

Parlementair onderzoek : een studie van het onderzoeksrecht in Nederland, het Verenigd Koninkrijk en de Verenigde Staten

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Summary

This dissertation offers a study of the parliamentary power of investigation in a comparative perspective. A parliamentary investigation, as defined here, is an inquiry carried out by a parliamentary committee provided with investigative jurisdiction and accompanying powers by its parent chamber, to which the committee is also expected to report.

The Dutch parliament's power of investigation (or inquiry) was first recognized in the Constitution of 1848. A Parliamentary Inquiries Act was adopted in 1850. The PIA, as amended, provides both chambers with the power to create a temporary investigatory committee with special statutory powers such as the right to summon witnesses to provide oral or written evidence. After a promising start in the nineteenth century, in which it was applied mainly as an instrument for large legislative projects, the instrument was largely abandoned for most of the twentieth century. In the late 1970s, however, increasing parliamentary activism led the Dutch House of Representatives – the politically dominant chamber – to revive its investigative power. Since then, the House has adopted more than thirty motions to launch a parliamentary investigation. These investigations are carried out by specially created temporary committees of the House and mainly serves as a tool for in-depth parliamentary scrutiny of the government. Only nine of these modern investigations were carried out by statutory committees established under the PIA ('enquêtecommissies'). The others were 'regular' investigations carried out by temporary committees without special statutory powers. In 2012, the Dutch Senate used its investigatory power for the first time in history by establishing a temporary (non-statutory) committee of investigation.

Since its revival, the power of investigation is generally considered a successful innovation in parliamentary practice. In the light of the ongoing debate about parliament's ability to perform its constitutional functions, especially its duty to scrutinize the policies and actions of the government, members as well as observers of parliament have called for the further development of the investigative function. Through investigations, it is argued, parliament can improve its institutional knowledge base, which is essential to maintaining an independent position vis-à-vis the government. Against this background, this dissertation focuses on the law and practice of parliamentary investigations in three systems: the Netherlands, the United Kingdom and the United States. Through a comparative analysis, it aims to provide insights, ideas and recommendations for the Dutch parliament's investigative function. To acquire a good understanding of the way in which the investigative power is applied in each system, the subject is studied from a broad perspective. Thus, it includes all forms of investigations carried out by parliamentary committees, statutory and non-statutory, and focuses not only on constitutional or legal aspects but also on organizational and practical matters.

In each country report, the discussion is divided in four chapters. The first chapter provides an analysis of the constitutional background of the parliament's power to investigate, including the political context in which it functions. Key constitutional concepts, such as ministerial accountability, parliament's controlling or scrutinizing role, existing parliamentary instruments, as well as important elements in the political context, such as the party system, are discussed. In the second chapter, the specific powers associated with parliamentary investigations, such as the right to summon witnesses and to gather written evidence, are discussed. This chapter also focuses on the special constitutional position of ministers and civil servants – or, in the American context: the President and the executive branch – in the context of parliamentary investigations. The third chapter discusses the committee structure, support organizations and other organizational aspects. The fourth chapter focuses on the investigative process, including issues such as confidentiality of evidence and the concurrence of parliamentary and criminal investigations.

In the final part of this dissertation, the key findings in the country reports for the Netherlands, the United Kingdom and the United States are compared and contrasted. What has become clear is that the history of power of investigation in all three systems goes back to the early beginnings of each parliament. For a long time, these parliaments applied their investigative power incidentally and for various purposes. In the twentieth century, however, the face of parliamentary investigations began to change. With the development of the welfare state came a growing government bureaucracy. In their efforts to keep pace, members of parliament realized that in order to exercise parliamentary control (congressional oversight in American terminology) effectively, acquiring adequate knowledge and expertise were of the essence. In each system, parliamentary (or congressional) reforms included strengthening the investigative function. In the United States Congress, the Legislative Reform Act of 1946 restructured the system of standing committees in both chambers, requiring them to exercise continuous watchfulness over executive departments and agencies within their jurisdiction. In the British House of Commons, a system of departmental select committees was created in 1979 in order to examine the expenditure, administration and policy of the principle government departments and associated public bodies. In both systems, the power of investigation was delegated to these permanent committees to be used at their discretion in the exercise of their functions. The House and Senate standing committees in the United States were provided with the right to subpoena witnesses for oral or written testimony, while the British select committees were granted the traditional parliamentary powers to send for persons, papers and records. These committees, established for a full parliamentary or congressional term, cover a broad policy area – roughly mirroring the structure of the executive branch – and can initiate investigations at their own accord, allowing them to set their own research agenda. In the Netherlands, by contrast, the investigative power, rediscovered in the 1970s primarily as an instrument for parliamentary scrutiny, has always remained a power to be incidentally delegated by the House of Representatives to temporary statutory or non-statutory committees. Dutch investigative committees are created for a specific inquiry, work within a detailed research framework as determined by the House and are dissolved after the report

has been published and debated. Such temporary committees have become exceptional in the United States and the United Kingdom.

While the British and American committee systems share some basic characteristics, a closer look at the way in which these committees operate also reveals a number of key differences. The British select committee system was introduced as a new institutional framework to complement the traditional instruments for parliamentary scrutiny of government, mainly exercised in the politically strongly divided and antagonistic chamber. In order to stimulate independence, coherence and cooperation within committees, the new committees are relatively small and membership is restricted to backbenchers, i.e. members who do not fulfill prominent party-political functions within parliament such as (shadow) ministers and (opposition) whips. House and Senate committees in the United States are generally much larger and have significant legislative and budgetary powers next to their oversight responsibilities, making committees important forums for political decision making within Congress. Allocation of seats within committees generally reflects the broader party balance within the chamber, but unlike the more consensual British select committees, the majority party often determines the committee's investigative agenda, even though the minority is procedurally entitled to a minimum of investigative rights. Especially in times of divided government, committee oversight and investigations can be highly partisan, although congressional committee practice also harbors a tradition of cross-party cooperation. Such cooperation is mainly to be seen at the level of oversight subcommittees working in low-politics areas, where majority and minority leaders find common interests and maintain good personal relationships. The Dutch temporary committees do not reflect the political power balance in the multi-party chamber. Instead, it has become customary for each party group within the House to detach one of their members to serve on the committee. Unlike standing committees, in which political differences and coalition or opposition positions are articulated, investigative committees in the Dutch parliament are usually characterized by interparty cooperation and consensus building across the political spectrum.

The analysis of the three systems has shown that power of investigation has been significantly more institutionalized in the British House of Commons and the American Congress, albeit in different ways, than in the Dutch House of Representatives. Even though the number of parliamentary investigations in the Netherlands has grown over the past decades, their appearance in everyday parliamentary practice has remained incidental. On the basis of experiences in the British and American systems, it is argued in the final chapter of this book that the investigative function of the Dutch parliament should be further developed. There are several reasons for doing so. First, delegating the investigative power to permanent committees can contribute to parliament's efforts to reduce the current imbalance of power between government and parliament. Permanent investigative committees, supported by a small but professional committee staff and possibly a central research facility within the House, can improve parliament's institutional ability to process and analyze the ever growing amount of information that is made available by government departments and other sources. Such committees, unlike the existing standing committees in the House, would be well-suited to improve parliament's institutional memory. Second, as the British example shows, permanent investigative committees could

play a useful role in parliament's function as forum for ministerial accountability. The accountability process can become more substantial than in the chamber or the standing committees, because investigative committees proceed on the basis of evidence rather than political debate. Moreover, in a less politically divisive environment the accountability process can more easily accommodate other actors such as departmental civil servants and officials from independent government agencies. Even though in the constitutional context of ministerial accountability in both the United Kingdom and the Netherlands departmental civil servants are normally expected to act upon the instructions of their ministers, the British case has demonstrated that this does not have to prevent ministers from allowing their civil servants to provide evidence to investigative committees. Third, the investigative process can serve as a way to make parliament more accessible, as it allows for outside participants such as interest groups and community organizations to share their opinions, experiences and expertise and actively participate in the evaluation of government policies. The investigative process is most useful in this respect when it is organized in a more or less standardized, predictable and transparent way. In addition, committees should actively seek the participation of outsiders, especially from groups or individuals who might not otherwise find their way to parliament. The British committees have been more successful in this respect than their Dutch and American counterparts.

When elaborating initiatives to further develop the investigative function of the Dutch parliament on the basis of experiences in other systems, one obviously needs to take into account the specific characteristics of the Dutch system. From a constitutional perspective, the power of investigation is sufficiently broad to allow for new initiatives. The government is required to cooperate with investigative committees in parliament, for example by providing documents and other forms of evidence upon request, although the 'interest of the state', a fairly undefined concept, prevents the (unconditional) provision of certain information. In organizational terms, the Dutch House of Representatives is much smaller than the British and American parliaments, while the multi-party system has resulted in an ideologically much more fragmented political landscape. This makes the overall number of members available for investigative committees much smaller in the Dutch parliament than in the other systems. Therefore, if the predominant and often celebrated culture of building cross-party consensus is to be preserved within Dutch investigative committees and the constructive cooperation of the government is considered essential, then further developing the investigative function is most likely to succeed if one primarily stimulates investigations regarding topics which are not at the heart of party-political debate and in which the position of individual ministers is not directly at stake.

Taking into account the specific conditions as noted above, the book argues that strengthening parliament's investigative function can take several directions. One direction is to further stimulate coordinating initiatives already taking place, such as the new research agenda procedure. This initiative provides, in addition to the tradition of *ad hoc* inquiries into specific policy shortcomings or incidents which have caused public concern, for a decision making process to establish a limited number of small-scale parliamentary investigations annually focusing broadly on the implementation of policy and future challenges. Topics are selected on the basis of pro-

posals brought forward by members in the standing committees. The agenda initiative, however, remains a centralized form of parliamentary decision making and the investigations included in the annual agenda are again carried out by temporary investigative committees. In both political and practical terms, further developing the investigative function along this path has its limits. In the spirit of the American and especially the British system, a more promising direction would be, it is argued, to decentralize the investigative function and to examine possibilities to create permanent committees with a continuous and flexible investigative mandate. In that light, the book concludes with a detailed proposal for the introduction of a system of permanent investigative subcommittees within the current standing committees. Such a reform requires no constitutional or statutory action and can be easily implemented by amending the House Rules. These subcommittees should be instructed to carry out investigations on topics of their own choosing with the jurisdiction of their parent committee, preferably focusing on broad forms of policy evaluation that stimulate a constructive (but not uncritical) dialogue with ministers and civil servants and allow for the participation of others. To stimulate internal coherence, subcommittee members should preferably not fulfill party-political positions within the committee's jurisdiction. Providing these subcommittees with statutory investigative powers under the Parliamentary Inquiries Act seems unnecessary, but if circumstances so require, the Act does not prevent the House to temporarily delegate such powers. Rather than providing formal powers, however, what is essential is for these subcommittees to be provided with a small but professional support staff and to actively seek cooperation with independent expert bodies such as auditing, planning and advising institutions.

The proposed institutional reform would be an addition to, rather than a replacement of, the existing practice of establishing temporary statutory or non-statutory committees for specific inquiries, even though for practical reasons such investigations will likely become more exceptional. The existing legislative and procedural framework for *ad hoc* parliamentary investigations, which underwent a comprehensive modernization in 2008, should therefore be maintained, although on the basis of recent practice as well as comparative insights, some recommendations for improvement are formulated, for example with respect to the protection of witnesses, the position of the committee chair, and the rules regarding the archiving of evidence and other committee documents.