

Criminal law as the optimum remedy in the enforcement of environmental crime.

An interdisciplinary study of the criteria used in choosing an enforcement regime for dealing with serious environmental crime

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Summary

The present study identified and analyzed the criteria used in the choice of an enforcement regime in dealing with serious environmental crime have been identified and analyzed. First of all, to understanding of the (interaction between the) criminal, administrative and civil procedure in the enforcement of environmental crime. On the basis of the analysis of the identified criteria and the research results, it was further examined which of the criteria are (ir)relevant and necessary in a normative assessment framework to achieve optimal enforcement of serious environmental crime. The use of criminal law as the optimum remedy was central to this. In addition, attention was also paid to a meaningful settlement for victim and society, private law as a supplement to public enforcement (hybrid justice), legal safeguards of suspects and the interaction between the various areas of law. Finally, (the results of) this research are intended to contribute to the development of a conclusive normative assessment framework.

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1. PREAMBLE

1.1. Background

Climate is an indispensable topic nowadays. Our influence on the climate as humans has increased since the industrial revolution.¹ By emitting greenhouse gases such as CO₂ and methane, traps heat in the atmosphere, raising the earth's temperature and changing the climate changes.² The increase in CO₂ is caused in part by the use of fossil fuels as energy sources and methane emissions from livestock farming.³ Climate change has a major impact on the (health of) humans, nature and the environment. The increase in the average temperature leads to extreme weather conditions, rising sea level, changes in animal and plant habitats and even extinction of animals and plant species. In addition, much of the Netherlands lies below sea level which increases the risk of flooding.⁴ Further warming should therefore be limited. Fortunately, as a society we are becoming increasingly aware of the need to protect the earth. For example, with the Climate Policy the government is trying to protect the Netherlands from the consequences of climate change (so-called climate adaptation).⁵ It is taking to this end, both nationally and internationally.⁶ In addition, attempts are being made to prevent further global warming by reducing greenhouse gas emissions and switching to a sustainable economy (i.e. climate mitigation).⁷ Think example, the energy transition of the built environment, which is part of the Climate Policy.⁸ Furthermore, the Climate Act sets the percentage by which CO₂ emissions must be To this end, a climate agreement has also been concluded from which it follows that in 2030 the Netherlands must reduce 49% reduction in CO₂ emissions compared to 1990. The Rutte IV government is aiming for a 'climate neutral Netherlands' in 2050. To achieve this, the goal to emit at least 49% less CO₂ by 2030 has even been tightened to 55%.⁹ Finally, the Netherlands to achieve negative greenhouse gas emissions by 2050.¹⁰

In contrast to climate issues, attention to tackling serious environmental crime has only recently increased due to social unrest.¹¹ The social unrest has been caused by cases with major media coverage, such as the criminal investigation into Tata Steel, Harsco Metals and DuPont.¹² These cases involved the intentional and unlawful introduction of hazardous substances into the soil, air or surface water. Environmental crime is often invisible and not immediately perceptible so that the societal need for action.¹³ This is due to the fact that,

¹ Stocker et. al, Climate Change 2013, p. 15.; 'Klimaatverandering en gevolgen', *Rijksoverheid*, www.rijksoverheid.nl (zoek op *klimaatverandering*); UNFCCC 1992.

² Stocker et. al, Climate Change 2013, p. 11.

³ 3 Fossiele brandstoffen zijn steenkool, aardolie en aardgas, zie: 'Klimaatverandering en gevolgen', *Rijksoverheid*, www.rijksoverheid.nl (zoek op *klimaatverandering*).

⁴ Idem.

⁵ 'Nederland voorbereiden op gevolgen klimaatverandering', *Rijksoverheid*, www.rijksoverheid.nl (zoek op *klimaatadaptie*).

⁶ Bijvoorbeeld het verstevigen van dijken en verbreden van rivieren, maar zie ook het Nationaal Deltaprogramma 2022; UNFCCC 1992; Het Kyoto-Protocol 1997; Het Klimaatop in Parijs: de Conference of Parties (COP21).

⁷ 'Klimaatbeleid', *Rijksoverheid*, www.rijksoverheid.nl (zoek op *klimaatbeleid*).

⁸ Kamerstukken II 2020/21 30196, nr. 763.

⁹ Coalitieakkoord 2021-2025; *Kamerstukken II* 2018/19, 32813 nr. 342.

¹⁰ *Kamerstukken II* 2022/23, 36 169, nr. 19; 'De Nederlandse Klimaatwet bevat laatste doel uit Europese klimaatwet: na 2050 streeft Nederland naar negatieve emissies van broeikasgassen', *Stibbe N.V.*, Stibbeblog.nl (zoek op *negatieve emissies*).

¹¹ Zie o.a.: Dreigingsbeeld Milieucriminaliteit 2021; Programma Tata Steel 2020-2050; Van Zanden & Neve, *TBS&H* 2016/4, p. 217-226.

¹² 'Openbaar Ministerie start strafrechtelijk onderzoek Tata Steel en Harsco Metals', *Openbaar Ministerie* 2 februari 2022, www.om.nl/actueel/nieuws (zoek op *Tata Steel*); 'Inschatting gezondheidsrisico's grafietregen Wijk aan Zee', *RIVM* 3 juni 2019, (www.rivm.nl/documenten) (zoek op *grafietregen en gezondheid*); Van Gestel, *Trouw* 2021; Heyblom, *Het Parool* 2022.

¹³ Roks et. al, *DD* 2020/4, p. 32; *Dreigingsbeeld Milieucriminaliteit* 2021, p. 12.

unlike common crimes, there is often no identifiable victim.¹⁴ The police and judiciary are generally rely primarily on reports. Environmental crime does not fall under "report crime," but is a "fetch crime" that the police themselves must actively pursue.¹⁵ The tackling environmental crime is thus mostly dependent on the effectiveness of monitoring and enforcement. An effective approach is important to keep damage to nature and the environment as possible, which in turn contributes to achieving the climate goals.¹⁶ The approach does not appear to be sufficiently effective to date, however. There are bottlenecks in practice such as enforcement deficits, poor information positions and long lead times that undermine the effectiveness of the government action.¹⁷ In addition, the system of supervision and enforcement inadequate, according to the Court of Audit.¹⁸ Indeed, a clear understanding of the functioning of the system of supervision and (criminal) enforcement is lacking.¹⁹ For example, the measures imposed measures at Tata Steel have had little or no effect to date.²⁰

Furthermore, because different authorities are charged with the enforcement of environmental crime, differences arise in enforcement strategy and application of sanctions. A company may for example, receive a different sanction for the same violation in one municipality or province than in another region or from a different regulatory authority.²¹ The same problem also occurs in the member states of the European Union.²² It has been one of the reasons for a proposal to revise Directive 2008/99/EC, as part of the European Green Deal ("EGD").²³ The lack of uniform enforcement leads to unjustified differences and impairment of the level-playing-field.

Criminal law is also used with restraint in addressing of environmental crime.²⁴ As a result, the punitive goal of retribution in environmental crime not adequately reflected.²⁵ The interventions are not or hardly applied, and the punishments that are imposed are so low that they have no deterrent function.²⁶ This restraint is in line with the traditionally held view that criminal law serves as the "last resort" (*ultimum remedium*). But in dealing with environmental crime, there is an possibility of enforcement through various jurisdictions. Enforcement can take place through administrative, criminal and/or private law, either separately or dually.²⁷ The hierarchy between areas of law thus disappears into the background, creating a shift from classical to a more hybrid administration of justice.²⁸ A

¹⁴ Roks et. al, *DD* 2020/4, p. 31.

¹⁵ Roks et. al, *DD* 2020/4, p. 31; *Stcrt.* 2005, 253, p. 16.

¹⁶ *Handhaven in het duister* 2021, p. 66; 'OM Jaarbericht 2021', p. 19, *Openbaar Ministerie* 3 mei 2022, www.om.nl/documenten (zoek op *jaarbericht*).

¹⁷ *Dreigingsbeeld milieucriminaliteit* 2021, p. 142; *Handhaven in het Duister* 2021, p. 65; Aalders *NJB* 2008/1801, p. 2; Koopmans *BSb* 2020/3, p. 156-162.

¹⁸ *Handhaven in het duister* 2021, p. 6.

¹⁹ *Een onzichtbaar probleem* 2021, p. 19; *Handhaven in het duister* 2021, p. 4 en 11

²⁰ *Stof tot nadenken*, 2021, p. 151.

²¹ *Om de leefomgeving* 2021, p. 12.

²² Administratieve boetes en inbeslagnemingen kunnen worden opgelegd in 23 lidstaten, strafrechtelijke boetes in 16, gevangenisstraffen in 17, opschorting van de handel in 15 en andere soorten sancties in 11, zie: COM(2021)851 def., par 2.

²³ De Europese Green Deal is een pakket beleidsinitiatieven dat de EU moet helpen met de groene transitie, waarbij het einddoel klimaatneutraliteit in 2050 is, zie: EGD COM(2019)640 def.; COM(2021)851 def.

²⁴ Kelk 2013, p. 9; *Handhaven in het Duister* 2021, p. 66; De Roos 2000, p. 31.

²⁵ *Handhaven in het Duister* 2021, p. 66.

²⁶ Denk aan het tijdelijk stilleggen van een bedrijf, zie: *Handhaven in het Duister* 2021, p. 66; *De markt de baas* 2019, p. 36; COM(2021)851 def., par 2.

²⁷ W.J.V. Spek, *Strafblad* 2010/3, p. 227; Crijns, *AA* 2012/11, p. 11; Smidt 1881, p. 11.

²⁸ Aalders *NJB* 2008/1801, par. 5; Crijns & Van Emmerik, *NJB* 2018/749, p. 1094; M. Hirsch Ballin, 'Strafrecht of bestuursrecht? Beide!', *Blog Bestuursrecht* 7 november 2017, www.pelsrijcken.nl/kennis; *Kamerstukken II* 2015/16, 29279, 334, p. 12.

more hybrid administration of justice also shifts the emphasis from criminal law as ultimum remedium to criminal law as the optimum remedium.

The shift to more hybrid justice and criminal law as the optimum remedy has advantages and disadvantages.²⁹ For example, the large volume of applicable laws and regulations could result that important procedural rights and human rights are insufficiently guaranteed and/or circumvented by legislative and executive authorities and government agencies.³⁰ Indeed, non-criminal investigative tools developed for a civil or administrative proceedings, do not always have to observe the same safeguards that must be strictly observed in criminal proceedings. Furthermore, there may confusion as to when and under what conditions the criminal law should be used.³¹ Indeed, the interaction between administrative and criminal law in environmental crimes is unclear.³² The different areas of law also serve different purposes.³³ For example, the administrative law is primarily focused on repairing and ending a violation, as a result of which criminal motives are often not recognized or are recognized too late and criminal law is intervened too late.

The use of various means of enforcement combined with a uniform implementation and enforcement policy, however, can also lead to more efficient and effective enforcement, a more targeted approach, and cost savings.³⁴ The enforcement goal is to achieve optimal promotion of compliance with standards.³⁵ In order to achieve optimal enforcement of environmental crime, a achieve optimal enforcement of environmental crime, the right choice and/or combination of enforcement means from private, administrative or criminal law is essential. The most appropriate response. To this end, however, a conclusive normative assessment framework is lacking. Especially for violations where a discussion is possible as to which enforcement system should be chosen ("grey area"), the current policy does not provide the desired guidance and decisiveness.³⁶

In this study, the use of criminal law as the optimum remedy in dealing with serious environmental crime. By examining the various enforcement criteria used examine which resources and/or measures from different jurisdictions determine what is necessary are to address specific forms of environmental crimes,³⁷ a clearer interaction between jurisdictions and better understand the system for optimal enforcement. Moreover, the research aims to contribute to the development of a conclusive normative assessment framework so that there is a clear guideline to determine the most appropriate response.

²⁹ Tegenover de hybride rechtspleging staat de klassieke rechtspleging, waarbij wordt uitgegaan van een zekere mate van hiërarchie tussen de rechtsgebieden en de inzet daarvan, zie: Buisman, *TBS&H* 2022/1, p. 1-4; Corstens 1984, p. 52-53.

³⁰ Buisman, *NJB* 2021/281, p. 1; Velthuis, *M en R* 2019/66, p. 392-393; *Kamerstukken II* 1990/91, 22008, 1-2, p. 28.

³¹ Zoals de onschuldpresumptie of het beginsel van nemo tenetur, zie: Buisman, *NJB* 2021/281; Hirsch Ballin 2018, p. 67.

³² Buisman, *NJB* 2021/281, p. 1.

³³ *Handhaven in het Duister* 2021, p. 63.

³⁴ Crombag 2010, p. 641; Kortmann & Sieburgh 2009, p. 256.

³⁵ Buisman, *NJB* 2021/281, p. 2.

³⁶ Nader rapport bestuurlijke boetestelsels, *Stcrt.* 2018, nr. 31269, p. 6

³⁷ Naar analogie zie: Buisman, *TBS&H* 2021/6.