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"YOU CAN'T HAVE YOUR CAKE AND EAT IT"

On the dilemma of co-operation in the enforcement of enviromental legislation between the police and the administration.

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1. INVOLVEMENT OF POLICE AND PROSECUTION IN THE ENFORCEMENT OF AN ENVIROMENTAL LAW

In 1981 the Netherlands for the first time were confronted with an enviromental scandal of huge proportion. Hazardous substances were delivered by big chemical companies in the Rotterdam harbour to the UNISER company, which called itself a company for the removal of hazardous waste. The actual removal was a process of mixing the dangerous chemical waste with water or sludge, and afterwards illegally dumping this "product" into the surface water, or transporting it to Belgium, and selling it as rude oil.

The managers of the waste discharging company after a long criminal procedure were found guilty and were sentenced to imprisonment from six months till two years.[2)] A government white book on the enforcement problems raised during the UNISER-case generally suggested amongst other that the enforcement problem should be solved by not only giving more attention to enforcement by the administration but also by stimulating police and criminal prosecution to make use of the powers given them by law. Until that time environmental law enforcement was a matter of administrative officials, mostly on the provincial and municipal levels, inspecting company sites for possible infractions of the environmental regulations. The police traditionally did not consider the task of enforcing administrative regulation as their priority. Now the police was called upon by politics to join forces with the administration.

In 1989 the first National Enviromental Plan underscored this policy. An amount of 40 million US dollars was promised to set police and prosecution in motion. The doctrine in legal literature of criminal law, being the last resort *(ultimum remedium)* for solving social conflicts such as the environmental pollution problem, was considered not to hold anymore. Conditions were

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[2)] Rb. Breda 15 februari 1982, NJ (Netherlands Juris prudence) 1983, 6.

considered to be so bad that strong remedies were urgently needed. The administration could not do it alone anymore.

Moreover the situation of the administration was such that it gave authorisation to companies to pollute the environment by issuing permits conditioning the limits of pollution emissions, while at the same time trying to tackle the problem of infringement of the rules by those same companies through actually taking coercive measures against them. This double function of policy implementation *(executive)* and at the same time law enforcing *(judicative)* is in contradiction with the trias doctrine.

But there were also practical reasons for enhancing the police function as regards environmental delinquency. The idea of promoting the performance of the criminal law organisation, police and prosecution, in environmental delinquency had its advantages. The criminal law organisation by its autonomous position in the State should by able to perform more independently from the daily political delusions government is often confronted with. Criminal law either could support the administration when it lacked the necessary measures to be taken, or take the initiative, whenever the administration was showing forbearance of the ongoing infringement of the law.

It also had its disadvantages. The police did not have so much as a tradition in handling environmental criminality. It lacked the knowledge and experience the environmental inspectorates on the central, provincial and municipal levels had developed during the past ten or twenty years. In fact a whole change in attitude and mentality was demanded from the organisation. The police had a perception of their task as putting villains behind bars. Now they suddenly had to care for the environment. Attacking environmental criminality actually was considered as "soft", while reducing drugs delinquency was seen as more prestigious and socially much more rewarding.

2. EMPOWERING OF POLICE AND PROSECUTION IN THE ENFORCEMENT OF ENVIRONMENTAL LAW

The police and criminal prosecution were given ample financial means for educational courses, controlling equipment, and extension of personnel. A special magazine "Handhaving" (Enforcement) was created reporting about successful (and less successful) cases of criminal approaches to environmental delinquency.

In each of the nineteen districts (arrondissementen) in the Netherlands public prosecutors were appointed especially charged with the prosecution of environmental criminal offences.

At the same time the administrative enforcement power was enhanced, new measures such as the administrative pecuniary penalty, a sum to be paid per period of time or per offence, were introduced.

Cf. General Administrative Act Section 5:32

1. *And administrative authority which is entitled to take enforcement action may instead impose on the offender a duty backed by a penalty.*
2. *The aim of a duty backed by a penalty shall be to remedy the infringement or to prevent a further infringement or a repetition of the infringement.*
3. *The imposition of a duty backed by a penalty shall not be chosen if this would be contrary to the interest intended to be protected by the regulation that has been infringed.*
4. *The administrative authority shall fix the penalty as a lump sum, as a sum payable by unit of time during which a duty is not performed, or as a sum per infringement of the duty. The administrative authority shall also fix a sum above which no further penalty will be payable. The fixed amount shall be in reasonable proportion to the importance of the interest that has been infringed and the intended effect of the imposition of the penalty.*
5. *A decision imposing a duty backed by a penalty which is intended to remedy an infringement or prevent a further infringement shall set a time limit within which the offender can perform the duty without the penalty becoming payable.*

Also municipalities were encouraged to join their controlling forces and combine the enforcement tasks into regional or district agencies. From 1990 till 1998 they received financial support from the Ministry of the Environment for these co-operative projects.

Last but not least, gradually more of the officials designated to be charged with monitoring observance of the provisions laid down by or pursuant to the environmental act concerned were also designated by the Minister of Justice as criminal investigators, having the authority to prosecute and cite cases.

3. TRYING TO BRIDGE THE ENFORCEMENT GAP

All this very soon led to higher discovery statistics, which first were seen as a raise in environmental criminality, a common mistake (sometimes wilfully) made by politicians. But at the same time there was a feeling that enforcement efforts still were not satisfactory and that the organisation could be better. These feelings were corroborated by research projects conducted by consultants, organisation experts, sociologists and other academic disciplines. These research projects - of which there were many during the "nineties" - generally led to the conclusion that there was an enforcement gap. According to a government committee appointed to give more insight in enforcement problems in general there were at least six important elements impeding the enforcement of

law. In their report the Commissie "Bestuursrechtelijke en privaatrechtelijke handhaving"[3] summed up these causes as follows:
- lack of clarity in standard setting;)
- lack of enforcement policy;
- low priority given to enforcement;
- controlling officers lack knowledge of the possibilities to enforce;
- shortcomings in the legal instruments to enforce the law;
- lack of financial means;
- lack of co-operation of the authorities charged with enforcement.

These causes of the enforcement gap, though quite plausible as such, are more or less begging the question. The fundamental problem behind them is not being tackled. Why are environmental standards lacking clarity, why are officers lacking knowledge, why is there no priority given to the environmental law enforcement, and so on.

Especially the latter aspect of co-operation has been given much thought in the analyses of many researchers, but their recommendations mostly stick in the mud of "more of the same". Why co-operation between the enforcement organisations is so hard to promote is not much part of the analysis. In this article specifically this lack of co-operation will be the subject of our analysis, which is part of a more comprehensive study about the efficiency or output of the criminal investigation process in relation to environmental offences. The basic objective of any criminal investigation is to prepare all the necessary legal evidence needed to convince the judge that a certain activity is to be considered a criminal offence and the defendant therefore punishable, which will eventually lead the magistrate to convict the offender. But apart from that, one may think of other outputs of the investigation process, such as prevention of the criminal offence, better co-operation with the administration, improvement of legislation, enforcement policy, and so on. The research we conducted ensued from questions of police and prosecution officers who recently finished environmental criminal cases and who were not satisfied with the results, as regards the output in terms of the desired surplus value just mentioned. The research was funded by the Ministry of Justice. We looked at the problem of co-operation between the police investigation team and the government enforcement authorities both from a legal and a socio-legal perspective. The problem was stated as follows:

„In which way the process of exchange of information, of attuning to enforcement counterparts, and of consulting and collaborating with them actually developed? Which problems were observed and how were they solved? Which are the conditions for a successful co-operation?"

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[3] Commissie-Michiels, Handhaven op niveau, Commissie bestuursrechtelijke en privaatrechtelijke handhaving, W. E. J. Tjeenk Willink, Deventer 1998.

We were given the opportunity to analyse documents of two big recent environmental criminal cases, which were called Duplo and Demo. We interviewed about thirty persons who were involved in these cases,either as public prosecutor, police officer or government official charged with the enforcement of environmental regulations.

4. DESCRIPTION OF THE DUPLO-CASE AND DEMO-CASE

4.1 DUPLO

The case of Duplo concerns the illegal import of plastic waste substances from Germany to several locations in the Netherlands, the illegal storage in these locations, and the illegal export of the waste substances from the Netherlands to England and Hongkong. The relevant legislation in this case is the European Regulation (EEC) Nr. 259/93, concerning the control of the transport in, into and out of the European Community and the Wet milieubeheer (General Management Act GMA).

In the EEC-regulation procedures have been laid down concerning transport of different kinds of waste designated for final removal or useful application into and out of different countries. For transport between countries of this material destined for final removal authorisation by the receiving country is needed. For transport of waste substances destined for useful application a distinction has been made in the Regulation between three catogories, which for each of these demand a different procedure. The red list substances go through the hardest procedure. Transport of these substances is only allowed with explicit authorisation by the relevant government. Transport of "orange list" substances may happen if the authorities have been notified before and if they do not oppose the transport. There is no procedure for "green list" substances, apart from the fact that these have to be submitted to "recognised installations". These are installations covered by a permit issued on the basis of the GMA.

All these rules were being infringed. Furthermore the defendants were under suspicion of fraud, and various other common offences not specifically related to the environment.

There were several governmental enforcement instances involved in controlling the companies that broke the law. First there is the Minister of the Environment who is in charge of implementing the European regulation. Then there is the Inspectorate of the Environment, charged with the enforcement of the Regulation. The enforcement is actually realised in five departments of the State Environmental Inspectorate.

Apart from that there are several provincial and municipal authorities involved in the enforcement of the GMA and the ensuing permits.

The police investigating team in Duplo started off on quite a positive basis. Most of the members had been engaged in another famous criminal case in the Rotterdam harbour, in which a tanker cleaning company was prosecuted for

infringement of the Water Pollution Act. For a period of almost six years the tanker cleaning company Rotterdam (TCR) illegally emitted hazardous waste substances in the water of the Rotterdam harbour. The defendants were sentenced to imprisonment up to six years.[4]

The fact that the company was financially supported by the Ministry of Transport and Waterworks with a grant of almost 10 million dollars was seen as a salient coincidence. Rumour had it that the Minister at one time had urged the Rotterdam prosecutor not to continue prosecuting, because of the financial damage inflicted to the economy, if tanker cleaning was to be stopped due to punitive measures being taken. But that rumour could not be ascertained in the analyses[5] made after the process.

Now the team, created by the Working group on heavy environmental criminality, which originated as a permanent prosecution group under the auspices of the Ministry of Justice, had a lot of experience and a lot of knowledge of the task that laid before them. Moreover, they were headed by an enthousiastic and able prosecutor, who got her stripes also in the TCR-case. The Duplo-investigating team consisted not only of policemen, some officials of the Ministry of the Environment, notably the State Environmental Inspectorate, also took part.

4.2 DEMO

As for the Demo-case here the investigating team was an initiative of the regional police of Twente, in the province of Overijssel. Demo occurred on a more local and regional basis and here the investigating team was concerned about one company, which handled and processed sludge, delivered by the regional water authority. The sludge was heavily polluted and had to be burned in incinerators. The company could not really cope with its task. Some years after the installation was build it went bankrupt. In the meantime the police suspected the company of infringement of the rules set by the Water Pollution Act and the Environmental Management Act (EMA) and of various instances of fraud. The trouble with the Demo case was that the province and the water authority originally were also suspected of co-operation with the firm, due to the facts that the water authority had invested money in the company, and because it was dependent of getting rid of its sludge to that particular company.

The investigating team had to co-operate with governmental enforcement officials from the province as well as the water authority. So the water authority in fact had two functions. On the one hand it was responsible for the implementation of the Water Pollution Act, and thus for the enforcement thereof,

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[4] Rb.Rotterdam, 13 October 1995, M en R 1996, Nr. 24.

[5] About six research studies were undetaken by various government bureaus, consultancies and academic institutes, paid for by different involved ministries; apparently government felt rather embarrassed by the environmental scandal, having after all committed itself that after the UNISER-case such a thing should not happen again in the Netherlands.

on the other hand it functioned as a player on the market of waste disposal, because of its vested interest in the removal of sludge. This "two caps" policy was not at all understood by the police, who reproached their counterparts of their double binds.

Furthermore also investigators from the State Environmental Inspectorate took part in the team. In the Demo case unfortunately the team had to cope with a relatively new public prosecutor, who was not as committed as his colleague in the Duplo case. Besides it appeared that he was more interested in fraud than in environmental delinquency, which was new and uncommon to him. The Demo-case took a long time, almost three years, due to the problems with evidence and the lack of co-operation with the government authorities. There has been no sentencing to date.

5. EVALUATION

Although these two cases were very different in scope and in approach, they also had something in common. The investigating teams were characteri[illegible] by the participation of officials from different disciplines and agencies. Both teams expressed a strong desire to co-operate and to improve the quality of their investigation beyond the results of an ordinary criminal investigation. Woorking on a basis of a project, although not new to them, proved to be a good experience and was assessed as indispensable for producing a qualitatively adequate criminal investigation. For investigating teams working on big environmental enforcement cases on a level as sophisticated as Duplo and Demo, the availability of expertise, especially on the environment, from the outside world is a necessity. The police cannot operate on its own, if it does not want to become isolated.

The Duplo team was rather unique in the history of the environmental criminal investigation. Not only in the sense of its intensive co-operation with other public investigation organisations, such as the Environmental Inspectorate, and the fortunate leadership of a devoted public prosecutor, but also because of the experience gained in the notorious TCR-case, mentioned above. It stands to reason that a concerted action like that would not be always possible, due to the fact that the environment still does not have sufficient priority in the police force, so subsequently the financial means and the necessary personnel are not always available to the degree that they were in the Duplo-case.

Nevertheless there were also some flaws. The perception of each others functioning sometimes is surprisingly strange. Generally speaking the police loathes the attitude of many administrative law enforcers who make compromises and "sweat it out". Some of the policemen could not understand why an official of the Ministry of the Environment spoke of "green list" waste substances, even in the presence of the defendants, while in fact it was agreed upon in the team that the plastic waste substances illegally stored were "orange list" substances. The

administration enforcement officials condemned the mentality of the police officers always wanting to "catch thieves", even when in reality criminal conduct was not under discussion. One cannot go by the book immediately in case of a big company, in which society has invested much money. One first should inquire if compliance is possible. So they argued.

Successful as it may have been, also regarding the surplus value in terms of co-operation and prevention, still the Duplo-case also had its shortcomings. The governmental "stakeholders" (as they were called by the police-officers who originated the case) notably operated somewhere on the fringe of the investigational field. Indeed, one could say, that the co-operation and the exchange of information suddenly came to a stop as soon as the investigation team felt bound by the formality of the criminal process, which does not allow for much openness and fine tuning with people not belonging to the prosecution office or the police force, especially if these people might be suspected of committing criminal offences, even if they are government official. In other words, one may be oriented on co-operation as a matter of improving the output of the criminal investigation, but this becomes difficult when the formal demands of the Dutch criminal process have to be clung to. Then the police and the prosecutor are very reluctant with spreading information they particularly want to withhold from politicians for the fact that administrators for political reasons might reveal this information to the suspects, or otherwise make the information public. In other words, in matters of co-operation and sticking to formal procedural legal prescriptions one cannot "have his cake and eat it".

Having said this, from the results of our enquiries it became clear that especially in the Duplo-case the police and the prosecution succeeded rather well in explaining their predicament to at least some of their public administration counterparts. On the level of the Ministry officials understood that the police for reasons of privacy and on the ground of the Act on police-registration (Wet op de politieregisters) were not allowed "when the going gets rough", i.e. when the criminal process formally enters its investigation phase, to exchange information too much. And so co-operation has its boundaries. This is well understood by the administrative counterparts, at least if they are sufficiently informed about the special function and authority of the police.

Where this is not the case, and Demo provides a striking example of this non-communication between police and administration, the police will be held accountable for their "arrogance" and for wilfully hampering the administrative and political process, which is carried on by the administration. In the case of Demo the administration of the province was visited by the police, boxes with documents and records were taken away, and the government officials were being interrogated "as if they were criminals". The Commissioner of the province in an interview characterised this event as follows: "This is not the way we go about with one another".

Confronted with this dilemma of co-operation and at the same time keeping aloof of each other, the answer of the prosecutor in the successful Duplo-case was surprising:

"One should not want to solve this problem in the first place. In a case such as TCR I want to cooperate with the police, and with the investigators of the Environmental Inspectorate and with no other investigator whatsoever." An exemption she made for the enforcement people of the regional Rotterdam harbour administration, because "they know that police and prosecutor sometimes have to be independent and reluctant with providing information, important for the prosecution and eventually the indictment and charging of the defendant.

6. CONCLUSION

Does this mean that "East is east and west is west, and never the twain shall meet?„ Are the judicative and the executive doomed to go seperate ways, due to the doctrine of Montesqieu, holding that the three powers in a democracy should operate independently from each other? Much as it may be agreed that nowadays in Central and Eastern European countries, formerly reigned by a communist party regime, this doctrine is of great value, we must at the same time recognise that in modern societies the total separation is hardly possible in every instance. The answer to the dilemma must be ambivalent. From the two cases we may conclude, that the public prosecutor in environmental criminal cases for successful prosecution is dependent on the knowledge and experience of various institutions, notably the administration. A substantial and co-ordinating involvement of the public prosecution seems to be an indispensable condition. In cases like Duplo and Demo the prosecutor may in the future become involved more in the playingfield of political powers. He or she should do of course everything to hold on to his autonomous position, but sometimes it is necessary to engage in the political arena, either to struggle for direct result at the cost of political compromises, or maybe to loose a bit in the first instance by gaining more ground in the second.

„KOLÁČ NEMŮŽEŠ MÍT A SOUČASNĚ HO SNÍST"

Resumé

Článek se zaměřuje na popis příčin a důvodů pro zapojení policie a dalších orgánů činných v trestním řízení do procesu prosazování norem práva životního prostředí, který byl dosud vyhrazen pouze orgánům státní správy. Státní správa vystupuje jako výkonná a současně jako soudní moc, což s sebou nese určitá nebezpečí konfliktu mezi těmito dvěma funkcemi, které mohou být omezeny či eliminovány zapojením nezávislých orgánů stojících mimo systém orgánů státní správy. Navíc správní právo postrádá určité instituty vyhrazené pouze právu trestnímu, které mohou sehrát při prosazování ekologických norem významnou úlohu.

Na základě výzkumů zaměřených na proces prosazování ekologických norem bylo identifikováno několik základních příčin způsobujících nedokonalé fungování tohoto procesu. Jedním z nich je i nedostatečná spolupráce mezi zainteresovanými státními orgány. Význam spolupráce mezi těmito orgány autor ilustruje na příkladech vyšetřování dvou významných případů znečištění životního prostředí v Holandsku, kde odlišné výsledky a průběh vyšetřování byly významně ovlivněny rozdílnou mírou spolupráce mezi orgány státní správy na jedné a policejními vyšetřovateli na druhé straně.

Klíčová slovy: prosazování, ekologická politika, ochrana životního prostředí, policie, státní zástupce.