

ENCROACHMENT OF CRIMINAL LAW IN ADMINISTRATIVE LAW IN THE NETHERLANDS

Rob Widdershoven*

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1 Introduction

The subject of 'Encroachment of criminal law in administrative law' can be approached in at least two ways. One could emphasise the role played by criminal law and the criminal courts or the role they could, or, as the case may be, should play as the supervisor of government action besides or instead of administrative law and the administrative courts. This approach will hereinafter be taken in accordance with the presentation of issues in the Questionnaire, whereby it can be remarked already here that this role of criminal law is but a minor one in the Netherlands. In section 3 this thesis will be explained further, whereby the substantive questions of the Questionnaire will be examined. In section 4 the procedural questions of the Questionnaire will be discussed and attention will thus be paid to the procedural interrelationship between criminal law and administrative law.

One could also approach the subject differently and study if and to what extent principles and standards of criminal law are finding their way into administrative law. This approach is currently rather popular in the Netherlands. The underlying reason for this is that during the past decade a shift has occurred from law enforcement by criminal law to law enforcement by administrative law. In this context, various administrative sanctions of a punitive character have been introduced, the imposition of which can be considered a criminal charge in the sense of Article 6 ECHR. As a result of this, all kinds of principles and guarantees which previously only applied in criminal law have now also begun to be applicable in administrative law. In order to ensure a proper understanding of the discussions surrounding enforcement in the Netherlands this redevelopment is also touched upon, in section 2. This article ends with an evaluation (section 5).¹

2 Law enforcement in the Netherlands

2.1 Introduction

Since the end of 1980s law enforcement has been at the centre of political and legal attention in the Netherlands. Until that time, politicians, policy-makers and lawyers

* Jean Monnet Professor of European Administrative Law at the University of Utrecht's Institute of Constitutional and Administrative Law, the Netherlands.

1. The footnotes refer to the most important literature and sources of law. The abbreviation HR refers to the Dutch Supreme Court [*Hoge Raad*]. The Supreme Court is the highest civil court, criminal court and tax court. The abbreviations ABRS, CRvB and CBB refer to the highest administrative courts. The Netherlands has a number of administrative courts which operate as appellate courts of last instance in separate fields of law. The ABRS is the highest court in environmental and planning law matters, the CRvB in social security and public service matters and the CBB in socio-economic matters.

were mainly interested in making ever newer acts and statutes. Whether these rules were properly implemented or complied with was not clear. For their enforcement, the instruments of criminal law were usually resorted to. There was barely any insight into nor much interest in whether the deployment of these instruments was effective.

At the end of the 1980s this attitude changed. As a result of a number of accidents and environmental scandals it emerged that the enforcement of rather a large body of legislation was not much to write home about.² This lack of enforcement may lead to serious damage to people and goods. Moreover, government suffers a terrible loss of face towards its citizens when it is apparently unable to compel compliance with its regulations. In a reaction to this several initiatives were taken. Legislation is since then, for example, submitted to a so-called "enforceability test": before a new piece of legislation is enacted it must first be determined that it can also be adequately enforced. In addition, alternative instruments of enforcement are more and more often used besides criminal law. These could involve both private law and administrative law instruments.³ The determining criterion for the choice of a certain instrument is "within the limits of constitutionality" its effectiveness: with what instrument can the best results be achieved with the least effort? Overall, this has led to law enforcement by criminal law being driven back and increasing amounts of legislation being enforced primarily by administrative law. Punitive administrative sanctions are also thereby used in various areas, more in particular the administrative fine.⁴

2.2 *The rise of punitive administrative enforcement*

Until the end of the 1980s law enforcement by administrative law was largely restricted to the use of reparatory sanctions, more in particular coercive action (administrative enforcement), the coercive sum and the cancellation of favourable administrative orders. With all these sanctions, the reparation of the infringement of the legal order is the primary goal, not punishment. With the aid of these sanctions, the citizen is forced to cease a prohibited act or to repair what has been brought about in violation of the statutory provisions. This could, for example, involve the demolition of an illegally built house. The only area where the administrative authorities could act through a punitive sanction was the fiscal area. For years the tax inspectorate has been competent to punish violations of the fiscal regulations by administrative fines.

The turn-around came in 1989. In that year the Administrative Enforcement Traffic Violations Act was passed, resulting in a large part of these violations no longer being punished by the criminal courts but by means of administrative fines imposable by the administrative authorities (with appeal lying to the court). In the years that followed the administrative fine was introduced in a large body of other legislation as a sanctioning instrument in addition to or instead of criminal law

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2. Met vaste hand, Policy Note of the Ministry of Justice, *Kamerstukken II*, 1990-1991, 22 045.
 3. Cf. Commissie Bestuursrechtelijke en Privaatrechtelijke Handhaving (Commissie Michiels), *Handhaven op niveau*, Deventer: W.E.J. Tjeenk Willink 1998.
 4. F.C.M.A. Michiels, *De boete in opmars*, Zwolle: W.E.J. Tjeenk Willink 1994.

sanctions. By now, apart from the areas of fiscal law and traffic law already mentioned, this sanction is an important sanctioning instrument in, for example, mass-media law, social security law, competition law, telecommunications law and in financial audit laws. In all these areas the fines are no longer imposed by the criminal courts but by the administrative authorities. Subsequent appeal lies to the administrative court.

In the choice for the administrative fine instead of criminal law sanctions various considerations are relevant.⁵ First and foremost it is important in the general sense that the legislation involved in these areas is of an organisational character (Ordnungsgesetzgebung), the violation of which is of little normative consequence. Moreover, issues of fault or malice are usually not of major significance and there is no need for custodial sanctions. Further, what has been relevant in a number of areas (traffic law, social security) is that mass perpetrated, relatively innocent violations are involved. The administrative authorities are better equipped to deal with these in the first instance than are the overburdened courts. Finally, in a number of areas – for example, competition and telecommunications law – the specialised nature of the violations motivated the introduction of the administrative fine. In these areas, the fines are imposed by specialised administrative agencies, such as the Netherlands Competition Authority and the Independent Post and Telecommunication Authority, which, due to their expertise, are considered better capable of handling these cases than the generally competent criminal courts.

A last factor which played a role in the advance of the administrative fine is Article 6 ECHR. In fixed case law the ECHR has established, on the one hand, that the imposition of an administrative fine – as that of a penal fine – is intended to be – punitive and deterrent – and should therefore be considered as a criminal charge in the sense of Article 6 ECHR.⁶ On the other hand, the Court has also determined in this same fixed case law that Article 6 ECHR does not stand in the way of a fine being imposed by an administrative authority (from an efficiency point of view, for example). However, appeal must lie from the imposition of the fine to a court which meets the requirements of Article 6 ECHR. By in principle allowing that punitive fines are imposed by an administrative authority the Court has paved the way for the introduction of the administrative fine in areas which hitherto were sanctioned exclusively with the aid of criminal law. Finally, it is worth noting that the Court has made clear that the member states cannot, through the introduction of administrative fines, escape the requirements of Article 6 ECHR. Because the administrative fine, just like the sanctions imposed by the criminal courts, must be considered a – criminal charge – the (criminal law) principles and guarantees of Article 6, first to third paragraphs, ECHR also apply to this type of sanction. This point is further examined in the next section.

5. Cf. the criteria set out by: Commissie voor de toetsing van wetgevingsvraagstukken (CTW), *Handhaven door bestuurlijke boeten*, The Hague 1994, the basics of which were adopted by the government: *Kamerstukken II*, 1993/1994, 23 4000 VI, no. 468.

6. ECHR 21 February 1984, Vol. A.73 (Öztürk), ECHR 25 August 1987, Vol. A.123 (Lutz) and ECHR 24 February 1994, Vol. A.284 (Bendenoun).

2.3 *The encroachment of criminal law standards in administrative law*

In the previous section the process was outlined whereby criminal law principles and standards have "encroached" upon a part of administrative law, i.e. that of the punitive administrative sanctions. In order to avoid misunderstanding it should be noted here that the Code of Criminal Procedure as such is not applicable to administrative punitive sanctions. What has, however, gained application are the criminal law standards and principles from international treaties which are directly applicable within the Dutch legal order. More specifically applicable are Articles 6 and 7 of the ECHR and Articles 14 and 15 of the ICCPR. This application is expressed through both the case law of the Dutch administrative courts on administrative fines and in legislation in which these fines are (or will be) regulated. Hereafter a number of these principles will be mapped out by way of example, in which, where the legislation is concerned, the regulation of the administrative fine as it will be included in the General Administrative Law Act will be referred to.⁷

a. *Principle of proportionality*: other than "regular" administrative decisions, which can generally only be marginally reviewed on proportionality by the courts, a full proportionality review takes place for administrative fines, taking into account the amount of the fine and the seriousness of the violation.⁸ Thus, with respect to the amount of the fine the administrative authority does not enjoy a margin of discretion to be respected by the court. The Dutch courts base the judicial duty to fully review the amount of the fine on Article 6, first paragraph, ECHR as this provision was interpreted by the ECHR in the *Le Compte, Van Leuven and De Meijere* Case, the *Albert and Le Compte* Case and the *Malige* Case.⁹ Because of this international law basis and given the constitutional obligation of the Dutch courts to leave aside national law which is in breach of directly applicable provisions of international law (cf. Article 94 of the Dutch Constitution) the Dutch courts can also review the proportionality of administrative fines, the amount of which is fixed by an Act of Parliament.¹⁰ This could result in judicial interference with the rates prescribed by law.

b. *Rights of defence*: where the rights of defence are concerned the first important thing is that both the judiciary and the legislature take the point of view that the rights granted by Article 6, third paragraph, ECHR to "everyone charged

7. This refers to the pre-draft of the Fourth Instalment of the GALA as published on 7 September 1999. This pre-draft is not yet an enactment of the law, but may be considered a codification of the existing rules for administrative fines. The General Administrative Law Act contains a generally valid codification of large parts of administrative law and the procedural law in administrative litigation.

8. ABRS 25 March 1999, AB 1999/229; CRvB 7 September 1999, JB 1999/253; CRvB 7 December 2000, JB 2001/18.

9. ECHR 23 June 1981, Vol. A.43 (*Le Compte, Van Leuven and De Meijere*); ECHR 10 February 1983, Vol. A.58 (*Albert and Le Compte*); ECHR 23 September 1998, R98-2922 (*Malige*).

10. Cf. ABRS 25 March 1999, AB 1999/229; ABRS 15 April 1999, RAwb 1999, 145.

with a criminal offence¹¹ apply just as well to the imposition of administrative fines.¹¹ Secondly, the (criminal law) principles of *nemo tenetur* and the right to remain silent recognised by the European Court as rights of defence are also applied to the imposition of administrative fines.¹² The offender threatened with an administrative fine must have these rights pointed out to him by the administrative authority.¹³ This is where the imposition of fines is essentially different from 'ordinary' administrative decisions in the taking of which a duty to inform actually rests upon the citizen concerned.

c. *Principle of guilt*: with punitive administrative fines the principle of guilt applies: an administrative fine cannot be imposed insofar as the offence is not imputable to the offender.¹⁴ The reparation-aimed non-punitive administrative sanctions mentioned in section 2.2 may also be imposed on citizens who are entirely without blame for the offence, but are still in a position to bring the illegal situation to an end. Further, stringent requirements are attached to the burden of proof for the imposition of an administrative fine due to the requirement set out in Article 6, second paragraph, ECHR ('everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law').¹⁵ the burden of proof as far as the (legal) facts making up the offence are concerned rests entirely with the administrative authority imposing the fine. In 'ordinary' administrative decisions, part of the burden of proof may rest with the citizen involved.

d. *Principle of legality*: finally, the various aspects which, according to (case law on) Article 7 ECHR and Article 15 ICCPR, stem from the principle of legality, are just as applicable to administrative fines. Thus, the principle of *nullum crimen sine lege*, the principle of *nulla poena sine lege* and the *lex certa* principle, are equally in force for the imposition of administrative fines.¹⁶ In addition, the special guarantee arising out of Article 15, first paragraph, third sentence, ICCPR applies, providing that the offender must benefit from an amendment to the law in which the imposition of a lighter sanction is provided for, also goes for administrative fines. When, for example, pending the appeal before the court, the amount of the administrative fine is reduced in the law, the court must apply the reduced amount.¹⁷ This deviates from the usual *ex tunc* review in administrative law, whereby the court must start from the facts and the law as they stood at the time the administrative

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11. Cf. *Memorie van Toelichting* to the pre-draft of the Fourth Instalment of the GALA, p. 130-132; cf. CRvB 29 June 2000, JB 2000/254.
 12. ECHR 24 February 1994, Vol. A.256-A (Funke); ECHR 17 December 1996, R96-2044 (Saunders).
 13. Cf. Article 5.0.11 pre-draft Fourth Instalment of the GALA.
 14. Cf. Article 5.4.1.2 pre-draft Fourth Instalment of the GALA. Cf. CRvB 4 March 1999, RAwb 1999, 115.
 15. ABRS 15 April 1999, RAwb 1999, 146; ABRS 15 February 2001, JB 2001/88.
 16. Cf. Article 5.0.4 pre-draft Fourth Instalment of the GALA. See CRvB 10 May 2000, JB 2000/228; CRvB 7 February 2001, JB 2001/116.
 17. Cf. CRvB 1 March 2000, JB 2000/107; CRvB 14 February 2001, JB 2001/80; HR 2 May 2001, JB 2001/148.

decision was taken.

2.4 *Conclusion*

All in all it can be said that criminal standards and principles have made their way into administrative law over the past few years. The underlying reason is that since the end of the 1980s the exclusively criminal law enforcement of organisational legislation has to an increasing extent been replaced by enforcement by punitive administrative sanctions. Because of this development, administrative courts must now apply formerly criminal law principles like the *nemo tenetur* principle, the principle of legality, the principle of guilt, et cetera.

3 **Criminal liability of public authorities or public officials**

3.1 *Introduction*

Where the criminal liability of public authorities and public officials is concerned the following distinction can be made. In the first place, Title XXVIII of the Penal Code contains several Serious Offences Involving Abuse of Office [*ambtsmisdriven*]. These are serious offences which can *only* be committed by public authorities and public officials. Two of these offences have an obvious connection with the politico-administrative activities of public authorities; the others are, however, closely related to ordinary offences, albeit that they can only be committed by public officials. These offences are dealt with in section 3.2. Except for these specific offences involving abuse of office, one general penal provision is also relevant for the criminal liability of public authorities and officials, i.e. Article 51 of the Penal Code, concerning the criminal liability of juristic (legal) persons. As public authorities may at the same time be juristic persons or organs of a juristic person this provision is also relevant for the criminal liability of public authorities. How far this criminal liability actually goes or should go is currently a topic of debate in the Netherlands. The issue is further discussed in section 3.3.

3.2 *Specific serious offences involving Abuse of Office*

As soon as people are vested with public authority the risk of abuse looms. The public must be protected from this. Moreover, the public must be able to have faith in the integrity of public authorities. The penalisation of serious offences involving Abuse of Office may contribute to this. From a politico-administrative point of view the serious offences described in Articles 355 and 356 of the Penal Code are the most interesting.

Article 355: Heads of ministerial departments:

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

Article 356: 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 itself these Articles, and particularly Articles 355 (4) and 356, contain a rather far-reaching criminal liability for Ministers and State Secretaries, as they are *inter alia* criminally liable for not implementing intentionally/by being grossly negligent/by careless conduct the provisions of not only the Constitution, but also of other statutes and (even) General Administrative Orders. In order to prevent Ministers being rather too rashly prosecuted, the Prosecutor must, however, apply a special, arduous procedure pursuant to Article 119 of the Constitution.¹⁸ The procedure boils down to only the Crown (King and Cabinet) or the Second Chamber (Lower House) being able to issue orders to the Procurator General with the Supreme Court to institute criminal proceedings before the Supreme Court. Sentencing is the province of the Supreme Court. Also due to this difficult procedure it has, since the introduction of criminal liability for Ministers in 1855, not yet occurred that criminal proceedings were instituted against a Minister on the basis of Articles 355 and 356.

Although for this reason there is no case law on the matter it is not questioned that the requirements that the said Articles contain for the criminal liability of Ministers go far beyond the requirements for the administrative liability of Ministers. For example, administrative liability does not rely on the unlawfulness having been committed intentionally, or by grossly negligent or careless conduct. Or, the other way around, it is, practically speaking, out of the question that Ministerial decisions, which stand the test of the administrative criteria for lawfulness as applied by the administrative courts, will nevertheless be considered criminal offences in the sense of Articles 355 and 356 in criminal proceedings.

Apart from these serious offences in the politico-administrative sphere, Title XXVIII contains a great many serious offences involving the abuse of office by public

18. The procedure is more closely elaborated in the Ministerial Responsibility Act, Stb. 185, 33. Hereon D.J. Elzinga, *De strafrechtelijke verantwoordelijkheid*, in: D.J. Elzinga (ed.), *Ministeriële verantwoordelijkheid in Nederland*, W.E.J. Tjeenk Willink: Zwolle 1994; P.P.T. Bovend'Eert and H.R.B.M. Kummeling, *Van Raalte's Het Nederlands Parlement*, Kluwer: Deventer 1995, pp. 244-245.

servants. The term "public servant" is interpreted broadly: it not only includes civil servants, but also judges, Ministers and local administrators and persons elected as Members of Parliament or members of local councils.¹⁹

Various serious offences involving the abuse of office are rather specific and concern offences which can only be committed by certain types of public officials, such as a commander of the armed forces (Article 357), prison guards (Article 367) or a public servant of the civil registry (Article 379). Further, there are some serious offences involving the abuse of office which concern the investigation of criminal offences, such as the unlawful entering of a dwelling, and unclosed room or premises (Article 370) and the unlawful seizure of a letter, postcard or parcel (Article 371). Various other offences are of a more general nature. Examples are: the embezzlement of money or paper of monetary value which is in control of a public servant in the execution of its duties (Article 359); the falsification of books and registers, intended solely for the purpose of administrative control (Article 360); the embezzlement or destruction of evidence (Article 361) and extortion by public servants (Article 366). As regards all offences mentioned above it can be noted that criminal proceedings are only very seldom instituted for these violations. And, insofar as this does happen, a disciplinary procedure against the public official involved will nearly always be instituted in addition.

The disciplinary procedure may result in the suspension, reprimand, (provisional) dismissal, etc. of the public official. Against such disciplinary sanctions appeal lies to the administrative courts. The substantive requirements for the imposition of a disciplinary sanction are less stringent than those for criminal liability. The disciplinary procedure serves to establish whether the public official in question has been guilty of neglect of duty. Neglect of duty includes both the breach of a statutory rule and committing and doing or failing to do something which a "good public official", all circumstances being equal, should fail to do or do.²⁰ This vague norm of course offers a better opportunity for (disciplinary) punishment than the more specifically worded criminal law norms.

The most interesting Articles in practice, which are regularly in the 1990s there were some 20 to 25 cases a year the basis for criminal proceedings against public servants are Articles 362 and 363 of the Penal Code concerning the taking of bribes. As of 2001, these Articles make criminally liable the public servant who accepts a gift or promise, knowing or reasonably suspecting, that it is made to him, in order to induce him to act or refrain from acting in the execution of his duties in a manner either not contrary (Article 362) or contrary (Article 363) to the requirements of his office. Secondly, the request of a gift or promise by a public servant for the same purpose is also penalised. Thirdly, accepting or requesting a gift or promise is also penalised if done by a former public servant or future public servant. The terms "gift" and "promise" are broadly interpreted by the courts and include "something

19. Pursuant to Article 483 of the Code of Criminal Procedure the arduous procedure as described above, resulting in sentencing by the Supreme Court, applies to the prosecution of Ministers and Members of Parliament.

20. M.J.S. Korteweg-Wiers, M. Dijk, F.M.B. Schrijvers and J.P.A.F. Vriens, *Hoofdlijnen van het ambtenarenrecht*, Samsom: Alphen a/d Rijn VUGA: Den Haag 1998, pp. 162-164.

of value for the recipient²¹ (gift),²¹ and "something that will be carried out in the future to the benefit of the public servant" (promise).²²

The criminal liability based on Articles 362 and 363 of the Penal Code as rendered above is the result of an amendment introduced into the law in the year 2001.²³ This amendment was motivated by a number of scandals from which it emerged that the integrity of public servants in the Netherlands was not (or no longer) given. Therefore, compared to the former Articles 362 and 363, the criminal liability of public servants was reinforced on a number of counts. For example, demanding gifts and promises did not used to be penalised as offences involving abuse of office and Articles 362 and 363 did not concern former and future public servants. Whether the revised Articles 362 and 363 will lead to more frequent prosecution and sentencing than in the past cannot yet be established at this time. It can, however, be remarked that public servants committing breaches of these Articles are nearly always also punished by disciplinary sanctions. As was noted above, the substantive requirements for the imposition of a disciplinary sanction are less severe than those for criminal liability.

3.3 Criminal liability of public authorities as juristic persons

In section 3.2 it was determined that, although in the Netherlands a number of specific criminal offences involving the abuse of office are to be found, these offences do not often give rise to prosecution and punishment and, further, that the requirements for criminal liability for these offences are (much) stricter than the requirements for administrative and disciplinary liability. In order to be able to paint the complete picture of criminal liability of public authorities and officials in the Netherlands these specific offences will not suffice: the general criminal liability of juristic (legal) persons is also relevant.²⁴

On the basis of Article 51, first paragraph, of the Penal Code not only natural persons, but also juristic persons can be criminal offenders. An entity can be a juristic person under private law, like a company, but also under public law. Juristic persons under public law are, among others, the State, the municipalities, the provinces and the group of so-called autonomous public authorities.²⁵ These public law entities can therefore in principle be criminally liable under Article 51. Where a criminal offence is committed by a juristic person, criminal proceedings may be instituted and sanctions may be imposed, not only against the juristic person, but also against (Article 51, second paragraph):

- those who have ordered the commission of the criminal offence (*Opdrachtgevers*), and;

21. HR 25 April 1916, NJ 1916, p. 551.

22. HR 21 October 1918, NJ 1981, p. 1128.

23. Stb. 2001, 43.

24. J.A.E. van der Jagt, *Decentraal bestuur vervolgbaar?* Gouda Quint: Deventer 2000; C.H. Brants and R. de Lange, *Strafvervolgving van overheden*, Monografieën Strafrecht 22, Kluwer: Deventer 1996; A.B. Blomberg, *Integrale handhaving van milieurecht*, Boom Juridische Uitgeverij: Den Haag, 2000, pp. 51-57.

25. The latter are the Dutch equivalent of the UK quangos and the US agencies.

- those in control of such unlawful behaviour (*„feitelijke leidinggevers“*). A person belongs to this category if he, „although competent and bound to take measures, has by failing to do so knowingly accepted the considerable chance that prohibited acts would occur.“²⁶

In a public law context holders of political offices and executive public servants may in principle be prosecuted and punished as „those who have ordered the commission of the criminal offence“ or as „those in control of such unlawful behaviour“.

Research in the Netherlands has shown that public law entities quite regularly commit criminal offences, especially in the field of environmental law.²⁷ This could, for example, involve a municipality dumping waste or having it dumped without the required permit, a department of the Ministry of Defence, which, in violation of the rules, pollutes the soil from ammunition or oil, the municipal waterworks illegally discharging effluent, or „outside the field of environmental law“ a public authority, which, in breach of the Working Hours Act forces its employees work nights. Thereby it is important that the violation of such orders and prohibitions as referred to here, has been penalised in the specific legislation, on the basis of the Economic Offences Act or in the Penal Code. It is further possible that if a public authority permits third parties to act illegally „for example, knowingly failing to enforce regulations against an illegal fireworks factory or discotheque posing a fire hazard“ this may, in certain circumstances, give rise to a criminal offence. A public authority could thus be prosecuted for culpable homicide (Article 307 of the Penal Code) when, partly to the non-enforcement by this authority, the fireworks factory explodes and several people living nearby are killed. Or it could be prosecuted for culpable homicide or culpable fire (Article 158 of the Penal Code) when, partly due to the non-enforcement, the discotheque catches fire and visitors are killed.

The question which is currently being debated in the Netherlands is whether public authorities and officials should actually be criminally liable for the offences mentioned here.

If one were to look solely at the wording of Article 51 of the Penal Code this question seems simple to answer. Given that public law entities like the State, municipalities or provinces are juristic persons, these entities, as well as „those who have ordered the commission of the criminal offence“ and „those in control of such unlawful behaviour“ may at first glance be prosecuted and punished without further ado.

During the discussions in Parliament on Article 51 of the Penal Code, however, the government made a number of remarks from which it becomes clear that it was in favour of merely a limited criminal liability of juristic persons under public law. For the government stated that the prosecution of juristic persons under public law will generally be scarcely opportune, especially where the offence was committed in the context of a general or specific administrative function. Full statutory criminal immunity, however, was also rejected. According to the government the courts

26. HR 16 December 1986, NJ 1987, 321.

27. Michiels Commission 1998, p. 139.

should base their decision on the circumstances of each particular case, whereby it would be relevant in particular whether the public authority acted in the context of a public duty or as an "ordinary" entrepreneur.²⁸ In reference to the parliamentary history the Supreme Court has in its case law (considerably) limited the criminal liability of public authorities. Thereby a distinction is made between the criminal liability of the State and that of the other juristic persons under public law.

According to the Supreme Court's case law, the State enjoys full criminal immunity. The Court considered to this end:²⁹ "The starting point must be that the actions of the State are to be considered to serve the general interest. (¶) For these actions, the State and its Ministers and State Secretaries are generally accountable to the Parliament. In addition, they can be prosecuted and tried under criminal law for offences involving abuse of office pursuant to Article 483 and the following of the Code of Criminal Procedure.³⁰ It is not consistent with this system that the State itself can be held criminally liable for its actions."

In this quotation two reasons for the criminal immunity of the State are revealed. In the first place there is the system of political liability on the basis of which public officials representing the State, the Ministers and the State Secretaries are accountable to Parliament. In the second place there is the specific criminal liability mentioned in section 3.2 above of Ministers and State Secretaries to which the arduous prosecution and sentencing procedure described there (order to prosecute from the Crown or the Lower House to the Prosecutor General; punishment by the Supreme Court) applies. Thus, it would be inappropriate if the State itself were to be prosecutable and punishable through the regular (far less strenuous) procedure. To these reasons another may be added, i.e., that of the unity of government and governmental policy.³¹ For a proper understanding of this argument it is important to note that the Minister of Justice is politically responsible and accountable for the prosecution policy of the Public Prosecutor. Prosecution of the State would therefore ultimately mean that the Minister of Justice is prosecuting another Minister (or him/herself) for breach of the Penal Code. This would give rise to inconsistencies within the Government and would place other Ministers under the supervision of the Minister of Justice. This is deemed undesirable.

In the legal literature, too, various arguments are adduced against the criminal immunity of the State.³² For instance, many find it objectionable that this immunity results in legal inequality between the State and other citizens. This inequality has meant that the State could not be punished for illegally polluting soil with oil when this has been done by public servants of the Ministry of Defence, whereas a

28. Kamerstukken II 1975-1976, 13 655, nos. 103, pp. 20-21.

29. HR 25 January 1994, NJ 1994, 598.

30. As noted in section 3.2 this Article refers to the arduous procedure for the prosecution and sentencing of Ministers in the Ministerial Responsibility Act.

31. Cf. Government Policy Note Strafrechtelijke aansprakelijkheid van overheidsorganen, Kamerstukken II, 1996-1997, 25 294, no. 2, pp. 12-14.

32. Cf. Michiels Commission 1998, pp. 145-146; M.L.W.M. Viering and R.J.G.M. Widdershoven, De strafrechtelijke positie van de overheid na Pikmeer II, in: Strafbbaarheid van overheden, Publicaties van de Staatsrechtkring 15, W.E.J. Tjeenk Willink, Zwolle 1998, pp. 81-82.

regular citizen could be punished for such acts. Apart from this, the criminal immunity of the State sets a bad example for the rest of society. Why should citizens abide by all kinds of rules when the State can simply violate them (and in fact regularly does so) and enjoy immunity? Despite these and other objections the government is, however, not planning to lift State immunity. For the moment, prosecuting the State will thus remain an impossibility.

With other juristic persons under public law I shall hereinafter limit myself to the municipalities and provinces things are less black and white. Since the groundbreaking *Pikmeer II* judgment by the Supreme Court in 1998 they are in principle criminally liable for illegal actions, unless they involve acts which by their nature and given the statutory system cannot legally be carried out but by public officials in the framework of the administrative tasks assigned to the municipality or province (exclusive government tasks).³³ There has been considerable debate in the literature about the meaning of this criterion. The general consensus is that the criterion should be taken to mean that municipalities and provinces enjoy only limited criminal law immunity. Insofar as certain acts could also be carried out by private individuals such as the illegal dumping of waste, the illegal pollution of the soil or the illegal discharge of effluent these decentralised authorities can be criminally liable for these acts. The same is true for administrative functions which can be privatised as these are apparently not exclusive government tasks. The conclusion of marriages and the issue of passports are, however, regarded as exclusive government tasks for which criminal immunity is in place. In addition, the Public Prosecutor takes the view that the (illegal) granting of permits and the (non-) enforcement of the law are to be considered exclusive government tasks. This point of view means that the municipalities and the provinces are not prosecutable for, e.g., the consequences of knowingly failing to act against an illegal fireworks factory or a discotheque posing a fire risk. This position is, however, not undisputed. At the moment, various procedures are being conducted with the aim of forcing the Public Prosecutor to prosecute.

It does not automatically follow from the fact that decentralised authorities are in many cases criminally liable that the Public Prosecutor will always proceed to take action against every illegal act on their part. According to the Supreme Court, the special position of these public authorities as well as the primacy of the politico-administrative supervision may be taken into account in two separate instances.³⁴ In the first place, an act which is in itself illegal may still be non-punishable due to the presence of a ground for justification. It is thus conceivable that an illegal act is carried out in the implementation of another statutory rule. When this is the case and the choice in favour of the illegal act is supported by a careful administrative weighing of interests the punishability of this act is precluded pursuant to Article 42 of the Penal Code. Further, it is conceivable that an illegal act may be justified on the ground of force majeure in the sense of Article 40 of the Penal Code. This was, for example, the case when a public authority temporarily illegally dumped the odorous remains of a burnt down fish factory onto an open-air refuse dump.

33. HR 6 January 1998, NJ 1998, 367, AB 1998, 45. The quotations hereafter are taken from this judgment.

34. Cf. Viering and Widdershoven 1998, pp. 77-79.

In the second place, the special position of the public authority can – according to the Supreme Court – be taken into consideration in prosecution policy. As there is no duty to prosecute in the Netherlands the Public Prosecutor can, even if an illegal act is involved for which there is no ground for justification, still decide to drop the prosecution of decentralised authorities for reasons to do with the general interest (the right to exercise prosecutorial discretion). In the Supreme Court's judgment, a possible – reason to do with the general interest – could be the situation that intervention by the criminal court would be – untimely – or would – obstruct the proper course of an administrative procedure –. With this suggestion the Court makes clear that the Public Prosecutor may not proceed lightly to prosecute public authorities. Politico-administrative supervision and supervision by the administrative courts in principle must come first.

The above means that although decentralised authorities such as municipalities and provinces may in principle be criminally liable under Article 51 of the Penal Code it is not often the case that prosecution is instituted against these authorities. Prosecution is in any event precluded when the offence took place in the framework of an – exclusive government task –, which probably includes (illegal) acts in connection with the granting of permits and law enforcement. Outside the exclusive government tasks the prosecution of illegal acts is indeed possible in principle, but it may still be denied on a ground for justification or as a result of general interest considerations. In answering the question whether this is the case, it is relevant whether the disputed act is supported by a careful, administrative weighing of interests. Although this has not been formally prescribed, where the criteria to be applied in this context are concerned, the Public Prosecutor and the criminal courts take guidance from the due care criteria which the administrative courts apply in order to determine whether an administrative decision is lawful.³⁵ To that extent, criminal liability adds little to administrative liability.

This is not to say, however, that the criminal liability of decentralised authorities does not have any meaning. In this context it is important that in the Netherlands appeal before the administrative courts only can be instituted against *administrative decisions*, like permits or concessions. The illegal acts of public authorities which one would like to prosecute are, however, usually of a *factual* nature: the soil is being polluted or effluent is being discharged without the proper authorisation. These factual, illegal acts cannot be contested before the administrative courts. Especially for these acts the criminal courts are supplementary to the legality test by the administrative courts. Because of the primacy of politico-administrative supervision the criminal courts must, however, discharge this function with the necessary reticence. They should not obstruct the proper course of any administrative process or interfere with careful administrative considerations.

35. Brants and De Lange 1996, pp. 38-40.

3.4 *Evaluation*

The above can lead to only one conclusion: in the Netherlands the criminal liability of public authorities and officials plays but a limited role besides that of the administrative liability (and political liability) of these authorities and officials. Although the Penal Code contains several serious offences involving the abuse of office, most of these offences are only rarely prosecuted and punished. To the extent that they are, disciplinary measures are usually also taken against the public officials involved (from which appeal lies to the administrative courts). This disciplinary [punishment] is subject to less stringent requirements than is the imposition of penal sanctions.

Further, Article 51 of the Penal Code in principle offers the possibility to prosecute and sentence juristic persons as well under public law. It is, however, established case law that that this Article cannot be applied against the State; this entity is therefore endowed with criminal law immunity. Decentralised authorities, however, may in principle be criminally liable pursuant to Article 51 of the Penal Code. This liability however does not apply to illegal acts in the context of an [exclusive government task]. Insofar as these decentralised authorities are capable of being criminally liable, it is moreover expected of the Public Prosecutor and the criminal courts that they observe a certain reticence where the illegal acts of these authorities are concerned: the proper course of the administrative process and careful administrative consideration are not to be obstructed.

4 **Procedural matters**

In this last section I will discuss to what extent the criminal and the administrative liability of public authorities and officials may be concurrent and [where so] may be mutually harmonised. Thereby a distinction has to be made between public authorities on the one hand and public officials on the other.

Where the public authorities are concerned, there are no possibilities for the procedural concurrence of criminal and administrative liability. As indicated in section 3.3 the State enjoys full criminal law immunity, already rendering concurrence with the administrative liability of the organs of the State, the Ministers, impossible for this reason alone.

Decentralised public authorities like municipalities and provinces do not enjoy full criminal law immunity, so that at first glance the procedural concurrence of criminal and administrative liability seems possible. Still, this is not the case, as both types of liability are fundamentally different where their subject and object are concerned.

- Subject: criminal liability under Article 51, first paragraph, of the Penal Code in the first place concerns the juristic person under public law, the municipality or province. Political office-holders and executive public servants of these entities may in principle also be prosecuted and punished as [those who have ordered the commission of the criminal offence] or [those in control of such unlawful behaviour]. The criminal procedure is thus directed against the juristic persons or against these individuals. Administrative law procedures are, on the other hand, not

directed against juristic persons or individuals, but against the organs of the juristic person. "Organs" of a municipality are the Mayor, the Municipal Executive or the Municipal Council; of a province: the Queen's Commissioner, the Provincial Executive or the Provincial Council. Acting as defendant in proceedings before the administrative courts is therefore not the individual who in fact took the decision, but an organ.³⁶

- Object: criminal liability is concerned with factual, illegal acts (cf. section 3.3). In proceedings before an administrative court, on the other hand, the legality of an administrative decision (not of a factual act) is up for judgment.

Given these differences where subject and object are concerned, the procedural concurrence between the criminal liability and administrative liability of public authorities is not indicated.

The above does not mean that there is no relationship whatsoever between both types of liability where substantive standards come in. As mentioned in section 3.3, an important reason for not prosecuting and punishing illegal acts of decentralised authorities is that these acts are underpinned by a careful, administrative weighing of interests. Although the criminal courts are thereby not formally bound to the administrative law criteria of due care, they do in practice take guidance from these criteria.

Where public officials are concerned, there are possibilities for concurrence, more in particular between the criminal liability for the serious offences listed in section 3.3 involving the abuse of office and the disciplinary liability of these officials. As the disciplinary liability has been formulated much more broadly than the criminal liability "disciplinary liability concerns neglect of duty, which includes both the violation of statutory provisions and the doing or omitting of something that a "good public official" should, under the same circumstances, do or omit" (cf. section 3.3) "this concurrence is unilateral. When an act can be regarded as a serious offence involving the abuse of office, this will without question involve "neglect of duty" in the disciplinary sense as well, as the public official will then also have violated a statutory norm. Vice versa, a disciplinary "neglect of duty" need however not always be so serious as to give rise to criminal liability.

Formally speaking, there is no connection of any kind between criminal and disciplinary procedures. In the distinct procedures a penal or disciplinary sanction is imposed by different entities "in the criminal procedure by the criminal courts; in the disciplinary procedure by the administrative authority" in accordance with different substantive standards. The administrative authority has its own responsibility to deal with violations in the disciplinary manner and should not wait for the outcome of the criminal law procedure in connection with the same offence, and vice versa. The principle of *ne bis in idem* does not apply between the two procedures either. The same offence may thus be punished by disciplinary and by penal sanctions. However, in the literature it is argued that, based on the principle of proportionality, both sanctions in their cumulated form may not be disproportional in

36. Which is, of course, represented by an individual, for instance an alderman or a public servant.

relation to the seriousness of the offence.³⁷ The fact that the public official involved has already been punished for his offence by disciplinary means should cause the criminal courts to mitigate any penal sanctions, and vice versa.

5 Evaluation

In the Netherlands there is a development where administrative law and criminal law are slowly edging towards each other. Law enforcement is increasingly being exercised with the aid of administrative law instruments. As this also involves the application of punitive administrative sanctions – especially administrative fines – criminal law standards and principles are encroaching in administrative law (section 2). On the other hand, criminal law plays an –albeit limited– supplementary role as the supervisor of public authorities and officials. This role on the one hand concerns the criminal liability of public officials for serious offences involving abuse of office (section 3.2), and on the other the criminal liability of municipalities and provinces for illegal acts (section 3.3).

This latter criminal liability does, however, not concern acts in the context of an –exclusive government task–. Furthermore, it is expected of the Public Prosecutor and the criminal courts that they act with reticence towards the illegal acts of public authorities: the proper course of the administrative process and the careful administrative weighing of interests are not to be interfered with. The primacy for the supervision of public authorities lies with the administrative courts and the politico-administrative supervisory mechanisms.

37. A.B. Blomberg, *Cumulatie van sancties*, JB-plus 2001, p. 138

