parliament who enjoys immunity. Moreover, in the latter scheme the scope of the immunity may vary from covering all actions both within and outside Parliament (inviolability) and protecting the freedom of expression of a member of parliament.

Development in the Netherlands

The first provisions regarding the doctrine of parliamentary immunity in the Netherlands were laid down in the Constitution of the Batavian People of 1798.[7] Even though there were some forms of protection and freedom of advice before 1798, they 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 by members of parliament, both within and outside Parliament, ought to have been non-prosecutable. In the relationship between Parliament, the government and the courts, the freedom and independence 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 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 were changed on a couple of occasions. Eventually, little remained 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

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.

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

12 Cf. Bannier, 1936, p. 171-172.

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 establishing 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 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 'advice 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 to fear 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 deduce the reasoning on which this system of limited immunity was based. Extending the immunity to behavior of members of parliament outside of parliamentary deliberations would probably 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 'advice' was removed and the scope was broadened to the extent that it also covered the written or spoken statements of members of parliament in the sessions 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 sessions 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 expressed that parliamentary immunity includes protection against

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 According to Elzinga 1990, p. 121 ff.
18 Elzinga 1990, p. 121.

criminal as well as civil, administrative and disciplinary liability. Ever since then, 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 sessions of the States General or of its committees or for anything they submit to them in writing.'

In 1987, this provision was at the centre of an interesting legal dispute. The District Court of The Hague was faced with the question whether Article 71 of the 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, the plaintiff Harm Drost argued that statements made by both Minister Van den Broek and Minister Korthals Altes during a sitting of the Senate were incorrect and misleading. In the view of Drost, these statements unfavorably 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 applying to the participants in the debate in person, it would mean that the provision did not necessarily apply to the participants in 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 would ultimately lead to the 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 ssessions 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 wording of Article 71.'[20]

Some Foreign Systems

In the foregoing, we have 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 provision corre-

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.

sponds 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 sessions 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 article 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 sessions of Parliament. Article 26 of the French Constitution further provides that criminal offences committed by a representative can be prosecuted if the Presidium of the Assembly lifts the immunity of the Member of Parliament concerned. However, it has to be noted that within the system provided under Article 26 of the French Constitution, even though a Member of the French Parliament can be convicted directly after the immunity has been lifted, any detention 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 (Article 58 of the Belgian Constitution) establishes 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 whether the statement was made in the exercise of the function of a parliamentarian. In that sense, this immunity goes beyond the Dutch system of immunity. However, statements made during (party) political activities should not be regarded as statements made in the exercise of the function of a parliamentarian. Therefore, interviews, speeches at party meetings and press conferences are strangely enough not covered by this provision. 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 (Article 59 of the 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 this 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*

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.

22 Cf. also ECtHR 16 July 2009, *Féret t. België*, appl. no. 15615/07, *Mediaforum* Vol. 11, no. 10, 2009.

enjoys immunity for the oral or written comments he makes during parliamentary debates (in both plenary and committee sessions). An exception is made for offensive language. The second paragraph of article 46 of the GG provides that the Members of the *Bundestag* also enjoy immunity for statements made outside of the assembly, although this immunity can be lifted by a majority decision of the *Bundestag*. It is established practice that at the beginning of a session of the *Bundestag* the immunity is collectively lifted by the Members.[23] The underlying reason for this is that individual procedures for lifting immunity attract a great deal 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.

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 of the ECHR (freedom of expression). In some cases, article 6 of the ECHR (the right to a fair trial) plays a central role. The question is then raised of whether the immunity of 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 noted that parliamentary immunity for statements made *during* sessions of 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 in *A v. the United Kingdom* is considered to be the start of this line of argumentation.[25] In this case, during the sitting of the British Parliament, Michael Stern, a British parliamentarian, made some remarks on the antisocial behavior of his neighbors and called them 'neighbors from hell'. After that his neighbors were approached by journalists and television reporters and received hate mail. Therefore, the neighbors decided to take legal action against Stern. Eventually, the case ended up in Strasbourg. The neighbors argued that Stern's parliamentary immunity prevented them from taking legal action in respect of statements made about them in Parliament and this

23 ECtHR 8 July 2008, appl. no. 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, wilder, wildst. Over de ruimte die het EVRM laat voor de vervolging van kwetsende politici', *NJCM-Bulletin*, No. 4, 2008, pp. 469-484.

25 ECtHR 17 December 2002, *A. v. United Kingdom*, appl. no. 35373/97, *Nederlands Juristenblad*, 2003, pp. 330-331.

therefore violated their right of access to a court under article 6. The ECtHR 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 holds despite the fact that 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 had made his statements during parliamentary deliberations. As immunity for statements within Parliament itself 'is consistent with and reflects generally recognized 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 had been violated, the Court deemed of importance whether a statement was 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 concept of proportionality between the aim sought to be achieved and the means employed.'[31] The approach of the ECtHR to the concept of a 'clear connection' is a 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

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

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

28 *Ibid*., paragraph 83.

29 ECtHR 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, ECtHR 6 December 2005, *Ielo v Italy*, appl. no. 23053/02, paragraph 50 and ECtHR 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.

31 *Cordova v. Italy*, paragraph 63.

Italian judges had no clear connection with their parliamentary activities.[32] According to Schutgens, there are no cases in which the Court has come to the conclusion that a parliamentarian's behavior 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 in the murders. At the insistance 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 contention. Castells lodged an application with the ECtHR and claimed that his freedom of expression had been violated. In its judgement, the ECtHR emphasized the importance of a Member of Parliament's right to freedom of expression. The Strasbourg Court held that freedom of expression constitutes one of the essential foundations of a democratic society and it considered the right of freedom of expression to be especially important for parliamentarians, as they represent and defend the interests of their electorate. The court came 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 defends 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 concerning an Icelandic author who had made allegations that excessive violence was common practice by the Icelandic police force, reiterated 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

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

33 Schutgens 2013, p. 29.

34 ECtHR 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.

convincingly established.'[36] Furthermore, in the case of *Wingrove v. United Kingdom*, the ECtHR held 'that there is little scope under Article 10 para. 2 of the Convention for restrictions on political speech or on debate of questions of public interest'.[37] In the case *Jerusalem v Austria*, the Court recalled its *Castells* judgement and added 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 has confirmed that the limits of acceptable criticism are wider with regard to a politician than they are with regard to a private individual.[39] Even provocative, offensive, shocking or disturbing statements are in principle protected under article 10 of the 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 a serious insult against the Spanish King and sentenced him to one year's imprisonment. During a visit by the Spanish King to the Basque Country, Otegi had stated that the King 'defends torture and imposes his monarchical regime on our people through torture and violence'. The ECtHR found a breach of article 10 of the 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] The right to make these kinds of statements especially, 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, criti-

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36 ECtHR 25 June 1992, *Thorgeir Thorgeirson v. Iceland*, appl. no. 13778/88, paragraph 63. In *Nilsen & Johnsson v. Norway* the Court, referring to *Thorgeir Thorgeirson*, stated 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 ECtHR 25 November 1999, *Nilsen & Johnsson v. Norway*, appl. no. 23118/93, paragraph 44.

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

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

39 See, for example, ECtHR 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 ECtHR 29 October 1992, *Open Door and Dublin Well Woman v. Ireland*, appl. no. 14234/88 and 14 235/88, paragraph. 71-72.

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

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

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

cized 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 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 at the impact that certain statements can have. This may mean that a politician in fact has more responsibility in expressing his opinions. 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 adopted 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 certain duties and responsibilities. This choice of words is remarkable and for that very reason the ECtHR, 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]

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

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

46 ECtHR 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

In two more recent cases we again find the view that a politician has more responsibility concerning his right to free speech and should therefore 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 criminals and profiteers of the Belgian welfare state. After the Belgian public prosecutor's 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 incitement to discrimination, segregation, hatred, and even violence, for reasons of race, colour or national or ethnic origin. The ECtHR in its turn reiterated 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 political debate, is not absolute in the view of the Court. The Court even went a little further and concluded that some statements could harm democracy. Recommending solutions to immigration-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 a restriction on 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 rejected the majority decision of the Court in his dissenting opinion. He stated that the rise of a xenophobic mentality among members of society, although being an insidious process, should be combated through a free exchange of views. The conviction of a xenophobic parliamentarian was 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

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

48 *Ibid.*, paragraph 77.

49 Judges Zagrebelsky and Tsotsoria joined his opinion.

contrary to the fight against racial discrimination and furthermore had put the safety and dignity of the entire French population at risk.[50]

What can one deduce from the case law of the Strasbourg Court? On the one hand, the Court makes clear that article 10 of the 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 dissuade them from making certain intolerant statements. In a previous publication, Nehmelman had 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 in the case of politicians than they are in the case of private individuals, or it should take the view that article 10 of the 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 of the ECHR should have a broad scope with regard to 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.

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

Introduction

The doctrine of immunity has always been controversial and raises many questions. Why are the limits to free speech wider regarding politicians than regarding private individuals? Should immunity not only cover statements made during sessions of Parliament but also statements made outside of parliamentary deliberations? Or should the concept of parliamentary immunity be abolished in its entirety? These questions that are nowadays relevant were already asked in the distant past. In this section, possible answers to the abovementioned questions will be briefly discussed. The pros and cons with regard to the extension of parliamentary immunity in the Netherlands will become visible, which will make it

50 ECtHR 20 April 2010, *Le Pen*, *LJN*: 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 Immuniteit 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.

possible to make a well-considered decision regarding the matter of broadening the scope of parliamentary immunity.

Abolishing the Existing System of Parliamentary Immunity

In the first half of the twentieth century, three Dutch 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 Heemskerk State Committee was not able to answer this question unequivocally. In 1934, the Koolen Commission advised that it should be made possible to lift immunity in the context of the problematic situation regarding 'revolutionary representatives'. Similar to the Koolen Commission, the De Wilde Commission advised lifting the immunity of parliamentarians who were found guilty of sedition or making 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 exempted from a common legal responsibility of the entire Dutch population. Van Os' criticism was based on the following arguments. Firstly, the historical argument for parliamentary immunity had virtually disappeared. As the Netherlands had developed into a stable constitutional monarchy, a Member of the States General no longer had to be protected against the power of the King. 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 on 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 why sovereignty had to be accompanied by the lack of the possibility of prosecuting a member of the States General. Also according

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).

to Van Os, the related point of the essence of 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 advocated in favor of article 71 of the Dutch Constitution.[54] Although Elzinga admitted that many of the original arguments for maintaining parliamentary immunity were no longer valid, he emphasized the importance of the concept of parliamentary immunity. Moreover, he refuted the argument that parliamentary immunity is a privilege for parliamentarians. Elzinga stated 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 their statements made in the deliberations. Parliament has its own internal mechanisms for disciplining a member of parliament. The President of each Chamber may admonish any member who violates the Rules of Procedure and then, after offering the Member concerned an opportunity to retract the offending remark, may impose parliamentary sanctions.[55] Therefore, the right to freedom of expression during sessions of 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 attain 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, and neither will the criminal enforcement system. But if the final aim is to have the competent authority impose 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 Speaker of the House 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 last few decades. This creates the risk that politicians will have to defend themselves before

54 Elzinga 1990.

55 The Speaker of the House has the power to impose the following sanctions on members of parliament who violate the Rules of Procedure: to issue a warning, to forbid a Member from speaking and to forbid a Member from attending the rest of the sitting or further sessions on the same day. These rules are laid down in articles 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 Immuniteit' ['Parliamentary Immunity'] *in* Krabbe (Ed.), *Staatsrechtelijke opstellen deel 2 [Constitutional Essays part 2]*, 1927, p. 122.

a court more frequently. 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 Graaf wanted to propose an amendment to remove article 71 of the Dutch Constitution. De Graaf 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 Graaf eventually decided not to propose the amendment.

Arguments For and Against the Extension of Parliamentary Immunity

As seen above, discussions in the Netherlands on parliamentary immunity in the past were focused on the matter of a possible abolition of parliamentary immunity. Nowadays, the question of an extension of parliamentary immunity takes centre stage in debates about parliamentary immunity. To be more precise, the discussion focuses on the question whether parliamentary immunity should also cover statements by the members of the States General made outside of 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 newspaper *Trouw*. In this interview Peters stated:

> '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 make 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 they were made outside Parliament?'[57]

Peters' view led to a discussion in the *Tijdschrift voor Constitutioneel Recht* between the former politician Eric Jurgens and Peters himself.[58] Jurgens wondered why, in a debate between a citizen and a member of parliament, the citizen 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 saw the choice of the legislator for a system of intra-

57 J. Peters, 'Immuniteit 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 E.C.M. Jurgens, 'Een gedurfde stelling' ['A Courageous Thesis'], *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.

parliamentary 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 warned against the danger of abuse if the scheme would be extended. In this regard, he mentioned the example of the Italian Senator Ianuzzi who could not be prosecuted after insulting a journalist.

Nieuwenhuis, an Associate Professor of Constitutional Law at the University of Amsterdam, also opposes any 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 also be expressed by other people, not being parliamentarians. His main argument against extending the scope of article 71 of the 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 centre 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 no longer limited to the parliamentary assembly.[62]

More recently Joop van den Berg, an Emeritus Professor of parliamentary history at the University of Maastricht, advocated rethinking the scheme of immunity under article 71 of the Dutch Constitution. In an article on the website 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, both Speakers of the Houses have the power to impose sanc-

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

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

tions for statements made during sessions of Parliament, while the judiciary is the competent authority concerning 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 raises the question whether the jurisdiction of the Chamber Presidents should be expanded to statements made outside parliamentary deliberations.

EXTENDING THE SCOPE OF PARLIAMENTARY IMMUNITY IN THE NETHERLANDS; POSSIBLE MODELS

Extension of the Parliamentary Immunity of Members of Parliament

It is necessary to consider the aforementioned legal framework before taking a position on this complex constitutional matter. For the sake of clarity, we will express our own view regarding 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 intraparliamentary immunity remains intact. The current scheme in which parliamentary immunity covers statements made during sessions 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] Parliament, as the centre of open political debate in which, in principle, an absolute freedom of expression applies to all participants, should be protected. The Speaker of the House must exercise general control over debates and, if necessary, impose sanctions on parliamentarians who violate 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, for its part, 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 advocating such an 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.

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

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 should all citizens enjoy the same protection as regards their political statements.

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 Speaker of the House 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 without limits. The question arises as to what a scheme of far-reaching, though limited, extraparliamentary immunity should look like exactly. 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 Speaker of the House or a special Chamber Committee is given the power to decide whether a parliamentarian has gone too far in expressing his opinion outside Parliament. This scheme, in which Parliament is given its own jurisdiction in deciding the scope of extraparliamentary immunity, is similar to the disciplinary committees for special professions 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 consisting of parliamentarians from left-wing parties that has to answer the question whether a (far-) right-wing member of parliament has gone too far in his statements during a television program.

The Speaker of the House or a special Chamber Committee having its own jurisdiction, despite being an interesting thought, should be regarded as unrealistic. With this in mind, Nehmelman, in previous publications, has 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 this system is the problem of an abuse of the 'lifting power' by political competitors of the parliamentarian

concerned. Therefore, Nehmelman has 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 the 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 Procurator General (*Procureur-Generaal)* will act as a public prosecutor. The parliamentarian concerned will be convicted when a majority of the Supreme Court determines, in these cases consisting of ten members, that he is 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 obtain a judgement quickly. Of course, the possibility to lodge an appeal with the Strasbourg court will remain.

In 2010, Nehmelman already argued that the procedure laid down in article 119 may already apply to the 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 comes down to the fact that alleged criminal statements by a parliamentarian may be regarded as misfeasance within 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 will apply to these types of cases.

In short, the proposed system entails the following: Thescope 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 has 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 persons 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 can thus 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]

65 Nehmelman 2010, p. 7 ff.

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

Conclusion

This chapter analyzed the concept of parliamentary immunity. By looking into the history of the doctrine of parliamentary immunity, describing different legal systems, and 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 an insight into 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 statements they make outside of parliamentary deliberations. In some cases, the ECtHR 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.