

## **Slide 1**

Ladies and Gentlemen, good evening. To have a good discussion about Government Criminality I think it is relevant to first know a little bit about criminality in general. Very broadly, to discuss Criminality is to study criminal behavior and the attribution of justice related to this. And in our legal system what is criminal behavior, is determined through criminal law. This is why, preparing for this contribution to the discussion of today's topic, I decided that I need to take our audience, that is you tonight, through a few basic notions of criminal law relevant to this theme.

One of the first basic notions I wish to point out is that in common everyday situations in society, human behavior is labeled criminal much easier and much faster when compared to how that same behavior is labeled when tested in a criminal court by judges. This has to do with the generality of everyday language and the specificity of criminal law language. Words can have a differentiated meaning in criminal law language when compared to everyday language. The main reason for this is that through the application of criminal law a person can be qualified as a criminal offender. An offender can be punished, and this can have serious consequences. A person can be jailed, under certain conditions for the remainder of that person's life. This is one of the reasons why criminal law is one of the most precise and strict, if not the most precise, legal discipline. I will explain some of this precision with you in a nutshell. This will require some mental exercises.

First, let us take a look at how human behavior is converted into a crime.

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This is through the transformation of a subset of facts into a 'punishable fact'.

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This is a feature of principles and the legal language used in our Criminal Law Code.

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The first rule in this Code expresses the legality principle. This is a notion that no behavior is punishable except if covered by a legal penalty provision. Such a provision needs to be law previous to the behavior for which a person is prosecuted. When there is a suspicion that a crime, in legal language a 'punishable fact', has happened, the competent authorities, which in our system are the public prosecutors and the police, are responsible to investigate the facts. All actions and behaviors of the authorities investigating a presumed crime are also bound to the legality principle.

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Article 9 of our Code of Criminal Proceedings states that prosecution of crimes takes place exclusively as regulated by law. In Criminal Law, the strong emphasis on the legal penalty provision requires very precise scrutiny of the facts and exact reasoning as to why a fact can be qualified a punishable fact covered by a specific penalty provision. I will show some examples of this process by dissecting some punishable facts.

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The first example is the crime we qualify as 'doodslag', or manslaughter. As you can see in the slide, the penalty provision starts with a description of the punishable fact, then follows with a qualification of the crime and then follows with the punishment bandwidth. The punishable fact is described as intentionally robbing another person of life. This punishable fact is then qualified as manslaughter. When a person is convicted of manslaughter, he might be sentenced for a maximum of fifteen years in prison or be fined to a maximum of the fifth category, which in Aruba is 100.000 Aruban florins at the moment.

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Another example is the crime we qualify as 'mishandeling' or 'mistreatment'. Here there is no elaborate description, but the description and the qualification are the same word. These were more general and quite simple provisions I showed just to give you a sense of how in criminal law facts are converted to punishable facts.

Now I want to show some examples of crimes, punishable facts, which can be deployed to punish corruptive behavior. The first one is very specific to people working in government.

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This is an example of a specific government crime describing both passive and active bribery.

The description of the punishable fact is more elaborate, as you can see under section 1 sub a. This is the description for the crime of passive bribery. It is described as accepting a gift of a *promise*, to act against a duty as a civil servant or official. In section 1 sub c you can see the punishable fact of active bribery, in which the civil servant requests or solicits a gift, promise or service.

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And, as can be seen in section 3, this punishable fact is more severely punished, with a maximum of 8 years versus 6, if committed by someone in his or her function as a minister of a member of parliament.

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Once you receive a bribe, a promise or a service in violation of the bribery provision, you might feel the need to cover up the origin and the source. This can result in the crime of 'laundering'. Laundering is also an elaborately described punishable fact. It includes notions as, true nature (werkelijke aard), origin (herkomst), placement (vindplaats) and displacement (verplaatsing) and so forth. This means that before the punishable fact of laundering is proven, a lot of facts need to be verified.

To be able to bribe or be bribed, and to be able to launder, collaboration with more people is usually required. It might even require acting together in a very organized way.

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Participating in an organization with the deliberate purpose and intent (oogmerk) to commit crimes, which can be the case when you collaborate closely in an organized manner, is the punishable fact of participating in a criminal organization.

The punishable facts I just shared with you all have one defining feature in common. They are formulated in such a way that they hold individuals criminally accountable through individual prosecution. The actions of each individual have to fulfill all the requirements of the punishable fact before judgement of guilt is passed. This makes prosecution quite difficult. And interestingly, in the prevailing practice of prosecution of corruption, many collaborators, sometimes all, can escape fulfilling the punishable fact requirements as an individual. It is only if we would sum the actions of all the individuals that all the requirement of the punishable fact can be fulfilled.

### **Slide 12**

In this slide, 27 years of corruption research is visualized in a network graphic. It visualizes data about complex networks of individuals involved in corruption scandals in Brazil from 1987 to 2014. Each vertex represents an individual, and the edges between vertices indicate that both individuals participated in the same corruption scandal. Be aware that these are only based on scandalous

cases. How many more of these practices are not more effectively kept invisible and are not taken into account?

Looking at how people in government organize the way they bribe and launder, one can identify networks of people working together, each fulfilling specific actions which in and on themselves do not yet constitute the requirements of a punishable fact, especially the more complex ones. But when considered together, we might get a different picture.

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Based on these insights, at this moment studies are being conducted to research how seemingly innocent individual actions when considered together with the actions of a group, say a hive, constitute a network where there is a real risk that legitimate network and influence functions change nature and become corrupt. The World Economic Forum Global Agenda Council on Anti-Corruption states it this way. Corruption – the abuse of entrusted power for private gain – is the single greatest obstacle to economic and social development around the world. It distorts markets, stifles economic growth and sustainable development, debases democracy and undermines the rule of law. It robs local populations, particularly in developing countries, of critically needed resources. Estimates show that the cost of corruption equals more than 5% of global GDP (US\$ 2.6 trillion) with more than US\$ 1 trillion paid in bribes each year. The list in the slide is based on the Criminal Law Convention on Corruption and contains the prevailing very damaging facts that need to be criminalized by law. Most of these are criminalized in some way or form in our criminal law code. But it is the prevalent opinion that the one in red, the active and passive trading in influence, is not yet explicitly criminalized in our criminal law.

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As mentioned, criminal law focusses on individual accountability. This principle, combined with the practice of those in government and their influential friends working together in fragmented actions through their networks, results in perceived impunity when those in public office abuse public entrusted power for private gain. This makes me beg the question: should we consider criminalizing collectives when it pertains to government corruption?

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Can we empower Criminal Law and the authorities responsible to take a bite out of Government Criminality and its undermining effects?