POlitical and CRIminal responsiBility

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Introduction

Preliminary remarks

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According to the Questionnaire\(^1\), the following relevant questions were to be addressed:

I. Concepts and definitions
II. Constitutional and legal status of Head of State, Head of Government and Ministers in relation to national and international criminal law
III. Responsibility of Head of State, Head of Government and Minister(s) for criminal acts or omissions committed by their subordinates, i.e. civil servants
IV. Distinctions between governmental (official) and personal criminal responsibility.
V. The availability of immunity and/or indemnity from criminal prosecution.
VI. In which courts would criminal proceedings take place?

1 Scope of this Report

This report deals primarily with national constitutional law. Matters of Dutch criminal law are discussed where appropriate. The impact of international law, although possibly increasing since the Netherlands signed the treaty in which the Statute of the International Criminal Court is laid down, forms no part of our discussion.\(^2\) Reference to the International Criminal Court is made only in passing.

2 Head of State

The Kingdom of the Netherlands is a constitutional monarchy. The King is Head of State. Since 1898 the office of King has been held by a woman, after a period (1890-1898) in which the Queen Mother acted as Regent. According to Dutch constitutional law, the question who is Head of State is not a difficult one, although there is no explicit provision in the written Constitution. The Constitution of 1814 spoke of William as Sovereign Prince. According to contemporary practice, the establishment of an hereditary monarchy in the Netherlands in 1813 implied that the new Sovereign Prince was Head of State. In 1815, following the Vienna Congress, a new state was recognised, comprising the Netherlands and part of what is now Belgium (separated in 1830). In a Proclamation of March 16, 1815,\(^3\) in which unity with Belgium was proclaimed, the Prince referred to himself as King of the Netherlands, and this title was recognised by foreign governments at the Vienna Congress.\(^4\) The 1815 Constitution referred to the King. During the important Revision of the Constitution in 1848, the Government explicitly referred to the King as the Head of State.\(^5\) This was never contradicted, and

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1. The Questionnaire was designed by prof. John Bridge, University of Exeter (U.K.).
2. The significance of the International Criminal Court is discussed by Van der Wilt 2000.
3. Stb. 27.
5. Memorie van Beantwoording van het Voorlopig Verslag, Handelingen 1848, p. 56.
has been generally accepted in constitutional doctrine ever since.\textsuperscript{6}

The King as Head of State has the power to bind the Kingdom of the Netherlands in international relations (cf. Vienna Treaty, art 7 § 2 sub a). This is also true for heads of government and ministers of foreign affairs. The King traditionally plays a central role in the field of foreign affairs. The most solemn treaties are signed by the King himself.\textsuperscript{7}

In international negotiations, the Kingdom is usually represented by the minister of Foreign Affairs or persons acting on behalf of the minister and under his instructions. Occasionally, other persons have represented the Kingdom, sometimes in a (seemingly) independent role.

Apart from his role in international relations, the King also has a role to play in domestic affairs, albeit a very limited one.\textsuperscript{8} In the process of cabinet formation - which is usually a matter of coalitions between political parties in the Netherlands - the King appoints the \textit{formateur}, who leads the negotiations between the political parties. Normally speaking the \textit{formateur} becomes the new Prime Minister, although there is no rule of constitutional law which makes this necessary. Moreover, there is a chance that a formateur will not be successful and has to be replaced by another \textit{formateur}. The new Prime Minister takes political responsibility for the decisions which the King has taken during the formation of the new cabinet, including the appointment of formateurs.

The Constitution also provides for some other tasks, such as the ratification of Acts of parliament (article 87 of the Constitution) or the reading of the official speech (\textit{troonrede}) at the State Opening of Parliament (article 65 of the Constitution). These tasks do not involve the exercise of any real power.

3 \textbf{Who is head of government?}

The Dutch Constitution has never mentioned a Head of government. Until recently this used to be no problem. Over the past years, however, questions have been asked concerning the position of the Dutch Prime Minister in relation to the European Council, which according to article 4 of the Treaty on European Union consists of ‘Heads of Government’ and Heads of State. Since in the Netherlands the King is part of the government (article 42 of the Constitution) and is head of state, one might think that the King is head of government as well, but in practice this was not the case. The position of Head of government has - until the year 2000 - never been formally recognised.\textsuperscript{9} The position of the Prime Minister is traditionally referred to in the Netherlands as a \textit{primus inter pares}.\textsuperscript{10} Like its parallels in other countries, Dutch prime ministership rose to prominence during the second half of the 19th century. Dominating figures like Johan

\begin{thebibliography}{10}
\bibitem{Kortmann&Bovend'Eert2000} Kortmann & Bovend'Eert 2000, p. 78; Burkens c.s. 2001, p. 222.
\bibitem{Bovend'Eert2000} Bovend'Eert 2000.
\bibitem{Bovend'Eert2000p78} Bovend'Eert 2000, p. 78.
\end{thebibliography}
Thorbecke (1798-1872), who led the then much smaller Cabinet during the years 1849-1853, 1862-1866, and again in 1871-1872, and later Abraham Kuyper (1837-1920), Prime Minister from 1901-1905, took a position which led Van Raalte in his 1917 dissertation about the office of Prime minister to the conclusion that there was a discrepancy between written law and political reality. At that time, the presidency of the Council of ministers was only temporarily held: the ministers elected their president annually. The Royal Decree of September 26, 1922, no. 18, ended this situation and made the presidency of the council of ministers a permanent position. Since 1933 normally, though not always, the formateur, i.e. the person who was asked by the King to form a government, became prime minister. There was no election by the Council of ministers, although this was still required by the Council's Reglement van Orde.\footnote{Van Raalte 1954, p. 11.}

In 1983, the present article 45 was incorporated in the Constitution. The second section of that article states that the Prime minister is the president of the Council of ministers. It was generally acknowledged that this provision does not make him head of the government.

In 2000, in its Memorandum on Kingship (Beschouwing over het koningschap, TK 27 409, nr. 1), the Cabinet took the position (albeit implicitly and in passing only) that the Prime Minister is the head of government (‘regeringsleider’). Almost certainly, this sentence was written especially for use abroad, to provide clarity with regard to the position of the Dutch Prime Minister. The position of the Prime Minister as the Head of Government has been generally recognised. The reference in the 2000 Memorandum only affirmed and confirmed the situation that had developed inside the Cabinet.

As a matter of constitutional law, the situation may be summarized as follows:

- The King is Head of State (an office not mentioned in the Constitution) and member of the Government (article 42 of the Constitution);
- The Prime minister is head of the Government (an office not mentioned in the Constitution, although article 45 § 2 awards the prime minister the position of president of the Council of ministers);
- The King is inviolable, the ministers are responsible (article 42 of the Constitution).

The responsibility of ministers is criminal and political. Criminal responsibility is regulated by the 1855 Act on Ministerial Responsibility (Wet ministeriële verantwoordelijkheid), which so far has never been applied. The extent of political responsibility is entirely a matter of unwritten law and convention. Inviolability of the King seems to many people to make legal sense only if it is understood as inviolability of the King’s person. Nevertheless, during the preparation of the Constitution in 1848 it was argued by members parliament that unlike the Belgian Constitution of 1831 the Dutch Constitution should not refer to the King’s person, but to the King. The reasons for this are not explicitly stated during the parliamentary debates on the revision of the Constitution in 1848. They may be found in monarchical sentiment in times of a
democratic revolution in Europe. As far as the Netherlands are concerned, 1848 comes close to a constitutional and political revolution as well. In that year, the foundations were laid for the development of a parliamentary system, which matured in a period of about 20 years. That parliamentary system gradually became more democratic with the extension of the franchise, although general suffrage was not introduced before 1917, then again under the influence of political developments abroad.

4 Political responsibility

4.1 Introduction: the Basics

A.D. Belinfante, professor of Administrative law at the University of Amsterdam, already in the 1960's suggested that the basic rules with regard to political responsibility were interlinked and could be formulated in the following way:

1. No powers without responsibility - No one should have powers to exercise official public authority, unless he or she can be held responsible for the exercise (or non-exercise) of those powers;
2. No responsibility without powers - No one should be held responsible for acts or omissions falling outside the scope of his powers.

These are very clear guidelines, which still have their practical value. Being guidelines, they cannot and should not be interpreted too strictly in practice. Political responsibility includes that one may be held responsible for having failed to obtain certain powers, if such an omission results in grave damage to the public interest. It implies also, that if members of parliament ask a minister for information which lies outside the scope of a minister's powers, the minister will normally answer such questions if it is obvious that either no other minister would be able to answer, or failure to answer would be considered as a political weakness which might result in political consequences for the minister involved.

4.2 History of political responsibility

4.2.1 Origins of political responsibility of ministers in the Netherlands

The political responsibility of ministers was introduced into the Dutch Constitution in 1848. Criminal responsibility of ministers had existed since 1840, when articles 75-77 of the Constitution were revised. The new article 75 provided that the Heads of Ministerial Departments were responsible for all acts which they performed or to which they contributed or cooperated, by which the Constitution or an Act of Parliament would be violated. Article 77 provided that the Hoge Raad would be the court before which the
charges with regard to the responsibility mentioned in article 75 were brought. This put beyond doubt that responsibility in article 75 of the 1840 Constitution referred to criminal responsibility only.

Political responsibility was seen in 1848 as an extension of criminal responsibility. In the period between 1848 and 1868, a parliamentary system developed in which the confidence of the States-general in the Cabinet, and in ministers individually, became the crucial factor. Parliament emerged from the conflicts of the years 1866-1868 as a clear winner, and it was then firmly established that Parliament ultimately decided the fate of the ministers, and not the other way round.\textsuperscript{13}

4.3 The classical doctrine of ministerial responsibility

According to the classical doctrine of ministerial responsibility the minister is responsible for acts of the King, for his own acts or omissions, as well as for the acts of civil servants working under his direction. Ministers are responsible to Parliament. Both Chambers of the States-General have the power to require information from ministers, and ministers are under an obligation to provide such information unless the provision of such information conflicts with the ‘interests of the State’ (article 68 of the Constitution). In practice this exception is rarely invoked, although sometimes ministers refuse to provide information on other grounds than those related to security and defense matters. Reasons related to financial interests of the state have also been invoked by ministers. It sometimes happens that ministers refuse information to Parliament on grounds not mentioned in the Constitution. Occasionally, Parliament has accepted such a refusal. In exceptional cases, citizens have been able to obtain information which ministers refused to give to parliament, through the Access to Government Information Act.

An example is the Securitel-affair, so called after the decision by the Court of Justice in case C-194/94 [ECR 1996, p. I-2201], CIA Security v. Signalson & Securitel. In the debate in the Dutch parliament on the consequences of this decision, ministers refused to provide a list with legislation which should have been notified to the European Commission. Such a list had been drawn up by civil servants, and members of the Second Chamber requested on the basis of article 68 of the Constitution that the minister would reveal its contents to parliament. Parliament accepted the minister’s refusal. Citizens then requested the list on the basis of the Government Information (Public Access) Act. The minister refused, but this refusal was speedily quashed by an administrative court.\textsuperscript{14}

\textsuperscript{13} The core rules of the parliamentary system are that Ministers are obliged to resign once lack of confidence from Parliament has shown, and that a government is not allowed to dissolve (a Chamber of) Parliament more than once with regard to the same issue.

The classical doctrine of ministerial responsibility rests on the assumption that there is a sufficiently hierarchical relationship between ministers and civil servants. Ministers must have effective control over their civil servants.

The classical doctrine of ministerial responsibility holds that the minister is politically responsible to parliament and that civil servants do their work entirely under the control of the minister. For the theoretical foundations of this model of bureaucracy one is often referred to Max Weber. The model rests on the assumption that there is a hierarchical structure of ministerial departments, and that the minister has sufficient powers as well as possibilities to ensure that his civil servants do what the minister wants them to do, and provide the minister with all the relevant information. If these conditions are fulfilled, Parliament may have effective control over the executive, via the minister.

The classical doctrine holds that ministerial responsibility contains various elements:

- Responsibility for acts of the King. Following article 42 of the Constitution, the King is inviolable, and the ministers are responsible. This is universally taken to mean that nothing the King ever says or does can entail political, criminal or civil responsibility. The King may not be ‘exposed’, i.e. his acts may in no way cause controversy and if so this should never touch the King personally. In practice, the Prime Minister is the minister who is most closely in touch with the King. Every week the King is consulted, the Prime minister supervises the writing of the King’s texts, hardly any act of the King will escape ministerial control. In practice, however, there is a certain recognition of the privacy of the King’s person, including a say in holiday destinations.

- Responsibility for the minister’s own acts. This is the most obvious part of ministerial responsibility. It is important to note that responsibility regards the office of minister, whereas political confidence (as relevant in the rule of confidence) regards his or her person. This means that parliament may express lack of confidence also on the occasion of a minister’s private behaviour.

- Responsibility with regard to acts of civil servants. This responsibility used to be self-evident, but in practice it is possibly the case that more or less autonomous acts of civil servants, and the restructuring of the civil service in order to meet modern organisational and political requirements and insights, have done much to undermine classical structures of political responsibility. The situation in the Netherlands is probably less dramatic than in the United Kingdom, where a recent manual of

15. Although in the Memorie van Toelichting (White Paper) on the approval of the Statute of the International Criminal Court a remarkable passage can be found in which it is said that a. in the Dutch constitutional system, the King is not a ‘political’ Head of State but a ‘representative’ Head of State, and b. it follows from article 42 of the Constitution that the King cannot commit criminal offences since the King’s acts are fully covered by ministerial responsibility. Kamerstukken 27 484 nr. 3, p. 9. This must be a slip of the pen, to put it mildly. For criticism of the view of the White Paper, see Kortmann 1999.

16. Although this may be politically charged as was the case when Queen Beatrix left for Austria on holiday shortly after Haider’s party won the elections and the member states of the European Union were considering sanctions against Austria.
constitutional law stated that the doctrine of individual ministerial responsibility ‘has been significantly weakened over the past ten years or so, so that it can no longer be said, in our view, that it is a fundamental doctrine of the constitution.’ Nevertheless, also in the Netherlands there have been complications in applying the doctrine of ministerial responsibility in some cases where acts of civil servants were involved.

The classical doctrine is really quite simple. As is well-known, practice is much more complicated. First and most importantly, there is the problem of information: it is not always certain that the civil servants give the right information to the ministers, and that it is right to blame the minister if the civil servants made an error in this respect. Apart from cases in which ministers have been misled, or have not been fully informed by their civil servants, there have been cases in which civil servants have not informed their minister about possible implications.

When Winnie Sorgdrager became minister of Justice in 1994, one of her first acts was to put her signature under a deal with a criminal informer. This deal had already been made under the previous minister. Although formally responsible, the minister was not informed about certain implications of the deal. Among other things, the informer was paid an amount of money to set up a new life abroad with a new identity. It later turned out - to great embarrassment of the minister of Justice - that the informer had duly received the money but had always remained in Rijswijk (very near the Hague), where he lived.

Also, there are cases in which civil servants made a wrong assessment of available information and of the need to tell the minister.

A clear example is the case of the Bijlmer-disaster. An El Al freight Jumbo crashed on an block of flats in a residential area in Amsterdam on October 4, 1992. Information regarding the cargo was not speedily given to the minister of Transport but kept confidential by certain civil servants. This became apparent only during a parliamentary inquiry more than six years later, and led to a fierce reaction both from the inquiry committee and from the prime minister. It later turned out that the information had probably been incorrect anyway but the civil servants’ attitude in this matter was a matter of heated debate.

Political responsibility of ministers is commonly described as risk liability, i.e. that it is not necessary that a fault lies with the office-holder. It is a matter of dispute whether it is necessary that a minister can be blamed personally for acts or omissions of civil servants.18

Following Mark Freedland, one could compare governmental organisations and

departments to large ships. The larger the ship, the less it is appropriate to say that the captain is steering it. On the other hand, ‘if the super-tanker founders on the rocks, we tend to regard it as rather over-punctilious for the captain to feel obliged to go down with the ship.’

Freedland’s observation that responsibility was less seen to be taken on a personal basis but more and more on an ‘institutional’ or ‘vicarious’ basis, and that ‘[i]n those circumstances, it came to seem less necessary for the minister to pay a personal penalty for departmental error by resigning from office’, is certainly also appropriate for the Netherlands. The assessment - and maybe even the demise or at least the crisis - of the classical conception of ministerial responsibility as ‘inappropriately sacrificial’ has led in the Netherlands to what was termed a ‘democracy of excuse’ (‘sorry-democracy’).

- Responsibility with regard to autonomous administrative bodies / agencies. With regard to autonomous administrative bodies (zelfstandige bestuursorganen) ministers have less powers than with regard to the civil service. This leads to a diminished scope of ministerial responsibility. Powers with regard to autonomous bodies may include powers of appointment, powers of supervision, and powers with regard to the budget. From the start it has been recognised that there would be problems and complications with ministerial responsibility with regard to autonomous bodies / agencies. Precisely because they were not part of the classical departmental organisation, but were placed at a distance from it though not entirely privately organised, the crucial question of budgetary and managerial autonomy arose. A governmental proposal for an Act concerning autonomous administrative bodies is presently debated by the States-General.

4.4 Modern developments

Ministerial responsibility has been a matter of continuous debate over the past decades. The main problems which led to modern developments in the doctrine of ministerial responsibility have to do with the relationships between ministers and their civil servants. As in many other countries, developments in the public sector in the Netherlands have included the rise of the civil service and of bureaucratic government apparatuses. Not only an increase in numbers but also a growing power of the bureaucracy, especially after World War II, led to questions with regard to political control, the relationship between ministers and their civil servants, and the relationship between ministers and

21. Legislative proposal 27 426, for an Act regarding autonomous administrative bodies. For a thorough discussion of the position of autonomous administrative bodies, see Zijlstra 1997.
22. A list of such bodies can be found at http://www.overheid.nl.
Parliament, both with regard to political control and with regard to Parliament’s role in
the process of legislation.  

In an essay in the Nederlands Juristenblad, Scheltema has summarized the ratio of
political responsibility in two points:
* that government policies correspond with the wishes of the majority of the
population, since political functionaries make the crucial policy choices; political
responsibility serves democratic legitimation;
* In a general sense, ministerial responsibility serves to ensure that the governmental
organisation functions well. It serves to establish lines of responsibility within the
governmental organisation. Since the organisation is hierarchical, responsibility is
naturally also hierarchical.

Scheltema argues that for guaranteeing the quality of the public service, other
mechanisms than political responsibility of ministers are more appropriate. Monitoring
by independent bodies, such as a ‘Quality Chamber’, would be feasible and appropriate
according to Scheltema.

4.5 The problem of government integrity

A parliamentary commission has made an inquiry into the use of ‘experimental’ forms of
criminal investigation by the police. During that inquiry allegations were made that
police officers had been involved in drug trafficking. Obviously this caused grave
concern, so much so that after some years a new parliamentary inquiry was made to see
what had been done with the results of the first one. The second inquiry resulted in a
report in which again very alarming figures were produced. Both these inquiries gave a
boost to the government’s attempts to combat corruption and promote the integrity of
government officials. Several proposals were made in this context, both with regard to
general criminal law as with regard to the rules concerning civil servants. The
government has taken a number of initiatives with regard to the struggle against
corruption and that this issue has a prominent position on the political agenda.

5 Relationship between political and criminal responsibility of officials

As an explanation for the fact that the Act on Ministerial Responsibility has never been
applied, Kortmann has suggested that in the Netherlands there is less need of criminal
responsibility of ministers because they can be sent away for political reasons,

26. For a different view, see Zijlstra 2001.
27. Kortmann 1995, Kortmann & Bovend’Eert 2000, p. 116: ‘Also as far as criminal responsibility is
concerned, it can be stated that this is completely eclipsed by political responsibility.’
individually.\textsuperscript{28}

With regard to decentralised authorities it is important to note that not only responsibility is relevant there, but also the administrative supervision by central authorities.

Furthermore, it may be the case (but there is little research on this) that the rise of judicial review as a means of control of the administration has also had an effect on political and criminal responsibility of ministers. If a court is able to correct an obviously mistaken decision by a minister, then hardly ever will there be a need to sue the minister or to hold him criminally responsible by way of sanction. For the citizen involved it will almost always be sufficient that an unlawful decision will be repaired.

The subject of the relationship between political and criminal responsibility must be subdivided into different issues:

- general criminal law and official conduct (e.g. drunken driving, but also environmental offences);
- specific criminal provisions regarding behaviour of office-holders and civil servants;
- political and criminal responsibility of ministers (for whom there are separate provisions in the Constitution, articles 42 and 119, and a separate Statute, the Wet ministeriële verantwoordelijkheid).

The basic principle in the Netherlands is that it follows from the rule of law that official conduct should always be in accordance with the law. Lawfulness springs from the (upholding of the) principle of legality as well as from requirements concerning procedures and normative balancing by the legislator, the executive and the courts.

It is well-known that it is sometimes difficult to see when and how government behaviour is unlawful. Until recently, unlawfulness of official acts was deemed possible only in the sense that government bodies could - exceptionally - commit more or less serious infringements of the prohibition of arbitrariness, the principle of reasonableness, or some other basic principle of proper administration. The establishment of a system of judicial review of administrative decisions has resulted in the General Administrative Law Act (GALA, Algemene wet bestuursrecht, 1994). This Act codifies most of the principles of proper administration. If an administrative body violates those principles, its decisions may be quashed by an administrative court.

Furthermore, for a long time the courts have accepted that government could act in tort. Compensation towards private individuals could be awarded in such cases. Apart from this civil unlawfulness (tort) and administrative unlawfulness (recognition that conduct of government bodies ought to be governed by fundamental principles of proper administration) other forms of unlawfulness were inconceivable. In legal doctrine, there was no room for the recognition that government officials could commit criminal

\textsuperscript{28} This approach is also taken by Broeksteeg a.o. 2000.
Although criminal responsibility of government ministers has existed since 1840, it has never had any practical significance. Generally speaking, it was considered inconceivable that government would commit criminal offences. Also standards for the personal behaviour of people holding prominent offices were rather high. It was considered entirely obvious that a minister - or generally a person in high office - should behave properly under all circumstances. However, standards have changed in that respect. Some decades ago, at a time when divorce was rare and shameful, a government minister who had a divorce could not stay in office. A secretary of state who made an improper financial deal with a neighbour also had to resign immediately. Drunken driving was a reason for resignation for a minister thirty years ago, but it is unlikely to be so today.

6 Present scope of criminal responsibility

Article 119 of the Constitution provides that the members of the States-General (Parliament), ministers and secretaries of state can be prosecuted for official crimes (ambtsmisdriven), also after they have resigned. The Hoge Raad is forum privilegiatum in such cases. The Crown (by way of a Royal Decree) and the Second Chamber of the States-General have the power to order such a prosecution. The Constitution only provides that ‘the order to prosecute’ is given in such a way. The Constitution does not determine to whom such an order will be given. The Code of Criminal Procedure provides that the order is given to the Procureur-Generaal at the Hoge Raad (article 483, § 3, of the Code of Criminal Procedure). Part of article 119 of the Constitution is repeated in article 92 of the Act on the Organisation of the Judiciary (the Wet RO). That article adds that official crimes and misdemeanours also include the facts which were committed under one of the aggravating circumstances referred to in article 44 of the Criminal Code. Article 92 of the Act on the Organisation of the Judiciary adds that the Hoge Raad also has the power to decide claims for compensation, damages and interests [as referred to in article 56 of the same Act]. Article 119 of the Constitution is also partly repeated in the Act on Ministerial Responsibility. Article 4 of this Act of 1855 provides that Heads of Ministerial Departments in case of criminal prosecution ‘be it by Us or by the Second Chamber’ stand trial before the Hoge Raad. Articles 5 and 6 of this Act

29. Brants & De Lange 1996, with further references.
30. Resignations related to private affairs have been relatively rare - compared to other, political, reasons for resignation - in the Netherlands. However, they are possible, which may illustrate that the rule of confidence also concerns private behaviour, whereas ministerial responsibility only concerns official behaviour.
31. In the Netherlands the term ‘second chamber’ refers to the directly elected lower house of parliament.
32. ‘Us’ refers to the Crown.
refer to prosecution by the Crown, articles 6-19 give the procedure for prosecution by the Second Chamber. Article 5 provides that a Decision by the Crown to prosecute should contain a precise indication of the facts which form the basis for the order. Also it should contain an order to the Procureur-Generaal at the Hoge Raad to prosecute. Article 483 Code of Criminal Procedure provides - remarkably enough - that ‘articles 4-19 of the Act on Ministerial Responsibility remain in force’. The relationship between these articles and article 119 Constitution and article 92 of the Act on the Organisation of the Judiciary is not without complications. However, it is clarified partly by § 2 of article 483 Code of Criminal Procedure, stating that the provisions of articles 4-19 of the Act on Ministerial Responsibility are equally applicable to the persons mentioned in article 92 of the Act on the Organisation of the Judiciary. It thereby becomes clear that the procedure of the Act on Ministerial Responsibility also applies to ministers who are not head of a department (the ministers ‘without portfolio’ of whom there often is at least one in the Council of Ministers), as well as to the secretaries of state. That it also applies to members of the States-General is less obvious, since this would mean that the Crown could prosecute members of parliament, and that members of the Senate (Upper House, First Chamber) could be prosecuted on the order of the Second Chamber. The crimes and misdemeanours referred to can be found in the Criminal Code. Title XXVIII of the Second Book of The Criminal Code (Wetboek van Strafrecht) and article 463 contain those crimes and misdemeanours.

6.1 History of article 119 of the Constitution

Since 1814, the Constitution has provided for the possibility that ministers, members of Parliament and some high officials could be criminally prosecuted on account of transgressions in their official capacity, and stand trial only for the Hoge Raad. This could only happen with permission by the States-General. At that time, the ratio was only that people of such high rank should have a forum privilegiatum. Criminal responsibility of ministers came into existence, together with the obligation to countersign royal decisions, in 1840.

6.2 Procedure

According to the 1855 Act on Ministerial Responsibility, the Crown or the Second

33. The present cabinet (1998-2002) under Prime Minister Kok, has two ministers without portfolio.
34. See Bovend'Eert 1991.
36. Article 104 of the 1814 Constitution; Article 177 of the 1815 Constitution. The office of staatssecretaris was not mentioned in the Constitution until 1948.
Chamber may order prosecution. The Procureur-Generaal at the Hoge Raad is under a statutory duty to execute this order and act as the prosecutor (article 483, §3, of the Code of Criminal Procedure). There is no discretion on his part as to the prosecution itself. The position of the Procureur-Generaal at the Hoge Raad has always been an interesting one, and has become even more interesting since 1999, when a change in the Act on the Organisation of the Judiciary (Wet op de Rechterlijke organisatie) placed his office outside the Public Prosecution Service, and made him independent. Before 1999 he was a member of the Public Prosecution Service, and as such he was under the obligation to obey instructions from the Minister of Justice, although these were rarely given. When the relationship between the Minister of Justice and the Public Prosecution Service was restructured, a body was formed in which the Procureurs-Generaal at the five Courts of Appeal were assembled. The Procureur-Generaal at the Hoge Raad, however, was placed outside the Public Prosecution Service.

Even under the old Act on the Organisation of the Judiciary, there has been debate whether the Procureur-Generaal at the Hoge Raad had the power to investigate (opsporingsbevoegdheid). This has become a highly sensitive issue under the new Act, since as an independent office the Procureur-Generaal at the HR in theory at least might show some initiative with regard to investigations into official crimes or related affairs. As to the question whether this is a theoretical possibility, or it may have some practical significance, no clues can be found in the parliamentary debates on the new Act.

A procedural particularity regarding criminal prosecution of ministers is that the Hoge Raad sits on the case with ten judges (article 103 of the Act on the Organisation of the Judiciary). For ordinary crimes and misdemeanours there is no forum privilegiatum. The forum privilegiatum only applies in case of official crimes.

7 Criminal responsibility of the State and (other) legal persons under public law?

Recent developments have triggered a debate among lawyers, and have inspired rethinking of criminal responsibility of ministers in the Netherlands. Especially in the field of environmental law, government bodies - both on a central and a decentralised level - have been involved in transgressions. Most of those transgressions have been committed in the form of violations of environmental provisions by civil servants or other employees in the service of a governmental body. Sometimes, however, questions have been asked with regard to the way in which government bodies have performed their tasks of supervision and law enforcement. In recent years, disasters like a fireworks

40. See especially Van der Jagt 2000.
41. For a discussion of some constitutional complications related to criminal prosecution of central government, see Hoogers 1998.
explosion in Enschede (May 2000) and a fire in a pub in Volendam (New Year's Day 2001) have given cause for concern whether supervision with regard to hazardous materials and hazardous activities had been sufficient. Although in both cases there has been extensive political debate and local aldermen as well as the burgomaster of Volendam have drawn political consequences from these debates and have offered their resignations, there has been a debate whether there should be a task for criminal law here as well.

Very interesting is what the Minister of Justice had to say to Parliament with regard to the possibility of criminal prosecutions related to the Enschede fireworks disaster. He reported that the Openbaar Ministerie had investigated whether the official crimes of articles 355 sub 4 and 356 of the Criminal Code had been committed (criminal negligence in the execution of laws). The Minister told Parliament that the Openbaar Ministerie had received no indications from this investigation to inform him about persons who had held ministerial office, with regard to the special procedure of article 483 of the Code of Criminal Procedure. What this indicates is that the Minister of Justice may have considered whether there was an occasion for applying the Act on Ministerial Responsibility (to which, as we saw above, article 483 of the Code of Criminal Procedure refers).

Beside having a symbolic value, criminal prosecution in matters like these would have fierce implications with regard to the relationship between criminal and administrative law. These implications have been the subject of a recent extensive and detailed study by David Roef in his doctoral dissertation on criminal liability of government bodies. If criminal courts would have to judge in a case of criminal prosecution of a government body on the grounds of neglecting its supervisory or enforcement tasks, an important matter for consideration would be which conditions local governments and central government would have attached to the environmental permits that were issued to private companies and citizens. Roef argues that criminal courts should be competent (or have been made competent already) to consider those questions, although many administrative lawyers would argue that a permit which was not challenged before the court has force of law and cannot be the object of judicial review after the period during which it could have been challenged has passed.

Whether the State of the Netherlands, the legal person which incorporates the Kingdom of the Netherlands in civil and criminal law, can be held criminally responsible was the issue in a much-debated decision by the Hoge Raad on January 25, 1994. This decision in the Volkel case, so called because it concerned the leaking of oil on the

42. Cf. Schalken 2001: Should the municipality of Volendam be criminally prosecuted because of lacking fire prevention? For a discussion of the consequences of the Enschede disaster, see Roef 2001a.

43. TK 27 157 nr. 23, p. 6: ‘Het openbaar ministerie heeft uit het onderzoek geen indicatie gekregen om mij, in verband met de bijzondere procedure van artikel 483 WvSv, te informeren over personen, die ten tijde als hier van belang het ministersambt hebben bekleed.’

44. Roef 2001b.
premises of the air force base of Volkel, was the first in which the Hoge Raad had the opportunity to judge a criminal prosecution of the State of the Netherlands itself. The district court at ’s-Hertogenbosch had convicted the State after a criminal prosecution which was initiated by the Public Prosecutor. The Hoge Raad gave a brief and therefore somewhat apodictic - and according to some commentators enigmatic - decision. It held that a criminal prosecution against the State of the Netherlands cannot be received by the courts. According to the Hoge Raad, the State has the power to take upon itself every activity it considers necessary in the public interest. There is, so the Hoge Raad argued, a system of political control based on the notion of ministerial responsibility. This means that the States-General can always control the way in which the government performs the tasks which the State has taken upon itself. It is not compatible with such a system that criminal courts should judge State acts.45

Already before Volkel, there had been a number of decisions by the Hoge Raad with regard to criminal prosecution of decentralized governmental bodies. In this case law, two criteria had emerged. First, if a government body was not a ‘public body’ (openbaar lichaam) in the sense of Chapter 7 of the Constitution, it can be prosecuted. Secondly, public bodies (in the sense of Chapter 7 of the Constitution) can be prosecuted with regard to activities that are not performed as part of their ‘public tasks’. Regarding both these criteria there turned out to be considerable demarcation difficulties. Whether a government body is a public body ‘in the sense of Chapter 7’ is sometimes difficult to establish. Whether a certain activity is part of the ‘official’ or ‘public’ tasks has always been a vexed question, but is felt to have become more complicated since come government tasks have been privatised. If government itself acts in a commercial manner, it is difficult to see why it can not always be treated in the same manner as private companies and/or individuals.

In its Pikmeer II-decision of January 6, 1998,46 the Hoge Raad decided that in order to decide whether a public task was involved, the court has to consider the legal framework. If a certain task is attributed exclusively - i.e., as the Hoge Raad stipulates explicitly, exclusively according to the law, not in fact - to public officials, this is an obstacle to criminal prosecution. Examples of such tasks can be found in the area of law enforcement, but also the provision of permits and the distribution of passports are tasks that legally cannot be performed by others than government officials.

8 Rethinking Criminal responsibility of ministers

The way in which the Hoge Raad approached the criminal responsibility of the State in the Volkel decision, surprisingly opened a whole new set of questions.47 Two sets of questions need to be distinguished:

47. Broeksteeg a.o. 2000, p. 969.
a. Why criminal responsibility of the State should be approached differently from criminal responsibility of ministers;
b. How criminal responsibility of ministers/State is related to criminal responsibility of civil servants.

In *Pikmeer I* (HR 23 April 1996), the *Hoge Raad* decided that if a government body cannot be criminally prosecuted, therefore its leading personnel cannot be prosecuted either. This is significant in the light of article 51 Criminal Code, which provides that prosecution in case of corporate crime may involve the corporation or the persons who have in fact directed the criminal acts involved.\(^48\) As a consequence, the only option open to public prosecutors is the prosecution of individuals who were employed (as civil servants or otherwise) by the government body involved and who were personally involved in acts which may have broken the law. We find a significant example in a decision by the Military Chamber of the District Court in Arnhem,\(^49\) in the case of a disastrous fire in a Hercules aircraft, in which 34 members of the Brass band of the Dutch Army died. The question for the court to decide was one of criminal negligence: could people have been saved if military and fire fighting commanders would have had certain information about their presence inside the aircraft, and if the fire fighters would have acted on that information? The Court’s judgment - which was not appealed against - was that there was no causal link between the acts (or non-actions) of the commanders, and the consequences for the victims.\(^50\) The problem here seems to be that a precise causal link between the acts of these individuals and the disastrous consequences has to be proven. That the government (or a certain government body) as a whole might be held responsible for a way of acting (or non-acting), or for the way in which it has organised its services in order to prevent or deal with disasters, is then no longer relevant. Within a whole chain of events and a chain of responsibilities, everything is focused on two individuals and their actions.

We have seen that although criminal responsibility of ministers does exist, it has no practical significance. Political responsibility, although there have been questions about its scope, functions in such a way that the need for criminal prosecution of ministers has always been small. Criminal law is considered an *ultimum remedium* also by those who have spoken out in favour of the possibility of criminal prosecution of central government.\(^51\) Those who are critical of this possibility, such as the Dutch Council of State, have brought forward this argument as well.

### 9 Official and personal responsibility

\(^{48}\) See also Brants & De Lange 1996; Viering & Widdershoven 1998; Van Veen 2000; Viering & Widdershoven 2001; Roef 2001b.

\(^{49}\) The only district court which has a Military Chamber. All criminal prosecutions of military personnel are brought before this court.

\(^{50}\) Rechtbank Arnhem 1-3-2001, Case number 05/072597-97.

\(^{51}\) Brants & De Lange 1996; Roef 2001b.
In a recent document, the Minister of Justice in the Netherlands summarized the doctrine of criminal ministerial responsibility by stating that ministers can be prosecuted for every crime they commit. When their offence constitutes an official crime or misdemeanor (ambtsmisdrif of ambtsovertreding) the special procedure outlined above applies. In case of ordinary offences / crimes which have been committed in official capacity article 44 of the Criminal Code provides increase of penalty. It is not required - although it might be desirable - that a person first leaves office in order to be prosecuted. The 1855 Act on Ministerial responsibility assumes that prosecution is possible both when a minister holds office and after he left it. Also, there is no separate procedure of impeachment. The rule of confidence between parliament and government also applies in these situations. In 1994, Secretary of State Evenhuis stepped down when there were allegations about improper financial transactions in the private sphere.

In case of exceptional crimes which are also punishable under the Statute of the International Criminal Court, officials should be handed over to this court although also under domestic law they could be prosecuted. According to the Dutch Constitution, there is immunity for what is said in or written to an assembly of Dutch Parliament or one of its Chambers (article 71 of the Constitution). This immunity is complete. However, judging from the wording of article 27 of the Statute of the International Criminal Court, it is at least not unthinkable that this article (and possibly others) will constitute an exception to the immunity awarded under the Dutch Constitution. The government has agreed with this view during the debates on the parliamentary approval of the Statute of the International Criminal Court.

10 The availability of immunity and/or indemnity from criminal prosecution

According to article 71 of the Dutch Constitution, members of parliament as well as ministers, secretaries of state and other persons taking part in the deliberations, cannot be prosecuted or held liable for that which they said during the meetings of the States General or of its committees or for anything they submit to them in writing. For anything that is said or written outside the framework of a meeting of parliament, the normal rules of criminal law apply also for the persons mentioned in article 71. Immunity with regard to meetings is absolute, it cannot be ended or suspended by anyone, including parliament itself. Both Chambers of the States General have drawn up Standing Orders which provide for sanctions in case a speaker uses offensive language, disturbs the peace or violates an obligation of secrecy. Articles 94-98 of the Standing Order of the First Chamber only provide for sanctions against members of the first Chamber, whereas article 58, section 2 of the Standing Order of the Second Chamber also mentions

52. According to an accepted view, expressed among others by Kortmann (1999), the Dutch Constitution only regulates legal relations in the Netherlands. Therefore, it has no bearing on the problems with regard to criminal liability under the Statute of the International Criminal Court.
ministers, who may be cautioned by the President of the Chamber to take back their words. Articles 59-61 of the same Standing Order refer to 'speakers' which may also include ministers. Secretaries of states are not mentioned explicitly in article 58 but we must assume this provision also applies to them.

References


