Summary

Enforcement of environment law: comparing criminal prosecution and administrative sanctioning in The Netherlands

Environmental policy and the subsequent legal instruments developed in The Netherlands during the second half of the twentieth century. At first, enforcement was aimed at promoting compliance. Through counceling and persuasion, local environmental inspectors hoped the offender would comply to the provisions. Enforcement through the sanctioning of offences was only gradually brought about. Sanctioning of offences through the punishment of deviant behaviour was rarely the case. Ever since the origin of environmental regulation in The Netherlands during the 1970s, enforcement of those rules has basically been a matter of civil authorities applying administrative tools and sanctions. Even though transgression of the rules in many cases constitutes a criminal offense as well as an administrative wrongdoing, criminal prosecution hardly ever is brought to bear in rank of the mill cases. Only flagrant criminal behaviour, for instance fraud in the area of waste disposal, has been a regular object of public prosecution.
Enforcement-officers can choose between the two possible ways of sanctioning, but also a combination of criminal prosecution and administrative sanctioning is possible. Such a combination is not self-evident and sometimes even problematic.
In this study, the central question is which enforcement instrument is most effective in what situation, when tackling environmental offences. The research conducted to answer this question knows one crucial precondition. In theory a variety of explanations is available to substantiate a certain amount of effectiveness of environmental enforcement. Consider efforts on the field of information, the type of the offender, the risk of being caught, the swiftness of the undertaken action, market incentives etc. The research conducted for this study concentrates on only one explanatory pattern for the effectiveness of enforcement: explanations related to the applied *enforcement instrument*.

But, what is effective environmental enforcement? Effectiveness is a characteristic of a certain means. Defining effectiveness requires the determination of the contribution of this means to the achievement a certain goal. What is the goal of enforcement of environmental provisions? Protection of the environment, one is inclined to say. Clearly this is the ultimate goal of environmental protection. The road to this goal takes a long haul and is full of obstacles. Intermediate goals that can be distinguished are prevention (general and specific), termination of the offence, restoration of the harmful effects, the promotion of compliance after an offence, compensation for damage done and punishment of the offender.

How higher one reaches in the flow chart, the more abstract the goals tend to be. The lower one aims, the more measurable the goals will be. Of course, when conducting a research on the functioning of environment law, one wants to know to which degree the environment profits from enforcement. But in an analysis of specific cases, this question is simply not answerable. That is why we choose for the selection of measurable and operational intermediate goals when determining the effectiveness of environmental enforcement. In the research four measurable intermediate goals are selected:
- is the offence terminated?
- are harmful effects of the offence restored?
- did offenders reiterate e.g. did the Prosecutors Office or the administrative authorities repeat enforcement efforts?
- can transformation of the behaviour of the offender be determined (compliance)?

In the research project we tried to determine the effectiveness of the enforcement of environmental provisions in 58 cases. In these cases enforcement is conducted in three different modes: criminal prosecution (11), administrative sanctioning (12) and through a mix of both type of instruments (35). The selected cases vary in several ways. Their complexity varies, different authorities are competent and the provisions concerned relate to various domains of environmental protection (storage of firework, storage of dangerous materials, pollution and agricultural sector).
In all selected cases the offence was – when possible – terminated. The offender behaves in accordance with the standards. In this respect environmental enforcement is effective. The other standards for effective enforcement were not attained. In 18 out of 58 (31%) cases sanctioning is not (entirely) effective. Criminal prosecution is effective in 10 out of 11 cases, administrative sanctioning is effective in 8 out of 14 cases and the combination of the two enforcement instruments is effective in 22 out of 33 cases. This can be seen as an indication that criminal enforcement – when chosen to apply – succeeds in reaching a relatively high score on effectiveness. Of course this does not mean that criminal enforcement always is more effective as administrative enforcement.
Of course situations in practice always contain combinations of several features. For the choice of a certain instrument to be effective, a careful and thorough judgement of all the features is necessary. This leads to a decision-making model that contains the reflection of the assumptions that can be made in this respect in a flow chart. The decision-making model can be seen as a hypothesis on the effectiveness of criminal law and administrative law in the enforcement of environmental law.

How does this decision-making model work out in our selected cases? In 18 out of 58 cases enforcement is not (wholly) effective. When our decision-making model would be a perfect predictor in these cases another enforcement instrument would be applied than indicated by the model. However, this is not the case. In 45 cases the decision-making model indicates a mix of criminal and administrative enforcement. In 14 of these cases enforcement was conducted in another way: 4 times only criminal punishment, 10 times only administrative sanctioning. In 6 cases the model indicates criminal prosecution; only in 1 case in stead of this a mix of enforcement instruments was applied. Finally, in 7 cases the model indicated administrative sanctioning. In 4 cases the enforcement deviated; twice criminal prosecution was applied, twice a mix of instruments was chosen. In two third of the cases the expected enforcement instruments indeed were applied. Most deviations are that only administrative sanctioning has taken place, while the model indicated the choice of a mix. Especially in those cases the biggest percentage of ineffective sanctioning is the result: in half of these cases the offence was repeated. The administrative authority only succeeds in a temporary transformation of behaviour; criminal prosecution could have prevented recurrence of the offence.

Criminal prosecution, however, can not *guarantee* the prevention of recurrence. At least two factors seem to influence the eventual effectiveness of criminal prosecution and prevention of recurrence. Firstly, low penalties (to discharge the offender of liability to conviction) in many cases (for instance if mala fide behaviour is the case) have low or zero preventive effect. Especially if the offence brings about an economical advantage that is not compensated for. In 4 of the analysed cases this seemed to be the case.

Secondly, the long interval of time between the moment the offence was committed and the conviction seems to take away the preventive effect of criminal prosecution. The Public Prosecutor's Office aims at a tit-for-tat strategy, but does not always succeed in this. In 4 of our cases, the limited effectiveness can be explained by this.

The third explanation for the limited effectiveness in the cases is the deficient implementation of enforcement by administrative authorities. Especially when the authority itself should take physical measures (for instance the removal of waste), it eventually risks the financial responsibility for the decontamination, rather than the polluter. The interviews support this explanation. In one case this seemed to be the decisive argument.

The fourth factor explaining the limited effectiveness of enforcement is the lack of cooperation between the Public Prosecutor's Office and administrative authorities. In only 3 out of the total of 58 cases, both partners did indeed coordinate their policies. In all of the other cases, no joint policy was developed. Sometimes not even information was

shared. In one case the attempt to follow the same strategy seemed to work counterproductive. The limited cooperation between the partners in enforcement can be connected to our observation that the chosen method of enforcement in practice does not correspond to the method prescribed by our decision-making model.

Our cases state that if only administrative sanctioning takes place, while the model indicates (also) criminal prosecution, the chances of reiteration are high. Compared to criminal prosecution, administrative sanctioning clearly has a lower preventive effect. The casestudy shows on the other hand that criminal prosecution is not always conducted in a proper way. When economic advantages would be taken away and higher penalties would be issued, the effectiveness of criminal punishment would probably be considerable higher.
The applied administrative sanctions are mostly penalties, while physical measures would probably be more effective. That is the case when environmental damage should be restored, but the offender does not have the necessary financial means to do so, or to pay for the administrative penalty. Contrary to what one perhaps would expect, companies with only limited recourses are not inclined to undertake actions to prevent the administrative penalty. Practice shows that lack of financial resources – certainly with companies with mala fide behaviour – explains predominantly passive behaviour of offenders. The case studies and interviews with enforcement officers show that physical measures taken by administrative authorities tend to work much more deterrent than administrative penalties.
Not only administrative authorities, but also the Public Prosecutor's Office has instruments to its avail which can be used to repair the consequences of environmental offences (article 8 sub c Economical Offences Act). However, in none of the cases one of this instruments was used.
As was argumented, a swift conviction (within three months) seems to contribute to more effective criminal punishment. But the tit-for-tat approach of the Public Prosecutor's Office is underused in those cases where it could have contributed to effective enforcement. Next to that, taking away the economic advantages of environmental offences would be a powerful instrument in relation to the prevention of offences, which could be used in more instances than observed.

Cooperation between different enforcement officers can contribute to effectiveness of enforcement. Or, put in other words, the observed lack of cooperation explains the ineffectiveness of enforcement in the cases studied. In several complicated cases (mala fide, notorious repeated offenders), where enforcement was successful, indeed cooperation was intensive. On the other hand, in the cases where the decision-making

model prescribes cooperation, a joint approach seemed to be absent. This fits into the general description, made upon the interviews en the case-analysis. Choices who, in which case is responsible for enforcement are made on an arbitrarily basis. Cooperation on a joint approach, reciprocal consultation and assessment of individual cases are usually to be found in the more complex cases, where offences are repeated or companies are mala fide. Administrative authorities and the Public Prosecutor's Office are commonly engaged in enforcement within their own responsibility. They do not feel dependent on each other, nor are they legally bound by enforcement activities of one another. If a combination of enforcement instruments is the most obvious enforcement strategy, both the administrative authority and the Public Prosecutor's Office must act. But combined enforcement is more than two organizations acting in the same case. A joint approach should result in more than the sum of both parts. That will only be the case if both the Public Prosecutors agency and the administrative authority are engaged in substantial cooperation.