
THE POSITION OF THE PUBLIC PROSECUTIONS DEPARTMENT IN THE ENFORCEMENT OF ENVIRONMENTAL LEGISLATION IN THE NETHERLANDS

DE LANGE, TON¹ AND WABEKE, JAN WOLTER²

¹Public Prosecutor, National Coordinator for Environment and Economy

²Chief Public Prosecutor

P.O. Box 90112, 4800 RA Breda, The Netherlands

SUMMARY

The Public Prosecutions Department in the Netherlands is closely involved in the enforcement of environmental legislation. It could even be said to play a prominent role. Close cooperation within government takes place. The majority of environmental violations in the Netherlands are tackled collectively, an approach which is fairly unique in the world today. The purpose of this contribution is to provide background information on the situation in the Netherlands.

1 INTRODUCTION

As far as we are aware, the Public Prosecutions Departments of many countries have little or no involvement in the enforcement of environmental legislation. Such activities are mainly left to the government environment agencies. The role of the Public Prosecutions Department is often limited to bringing environmental cases to court. Cooperation with government in areas such as planning, making agreements and the phases prior to prosecution is seldom seen as accepted practice. In the Netherlands, however, this is the approach taken. In our opinion there is a clear explanation for this. One of the contributing factors is the active and independent position which the Public Prosecutions Department occupies within the Dutch system. On one hand it is a government body with responsibility for policy on crime, while on the other it also forms part of the judiciary. In other words, it is a hybrid organization. In order to acquire a thorough understanding of this situation, it is important to say a few words about the Public Prosecutions Department from the point of view of comparative law. After this, we will turn our attention to the duties and relations of the Public Prosecutions Department. In conclusion, we will discuss the way in which cooperation with government takes place in the form of enforcement agreements.

2 THE SITUATION AS IT STANDS

Many countries operate on the basis of the adversarial system. This system is based on argument and is therefore built upon the antagonistic principle. The judge is passive, a kind of referee who adjudicates on motions and objections, while the jury observes and reaches its verdict. The quest for truth depends upon the outcome of the battle between the two parties involved, one of whom is the State. The public prosecutor is plaintiff for the State and therefore

represents one side of the argument. Of course, it is only logical that this structure also influences the phase prior to the trial itself. The preparations for the case are also characterized by the battle between opposing sides, with the emphasis very much on winning the case.

Other countries, including the Netherlands, have a less dualistic system. These nations have adopted the so-called 'inquisitory' style of hearing, also known as the continental system. The most important characteristic of this approach is that the judge is active and embarks upon his own independent search for the truth. This system also has a public prosecutor who acts as plaintiff, but the scope of this role is more broadly defined. The public prosecutor also has authority over the police, as well as forming part of the judiciary. In order to collect evidence from this double position, he is in charge of the criminal investigation, the police and the special investigative services. The gathering of evidence is not only limited to evidence which can lead to prosecution but also takes in evidence in defence of the accused. In this process the public prosecutor is the enforcer of procedural standards. As such he safeguards justice and lawfulness, ensures the integrity of investigative methods and also protects the constitutional rights of the accused. Here the focus is on the search for the truth and not winning one's case.

The Public Prosecutions Department in the Netherlands is therefore a hybrid organization. It is a government body which at the same time forms part of the judiciary. Both of these aspects are reflected in the tasks fulfilled by the public prosecutor in the enforcement of criminal law.

The public prosecutor is responsible for the gathering of evidence. If a punishable offence (e.g. a violation of environmental law) is committed, investigation is the responsibility of the police and other (special) investigative services. They search for clues, take samples and measurements, hear testimonies, arrest suspects and so on. However, these are all tasks which come under the authority of the Public Prosecutions Department. It is this body that determines the subject and the nature of the investigation. In the case of serious (environmental) offences, the public prosecutor sometimes takes direct charge of an investigation. The investigative role of the Public Prosecutions Department can also be seen as a government task, if regarded within the context of law enforcement. However, such a description would be too limited to encompass the public prosecutor's role in the investigation. As magistrate, he must also ensure that the investigation takes place with due care and integrity, a task which must be carried out in accordance with established legal procedures.

If severe coercive measures, such as a search of premises or the tapping of telephone conversations, are deemed to be necessary to an investigation, permission has to be granted by a judge. The public prosecutor meanwhile is able to authorize less far-reaching coercive action, such as the confiscation of administrative documents or the arrest of a suspect. In this regard he functions as a magistrate. This means that he does not take a one-sided approach by selectively searching for evidence which suits his purpose in the battle against environmental crime. It is a task which calls for a thorough and dispassionate approach.

When the police or the (special) investigative services have completed their investigations, the results are recorded in the form of a written report. This report serves as the most important piece of evidence which the public prosecutor puts before the judge. In practice, the majority of cases do not come to trial. Failure to gather sufficient evidence will result in a decision not to prosecute. The public prosecutor is allowed to take such a decision independently. It bears all the hallmarks of a magisterial decision in that it pre-empts an eventual decision by a judge, who would rule in favour of the accused if such a case went to trial. However, the public prosecutor can also decide not to bring charges in cases where there is sufficient evidence available. He can also attach conditions to such a decision, such as the payment of

damages, the restoration of the rightful situation or demanding that the accused not reoffend within a certain period. Those who do not abide by the conditions set will receive a summons. In this case the public prosecutor acts as judge to all intents and purposes.

The same may be said of the public prosecutor's authority to impose payment of a set amount instead of criminal proceedings. Failure to pay will mean that the accused will still have to appear in court. The sentence demanded by the public prosecutor will then be at least equal to the proposed settlement amount and is often a little higher. In the majority of cases, the judge agrees with the amount set by the public prosecutor and can generally assume that the public prosecutor has acted with magisterial impartiality.

If an offence is regarded as too serious or if no settlement can be reached, then the public prosecutor will directly issue the accused with a summons. The summons lists the offences for which the accused must stand trial. Further legal description of these offences are contained in the indictment. The judge can only sentence the accused for offences which are included in the indictment. For example, a company which has committed offences against the environment which also involve fraud cannot be prosecuted for environmental offences if fraud is the only offence mentioned in the indictment. The public prosecutor therefore decides the scope of the criminal case. He is also the only party with access to the criminal court.

At the trial itself, the public prosecutor takes on the role of plaintiff for the State. In his closing speech, he presents his interpretation of the evidence and the culpability of the accused. He also gives an indication of what he regards as a just sentence. Three main categories of punishment are available under Dutch law: imprisonment, financial sanctions and community service. These can also be given in the form of a suspended sentence. The conditions attached to such a sentence are particularly interesting in relation to environmental legislation. For example a company might be ordered to make certain provisions in order to limit or prevent environmental pollution. In addition to these primary forms of punishment, a public prosecutor can also ask the judge to impose other measures, such as the closing down of a company or the appointment of an administrator. The public prosecutor may also submit that the accused be deprived of any profits illegally obtained through violation of (environmental) legislation. The public prosecutor has the obligation to inform the judge as fully as possible. He may not withhold any information and in his demands for a sentence he must also take (mitigating) circumstances into account. He must formulate his sentence demand in such a way that it can be taken over directly by the judge, which indeed is often the case. The judge must be able to trust the facts as presented by the public prosecutor and rely upon the fairness of the decisions taken by the public prosecutor prior to the trial. As this account shows, the public prosecutor is able to determine the policy as regards the investigation and to decide which cases qualify for punishment by law.

These tasks can also be viewed from a governmental perspective. As already stated, it is the Public Prosecutions Department alone that decides who has to appear before the judge and for which offences. Due to the discretionary nature of this power - policy is made for this part of the process - we may also assume that this is also a task for the Public Prosecutions Department as government body. After all, this process involves public prosecutors making decisions about the implementation of their governmental task, in this case the combating of environmental crime.

The fact that the Public Prosecutions Department is both a government body and part of the judiciary influences its relationship with the Minister, the judges, the police and also the public administration.

In carrying out its tasks, the Public Prosecutions Department reports to the Minister of Justice and the judge. This too can be seen as an expression of the hybrid character of the Department.

The Minister of Justice bears the political responsibility for combating crime (including environmental crime). An important part of the policy is implemented by the Public Prosecutions Department. By law, the Minister of Justice is permitted to give instructions to the Department and in turn, the Department reports to the Minister. In this context, planning and control play an important role.

The Minister establishes the general policy outlines for the year ahead, after consultation with the Public Prosecutions Department. The Department then translates this policy into frameworks which apply to all public prosecutors. These also incorporate resolutions which emerge from the public prosecutor's consultations with local government and police.

The attention focused on prevention in recent years has made an important contribution towards bringing the Public Prosecutions Department and government closer together. The shared feeling of responsibility for finding solutions to safety and quality-of-life issues strengthens these ties. This bond is particularly strong with regard to the environment. Government is the most important partner for the Public Prosecutions Department when it comes to formulating local enforcement policy.

These various relations are not without their tensions. The problems experienced at local government level do not necessarily reflect the national priorities identified by the Minister. What the world of politics wants or does not want is not always echoed by the legal system. What the investigative services regard as necessary is not always compatible with the rights of the accused. However important the political aspects of combating crime may be, at the end of the day, the public prosecutor has to be able to explain his case to the judge. At the same time, these tensions serve to clarify the benefits of having an intermediary institution in the field of law enforcement. This has to be an institution with a degree of independence, which can report to the Minister and the judge, but also to the local government with whom cooperation is taking place.

From its hybrid position, the Public Prosecutions Department makes agreements with the government which operate on the premise that all aspects of law enforcement are interrelated. Repressive measures alone are not effective. Prevention remains an important element in the politics of fighting crime. This is certainly true in the field of environmental enforcement. For these reasons, agreements are made about the intensity and the quality of supervision. If repressive measures do follow, they are imposed in such a way as to generate a preventive effect. The approach taken is a responsible one in accordance with the standards laid down by criminal law and the constitution, but it must also be effective. Financial sanctions and prison sentences alone are not enough. There are also possibilities for the government in this respect. Agreements can be established in this area and priorities can also be set with regard to the entire process. The primary concern of the government is environmental relevance. The setting of standards is only a means to an end and need not be strictly adhered to at all costs. For the government, ecological considerations are not always top priority. Sometimes political, economic or social considerations have the upper hand. Within this context, the Public Prosecutions Department mainly guards against the slipping of standards and seeks to protect consistency and equality before the law, with an eye to its position as magistrate. The public prosecutor must have no qualms about presenting the results of enforcement to the judge. The fact that the Public Prosecutions Department forms part of the judiciary therefore places constraints on its cooperation with the government.