University of Groningen

Criminal Liability of Political Decision-Makers in the Netherlands

Geelhoed, Willem

Published in:
Criminal Liability of Political Decision-Makers

DOI:
[10.1007/978-3-319-52051-3_9](https://doi.org/10.1007/978-3-319-52051-3_9)

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2017

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):
Geelhoed, W. (2017). Criminal Liability of Political Decision-Makers in the Netherlands. In F. Zimmermann (Ed.), *Criminal Liability of Political Decision-Makers: A Comparative Perspective* (pp. 167-191). Springer.
https://doi.org/10.1007/978-3-319-52051-3_9

Copyright

Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license. More information can be found on the University of Groningen website: <https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment>.

Take-down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): <http://www.rug.nl/research/portal>. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

Criminal Liability of Political Decision-Makers in the Netherlands

Willem Geelhoed

I. Preliminary Remarks

1. Distribution of Competences

In the Netherlands, executive political decisions are normally made by collegiate bodies and not by single office holders (Art. 125(2) Basic Law). This counts for all levels of government, be it national, provincial or municipal. The mayor also has some competences of his own. Aldermen, however, do not have competences of themselves and can only participate in the collegial decision-making of their college. However, members of the executive bodies mostly have their own portfolio and are tasked with preparing the actual decision-making. So when the decision to build a bridge is taken on the national level, the primary decision-maker is the national Government, as a collegial body. However, the responsible government minister (for Infrastructure and the Environment) will bear political responsibility vis-à-vis Parliament. If the decision to build a bridge is taken on the municipal level, the primary decision-maker is the college of mayor and aldermen. In that case, however, the municipal council can also hold a single alderman politically accountable for bad decision-making. The fact that, on a national level, the Government and, on a municipal level, the college of mayors and aldermen can only decide collegially could mean that they cannot be held individually accountable in a political sense.¹ However, also individual aldermen may be forced out of office by the municipal council (Art. 49 *Gemeentewet*). This is in breach of the principle of collegial decision-making but strengthening the democratic control over the executive since it lowers the threshold for the representative to use its powers. On the

¹Possibly based on Art. 125 Basic Law.

W. Geelhoed (✉)
University of Groningen, Groningen, The Netherlands
e-mail: w.geelhoed@rug.nl

national level, the rule that the executive has to step down when the representative assembly so requires is not laid down in the Basic Law but is an unwritten rule of constitutional law, accepted as valid since the 1900s. All this is mostly important for political responsibility, not for criminal liability. However, in some criminal cases, questions of participation may become relevant. In that context, it can be important whether the office holder was single-handedly deciding or only participating in a collegial decision.

Strictly speaking, the Netherlands is only one of the four countries that together form the Kingdom of the Netherlands. In the context of criminal liability for political decision-makers, the Caribbean part of the Kingdom is particularly relevant since prosecutions and convictions of politicians happen more often there than in the European part. One example of that is the recent conviction for corruption of Gerrit Schotte, a former prime minister of Curaçao.² In the remainder of this study, I will, however, focus on the European part of the Kingdom.

In the Netherlands, governments on any level are not directly elected by the people. Sometimes the electorate is asked to choose between candidates for appointment as mayor. Representative bodies are elected mostly in direct elections but sometimes also in indirect elections, as is the case with the First Chamber of the States-General (i.e., the Senate). Members of representative bodies in principle have the task to control the executive. These representative assemblies are the most important body of political organisation, which importance does not attach to the colleges of the executive (Art. 125(1) Basic Law). However, representative bodies are not the ones that can be held politically accountable in the sense that their removal can be brought about by force. Executive colleges can be forced to step down if a vote of no confidence is carried by the representative body, but the representative body can only be disbanded by the executive on the national level (for instance, when the Government believes that snap elections could improve its political mandate). This is not possible on lower levels of government. Representative bodies on these levels are therefore rather controlling and supervising the executive colleges. Their responsibility towards the electorate can be regarded as a form of political responsibility, but the representative is mostly not viewed as being heavily involved in actual political decision-making that it is to be held politically accountable. In the following, I will therefore focus on executive officials on the national level and mayors and aldermen on the municipal level.

The way in which politicians at the municipal level are appointed shows that mayors are quite distinct from aldermen. Mayors are appointed by the King (in fact by the Government) by royal decree (Art. 131 Basic Law). The procedure is regulated in Art. 61 *Gemeentewet*. Aldermen, on the other hand, are appointed by the municipal council (Art. 35 *Gemeentewet*). These last appointments are the result of political negotiations between the parties represented in the municipal council. Mayors are outside these political negotiations but do have the possibility to submit their views on the proposed aldermen (Art. 35(2) *Gemeentewet*).

²Gerecht van Eerste Aanleg Curaçao, 11 March 2016, not yet reported.

Normally, municipalities carry out their own business and do not take instructions from the central Government. Mayors can only be instructed by the Government in very specific cases, such as the housing of refugees or other displaced persons (Art. 68 *Huisvestingswet*). Additionally, in the context of spatial planning, the national Government can issue instructions to municipalities in order to safeguard certain interests of a national or regional nature (Arts. 4.3 and 4.4 *Wet ruimtelijke ordening*). In these cases, the municipality is addressed and not the mayor or the college of mayor and aldermen. It is, however, an example of a provision limiting the free discharge of affairs by the political bodies in the municipal sphere.

Regarding municipalities, in 2002, a fundamental divide was introduced between the executive and representative powers at municipal level.³ Before, aldermen were members of the municipal council (the representative body). Since that time, they have formed the executive body at the municipal level, together with the mayor. Mayors are considered to be apolitical, hence their appointment by the King instead of the municipal council. Their self-standing tasks include the maintenance of public order and other tasks not encompassing public works. This latter portfolio is normally entrusted to an alderman. One of the activities that could be carried out by a municipality in these matters could be the building of a bridge, which is certainly the case when it concerns a connection of only local importance. Then an alderman is probably entrusted with planning and preparing the works, as well as defending the project in the municipal council. Bridges of regional importance are built by provinces. Furthermore, provinces play a large role in bridge operation and maintenance. In these cases, responsibility will lie with a so-called *gedeputeerde*, a member of the Provincial-Executive (*Gedeputeerde Staten*). These *gedeputeerden* comprise the executive power at the provincial level, together with the Kings' Commissioner. They are politically responsible to the States-Provincial, the representational body at the provincial level. Bridges that are important on a more than regional scale are built, operated and maintained by the national bridge and road authority (*Rijkswaterstaat*), a sub-department of the Ministry of Infrastructure and the Environment. For this sub-department, the national Government (mostly in the person of the Minister of Infrastructure and the Environment) is politically responsible to the States-General, consisting of the Second and First Chambers.

2. Definition of Civil Servants in Criminal Law

Article 1 of the Civil Servants Act (*Ambtenarenwet*) defines as a civil servant anyone who is appointed to work in public office. This seems to exclude members of representative bodies as they are elected and not appointed. However, this

³*Wet dualisering gemeentebestuur*, *Staatsblad* 2002, 111, in force since 7 March 2002.

distinction only applies to administrative law contexts and is not valid for criminal law. The Criminal Code uses an autonomous definition of a civil servant, which includes members of representative bodies (Art. 84 CC). Therefore, all participants in the political decision-making are deemed for criminal law purposes to be civil servants. This includes mayors, aldermen, government ministers or secretaries of state (*underministers*), Parliament members or members of municipal councils. In Dutch criminal law, there is therefore no distinction between members of representative bodies on the one hand and executive officials on the other hand. Most offences that criminalise certain forms of conduct in public office refer to civil servants in this sense because they use the capacity of a civil servant as an element of the offence. Only a few offences refer to a subset of the all-encompassing group of civil servants, e.g. ministers in the national Government.

II. Comparative Case Study

1. Part 1: Criminal Liability for Bad Political Decisions

Dutch criminal law does not include a specific offence of misuse of office or abuse of public duty. However, a certain number of offences could apply to the case, all criminalising certain forms of behaviour. These concern mostly property offences of embezzlement or misappropriation. Additionally, forging of documents is an offence that is used for many different purposes, and therefore this offence could be relevant as well. An offence actually criminalising wrongful decision-making does exist but has never been used. This is the offence of acting contrary to laws or regulations, for which only members of the national Government can be held liable. Therefore, rather than focusing on one offence, multiple offences will be listed and concisely explained. Below, all of these different offences will be described shortly, and their possible application to the case will be illustrated.

There is a complete translation available of the Dutch Penal Code, but it is somewhat outdated.⁴ In the offence definitions below, I largely followed this translation but made adaptations where necessary due to legislative changes.

a) Embezzlement, Art. 321 CC

The offence of embezzlement is mostly used in situations where it cannot be proven that the perpetrator actually removed the object he appropriated. In this way, it complements the offence of theft, which includes an element of removal of the object. The provision reads as follows:

⁴L. Rayar/S. Wadsworth, *The Dutch Penal Code*, 1997 (Littleton, Rothman).

A person who, intentionally, appropriates unlawfully any property belonging in whole or in part to another, and of which he has control other than as a result of a serious offense, is guilty of embezzlement and liable to a term of imprisonment of not more than three years or a fine of the fifth category.

The core of this offence is the element of appropriation, which makes it a clear case of a property offence. It would seem that the offence could not apply to the case in which the bridge was built since the mayor did not appropriate any property to himself. However, as explained below, the Supreme Court weakened this element to a large extent. Appropriation of funds, for instance, also includes the administration of these funds in a way that is contrary to previous agreements about their administration, where agreements were made between the provider of the funds and the administrator. Also, making the return of the money impossible or just difficult will count as appropriation. It is therefore not completely clear that the offence of embezzlement does not apply to our case since the case is not exhaustive in its description of the whereabouts of the money and at whose disposal it remains. If someone overseeing the administration of the money decides about that administration in such a way that it is difficult to return it to the rightful owner or if he decides to administer it in a way that is contrary to agreed standards (for instance, in regulations of the municipality itself about its financial administration), it could be a case of embezzlement. Therefore, it is worthwhile to investigate the interpretation of this offence, mainly focusing on the delineation of the property and the acts of appropriation.

aa) Appropriation

In general, a person appropriates an object if he acts as the sole master to which that object belongs.⁵ This can include, in case of money, the administration of this money contrary to previously made agreements.⁶ Appropriation also includes making the return of the money impossible or significantly more difficult.⁷ Additionally, if a person received a sum of money, for a dedicated purpose, and spent it partly for another purpose, he can be said to have appropriated that part of the sum.⁸

Regarding the building of the bridge, it is difficult to see whether there could be any appropriation of the money. Supposing that a specific sum of money had been dedicated to the bridge-building project and this was all spent on the project, there can be no appropriation of the money by the perpetrator for himself. If the politician involved spent part of the funds on other projects or used them for his own benefit, it would be clear that he would have appropriated the money. However, if part of the project failure consists in diverting funds to other goals and accordingly the money

⁵Hoge Raad, 13 September 2005, NJ 2005, 471.

⁶Hoge Raad, 12 May 1998, NJ 1998, 695.

⁷Hoge Raad, 6 July 1999, NJ 1999, 740.

⁸Hoge Raad, 5 April 2011, NJ 2011, 175.

dedicated to the project is difficult to track down or return if needed, it could be possible that the person managing the budget would be appropriating the money. This could be the case when there is maladministration in the sense that an administrator makes it intentionally so difficult to supervise the funds, to return them or to get access to them that effective control of the funds has ceased to exist. Suppose that the municipal council agreed to the project, which includes agreeing to the financial statement that is part of the project plan. That means that there is an agreement between the municipal council and the college of mayor and aldermen to use some of the municipality's funds for the project, which is carried out under the supervision of the college of mayor and aldermen. If that college, in contravention of these agreements, decides to divert some of the funds from one part of the project to another part of the project, that might fall within the scope of embezzlement since it means that the funds are administered contrary to the agreements that were made. Admittedly, it is rather unlikely that such a case will be brought before a court and will lead to a conviction. This would be highly dependent on the actual way in which funds were administered and to the relationship between the project (or part of the project) for which the money was intended and the goals to which it was actually put. The further they are apart, the more likely that there is a true element of misadministration and thereby appropriation.

bb) Any Property

Any property that can be of value for its possessor is a potential object of embezzlement. Also, non-tangible objects come within the reach of this provision. That is certainly the case for money in bank accounts.⁹

cc) Having Control Other Than Through a Criminal Offence

A person cannot be liable for embezzlement if he appropriated an object that he possessed because of a criminal offence. Instead, it is necessary that the object was specifically entrusted to the perpetrator. A formal judicial conveyance is not a requirement,¹⁰ but there must be something more than just a purely factual situation.¹¹

The politician overseeing the bridge-building project could probably dispose of the money within the project's accounts in the meaning of this element of the offence of embezzlement.

⁹Hoge Raad, 11 May 1982, NJ 1982, 583.

¹⁰Hoge Raad, 31 May 2011, LJN BQ1972.

¹¹Hoge Raad, 25 November 1986, NJ 1987, 418; Hoge Raad, 22 January 1991, NJ 1991, 383.

dd) Belonging in Whole or in Part to Another

While the property has been entrusted to the perpetrator, it is required that it still belongs to another person. Normally, this is interpreted along the lines of the private law concept of ownership. Problems can arise when goods are joined or mixed, as can easily be the case when it concerns money. However, money is considered never to be indivisibly mixed.¹² If therefore a person receives a sum of money in his bank account that he is supposed to hold for another and never returns it, the object of his offence will be seen as separable from the rest of the funds in his bank account, and therefore he can be liable for embezzlement of that part of the money that originally belonged to the other person.

In the case of the building of the bridge, it is quite clear that the funds for the project did not belong to the politician in charge but to another person, i.e. the government that provided the money.

ee) Intent

The definition of embezzlement requires the appropriation to be conducted with intent. It does not require any form of direct intent, and therefore *dolus eventualis* suffices for criminal liability. Therefore, if the perpetrator was aware of a substantial risk that a certain sum of money in a particular account would not be returned to its rightful owner and he accepted that risk, he would have acted with sufficient intent to be liable for embezzlement.

ff) Unlawfulness

Unlawfulness in general means that an act was committed against objective legal standards (as opposed to subjective rights, which could be waived). The appropriation by the perpetrator must be unlawful, which mostly coincides with the element that the embezzled object belonged entirely or partially to another person. In specific cases, evidence concerning this element comprises proof of both the owner and the perpetrator's position vis-à-vis the object concerned.¹³ This element would therefore be evaluated by a comparison between the subjective rights of the original possessor and the subjective rights of the eventual possessor. If there is any act of approval by the original possessor, there is no unlawfulness. Unlawfulness in the context of embezzlement could mean the following: if a seller, acting for another, sells bread and does not return the proceeds, he embezzles the proceeds. But if the seller intentionally sells the bread at a lower price than he agreed with the other person for whom he sells the bread, he embezzles the bread itself because he

¹²Hoge Raad, 12 February 1952, NJ 1952, 700; Hoge Raad, 13 September 2005, NJ 2005, 471.

¹³T.J. Noyon/G.E. Langemeijer/J. Rummelink, *Het Wetboek van Strafrecht*, article 321, note 2.

disposes of the bread in a manner that was not allowed (i.e., not agreed upon by the other) and to his own benefit.¹⁴ Therefore, unlawfulness is to some extent dependent on agreements made, but only if they are specific.

If budgetary agreements forbid a certain disposal of funds, the unlawfulness element would be fulfilled if the perpetrator acted against these agreements. In that regard, the decision of building a bridge itself can hardly be seen as unlawful since it was the decision-maker's duty to decide on these matters. However, if any appropriation would have taken place in the sense that the decision-maker received some of the funds himself, the element of unlawfulness would surely be fulfilled. But that is not the only way of embezzling. An act could also be seen as embezzlement if the unlawfulness existed in the disposing of the money contrary to agreements.

b) Embezzlement in Public Office (Art. 359 CC)

This offence definition concerns a special case of embezzlement, raising penalty levels for a certain group of perpetrators: public servants. Apart from that, the offence definition is slightly different from the definition of regular embezzlement. The provisions reads:

A public servant or any other person charged, either on a permanent or temporary basis, with any public office, who intentionally embezzles money or paper of monetary value which is in his control in the execution of his duties, or allows another person to remove or to embezzle such, or as an accessory assists that other person in such act, is liable to a term of imprisonment of not more than six years or a fine of the fifth category.

Most of the elements of this offence definition are comparable to the general definition of embezzlement in Art. 321 CC. Some elements, however, deserve a more detailed explanation.

aa) Capacity of Public Servant

The offence applies to two groups of persons. The first group consists of all public servants, which includes anyone who has been appointed by a public law decision of the Government in any position whatsoever. This also includes members of representative bodies (see Art. 84 CC) and executive politicians on all levels of government. The second group consists of persons on whom a public office has been bestowed, either on a permanent or on a temporary basis.

¹⁴Noyon/Langemeijer/Rommelink, article 321, note 2.

bb) Money or Paper of Monetary Value

Whereas the general offence of embezzlement can be committed in respect of any property, embezzlement in public office is restricted to money or paper of monetary value. This does not mean that embezzlement of other kinds of property, when committed by a public servant, does not amount to an offence or that it should be classified as a generic case of embezzlement. There is another offence of embezzlement by a public servant, which criminalises the embezzlement of any matter that is intended to convince the competent authorities or to serve the competent authorities as evidence, or instruments, documents or registers (Art. 361 CC). These two offence definitions have been split by the legislator because of the desire to attach a comparatively higher penalty of 6 years' imprisonment to the embezzlement of money or papers of monetary value, while to the embezzlement of other matters a term of imprisonment of 4 years and 6 months is attached. This second definition will not further be discussed here since it seems of less importance to the case.¹⁵

cc) Embezzles or Assists in Removal or Embezzlement

This element of the offence refers directly to Art. 321 CC. For this particular element to be fulfilled, all the elements of the regular offence of embezzlement have to be fulfilled as well. However, the offence definition of Art. 359 adds some other alternative acts that can lead to criminal liability. This concerns allowing other persons to remove or to embezzle the money or the paper with monetary value or to assist another person in the removal or embezzlement of these objects. Remarkably, the element of removal is introduced here as an alternative to embezzlement, which is an element absent from the definition of regular embezzlement. This element distinguishes theft from regular embezzlement, but in this offence definition it can clearly lead to liability for embezzlement in public office if the act consisted of allowing or assisting others in the removal of the object. To some extent, this can be seen as logical since that other person will by definition not have control over the object, that control being in the hands of the perpetrator. However, while the regular definition of embezzlement includes an element of unlawfulness, and therefore this element is included in the element of embezzlement that is part of the offence definition of Art. 359 CC, there is no element of unlawfulness attached to the alternative option of the removal of money or papers on monetary value. This can be seen as a consequence of the nature of the offence as it is intended to safeguard the integrity of the public service and not to protect private property.¹⁶

¹⁵See for more details, *E. Sikkema*, *Ambtelijke corruptie in het strafrecht*, 2005 (Boom Juridische uitgevers, Den Haag), p. 472-462.

¹⁶*E. Sikkema*, *Tekst & Commentaar Strafrecht*, Inleidende opmerkingen bij boek II, titel XXVIII, note 2 en article 359, note 5.

In the case of the building of the bridge, also embezzlement in public office is hard to construct: the money was not appropriated or removed, but it was only decided to move forward with the project knowing that the available money would be spent in a non-optimal manner. However, a decision to start an engineering project, knowing that the project would be of much less benefit than initially presented, could perhaps be seen as a form of assisting others in the removal of money. For that conclusion to be credible, the decision-maker must intentionally assist a specific other person in that person's removal of money. It seems a bit far-fetched to hold that criminal liability could be construed in such way in the case of the building of the bridge.

c) Misappropriation of Subsidies (Art. 323a CC)

Dutch law provides for a specific ground for criminal liability in cases where government subsidies or grants were diverted.

The provision reads:

A person who intentionally and unlawfully uses resources that have been provided for a specific objective by the government or by or on account of an international organisation, for other purposes than for which they were provided, is liable to a term of imprisonment of not more than three years or a fine of the fifth category.

This provision originates in an obligation to implement the conventions on the protection of the financial interests of the European Union. Initially, it only criminalised fraud regarding EU subsidies. The Financial and Economic Crime Act 2014¹⁷ enlarged the scope of this article to subsidies and grants provided by the government or by any international organisation.

aa) Diversion of Funds

This article requires an element of diversion of public funds. In the case of the building of the bridge, the money is not diverted, but the funds were used in the project. The fact that the project is a financial failure does not imply that the funds were diverted to other uses. They were still used for the purpose of building a bridge, and therefore this provision cannot be applied to the case.

¹⁷*Wet verruiming mogelijkheden bestrijding financieel-economische criminaliteit*, Staatsblad 2014, 445, in force since 1 January 2015.

bb) Unlawfulness

The appropriation can be unlawful, for instance, in cases where the receiver of a subsidy handled the money that was provided in a way that is contrary to the conditions under which the subsidy was provided.

cc) Intent

The diversion of funds must happen intentionally. Indirect intent, *dolus eventualis*, is sufficient for this. Due to the placing of the element in the offence definition, this element requires that the funds were intentionally diverted and that the perpetrator knew that the funds originated from the government or from an international organisation.

dd) Provided by the Government or by an International Organisation

The funds must have been provided by the government, which can be interpreted as any level of government in the Netherlands, or by any international organisation.

d) Falsifying Documents (Art. 225 CC)

The provision reads:

(1) A person who falsely prepares or falsifies a document that is to serve as evidence of any fact, with the object of using it as genuine and unfalsified or of having it used as such by others, is guilty of the forgery of documents and liable to a term of imprisonment of not more than six years or a fine of the fifth category.

(2) The punishment in section 1 is also applicable to a person who intentionally makes use of the false or falsified document as if it were genuine and unfalsified, or who intentionally delivers or has at his disposal such document, where he knows or should reasonably suspect it to be used in such manner.

In the Netherlands, the offence of falsifying documents has a wide scope and is used for many different purposes. Dutch law does not contain a general offence of fraud,¹⁸ and instead the offence of falsifying documents is applied to cases in which a person provided false information when submitting forms or documents for official purposes.

¹⁸However, there are multiple provisions for specific types of fraud. Art. 227a and 227b CC criminalise fraud concerning subsidies or benefits, Art. 340 CC criminalises insolvency fraud, Art. 69 General Tax Act criminalises tax fraud, etc.

aa) First Alternative: Drawing Up a Document or Forging an Existing Document, Which Is To Be Used in Evidence

(1) Intended To Be Used in Evidence

Normally, the evidentiary purpose could, for instance, apply to a constructor who would, in a bidding statement, provide false information in writing. It would seem a bit far-fetched, however, to say that, in the case of the building of the bridge, this offence could apply to the decision-maker if he would have written in a statement to the municipal council (if he is an alderman) or Parliament (if he is a government minister) that the bridge would cost a certain amount of money, knowing that this estimate is too low. It is not very clear that such a letter is meant to be used in evidence in any way. Perhaps there could be liability under this offence if the politician made a statement including a full account of all costs of the project and sent it to Parliament or the municipal council, declaring the statement to be the full account of the attainable project and knowing that the estimated budget is insufficient. But in the case under discussion, there has not been any statement providing false information to the representative body, and therefore this potential form of liability can be excluded.

(2) Direct Intent to Use It as if It Was Real and Unforged

The offence definition requires direct intent to use the document containing the false information, pretending it was real and unforged. This element usually does not provide many evidentiary difficulties when the document is clearly false. In that case, the person who falsified the document can normally be said to have been intending to use the document as if it was real and unforged.

bb) Second Alternative: Using, Delivering or Possessing False Documents

(1) Use or Let Someone Use a Document as if It Was Real and Unforged

The document has to be used in some way. This can be the case when a document has been presented by the perpetrator to a civil servant in the course of some public law procedure or when applying for a decision to be made by a government institution.

(2) Intent

In order to be held liable, the perpetrator needs to have intent as to the use of the falsified document, pretending it was real and unforged. Alternatively, the perpetrator can also intentionally deliver or possess a falsified document. In these latter cases, the perpetrator has to reasonably suspect that the documents were intended to be used in evidence.

cc) Both Alternatives: Falseness of the Document

The requirement that the document is false can be fulfilled in three different types.¹⁹ The first type is that the document is false in a substantive sense, which means that it was drafted as a new document, pretending to be real, or that it was a partially drafted document but finished by another person. In these cases, the authenticity of the information is questionable. The second type is that the document that was drafted contains statements that do not conform to reality. In these cases, the document is false in an intellectual sense. The legislator intentionally included this type of intellectual falseness within the scope of the offence.²⁰ The third type is that the document was incorrectly entered into the company administration, and in that context it altered the truthfulness of the company's internal information system, which can also be used for evidentiary purposes.

In the case of the building of the bridge, possessing documents containing calculations of costs that do not conform to the costs foreseen in reality could amount to a case of possessing false documents intended to be used in evidence. The project's administration consists of records that can have an evidentiary purpose. If the documents are false in an intellectual sense, there can therefore be criminal liability under this provision. It must, however, be the case that the statements or the calculations in the documents were not in conformity with the actual estimates at the time of the drawing up of the documents. In the case of the building of the bridge, this is questionable since it only turns out later that the project was unprofitable or at least did not result in the benefits intended with the project.

e) Acting Contrary to Laws or Regulations (Arts. 355 and 356 CC)

The Dutch Criminal Code contains some special offences applying to members of the national Government, criminalising acts that are not in conformity with laws or regulations. Since it is in practice nearly impossible to indict a government minister (see below), these provisions have never been used. There is therefore no case law on the matter.²¹ Since Arts. 355 and 356 are closely linked, they will be discussed together.

The text of Art. 355 CC reads:

Heads of ministerial departments:

- (1) Who countersign royal decrees or royal decisions, knowing that in so doing the Constitution or other statutes or General Administrative Orders are violated;

¹⁹See *Sikkema*, article 225, note 18.

²⁰See *Noyon/Langemeijer/Remmelink*, article 225, note 4.3.

²¹See for more information: *Broeksteeg*, *Verantwoordelijkheid en aansprakelijkheid in het staatsrecht* (2004), p. 123-175.

- (2) who execute royal decrees or royal decisions, knowing that they do not bear the requisite countersignature of one of the heads of the ministerial departments;
 - (3) who take decisions or issue orders or enforce existing decisions or orders, knowing that in so doing the Constitution or other statutes or General Administrative Orders are violated;
 - (4) who intentionally fail to implement the provisions of the Constitution or other statutes or General Administrative Orders, where and insofar as such implementation falls within the competence of their ministerial department due to the nature of the matter, or where and insofar as such implementation has been expressly assigned to them;
- are liable to a term of imprisonment of not more than three years or a fine of the fourth category.

The text of Art. 356 CC reads:

Heads of ministerial departments who, by their grossly negligent or careless conduct, are responsible for an omission to implement what is defined in article 355(4) are liable to a term of detention of not more than six months or a fine of the third category.

In theory, these offences could perhaps be applicable in the case of the building of the bridge if the decision to build the bridge is made by a minister of the national Government.

aa) Special Capacity: Heads of Ministerial Departments

The offences apply to ‘heads of ministerial departments’. In order to be held liable under these provisions, the perpetrator must have acted in his capacity as a head of a ministerial department. Acts committed in a private capacity do not fall within the scope of these provisions.²² The term ‘heads of ministerial departments’ seems to exclude secretaries of state, who serve as a kind of under-ministers. However, secretaries of state are for all purposes equated to ministers. This also counts for so-called ministers without portfolio, who do not lead a government department but are full members of the national Government tasked with a special portfolio not directly pertaining to a government department.²³

bb) Signing Decisions, Acting, Deciding or Omitting to Act

These elements encompass practically anything a minister could do within his function. It obviously includes any decision-making or acting in order to start or continue the project of the building of the bridge.

²²Sikkema, article 355, note 6.

²³Wet van 25 januari 1951, houdende nadere voorzieningen in verband met de invoering van de ambten van minister zonder portefeuille en van staatssecretaris, Staatsblad 1951, 24.

cc) In a Way That Is Contrary to the Basic Law, Any Law or Any Lower Regulation

The signature of a decision, the act, the decision or the omission of a decision needs to be contrary to the Basic Law, to any national law or to any regulation of a lower-level government. Agreeing to the building of the bridge, knowing that the costs will be higher than initially presented, could perhaps be seen as acting contrary to the Governments Accounts Act (*Comptabiliteitswet*), especially Art. 35 thereof, as well as contrary to the Public Procurement Act (*Aanbestedingswet*). This is highly speculative, however, as the offences of Arts. 355 and 356 never have been used. But different scenarios could apply here: is it, for instance, the case that the bridge-building costs were calculated by the Government in a way that the funds would certainly be insufficient? In that case, there could be a violation of the accounting rules that are prescribed by the Governments Accounts Act. Or is it the case that the bid of a construction company was much too low, and did the minister accept the bid, knowing that it is too low? In case the bid seems abnormally low, the Government is obliged to ask for more information (Art. 2.116 Public Procurement Act).

dd) Omitting to Act

Additionally, the negligent non-execution of the Basic Law, any law or any lower regulation, if this execution is commissioned to a minister's department, is a criminal offence for the minister concerned (Art. 356 CC). Not asking information about a bid that seems to be too low could be an omission offence under Art. 356 CC if this was done negligently. If the costs seem to run out of hand later (and the minister did not know in advance that the bid was too low), there probably is no offence applicable since the foreseeability, which is necessary for negligence, is absent.

2. Part 2: Criminal Liability for Pursuit of Personal Interests

a) Passive Public Corruption (Art. 363 CC)

Dutch criminal law distinguishes between active and passive forms of public corruption. Since active corruption is an offence that can be committed by anyone, it is seen as an offence against public authority (Art. 177 CC). Passive corruption is regarded as an offence committed in public office, and it is therefore regulated in the section on misconduct in office (Art. 363 CC). Previously, in both sets of provisions, there also was a distinction between two types of corruption. The first type concerned corruption where the civil servant acted in breach of a public duty (Arts. 177 and 363 CC (old)), which carried in both the active and passive forms a

maximum sentence of 4 years' imprisonment. The second type concerned corruption where the civil servant acted not in breach of a public duty (Arts. 177a and 362 CC (old)), which carried in both forms a maximum penalty of 2 years' imprisonment. The Financial and Economic Crime Act 2014 abolished this distinction, partly because the element of breach of a public duty was interpreted by judges in such a way that a breach of public duty was easily found. The legislator wished to underline that the execution of a public office should be free from any financial influence.²⁴ Both the active and the passive forms of corruption no longer contain an element relating to a breach of a public duty, while the maximum penalty has been raised to 6 years' imprisonment for all forms of corruption.

The provision reads:

1. A public servant:
 - (1) who accepts a gift, promise or service, knowing or reasonably suspecting that it is made or offered to him in order to induce him to act or to refrain from acting in the execution of his duties;
 - (2) who accepts a gift, promise or service, knowing or reasonably suspecting that it is made or offered to him as a result or as a consequence of something he has done or has refrained from doing, in the execution of his current or former duties;
 - (3) who requests a gift, promise or service in order to induce him to act or to refrain from acting in the execution of his duties;
 - (4) who requests a gift, promise or service as a consequence of something he has done or has refrained from doing, in the execution of his current or former duties;
 is liable to a term of imprisonment of not more than six years or a fine of the fifth category.
2. The punishment in section 1 is also applicable to a person who, in the prospect of appointment as a public servant, commits an act as defined in (1) or (3), if the appointment ensues.
3. The person who commits an act as defined in section 1 with respect to his capacity as Minister, Secretary of State, King's Provincial Governor, member of the Provincial-Executive, mayor, alderman or member of a representative assembly, is liable to a term of imprisonment of not more than eight years or a fine of the fifth category.

The article applies to all civil servants, including members of executive and representative bodies. Section 1 of Art. 363 provides the main offence definition of passive public corruption. The four alternatives of this definition result from the combination of two pairs of elements. The first pair concerns the elements of accepting (as defined in (1) and (2)) and requesting (as defined in (3) and (4)). The second pair concerns the elements of inducement (as defined in (1) and (3)) and consequence (as defined in (2) and (4)).

²⁴*Sikkema*, article 362, note 13; Kamerstukken II 2012/13, 33685, 3, p. 6-7. See also *T.R. van Roomen/E. Sikkema*, *De strafbaarstelling van publieke en private corruptie: wat mag wel en wat mag niet?*, *Delikt en Delinkwent* 2012, p. 792-804.

aa) Accepting or Requesting

The element of accepting or requesting a gift, promise or service does not include that the civil servant actually performed his part of the deal. For the fulfilment of this element, it is sufficient to only accept or request a gift while promising to do something in return.²⁵ It is irrelevant whether public law or any public authority forbids the civil servant to accept or request the gift, promise or service, for there is no element any more of a breach of public duty.

bb) A Gift, Promise or Service

This element does not contain any threshold as to the value of the gift, promise or service. The legislator deliberately did not include an element relating to social acceptability of the gift, promise or service.²⁶ Therefore, accepting even the smallest gift, promise or service constitutes a case of corruption if it was offered in connection to a civil servant's public duties. The fact that it is socially unacceptable that a civil servant acts in such a way is so important, according to the legislator, that it is desirable to avoid any discussion on the gift being illicit or not in itself and therefore to dispense with any substantive requirement on the nature of the gift, promise or service.²⁷

cc) Knowing or Reasonably Suspecting

The offence definition includes an element of intention or, alternatively, of *culpa*. Alternatives (1) and (2) contain both these elements as alternatives, whereas alternatives (3) and (4) require intent, which is implicitly included in the element of requesting.²⁸

dd) Offered in Order for Him to Do or Omit Something

The offer should be intended to move the civil servant to act in a certain way or to refrain from acting in a certain way. Whether the person offering the gift, promise or service acted with intent is, however, not an element of the crime, and therefore it is not necessary that this is proven. The subjective intention of the person offering the gift is not important for the liability of the civil servant in question.²⁹

²⁵Hoge Raad, 22 February 2000, NJ 2000, 557.

²⁶Kamerstukken II 1998-1999, 26469, 3, p. 4-5.

²⁷Kamerstukken II 1999-2000, 26469, 5, p. 6-7.

²⁸See Kamerstukken II 1998-1999, 26469, 3, p. 15; Hoge Raad, 12 July 2011, LJN BQ3124.

²⁹Hoge Raad, 9 April 1946, NJ 1946, 324; Hoge Raad, 4 February 1947, NJ 1947, 170; Hoge Raad, 20 June 1967, NJ 1968, 67; Hoge Raad, 27 September 2005, LJN AT8328.

ee) Offered as a Result of Something He Did or Omitted

This alternative is intended to prevent an evasion of criminal liability, which could be achieved by accepting a gift only after the requested act was carried out by the civil servant. Proof of actual causation is not necessary since the wording of the offence definition includes a less intensive connection between the gift and the civil servant's acts.³⁰

ff) In the Execution of His (Current or Former) Duties

Alternatives (1) and (3) require that the acceptance or request took place in execution of the civil servant's duties, whereas alternatives (2) and (4) also refer to the civil servant's former duties. This difference can be explained from the fact that the first pair of alternatives refer to inducement of the civil servant, while the second pair refers to gift, services and promises offered as a consequence of the execution of the civil servant's duties.

Any acceptance or request of any gift by a civil servant is a criminal offence, as long as it is connected to his duties. In the case of the building of the bridge, therefore, it does not make any difference if the money was offered to finance a political campaign or to be used by the decision-maker in any other way.

gg) Prospective Corruption

Acts defined in section 1 (1) and (3) also apply to persons who committed these in the prospect of an appointment in public office, under the condition that later the appointment materialised (Art. 363 section 2 CC). There is therefore no difference as to the point in time the bribe was offered.

b) Conflict of Interests (Art. 376 CC)

In the case of the building of the bridge, there can be questions of criminal liability relating to conflicts of interests in the decision-making. Dutch criminal law contains a specific provision for civil servants who participate in the work of contractors or suppliers of government works while being in charge of these works.

The text reads:

A term of imprisonment of not more than six months or a fine of the fifth category shall be imposed upon a public servant who intentionally participates, either indirectly or directly, in contracting work or the supply of goods, the administration or supervision of which he was fully or partially in charge of at the time of the activity.

³⁰*Sikkema*, article 362, note 10g.

aa) Participation

In this offence definition, participation in contracting or supplying is a self-standing element of criminal liability. This is not to be mixed up with the general rules on participation in criminal offences (Arts. 47–48 CC). On the contrary, this element has a more specific meaning, in the sense that it requires the perpetrator to possess a financial interest in the company that contracted the works or supplies goods.³¹

bb) Administration or Supervision

These elements should not be taken in a formal sense. Sikkema gives the example of an alderman being in a general sense responsible for the administration and supervision of all deliveries to the municipality that concern road building, for instance.³²

cc) Intent

The element of intent includes *dolus eventualis*. When applied to the case of the building of the bridge, where the decision-maker was one of the partners of a potential contractor, he would be participating in the contracting work or the supply of goods in the sense of this offence definition. His personal interest lies in the financial involvement in the bridge building company. The only element that can leave some room for doubt is the requirement of intent. However, since this element only requires *dolus eventualis*, it will probably be fulfilled. It can be assumed that the perpetrator would know about his involvement in the company and, while moving forward on the project, accepts that entanglement. In that case, he would very probably be criminally liable for this offence.

III. Special Sanctions Applicable to Politicians

Sanctions of special interest to criminal cases involving politicians are the removal from public office and the deprivation of the right to be eligible for public office (this is possible for all forms of public malfeasance/misconduct). Also, the right to vote and the right to stand for elections can be taken away. These specific sanctions are listed in Art. 28 CC and only apply if the offence for which someone is convicted specifically provides the judge to impose these sanctions. All public office offences provide for the sanctions of removal from public office and for the

³¹Sikkema, article 376, note 1.

³²Sikkema, article 376, note 8b.

deprivation of the right to be eligible for public office (Art. 29 CC). In all cases, applying these sanctions is discretionary for the judge, not mandatory.

The sanction of losing the right to vote and stand for elections is not applicable to all public office offences. These rights can only be taken away when the suspect has been convicted to imprisonment for more than a year, for one or more specifically mentioned offences (Art. 380(2) in combination with Art. 28(3) CC). The specific offences where this is possible include the public office offence of acting contrary to laws and regulations (Art. 355 CC), an offence that can only be committed by ministers and state secretaries. Two other public office offences make the sanction possible: the refusal of a military commander to provide civil authorities with military forces if necessary (i.e., in case of national emergencies) (Art. 357) and the civil servant who seeks the assistance of military force against the execution of official decisions or laws (Art. 358 CC). Apart from these three offences, no public office offences make it possible to apply the sanction of losing the right to vote or stand for elections. Non-public office offences making this sanction possible mostly relate to national security (Arts. 92–105 CC) or royal dignity (Arts. 108–113), revolutionary acts, etcetera.

An important provision is Art. 44 CC, which is a general part provision applicable to all criminal offences. It raises the penalty level with a third when the offence was committed by a civil servant who either violates a specific public duty or uses powers, opportunities or means that his office bestows upon him. This provision does not apply to public office offences since these already have a raised penalty level that takes into account the capacity of a civil servant. This provision is also relevant to offences committed by a government member or a member of Parliament. He can be prosecuted before the Supreme Court, but only if the suspected offence occurred in violation of a specific public duty or if he uses powers, opportunities or means that his office bestowed upon the suspected government member or member of Parliament. For other offences committed by these persons, the normal court system is competent. The normal court system is always competent for lower-level politicians.

IV. Immunities and Other Limitations of Criminal Liability

There are very limited immunities for prosecution. On the national level, members of Parliament, government ministers and secretaries of state and anyone who participates in hearings of the Parliament can claim immunity when they are prosecuted for statements made in Parliament, in a parliamentary committee or in writing to one of these (Art. 71 Basic Law). There are equivalent immunities for lower-level politicians (Art. 22 *Gemeentewet*, Art. 22 *Provinciewet*). These immunities only relate, due to their nature, to specific offences such as hate speech. Moreover, these immunities only cover statements made in parliamentary activities. The immunity cannot be lifted, even by the Parliament. The immunity would not cover the taking of a bribe offered in exchange for a member of Parliament to

vote in a certain way. Politicians do not enjoy immunity for statements made in public meetings, during press interviews, etcetera since these all take place outside formal parliamentary activity. Prosecutions for defamation outside Parliament actually occur, such as in the case against right-wing politician Geert Wilders for his statements about the objective of minimising the number of citizens from Moroccan origin in the Netherlands.³³ Since these statements were not made in Parliament, Wilders is not shielded from prosecution.

Another exception relates to parliamentary investigations. Normally, committees of the States-General can conduct investigations into certain matters that are too extensive to deal with in an ordinary parliamentary hearing. These investigative committees possess powers to summon anyone, under threat of criminal prosecution and sentencing. These offences are laid down in Art. 192a–192c CC. Article 192d CC, however, exempts members of the States-General, ministers and secretaries of state from liability for these offences. They remain obliged to appear at hearings, but not under threat of criminal prosecution. The legislator found it undesirable to introduce that, since it could lead to political chicanery.³⁴

These exemptions from criminal liability are, among others, intended to shield the political sphere from the powers of the Prosecution Service and to save political processes from being influenced because of the use or threat of criminal law measures by politicians in a role in which they can steer the powers of prosecution towards political opponents. The safeguard for politicians to speak freely in Parliament is quite strong since it is entrenched in the Basic Law. Should the Prosecution Service ever become a political tool to be used by the Government against its political opponents, the powers of prosecution cannot be used for prosecuting opponents for statements made within the political sphere, in any case not without changing the Basic Law.

Apart from this, Dutch law does not offer any immunities to politicians or anyone else. However, the special procedures in place for the prosecution of politicians are sometimes equalled to immunities. This is probably not far off the mark as these procedures are rarely used. Formally, though, politicians are only exempt from prosecution for statements made within Parliament.

V. Special Courts and Special Procedural Requirements

For politicians in lower levels of government, there are no special rules for prosecution. Quite regularly, these lower-level politicians are prosecuted for the regular District Courts. Special procedural rules do apply to government ministers, secretaries of state (*underministers*) and members of Parliament. For these, the

³³See <https://www.rechtspraak.nl/Uitspraken-en-nieuws/Bekende-rechtszaken/Strafzaak-Wilders> (accessed 12 July 2016).

³⁴Kamerstukken II 2005–2006, 30415, 6, p. 28–29, 48, 51.

Basic Law (Art. 119), the Code of Criminal Procedure (Arts. 483–485), the Judicial Organisation Act (Art. 76) and the Ministerial Accountability Act (*Wet ministeriële verantwoordelijkheid*) give special rules. These rules apply to any act of public malfeasance or misconduct committed in the commission of these politicians, and the rules also apply after their commission has ended. If there is a suspicion that a person belonging to this group of government officials and parliamentarians committed a public office offence, the Public Prosecution Service may conduct a preliminary investigation. If the Prosecution Service comes to the conclusion that there is enough evidence to raise a suspicion, it places the matter in the hands of a special investigatory committee of the States-General (in this case, of the Second Chamber).³⁵ This committee carries out the criminal investigation and reports to the Parliament. Then Parliament must decide about whether to instigate prosecution within 3 months after the investigation started. If the Second Chamber decides that the person should be prosecuted, it places the matter in the hands of the Procurator-General at the Supreme Court. This member of the judiciary does not belong to the Public Prosecution Service but is attached to the Supreme Court. However, it does not take part in the judicial decision-making of the Court but only has powers of advice.

This procedure has not been used in recent times. The last time it was used was in 1868, when the Supreme Court imposed on Navy Minister Pels Rijcken a fine of ten *guilders* (approx. five euros) for letting his dog walk on grounds where such was not allowed. He did this in a time when cattle fever was prevalent and there were strict controls on pets. Letting a dog walk loose is certainly not a public office offence now, and it also was not at the time the offence was committed. There is, however, as mentioned above, a multiplicity of legal rules on competence for offences committed by public officials. Among them are the Basic Law, the Judicial Organisation Act, the Code of Criminal Procedure and the Ministerial Accountability Act. The Basic Law from 1848 limited the competence of the Supreme Court to try political officials to only public office offences, whereas the original Basic Law from 1814 did not limit that competence: on the basis of the 1814 Basic Law, the Supreme Court could try political officials for all crimes they committed. Since the case of Pels Rijcken happened in 1868, the Supreme Court should not have been competent because the Basic Law from 1848 was in force limiting their competence to public office offences. However, the Judicial Organisation Act was in 1868 not amended in line with the Basic Law and still had the rule that ‘all crimes’ committed by political officials should be prosecuted before the Supreme Court. This law was only brought in line with the Basic Law in 1886, when it followed the Basic Law in restricting the competence of the Supreme Court to public office offences. In the case of Pels Rijcken, the Supreme Court decided to apply the rules in the Judicial Organisation Act and to disregard the fact that the Basic Law did not

³⁵This special investigation committee should not be mixed up with the investigatory committees carrying out regular parliamentary investigations, but it concerns here a committee charged with criminal law investigative powers.

give the Court any competence. The Court obviously regarded it as favourable for the defendant that he could be tried in a *forum privilegiatum* at the Supreme Court, and it therefore gave precedence to the Judicial Organisation Act over the Basic Law.³⁶

Recently, an investigation has been carried out by the Public Prosecution Service into a situation where confidential information relating to the intelligence services has been leaked. There is a Second Chamber committee consisting of the heads of the political groups that receives intelligence information on a strictly confidential basis, the Intelligence Committee. This committee is presided over by the head of the largest group in the Second Chamber. The information that was leaked out of this committee consisted of the confidential statement by Defence Minister Hennis that 1.8 million telephone calls had been collected by Dutch intelligence services and given to US authorities, while Home Affairs Minister Plasterk earlier publicly stated that these telephone calls were collected by US services. The statement of Minister Hennis turned up in a national newspaper. The statement is politically quite sensitive because it not only became public through a breach of confidence, but it could also lead to the decision that Minister Plasterk has to step down from office since he informed Parliament incorrectly. The chairman of the Intelligence Committee reported the case to the police; the Public Prosecution Service investigated the case and delivered its report to Parliament, stating that there was a serious suspicion of leaking information by a member of the Intelligence Committee. Parliament formed an investigatory committee in the sense of the Ministerial Accountability Act, with the task to investigate which MP had breached his confidence. This investigatory committee has published its report, in which it concluded that it could not find a suspicion against any particular person.³⁷

These strict procedural rules in some sense provide for safeguards to avoid politically motivated proceedings. It is very unlikely that politicians in the central Government and members of Parliament would be prosecuted before the Supreme Court since the instruction to start proceedings can only be given by the Second Chamber or by the Government itself (in that case, it will most likely be a former member that is prosecuted). This special procedure inevitably induces such political sensitivities that it is never used. The idea for this special procedure is that politicians (at least those at the central level) should be free from light-hearted prosecutions and receive the benefit of a trial in only one instance, directly before the Supreme Court. Moreover, if the normal prosecution procedures would also be in place for politicians, the Minister of Justice would have the power to instruct the Public Prosecution Service to prosecute his political opponents (on the basis of Art. 128 of the Judicial Organisation Act). This would be a very powerful tool in the hands of the Government in order to subdue the opposition. Therefore, not the Public Prosecution Service has the task of prosecution politicians before the

³⁶M. Verhulst/G. Boogaard, Het hondje van minister Pels Rijcken – Over verwijzingen naar eerdere vervolgingen van politieke ambtsdragers, *Nederlands Juristenblad* 2016, 74.

³⁷Verslag Commissie van onderzoek, 20 January 2016, available at <http://www.tweedekamer.nl>.

Supreme Court, but this is bestowed upon the Procurator-General. Because he is not a member of the Public Prosecution Service, the Minister of Security and Justice is not able to direct the prosecution and aim it at his opponents. However, for any other offences that have not been committed in office, the regular court system is competent, and in these cases the Public Prosecution Service remains under the instruction of the Minister of Security and Justice.

VI. Further Particularities in Proceedings Against Political Decision-Makers

Dutch criminal law enables the prosecution and liability of legal persons. This is possible not only for private entities but for public entities as well (Art. 51 CC). However, this does not apply to the central Government level: the State as such enjoys immunity from prosecution.³⁸ A bill has been discussed in Parliament to abolish this immunity, but it failed to pass the Senate (by one vote) in November 2015.³⁹

Lower-level public entities can be held criminally liable, however. This is only possible if they acted outside the scope of exclusive public duties. Within this scope, they also enjoy immunity from prosecution.⁴⁰ For instance, lower-level public entities act outside the scope of exclusive public duties when they act in a way that is similar to normal companies. Some municipalities let private companies collect household waste, whereas some municipalities do it themselves. In these cases, the municipality does not enjoy immunity from prosecution. Actually, this distinction between public duties and ‘privatisable’ duties is a distinction that the legislator made, using the equality principle⁴¹: there is no justification why we should treat a government in any other way than we would treat a private company if their activities are the same. According to the Supreme Court, the rule to hold public bodies accountable only when discharging non-public duties could in principle also be justified because public authorities have been explicitly charged with public duties, and therefore the legislator has already decided that they should carry out that duty. For that reason, the judge should not review their actual activities. Conversely, a non-public duty has not been scrutinised by the legislator before; the municipality chose to carry it out itself. Therefore, the judge is right in reviewing the actual activities. However, according to the Supreme Court, this line of thinking does not lead to a very well-defined scope of accountability because the law only charges public bodies with tasks in a very widely circumscribed way. Therefore, the Supreme Court only uses the equality argument as a ground for his decision. The

³⁸Hoge Raad, 25 January 1994, NJ 1994, 598 (Volkel).

³⁹This concerns bill no. 30 538.

⁴⁰Hoge Raad, 6 January 1998, NJ 1998, 367 (Pikmeer II).

⁴¹Kamerstukken II 1975-1976, 13655, nr. 3, p. 21.

Court explicitly refers to the fact that the Prosecution Service is able to include general interest reasons in its decision-making process and that the Minister of Justice can instruct the Prosecution Service not to prosecute, for instance in order not to disturb any steps to hold politicians politically accountable by instigating prosecutions in a too early moment.⁴²

If a municipality is held liable, a participant in the crime (who is mostly called the factual leader of the crime) can also be held criminally liable (Art. 51(2) CC). This participant could be a person in charge within the entity, but this can also be a lower-placed public servant, e.g. overseeing the works. In the case of the building of the bridge, it is very unlikely that any person would be held criminally liable, whether being the municipality as a public entity or anyone acting within that sphere as a participant to the offence. Deciding on the building of a bridge is a task exclusively within the duties of a government. The actual bridge building is not within these duties since that is an activity that can be contracted. The municipality will therefore be immune from prosecution, and therefore any politician who participated in the decision-making cannot be prosecuted as a participant in the crime of the municipality. This does not in any way prevent a prosecution against that politician as an individual person, however.

Dr. Willem (Pim) Geelhoed is assistant professor in Criminal Law and Criminal Procedure at the University of Groningen.

⁴²Hoge Raad, 6 January 1998, NJ 1998, 367 (Pikmeer II).