Legitimiteit en onpartijdigheid bij vervolging : een vergelijking van de verhouding tussen het openbaar ministerie en de minister van Justitie in Frankrijk, Italië en Nederland

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Summary

Legitimacy and impartiality in prosecution.
A comparison of the relation between the public prosecution service and the minister of Justice in France, Italy and the Netherlands

The relation between the prosecution service and political bodies is marked by a tension between demands of both democratic legitimacy and impartial objectivity. Each legal system has to meet these demands in some way. This book attempts to show how the systems of the Netherlands, France and Italy approach this matter, which arguments lie behind and which reforms could be undertaken in this regard.

For each country, firstly, an analysis is set out of the position of the prosecution service within the constitutional framework. Then an outline follows of the organisational structure of the aforesaid service and of its powers under criminal law. After that, a description is given of the role and the various powers of the minister of Justice. Finally, the research into each system ends with a study of the accountability of the minister to parliament.

The conclusions to these country analyses can be summarized as follows. The Dutch prosecution service and minister of Justice relate to each other by consulting together on an equal basis. The minister is empowered to be informed about even the details of criminal cases. Prosecutors are totally subordinate in legal status, although this does not appear to politicise the prosecution. The minister is entitled to order any kind of prosecutorial action to be taken or to be stopped. In practice his influence nearly only takes the form of consultation. On a number of occasions this is done on the instance of parliament, which scrutinizes the minister closely.

The French relation between the prosecution service and politics is in a phase of change. The current legislation gives the minister a dominant role, checked by an advisory function of the High Council of the Magistracy. This statutory situation is contrasted by the official policy of some of the governments from the end of last century on. This policy was to follow all advice concerning appointments and disciplinary actions. Also, the minister no longer gave any orders in specific criminal cases, but only issues general directives on matters of prosecution. Still, appointments of the highest prosecutor functions are of a marked politicised nature. Parliament plays a rather insignificant part in this field. The minister can afford to take a passive attitude, while he does not have to fear parliamentary sanctions.

Contradiction rules the Italian positions of the political bodies and the prosecutors. The prosecution service is highly independent from the government, who has no say in their legal status or their functional activity. The prosecutors still do exercise powers of similar importance as those in the aforementioned countries. On the other hand, the service is subject to a principle of legality of the prosecution, which states that every crime notice has to lead to prosecution. De facto the prosecutor does exercise discretion in deciding which cases should be prioritised and which not. The latter cases still end up being dismissed in the long run. Furthermore, although the government can exercise little influence on criminal cases, for these it does answer to parliament. Members of parliament can receive detailed criminal information from the minister, or through quasi-permanent commissions of inquiry.
The Italian prosecution service appears to be comparatively the most autonomous in legal terms. In comparison with the Netherlands, France subjects its prosecutors to a more restricted range of ministerial orders. In the practice of all three countries the prosecution service enjoys some autonomy in legal status, in particular concerning appointments to lower functions. Practice also shows independent decision making in individual cases. Also, no political body in any of these countries imposes any directives that indicate which type of case should be treated without priority.

The descriptive analysis above can be paired with an investigation into the validity of the reasons behind the existing juridical relation between prosecution service and politics. At this point democratic legitimacy sets certain demands. Since the prosecutors have a discretion in their decisions and the power whether to initiate a procedure, political bodies should have a say in the general policy of the prosecution. A second conclusion also regards the prosecution service's discretion not to prosecute an offender for an act punishable under criminal law. If the prosecutor may decide not to prosecute for other than legal reasons, then the government needs to be able to bring about a contrary decision. The demand for impartiality under the rule of law on the other hand imposes restraint from political interference in criminal cases. This should be furthered by minimizing governmental influence in the legal status of individual prosecutors.

These conclusions promote ideas for change in the system that governs the relation between politicians and prosecutors. Firstly, an appeal could be instituted against ministerial orders regarding specific cases. Secondly, sympathy exists for creating a national public prosecutor leading the prosecution service, while enjoying a certain functional autonomy. A further suggestion for reform is to give parliament the task of setting directives on the general prosecution policy. This option could be of particular interest to the Italian situation. Lastly, an independent legal status for prosecutors could be combined with a limitation of ministerial influence to general directives. Variations of these could function well in both France and the Netherlands.