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Prosecutorial Discretion in the Netherlands: An Advantage for Politicians?

Willem Geelhoed

I. Introduction

Some jurisdictions allow the political sphere to influence the criminal justice system. In these jurisdictions, there is probably a need to shield that criminal justice system from political influence in cases where politicians are the suspect of criminal offences. Such is even more the case where it concerns public office offences since in these cases politicians might desire to aim criminal law means at their political opponents or perhaps to scapegoat a fellow politician. A reason why politicians are allowed to influence the functioning of a criminal justice system in the first place could lie in the fact that the criminal law authorities enjoy considerable discretion in their decision-making. This is most clearly visible in the prosecution service. Checks and balances around its functioning not only prevent potential mishaps; they also serve as tools connecting the criminal justice system to society: if there is a desire for societal acceptance of the decisions made by prosecutors, there must also be means to steer prosecutorial decision-making. And the wider the scope of discretion that is attributed to prosecution services, the more important it is that checks and balances in the criminal justice system safeguard the proper decision-making in individual cases, as well as prioritisation and policy setting in general.

How does it work in such a system where the political sphere and the criminal justice system are closely connected, in case a politician is suspected of having committed a public office offence? If there is a wide scope of discretion, based on the expediency principle, prosecutorial decision-making might very likely be forced to attach more weight to political preferences than to the need to secure public integrity by diligently prosecuting public office offences. The Netherlands is

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a prime example of a jurisdiction in which the prosecution service enjoys considerable discretion and where the Minister of Security and Justice is able to instruct the Public Prosecution Service in all its functions. There are special rules in place in order to prevent political motivations from influencing the decision to prosecute public office offences committed by national-level politicians. However, these special procedural rules are hardly ever used. In the 1900s, there have been a few cases of politicians being prosecuted.¹ Only recently, a first modern case of a public office offence by a national-level politician has been investigated by Parliament.² The fact that it took so long for a first recent case to happen could perhaps be explained by the fact that criminal liability is overshadowed by the system of political accountability.³ As long as the political sphere is perceived to be adequate for correcting misbehaviour by politicians, special criminal procedures are only of academic interest. Perhaps that will not remain the case for long.

II. Prosecutorial Decision-Making: Expediency and Legality

A classic distinction can be made between criminal law systems that accept the legality principle and systems that accept the expediency principle. The legality principle requires every provable case to be brought to trial, whereas the expediency principle enables the prosecutor to assess the ‘general interest’ when deciding about prosecution. This distinction is however rather crude, and at best it can be seen as a simplification since both principles nowhere apply unqualified.⁴ Alternatively, a distinction can be made between three groups of jurisdictions, albeit these groups are not very uniform. The Scandinavian countries also do not show much uniformity in this regard and therefore are left out in the groups below.

The first group consists of common law systems, which are not based on codifications. Because it makes little sense to proclaim a categorical duty to prosecute all offences if substantive criminal law cannot be seen as a complete and well-ordered system, prosecutorial discretion is the only option.⁵ It provides for

¹*M. Verhulst/G. Boogaard*, Het hondje van minister Pels Rijcken – Over verwijzingen naar eerdere vervolgingen van politieke ambtsdragers, *Nederlands Juristenblad* 2016 (no. 74).

²*Commissie van onderzoek*, Verslag, 2016 (Tweede Kamer, Den Haag), to be found at <https://www.tweedekamer.nl/kamerleden/commissies/cvo> (accessed 14 July 2016).

³*J.L. de Wijkerslooth/J. Simonis*, De vervolgbaarheid van ministers en staatssecretarissen, *Nederlands Juristenblad* 2004, pp. 672-678; *E. Sikkema*, Hoge bomen vangen (nog) geen wind. Strafrechtelijke verantwoordelijkheid van ministers, vervolgbaarheid van publiekrechtelijke rechtspersonen en de positie van de minister van Justitie, in: Keulen/Knigge/Wolswijk (eds.), *Pet af*, 2007 (Wolf Legal Publishers, Nijmegen), pp. 411-439, at 416.

⁴See for instance *J. Fionda*, *Public Prosecutors and Discretion. A Comparative Study*, 1995 (Clarendon, Oxford).

⁵See on the approach to expediency in England and Wales for instance *A. Sanders*, Prosecutions in England and Wales, in: Tak (ed.), *Tasks and Powers of the Prosecution Services in the EU Member States*, 2004 (Wolf Legal Publishers, Nijmegen), pp. 97-127.

the necessary flexibility in the subsumption from a concrete case to the potentially available offences. Of course, offences in many common law systems are increasingly included in statute law, which gives these systems much more consistency and coherence. The need for unbound discretion diminishes accordingly.

The second group is formed by jurisdictions from the French legal family (France, Belgium, Luxembourg, the Netherlands). These countries accept the expediency principle. In the case of France, a legality principle was the logical corollary of introducing a codified criminal law system after the revolution.⁶ It soon became clear that the legality principle was untenable when strictly applied: societal realities required legal flexibility. France therefore accepted the expediency principle,⁷ and it spread to the other countries in the French sphere of influence. However, there is not much uniformity: the jurisdictions differ in the scope of discretion they offer to their public prosecution service, which also happens to be a French invention.

The third group is formed by Germany, Poland, Italy and Spain. Germany took over the French legality principle when it introduced its 1877 Code of Criminal Procedure. The reason for that was not so much the well-structured French Criminal Code but a preference that prosecutors be independent. The need to shield prosecutorial decision-making from political interference not only required that prosecutors would be unable to take instructions from a Minister of Justice. It also required them to be bound to the offences of the Criminal Code because otherwise they would be in need of any guidance in their decision-making.⁸ The strict starting point has been qualified to a large extent in more recent years. However, there is less need for special rules to exclude political involvement in the prosecution service in these countries. For the other groups, things are different.

III. Checks and Balances in the Dutch Prosecution System

When accepting the expediency principle, checks and balances are needed, certainly when prosecutors enjoy a considerable scope of prosecutorial discretion such as is the case in the Netherlands.⁹ That is, of course, because discretion can be used in arbitrary ways and arbitrariness is generally not seen as favourable. Therefore,

⁶See for instance Art. 4 of the *Code des délits et des peines*, adopted on 3 Brumaire of the 4th year (25 October 1795).

⁷In the *Code d'instruction criminelle*, entering into force on 16 November 1808, the legality principle is no longer included.

⁸P.J.P. Tak, Het vervolgingsbeleid in de Duitse Bondsrepubliek. Een onderzoek naar de uitzonderingen op het legaliteitsbeginsel (par. 153-154d StPO Strafprozessordnung), 1973 (W.E.J. Tjeenk Willink, Zwolle), pp. 1-22.

⁹W. Geelhoed, Het opportuniteitsbeginsel en het recht van de Europese Unie. Een onderzoek naar de betekenis van strafvorderlijke beleidsvrijheid in de geëuropeaniseerde rechtsorde, 2013 (Kluwer, Deventer).

there is a need to keep prosecutors within some limits, whereby methods are used that lie outside of substantive criminal law, contrary to the solution of the legality principle that binds prosecutors to the Criminal Code. These methods of restricting discretion include the organisation within the Dutch Public Prosecution Service, which is strictly hierarchical.¹⁰ Internal control can take the form of instructions in specific cases but is also clearly visible in the large body of guidelines that the central College of Procurators-General has issued.

There are also forms of control exercised by actors outside of the Public Prosecution Service. In the Netherlands, a two-sided system of these external checks and balances developed. There are possibilities for judicial review of prosecutorial decisions, and there is political steering of the prosecution system.¹¹

Judicial remedies include the possibility of a judicial order to start prosecutions, issued by the Court of Appeal on request of the victim or a directly interested party.¹² This order can be made when the prosecution service decided not to instigate criminal proceedings in a certain case or when the prosecution service restricted the scope of the proceedings to a lesser offence than would have been possible.¹³ Furthermore, in cases where the prosecution was actually brought before a judge, that trial judge can declare the prosecution inadmissible in cases where the prosecution service acted contrary to general principles of law. These general principles are the equality principle, the principle of legitimate expectations, the prohibition of misuse of powers and the prohibition of arbitrariness.¹⁴

Regarding political steering, the Minister of Security and Justice is politically responsible for the Prosecution Service. This is connected to the conviction that law enforcement should be responsive to society and to societal needs.¹⁵ Furthermore, political accountability plays a large role in societal steering. There is very little judicial involvement in shaping society and repairing its defects, which is, for instance, visible in the lack of a constitutional court. Therefore, if the Public Prosecution Service might be malfunctioning, it is perceived as a natural and appropriate reaction to hold the Minister of Security and Justice to account for that. The ultimate consequence is that the minister has to step down from office if Parliament loses the confidence in his oversight of the prosecution service. This possibility, based on a constitutional convention,¹⁶ is not merely academic: Parliament regularly uses this power over the Government, albeit only seldom in conflicts over the Public Prosecutions Service's functioning. This possibility is of course a

¹⁰Art. 130(4) and 136(3) Judicial Organisation Act.

¹¹*G.J.M. Corstens*, *Waarborgen rondom het vervolgingsbeleid*, 1974 (Vermande, IJmuiden).

¹²Art. 12i Code of Criminal Procedure (further: CCP).

¹³Supreme Court of the Netherlands, no. 103681, 25 June 1996, (Nederlandse Jurisprudentie 1996, no. 714).

¹⁴*Y. Buruma*, *Rechterlijke controle op de vervolgingsbeslissing*, *Strafblad* 2015 (no. 45).

¹⁵*P.P.T. Bovend'Eert*, *Ministeriële verantwoordelijkheid*, 2002 (Ars Aequi, Nijmegen).

¹⁶*P. van Velzen*, *De ongekende ministeriële verantwoordelijkheid, theorie en praktijk 1813-1840*, 2005 (Wolf Legal Publishers, Nijmegen) traces its origins back to the early 19th century.

clear sign of the importance of political accountability as the prime mechanism of controlling state power by the Parliament.¹⁷

The logical way of reasoning is therefore that if the minister is responsible, he also should have control over the prosecution service.¹⁸ He is therefore empowered to give instructions to the prosecution service.¹⁹ These instructions can regard both general issues of crime control and priority setting, as well as specific cases in which the prosecution has to make decisions. Both types of instructions can be positive and negative, i.e. instructions to act or to refrain from acting. The law also provides for safeguards in order to ensure that the minister's use of his instructive powers is transparent. This is especially true for instructions in specific cases because of their potentially disruptive nature in the lives of citizens. Specific decisions may involve an order to start prosecutions or to refrain from prosecuting. In these specific cases, an exchange of views between the Minister of Security and Justice and the Public Prosecution Service is obligatory.²⁰ Moreover, an instruction to start prosecutions must be added to the case file. It will then be clear for the trial judge that the minister specifically ordered the prosecution to be started.²¹ It will also become publicly known that such was the case since the instruction will probably be discussed during the trial hearing. But in case an instruction involves an order to refrain from prosecuting, there will be no trial. The way in which transparency is secured in these cases is to make it obligatory for the minister to inform Parliament about his instruction. In that case, the Public Prosecution Service may submit its views on the matter to the Parliament as well.²² Parliament may discuss the instruction in Parliament and even, in extreme cases of disagreement, carry a vote of no-confidence upon which the minister has to step down from office. Though this system seems to offer much transparency, there are few cases, if any, in which an official injunction has been issued.²³ Perhaps that is due to the fact that some influence over the Prosecution Service can also be exerted by the Minister of

¹⁷R.K. Visser, *In dienst van het algemeen belang. Ministeriële verantwoordelijkheid en parlementair vertrouwen*, 2008 (Boom, Amsterdam).

¹⁸See the report of the *Scheltema Commission*, *Steekhoudend ministerschap; betekenis en toepassing van de ministeriële verantwoordelijkheid*, 1993 (Sdu, 's-Gravenhage). Criticism on this element of the report: S.E. Zijlstra/K. Wilkeshuis, *Verantwoordelijkheid en publieke taak*, in: Broeksteeg/Van den Berg/Verhey (eds.), *Ministeriële verantwoordelijkheid opnieuw gewogen*, 2006 (Kluwer, Alphen aan den Rijn), pp. 9-18.

¹⁹Art. 127 Judicial Organisation Act.

²⁰Art. 128(1)-(4) Judicial Organisation Act.

²¹Art. 128(5) Judicial Organisation Act.

²²Art. 128(6) Judicial Organisation Act.

²³See for a historical perspective M.E. Verburg, *De minister de baas. Minister van Justitie en Openbaar Ministerie. Grepen uit de historie van de aanwijzingsbevoegdheid*, 2004 (Sdu, Den Haag).

Security and Justice in his regular meetings with the College of Procurators-General. Such subtle influencing might make it superfluous to use formal instructions.²⁴

The system of positive and negative instructions can of course be used as a political tool and be aimed at political opponents. It can also be aimed at fellow government members, for instance when they belong to a different political party in the ruling coalition. Because the use of these instruction powers could be very damaging in a political sense, there are special procedures in place that must be followed in cases of public office offences. These procedures exclude the Minister of Security and Justice's instruction powers over the prosecution service, but they also possess other elements diverging from regular criminal proceedings. Since these procedures only apply to public office offences, it is important to first look at how these are defined. For other offences, regular criminal procedures remain in place, including the instruction powers of the Minister of Security and Justice. The protective character of the special procedural rules is therefore limited.

IV. Criminal Liability of Politicians

In general, the offences for which politicians can be held criminally liable can be distinguished into three categories. Firstly, there is the category of statements that could lead—in normal circumstances—to criminal liability for defamation. Politicians are immune for prosecutions relating to these statements only when these are made in parliamentary activities.²⁵ Secondly, there is a set of public office offences for which special procedures apply, if it concerns a member of the national Government or a member of Parliament. Thirdly, all other offences are dealt with by normal courts in standard criminal procedures. For instance, the prosecution of Geert Wilders for defamation takes place in a normal court because the statements for which he is prosecuted were not made in Parliament and defamation is not a public office offence.²⁶ This category is therefore quite wide, and many offences will be handled in regular proceedings.

The second category of public office offences consists of offences that are committed in violation of a public duty and offences that were committed using powers, opportunities or means that were bestowed upon the perpetrator because of a public office. This is not a strictly delineated set of offences. Some offences of the

²⁴*P.J.P. Tak*, The Dutch Prosecution Service, in: *Tak* (ed.), *Tasks and Powers of the Prosecution Services in the EU Member States*, 2004 (Wolf Legal Publishers, Nijmegen), pp. 355-383, at 374-375.

²⁵Art. 71 Basic Law.

²⁶On the difficulties in this type of cases, see *Y. Buruma*, 'Als Wilders Berlusconi was... Een essay over de strafvorderlijke legaliteits- en opportunitiebeginselen' in: *Buruma/Fleuren/Van Kempen/Kusters/Mertens* (eds.), *Op het rechte pad*, 2008 (Wolf Legal Publishers, Nijmegen), pp. 135-147.

Criminal Code are labelled ‘public office offences’ and are therefore explicitly included.²⁷ This includes public corruption, coercion by abuse of office and acting contrary to any laws or regulation, an offence only applicable to cabinet members. For all other offences deemed to be public office offences for the reason that they were committed with powers of public office, the penalty level is increased by a third.²⁸ Committing of the offence in public office is in these cases seen as an aggravating factor. For the offences explicitly labelled ‘public office offence’, this aggravating circumstance is already incorporated in the penalty maximum.

Special procedures for national-level politicians suspected of public office offences could be used therefore for both the offences explicitly labelled ‘public office offence’, as for all other offences as long as they were committed using powers, opportunities or means that were bestowed upon the perpetrator because of a public office.

V. Special Procedures for Prosecuting Politicians

The special procedures for prosecuting politicians only apply to national-level politicians; there are no special procedures for politicians from lower levels of government. The reason for that is that the Minister of Justice, who is by definition a national-level politician, is the only politician who can wield influence over prosecutions. While political objectives could potentially lead the Minister of Security and Justice to aim that power at anyone, be it a regular citizen or a politician at any level, only national-level politicians are deemed to be in such danger to become victims of his power that they should be shielded against this by special procedures. Furthermore, light-hearted prosecutions by regular procedures should be prevented, and it should also be impossible for the Minister of Security and Justice to obstruct a prosecution of a fellow politician.²⁹ The group of politicians for which this procedure applies therefore comprises members of Parliament and cabinet members (ministers and state secretaries).

There are several distinctly special elements in this procedure. The first element in which the procedure is special is the way in which the decision to prosecute is made. This decision is not made by the Public Prosecution Service, for reasons already discussed. Instead, both the Parliament and the Government have the power to indict a national-level politician, and this power is not limited to a decision to prosecute a member of the ‘other side’. That is to say, both the Government and the Parliament may decide to prosecute a government member or an MP.³⁰ The decision to prosecute must be made by Royal Decree (when done by the

²⁷ Arts. 355-380 CC are crimes explicitly labelled as such.

²⁸ Art. 44 CC.

²⁹ *Sikkema* (note 3), pp. 417-418.

³⁰ Art. 119 Basic Law.

Government) or by a special parliamentary procedure (when done by the Second Chamber of the Parliament). There are no special provisions on how the Government should issue a Royal Decree in this context, apart from the obligation that the facts of the case must be specifically circumscribed in the indictment, that both Chambers of Parliament are informed and that the Procurator-General will be tasked with executing the Decree.³¹

By contrast, the parliamentary procedure to decide on prosecution is a very special one. It is mainly designed to prosecute members of Government, but it should probably also be applicable to MPs. This is due to the fact that the procedure is laid down in the Ministerial Accountability Act, which is not directly applicable to accountability of MPs. The procedure requires that a suspicion that a member of Government has committed a public office offence must be submitted in writing to the presidency of the Second Chamber by at least five MPs, containing a statement of facts.³² The Presidency then presents this suspicion to the Chamber for acceptance and informs the cabinet member concerned.³³ If the Chamber accepts this, the Parliament appoints a special investigative committee in order to investigate the case. This committee should perform criminal investigations while not using regular criminal investigative measures but the measures included in the Parliamentary Inquiry Act. When the committee concludes its investigation, it presents the findings to the Chamber, which decides on the findings and on the question whether to start a prosecution or not.³⁴ This decision should be made within 3 months after the suspicion has been reported.³⁵ The Chamber should decide on the basis of law, fairness, morality and the national interest.³⁶ If it finds that a prosecution should follow, it defines the facts of the case and sends the decision to the Procurator-General at the Supreme Court for executing its decision and carrying out the prosecution.

The second element in which the procedure is special is the way in which the prosecution is conducted. This is not done by the Public Prosecution Service, since its actions in the phase after a decision to prosecute is made can also be influenced by the Minister of Justice. Instead, the Procurator-General at the Supreme Court is competent to prosecute since he is not a member of the Public Prosecution Service and is, unlike regular prosecutors, fully independent of the Government. He is also obliged to execute the decision to prosecute that was made by either the Government or the Parliament and cannot dismiss the case.³⁷ There are a few special provisions for a pre-trial investigation, such as the possibility for the Supreme Court to appoint an investigating justice if needed. For the rest, normal procedural rules

³¹ Art. 5 Ministerial Accountability Act.

³² Art. 7 Ministerial Accountability Act.

³³ Art. 8 Ministerial Accountability Act.

³⁴ Art. 13 Ministerial Accountability Act.

³⁵ Art. 16(1) Ministerial Accountability Act.

³⁶ Art. 18(1) Ministerial Accountability Act.

³⁷ Art. 483(3) CCP.

for prosecutions at first instance courts apply.³⁸ One other exception is the express exclusion of the rule that prosecutors are subject to oversight by the Procurator-General at the Court of Appeal.³⁹ This ensures the Procurator-General's independence from the Public Prosecution Service and, thereby, from the Minister of Security and Justice.

The third element in which the procedure is special is the competent trial court. This is the Supreme Court, sitting in full court of 10 justices.⁴⁰ Also for the trial, the regular rules of criminal procedure apply, albeit with some adaptations. There is no appeal possible on grounds of fact or of law. This is legally possible since the Netherlands did not ratify the seventh protocol to the ECHR and is therefore not obliged to offer the possibility to an appeal. The fact that politicians are tried in single instance by the highest court is, instead, seen as a privilege: the Supreme Court is deemed to be a *forum privilegiatum* consisting of the most senior judges of the country.⁴¹

The special procedure is designed to balance two distinct interests. On the one hand, it should make it a real possibility to prosecute national-level politicians instead of offering them full immunity. On the other hand, the procedure should raise barriers against light-hearted and ill-motivated prosecutions by taking the decision-making power out of the hands of regular prosecutors and excluding political interference by the Minister of Security and Justice.⁴² Nevertheless, the procedure can hardly form an impediment against politically motivated prosecution since the Parliament and the Government are able to decide on prosecutions. They can either shield each other against the criminal justice system or attack each other with criminal law measures. That could be its only advantage: placing the decision to prosecute public office offences, committed at the highest political level, in the hands of two counterbalancing powers.⁴³ How does that work in practice?

³⁸Art. 484(1) CCP.

³⁹This is not to be confused with the Procurator-General at the Supreme Court. As in all legal systems in the French tradition, the Supreme Court is assisted by a Procurator-General and his deputies, the Advocates-General. The Procurators-General at the five Courts of Appeal were the heads of the Public Prosecution Service, before the reform of the judicial organisation in 1999. At that time they were replaced by a College of Procurators-General that is now leading the Public Prosecution Service.

⁴⁰In case no majority can be reached, the suspect is acquitted (Art. 76(4) Judicial Organisation Act).

⁴¹See D.J. Elzinga, De strafrechtelijke ministeriële verantwoordelijkheid, in: Elzinga (ed.), Ministeriële verantwoordelijkheid in Nederland, 1994 (W.E.J. Tjeenk Willink, Zwolle), pp. 65-78, at 70-74.

⁴²Sikkema (note 3), pp. 416-417.

⁴³Sikkema (note 3), pp. 421-422.

VI. A Recent Investigation into Public Office Offences

Recently, there has been a case in which a suspicion of violating secrets was investigated by the Second Chamber.⁴⁴ The suspect of this offence was an unknown MP, but it must have been the head of one of the political parties in the Chamber. At least, such is probably the case since the secrets involved were discussed in the Second Chamber committee on security and intelligence. This committee is responsible for parliamentary oversight over the intelligence services and forms the only means of democratic control over them. Since all matters that are discussed in the committee relate to state security, there are strict rules on confidentiality. Only the heads of the Second Chamber's political parties are members of the committee. Therefore, the committee has a considerable weight, consisting of the key players in Dutch politics.

In October 2013, home affairs minister Plasterk publicly stated that the American NSA apparently collected Dutch telephone data of 1.8 million calls. These data only contained technical information on the telephone calls, not the content of the calls. Following that statement, on 12 December 2013, there was a meeting of the secret committee. During that meeting, minister Plasterk and defence minister Hennis stated that the NSA did not collect the data but that the data had been handed over to them by the Dutch authorities. In its edition of 18 February 2014, national newspaper NRC writes that fact down: the telephone data were given to the NSA by Dutch authorities. Then the question arose from whom the NRC received that information.

A month later, on 13 March 2014, the chairman of the secret committee, Halbe Zijlstra (who is the head of the liberals, the largest party in the Second Chamber), reports the case to the police as a breach of official secrecy. As a suspect, an unknown member of the secret committee was recorded, that is to say one of the heads of the Chamber fractions. Possibly, the perpetrator could also have been an assistant to one of the committee members or someone else who happened to have received that information. However, since the confidentiality surrounding the committee meetings is extremely strict, this was deemed to be only a slight possibility.

Since the law requires that a complaint of a public office offence by a government member should be made by five MPs to the Chamber presidency, and this probably also applies to MPs as suspects, this element of procedure clearly was not followed here. However, upon receiving the report by Mr. Zijlstra, the police started an investigation. This was led by the Internal Affairs section of the national police and led by the regular prosecutor. The Public Prosecution Service reported in November 2015 that the investigation did not lead to the naming of a particular suspect but that the suspect probably was a member of the secret committee. Moreover, the case could be classified as a breach of secrecy while using official

⁴⁴See for a description of the events leading up to the investigation the report of the *Commissie van onderzoek* (note 2), pp. 23-30.

powers or opportunities.⁴⁵ Because of these reasons, the Public Prosecution Service regarded itself as no longer competent to investigate any further and handed the investigation over to the presidency of the Second Chamber.⁴⁶ Upon receiving the report, the presidency designated an investigative committee of MPs, which was accepted by a majority of the Chamber.

The investigative committee started an investigation using its powers under the Parliamentary Inquiry Act. Some of the MPs in the investigative committee were former prosecutors and judges, so the committee members could use their own experience in criminal investigations. It sought additional advice from academics and specialists in criminal law and constitutional law. The investigative committee interviewed all the members of the secret committee, who all declared not to have given the relevant information to the press. In the end, this led the investigative committee to conclude in its report that there was not enough evidence to continue the investigation with further interviews.⁴⁷ It reported that it could not identify a suspect who could be prosecuted. It also reported a problem with the legislation in place to carry out its investigations on the basis of the Parliamentary Inquiry Act: this act contains a provision that statements made in parliamentary enquiries may not be used in evidence in a criminal procedure.⁴⁸ The reason for this is that the objective of a parliamentary enquiry is to discuss public wrongs in the open, which sometimes has negative consequences for witnesses appearing in these enquiries. Once they have come clean before a parliamentary enquiry committee, they should not also be prosecuted. However, according to the investigative committee, this provision is not written for the criminal investigations that are to take place on the basis of the act, and it severely hampers them. The idea behind the exclusionary rule might be appropriate for actual parliamentary enquiries. But when a parliamentary investigative committee, using its investigative measures in a criminal investigation, cannot use the results of these interviews in evidence in the ensuing trial, it does not make much sense to hold them at all.⁴⁹ Other investigative measures, including coercive ones, are not at the disposal of parliamentary investigative committees. Therefore, the special procedure is unnecessarily protective and should be reformed, according to the committee.⁵⁰ It refers to the report of the earlier *Commissie Prinsjesdagstukken*, which also advised to reform the system.⁵¹ That committee already signalled that the Parliamentary Inquiry Act offered insufficient investigative measures to parliamentary investigative committees.⁵²

⁴⁵ Art. 44 in combination with Art. 272 CC.

⁴⁶ *Commissie van onderzoek* (note 2), pp. 23-30.

⁴⁷ *Commissie van onderzoek* (note 2), pp. 31-43.

⁴⁸ Art. 30 Parliamentary Inquiry Act.

⁴⁹ *Commissie van onderzoek* (note 2), p. 34.

⁵⁰ *Commissie van onderzoek* (note 2), p. 45.

⁵¹ *Commissie Prinsjesdagstukken*, Publiek geheim, 2010 (Tweede Kamer, Den Haag).

⁵² *Commissie Prinsjesdagstukken* (note 51), p. 79.

On the basis of the findings of the investigative committee, the special procedure seems indeed to be unable to function as it should; at least, such is the case when the Parliament is willing to prosecute an MP or a cabinet member. Prosecutorial decision-making by the Government is probably much easier because it is less subjected to procedural difficulties. But as far as the Parliament is concerned, the system does not succeed in reaching its two objectives of making the prosecution of politicians a real possibility and at the same time preventing a light-hearted prosecution. The protective nature of the special procedure can therefore be seen as an advantage for politicians since it is the only possibility to prosecute national-level politicians for public office offences.

Another drawback of special procedures of this kind is that they are rarely used. Therefore, little practice exists, and legal or practical obstacles remain undiscovered and therefore unsolved. That leads to the situation that there is no reliable procedure in place to handle a serious case of a public office offence when it arises, and the special procedure must be followed.⁵³ There are some proposals for change, such as the proposal from the investigative committee and the earlier report of the *Commissie Prinsjesdagstukken*. According to the latter, the special procedure should be amended at least on the matter of the insufficient investigative measures of parliamentary investigative committees. Others have advised that, instead of the special procedure, the regular Public Prosecution Service should be charged with the investigation that is carried out by the Internal Affairs division of the police. This would completely abolish the need for a parliamentary investigative committee. In that scenario, it is important to exclude the Minister of Security and Justice's powers to exert his influence over the Public Prosecution Service. This could be done in a special provision in the Judicial Organisation Act excluding his specific injunction rights when it concerns a case of a prosecution of a national-level politician.⁵⁴ Proposals to limit the Minister of Security and Justice's injunction rights had already met with criticism from the Government before the recent case of violating secrets arose. The Government deplores that, in this scenario, the connection between the minister's competence and his accountability is lost: he can no longer instruct the Public Prosecution Service, but he will nevertheless be accountable to Parliament.⁵⁵ Possibly, the recent case could have some effect and lead the Government to reconsider its position. In the meantime, the Dutch criminal law system is ill-prepared for tackling public office offences by national-level politicians, certainly when it is up to the Parliament to make the decision to prosecute.

⁵³In 1994, Elzinga still concluded differently: *D.J. Elzinga* (note 41), pp. 65-78.

⁵⁴*Sikkema* (note 3), pp. 424-426.

⁵⁵Kamerstukken II, 2001/02, 25294, no. 15.

VII. Conclusion

Whereas an elaborate system of criminal liability, coupled with special procedures, was developed in the first half of the 1900s, soon after that society relied on political accountability as the primary means to deal with misbehaving politicians.⁵⁶ The system for criminal accountability, which was in operation in the first half of the nineteenth century and largely revised in 1855, therefore never played an important role. However, the importance of criminal liability might relive in the future. One of the consequences of the ‘populist turn’ in politics might be that the political sphere is no longer the preferred place for definitively dealing with serious misbehaviour by politicians. There are signs already that populist parties are interested in using criminal law methods to attack political opponents, including the special procedures available to prosecute cabinet members or members of Parliament. Five MPs of the Freedom Party reported to the Second Chamber presidency a suspicion that the prime minister committed the offence of acting contrary to laws or regulations,⁵⁷ in his decision to not immediately put the result of a referendum into action.⁵⁸ In this changed political landscape, special procedures for prosecuting politicians will possibly gain interest. They are an example of how a system in which the prosecution enjoys considerable discretion, attempts to check that discretion by ministerial injunction rights, and in turn excludes these injunction rights in order to prevent undue influence by politicians in the criminal justice system.

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⁵⁶*De Wijkerslooth/Simonis* (note 3), pp. 672-678; *Sikkema* (note 3), p. 416.

⁵⁷Art. 355 CC.

⁵⁸<http://nos.nl/artikel/2099339-pvv-rutte-pleegt-ambtsmisdrijf-rond-referendum.html> (accessed 14 July 2016).